

1971

Present : de Kretser, J.

D. S. MADANAYAKE, Appellant, and
M. D. R. SENARATNE, Respondent

S. C. 100/69—C. R. Colombo, 93443

*Lease of bare land—Provision that lessee can. put up temporary buildings thereon—
Whether Rent Restriction Act is applicable to the lease—Res judicata—Evidence
relating to it.*

Where the lease of a bare land which provides for monthly payment of ground rent contains a condition enabling the lessee to put up, with the approval of the lessor, buildings and structures of a temporary nature which the lessee would be entitled to remove at any time, the provisions of the Rent Restriction Act are not applicable to such contract of letting.

Where, in relation to an issue of *res judicata*, the plaint and answer of a previous action are tendered as documents, the entire Record of that action should not be placed among the documents.

APPPEAL from a judgment of the Court of Requests, Colombo.

C. Ranganathan, Q.C., with B. A. R. Candappa, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with S. S. Basnayake, for the defendant-respondent.

Cur. adv. vult.

October 5, 1971. DE KRETSEK, J.—

On P.I. indenture of lease No. 1707 of 12.5.61 Plaintiff leased to the Defendant for a period of 3 years the bare land bearing Assessment No. 386, Skinner's Road North described in the Schedule to P.I for a monthly Rental of Rs. 205/-.

The lease provided *inter alia* for the Lessee to erect buildings and structures of a temporary nature with the approval of the Plaintiff which at the termination of the lease, the Lessee would be entitled to remove at his expense.

The Defendant who was carrying on the business of running a Timber Mill put up buildings on this land the Plans for which had been approved by the Plaintiff. Some indication of their value is that the Municipality assessed the premises thereafter and on that basis a rental of Rs. 495/- a month could have been charged. The Defendant did not give up possession when the lease terminated on 14.5.64 and his version that he did not do so as he had become their lawful tenant by an agreement between the Plaintiff and himself was vindicated when on the 29th January 1965 Plaintiff instituted D. C. 335 R.E. Colombo seeking to have him ejected on the footing that he was liable to hand over possession to Plaintiff on the termination of the lease on 14.5.64 and had failed to do so. The Plaint and Answer in the Case are produced as P. 2. It is common ground that Plaintiff's action was dismissed with costs. The Plaintiff did not appeal from that Order.

On the footing that Plaintiff had let the bare land to Defendant, Plaintiff on the 23rd January 1966 by P. 3 gave Defendant notice to quit and deliver vacant possession on or before the 14th of March, 1966. The Defendant did not do so and Plaintiff then filed the present action. The Defendant filed answer claiming that he was the tenant of Premises 386 and claiming the protection of the Rent Restriction Act.

The following are the issues framed at the trial and the answers to them :—

- (1) Is the defendant a tenant of the bare land described in the schedule to the plaint under the plaintiff as from 15th May 1964, on a monthly rental of Rs. 205/- ?

Answer — No.

- (2) Did the plaintiff on or about 23.1.66 give notice to the defendant to quit and deliver vacant possession of the said land on or before the 14th March 1966 ?

Answer — Yes.

- (3) If issues 1 and 2, or issue (1) alone is answered in the affirmative is the plaintiff entitled to maintain this action for ejectment against the defendant ?

Answer — No.

- (4) What amount is due to the plaintiff as arrears of rent and damages ?

Answer — Docs not arise but it has been admitted that damages had been paid up to 15th April 1966 at Rs. 205/- a month.

- (5) Has the defendant been a tenant of premises bearing No. 386, Skinner's Road North, at all times material to this action ?

Answer — Yes.

- (6) Is the judgment and the decree in case No. 355 R. E. of D. C. Colombo *res judicata* on the question of the defendant's tenancy of the said premises ?

Answer — Yes.

- (7) Are the said premises governed by the Rent Restriction Act as amended by Act No. 12 of 1966 ?

Answer — Yes.

- (8) Does the notice mentioned in issue (2) in any event terminate the tenancy of the defendant under the plaintiff ?

Answer — Yes.

- (9) If issues 5, 6, 7 and 8 or any one of them or all of them be answered in favour of the defendant, can the plaintiff have and maintain this action ?

Answer — No.

The Trial Judge dismissed Plaintiff's action and the present Appeal is from that Order.

