MACAR AND ANOTHER
v
MOHAMED ALI

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. NO. 604/94 (F)
D.C. COLOMBO 7820 / RE
JULY 17 and
NOVEMBER 12, 2003

Rent Act, No.7 of 1972 – Excepted premises – Portion of original premises given separate assessment number – Annual value not challenged – Tenant in occupation of entirety – Rent Restriction Act, No. 29 of 1948 – Amending Act, No. 6 of 1953 compared – Nature of physical alterations – Attracting assessment for the first time – Failure to answer in limine the question whether premises are excepted or not – Is it a miscarriage of justice? – Attornment – Municipal Councils Ordinance, section 235.

The plaintiff-appellant sought the eviction of the defendant-respondent from premises No. 207 and 207B on the basis that they are excepted premises – the two premises being assessed at Rs. 38,720/- and Rs. 9,280/- for the first time in 1990. The defendant-respondent's position was that he became the tenant in 1975 and that in 1996, a portion of the original premises No. 207, was given a separate No. 207B, though there was no structural alterations, and he continued to be the tenant of the entirety of the premises under the same contract of tenancy which commenced in 1975 even after he attorned to the plaintiffs-appellants. The District Court held in favour of the defendant-respondent.

Held:

(i) Evidence reveals that the two separate numbers were given not because of a wall being built but because of a request made by the owners who gifted the premises to the present plaintiff-appellant.

(ii) A change in the assessment number and an increase in the annual value would not take the premises out of the Rent Act despite two numbers being given.

Per Somawansa, J.

"There is no material placed by the plaintiff-appellants to show that a grave miscarriage of justice has been caused to them as a result of failure or neglect on the part of the trial judge to answer *in limine* the question whether premises are subject to the operation of the Act or excepted premises."

APPEAL from the judgment of the District Court of Colombo

Cases referred to:-

1. *Muttucumaru* v *Corea* – (1958) 59 NLR 525
2. *Seneviratne* v *Perera* – 63 NLR 509
3. *Wijetunga* v *Senanayake* – 69 NLR 445
4. *Podisingho* v *Perera* – 75 NLR 333
5. *Don Gerald* v *Fonseka* – 71 NLR 457
6. *Sally Mohamed* v *Seyed Mohamed* – 64 NLR 486
7. *Chettinad Corporation Ltd.* v *Gamage and others* - 62 NLR 86
8. *Hewavitharane* v *Rathnapala* – (1988) –1 Sri LR 240
9. *Weerasena* v *A.D.R. Perera* – (1991) – 1 Sri LR 121
10. *Imbuldeniya* v *de Silva* – (1987) – 1 Sri LR 367
11. *Ansar* v *Hussain* – (1986) 1 CALR 365
12. *Wakkumbura* v *Nandawathie* – (1998) 2 Sri LR 154

K.S. Tillakaratne for plaintiff-appellant.

N.S.A. Goonetilake, P.C., with *N. Mahendran* for defendant-respondent.

Cur.adv.vult

March 05, 2004

ANDREW SOMAWANSA, J.

The plaintiffs-appellants instituted the instant action in the 01
District Court of Colombo seeking ejectment of the defendant-respondent and those under him from premises bearing assessment Nos. 207 and 207B Galle Road, Colombo 3 morefully described in the 1st and 2nd schedules to the plaint and for restoration to possession thereto and damages at the rate of Rs. 20,000/- per month from 01.02.1992 till possession is restored.

The position taken by the plaintiffs-appellants was that the said premises being business premises and excepted premises the protection afforded by the Rent Act did not apply to the defendant- 10

respondent, that by notice to quit dated 12.12.1991 the defendant-respondent's tenancy had been terminated with effect from 31st January 1992, that the premises in suit Nos. 207 and 207B had for the first time being assessed at an annual value of Rs. 38,720/- and Rs. 9280/- respectively in the year 1990 and were therefore excepted premises within the meaning of the Rent Act.

The position taken by the defendant-respondent was that he became the tenant of premises bearing assessment No. 207 under one M.C.M. Ziyard in 1975, that the plaintiff-appellant became the owner of this property in December 1989 on deed No. 3813 marked V3, that the said M.C.M. Ziyard in October 1990 instituted action No. 7561/RE against the defendant-respondent on the basis that the defendant-respondent was his tenant and as landlord sent a quit notice dated 28.08.1990 to the defendant-respondent, that the said case No. 7561/RE was instituted after the said deed of gift No. 3813 marked V3, that on the death of the said M.C.M. Ziyard application for substitution was refused by Court and the said Action No. 7561/RE was not proceeded with, that in the year 1990 a portion of the original premises bearing assessment No. 207 was given a separate No. 207B though there were no structural alterations, that even thereafter both premises bearing Nos. 207 and 207B continued to be governed by the Rent Act, No. 07 of 1972, that he continued to remain the tenant of the entirety of the premises and was in occupation of the entirety under one and the same contract of tenancy which commenced in 1975 even after he attorned to the plaintiffs-appellants.

