Fonseka v. Gulamhussein *

COURT OF APPEAL.
WIMALARATNE, P. AND ABDUL CADER, J.
C. A. (S.C.) 725/75 (F)—C.R. COLOMBO 4393/ED.
MARCH 26, 1979.

Rent Act, No. 7 of 1972, section 28—Non-occupation of premises by tenant—Action for ejectment—Premises occupied by employees of defendant—Whether landlord had acquiesced—Whether occupation by employees permissible under section 28.

The plaintiff filed action against his tenant, the defendant, for ejectment from certain premises under the provisions of section 28 of the Rent Act, No. 7 of 1972, on the ground that "the defendant has ceased to occupy the said premises ...... without reasonable cause for a continuous period of well over six months." It transpired at the trial that for a period of five years prior to institution of this action it was the defendant's employees who were occupying these premises. The learned trial judge held that although some members of the defendant's staff may have lived in these premises to the knowledge of the plaintiff it cannot be held that the premises in suit was given to the defendant for the use and occupation of his employees. In appeal the question that was argued was whether section 28 (1) of the Rent Act would prevent an employer from housing his employees in premises that he had rented out inasmuch as the house was being put to its natural use as residential premises.

Held

The defendant was liable to be ejected as he was not in occupation within the meaning of section 28 (1). Occupation through a licencee is not protected by the section and unless there is reasonable cause the defendant is liable to be ejected. The defendant had not established such reasonable cause inasmuch as except for stating that the status *quo ante* prevailed he had placed no other cause before the Court; but the plaintiff had not acquiesced in the defendant's non-occupation and indeed had drawn his attention to it as far back as 1961. However, until 1972 the plaintiff had no opportunity to seek ejectment on the ground of non-occupation and this action was filed as soon as the opportunity arose after awaiting the stipulated six months.

Per WIMALARATNE, P.

"Section 28, it would appear, gives protection to a tenant of residential premises only if he is in physical occupation. The protection is withdrawn if he has ceased to occupy the premises for a continuous period of six months, without reasonable cause. A tenant who has ceased to occupy as a result of lawful sub-letting or as a result of placing some other

* Affirmed by S.C.—see (1981) 1 Sri L.R.

person in occupation *with the consent of the landlord, express or implied,* would have reasonable cause, within the meaning of this section. But where a person is placed in occupation of residential premises by the landlord, who thereby ceases to occupy, without the consent of the landlord, express or implied, he would not have reasonable cause."

Cases referred to

(1) *Mohamed v. Kadhibhoy, (1957) 60 N.L.R. 186.*

(2) *Wijeratne v. Dschou, (1974) 77 N.L.R. 157.*

(3) *Samerawickrema v. Senanayake, SC. 21/73—D.C. Kandy 22104, S.C. Mts. 23.11.77.*

(4) *Suriya v. Board of Trustees of Maradana Mosque, (1954) 55 N.L.R. 309; 50 C.L.W. 45.*

(5) *Skinner v. Geary,, (1931) K.B. 560; (1931) All E.R. Rep. 302.*

(6) *Dando v. Hitchcock, (1954) 2 K.B. 317; (1954) 3 W.L.R. 76; (1954) 2 All E.R. 535.*

(7) *Hiller v. United Dairy, London Ltd., (1934) 1 K.B. 57; 150 L.T. 74.*

(8) *Reidy v. Walker, (1933) 2 K.B. 266; 149 L.T. 238; 49 T.L.R. 386.*

APPEAL from the District Court, Colombo.

A. C. Gooneratne, Q.C., with *D. R. P. Goonetilleke,* for the defendant-appellant.

C. Thiagalingam, Q.C., with *K. Kanag-Isvaran,* for the plaintiff-respondent.

Cur. adv. vult.

June 25, 1979.

WIMALARATNE, P.

I have had the benefit of reading the judgment prepared by my brother, Abdul Cader, J. I agree with the conclusion reached by him that occupation of residential premises through a licensee or an employee does not give the tenant protection under section 28 (1) of the Rent Act, No. 7 of 1972, unless he shows reasonabe cause for non-occupation. In view of the importance of the subject, I wish to add a few observations of my own.

Normally, the tenant of residential premises is also the person in occupation of the premises, and it is he who enjoys the protection of the Rent Act. But the Act recognises persons other than the tenant as the persons in occupation. Sections 15, 16 and 17 are three provisions where the Act gives protection either to the tenant or to the person in occupation. A landlord is prohibited from witholding amenities and facilities earlier provided to the tenant or the person in occupation (section 15). Likewise, a landlord is prohibited from using force or causing damage to the tenant or any person in occupation (section 16). And a landlord is prohibited from interfering with the use and occupation of, or preventing access to, the tenant or person in occupation (section 17). In these instances, "person in occupation" means a person in occupation with the consent, express or implied, of the landlord.

