MOHAMED v. THE PUBLIC TRUSTEE

SUPREME COURT
SAMARAKOON C. J., THAMOTHERAM, J., WEERARATNE, J., SHARVANANDA, J. AND WANASUNDERA, J.
S.C. APPEAL NO. 1 OF 1978 - C.A. (S.C.) APPLICATION NO. 151/71 (F).
NOVEMBER 20, 1979.

Contract of letting - Death of landlord - Termination of contract - Vesting of rights in heirs - Administrator's status to institute action in ejectment - Civil Procedure Code, section 472.

One 'S' who owned the premises in suit, let it furnished to the appellant in the year 1953 at a monthly rental of Rs. 100. The premises were let for a period of an year but was renewable annually. The terms of the letting were in an informal writing and it is common ground that the occupation of the premises commenced and continued as a monthly tenancy. The appellant paid rent to the landlord up to 31st March, 1954. The landlord died on 1st April, 1954 and the appellant ceased to pay rent thereafter. The respondent, who is the Public Trustee, was granted letters of administration to the estate of the deceased landlord in May 1965. By notice dated 18th October, 1965, the respondent, as administrator, noticed the appellant to quit the premises on or before 31st January, 1966, but the appellant failed to do so. Hence, the respondent instituted action for ejectment of the appellant, for arrears of rent and for continuing damages.

It was contended on behalf of the appellant -

(a) that the contract of tenancy terminated upon the death of the landlord and therefore no action could be instituted on the basis of the contract of tenancy;

(b) that even if the tenancy continued after the landlord's death, his rights upon the contract vested in the heirs and therefore the administrator did not have the status to maintain this action.

Held :

(a) On the death of the landlord his heirs became vested with the contractual rights and obligations in respect of the premises and there was a valid contract of tenancy with the appellant at the time the respondent gave him notice to quit the premises;

(b) The respondent, as administrator, was entitled to maintain this action in terms of section 472 of the Civil Procedure Code.

The case of *Abdul Hafeel v. Muttu Bathool* (2) held to be wrongly decided.

Cases referred to :

(1) *Fernando v. de Silva, (1966) 69 N.L.R. 164.*
(2) *Abdul Hafeel v. Muttu Bathool, (1957) 58 N.L.R. 409.*
(3) *Ukku Amma v. Jema, (1949) 51 N.L.R. 254*
(4) *Kuruneru v. Alim Hadjiar, (1959) 61 N.L.R. 277.*
(5) *Tiopaizi v. Bulawayo Municipality. (1923) A.D. 317*

(6) *Ariyanandhi v. M.A.M. Sideek, S.C. 520/69, D.C. Galle L 7595. S.C. Minutes 26.6.75.*
(7) *Silva v. Silva, (1907) 10 N.L.R. 234.*
(8) *Staples v. de Saram, (1863-68) Ram. Reports 265.*
(9) *Cantlay v. Elkington, (1906) 9 N.L.R. 168.*
(10) *In re Idroos Lebbe Markar, (1872-76) Ram. Reports 102.*
(11) *Perera v. Silva, (1893) 2 C.L.R. 150.*
(12) *Fernando v. Rosa Maria, (1926) 28 N.L.R. 234.*
(13) *Public Trustee v. Karunaratne, (1938) 40 N.L.R. 429.*
(14) *De Silva v. Rambukpotha, (1939) 41 N.L.R. 37.*
(15) *Rodrigo v. Parangu, (1950) 51 N.L.R. 450.*
(16) *Chelliah v. Wijenathan, (1951) 54 N.L.R. 337.*

APPEAL from a judgment of the Court of Appeal.

S. W. Jayasuriya, with *R. Manicavasagar* and *M. Sivanathan,* for the defendant-appellant.

D. R. P. Goonetillake, with *Rajendra Pieris* and *Palitha Fernando,* for the plaintiff-respondent.

Cur. adv. vult.

December 10, 1979.
SAMARAKOON, C.J.

The defendant-appellant has been granted leave to appeal to this Court by the Court of Appeal from its judgment delivered on the 20th October, 1978. This action arises out of a contract of letting of premises bearing assessment No. 6, Lilian Avenue, Mount Lavinia, in the year 1953. At the time of letting it was owned by one W. A. T. de Silva who let it furnished to the appellant at a monthly rental of Rs. 100. There was an agreement in writing between the two parties setting out the terms of the letting, which agreement was produced marked P2. It is for a period of an year and renewable annually, but being an informal writing it only resulted in a periodic tenancy. The appellant paid rent to the landlord up to the end of March, 1954. The landlord died on the 1st April, 1954, and the appellant ceased payment of rent thereafter. The plaintiff-respondent, who is the Public Trustee of Sri Lanka, applied for letters of administration to the estate of the deceased landlord in case No. 1467/T of the District Court of Kandy, and he was granted letters of administration dated the 6th of May, 1965 (P1). By notice dated 18th October, 1965, the respondent has, as administrator of the said estate of the landlord, noticed the appellant to quit and deliver vacant possession of the premises in suit on or before the 31st of January, 1966, but the appellant failed to do so and this action was instituted in the District Court of

Colombo for the ejectment of the appellant for arrears of rent, and for continuing damages. The appellant resisted the claim. The District Judge was called upon to decide two main issues in dispute which were raised by the appellant.