At the commencement of the trial 07 admissions were recorded and 23 issues were raised by both parties. At the conclusion of the trial the learned District Judge by his judgment dated 06.10.1994 held with the defendant-respondent and dismissed the plaintiffs-appellants' action. It is from the said judgment that this appeal has been lodged.

It is contended by the counsel for the plaintiff-appellants that in the eyes of the law as it stands and interpreted by the highest Court in the land the judgment of the learned District Judge cannot stand for a moment for the reason that the plaintiffs-appellants base their action on the fact that the premises were excepted premises as at the time of the institution of the action as borne out by paragraph

02 of the plaint in conformity with the relevant provisions of the Rent Act, No. 07 of 1972 operative in the area where the premises were situated as at the time of the institution of the action. Further he submits that certified extracts of the Assessment Book under section 235 of the Municipal Councils Ordinance which gives the annual values for the year 1991 in respect of the two premises in question as Rs. 38,770/- and Rs. 9280/- speak for themselves to determine as to whether premises are excepted premises or not. He further submits that the question whether the premises in respect of which the action is brought are to be regarded as premises subject to the operation of the Act or as excepted premises has to be answered *in limine* which cardinal and mandatory rule the learned trial Judge has failed or neglected to observe and has caused a grave miscarriage of justice. To substantiate the above submission photostat copies of pages 103 to 133 of Professor G.L. Peiris "Landlord and Tenant" Vol. II, have been tendered marked as 'A'."

However I am unable to agree with the above submission for the simple reason that though the above submission would hold water under the Amending Act, No. 06 of 1953 but certainly not under the Rent Act, No. 07 of 1972. This is explained by Professor G.L. Peiris himself in his book "Landlord and Tenant" Vol. II page 113 onwards which I would like to re-produce here:

> "As it stood in its original form in the Rent Restriction Act of 1948, Regulation I of the Schedule stated that "annual value" meant the annual value of the premises as assessed for the purposes of any rates levied by any local authority under any written law during the month of November 1941. By Regulation 2, premises were declared to be "excepted premises" if, being premises of the description mentioned in Column 2, the annual value thereof exceeded the amount reflected in it. In Column 2, premises were described as (a) residential premises, and (b) business premises.
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> By Act, No. 6 of 1953, Regulation I, as it appeared in the Rent Restriction Act, No. 29 of 1948, was deleted, and regulation 2, in the form in which it is reproduced in Chapter 274 of the 1956 edition of the Legislative Enactments, was adopted. The material change effected by the Amending Act of 1953 was that the assessment of

the annual value of the premises ceased to be related to **a particular point of time** – namely November 1941 –but was linked instead to "any rates levied **for the time being** by any local authority under any written law".

"In *Muttucumaru* v *Corea* (1) Sinnetamby, J. made the apt comment: "The result of the amendment is that, in order to determine whether premises are 'excepted' or not, one has not to look for the annual value as on November 1941, but to ascertain the annual value 'as assessed for the purposes of any rates levied **for the time being**'. The effect of the amendment is two fold: first, it excepts from the operation of the Act new construction after a certain date and secondly, a fixation of the annual value is related not to November 1941 but to 'the time being'. The result is that, if the assessment of the annual value of any premises which is below the figures in Column 3, is at any stage increased, the premises would become 'excepted' if the total increased amount in the case of residential premises exceeds Rs. 2,000 and, in the case of business premises, exceeds Rs. 6,000. It is no longer fixed and inflexible. In order, therefore, to ascertain the annual value 'for the time being'. That expression, it seems to me, must relate to the date of action."

"However, the law on the subject has been changed once again by the Rent Act, No. 7 of 1972, which declares that "the Rent Restriction Act (Chapter 294), as amended from time to time, is hereby repealed". Regulation 3 of the Schedule to the Rent Act of 1972 now provides that "Any business premises (other than premises referred to in Regulation 1 or Regulation 2) situated in any area specified in Column 1 hereunder shall be excepted premises for the purposes of this Act, if the annual value thereof, as specified in the assessment made as business premises for the purposes of any rates levied by any local authority under any written law and in force on the first day of January, 1968, or where the assessment of the annual value thereof as business premises is made for the first time the first day of January 1968, the annual value as

specified in such first assessment, exceeds the amount specified in the correspondent entry in Column II."

