1950 *Present :* **Dias S.P.J.**

MENDIS, Appellant, *and* FERDINANDS, Respondent

S. C. 186—C. R. Colombo, 17,865

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (c)—Landlord's requirement of premises for occupation by dependent member of his family—Factors to be considered by Court—Plaintiff's need must be immediate.

In an action brought under section 13 (1) (c) of the Rent Restriction Act plaintiff sought to eject a tenant alleging that the premises in question were required as a residence for his sister.

Held, that the following questions should have been considered by Court : (1) whether the plaintiff's need of the premises was immediate at the date of the institution of action, (2) whether the sister of the plaintiff was a destitute person, (3) whether plaintiff's sister was herself the owner of a house where she could go into residence.

Actions for ejectment brought under section 13 (1) (c) of the Rent Restriction Act fall into three classes : (1) where the hardship of the landlord is equally balanced with that of the tenant, the landlord's claim must prevail ; (2) where the hardship to the landlord outweighs the hardship to the tenant, the landlord's claim must prevail ; (3) where the hardship to the tenant outweighs the hardship to the landlord, the landlord's action must be dismissed.

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

A. H. C. de Silva, with *Mahesa Ratnam*, for defendant appellant.

N. K. Choksy, K.C., with *M. P. Spencer*, for plaintiff respondent.

Cur. adv. vult.

June 22, 1950. DIAS S.P.J.—

In this case the plaintiff respondent sought to eject his tenant, the defendant appellant, from the premises known as No. 10, Dillenia Road, Borella. The appellant had been given due notice to quit, but his defence is that, although he had made every endeavour to obtain a house to live in, he had been unsuccessful in his quest.

The parties went to trial on the following issues :

1. Are the premises in question reasonably required by the plaintiff for the occupation as a residence for his sister—Miss Ethel Ferdinands?

2. Is the said sister a person dependent on the plaintiff within the meaning of section 13 of the Rent Restriction Act ?

This action having been instituted on January 13, 1949, it is the Rent Restriction Act, No. 29 of 1948, which applies to this case. That Act came into force on January 1, 1949.

Section 13 (1) imposes a fetter on a landlord from seeking to eject his tenant by process of law without an authorization in writing by the Rent Control Board. One exception to this rule is where " the premises are, in the opinion of the Court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord . . . ." The expression " member of the family " is defined to mean " the wife of that person, or any son or daughter of his over eighteen years of age, or any parent, brother or sister dependent on him ". It is the duty of the landlord to prove facts which bring his case within the exception. If he fails, the bar in section 13 (1) will apply, and, in the absence of a written authorization from the Board, his action must be dismissed. The burden of proof on both the issues, therefore, lay on the plaintiff—see *Raheem v. Jayawardene* [1].

It is, I think, settled law, that in cases of this kind it is the duty of the Judge in forming an opinion whether or not the premises are "reasonably" required for occupation as a residence by the landlord or a member of his family, not only to ascertain whether the desire of the landlord is a reasonable one, but also to be satisfied on various other matters like (*a*) what alternative occupation is available to the tenant, and (*b*) the position of the tenant—*Raheem v. Jayawardene (supra)*, *Ramen v. Perera* [2]—and (*c*) the relative positions of the plaintiff and the defendant—*Mohamed v. Salahudeen* [3]. The question is now settled by the two-Judge decision in *Gunasena v. Sanagaralingam Pillai* [4]. It is the duty of the Court, not only to take into consideration the situation of the landlord, but also that of the tenant, together with any other factors which may be directly relevant to the acquisition of the premises by the landlord.

If the case law on this subject is classified, it will be found that they fall into three classes—(1) Cases where the hardship of the landlord and the tenant are equally balanced. In such a situation the landlord's claim must prevail—*De Mel v. Piyatissa* [5], *Ramen v. Perera (supra)* ; (2) Cases where the hardship to the landlord outweighs the hardship to the tenant. In such cases, the landlord's claim, obviously, must prevail—*John Appuhamy v. David* [6], *Egginona v. David* [7] ; and (3) Cases where the hardship to the tenant outweighs the hardship to the landlord. In such cases, the landlord's action must be dismissed. Examples of this principle are furnished by *Abeyasekere v. Koch* [8], *Brito Mutunayagam v. Hewavitarne* [9]. The question in each case depends on which of these three classes that case falls into.

