AMARASEKERA
v
SOMAPALA

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A. 237/89 (F)
D.C. KANDY 1708/RE
NOVEMBER 14, 2002
MARCH 19, 2003

Rent Act, No. 7 of 1972 – Section 22 (2) – Deterioration of premises – Proof – Balance of Probability – Duty of a tenant to take due care of premises tenanted – Conduct of tenant.

Held :

(i) It is the duty of a tenant to take due care of the premises tenanted to him and to restore the same at the end of the tenancy to the landlord in the same condition in which it was delivered to him reasonable wear and tear excepted.

(ii) It is the duty of the tenant to use the premises with the same degree of diligence that a owner would use his own property and to take equal amount of care in the preservation of the property.

(iii) On a balance of probability the plaintiff-appellant has been successful in establishing that there is deterioration of the premises, and the conduct of the defendant-respondent does not measure upto the accepted standards, not only has he caused damage to the premises he has clearly neglected the care of the premises and allowed the pemises to be deteriorated.

APPEAL from the Judgment of the District Court of Kandy.

Cases referred to:

1. *J.O.de Zoysa* v *Victor de Silva* – 73 NLR 576
2. *Fonseka* v *Wijetunga* – 1984 2 Sri LR 79
3. *T.D.Wijeratne* v *T.J. Dschou* – 77 NLR 157

A.K. Premadasa P.C. with *C.E.de Silva* for plaintiff-appellant

Lakshman Perera for the defendant-respondent.

Cur.adv.vult

October 10, 2003

SOMAWANSA. J.

The plaintiff-appellant instituted the instant action in the 01
District Court of Kandy seeking ejectment of the defendant-respondent and those holding under him from the premises bearing assessment No. 297, Pilimatalawa morefully described in the schedule to the plaint, a sum of Rs. 15,000/- as damages caused to the premises. Further damages at the rate of Rs. 250/- per month as from 1982.06 until restoration of possession thereof. Ejectment

of the defendant-respondent was sought on the basis of 3 grounds, namely –

1) Reasonable requirement

2) Registration of a lease under section 29 of the Rent Act, No. 07 of 1972

3) Deterioration of the premises due to damage caused by the defendant-respondent.

The defendant-respondent while denying the averments of the plaintiff-appellant claimed that he is a tenant protected by the Rent Act, No.07 of 1972, that no cause of action has arisen under the Rent Act to eject him, that notice to quit is bad in law and that he has deposited a sum of Rs. 1544.20 in excess as rent. In the premises he prayed for a dismissal of the plaintiff-appellant's action, a declaration that he is the lawful tenant of the premises described in the schedule to the plaint and as a claim in reconvention a sum of Rs. 1544.20 being excess rent deposited by him.

At the commencement of the trial parties admitted the tenancy, the applicability of the Rent Act, No. 07 of 1972 to the premises in suit, execution of lease agreement No. 2318 dated 09.06.1977 for a period of 5 years, that the said period has lapsed, the receipt of the notice to quit pleaded in paragraph 05 of the plaint and that the plaintiff-appellant is the owner of the premises in suit. 17 issues were raised by the parties and at the conclusion of the trial the learned District Judge by his judgment dated 07.07.1989 held with the defendant-respondent and dismissed the plaintiff-appellant's action. It is from the said judgment that this appeal has been preferred.

At the hearing of this appeal, counsel for the plaintiff-appellant confined his submission to the issue of deterioration of the premises only. To prove deterioration of the premises counsel for the plaintiff-appellant relied very heavily on the evidence given by the defendant-respondent.

However the plaintiff-appellant himself called police constable Piyadasa to speak to the deterioration of the premises in suit. It is to be noted that on a complaint made to the Kadugannawa Police marked P4 after this action was instituted this witness had gone to

the premises in suit and made his observations as to the damage that had been caused to the said premises.

The complaint to the police has been made on 04.06.83. The portion of the complaint relevant to the instant action is as follows:

" දැනට නිවසේ පදිංචි සෝමපාල පාවිච්චියේ වරද නිසා ගෙට විශාල අලාභ හානියක් වී ඇත. පසුගිය මැතිවරණ කාලයේ සෝමපාලට හිරිහැර කිරීමට පැමිණි මිනිසුන් වහලට නැගිම නිසා වහලේ රටළුු කැඩීයාමෙන් වැහි දිනවලට ගේ තුළට වතුර වැටී අලාභ වී ඇති නමුත්, පදිංචිකරු මේ යම්බන්ධව කිසිම පියවරක් ගෙන නැත. දැනට ගෙයි වහලට මුක්කු දී ඇත. "

