

GOMEZ
vs.
BERNARD

SUPREME COURT.

BANDARANAYAKE, J., FERNANDO, J. AND

AMERASINGHE, J.

S.C. APPEAL NO. 24/87.

C.A. APPEAL NO. 148/81 (F).

D.C. NEGOMBO 2352/RE.

MAY 30th, 1991.

Landlord and tenant – Defendant coming into premises let to a doctor – Sub-tenant/employee/licensee of doctor? – Doctor's death in 1976 at which time deceased plaintiff was landlord, doctor tenant and defendant sub-tenant – Doctor's widow granted limited letters to sell cars – No evidence of grant without limitation or payment of rent – Abandonment – Rei vindicatio suit – Rent Act, Section 36(2)(c)(iii) – Burden of proof.

The deceased plaintiff let the premises in suit to the original tenant who however in September 1970 sub-let them to the defendant. The defendant then offered rent to the plaintiff who refused to accept it. She sued the defendant for declaration of title, ejection and damages. It was contended for the defendant that when he proved he was a sub-tenant under the original tenant he thereby proved a right to possession until the tenant's right was terminated.

Held :

1. Per Fernando J. " while I am inclined to agree that a sub-letting created in violation of a statutory prohibition is not effective to confer on the sub-tenant rights as against the landlord....yet so long as the tenancy subsists, it is the tenant who is entitled to possess the premises and the landlord cannot obtain a decree for possession as against the sub – tenant in derogation of the tenant's right.

2. The burden was on the defendant to establish that his occupation was lawful after 1976 and he had therefore to prove his allegation that the widow succeeded the deceased tenant. A person who obtained a limited grant to sell the cars of the deceased cannot properly be described as an administrator of the estate of the deceased. Section 36 (2)(iii) refers to a person who has obtained a grant of administration without any limitation expressed therein, and perhaps

even a limited grant which refers to the rented premises and confers the power of dealing therewith. The widow did not fall within section 36(2)(c) (iii).

Further she did not assert or exercise any rights in relation to the premises, or in relation to the plaintiff as landlord or to the defendant as sub-tenant. Hence, even if she had been eligible to claim a right to succeed to the tenancy, she was in no better position than a tenant who repudiates or disclaims, or abandons, the tenancy; consequently her right to possession of the premises came to an end ; she lost the protection of the Rent Act, and was liable to ejection without notice in an action brought by the owner. The defendant's position ceases to be protected.

3. The language of sub-sections (3) and (4) of section 36 contemplates an application being made by the landlord to the Rent Board to determine whom he should accept as tenant when the original tenant has died where there are two or more persons who appear to satisfy the requirements of section 36(2)(c). The only exception might be where there is only one person who appears to be qualified, but some doubt exists as to his right. Where, however, there is no person *prima facie* eligible to succeed, there is no obligation on the landlord to make an application under section 36(3). Section 36(2)(c) provides for a number of possible successors when the tenant dies but they succeed only upon the fulfilment of specified conditions – thus the surviving spouse or child can succeed only if he carries on in the premises the business carried on by the deceased tenant ; a partner or heir to the business only if he is a partner in the business or an heir to the business carried on by the deceased tenant ; an administrator if he is the administrator of the estate of the deceased tenant.

4. Section 10 (2) of the Rent Act debars the plaintiff from obtaining relief based on unlawful sub-letting but does not affect his common law right to maintain an action for declaration of title, ejection and damages against the defendant who has failed to establish a right of possession (based on sub-tenancy or otherwise).

Cases referred to :

1. *Ibrahim Saibo v. Mansoor* (1953) 54 NLR 217.
2. *Zubair Kannu* (1984) 2 Sri Kantha Rep. 87.
3. *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219.
4. *Hameed v. Weerasinghe S.C.* 13/86 S.C. Minutes of 16th March 1986.
5. *Kalyoom v. Mansoor* [1988] 1 Sri L.R. 361.
6. *Dharmawardena v. Walwattage* [1987] 1 Sri L.R. 57.
7. *Allis Appu v. Endris Hamy* (1984) 3 S.C.R. 87, 90.

APPEAL from judgment of the Court of Appeal.

J. W. Subasinghe, P.C. with Harsha Soza for the appellant.

A. K. Premadasa, P.C. with R. K. Suresh Chandra and J. Ratnayake for respondent.

Cur. adv. vult.

September 05, 1991.

FERNANDO, J.

