

MUTHUKUMARANA
v
SIRISENA AND ANOTHER

SUPREME COURT
SARATH N. SILVA, C.J.
WIGNESWARAN, J.
TILAKAWARDANE, J.
SC 53/2002
CA 850/94 (F)
DC HAMBANTOTA 169/RE
JANUARY 26, 2004
FEBRUARY 26, 2004
MARCH 10, 2004

Rent Act No. 7 of 1972 – Sections 10(5), 22(b), 22(1) – Section 31 – Contract of tenancy – Rights of a sub-tenant – Lease – Could the lessee be evicted after the period of lease? – Is he a statutory tenant – Locatio conductii rei – Is there a privity of contract between landlord and sub-tenant? – Who acquires the status of a statutory tenant? Waiver of right to sue – Subletting without consent – Fatal? – Prevention of Frauds Ordinance – Section 2.

The plaintiff filed action against the 1st and 2nd defendants for ejectment. The plaintiff's mother leased the premises to the 1st defendant in 1974 for a period of 15 years on a notarially executed agreement. When the lease was subsisting she gifted the premises to the plaintiff-daughter – after the period of lease was over the plaintiff served a notice to quit on both defendants on the ground that the premises have been sublet by the 1st defendant to the 2nd defendant without the prior consent of the plaintiff.

The 1st defendant filed answer stating that he handed over possession to the owner after the 15 year period. The 2nd defendant contended that he carried on business with the 1st defendant in the premises from 1974-1979, and thereafter the 1st defendant left selling the business to him and that thereafter he paid rent to the plaintiff as a statutory tenant.

The trial Court held with the plaintiff on the basis that when it is admitted that the plaintiff is the landlord and the 1st defendant is the tenant, the 2nd defendant could plead the protection of the Rent Act only if he could

establish that there was a fresh contract of tenancy – since he failed to establish that, he was liable to be ejected. The Court of Appeal overturned the judgment of the District Court, holding that, as the plaintiff was aware from about 1981 that the premises have been sublet to the 2nd defendant and as such has waived the right to sue for ejectment on the ground of unauthorized subletting-plaintiff's action was dismissed.

On appeal -

Held:

- (1) Under our common law a lease of property is a special contract coming within the broad heading of *hire-locatio conducti rei*. A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can arise where the parties are *ad idem* as to its essential particulars.
- (2) All leases whether it be notarially executed for a specified period or terminable at will in respect of premises situated in an area in which the Rent Act operates, other than premises excluded in terms of section 2(4) would be subject to the provisions of the Rent Act.

Per Sarath N. Silva, C.J.

"On the basis of the common law and the statute law applicable, it would be seen that the *lessee* (tenant) would be entitled to the benefit of the lease as well as the provisions of the Rent Act and could not in any event be ejected even after the period of the lease, except on a ground specified in the Rent Act".

- (3) A person could acquire the status and be described as a statutory tenant only if that person was in the first instance a lessee or a tenant under a contract entered into with the landlord.
- (4) As regards the position of a subtenant – whether it be under the common law or the Rent Act, the categorical position is that there is no privity of contract between a landlord and a sub-tenant. In view of Section 22(1) (2), it is the contractual tenant who acquires the status of a statutory tenant. The protection if any of the sub-tenant is subscribed within the rights of the tenant who alone has privity of contract with the landlord.

Per Sarath N. Silva, C.J.

"Section 10(5) which provides for ejectment on the ground of subletting without prior consent in writing of the landlord envisages a relationship between the landlord and the tenant and of a cause of action primarily against the tenant. If the cause of action is established against the tenant – the subtenant is necessarily ejected."

(5) The 2nd defendant who raised issues on the basis that he was the subtenant has no independent right to remain in occupation – he has no contractual relationship with the landlord which could give him a right to be in occupation under the common law. Nor is he protected from ejection by the provisions of the Rent Act – as the 2nd defendant is in unlawful and forcible occupation of the premises he is liable to be ejected.