It is I think necessary for the proper determination of the dispute in this case to remember that from the 15th of May 1964 all that Plaintiff could have let to Defendant on a monthly basis was the bare land he had already let to him on the Lease P. 1. for the buildings, to which at no stage Plaintiff laid claim, belonged to Defendant and he could take them away. If Defendant persuaded Plaintiff, and for this purpose the evidence is that he employed the services of a Mr. S. D. S. Jayasinghe, to let to him Defendant would naturally postpone the taking away of the buildings he had put up and would continue to use them.

So that the *result* of Defendant obtaining a fresh agreement would be that he would enjoy the land and the building, but that result must not lead to confusion that the actual agreement entered into was a letting of the land as well as the building. In view of the decision in D.C. 335 Colombo my Order proceeds on the basis that there was in fact a fresh agreement entered into although on the evidence there appears much to point to the fact there was not for e.g. the Defendant says "after the termination of the lease I was not prepared to give more, as it was I who put up the buildings and I continued in occupation paying Rs. 205/- a month." It is Plaintiff's evidence that when the lease was at an end he was willing to let Defendant continue in the premises as his tenant but that while there were negotiations there was no agreement as regards the Rent.

It is probably because Plaintiff realised that if he let to Defendant on the monthly basis the Defendant was seeking to obtain that Defendant would have the use of a premises which according to the Assessment could command a rental of Rs. 495/- a month that Plaintiff sought to have an enhanced rental. Be that as it may it had been held in D. C. 335 that Defendant had been given a fresh agreement and Plaintiff had not only not appealed from that Order but had also sent P. 5 on the footing of that Order.

The Trial Judge correctly says that the question for decision is what was the subject matter of the tenancy on 15.5.64 and in coming to the conclusion that it was the premises (that is house and building) bearing Assessment No. 386 he has laid great stress on what Plaintiff set out in D. 1 an application to the Rent Control Board for a determination of the Rent. It appears to me that he has lost sight of the fact that that application was not proceeded with when Defendant took up the position that all that was let to him was the bare land.

In considering the matter he has completely ignored Defendant's evidence in this Case "my position is that the buildings belonged to me and I am a tenant of the bare land." There is also the fact that right throughout the Rent of Rs. 205/- per month has been tendered as *ground rent* and received as such.

In my opinion therefore Issue No. 1 should have been answered in the affirmative. The Trial Judge has also held that the judgment and decree in Case No. 335 D. C. Colombo is *res judicata* on the question of the Defendant's tenancy of the said premises. If by that he meant that the decision in D. C. 335 settled the controversy whether or not there was a tenancy agreement entered into when the lease P. 1 expired it would be impossible to say that he was wrong, but if as his judgment appears to indicate he was of the view that it concluded the question as to what the tenancy agreement was in respect of I do not find it possible to uphold his finding. In the absence of the production of the Issues framed in the Case the Judgment and Decree I find it difficult to understand how the Trial Judge could say "the matters in issue in that case being the same as matters in issue in the present Case I hold the Judgment and Decree of the District Court Case is *res adjudicata*." While I am on this point I wish to say that I find among the productions the entire Record in D. C. 335 (Certified copy). That is something which Proctor for the Plaintiff should not have tendered as only the Plaint and Answer were productions. It has led to confusion and also unnecessary expense in the preparing of the brief. This is not the first time that I find what has not been produced being placed among the documents. I hope that it will not happen again, now that I have drawn attention to the matter.

The Trial Judge has answered Issue No. 7 "Are the said premises governed by the Rent Restriction Act as amended by Act 12 of 1966" in the Affirmative. That would be the correct answer to the issue if the

facts established that the Plaintiff had let to the Defendant the buildings and the land appurtenant to them (which would be the premises for the purposes of the Rent Restriction Act) for the evidence establishes that the Municipality had assessed the premises and they could command a Rental of Rs. 495 a month. It appears to me that the more correct issue to have been formulated in the instant Case would be whether the Defendant could claim the protection of the Rent Restriction Act. It appears to me that once the factual situation was clarified viz. that Plaintiff could only let and did in fact only let the bare land the provisions of the Rent Restriction Act had no application to the letting for it has been repeatedly held that that Act has no application to the letting of bare land. The fact that the Defendant had put up temporary buildings which he could remove at any time pleasing to him, on the land he had taken on rent and made use of them, in my view makes no difference on the question whether the Act applies or not.

In the instant Case there is complete agreement between Plaintiff and Defendant that what Plaintiff let to Defendant was bare land and that the buildings were those put up by the Defendant which he was entitled to remove at any time.

The Appeal is allowed. The judgment and order of the learned Commissioner is set aside and decree will be entered giving judgment for Plaintiff as prayed for by the Plaintiff in his Pleint.

Appeal allowed.

