VIRASINGHE
v.
VIRASINGHE AND OTHERS

COURT OF APPEAL
WEERASURIYA, J., AND
DISSANAYAKE, J.
CA/707/93 (F)
DC COLOMBO NO. 14447/P
OCTOBER 17, 2000.

Partition Law, No. 21 of 1977, sections 66 (1) and (2) – Decree for sale of common property – Deed of lease executed after lis – pendens is registered – Is the deed of lease valid? – Consent – Acquiescence in the leasing of the premises – Prevention of Frauds Ordinance, section 2.

The plaintiff-appellant instituted action seeking a sale of the land in question in terms of the provisions of the Partition Law. The 4th defendant-respondent claimed a tenancy under the plaintiff-appellant and 1st and 2nd defendant-respondents (co-owners). The District Court held that the 4th defendant-respondent was a tenant.

On appeal –

It was contended that a lease which is void in law cannot create a valid monthly tenancy and that no issue of acquiescence by the plaintiff-appellant arose for consideration by court.

Held:

(1) The 1st and 2nd defendant-respondents by a Notarial deed leased the premises in question to the 4th defendant-appellant for a period of 10 years. However, the deed of lease had been executed after the partition action was duly registered as a *lis pendens* and therefore is void and of no effect in law – sections 66 (1) and (2).

(2) Evidence led shows that the 4th defendant-respondent became a monthly tenant prior to the purported lease agreement.

(3) Since the commencement of the tenancy is not referable to the deed of lease, the 4th defendant-respondent is not precluded from claiming a valid monthly tenancy.

(4) It could be said that the 4th defendant-respondent had come into occupation of the premises as the tenant at the behest of the 1st defendant-respondent who had acted as the agent of all the co-owners. The protection afforded by the Rent Act is available to the tenant as against all the co-owners on the ground that parties has acquiesced in the letting.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Hinni Appuhamy v. Kumarasinghe* – 59 NIR 566.
2. *Kalpage v. Gunawardena* – 66 NLR 302.
3. *Ranasinghe v. Marikkar* – 73 NLR 361.
4. *Pararajasekaram v. Vijayaratnam* – 76 NLR 470.

Ikram Mohamed, PC with *Harsha Soza* and *A. M. Faisz* for plaintiff-appellant.

P. A. D. Samarasekera, PC with *R. Y. D. Jayasekera* for 4th defendant-respondent.

Cur. adv. vult.

January 26, 2001.

WEERASURIYA, J.

The plaintiff-appellant instituted this action seeking a sale of the land described in the 4th schedule to the plaint, in terms of the provisions of the Partition Law, No. 21 of 1977. The said land was depicted in the preliminary plan bearing No. 3903 dated 24. 10. 1986, made by licensed Surveyor S. D. Liyanasuriya marked X.

There was no dispute regarding the corpus or the pedigree in respect of the land which is owned by the plaintiff-appellant, 1st defendant-respondent and 2nd defendant-respondent.

This land was mortgaged to the 3rd defendant-respondent (Bank of Ceylon) on deed marked 3D2. The 3rd defendant-respondent claimed that a sum of money was due and owing from the plaintiff-appellant and 1st and 2nd defendant-respondents jointly under the said mortgage bond (3D2).

The main contest in this case was raised by the 4th defendant-respondent claiming a tenancy under the plaintiff-appellant and 1st and 2nd defendant-respondents.

Learned District Judge by his judgment delivered on 20. 10. 1993, whilst holding that 4th defendant-respondent was a tenant of the premises, made order to enter interlocutory decree for sale of the common property, as partition is inexpedient and impracticable. The plaintiff-appellant has preferred this appeal against the said judgment.

At the hearing of this appeal, learned President's Counsel appearing for the plaintiff-appellant contended that the learned District Judge has misdirected himself in holding that the 4th defendant-respondent was a tenant of the premises.

The above contention of learned President's Counsel was based on the following grounds:

(1) That a lease which is void in law cannot create a valid monthly tenancy.

(2) That no issue of acquiescence by the plaintiff-appellant arose for consideration by Court.

(3) That there was a failure to consider the evidence led on behalf of the 4th defendant-respondent relating to the question of tenancy.

The following authorities were cited in support of the above matters:

(a) *Hinni Appuhamy v. Kumarasinghe*[1]
(b) *Kalpage v. Gunawardena*[2]
(c) *Ranasinghe v. Marikkar*[3]
(d) *Pararajasekeram v. Vijayaratnam*[4]

The 1st and 2nd defendant-respondents by deed bearing No. 74 dated 24. 07. 1985 and 17. 12. 1985, attested by Thurairaja NP, purported to lease to the 4th defendant-respondent, the premises in suit for a period of 10 years. The 1st defendant-respondent who was one of the lessors signed the said deed on 24. 07. 1985, while the other lessor namely, the 2nd defendant-respondent signed the deed on 17. 12. 1985. Therefore, the lease being a joint lease by co-owners of the said premises cannot be said to have been duly executed and completed until both lessors signed the said deed. Accordingly, the said deed had been completed only after the 2nd defendant-respondent signed the deed on 17. 12. 1985.

