MARTIN SINGHO AND TWO OTHERS
v.
NANDA PEIRIS AND TWO OTHERS

COURT OF APPEAL.
S. N. SILVA J.
R. RANARAJA, J.
C.A. 1221/88
D.C. MT. LAVINIA 11044/P
DECEMBER 14, 1994.

Partition Law 21 of 1977 – S. 52(2) 48(1) – Delivery of possession – Tenant – Protection under Rent Act 7 of 1972 – S. 14(1) – Best test of establishing Tenancy.

Court allowed the application of the Original 1st Respondent for delivery of possession of Lot 1, by ejecting the Petitioners, who unsuccessfully claimed Tenancy Rights to the Houses standing thereon. No affidavits in support or Rent Receipts were filed by the Petitioners.

Held:

(1) A contract of Tenancy need not be in writing; the parties must be agreed on the identity of the premises, the period of Tenancy and the Rent Payable.

(2) The best test of establishing Tenancy is proof of payment of Rent and the best evidence of payment of Rent is Rent Receipts.

(3) S. 52(2) read with S. 48(1) of the Partition Law and S. 14(1) of the Rent Act required Court to determine–

(i) whether the petitioners had entered into occupation of the premises as Tenants prior to the date of the Final Decree.

(ii) whether they were entitled to continue in occupation of the premises as Tenants under the original 1st Respondent.

The Petitioners had failed to satisfy Court of the matters aforesaid.

Case referred to:

1. *Jayawardane v. Wanigasekera* – 1985 1 SLR 125.

AN APPLICATION in Revision from the Order of the District Court of Mt. Lavinia.

P. A. D. Samarasekera, P.C., with *G. L. Geethananda* for Petitioners.

J. de Almeida Gunaratne for Respondents.

January 10, 1995.
RANARAJA, J.

This is an application in revision from the order of the District Judge dated 4.11.88. By that order court allowed the application of the original 1st respondent for delivery of possession of lot 1 in final partition plan No. 2196 dated 9.1.78, prepared by H. A. Peiris, licensed Surveyor, by ejecting the petitioners, who unsuccessfully claimed tenancy rights to the houses standing thereon. On 1.11.94 learned President's Counsel for the petitioners conceded that he was not challenging the interlocutory decree, final decree and other proceedings in the case, except the order dated 4.11.88. Accordingly both counsel have confined their written submissions to the legality and propriety of that order.

When notice of the application of the 1st respondent for delivery of possession was served on the petitioners, each filed objections separately. The objections of the 1st and 2nd petitioners, which are almost identical, state that they are the lawful tenants of the premises Nos. 62/26 and 62/24 respectively, and are protected by the provisions of the Rent Act. The 3rd petitioner in his objections has averred that the surveyor who prepared the preliminary plan, had reported to court that he was a tenant of one of the houses, which fact it is alleged, was accepted by the plaintiff and was further corroborated by the evidence of one of plaintiff's witnesses Sugathapala, at the trial. He too claimed the protection of the Rent

Act. No affidavits in support of their objections were filed by any of the petitioners. Thus, it was left to the District Judge to act only on the evidence placed before him at the inquiry.

Section 52(2) read with section 48(1) of the Partition Law and section 14(1) of the Rent Act, required court to determine (1) whether the petitioners had entered into occupation of the premises as tenants prior to the date of the final decree and (2) whether they were entitled to continue in occupation of the premises as tenants under the original 1st respondent Rosalin Fonseka, who was allotted the lot in which the relevant houses stood. If the petitioners succeeded in satisfying court of the two matters aforesaid, the application of the 1st respondent had to be dismissed, as section 14(1) of the Rent Act makes provision for the tenants of residential premises to continue as such, under any co-owner who has been allotted the relevant premises in the final decree.

Although a contract of monthly tenancy need not be in writing, the parties must be agreed on the identity of the premises, the period of the tenancy and the rent payable. The 1st and 2nd petitioners claim to have commenced the tenancy under the 2nd respondent Sardiel Peiris alias Victor Peiris, who was the husband of the original 1st respondent. However, the report of the surveyor who prepared the preliminary plan, on which learned President's Counsel placed much reliance, discloses that these two petitioners have in fact claimed to have built the houses which they were in occupation of, with the consent of the plaintiff in the case, namely Walter Perera. In their objections they also claimed to have become tenants of the premises in 1951 and 1956 respectively. but in their evidence at the inquiry, they stated their tenancies commenced in 1953. The 1st petitioner has given his address as no. 62/27, whereas he claims tenancy rights in premises 62/26. Similarly, the 2nd petitioner's wife, who gave evidence on his behalf, has given her address as 62/24, whereas her evidence is that her son had deposited rents with the rent control board for premises 62/27. If these were errors in the proceedings, no steps have been taken to correct them. Whilst the 1st petitioner claimed to have paid a monthly rent of Rs. 1-/- and the 2nd petitioner's wife stated that her husband originally paid a sum of Rs. 5/- per month, which was subsequently increased to Rs. 7/- and Rs. 10/-, neither could produce any receipts in proof of payment. The reason given being, that the 2nd respondent never issued receipts. Both stated that the 2nd respondent refused to accept rents some years before the application for writ of possession was made. The 1st

petitioner admitted he did not pay any rent thereafter, while the 2nd petitioner's wife's evidence is that her son deposited the rents with the board. That too, after the final decree. The 2nd petitioner has however failed to produce any receipts for such payments with the application to this court. In view of the unsatisfactory nature of the evidence led on behalf of both the 1st and 2nd petitioners in the lower court, the District Judge cannot be blamed for the conclusion he reached that the 1st and 2nd petitioners failed to establish tenancy rights to the relevant premises.

The 3rd petitioner failed to lead any evidence at the inquiry. There is no record of any application being made, to lead any evidence on his behalf after he belatedly appeared in Court on the date of inquiry. The averment in his objections that he claimed tenancy rights before the surveyor is not borne out by the surveyor's report. He has failed to file a copy of the proceedings where the plaintiff allegedly admitted his tenancy or the evidence of Sugathapala, who he says, testified to the fact that he was a tenant. His position in this court, that it was his grandfather Alwis Costa who was the tenant and it is his rights that he now claims by succession, is entirely contradictory to his position in the lower court.

Learned President's Counsel has submitted that the District Judge has not given the petitioners a fair hearing by refusing certain documents to be marked and a witness being called to give evidence. It appears that the documents and the witness would have supported the fact that the petitioners were in occupation of certain premises on the relevant lot. Even if this evidence was available, it would not have established the fact that the petitioners were in occupation as tenants, especially in view of the evidence of the 1st petitioner that, when they were ordered to vacate the land belonging to the hospital, the 2nd respondent invited them to live on the land to be partitioned.

As observed by the District Judge, the petitioners have failed to produce any documentary evidence in proof of their tenancy. The best test of establishing tenancy is proof of payment of rent, and the best evidence of payment of rent is rent receipts. (see *Jayawardene v. Wanigasekera* [1]). We see no reason to interfere with the order of the District Judge. The application is dismissed but without costs.

S. N. SILVA, J. – I agree.

Application dismissed.