RAYMOND v. MAHADEVA

COURT OF APPEAL
RANASINGHE, J. AND K. C. E. DE ALWIS, J.
C.A.(S.C.)85/73(RE)
CR COLOMBO 3545/ED
JULY 4, 1980

Landlord and Tenant – Rent Act No. 7 of 1972, section 27(1) – Evidence Ordinance, section 116.

The landlord instituted proceedings under section 27(1) of the Rent Act against the tenant to have him ejected from the part of premises let to him. The tenant prayed for dismissal of the action on the ground that the landlord is disqualified from instituting action in terms of the proviso to section 27(1).

Held :

It was for the landlord to satisfy the court that he is not suffering from the disability set out in the said proviso. The provisions of section 116 of the Evidence Ordinance do not prevent the tenant from taking up the position that the proviso to section 27(1) stands in the way of the landlord obtaining relief.

Cases referred to:

(1) *Sivarajasingham v. Sivasupramaniam SC* 21/19 CA (SC) 95/78 – DC Mt. Lavinia 229/Re – SCM 2337.
(2) *Mullins v. Treasurer of Survey* (1880) 5 QBD 170 1733.
(3) *West Derby Union v. Metropolitan Life Assurance Company* (1897) AC 647 at 652.
(4) *R. v. Dibdin* (1910) AC 57 at 125.

APPEAL from the Court of Request, Colombo.

P. Nagendran for the plaintiff-appellant.

J. V. C. Nathanielsz for the defendant-respondent.

Cur adv vult.

9th September, 1980.
RANASINGHE, J.

The plaintiff-respondent, who has been residing in the premises bearing No. 65/1, Dr. C. W. W. Kannangara Mawatha (hereinafter referred to as "the said premises"), let out a portion thereof to the defendant-appellant on or about 1.10.61 at a monthly rental of Rs. 250/-, and continued to reside in the remaining portion of the said premises. On or about 25.4.72 the plaintiff-respondent gave the defendant-appellant notice to quit and deliver vacant possession of the portion so let out, at the end of May, 1973. The defendant-

appellant, having failed to vacate the said premises, the plaintiff-respondent instituted these proceedings, under Section 27(1) of the Rent Act, on 19.6.72.

The position taken up by the defendant-appellant is: that the Rent Control Board, by its order dated 26.3.72, fixed the authorised rent of the portion of the said premises let out to the defendant-appellant at Rs. 150/- per month: that, as the defendant-appellant had paid rent at the rate of Rs. 250/- per month from October, 1961 to April, 1972 he is entitled to recover the excess payments so made: that the plaintiff-respondent is not entitled to maintain these proceedings under the provisions of Section 27(1) of the said Act as the plaintiff-respondent had acquired ownership of the said premises from a person other than a parent or spouse.

The learned trial judge has held in favour of the plaintiff-respondent and has entered judgment for the plaintiff-respondent directing that the defendant-appellant and all others be ejected in terms of the provisions of Section 27(2) of the Rent Act.

The two questions which were argued before this Court are: whether the plaintiff-respondent falls within that category of landlords who are entitled to maintain an action for ejectment under the provisions of Section 27 of the said Act: the date from which the Order made by the Rent Board on 26.8.72 becomes operative – from the commencement of the tenancy in October 1961 or from the day on which the said order was in fact made.

In the case of *Sivarajasingham v. Sivasupramaniam*[1], it was decided that an order made by the Rent Board fixing the proportionate rent in respect of a part of rent-controlled premises would relate back only to the date of the commencement of Act No. 7 of 72 and would not relate back to any point of time prior to the coming into operation of the provisions of the said Act. In the result the sum of Rs. 150/- per month fixed by the Rent Board would be operative only from 1.3.72. The defendant-appellant had paid at the rate of Rs. 250/- per month, right up to the end of April 1972. The learned District Judge has held that the defendant-appellant, has thereafter from time to time made payments which would add up to Rs. 1,650/-. Thus, since 1.3.72, the defendant-appellant has paid in all a sum of Rs. 2,150/-. This sum would amount to the rent (at Rs. 150/- per month) for 14 months, and also leave behind a further sum of Rs. 50/-. In the result the defendant-appellant has paid all dues up to the end of April 1973, and also a part payment in a sum of Rs. 50/- in respect of May 1973. Damages at the rate of Rs. 150/- per month are due to the plaintiff-respondent from June 1973, together with a further sum of Rs. 100/- being the balance due in respect of May 1973.

The learned District Judge has held that the plaintiff-respondent has fulfilled all the requirements of clauses (a) to (d) of sub-section (1) of Section 27 of the Rent Act 7 of 72; but he has not considered the effect of the proviso to sub-section (1) of the said Section 27 because of the view taken by him that the defendant-appellant is estopped from denying that the plaintiff-respondent had title to the said premises at the specified date. The "specified date" for the purpose of this case would, according to the provisions of the said Section, be the date on which the defendant-appellant became the tenant of the premises in question. That according to the evidence, would be October 1961.