Police Constable Piyadasa in his examination in chief says as follows:

"ඒ ස්ථානයේ කඩේට පිටුපසින් කාමරයක් තිබෙනවා. ඒ කාමරයේ බිත්ති නුහක් නැන්වල කැඩිලා තියෙනවා. ඒ වගේම එම කොටසින් කඩේ පිහිටා ඇති ඉදිරි කොටයේ බිම සිමෙන්ති කැඩී තියනවා. ඉන් පසුව මම උඩ තට්ටුවට ගිහින් උඩ තට්ටුව පරීක්ෂා කළා. එහි යවිකර තිබෙන ජනෙල් දෙකක වීදුරු කැඩී ලෑලි ගහල තියෙනවා. එම ජනෙල් දෙක පලු කිපයකින් යුක්තයි. එම තට්ටුවේ ලෑලි මත සිට වහලේ මුදුන් තැනට මුක්කු හිටවා තියනවා. වහලය තවදුරටත් පරීක්ෂා කිරීමේ දී අබලන්ව තිබුනා යෑම නැනකම පාහේ!"

Under cross examination the withess stated:

"උ: සිමෙන්ති කපරාරු කරලා තිබුනා. ඒ බිත්ති තැනින් තැන කැඩී තිබෙනවා. කොටස් වශයෙන් කැඩිලා අයින් වෙලා තියෙනවා. ඒ කැඩි තිබුනේ ගොඩනැගිල්ල නොවෙයි, කපරාරුව.

ප්‍ර: එය හිතා මතා කළ දෙයක් හැටියට තමන්ට පෙනි ගියේ නැහැ.

උ: එහෙම මට පෙනුනේ නැහැ.

ප්‍ර: සිමෙන්ති කැඩී තිබුනා කියලා නමන් තිවිවා?

උ: ඔව්

ප්‍ර: සාමාන්‍යයෙන් කලක් යනකොට ඒ වගේ සිමෙන්තියේ තැනින් තැන කැඩෙනවා?

උ: ඔව්

ප්‍ර: ඒකත් කවුරුත් හිතා මතා කළ දෙයක් කියලා තමා තක්සේරු කළා ද?

ප්‍ර: පිටිපස්සේ බිත්තියේ කපරාරුවත් කැඩී තිබුනා.

උ: ඔව්

ප්‍ර: තමන් උඩ පොල්දරේට නැග්ගා කියලා කිව්වා?

උ: ඔව්

ඒ ලැලි වලට හානියක් වෙලා තිබුනේ නැහැ. ලැලි වල යට කැඩී තිබුනා. වහලය මැදින් පහලට වෙලා තියෙනවා.

ප්‍ර: පරාල දිරා යාමෙන් එහෙම පහත් වෙන්න ඇති කියලා තමන් හිතනවාද?

උ: ඔව්

ප්‍ර: එතන්ට අළුත්වැඩියාවක් අවශ්‍ය බවයි තමන්ට පෙනී ගියේ?

උ: ඔව්

ප්‍ර: බිත්තිවලත් තැන් තැන්වල කපරාරු කැඩිලා තිබුනා?

උ: ඔව්!'

The plaintiff-appellant too gave evidence and it transpired in his evidence that as he was out of the country the complaint marked P4 was made by his father. In re examination he went on to say:

" එහි වහලේ යට ලියට අලාභ කර තිබෙනවා. බිත්ති කපරාරු වලට හානි වී තිබෙන්නේ නිතර නිතර රාක්ක ගහන්න ඇණ ගහලා. කෙටි කාලයකට තැබෑරුමක් පවත්වාගෙන ගියා විත්තිකරු. පොලොවත් බිත්තින් වෙන් කිරීමෙන් අලාභ වී තිබෙනවා. ඒවා ඉඛේ වූ දේවල් නොවේ. විත්තිකරු රාක්ක ගහන විට ගැලවී තිබෙනවා. පොළව යම්බන්ධයෙන් පළුදු තිබුණා. පොලොවට සිමෙන්ති දලා තිබුනා. දැනට 75% ක් විතර පොළව කැඩිලා. තැබෑරුමට රාක්ක ගහන්න යන විට පොලව කැඩිලා තිබෙන්නේ. මේක රටබිම යාප්පුවක්. මේ යාප්පුව දාන්න ගිහින් පොලවට වෙන් කිරීමේ බිත්තියක් පොලවට යවී කර තිබුණා. පොලව 75% ක් කැඩිලා තිබුණා. හැම තැනින්ම බඩුබෑම හේතුකොට ගෙන කැඩිල තිබුණා. බීම බෝතල් බාන කොට කැඩිලා. වහලේ යටලිය කැඩිලා තිබුණා. ඒ නිසා තෙමිලා දිරා පත්වෙලා. මා යම්බන්ධයෙන් මේ විත්තිකරු ගෙවල් කුලි මණ්ඩලයටත් නවුටි දාලා තිබෙනවා."

