

1955

Present : de Silva J.MRS. D. E. G. JAYASINGHE, Appellant, and F. GOOLAM
HUSSEIN *et al.*, Respondents*S. C. 151—C. R. Colombo, 38,628**Rent Restriction Act, No. 29 of 1948—Section 9 (1 and 2)—“Sub-letting”—Applicability of the term to transfer of a business for a stipulated period.*

Where a tenant who carries on a business in the rented premises transfers the business to a third party for a stipulated period without obtaining the landlord's consent in writing, such transfer does not amount to sub-letting within the meaning of section 9 of the Rent Restriction Act if the possession of the premises by the transferee is only incidental to the transaction relating to the business.

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

H. V. Perera, Q.C., with H. W. Jayewardene, Q.C., and D. R. P. Goonetilleke, for the 1st defendant appellant.

R. R. Crosslette-Thambiah, Q.C., with H. W. Tambiah and N. C. J. Rustomjee, for the plaintiffs respondents.

Cur. adv. vult.

February 16, 1955. DE SILVA J.—

In this action, the plaintiffs who are the landlords of premises bearing No. 151, 5th Cross Street, Colombo, sought to eject the two defendants on the ground that their tenant, the 1st defendant, had sub-let the premises on the notarial agreement P4 dated 11th June, 1951, to the 2nd defendant without obtaining their consent in writing, in contravention of the provisions of Section 9 (1 and 2) of the Rent Act of 1948. They also contended that the 1st defendant was a non-occupying tenant and was therefore not protected by the relevant provisions of the Rent Act. The 1st defendant filed answer denying that she had sub-let the premises to the 2nd defendant. She also denied the truth of the averment that she was a non-occupying tenant. The 2nd defendant resisted the claim of the plaintiffs on the same grounds and maintained that there was a misjoinder of parties and causes of action. The learned Commissioner of Requests held in favour of the 1st defendant on the question of non-occupancy. He, however, held that the 1st defendant had sub-let the premises to the 2nd defendant on P4 and that therefore the plaintiffs were entitled to eject the 1st defendant. The issue relating to the misjoinder of parties and causes of action was answered in the affirmative, but the learned Commissioner stating that he was entitled to delete the name of the 2nd defendant proceeded to consider the case as against the 1st defendant only. Accordingly he entered judgment for the plaintiffs against the 1st defendant as prayed for on the ground of sub-letting. From this judgment the 1st defendant has appealed.

The 1st defendant's husband carried on a grocery business in the premises in question under the name and style of "R. Jaglas Fernando &

Sons". He died in the year 1930 and thereafter his widow, the 1st defendant, continued the business in the same premises and under the same business name. The plaintiffs became the owners of these premises in or about the year 1948, and the 1st defendant became their tenant from that time at a monthly rental of Rs. 175.42. The 1st plaintiff has stated that when he came to know that the 1st defendant had sub-let the premises to the 2nd defendant on P4 he gave notice on 14.3.'52 to the 1st defendant terminating the lease.

The main question for determination is as to whether or not P4 is in effect a letting and hiring of the premises in suit. By this document the 1st defendant claiming to be the owner and proprietor of the business carried on under the name, style, and firm "R. Jaglas Fernando & Sons" of No. 141, 5th Cross Street, Colombo, purported "to sell and deliver" to the 2nd defendant "the goodwill of the said business together with the furniture and fittings appertaining thereto and in the schedule hereto fully and particularly described", for a period of 5 years commencing from 1.6.'50 for a consideration of a monthly payment of Rs. 600 which is described as "a commuted share of the profits" subject, *inter alia*, to the following conditions:—

- (a) If the purchaser failed to pay to the vendor the monthly payment of Rs. 600 for 3 consecutive months or he committed a breach of any of the other conditions the vendor reserved the right to cancel the agreement after giving notice, and take over the business.
- (b) The vendor was to pay regularly and punctually the house rent in respect of the premises No. 141 "and shall assure unto the said purchaser the quiet and vacant possession of the said premises" during the said period of 5 years.
- (c) The vendor shall not be liable for any debts or liabilities incurred by the purchaser in respect of the business.
- (d) "The said purchaser binds himself and his aforewritten to carry on the said business under the aforesaid name of 'R. Jaglas Fernando & Sons' and under no other name nor shall the said purchaser assign these presents to any person or persons whomsoever without the written consent thereto of the said vendor first had and obtained."
- (e) At the end of the said period of 5 years the purchaser was to reconvey and deliver the goodwill of the said business with the furniture, fittings, &c.
- (f) If the purchaser failed to reconvey and deliver the goodwill of the business and the furniture, fittings and movables as agreed he was to pay the vendor at the rate of Rs. 100 per day as liquidated damages until "the said goodwill, the furniture, fittings and other movables are re-conveyed and delivered and vacant and quiet possession of the said premises No. 141 are given to the said vendor." If the purchaser was not able to carry on the business he was entitled to terminate the agreement by giving 6 months notice to the vendor.