A substantial building abutting Main Street, Negombo, had been let to a doctor. The premises were partitioned in 1966 into two allotments, and the doctor continued in occupation as the tenant of the two allottees. The larger portion of the building was allotted to the Plaintiff's sister, and was used by the doctor for his nursing home. The smaller portion (admittedly "business premises") was allotted to the Plaintiff, and was used by the doctor for other business purposes. In September 1970, the Defendant came into those premises, and the dispute is whether he was a sub-tenant, or an employee or licensee of the doctor. The Plaintiff had not given her prior written consent for any sub-letting. The Plaintiff's evidence was that she believed the doctor to be carrying on a business (connected with photography) on the premises, and that the doctor had brought the Defendant onto the premises. The doctor paid the rent to the Plaintiff. It was only after the doctor's death on 21.10.76 that she became aware that the Defendant was claiming rights of occupation; the Defendant tendered rent to her, but this she declined to accept.

It was contended on behalf of the Substituted-Plaintiff-Appellant (the Plaintiff having died while this appeal was pending) that the Defendant was no more than a licensee. However, there was evidence that the Defendant paid rent to the doctor, and that the doctor had treated him as a sub-tenant; after the doctor's death the Plaintiff had instituted an action against him describing him as a sub-tenant, but this was withdrawn with liberty to bring a fresh action. On this question the District Court and the Court of Appeal have come to concurrent findings of fact, that the Defendant was a sub-tenant, which I see no reason to disturb. Accordingly, at the time of the doctor's death in 1976, the Plaintiff was the landlord, the doctor was the tenant, and the Defendant was his sub-tenant, but without the knowledge or consent of the Plaintiff.

The doctor's widow applied for letters of administration ; according to the document produced, what was granted to her was " Limited Letters of Administration ", whereby she was " fully empowered and authorised.....to sell motor car bearing No 3 Sri 761 and to bring the proceeds of the sale to the credit of this case ". No other document was produced, and there is no evidence or admission that she obtained a grant without limitation. There was no evidence that she paid or tendered rent to the Plaintiff, or that she made any claim to be the tenant of the premises or acted as such ; or that the Defendant paid or tendered rent to her, or that she accepted or acknowledged the Defendant as her tenant. The Defendant testified that he deposited rent with the Municipal Council, but there was no evidence as to whether this was in the name and to the credit of the deceased, his widow or the Plaintiff.

The Plaintiff instituted action against the Defendant for declaration of title, ejectment and damages, without joining the widow (or any other legal representative or successor of the deceased tenant). The District Court dismissed the action, and that order was affirmed by the Court of Appeal. The reasoning in the judgments of the District Court and the Court of Appeal may be summarized as follows: The Defendant had been a sub-tenant ; upon the death of the tenant the widow had been appointed Administratrix, and therefore became the tenant, by operation of law, namely section 36 (2)(c)(iii) of the Rent Act ; the Defendant by continuing in occupation of the premises became the sub-tenant of the widow ; even though the sub-letting was contrary to the provisions of the then prevailing law (section 9 of the Rent Restriction Act) section 10 (7) of the Rent Act " legalised the prior unlawful sub-letting, thereby creating a state of lawful sub-tenancy "; no action could be instituted, either against the tenant or the sub-tenant, on the ground of an unlawful sub-letting which commenced prior to the Rent Act ; such sub-tenant could not be treated as a trespasser, and in any event no action could be instituted for the ejectment of the sub-tenant, without first obtaining a decree for ejectment against the tenant.

A preliminary question in regard to the burden of proof arises. Learned President's Counsel for the Defendant contended that it was not enough for the Plaintiff to establish title to the premises ; when the Defendant established that he was a sub-tenant under the original

tenant, he thereby proved a right to possession – a right derived from the tenant's right to possession; the burden then lay on the Plaintiff, he submitted, to prove that the tenancy had been terminated, thereby rendering the sub-tenant's possession unlawful (citing *Ibrahim Saibo v. Mansoor* ⁽¹⁾, *Zubair v. Kannu* ⁽²⁾, and *Theivandran v. Ramanathan Chettiar* ⁽³⁾). In *Ibrahim Saibo* it was laid down that the sub-tenant's right of occupation is fragile, being " essentially dependent on the lawful continuation of the main tenancy ":

"..... a landlord has one distinct cause of action against the tenant (based on contract) for the recovery of the property, and another (based on delict) for the ejection of the sub-tenant who remains in occupation after the main tenancy has expired. "

While it was recognised that a sub-tenant can shelter behind the protection afforded to the tenant if that protection had not ceased to exist, the burden of proof was not discussed.