"It will be noted that the criterion adopted in this regard in the Rent Act of 1972 is closer to that emerging from the original Rent Restriction Act, No. 29 of 1948, than to the approach reflected in the Amending Act, No. 6 of 1953, so far as the method selected is concerned. The initial Act of 1948 and the new Act of 1972, in their respective Regulations incorporated in the Schedule, have in common the feature that the annual value of the pemises is required to be determined as at an appointed date referred to in the relevant Regulations. By contrast, the Amending Act of 1953 did not contain reference to an appointed date for this purpose, but enabled the annual value of the premises to be ascertained as and when each action was instituted".

I might also say that in addition to *Muttukumaru* v *Corea* (*supra*) decisions of *Seneviratne* v *Perera*(2), *Wijetunga* v *Senanayake*(3), *Podisingho* v *Perera*(4) and *Don Gerald* v *Fonseka*(5) have been highlighted by the counsel for the plaintiffs-appellants as cogently relevant binding decisions. However these are decisions made under the Amending Act, No. 06 of 1953 and has no relevance to the instant action to which applicable law is to be found in the Rent Act, No. 07 of 1972. I might also say that the question whether the premises in respect of which the action is brought are to be regarded as premises subject to the operation of the Act or as excepted premises has to be answered *in limine* is only an opinion expressed by Professor G.L. Peiris. In any event, there is no material placed by the plaintiffs-appellants to show that a grave miscarriage of justice has been caused to them as a result of failure or neglect on the part of the trial Judge to answer *in limine* the question whether premises are subject to the operation of the Act or excepted premises. I might also say that the learned District Judge has very correctly answered this question when he answered issue No. 01 in the negative and issue No. 19 in the affirmative.

Another matter that was raised by the counsel for the plaintiffs-appellants is that the version of the defendant-respondent that

there was no attornment is proved false by the documents marked and that this vital and material fact had not been considered or brushed aside by the learned District Judge in answering the issues. Here again, I am unable to agree with the counsel for the plaintiffs-appellants for by letter dated 08.10,1991 marked P26 the plaintiffs-appellants have informed the defendant-respondent that they were the present owners and requested the defendant-respondent to attorn to them which the defendant-respondent had complied by accepting the plaintiffs-appellants as his landlord by letter dated 25.11.1991 marked P25.

Counsel for the plaintiffs-appellants also submits that the defendant-respondent has not challenged the annual value as provided for by the Municipal Councils Ordinance and as such the annual value stands as it is and as such the premises are excepted premises in the eyes of the law and as such the trial Judge should have answered the issue with regard to excepted premises in the affirmative and then there would not arise any necessity to answer the rest of the issues. However in view of the Regulation 3 of the Schedule to the Rent Act, No. 07 of 1972 this argument cannot hold water.

According to the evidence of the plaintiffs-appellants the premises in suit earlier bore only one number, *viz.* Assessment No. 207 but that thereafter owing to a structural alteration carried out by the defendant-respondent, it became divided into two partitions and as a result of which for the first time two Nos. 207 and 207B came into existence. Though the 1st plaintiff-appellant in his evidence stated that a dividing wall was built in the middle of the premises thus giving rise to two units and two assessment numbers being given for the first time. However cross-examination revealed that he knew little or nothing about the defendant-respondent or tenancy of the premises or anything of the earlier history of the premises in suit. However evidence of the representative of the Colombo Municipal Council from the Municipal Assessor's Department revealed that two separate numbers have been given not because of a wall being built but because of a request made by the co-owner M.C.M. Ziyard and another who gifted the premises to the present plaintiffs-appellants. The letter marked V6 was never referred to by the plaintiffs-appellants which was addressed to the Municipal Assessor

requesting that premises No. 207 be separately assessed as two units and be given two separate assessment numbers as there are two co-owners so that they could pay the rates separately. Evidence revealed that accordingly two numbers came into being. It is to be seen that the letter V6 is dated 13.02.1990 by which date the deed of gift No. 3813 dated 14.03.1983 marked V3 had been executed. Thus the two signatories to V6 were uttering a blatant falsehood.

On the other hand, according to the recital on the second page of deed of gift marked V3, the premises are subject to the provisions of the Rent Restriction Act. It is to be noted that the premises themselves have not changed but then it had got two numbers, *viz.* 207 and 207B. Accordingly a change in the assessment number and an increase in the annual value would not take the premises out of the Rent Act despite two numbers being given. In the case of *Sally Mohamed* v *Seyed Mohamed* (6) the facts were:-

> "In November 1941, premises Nos. 102 and 104 were assessed jointly with premises No. 100. In 1945 premises Nos. 102 and 104 were assessed together but separately from premises No. 100. In 1955 separate assessments were made for each of the two premises Nos. 102 and 104".