They were -

1. Was the contract of tenancy terminated upon the death of the landlord, and therefore could any action be instituted against the defendant on the basis of the contract of tenancy.

2. Even if the tenancy continued after the landlord's death, were his rights upon the contract vested in the heirs, and therefore, did the administrator have a status to maintain this action in law.

In respect of the first contention, conflicting decisions of the Supreme Court were cited to the District Judge. He considered these decisions and preferred to follow the decision in *Fernando v. de Silva* (1) which held that the contract of tenancy was not terminated by the death of the landlord. The Court of Appeal has upheld his decision. On the second point the District Judge has held that the administrator could enforce the contract in terms of section 472 of the Civil Procedure Code. On this point too the Court of Appeal has upheld the decision of the District Judge. The appellant now contends that the Court of Appeal came to a wrong conclusion on both issues. I will deal with both matters in their order.

Counsel for the appellant contended that the contract of tenancy terminated on the death of the landlord and therefore there was no contract in law upon which an action in ejectment could be maintained against the appellant. He contended that the appellant was a trespasser on the land and could only be evicted by an action *rei vindicatio*. He cited the decision in the case of *Abdul Hafeel v. Muttu Bathool* (2) for the proposition that a contract for a periodic tenancy *ipso facto* terminates on the death of either the lessor or lessee. That case was one concerned with the death of the tenant. One Cader was the monthly tenant of premises No. 124, Main Street, Galle, in which he carried on a business in hardware. He died on the 6th March, 1951 and the appellant who was his widow and the executrix of his estate carried on this same business at the said premises. The plaintiffs claiming to be co-owners of the premises, sued the widow in ejectment and for damages from the

date of death of Cader. The widow claimed that on the death of Cader she as the executrix of the estate of the deceased succeeded, by operation of law to all his rights and obligations under the contract of tenancy. Basnayake, C.J., with whom Pulle, J. agreed, did not accept this contention and held in favour of the plaintiffs. He stated that "the term fixed in a monthly tenancy is the end of the month" and as stated by Van Leeuwan and Voet, "the contract of letting and hiring is governed by almost the same rules as purchase and sale." "According to these rules", he states, "upon the death of a party there can be no tacit renewal of a contract and there can be no new contract between the executor or heir and the lessors unless such a contract is concluded between the parties". He held that since Cader died before the tacit contract of tenancy came to an end on 31st March, 1951, and as there was no fresh contract entered into between the plaintiffs and the widow before 1st April, 1951, the widow had no right to occupy the premises in suit.

The Roman Dutch Law dealt with two types of lessees of immovable property:-

1. A long lease - for more than ten years. In such cases the same solemnities and observances as in alienations was observed and the contract had therefore to be legally granted before a Magistrate (Van Leeuwen's Commentaries on Roman Dutch Law, Book IV, Chapter XXI, Section 9, Kotze's translation Vol. 2 Ed. 2, p. 17) to prevent frauds of transferees *Censura Forensis,* Part I, Book IV, Chapter XXII. Section 5.

2. A short lease - for a period less than 10 years which did not require formality.

This distinction is not part of our law. *Ukku Amma* v. *Jema* (3). Under our law a lease of immovable property, except a lease at will or a lease for a period not exceeding a month, must be notarially executed in the presence of two witnesses (vide section 2, Prevention of Frauds Ordinance). It is common ground that the occupation of the premises in suit in this case commenced and continued as a monthly tenancy. Under the Roman Dutch Law the general rule was that death of either party does not automatically terminate the lease. "If the tenant or lessor dies during the continuance of the lease, his heirs must carry out the contract. Except in the case of encumbered or other property, which the

