1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

K. CHARLES APPUHAMY, Appellant, *and* T. B. ABEYESEKERA, Respondent

S. C. 406—D. C. Kandy, M. R. 5,051

Rent Restriction Act—Applicability to "lease" of a business.

Where a business of the nature of a hotel and tea kiosk was "leased" by A to B and, under the contract, A gave over to B the mangement, control and conduct of the business for a term of years—

Held, that at the end of the specified period B was not entitled to the protection of the Rent Restriction Act in regard to the premises in which the business was carried on.

[1] *(1906) 9 N. L. R. 114.* [2] *(1937) 39 N. L. R. 316.*

[3] *(1946) 47 N. L. R. 347.*

APPEAL from a judgment of the District Court, Kandy.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *P. Somatilakam*, for the plaintiff respondent.

Cur. adv. vult.

November 8, 1954. NAGALINGAM S.P.J.—

A novel point is raised in this case and it is said to be *res integra*. The plaintiff by a document P1 of 1950, which is expressed on the face of it to be an indenture of lease, "let, demised and leased" unto one Edwin Silva "the Hotel and Tea kiosk known and registered as the Kandy Restaurant" together with all the equipment for a term of three years commencing from the 1st January, 1950, at a monthly rental of Rs. 380.

Edwin Silva by deed P2 of 1950, with the consent of the plaintiff, assigned all his rights, title and interest in and to the indenture of lease P1 to the defendant. The period of lease provided under the "indenture of lease", P1 of 1950, expired on the 31st December, 1952, and the plaintiff claimed delivery of the "Hotel and the Tea kiosk". The defendant denied the plaintiff's claim and has taken up the position that as the business had been carried on in certain premises bearing assessment No. 39, Brownrigg Street, Kandy, to which the provisions of the Rent Restriction Act apply and as the possession of the premises too had been delivered to him by virtue of the documents P1 and P2, he is entitled to claim the protection given by the said Act to a tenant as against his landlord.

The question therefore resolves itself into a determination as to whether the relationship created between the plaintiff and the defendant by virtue of the deeds P1 and P2 is one of letting and hiring of immovable property as contended for by the defendant or whether the delivery of possession of the immovable property was ancillary to the delivery of possession of the business of the Hotel and Tea kiosk. It is to be observed that the mere affixing of a label to a transaction by the parties or by their legal advisers does not control or govern the true nature of the rights and liabilities created which have to be determined by an examination of the terms and conditions of the instrument itself. Though the document P1 is described as an indenture of lease it is not a lease in the true sense of the term, for a lease relates to the letting and hiring of immovable property.

If one examines the document P1 one would seek in vain to gather from the document any letting and hiring of any immovable property—much less of 39, Brownrigg Street, Kandy, where the business was carried on; but on the other hand what is "leased" is the Hotel and Tea kiosk known and registered as the Kandy Restaurant. That the parties did not regard the transaction that they entered into or the instrument recording such transaction as one of a lease of immovable property is manifest from the circumstance that there is no description given of any

immovable property. But on the other hand a full description is given of the various fittings, equipment and furniture of the business, and one of the principal covenants to be observed on the part of the "lessee" is stated to be "to manage and control the said hotel and business in a proper manner" and to yield up, surrender and deliver the said business known as the Kandy Restaurant and all the movables therein described at the expiration or sooner determination of the term of the "lease". It is abundantly clear therefore that the document itself is no lease and definitely not a lease of any immovable property.

It is however contended on behalf of the defendant-appellant that under the document P1 the lessee was required to permit one Perera who was carrying on the business of oilman stores in a part of the premises No. 39, Brownrigg Street, to carry on that business there, and to permit the lessor to use and occupy a room in the upstairs of the said premises and those requirements indicate that there was in truth a letting of the entirety of the building No. 39, Brownrigg Street.

Further, it is said that *de facto* possession of the premises having been given and the quantum of rent payable in respect of the premises in accordance with the provisions of the Rent Restriction Act, viz., Rs. 130 a month having been taken into computation in fixing the amount of "rent" of Rs. 380 a month payable by the lessee under P1, all the essential elements necessary to constitute a letting and hiring of immovable property have been established. I do not think this argument is sound. A simple illustration will suffice to demonstrate the fallacy underlying it. Take, for example, the case of a guest who is charged a composite sum for board and lodging by a hotel-keeper; if it can be shown, as indeed it easily can be, that in arriving at the figure the guest is charged, the hotel-keeper took separately into account the following items:—

(*a*) Rent for bed room,
(*b*) Hire of furniture, crockery and cutlery,
(*c*) Cost of food,
(*d*) Charges for service,

can it be said that the guest becomes a tenant of the room and that the term "guest" is a misnomer in his case? Obviously, the answer is "No".

In the absence of any words of assurance of premises bearing No. 39, Brownrigg Street, to the lessee under P1, the covenant that the lessee should permit certain persons to carry on and use part of the premises would at best lead to the inference that the lessee had some interest in the immovable property but *non constat* that such interest is a lease or an interest in the nature of a lease. Indeed, the document P1 should properly have been described as Articles of Agreement entered into between the two parties whereby one party gave over the management, control and conduct of the business for a term of years to the other party subject to the stipulations contained in the document P1.

It is however necessary to ascertain what is the nature of the interest in the immovable property that has been recognized as having been vested in the lessee under P1 by the instrument itself. Any business, if it is to be conveyed as a going concern, excepting that of a hawker or a

pedlar, must ordinarily have a place of business and when the management of a business is handed over, particularly a business of the nature of a Hotel and Tea kiosk, it is impossible to imagine that possession of the place where the business is carried on could be withheld. A business of a Hotel and Tea kiosk does not merely consist of the equipment but must necessarily include the building where the beds and bedding are kept, the dining room where the tables and chairs at which customers are served with meals and refreshments are kept, and also of the goodwill attaching to such business which may be the most valuable part of the whole concern, namely, the name of the business and the situation of the premises where the business is carried on, for, as is well known, a reputed name as well as a favourable site, both attract custom.

On a proper reading of the document P1, it is impossible to resist the conclusion that the transaction entered into between the parties was one not of letting any immovable property for the purpose of enabling one party to carry on a business, nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the "lessee" in charge of a business that had been and was being carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the goodwill and the improvements and advantages gained or accrued thereto in the meantime; and as ancillary to the object which the parties had in contemplation it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and is far removed from that of a tenant.

There is another matter to which I should advert before concluding my judgment. The basis for the defendant's claim to remain in occupation of the premises is that "he is unable to vacate the said premises till he finds suitable alternative accommodation *for his business*". This I consider to be a most extraordinary claim. The defendant was never the owner of the business. The business undoubtedly was that of the plaintiff. He, the defendant, had been placed in charge of the business to be run by him, for his benefit no doubt, but for the limited period of the unexpired term stipulated in the document P1. But that term has expired and I cannot see how he can be permitted to claim the business as his own. If the business is not his, and he has no business of his own, then the foundation of his claim "that he cannot vacate the premises till he finds suitable accommodation for his business" vanishes. Probably the defendant does not realise that by the claim put forward by him he is exposing himself to the charge that he is making an attempt to betray the trust placed on him and to perpetrate a fraud on the plaintiff.

In these circumstances I do not think that it could properly be said that there was a letting of immovable property to which the provisions of the Rent Restriction Act apply. I am therefore of opinion that the judgment of the learned District Judge is right and that the appeal should be dismissed with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.