Theivandran dealt with a vindictory action ; the defendant was in occupation under a partnership agreement with the tenant ; the plaintiff admitted the tenancy ; it was held that the burden shifted to the plaintiff to establish that the tenancy had been terminated by surrender of possession or that the defendant was claiming adversely to the tenant :

"..... in the case of premises which have been let.....if the landlord *qua* owner..... chooses to sue for ejection of a third party in occupation, the burden will be on him to show that the right of the tenant to be in possession has reverted in him..... Had the tenant abandoned or surrendered possession of the premises.....the plaintiff might then have treated the tenancy..... as determined and thus having become entitled to possession, sued for the ejection of the defendant."

Zubair v. Kannu was similar ; the defendant's claim to be a partner of the tenant was rejected, and it was held that the tenant continued to be entitled to possession; the landlord was therefore refused a decree for possession.

The position here is entirely different. What has been proved is that the tenancy and sub-tenancy subsisted until the doctor's death in 1976. There was no automatic devolution or transmission of tenancy rights to a particular successor. Section 36 (2)(c) provides for a number of possible successors, but they succeed only upon the fulfilment of specified conditions ; thus the surviving spouse or child can succeed only if he carries on in the premises the business carried on by the deceased tenant ; a partner or heir, only if he was a partner in the business, or an heir to the business, carried on by the deceased tenant ; an administrator, if he is the administrator " of the estate of the deceased tenant ". Thus there may be no qualified successor, and sometimes even no potential successor. It was therefore incumbent on the defendant to establish who became the new tenant, and to show by what right he continued to occupy the premises, after the death of the old tenant (cf. *Hameed v. Weerasinghe* ⁽⁴⁾). The burden was thus on the defendant to establish that the widow did become the tenant, and not on the plaintiff to prove the negative.

Where the landlord is aware that there are two or more persons who satisfy, or appear to satisfy, the requirements of section 36(2)(c), he would be uncertain whom to accept as the tenant ; section 36 (3) would oblige him to apply to the Rent Board for an order to determine that question, as held in *Kalyoom v. Mansoor* ⁽⁵⁾. I find it difficult to agree with the observations of S. N. Silva, J., suggesting that even if there is only one qualified person, the landlord must make an application under section 36 (3) : if, for instance, there is an executor who has obtained probate, and there are no persons qualified under clauses (i) and (ii) of section 36 (2) (c), there seems to be no good reason why the landlord should apply under section 36 (3). The language of sub-sections (3) and (4) contemplates an application being made, and notice being issued, where there are " persons " who may be deemed to be tenants. The only exception might be where there is only one person who *appears* to be qualified, but some doubt exists as to his right. Where, however, there is no person *prima facie* eligible to succeed, there is no obligation on the landlord to make an application under section 36 (3). It was not contended in the present case that the Plaintiff was obliged to make an application under section 36 (3) ; probably because it was clear that she was unaware that there was any person *prima facie* eligible to succeed under section 36 (2) (c).

The Substituted-Plaintiff's contentions in appeal may be summarised as follows :

1. The transaction whereby the premises had been sub-let by the doctor to the defendant was tainted with illegality, as it was entered into in violation of section 9 (1) of the Rent Restriction Act (corresponding to section 10 (2) of the Rent Act) which imperatively requires the prior consent in writing of the landlord ; whatever rights the defendant might have had there-under as against the original tenant, his occupation was unlawful as against the plaintiff, from September 1970.
- 2.(a) Upon the death of the doctor, no one qualified to be deemed the tenant under section 36 (2) (c). There was no spouse or child carrying on the business in the rented premises, there was no partner in or heir to the deceased's business, and there was no " executor or administrator of the estate of the deceased ". The limited grant obtained by the widow did not satisfy section 36 (2) (c) (iii).
 - (b) Even if the widow did qualify under that section, she never asserted or exercised rights as tenant, and abandoned whatever rights she may have had in respect of a tenancy.
 - (c) There being no tenancy after the death of the original tenant, the occupation of the defendant became unlawful as against the plaintiff at least in 1976.