APPEAL from the judgment of the Court of Appeal.

Cases referred to:

1. *Kurukulasuriya v Ranmenika* – 1 Sri LR 331 at 339.
2. *Fernando v Samaraweera*.
3. *Scrutton* 1922 1 KBD at 438 at 448.

W. Dayaratne for plaintiff-respondent-appellant.

Hemasiri Withanachchi for 2nd defendant-appellant-respondent.

Cur.adv.vult.

September 8, 2004

SARATH N. SILVA, C.J.

The plaintiff filed this action on 6.2.1991 against the 1st and 2nd defendants for ejection, restoration of possession and damages, in respect of a two storied business premises located along Ridiyagama Road, Ambalantota. It is admitted that the plaintiff's mother being the owner, leased the premises to the 1st defendant on 9.9.1974 for a period of 15 years on a notarially executed agreement. When the lease was subsisting she gifted the premises to the plaintiff being her daughter. After the period of the lease was over, on 28.9.1990 the plaintiff served a notice to quit on both defendants on the ground that the premises have been sublet by the 1st defendant to the 2nd defendant without the prior consent in writing of the plaintiff.

The 1st defendant filed answer stating that he handed over possession to the owner and has not been in possession of the premises from 9.10.1990. He took no part in the proceedings thereafter.

The 2nd defendant filed answer stating that he carried on business with the 1st defendant in the premises from 1974 to 1979. Thereafter the 1st defendant left selling the business to him. He remained in the premises as tenant paying rent to the plaintiff and after termination of the period of the lease on 9.9.1989 became a statutory tenant.

At the commencement of the trial admissions were recorded as to the lease for a period of 15 years in favour of the 1st defendant and the plaintiff's ownership of the premises. Admission No. 3 is that the 1st defendant is the tenant of the plaintiff. The plaintiff only raised issues as to whether the 2nd defendant is in unlawful occupation of the premises and is liable to be ejected.

The 2nd defendant raised issues 4, 5 and 6 as to sub-tenancy, on the basis that from 1979 he has been in occupation of the premises as sub-tenant with knowledge of the landlord who has thereby waived the right to sue for ejectment on the ground of sub-letting. Issue 7 is on the basis that after the termination of the period of the lease he became the statutory tenant and is entitled to remain in possession by virtue of the Rent Act.

The District Judge held with the plaintiff on the basis that upon an admission being recorded that the plaintiff is the landlord and 1st defendant is the tenant, the 2nd defendant could plead the protection of the Rent Act if he would establish that there was a fresh contract of tenancy with him or that he acquired rights of tenancy by operation of law. Since he failed to establish a right of occupation on either basis, it was held that he was liable to be ejected.

It is to be noted that although in paragraph 11 of the answer the 2nd defendant stated that from 1979 upto 9.7.1989 (end of the period of the lease) he was the tenant of the plaintiff and thereafter became the statutory tenant, he raised issues on the basis that he became the sub-tenant from 1979 and after the termination of the lease became the statutory tenant. The 2nd defendant had to change his stance in this manner probably

due to the evidence he was intending to adduce. He stated in evidence that rent was paid by him to the plaintiff but all the receipts produced by him acknowledge the receipt of rent in respect of the lease in favour of the 1st defendant. No rents have been paid or received after the period of the lease ended.

The Court of Appeal adopted a different line of reasoning from that of the District Judge and held that the plaintiff was aware from about 1981 that the premises have been sublet to the 2nd defendant and as such has waived the right to sue for ejection on the ground of unauthorized sub-letting. On that basis it has ordered that the action be dismissed.

Thus the two Courts have adopted different lines of reasoning. Terms, such as, tenant, sub-tenant and statutory tenant have been used and interchanged in a confused manner in the pleadings and issues. It is therefore necessary to examine the questions that arise for consideration in their proper perspective.