It was held in that case:

> "That under section 5(1) of the Rent Restriction Act, the standard rent of premises Nos. 102 and 104 was and is the amount of the assessment made for the premises jointly with premises No. 100 in November 1941, and that will remain unchanged, despite the separate assessments made in 1945 and 1955, unless the board in the exercise of the power given by the proviso introduces an alteration by fixing separate standard rents for the two numbers. In the absence of such a fixation by the board, the 1941 assessment still holds good, and the standard rent has to be calculated on that basis".

In the case of The *Chettinad Corporation Ltd.* v *Gamage and another* (7) the facts were:

"Tenement No. 273/2 was assessed in November 1948 at an annual value of Rs. 850. In 1951 the same tenement and the adjoining tenement No. 275 were consolidated and assessed together at the annual value of Rs. 425".

It was held:

"That under section 5(1) of the Rent Restriction Act, whatever may have been the result of the consolidated assessment and the alteration of the number of the premises, the annual value of premises No. 273/2 for the purposes of the Rent Restriction Act remained at Rs. 850 inasmuch as it was fixed at that figure when the assessment was made for the first time in 1948".

Both the above cases were decided in terms of the Rent Restriction Act, No. 29 of 1948. Again in *Hewavitharana* v *Rathnapala*(8) the facts were as follows:

"Two adjacent business premises Nos. 350 and 356, admittedly governed by the provisions of the Rent Act up to October 1975, were occupied by one tenant under the same landlord. The tenant had connected the two premises by an intercommunication door. At the request of the landlord, in October 1975, the Municipal Council gave one assessment number to both premises and fixed the annual value at Rs. 8310 by addition of the two previous annual values increased by Rs. 10. The landlord filed action against the tenant for ejectment on the basis that the premises were excepted premises. The question arose as to whether for the purpose of regulation No. 3 as to excepted premises, the annual value of January 1968 or the annual value fixed in October 1975, should be applied. If the annual value of October 1975 is applicable the premises become excepted premises."

It was held:

"That the nature of the physical alterations done to the premises is such that assessment of October 1975 did not give birth to new premises, attracting an assessment for the first time and therefore the January 1968 annual

value should be applied to determine whether the premises were excepted premises or not."

In *Weerasena* v *A.D.R. Perera*[9] the facts were as follows:

"The plaintiff let premises No. 97, Stanley Tillekeratne Mawatha, Nugegoda to the defendants in 1972, which premises were excepted premises. The rear portion of the premises, a store room was later separately assessed as 97B. The plaintiff's action for ejectment failed as premises No. 97B was alleged to be covered by the Rent Act and there being no valid termination. The Court of Appeal reversed the judgment and directed ejectment from the full premises."

It was held:

"(i) Where there has been one contract of letting, the mere assessment and sub-division of a part of that premises does not give rise to a separate letting or give birth to a new premises, when the sub-division is an adjunct of the former.

(ii) The entity of protection is not the premises, but the contract – *Imbuldeniya* v *de Silva*[10] applied.

(iii) Applying the test in *Ansar* v *Hussein*[11] in the absence of any physical alteration to the premises 97B it cannot be said that a new premises has come into existence."

In *Wakkumbura* v *Nandawathie* [12] the facts were as follows:

"The respondent was the tenant in respect of 3 adjacent premises Nos. 83, 82, 83/1, during the period 1958-1987. The premises were subjected to 4 assessments, twice as three separate units and twice as a single consolidated unit.

The plaintiff-appellant instituted action against the defendant-respondent to have her ejected from business premises formerly bearing assessment Nos. 83, 81, 83/1, and presently assessment No. 81. It was contended by the plaintiff that the premises No. 81 is a business pemis-

es, that it was first assessed as No. 81 in 1983, and the said premises are excepted premises. The defendant's position was the first assessment of the premises as a single unit and that as business premises was in 1970, and therefore the premises are not excepted premises.

The District Court held that, the premises are not excepted premises which was affirmed by the Court of Appeal."

It was held in that case:

"(1) For the purpose of the existence of a new premises it is essential that some kind of physical alteration to the premises was carried out. In a situation where there is a physical alteration to a premises the extent and significance of that physical alteration would certainly have to be taken into consideration.

(2) The premises are business premises. The first time the premises were assessed as one unit as business premises after January 1, 1968, was in 1970. There is no evidence of substantial physical alteration to the building thereafter; in this circumstance, it cannot be said that a new premises have come into existence and therefore the assessment in 1970 will continue to govern the premises."

The above 3 cases were decided with reference to the provisions of Rent Act, No. 7 of 1972.

It appears that the learned Distsrict Judge having considered the evidence placed before Court on a balance of probability has come to a correct finding and the principles as laid down in the above decisions would certainly substantiate his findings.

In the circumstances, I see no basis to interfere with the judgment of the learned District Judge. Accordingly the appeal of the plaintiffs-appellants will stand dismissed with costs fixed at Rs. 10,000/-

DISSANAYAKE, J. - I agree.

Appeal dismissed.