It is noteworthy that the present action was filed by the plaintiff-appellant on 22. 08. 1985 and *lis pendens* was registered on 22. 10. 1985 before the deed of lease was completed. Accordingly, the deed of lease marked P23 had been executed after the partition action was duly registered as a *lis pendens* and therefore is void and of no effect in law in terms of sections 66 (1) and (2) of the Partition Law.

However, the evidence led in the case clearly established that the 4th defendant-respondent became a monthly tenant of the premises on 01. 01. 1985. Thus, it is manifest that prior to the purported lease agreement (P23), the 4th defendant-respondent became a monthly tenant of the premises in suit.

In the case of *Pararajasekeram v. Vijayaratnam* (*supra*) it was held that informal lease of a land is not one which may be treated as a tenancy from month to month and in view of section 2 of the Prevention of Frauds Ordinance such an agreement is null and void and of no force or avail in law.

In the instant case, a vaild monthly tenancy has come into effect as from 01. 01. 1985. Therefore, the decision in *Pararajasekeram v. Vijayaratnam* has no application to the facts of this case.

Since the commencement of the tenancy is not referable to the deed of lease marked P23, the 4th defendant-respondent is not precluded from claiming a valid monthly tenancy. In the light of the above material, the case of *Hinni Appuhamy v. Kumarasinghe* (*supra*) has no bearing to this case.

Learned President's Counsel appearing for the plaintiff-appellant contended that there was no material to establish that there was consent or acquiescence by the plaintiff-appellant in the leasing of the said premises and there was no issue of acquiescence raised at the trial.

Learned President's Counsel appearing for the 4th defendant-respondent on the other hand contended that 1st defendant-respondent had acted as the agent of the plaintiff-respondent at all times material to this action.

It is significant to observe that the plaintiff-appellant in his evidence admitted that his brother,1st defendant-respondent, acted as an agent for him and for the other brother (2nd defendant-respondent). The plaintiff-appellant sought to make out that upto a certain time the 1st defendant-respondent acted as his agent with regard to the account maintained at the 3rd defendant Bank in relation to the loan obtained from the Bank. However, he asserted that the said joint account was operated till December, 1982 and thereafter he left the country having instructed the Bank that he was not operating the account. This assertion of the plaintiff is mainfestly unacceptable for the reason that, he failed to question the bank official who gave evidence relating to the joint account on the purported instructions he had given in respect of the said joint account, to disclaim his liability.

It was clear from the evidence of the plaintiff-appellant that he knew that the premises had been let by the 1st defendant-respondent even prior to the 4th defendant-respondent moving into the house. The evidence of the plaintiff-appellant that he met the previous tenant and discussed about the tenancy cannot be disregarded.

The plaintiff-appellant conceded that, 1st defendant-respondent made payments to the Bank relating to the said overdraft. He further admitted that all moneys paid to the Bank of Ceylon was obtained from the rent of the premises and that he did not personally make any payment in settlement of the loan.

Much emphasis was laid on document marked P25 in an attempt to discredit the proposition of agency by the 1st defendant-respondent for and on behalf of other co-owners. Reference was made to the following passage in that document namely: "We might mention that this payment is being made by Messers C. S. R. Virasinghe and P. A. Virasinghe who intend to claim the share payable by Mr. I. A. K. Virasinghe from him".

It is to be observed the above passage cannot be construed to counter the position of the 1st defendant-respondent of having acted as agent of the plaintiff-appellant. This passage is an obvious reference to the liability of the plaintiff-appellant to the joint account operated for the purpose of obtaining the overdraft facility.

Learned District Judge has made specific reference to the manner in which the plaintiff-appellant had given evidence. It was demonstrated that plaintiff-appellant had contradicted his own evidence even in examination in chief on material points. It was found that he was evasive and inconsistent on vital matters relating to the issue of tenancy.

Upon an examination of the material available, it is not unsafe to come to the conclusion that 4th defendant-respondent had come into occupation of the premises as the tenant at the behest of the 1st defendant-respondent who had acted as the agent of all the co-owners. In the result, the protection afforded by the Rent Act is available to the 4th defendant-respondent as against all the co-owners on the ground that they had acquiesced in the letting.

In the case of *Kalpage v. Gunawardena* (*supra*) it was held that where there are a number of co-owners in respect of rent controlled premises, a lease of the entire premises, executed by one of them does not bar the other co-owners, in the absence of an issue on acquiescence from having the tenant ejected as a trespasser. However, in that case, no question arose as to the legal position of one co-owner acting as the agent of the other co-owner.

The case of *Ranasinghe v. Marikkar* (*supra*) would be relevant to a question of one co-owner letting the premises without the consent or acquiescence of other co-owners and the consequent loss of protection of the Rent Act as against a purchaser who buys the premises in terms of an interlocutory decree.

The contention of learned President's Counsel that the District Judge has not considered the evidence of the plaintiff-appellant is unacceptable. Learned District Judge has made reference to the evasive and inconsistent manner in which the plaintiff-appellant has given evidence which seriously affected his credibility. Having examined the evidence with care, I see no basis to interfere with his findings.

For the foregoing reasons, this appeal is dismissed with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.