It is to be seen that even in the application made by the plaintiff-appellant to the Rent Board marked V4 the plaintiff-appellant has claimed a sum of Rs. 25,000/– in respect of damage caused to the premises in suit. However the application was later withdrawn by the plaintiff-appellant.

The defendant-respondent himself under cross examination admitted that he did some structural alterations to the premises. He stated:

" ඒ රාක්ක ගහන්න සිද්ධ වුනේ රටබීම සාප්පුව පටන්ගන්නා විට. ඒ රාක්ක දැන් ගලවලා. පොලිසියේ මහත්වරු යන විටත් එ'වා ගලවා තිබුනේ.

ප්‍ර: ඔය බෝතල් කීපයක් ගෙනවිත් පොලවේ තියන විට සාමාන්‍යයෙන් පොලවත් කැඩෙනවා.

උ: ඔව්.

රාක්ක ගලවා රාක්ක ගහනවිට එතැන බිත්තිය හිල් වෙනවා. ඇණ ගහන විට ලොකු ඇණ ගහන්න ඕනෑ. අඟල් 3 ක ඇණ 50 ක් විතර ගහන්න සිද්ධ වෙනවා. ඒවා ගලවන විට බිත්ති කැඩෙනවා.

ප්‍ර: තමා පිලිගන්නවා හරි ගැස්සුවා හරි නැතිවා හරි තමා ඇණ 25, 50 ක් එහි බිත්තිවලට ඇණ ගහන්න සිද්ධ වුනා නේද?

උ: ඔව්.

ඒ ඇණ ගලවන විට බිත්තිවල බදම ගැලවෙනවා. මම මෙම බීම හල ගෙන යාමට කොටසක් වෙන් කලා. උඩ මැද තනුවත් තියෙනවා. ඒ කණුවේ සිට බිත්තියට ගඩොල් වලින් පකස් කර බිත්තියක් හැදුවා. ඒ විදියට බිත්තියක් හැදුවා. එයින් දෙකට වෙන් වුනා. බිත්තියක් හදන විට පොලවේ නිකන් ගල් තබන්නේ නැහැ. පොලවේ ගල් තබා වෙන් කලා. නමුත් බිත්තිය ඒකට මාට්ටු කලේ නැත. අත්තිවාරමක් යකස් කලේ නැත. තල්ලුකලොත් වැටෙන්නේ නැහැ. යට හයි වෙන්න කිසිවක් නැහැ.

ප්‍ර: මා යෝජනා කරන්නේ ඔය තියන සාක්ෂියත් අසත්‍යයක් බවයි. බිත්තියක් හදනවා නම් බිත්තිය හදන්න පොලව යම් කොට ස ක' නාරා එයට ගල් යට කල යුතු බවයි.

උ: උත්තරයක් නැත.

(අධිකරණයට)

ප්‍ර: ඒ බිත්තිය එහාට මෙහාට කරන්න පුළුවන් ද?

උ: බැහැ. සිමෙන්ති පොලව ඒ ගානට කැඩුවා.

ප්‍ර: කොච්චර ප්‍රමාණයක් කැඩුවාද?

උ: කඩේ දිග ප්‍රමාණයට දිගටම කැඩුවා. කඩේ දිග අඩි 12 ක්

පමණ ඇති. බදාම විතරයි කැඩුවේ. පිමෙන්තිය කඩන්න වුනා. ඒ ගඩොල් වලටම කැඩුවා. වුට්ටක් එහාට මෙහාට වෙන්න ඇති.

ප්‍ර: මා යෝජනා කරන්නේ ගඩොල් ප්‍රමාණයට වැඩියෙන් කඩන්න ඕනෑ නැතිනම් බැහැ.

උ: මට මතක නැත.

ප්‍ර: ගඩොලින් දාන්න ප්‍රමාණයට කඩනවා නම් ඒ ගඩොල් ප්‍රමාණයට වැඩියෙන් කඩන්න ඕනෑ නේද?

උ: බාස් කෙනෙක් කැඩුවා. බාස් කොහොම කැඩුවා ද කියා මා දන්නේ නැහැ. උඩ බිත්තිය යවී වී තිබුණා බාල්කයට!"