"According to the defendants the agreement P4 is not a sub-lease of the premises but a transaction relating to the business "R. Jaglas Fernando & Sons". What matters is not the label that parties assign to a document but its real nature which can be gathered from its contents and the attendant circumstances. The 1st defendant states that she entered into the agreement P4 as she found that it was not possible to carry on the business single-handed. Prior to the agreement her two sons were helping her in conducting the business but she lost their services about this time as one of them proceeded to England and the other started a business of his own. She was also medically advised not to strain herself too much. It is for these reasons she says that she entered into the agreement P4. Her explanation is reasonable and appears to be true.

This agreement P4 on the face of it is a transfer of the business for a stated period subject to conditions and covenants some of which I have set out earlier. But, Dr. H. W. Thambiah for the appellants submits that it is in fact a tenancy agreement in the guise of a sale of the business. In support of this agreement he relies on the covenant by which vacant possession is assured to the purchaser and also on the undertaking of the latter to give over possession of the premises on the termination of the agreement. On the other hand there are several other covenants which go to show that this is a genuine transaction relating to the business in which the possession of the premises is involved only incidentally. Dr. Thambiah's submission that the sale of the business is a mere blind to conceal the letting and hiring of the premises is not borne out by the facts. If this was in fact a contract of tenancy one would have thought that the purchaser would be entitled to make use of the premises for any kind of business at his option. In this instance the purchaser is not vested with any such right. According to the terms of the agreement it is obligatory on the purchaser to carry on the identical grocery business under the name "R. Jaglas Fernando & Sons". A breach of that obligation would immediately entitle the vendor to terminate the agreement and take over the business. It is not suggested that the purchaser is carrying on any other business in these premises. The vacant possession that has been assured to the purchaser is what was necessary to give effect to the main object of the agreement, namely, the conduct of the business by the purchaser during the stipulated period. It is in evidence that even after this agreement was entered into the 1st defendant is continuing to have her notarial office in the premises. It has not been suggested to the 2nd defendant in cross-examination that she is having her office there on an independent agreement with the 2nd defendant. The fact that the 1st defendant still has her office in this building is proof that the 2nd defendant was given vacant possession only to the extent necessary for him to carry on the business. In these circumstances it is not unreasonable to hold that the 1st defendant has not in fact given over exclusive possession of the entire premises or a definite portion of it to the 2nd defendant. A fundamental requirement of a tenancy is that the tenant must have the exclusive possession of the premises let. In this case that condition has not been satisfied. It was also argued that the fact that according to the agreement the 1st defendant was not

to share the losses incurred in the business is an indication that this transaction was a mere contract of tenancy. That does not necessarily follow. It may well be that the business is a flourishing one and the 2nd defendant was satisfied that he would be able to earn a handsome profit from it. The agreement describes the sum of Rs. 650 payable monthly to the 1st defendant as a commuted share of the profits. There is no material to warrant the inference that this is a mis-description of the amount payable. The suggestion that the sum in question is only black-market rent has no foundation.

If P4 created a contract of tenancy the 2nd defendant would be entitled to the protection of the Rent Restriction Act and refuse to vacate the premises, if he so wishes, at the termination of the agreement. But is the 2nd defendant in fact entitled to set up such a claim? In my view he is not entitled to do so. On this point the judgment of Nagalingam S. P. J. in *Charles Appuhamy v. Abeyesekera*¹ is relevant. The plaintiff in that case "let, demised and leased" on the document P1 of 1950 to one Edwin Silva the hotel and tea kiosk known as the "Kandy Restaurant" carried on in the premises No. 39, Brownrigg Street, Kandy, for a period of 3 years. Edwin Silva with the consent of the plaintiff assigned his rights to the defendant. At the end of the period of 3 years the defendant failed to give over the "Kandy Restaurant" to the plaintiff who then sued the defendant. The defendant then took up the position that he was a tenant of the premises and claimed the protection of the Rent Restriction Act. In rejecting this claim Nagalingam S. P. J. held that P1 was not a contract of tenancy but an agreement relating to the management, control and conduct of a business. It is true that in the agreement P1 relied on in that case no vacant possession of the premises was specifically assured to the lessee but that such possession was contemplated is clear from the terms of the agreement and possession was in fact delivered to him. In that case the delivery of possession of the premises to the lessee was considered to be ancillary to the agreement relating to the business. In the instant case too it is clear that possession of the premises was given to the 2nd defendant merely for the purpose of running the business in terms of the agreement P4, for the mutual benefit of the two defendants. The 1st defendant handed over the business to the 2nd defendant as a going concern and the latter was to give it back to the former on the termination of the agreement in a similar condition. To achieve this object the 2nd defendant had to obtain possession of the premises, but, such possession was not given to him on the basis of a tenancy. He is occupying the premises only as a licensee to enable him to conduct the business during the stipulated period. The issues regarding sub-letting must therefore be answered in the negative.

Accordingly I allow the appeal and dismiss the plaintiffs' action. The 1st defendant is entitled to costs in both Courts.

Appeal allowed.

¹ (1954) 56 N. L. R. 243.