SHAHUL HAMEED
v.
ABDUL CADER

COURT OF APPEAL.
EDUSSURIYA, J.,
JAYASINGHE, J.
C.A. NO. 788/91.
D.C. COLOMBO NO. 6225/RE.
FEBRUARY 9, 1998.

Rent Act , No. 7 of 1972 – No. 10 of 1977 – S. 22 (1A), s. 22 (1) (bb) – Notice of Action served on Commissioner of National Housing – Prior notice in writing – is it necessary? Subsequent notice – Prejudice – Civil Procedure Code, s. 461 – Cause of action.

The plaintiff-respondent filed action against the defendant on the ground that the disputed premises is reasonably required for the use and occupation as a residence. The plaintiff also served notice of action on the Commissioner of National Housing together with notice to quit and a copy of the plaint. The defendant-appellant pleaded, *inter alia*, that the plaintiff-appellant had not complied with the requirements of s. 22 (1) (*bb*) and sought the dismissal of the action. The District Court held with the plaintiff-respondent. On appeal, it was contended that as the plaintiff has failed to give prior notice in writing to the Commissioner of National Housing before the institution of the action, he cannot succeed in the action.

Held:

(1) Section 22 (1A) – the landlord shall not be entitled to institute any action for the ejectment of the tenant . . . unless such landlord has caused notice of such action to be served on the Commissioner of National Housing.

Section 22 (1A) mandates that the landlord cause notice of such action to be served on the Commissioner. Unless action has been instituted the plaintiff would not be able to satisfy the requirements of s. 22 (1A).

Quaere –

It seems that the first limb of the section materially contradicts the second limb, while the section starts off on the basis. ". . . shall not be entitled

to institute any action . . ." goes on to stipulate that ". . . unless the landlord has caused notice of such action to be served on the Commissioner . . ."

Per Jayasinghe, J.

"An action in Court must necessarily have a case number. Unless action is instituted there is no case number, to be served on the Commissioner; it is, therefore, my view that it was never the contemplation of the legislature to create an anomalous situation brought forth by s. 22 1 (A)."

(2) In any event the Commissioner's hand is activated only after a Court enters judgment against the tenant, thus the failure to give notice before institution of action cannot and will not prejudice the tenant.

APPEAL from the judgment of the District Court of Colombo.

V. Thevasenadhipathy with *V. Thiyageswaran* for defendant-appellant.

S. Mahenthiran for plaintiff-respondent.

Cur. adv. vult.

March 20, 1998.

JAYASINGHE, J.

The plaintiff filed action in the District Court of Colombo against the defendant on the ground that the disputed premises is reasonably required for the use and occupation as a residence for herself and her family. The plaintiff alleged that she gave notice in writing to the defendant to deliver vacant possession of the premises but the defendant has failed to comply and that he continues to be in wrongful and unlawful occupation and prayed for damages in a sum of Rs. 30 a month. In terms of the Rent Act, No. 7 of 1972, as amended by Law No. 10 of 1977 the plaintiff served notice of action on the Commissioner of National Housing together with notice to quit and a copy of the plaint and prayed for the ejectment of the defendant and for damages in a sum of Rs. 30 a month till the plaintiff is placed in possession.

The defendant filed answer: pleaded that the plaintiff has not complied with the requirements of section 22 (1) (*bb*) of the Rent Act and that the plaintiff has not pleaded the date of commencement of the tenancy and sought the dismissal of the action: and also made a claim in reconvention in a sum of Rs. 30,000 incurred in obtaining an electricity connection: claimed Rs. 2,000 being rates paid to the local authority.

The learned District Judge after trial held with the plaintiff and refused the claim in reconvention of the defendant. This appeal is from the said judgment of the learned District Judge dated 04.12.1991.