In section 22(2) the relevant provisions applicable the instant action is as follows:

> ".....the condition of the premises has in the opinion of the Court, deteriorated owing to acts committed by or to the neglect or default of the tenant or any such person".

In the case of *J.O. de Zoysa* v *Victor de Silva* (1)

Per Thamotheram, J.

"The short point I have to consider in this case is whether a deliberate demolition of a boundary wall of a premises, without the consent of the landlord, for a private purpose of the tenant can amount to deterioration of the premises committed by the tenant under section 13(1) (d) of the Rent Restriction Act (Chapter 274).

There is evidence that in addition to the damage to the boundary wall there was some damage to the premises by the demolition, such as the exposure of a drain pipe, erosion of the earth and the weakening of the portion of the boundary wall which also served as a retention wall. There is no doubt that a boundary wall is part of the premises. I cannot say that the learned Commissioner was wrong in holding on the above facts that there had been deterioration (made worse) of the premises by the demolition of the boundary wall".

In *Fonseka* v *Wijetunga*(2) the head note reads:

" on the allegation of damage the Additional District Judge had accepted the evidence of the architect Peiris and found that damages has been caused to the floor of the shop, kitchen floor and southern wall of the shop by acts of the defendent. The southern wall was damaged by nine angle-iron spikes driven into it to hold timber racks. As a result the wall had a crack penetrating to the other side causing dislocation of the parapet gutter and rainwater to drain into the shop. The wall was thus rendered weak and liable to collapse"

Held:

"The two grounds on which a landlord can eject his tenant under section 12A(1)(d) of the Rent Restriction Act are 'wanton destruction, and, wilful damage.' The former means that there must be proof that the premises have suffered total or partial destruction. In other words they must be totally or partially destroyed. To be wanton. such destruction must be the result of carelessness for or indifference to the consequences or an unrestrained disregard of them. "Wilful damage" on the other hand means damage caused "intentionally" or "deliberately".

There was no evidence that the respondent was guilty of wanton destruction. On the other hand the damage to the southern wall caused by driving in nine angle-iron spikes was a deliberate act and the resulting weakening of the wall making it liable to collapse is a direct consequence of the act of driving in the spikes. The kitchen floor was cracked and pitted by the splitting of firewood on it and the floor of the shop was damaged by the planting of posts to support heavy rafters. Therefore the respondent is guilty of causing wilful damage to the premises within the meaning of section 12A(1)(d) of the Rent Restriction Act.

The damage must be serious and not trivial and what exactly is serious damage must be left to the discretion of the Judge. In the Instant case the damage to the southern wall taken with the damage to the kitchen floor and to the floor of the shop must be regarded as serious and justifies ejectment".

Per Samarakoon, C.J.

" It is the duty of a tenant to take due care of the premises and to restore the premises to the landlord at the end of the tenancy in the same condition in which it was delivered to him reasonable wear and tear excepted. (Wille's Principles of South African Law 7th Edition p.422). He must not *inter alia* cause damage to the premises (Voet 19.2.29). But this damage must be of a serious and not of a trivial nature. (Voet 19.2.18). What exactly is serious damges is a matter that "ought to be left to the discretion of a prudent and cautious Judge". (Voet 19.2.18.) The above are principles of Common Law applicable to the relationship of landlord and tenant and I think they are apposite for the construction of the provisions of section 12A(1)(c) of the Rent Restriction Act (Chapter 274).

T.D.Wijeratne v *T.J. Dschou*[3] the head note reads:

"The defendant who was a tenant of certain rent-controlled premises whose standard rent for a month did not exceed Rs.100, was running a restaurant business in the premises from 1942. The premises were kept closed from early 1965 till 1969 and were not physically occupied by the tenant or by anybody for over two years prior to the date of the institution of the present action in October 1967. The plaintiff (landlord) claimed the ejectment of the defendant on two grounds, viz (a) that the defendant had not been in physical occupation of the premises for over two years; (b) that the defendant had caused wilful damage to the premises within the meaning of section 12A(1)(d) of the Rent Restriction Act by keeping the premises unoccupied and closed;".

It was held:

(ii) "that there was sufficient evidence in the present case to establish that, by keeping the premises unoccupied and closed for a period of over two years, the defendant had caused wilful damage to the premises within the meaning of section 12A(1)(d) of the Rent Restriction Act and was, therefore, liable to be ejected on that ground. It is only in the perspective of landlord and tenant relationship that the question whether wilful damage has been caused should

be determined. Under Roman-Dutch law it is the duty of the tenant to use the leased premises with the same degree of diligence that a good and prudent householder would use in the preservation of his own property".