The Commissioner of Requests found that the plaintiff is at present living in a large bungalow in Gower Street and of which he is the owner. As the plaintiff's wife and child are in Britain and will be there for over two years, the plaintiff *proposes* to rent his house, and move into a smaller house belonging to him ; but as that house only has two rooms, he will not be able to have his sister to stay with him, as she is doing at present. The Commissioner says that the reason for the plaintiff closing down his

[1] *(1944) 45 N. L. R. 313.*
[2] *(1944) 46 N. L. R. 133.*
[3] *(1945) 46 N. L. R. 166.*
[4] *(1948) 49 N. L. R. 473.*
[5] *(1948) 39 C. L. W. 63.*
[6] *(1945) 47 N. L. R. 36.*
[7] *(1946) 22 C. L. Rec. 40.*
[8] *(1949) 41 C. L. W. 31.*
[9] *(1950) 51 N. L. R. 237.*

house in Gower Street is due to financial reasons, and that it would not be possible for him to run that big house and also to remit to his wife and child in England approximately Rs. 1,450 a month. The Commissioner, however, either has failed to refer to or has overlooked the fact that the sister of the plaintiff is not a destitute person who is dependent on others. No doubt, she is the only daughter in a family of nine or ten children, but on her mother's death, she inherited 1/10th of the estate. There is evidence that the estate duty on the mother's estate came to Rs. 4,000 or Rs. 5,000 and for purposes of administration some Colombo house property had to be sold for Rs. 20,000. Furthermore, the Commissioner has failed to take into account the fact that the plaintiff's sister is the owner of a house in Colombo called " Brookside " which she inherited from her father and which she has rented out for Rs. 118 *per mensem*. If this lady requires a place to reside in, all she has to do is to terminate that tenancy and go into residence there. Her reason for not doing this is that that rent is her only source of income. It seems hard that the defendant, whom the Commissioner holds has unsuccessfully done everything in his power to obtain a house to live in, should be thrown on the streets in order to release the premises in question to the plaintiff's sister who while owning a house of her own does not choose to occupy it. Furthermore, the sister is living with the plaintiff in his large Gower Street house and is keeping house for her brother. As pointed out by my brother Basnayake in the unreported case *S. C. 103 C. R. Kandy 3342* (S.C.M. May 3, 1950)* the plaintiff's need of the premises should be " immediate ", that is to say, at the date the action in ejectment was filed. In the present case, as found by the Commissioner, " the plaintiff *proposes* to rent his Gower Street house and go to reside in a smaller house". The rights of the parties must be determined as at the date the action was filed. At that date the plaintiff's intention to rent his Gower Street house was prospective and might never materialise. Until then there is no need for the sister to require a house of her own.

There is no question but that both the plaintiff and the defendant are stating what is true. In such circumstances, an appellate tribunal is placed in no less advantageous a position than the Court below to arrive at a correct conclusion—*Abeyasekere v. Koch (supra)*.

The Commissioner of Requests says " I have no doubt that the defendant has made efforts to secure a bungalow. The need of the defendant appears to me to be as great as that of the plaintiff—but the plaintiff being the owner, his need must prevail over that of the defendant". For that reason he has answered both issues in the affirmative and entered judgment for the plaintiff. With great respect, I am unable to agree. This is not a case where the hardship caused to the defendant by having to leave the premises can be said to be equally balanced by the hardship caused to the plaintiff or his sister by their not being able to get possession of the house. If the facts are considered without prejudice, the defendant's need far exceeds that of the plaintiff or his sister. Their need for this house is not immediate. The lady is living with the plaintiff, and she has several other brothers who can give her a habitation. She owns her own house, but has taken no steps to eject her tenant so that she may

* See *(1950) 51 N.L.R. 381*—Ed.

occupy it herself. She cannot by any stretch of the imagination be described as being a dependant of the plaintiff. She is quite an independent person, with property of her own and an income of her own. The fact that the Commissioner without any agreement between the parties thought fit to direct that the writ of ejectment should not issue for two months shows that subsconsciously, perhaps, he felt that he was doing an injustice to the defendant.

I set aside the judgment and decree appealed against, and dismiss the plaintiff's action with costs both here and below.

Appeal allowed.

1949 *Present :* **Windham J. and Gratiaen J.**

BISO MENIKA *et al.*, Appellants, *and* PUNCHIAMMA *et al.*, Respondents

S. C. 294—D. C. Matale, L 125

Kandyan Law—Deed of gift in consideration of marriage—Revocability—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938—Sections 4 (1) and 5 (1) (b)—Meaning of " expressed to be in consideration of a future marriage ".

A deed of gift in consideration of marriage, to be irrevocable in terms of section 5 (1) (*b*) of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, must not only be proved to be in consideration of a future marriage, but must also be " expressed to be " in consideration of a future marriage. The deed of gift must state expressly, and not merely use words from which the inference might or even must be drawn, that the gift is in consideration of a future marriage.

APPEAL from a judgment of the District Court, Matale.

Vernon Wijetunge, for plaintiffs appellants.

B. S. C. Ratuwatte, for defendant respondents.

Cur. adv. vult.

October 31, 1949. WINDHAM J.—

This appeal raises a question regarding the proper interpretation to be placed on paragraph (*b*) of section 5 (1) of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938. The first plaintiff-appellant is the wife of the second plaintiff-appellant and the defendant-respondents are her parents. In 1941 the second plaintiff agreed with the defendants to marry the first plaintiff, then a young widow, upon their promising to give him as dowry certain lands. Second plaintiff gave notice of the marriage on 11th September, 1941, and later, the defendants having failed to execute the dowry deed, he gave fresh notice of the marriage on 5th January, 1942. On this same date the defendants executed a deed of gift, P3, giving to the first and second plaintiff the lands which they had promised. The plaintiffs got married