lessor does not possess in full ownership in which event the lease expires with the death of the lessor" (Van Leeuwen Commentaries on the Roman Dutch Law, Book IV, Chapter XXI, Section 6, Kotze's Translation, Volume II, Edition 2, page 168) "for when the right of the lessor comes to an end, the right of the lessee is also terminated since no one can transfer a greater right to another than he himself possesses." "The engagements which are formed by the contract of letting and hiring pass to the heirs or executors of the lessor, and to those of the lessee". Domat in section 465 (Vol. I, p. 259). Vide also per Basnayake, C.J. in *Kuruneru* v. *Alim Hadjiar* (4) at 280. A similar termination takes place when the tenancy "is understood to expire by death" (Grotius 3.19.9), or when it is a tenancy at will such as a tenancy at the will of a lessor (Voet 19.2.9). These passages from Grotius and Voet are cited by Basnayake, C.J. in his judgment in the case of *Abdul Hafeel* v. *Muttu Bathool* (2) at 410. He found no support in them for the view that on the death of a monthly tenant the tenancy passes automatically to his executor or executrix. Indeed, there is none. They were cited by Lee and Honore as statements illustrating exceptions to the general rule that "rights and duties of the lessor and of the lessee are (normally) transmitted on death to their representatives". Termination of a lease by death does not take place when there is agreement on a definite period, (Grotius 3.19.9), vide also per Villiers, J.A. in *Tiopaizi* v. *Bulawayo Municipality,* (5) at 325 when the lease is at the will of the lessor (Voet 19.2.9) and when the lease is at the will of the lessee (Ontwerp 2603). That is the interpretation of section 389 in "The South African Law of Obligations" by Lee and Honore. The general rule applicable to all leases is set out in Pothier's Treatise on the Contract of Letting and Hiring as follows:-

"Section 317.- A lease is not dissolved by the death of one of the parties; but, in accordance with a rule common to all contracts, the rights and obligations arising from the lease pass to the person of his heir, or to that of his *vacua successio.*

This rule is subject to an exception where the lessor made the lease in his capacity as usufructuarius, for in that case the lease is dissolved by the lessor's death, as we have already seen. The rule is subject to a second exception, namely, in cases where the lease has not been made for a definite period, but for as long as the lessor may please. such a lease is terminated by the lessor's death:

Locatio precative ita facta, quoad is qui locasset vellet, morte ejus qui locavit tollitur; L. 4, ff. *locat* (D. 19.2.4). For the same reason, where the lease was for as long as the lessee pleased, it ought to be said that it would be terminated by the death of the lessee."

Basnayake, C.J. did not apply this general rule to the monthly tenancy, because the tenant died before the 31st March, 1951, which was the date on which the monthly tenancy ended. A periodic lease can be renewed by tacit agreement. Van Leeuwen (Commentaries on Roman Dutch Law Book IV, Chapter XXI, Section 6) expresses a similar opinion:-

"The time agreed upon having expired the lease likewise is at an end, but the lease of houses is tacitly considered to have been prolonged if the lessor at the expiration of the lease allows the tenant to remain in undisturbed possession". He is "not to be ejected in an untimely manner, but a fair time should be allowed him ..... within which he may provide himself with another house" Voet (XIX 2.9) quoted by Basnayake, C.J. (Vide 58 N.L.R. at 410 and 411).

Therefore in the case of a periodic tenancy at the death of either party the contractual rights pass to the heirs and in such a case when the time fixed arrives it is open to the heir to give the other party reasonable notice of termination. If he allows the other party to remain there is, in my view, a renewal by tacit agreement.

In this case the landlord died on the 1st April, 1954. Applying the rule of the Roman Dutch Law the heirs of the landlord became vested with the contractual rights and obligations in respect of the premises. They did not exercise any right of termination of the tenancy at the end of the month of April, and there was then renewal of the tenancy by tacit agreement and it continued until the respondent stepped in and terminated the tenancy. I therefore hold that there was a valid contract of tenancy with the appellant at the time the respondent gave him notice to quit the premises. The case of *Abdul Hafeel* v. *Muttu Bathool* (2) was wrongly decided. Vide also *Ariyanandhi* v. *Mohamed Awf Mohamed Sideek* (6).

The next question I have to consider is whether the respondent had any status to institute this action. Since the decision of the Full Bench in *Silva* v. *Silva* (7) it is undisputed law that the title to