Per Sharvananda, J.:

"Under the Roman Dutch Law it is the duty of a tenant to use the leased premises with the same degree of diligence that a good and prudent householder or paterfamilias or farmer would use for his own property and to take an equal amount of care and preservation of the property. A tenant is accordingly liable to the landlord for ordinary gross negligence as well as for fraud – Voet 19.2.29. Voet states that the lessee will be fast bound to the lessor if he has neglected the care of homesteads, barns and water leadings and thus has allowed these things and others like them to be spoilt. As the "hirer" is responsible for that degree of diligence which all prudent men, that is which the generality of mankind, use in keeping their own goods of the same kind he is liable for such injuries as are caused by an omission of that diligence. Wille – Landlord and Tenant 1910 ed., page 423".

It appears that the learned District Judge was of the view that damage if any caused to the premises in suit were of a trivial nature and that there was'nt an iota of evidence to establish that the defendant-respondent caused damage intentionally or deliberately. Furthermore, the learned District Judge refers to some damage caused to the premises while the defendant-respondent was running a wine stores which the defendant-respondent himself admitted under cross examination. However the learned District Judge has come to a finding that this was a matter that should have been considered at the time the lease marked VI was given to the defendant-respondent and as the plaintiff-appellant failed to take any steps at that stage, he is precluded from relying on such damage if any now. However I am unable to agree with this finding of the learned District Judge. For as admitted by the defendant-respondent the alteration he had done to the premises when he decided to run a wine stores discloses that not only did he cause damage to the walls by driving 50 or so 3 inch nails to the walls in order to hold racks but also caused damage to the floor of the premises in

the process of constructing a partition with bricks. There is also the evidence of planting a post to support the roof.

It is conceded that these alterations were done prior to the signing of VI. Does it mean as obseved by the learned District Judge and also submitted by counsel for the defendant-respondent that the plaintiff-appellant is now precluded from agitating on these matters after the signing of VI. I would without hesitation agree with the counsel for the plaintiff-appellant that he could and he should succeed in his claim that the defendant-respondent has caused damage to the premises. It is to be noted as admitted by the defendant-respondent himself that before PC Piyadasa visited the premises he had removed the partition wall. However PC Piyadasa did observe and testified to the condition of the premises though he was unable to say whether the defendant-respondent was responsible for the same. However we have on the other hand, the admission of the defendant-respondent himself under cross examination.

Be that as it may, it is the duty of a tenant to take due care of the premises tenanted to him and to restore the same at the end of the tenancy to the Landlord in the same condition in which it was delivered to him reasonable wear and tear excepted. All in all he must not cause damage to the premises. On the other hand, it is the duty of the tenant to use the leased premises with the same degree of diligence that a owner would use his own property and to take equal amount of care in the preservation of the property.

The conduct of the defendant-respondent in this case does not measure up to the said standards, not only has he caused damage to the premises he has clearly neglected the care of the premises leased/tenanted to him and allowed the premises to be deteriorated. It is to be noted that there is no evidence that the defendant-respondent requested the plaintiff-appellant to effect any repairs or on such a request the plaintiff-appellant failed and neglected to attend to any repairs specially those revealed in the evidence of PC Piyadasa. In any event, the fact that the defendant-respondent neglected the care of the property is specifically referred to in the police complaint P4 wherein the plaintiff-appellant's father has complained.

"පාවිච්චියේ වරද නිසා ගෙට විශාල අලාභ හානියක් වී ඇත. පසුගිය මැතිවරණ කාලයේ පෝම්පාලට හිරිහැර කිරීමට පැමිණි මිනිසුන් වහලයට නැඟීම

නිසා වහලේ රටඋළු කැඩී යාමෙන් වැහි දිනවලට ගේ තුළට වතුර වැටී අලාභ වී ඇති නමුත්, පදිංචිකරු මේ සම්බන්ධව කිසිම පියවරක් ගෙන නැත. දැනට ගෙයි වහලට මුක්කු දී ඇත."

In the circumstances, it is my considered view that on a balance of probability the plaintiff-appellant has been successful in establishing that there is deterioration of the premises as a result of the above acts of the defendant-respondent. For the foregoing reasons, I would allow the appeal and set aside the judgment of the learned District Judge and direct him to enter judgment for the 330
plaintiff-appellant as prayed for. The defendant-respondent will pay a sum of Rs.10,000/- as costs.

The Registrar is directed to send the case record to the appropriate District Court forthwith.

DISSANAYAKE, J. - I agree.

Appeal allowed.