Under our Common-Law a lease of property is a special contract coming within the broad heading of hire (*locatio conducti rei*). Basnayake J. (as he then was) articulated the basic proposition as to the formation of a tenancy with striking simplicity as follows:

A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can arise where the parties are ad idem as to its essential particulars."

At common law parties are free to agree on the terms and conditions of the lease including the period and the rent payable. In the absence of an agreement to the contrary the common law recognized certain basic duties on the part of the *lessee* respectively. (Roman Dutch Law by R.W. Lee 5th Edition page 300 and 301). A lease is terminable by effluxion of time or by notice and the landlord is entitled to institute proceedings for ejection after the termination of the lease. To this broad framework of the common law statutory requirements and limitations have been added resulting in

what has been described by the Supreme Court as, "two streams of law which will operate in all areas where there is no conflict." (Vide: *Kurukulasuriya v Ranmenike* ⁽¹⁾ at 339).

The Prevention of Frauds Ordinance enacted as far back as 1840 introduced a requirement as regards the formation of a lease in respect of immovable property. Section 2 provides that lease of immovable property "other than a lease at will or for any period not exceeding one month" shall not be of force or avail in law, unless it is notarially executed. The Ordinance thus recognized a distinction between a lease for a specified period on the one hand and a lease at will, better known as a monthly tenancy, on the other. The latter could be terminated by giving one month's notice. The lease referred to in the present case has been notarially executed and valid for the period of 15 years provided therein. However, all leases whether it be notarially executed for a specified period or terminable at will, in respect of premises situated in an area in which the Rent Act is in operation, other than premises excluded in terms of Section 2(4), would be subject to the provisions of the Act. The Act contains restrictions inter alia as to the rent that is recoverable and the grounds on which a tenant could be ejected.

On the basis the common law and the statute law are applicable to the facts of this case, it would be seen that the lessee (tenant) would be entitled to the benefit of the lease as well as the provisions of the Rent Act and could not in any event be ejected even after the period of the lease, except on a ground specified in the Rent Act.

I would now deal with the use of the terms tenant and statutory tenant. In our law a lease for a period of a monthly tenancy is created by a contract entered into by the parties and where the rent Act applies, would be subject to its provisions. The Rent Act describes the person entitled to occupy premises on a contract of letting and hiring, as tenant. The statutory protection given to the tenant by the Act will ensure to his benefit even upon the effluxion of the period of the lease or its

termination by notice. After the period of the lease or its termination, the continuance in occupation is not on the basis of the lease or contract of tenancy but on the basis of the protection given by the statute and he is then described as a statutory tenant.

In the case of *Fernando v Samaraweera*⁽²⁾ at 281 Basnayake J, has summed up the genesis of the concepts of statutory tenant and statutory tenancy, with reference to the observations of Judges in England, as follows:

"It appears from the foregoing that a landlord who has terminated the contract of tenancy through a desire to get back his premises but is unable to satisfy the above requirements has to submit to the continued occupation of his premises by a person whom he does not want there but whom the statute will not permit him to eject therefrom by process of law. Such a person cannot be described as a trespasser for his occupation of the premises is not unlawful. He is, since the termination of the tenancy, under no contractual relationship with the landlord.

This creature of the statute whose counterpart is to be found in England has been called the "statutory tenant" by Lord Justice Scrutton⁽³⁾ who also described him as that anomalous legal entity who would not ordinarily be described as a tenant. Lord Coleridge described the resulting legal relationship as a "statutory tenancy".....

Basnayake, J. has gone on to itemise the rights and obligations of the statutory tenant and the landlord.