1. While I am inclined to agree that a sub-letting created in violation of a statutory prohibition is not effective to confer on the sub-tenant rights as against the landlord (cf. *Dharmawardena v. Walwattage*⁽⁶⁾, yet so long as the tenancy subsists, it is the tenant who is entitled to possess the premises, and the landlord cannot obtain a decree for possession as against the sub-tenant in derogation of the tenant's right (*Zubair v. Kannu*). In *Theivandran, Sharvananda, C.J.*, held the landlord to be entitled to a declaration of title as against a person in occupation with the tenant's consent. If a tenant unlawfully sublets part of the rented premises to a person who, for instance, later uses the premises for purposes connected with terrorism, narcotics or kasippu, is the landlord entitled to seek ejectment of the sub-tenant

only, perhaps expressly acknowledging and reserving the tenant's right of possession (as in *Allis Appu v. Endris Hamy* ⁽⁷⁾). However, in view of my decision on the other matters, it is unnecessary to decide this question.

2. In regard to the second submission, the burden was on the defendant to establish that his occupation was lawful after 1976, and he had therefore to prove his allegation that the widow succeeded the deceased tenant. It was not suggested that the widow was eligible under clauses (i) or (ii) ; she was not an executor (whether " executor " includes a person named as executor in a last will, or means only a person who has obtained probate). " Administrator " clearly means a person who has obtained such status by virtue of the order of a competent court. Here the widow only obtained a limited grant to enable her to sell a specific asset. Can she be considered to be the " administrator of the estate of the deceased " ? At the time section 36 was enacted, the relevant provisions of the Civil Procedure Code dealing with the grant of letters of administration were sections 539 and 540 (corresponding to sections 296 and 290 of the Administration of Justice Law, No 44 of 1973). Section 539 provided for a grant of administration limited in respect of the property to be administered or the power of dealing with that property ; i.e. limited to a particular property, and for a particular purpose, such as selling a specific asset for payment of estate duty. A person who obtained a limited grant of that nature cannot properly be described as an administrator of the estate of the deceased. I am of the view that section 36 (2) (c) (iii) refers to a person who has obtained a grant of administration without any limitation expressed therein, and perhaps even a limited grant which refers to the rented premises and confers the power of dealing therewith. The widow did not fall within section 36 (2) (c) (iii).

Further, she did not assert or exercise any rights in relation to the premises, or in relation to the plaintiff as landlord or to the defendant as sub-tenant. Hence, even if she had been eligible to claim a right to succeed to the tenancy, she was in no better position than a tenant who repudiates or disclaims, or abandons, the tenancy:

consequently her right to possession of the premises came to an end ; she lost the protection of the Rent Act ; and was liable to ejection without notice in an action brought by the owner. The defendant's occupation ceased to be protected.

Learned President's Counsel for the defendant contended that the plaintiff's right of action was barred by the provisions of section 10 (7) :

" Nothing in subsection 2, subsection 5 or subsection 6 shall apply to the subletting of any premises or part thereof without the prior consent in writing of the landlord where such premises or part have been sublet prior to the date of commencement of this Act to any person, so long as that person continues to be the subtenant of the premises or part thereof."

Learned President's Counsel for the Plaintiff submitted that this provision applies only to a lawful sub-letting ; that the sub-letting to the defendant was without the Plaintiff's consent, and section 10 (7) had no application. It is clear, however, that " sub-letting " in section 10 (7), and indeed in the whole of section 10, refers to the physical act of sub-letting, namely parting with possession, or relinquishing control of the premises, and not to the conditions which make sub-letting lawful. However, section 10 (7) does not operate to bar all actions for recovery of possession ; it is no more than an exception to some of the provisions of section 10. Looked at from the point of view of the owner of the premises, this provision merely precludes resort to the remedies provided by section 10 (2), (5) and (6), but does not affect his other proprietary remedies. In this instance section 10 (7) debars the Plaintiff from obtaining relief based on unlawful sub-letting, but does not affect his common law right to maintain an action for declaration of title, ejection and damages against the defendant who has failed to establish a right of possession (based on sub-tenancy or otherwise).

I therefore allow the appeal, and set aside the judgments and decrees of the District Court and the Court of Appeal. The substituted-plaintiff will be entitled to a declaration of title, to a decree for the ejection of the defendant, and to damages, as prayed for in paragraphs (a), (b) and (c) of the prayer to the plaint, together

with costs in a sum of Rs. 3,000 in this Court, as well as costs in both Courts below.

BANDARANAYAKE, J. – I agree.

AMERASINGHE, J. – I agree.

Appeal allowed.