The only matter urged before this Court by the defendant-appellant was whether there has been sufficient compliance of section 22 (*bb*) read with section 22 (1A) of the Rent Act. According to section 22 (1A) ". . . the landlord of any premises referred to in paragraph (*bb*) of that subsection shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises. . . unless such landlord has caused notice of such action or proceedings to be served on the Commissioner of National Housing". Mr. Thewasenadhipathy argued that the plaintiff's action cannot succeed as the plaintiff has failed to give prior notice in writing to the Commissioner of National Housing before the institution of the action. He stressed that the notice to the Commissioner has been received only after the institution of the action and that the learned District Judge failed to consider this fact. He submitted that P3 is dated 28.2.1985 and according to the evidence led P3 has been received by the Commissioner on 01.03.1985. Action being already instituted on 28.02.1985. The non-compliance of the requirements of section 22 (1) (1A) would make the action bad in law. I am unable to accept this submission of counsel. It is not in dispute that the notice to the Commissioner was sent on the 28th February and action also instituted on the same day. It is in evidence (vide P3) that notice was sent after institution of the action. It is a possible argument that the jurisdiction of Court is invoked when he puts the notice to the Commissioner into the post. The plaintiff cannot guarantee its delivery. Even though it appears that the notice was subsequent there seems

to be no prejudice caused to the defendant as a result of the institution preceding the notice. In any event section 22 (1A) mandates that the landlord cause notice of action to be served on the Commissioner. This requirement is to enable the Commissioner to look for alternative accommodation for the tenant in the event of a decree for ejectment of the tenant from the premises is entered. It is seen, therefore, that it is only at that stage that a burden is cast on the Commissioner to look for accommodation. The ensuing liability of the Commissioner stems from the notice that has been served on him under section 22 (1A). The question for determination is, therefore, whether a failure to serve notice prior to the institution of action on the Commissioner would make the institution bad in law. There is a similar provision in the Civil Procedure Code. Section 461 lays down the prerequisites for institution of action against the Attorney-General as representing the State or public officer. The words of section 22 (1A) may give rise to the inference that the service of the notice on the Commissioner should precede the institution of action, unlike in section 461 and the corresponding form 79 in the Civil Procedure Code where the notice contemplated therein is that of a proposed action. Section 22 (1A) does not set out that the notice to be served on the Commissioner is notice of a proposed action but the action itself and accordingly it is my view that notice must accompany the plaint after it is registered in Court so that if and when a decree is entered against the tenant the said decree is sent to the Commissioner he will then know that the said decree relates to the notice already served on him. Section 461 of the Civil Procedure Code states that "No action shall be instituted against the Attorney-General as representing the State. . . until the expiration of one month next after notice in writing has been delivered to such Attorney-General . . . stating the cause of action and the name and place of abode of the person intending to institute the action and the relief which he claims; and the plaint in such action must contain a statement that such notice has been delivered . . ." Under section 461 all that the plaintiff has to do is to inform the Attorney-General the "Cause of action and the relief which he claims" where as according to section 22 (1A) "the landlord shall not be entitled to institute any action or proceedings . . . unless such landlord . . . has caused notice of such action or proceedings to be served on

the Commissioner of National Housing". While under section 461 the requirement is to state the "cause of action" section 22 (1A) mandates that the landlord "cause notice of such action or proceedings to be served on the Commissioner". The basic difference is that in the former situation the plaintiff informs the Attorney-General the "cause of action" while in the latter "cause notice of action or proceedings served on the Commissioner". A careful examination of the two provisions would show that in the section 461 notice there is only a contemplation of an action, notice of which is given to the Attorney-General. But, in the latter case what is envisaged is giving of notice of the action itself. Unless action has been instituted the plaintiff would not be able to satisfy the requirements of section 22 (1A). It seems to me that the first limb of the section materially contradicts the second limb. While the section starts off on the basis that ". . . shall not be entitled to institute any action or proceedings . . ." goes on to stipulate that ". . . unless the landlord has caused notice of such action or proceedings to be served on the Commissioner. . ." section 22 (1A) presupposes the institution after notice to the Commissioner. As stated it may not be the case. The Commissioner's hand is activated only after a Court enters judgment against the tenant. Therefore, the failure to give notice before institution of action cannot and will not prejudice the tenant. In any event the landlord also encounters certain practical difficulties in giving notice to the Commissioner. Section 22 (1A) requires that the landlord causes notice of action to be served on the Commissioner. An action in Court must necessarily have a case number. Unless action is instituted there is no case number to be served on the Commissioner. It is, therefore, my view that it was never the contemplation of the legislature to create an anomalous situation brought forth by section 22 (1A). The appellant ought not to succeed for the reason that failure to give notice to the Commissioner has not caused the appellant any prejudice.

EDUSSURIYA, J. – I agree.

Appeal dismissed.