Therefore a person could acquire the status and be described as a statutory tenant only if that person was in the first instance a lessee or a tenant under a contract entered into with the landlord. In certain situations it provides for the continuance of a relationship that was in operation but the initial relationship should necessarily have been brought about

by a contract entered into by the parties. It is noted that Section 22(1) of the Rent Act in respect of premises where the standard rent does not exceed Rs. 100/- and Section 22(2) in respect of premises where the standard rent is above Rs. 100/, protection from ejection is afforded to a tenant meaning thereby a contractual tenant. After the termination of the lease or the tenancy and during the pendency of the proceedings for ejection he acquires the status of a statutory tenant and if the action is dismissed the original contract of tenancy is revived. This position is clearly stated in Section 31 of the Rent Act which reads as follows:

"Where an action for ejection of any person from any premises occupied by him as a tenant is dismissed by any court by reason of the provisions of this Act, his occupation of those premises for any period prior or subsequent to the dismissal of such action shall, without prejudice to the provisions of this Act, be deemed to have been or to be under the original contract of tenancy."

I have to now deal with the position of a sub-tenant. The position of a sub-tenant (sub lessee) in relation to the landlord (lessor) is clearly stated in the following passage by R.W. Lee, where it is contrasted with that of assignment –

"The interests of the lessor and lessee respectively are assignable by act of party. The effect of assignment by a lessee is to substitute the assignee (cessionary) in the place of the original lessee, who thereupon ceases to be bound or entitled under the contract. A sub lease has no such effect. It is a contract whereby the original lessee lets the property to a third party for the whole or for a part of the unexpired term of the original lease. As between lessee and sublessee there is a cession of the lessee's rights of use and enjoyment; but the lessee does not cease to be liable to the lessor, nor does the sublessee become liable to, or acquire any rights against, the lessor. As between lessor and sublessee there is no privity of contract."

(An Introduction to Roman Dutch Law, R.W. Lee – 5th Ed. P.301).

The contractual relationship in regard to a sub-letting thus described under the common law, is restated in Section 10(8) of the Rent Act as follows:

"Where any premises are sublet by a tenant in whole or in part the tenant shall in relation to the subtenant or each of the subtenants be deemed for all purposes of this Act to be the landlord of the premises and the other provisions of this Act shall apply accordingly."

Hence whether it be under the common law or the Rent Act, the categorical position is that there is no privity of contract between a landlord and a sub-tenant. The position taken up by the 2nd defendant in the issues raised by him that he was sub-tenant and after the effluxion of the period of lease became the statutory lessee, is untenable in law.

As pointed out above it is the contractual tenant who is afforded statutory protection from ejection. The provisions in Section 22(1) and (2) are couched in the following terms—

"Notwithstanding anything in any other law no action or proceedings for the ejection of the tenant shall be instituted in or entertained by any Court unless where"

In view of this protection it is the contractual tenant who acquires the status of a statutory tenant. The protection, if any of the sub-tenant is subsumed within the rights of the tenant who alone has privity of contract with the landlord.

Section 10(5) which provides for ejection on the ground of sub-letting without the prior consent in writing of the landlord, envisages a relationship between the landlord and the tenant and of a cause of action primarily against the tenant. If the cause of action is established against the tenant, the sub-tenant is necessarily ejected. Therefore it is the tenant, if at all who could plead a waiver of the cause of action that accrues

against him. In this case the tenant has not disputed the cause of action against him and has specifically pleaded in the answer that he yielded possession of the premises to the landlord on 9.10.1990. The 2nd defendant who raised issues on the basis that he was the sub-tenant has no independent right to remain in occupation of the premises. As revealed in the preceding analysis, he has no contractual relationship with the landlord which would give him a right to be in occupation under the common law nor is he protected from ejection by the provisions of Rent Act. Therefore Issues 1 and 2 raised by the plaintiff that the 2nd defendant is in unlawful and forcible occupation of the premises and is liable to be ejected must necessarily be answered in favour of the plaintiff. Accordingly, I allow this appeal and set aside the judgment dated 22.2.2002 of the Court of Appeal. The judgment and decree of the District Court will stand. The 2nd defendant will pay a sum of Rs. 25,000/- as costs of this appeal to the petitioner.

WIGNESWARAN, J. - I agree.
TILAKAWARDENA, J. - I agree.

Appeal allowed.

Judgment and Decree of District Court to stand.