A tenant can also place a person in occupation by sub-letting the premises or a part thereof to a sub-tenant with the prior consent in writing of the landlord—section 10 (2). Where the tenant sub-lets without such prior consent in writing, the landlord is entitled to a decree for ejectment against both tenant and sub-tenant—section 10 (5). A sub-tenant in occupation with the written consent of the landlord is a person in occupation who is in the premises with the consent of the landlord, and, therefore, enjoys the protection given by sections 15, 16 and 17.

The scheme of the Rent Act, therefore, appears to be to protect only tenants in actual occupation or other persons who are placed in occupation of residential premises by the tenant with the consent of the landlord.

Section 28, it would appear, gives protection to a tenant of residential premises only if he is in physical occupation. The protection is withdrawn if he has ceased to occupy the premises for a continuous period of six months, without reasonable cause. A tenant who has ceased to occupy as a result of lawful sub-letting or as a result of placing some other person in occupation *with the consent of the landlord, express or implied,* would have reasonable cause, within the meaning of this section. But where a person is placed in occupation of residential premises by the landlord, who thereby ceases to occupy, without the consent of the landlord, express or implied, he would not have reasonable cause.

That the Legislature had in contemplation the giving of protection to a tenant of residential premises who is in actual occupation of those premises, and not through another, is apparent from the provision included in the Rent Act for the continuance of tenancy on the death of the tenant. One has to note the care with which the Legislature has designated, in section 36, the persons who, on the death of the tenant, are deemed to be the tenant of the premises for the purposes of the Act. The classification even draws a distinction between (*a*) residential premises the annual value of which does not exceed the relevant amount and had been let prior to the date of commencement of the Act, and (*b*) residential premises other than those described in (*a*). It would be unthinkable that the Legislature intended to give protection to, say, a brother or parent of a deceased tenant of residential premises who himself was not in actual occupation, but had placed his employees in occupation.

As the case law on the subject has been dealt with fully in my brother's judgment, it is unnecessary for me to repeat it. I am of the view that section 28 of the Rent Act gives no protection to a tenant of residential premises who has ceased to be in actual physical occupation for a period of six months prior to the institution of action for ejectment. The fact that the mode of occupation was through the tenant's employees will not be a reasonable cause within the meaning of his section, if that mode of occupation was through the tenant's employees will not implied, of the landlord. In the present case, the tenant has not proved that such mode of occupation had the express or implied consent of the landlord.

I would therefore, dismiss this appeal with costs.

ABDUL CADER, J.

The plaintiff prayed that the defendant, his tenant, be ejected from the premises in suit on the ground " that the defendant has ceased to occupy the said premises..........without reasonable cause for a continuous period of well over 6 months." The defendant answered that he has not ceased to occupy a premises within the provisions of section 28 of the Rent Act, No. 7 of 1972, and that the plaintiff was a consenting party to the manner in which the premises in suit were being occupied.

Among the issues framed were :—

(1) Had the defendant ceased to occupy the premises in suit without reasonable cause for a continuous period of well over 6 months ?

(3) Has the plaintiff terminated the contract of tenancy with the defendant ?

(4) Is the plaintiff estopped in law in relying upon the defendant ceasing to occupy the premises in suit ?

(5) Are the premises in suit residential premises ?

The learned Magistrate answered issues (1) and (5) in the affirmative, issue No. 4 in the negative and No. 3 to the effect that the termination of the contract of tenancy is not necessary. The answer to issue No. 3 really depended on the answer to issue No. 1. Only issue No. 1 was canvassed before us.

It transpired at the trial that the defendant went into occupation by tenancy agreement marked P1 dated 10.3.1945 and for a period of 5 years prior to the institution of this action, the defendant had been living at Queen's Road and it was his employees who were occupying these premises.