Learned Counsel appearing for the plaintiff-respondent relies on the provisions of Section 116 of the Evidence Ordinance to support the said plea of estoppel. It, however, appears to me that the provisions of the said Section 116 is of no avail to the plaintiff-respondent in the circumstances of this case.

At the very outset it must be noted that the denial of title in the landlord as at the beginning of the tenancy is not permitted by the said Section 116 only "during the continuance of the tenancy". As already stated, the plaintiff-respondent has terminated the contract of tenancy as between her and the defendant-appellant, by her letter dated 25.4.72, with effect from 31.5.72. These proceedings were instituted by the plaintiff-respondent on 19.6.72; and the answer of the defendant-appellant, in which the position in question was first set up, was filed on 27.9.72. The contract of tenancy as between them has, therefore, come to an end, and appellant's right to continue in occupation is based only upon the provisions of the Rent Act No. 7 of 72.

With regard to the construction of provisos, **Craies: on Statute Law (6th edt.) p. 217 states:**

> "The effect of an excepting or qualifying proviso, according to the ordinary rules of construction is to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect".

Lush J. in the case of *Mullins v. Treasurer of Survey*[2]:

> "When one finds a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso".

The authorities also make it clear that:- if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, then those provisions cannot be derived by implication from a proviso: that the terms of an intelligible proviso may be a useful guide, in the selection of one or other of two possible constructions of words in the enactment, or they could in a doubtful case, show the scope of the words in the enactment – vide *West Derby Union v. Metropolitan Life Assurance Co.*[3]; *R. v. Dibdin*.[4]

A consideration of the words of the proviso to my mind shows that they spell out circumstances which would disentitle a landlord who is also at the time of the institution of the proceedings, the owner of the premises in questions, from seeking to eject the tenant even though the requirements of the foregoing clauses (a) to (d) in sub-section (1) have been satisfied. It is for the landlord to satisfy the court that he is not suffering from the disability set out in the said proviso. It is a burden which really has to be discharged by the plaintiff landlord. When the defendant tenant prays for a dismissal of the action on the basis of the said proviso, what he is in effect doing is to draw the attention of the Court to the fact that the plaintiff landlord is one suffering from the disqualification created by the said proviso and that therefore the plaintiff-landlord has failed to satisfy court that he, the plaintiff-landlord, is one entitled to relief under the provisions of Section 27(1) of the Rent Act. Furthermore, the Rent Act is one enacted long after promulgation of the Evidence Ordinance. On a consideration of all these matters, I am of opinion that the provisions of Section 116 of the Evidence Ordinance do not prevent the defendant-appellant from taking up the position that the proviso to sub-section (1) of Section 27 of the Rent Act stands in the way of the plaintiff-respondent obtaining relief in this case.

Learned Counsel for the defendant-appellant also contended that the said proviso applies only where a person becomes both the landlord and the owner only after the "specified date". I do not think that this contention is entitled to succeed for the emphasis placed by the wording of the said proviso on what takes place after "the specified date" is only on the acquisition of ownership of the premises.

At the commencement of the trial, four issues numbered 13 to 16, relating to this question were raised on behalf of the defendant-appellant. During the course of the trial, however, when learned Counsel appearing for the defendant-appellant sought to lead evidence in respect of the said issues, after an objection which was raised on behalf of the plaintiff-respondent, the learned District Judge disallowed the leading of such evidence. Learned Counsel appearing for the defendant-appellant has, in the written

submissions tendered on behalf of the defendant-appellant, sought to lead the relevant documentary evidence before this Court. Th said documents have, however, not been specified in detail. Nor have they been tendered. Furthermore, they have not been referred to in the petition of appeal either. The answering of the aforesaid issues could also involve the decision of questions of fact. In these circumstances it appears to me that an opportunity would have to be given to the defendant-appellant to lead the said evidence before the District Court. It has to be noted that, although the learned District Judge ruled out the evidence sought to be led under the aforesaid issues, yet, the learned District Judge has proceeded to answer all the said issues 13 to 16. Such findings are, therefore, not tenable.

In view of the view I have taken on this question, it is not necessary to consider the further argument put forward by learned Counsel for the defendant-appellant based on the alleged failure of the plaintiff-respondent to aver in the plaint, certain facts and circumstances said to be relevant to the acquisition of ownership of the said premises by the plaintiff-respondent, the absence of which, said averment, was according to the defendant-appellant tendered the plaint defective.

For these reasons, the appeal of the defendant-appellant is allowed, and the judgment of the learned District Judge is set aside, and the case is sent back for trial *de novo* upon the issues numbered 1, 2 and 13 to 17. Issues number 2 is to be answered in the manner set out earlier in the judgment.

The defendant-appellant is entitled to the costs of this appeal. The parties are to bear their own costs of the proceedings held so far before the District Court.

K. C. E. DE ALWIS, J. – I agree.

Appeal allowed.