property vests in the heirs on the death of the owner. Counsel for the appellant therefore contended that only an action *rei vindicatio* by the heirs could validly dispossess him. Counsel for the respondent cited a number of decisions of the Supreme Court which hold that the property of the deceased is vested in the administrator and therefore such an action as this is maintainable. The Roman Dutch Law knew of no such office as that of administrator of the estate of a deceased though it recognised the office of executor who "was little more than the agent of the heir". By the Royal Charter of 1833 the English Law of Executors and Administrators was introduced into Ceylon by reason of which "we recognise the same power of Executors and Administrators over land and other immovable property here which the English law gives them over chattels real and thus an entire estate, landed as well as personal is administered" (8) at 276. It is the general law alone and not every English Statute dealing with Executors and Administrators that applies, *Cantlay* v. *Elkington,* (9) at 176, much of it being analogous to the procedure in English Courts of Equity (10) at 103. In *Perera* v. *Silva* (11) which was decided in the year 1893 Burnside, C.J. stated "the whole of the estate of the deceased should vest in the administrator for disposal among the persons legally entitled to individual shares of it. It certainly would be a gross anomaly if the administrator, although subject to be sued for the deceased's debts, could not realise the property liable for them." When the heirs take possession of the estate of the deceased to which they are entitled they hold the property in trust for the legal representative "so that the interests of the heirs is not an absolute one but a qualified one." " A certain interest vests in the legal representative" per Jayawardena, A.J. in *Fernando* v. *Rosa Maria* (12) at 237. An administrator can bring an action to recover money or other movable property forming part of the estate in the hands of another. *Public Trustee* v. *Karunaratne* (13) at 430. Burnside, C.J. while stating that the estate "should vest" speaks of a trust. Jayawardena, A.J. refers to a "certain interest" that vests in the legal representative. The case of the *Public Trustee* v. *Karunaratne* (13) was concerned with money and movable property. These could be recovered by a citation issued in terms of section 712 Civil Procedure Code. None of these cases expressly hold that the property of the estate vests in the legal representative to enable him to maintain an action. Then came the decision in *De Silva* v. *Rambukpotha* (14) in which the provisions of section 472 of the Civil Procedure Code were considered. In that case Soertsz, J.

was confronted with the Full Bench decision in *Silva* v. *Silva* (7) and the dictum of Grenier, J. in that case which was as follows:-

"It is a fallacy therefore to suppose ..... that an administrator obtains an absolute title to the estate of his intestate. What happens is that on letters of administration being granted to him ..... he is entrusted and charged with the estate of the deceased for purposes connected with the proper administration and settlement of it."

Whilst admitting that this was the correct logical view Soersz J. nevertheless, held as follows:-

"In my opinion, therefore, it would not be incorrect to say that the property of the intestate vests in the administrator for purposes of administration. Section 472 of the Civil Procedure Code in so far as it relates to executors and administrators can be given a meaning only in that view of the matter.

The only alternative is to adopt appellants' Counsel's suggestion that that part of the section is meaningless in the present state of the law. That, however, is a suggestion that I am not at all disposed to accept. I cannot regard that part of that section as some Utopian forecast. Section 218 of the Code seems to support the view I take of section 472."

In so deciding he disregarded the correct logical view because "it sometimes happens that a logical inconsistency is tolerated and even encouraged by law for some very good reason". (14) at 41. Basnayake, C.J. in deciding *Rodrigo* v. *Parangu* (15) cited the decisions of *Perera* v. *Silva* (11), *Fernando* v. *Rosa Maria* (10) and *De Silva* v. *Rambukpotha* (14) for the proposition that "under our law the estate of a deceased person vests in the administrator". I think this is an overstatement and it is impossible to reconcile it with the admission of logical inconsistency. Gratiaen, J. in *Chellia* v. *Wijenathan* (16) at 340 found a way of escape as follows:-

"The land is regarded as "vested" in the administrator in a strictly limited sense - so as to enable him, in his representative capacity, to recover from a third party what is claimed to be an asset of the intestate's estate. Interpreted in this way, the language of section 472 is perfectly consistent with the principle laid down

in *Silva* v. *Silva (supra)* which was, indeed decided *after* the section had come into operation. Section 472 does not purport to introduce substantive law but merely prescribes a convenient procedure for actions of the kind which we are now concerned with. Once the administrator's status has been established at the trial, the only matter for investigation is the *title of the heirs* which he claims to be superior to that of the opposing party. It is possible in this way to reconcile the substantive law clarified by the Full Bench in *Silva* v. *Silva (supra)* with procedural law prescribed in section 472 of the Civil Procedure Code." (16) at 340.

It certainly is difficult to grant such an interpretation, whether the word *vested* be written within inverted commas or not. This resulting position I believe was due to the fact that section 472 of the Civil Procedure Code appears to have been drafted on a certain assumption, which assumption later became incorrect as a result of *Silva* v. *Silva* (7). Accordingly I would grant that this is a necessary approach making the section workable in practice, whereas a strictly logical approach would render the section meaningless. It is an interpretation that is inevitable, practical and long established, with which I am loathe to disagree after so long a period. I therefore hold that the respondent is entitled to maintain this action in terms of the provisions of section 472 of the Civil Procedure Code. For the above reasons I would dismiss the appeal with costs.

Before I conclude, I desire to deal with another point. Rodrigo, J. states that by virtue of section 5 of Act No. 10 of 1961 provision was made for a tenant to pay rent to the Local Authority and thereby the appellant was provided with an alternative mode of performing his obligation to pay rent. There was no obligation on the appellant created by this Act to pay rent to a Local Authority. Furthermore the death of the landlord occurred in April, 1954, and the Act came into operation seven years later.

THAMOTHERAM, J. — I agree.
WEERARATNE, J. — I agree.
SHARVANANDA, J. — I agree.
WANASUNDERA, J. — I agree.

Appeal dismissed.