Our attention was drawn to P6 wherein the defendant had stated, "I still continue to occupy the premises along with the members of the staff, the only difference now being that I occupy No. 37, Alfred Place, beside the above." P17 was addressed to the defendant, 25, Queen's Avenue, Colombo 3. In fact, counsel for the defendant did not contest the finding of the learned Magistrate that the defendant had left the premises in suit in 1955-56. He has held that the tenancy had been in favour of the person who has been in physical occupation of the premises, viz., defendant and Gnanapragasam and then defendant and that, although some members of the defendant's staff may have lived in these premises to the knowledge of the plaintiff, it cannot be said that premises in suit was given to the defendant for the use and occupation of his employees. These findings were not canvassed before us, the only matter discussed before us being whether section 28 (1) of the Rent Act would prevent an employer from housing his employees in premises that he had rented out inasmuch as the house was being put to its natural use as residential premises.

The question whether a non-occupying tenant would have the protection of the Rent Act had been the subject of consideration even under the Rent Restriction Law, No. 29 of 1948, as amended by Act, No. 10 of 1961 and 12 of 1966. The more acceptable opinion of the Supreme Court was to the effect that it would be wrong to introduce this English principle into the Ceylon law as the Rent Act did not provide such relief. Particular mention should be made of the judgment of Basnayake, C. J. in *Mohamed v. Kadhiboy* (1) the judgment of Sharvananda, J. in the case of *Wijeratne v. Dschou* (2) and the unreported judgment of 5 Judges delivered in *Derrick Samarawickrema v. Miss P. S. Senanayake* (3)

The definition in section 48 of the Rent Act is of no assistance to decide this question for the reason that residential premises has been defined to mean "any premises for the time being occupied wholly or mainly for the purpose of residence" while residence itself is not defined. When I look into the Act itself, I find that section 15 (1) is to the effect that no landlord shall discontinue or withhold any amenities or facilities previously provided for the tenant of, or the *person in occupation*, of, such premises. But in section 17 (2) it is stated that the person in occupation means a person in occupation of the premises wih the consent express or implied of the landlord of the premises. Therefore, though it would appear that occupation through servants is caught up within the meaning ot residence, section 17 (2) provides that such

occupation shall be with the consent express or implied of the landlord of the premises. In this case, there has been acquiescence on the part of the landlord merely because the law did not give him any assistance. But the moment the law was changed with the introduction of section 28, he has sought the assistance of the Court to eject the defendant on the basis that it is the defendant's servants and not he who are in occupation of the premises. Therefore, it cannot be said that there has been consent on the part of the landlord express or implied. In the case of *Suriya v. Board of Trustees of Maradana Mosque* (4) Gratiaen, J. stated as follows :—

> "*Brown v. Brash* (*supra*) which declared that "a non occupying tenant prima facie forfeits his status, as a statutory tenant under the Rent Restriction Acts must not be misunderstood. In *Sabapathy v. Kularatne* (*supra*) I intended only to accept the dictum that questions of relative hardship cannot arise where the tenant has completely abandoned possession of the premises and thereby, to use the words of Asquith L.J., " completely removed himself from the protective orbit of the Acts. " But a tenant who lawfully sub-lets the premises can in no sense be equated to one who defeats the very object of rent restriction legislation by renting a house and then, by completely abandoning it, " withdraws it from circulation " although it is urgently required for occupation by others—per Scrutton, L. J. in *Skinner v. Geary*. See also *Wabe v. Taylor*. Such instances, as far as I am aware, have not arisen in any action instituted in Ceylon, and I do not doubt that, if they do, the *Courts would refuse to interpret the local Act so as to permit the tenant to claim protection*. But in the normal cases with which we are only too familiar, the landlord can only obtain an order for ejectment by one or other of the conditions specified in the Act. " (the emphasis is mine)

In the Five Bench case that I referred to, Wanasundera, J. stated as follows :—

> " The evidence in that case showed that the defendant having taken the premises for residential purposes was not in physical occupation of them, but had allowed the premises to be used as his office and store and also as sleeping quarters for the employees of his business. Although the defendant was not residing in the premises with his wife and children, it seems to me that on the findings of the Court *the defendant was in occupation of the premises through his servants and the premises were being used for his purposes and or*

his behalf. In this state of facts, with all respect to Alles, J. the question of non-occupying tenant does not appear to *arise for consideration.*" (the emphasis is mine)

In both these cases, the question of occupation through a licensee did not arise and these observations were, therefore, with respect, obiter. But the rights of a non-occupying tenant came for decision directly in *Skinner v. Geary* (5). In that case, the defendant took a house and permitted his sister to live in that house while he lived in another house. The County Court Judge held that the tenant was not in actual occupation of the house and that he did not retain possession within the meaning of the Rent Restriction Act. The appeal was dismissed on the ground that the fundamental principles of the Rent Restriction Act was to protect only the tenant who himself resides in the house, and that the tenant to be entitled to the protection of the Act must be in personal occupation or in actual possession of the premises.

Scrutton, L.J. observed :—

"In my opinion, this underlying principle has been treated as governing the Acts—namely, that these Acts were passed during war time owing to the scarcity of houses, and the fact that very high rents were being claimed by landlords from tenants led to the intervention of Parliament, which fixed the rents which could be exacted, and in effect enacted that if a tenant paid the rent so fixed he should be allowed to remain in occupation. Parliament was dealing with a tenant who was in occupation and who was not to be turned out; it was not dealing, and never intended to deal with a tenant who was not in occupation but who wished to say: 'Although I am not in actual occupation I claim the right so long as I pay the rent to retain my tenancy'."

It may be noted that it was under similar circumstances that local rent laws, too, were passed.

Slesser, L. J. said in the same case :—

"Having regard to the mischief with which the Acts deal and the invasion of the common law rights of the landlords, it would not in my opinion be a reasonable interpretation of the Statute for us to say that a tenant who has acquired the legal tenancy of a dwelling house but who does not remain in actual possession thereof is entitled to the protection of the Acts. I, therefore, come to the conclusion that the restriction on the landlord's right to recover possession is confined to the case of persons who are tenants residing

on the premises, meaning thereby not residing in the narrow sense, but tenants of whom it can properly be said that they are in actual occupation."

Of significance is Greer, L.J.'s complaint in the same case:—

"To add to the provisions of section 4 of the Act of 1923 that non-residence shall be a ground for taking the house out of the protection of the Acts seems to me to be legislation and not a decision on the meaning of the Acts............ It does not seem to me that mere non-residence justifies the Court in making an order for possession, *inasmuch as it is not so provided* in the Act." (the emphasis is mine)

Then came the case of *Dando v. Hitchcock* (6) in which Denning, L.J. adopted the dictum of Lord Wright in *Hiller v. United Dairy, London, Ltd.* (7).

"If the rights under the Acts which are given to Statutory tenants are, as this Court has held in several cases purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted."

He went on to quote Lord Goddard, C.J. in *Reidy v. Walker* (8):—

"The Rent Restriction Acts were "intended for the protection of a person's home," not for the protection of some other rights which he may have."

Birkett, L.J. stated:—

"The principle in *Skinner v. Geary* and subsequent cases is that just stated by Denning, L.J., namely, that the protection which the Act affords is to the tenant in his own home. It is a personal thing although that is, of course, not laid down in the Rent Restriction Acts."

Lord Goddard, C.J. stated:—

"I think that the Acts are intended and designed to protect the tenants and tenants only............The Acts put very considerable difficulties in the way of landlords and circumscribe their legal rights to a very great extent. I do not think that we ought by decisions to enlarge the difficulties of landlords or to go further than the declared object and policy of the Act dictate—that is, to protect the tenants—and I think that it cannot be denied that that means tenants who live in these houses..........I can see no reason

why his tenancy should be protected to enable him to keep in the house a manager, or a partner, or anyone else whom it may be convenient to have there."

All these passages cited by me in a large measure support the plaintiff in this action.

In the Five Bench case referred to by me earlier, Wanasundera, J. stated as follows :—

"The English decisions which hold that a non-occupying tenant is disentitled to protection against ejectment have some justification in the language of the U.K. Rent Acts. Section 5 (1) of the English Rent Act of 1920, when contrasted with the corresponding provisions of our Act, brings out this feature. The provision of the U.K. Act reads :—

'No order or judgment for the recovery of possession of any *dwelling house* to which this Act applies or for the ejectment of a tenant therefrom shall be made or given............'

The term 'dwelling house' has been taken to connote a place where a person resides and the effect of the provision is to protect 'a person residing in a dwelling house from being turned out of his home'."

He went on further to discuss some of the case law from U.K. and concluded as follows :—

"We have to construe the actual language of our own legislation in the context of local conditions without importing English doctrines and trying to strain the language of the enactment to bring it in line with some pre-conceived notion. We have no doubt in the past, been guided by English decisions in this field, but such decisions must be used carefully and with discrimination."

In respect of the case which was before Wanasundera, J. section 28 of the Rent Act of 1972 had no application, whereas this case is governed by that section which I quote below :—

"28 (1) Notwithstanding anything in any other provisions of this Act, where the tenant of any *residential premises* has ceased to *occupy* such premises, without reasonable cause, for a continuous period of not less than six months, the landlord of such premises shall be entitled in an action instituted in a court of competent jurisdiction to a decree for the ejectment of such tenant from such premises."

The English courts have used a dwelling house as synonymous with residence. Therefore, I do not think that a difference in terminology as between "a dwelling house" in the English law and "residence" in our law is of any significance. Without a provision similar to section 28(1), the English courts felt constrained to protect the interests of the landlord by limiting the encroachment by the Rent Acts into his Common Law rights by looking into the purpose of that legislation. We have in this country now a special provision which did not find a place in our earlier Acts. It may not be wrong to presume that the section has been introduced by the legislature in the context of the many cases in our courts on this subject.

It is equally true as in the U.K. that the Rent Restriction Act has been promulgated to protect the tenant and thereby a part of the Common law rights of the landlord were taken away. Therefore, in interpreting our own Rent Act, even as it was stated in the English Courts, which I have quoted above, it is the duty of this Court to interpret the Act so as to take away from the landlord only so much of the common law rights that have been taken away expressly by the Rent Act. I mean thereby that a strict interpretation of the Statute is necessary. As one reads section 28(1), the impression that that section conveys is that it is personal occupation by the tenant that is protected. This view is sustained by the various passages that I have quoted from English courts. Secondly, when a tenant enters into residence on a contract with a landlord and in this case it is in evidence that the contract was to enable the defendant himself to live on the premises, the tenant can rely on the terms of that contract and nothing more. The defendant is now a statutory tenant inasmuch as the contract has been terminated. In 1954 2 Q.B., 321, a clause in the tenancy agreement provided that either the tenant or his "present manager" could reside. Denning L. J. said:

"I do not think that the clause in the agreement can be admitted to have such an effect. The clause is not carried over into the statutory tenancy because it is not consistent with the provisions of the Act. It is contrary to the principle that the tenant is only protected so long as he himself retains possession, which means so long as he himself remains in personal occupation."

Therefore, even where the contract permitted occupation through another, it was held that once the tenant became a statutory tenant even though there be a provision in the contract for occupation by another, it ceased to have any force.

I have come to the conclusion that occupation through a licensee is not protected by section 28(1) and unless there is a reasonable cause, the defendant is liable to be ejected. The burden is on the defendant to establish reasonable cause and, except for stating that the status quo ante prevails, no other cause has been placed before the Court.

As far back as 1961, the plaintiff had drawn the attention of the defendant to the fact that he was not in occupation of the said premises. On the basis that he had sub-let the premises, the plaintiff had served notice on him to vacate the premises and had even drafted a plaint on that basis. Until 1972, the plaintiff had no opporunity to seek ejectment on the ground of non-occupation. Immediately, the opportunity arose after awaiting the stipulated six months, he filed this action. Therefore, there has been no acquiescence by the plantiff.

I hold that the judgment in favour of the plaintiff has been correctly entered by the learned Magistrate and dismiss the appeal with costs.

Appeal dismissed

Mendis, Fowzie and others v. Goonewardena, G. P. A. Silva

COURT OF APPEAL.
VYTHIALINGAM, J., ABDUL CADER, J., AND ATUKORALE, J.
C. A. APPLICATIONS. 669/78, 695/78, 766/78, 789/78, 873/78, 805/78, 880/78, 924/78, 1024/78, 421/78, 693/78, 750/78, 757/78, 912/78 AND 914/78
JULY 30 AND 31, 1979 AND
AUGUST 6, 8, 9, 10, 13, 14, 15, 16, 17, AND 20, 1979.

Writ of Certiorari – Is Commissioner holding inquiry under S. 2 of Commissions of Inquiry Act and making his report amenable to certiorari ? – Will certiorari lie where it would be futile ? – Natural justice – Duty to act fairly – Imposition of civic disabilities – Relevant person – Will quashing of findings of commission involve questioning of validity of laws which is prohibited by Article 80(3) of the Constitution ?

The President by warrant appointed two one man Commissions under the Commissions of Inquiry Act to inquire into and report (with their recommendations) on whether in the course of the administration by the Council or by any person appointed under any written law, of the affairs of each of the twelve municipalities specified in the schedule to the warrant, there had been incompetence, mismanagement, abuse of power, corruption, irregularities in the making of appointments of persons, or contraventions of any provisions of any written law and the extent of their responsibility. Upon receiving the reports Laws No. 38 and No. 39 of 1978 were passed imposing civic disabilities on certain persons specified in the Schedules to the two laws against whom findings had been made by the respective Commissioners. Fifteen applications were then filed by some of the persons