Weerasinghe v. De Silva

COURT OF APPEAL
COLIN THOME, J. AND RANASINGHE, J.
C.A. (S.C.) 588/74—C.R. COLOMBO 3584/ED
OCTOBER 23, 24, 25, 1978

Rent Act No. 7 of 1972, section 28—Non-occupation of premises by a tenant—Should period of non-occupation be computed only from coming into operation of Act—Such section not retrospective—Nature of occupation required by section—Residential premises used by tenant as business premises—Knowledge and/or consent of landlord—Prohibition against such usage contained in provisions of Rent Acts—Does such usage have the effect of altering character of premises to take them out of operation of section 28.

Held

That section 28 of Rent Act No. 7 of 1972 is prospective in operation and accordingly non-occupation by a tenant of residential premises prior to 1st March, 1972, did not constitute a ground of ejectment.

Held further

The occupation required by the provisions of section 28 is the occupation of the premises as a residence and occupation other than as an actual residence will not give protection from the operation of the provisions of section 28(1).

Section 10 of the Rent Restriction Act (Cap. 274) as amended by Act No. 10 of 1961 provided that the tenant of any residential premises to which the Act applied should not use such premises for any purpose other than that of residence except with the prior written consent of the landlord and, where the premises are situate within the administrative limits of any local authority, the prior written consent of the Mayor or Chairman of such local authority. Section 12 of Rent Act No. 7 of 1972 provides that a landlord or tenant of any residential premises should not, unless so authorised by the Commissioner of National Housing, use such premises wholly or mainly for any purpose other than that of residence. In this section "residential premises" was defined to mean any premises which at any time within a period of ten years prior to the date of commencement of this Act had been occupied wholly or mainly for the purpose of residence. In this case at the time of the original contract of tenancy the premises were residential premises but during the period of ten years prior to the date of commencement of Rent Act No. 7 of 1972 they had been used for business purposes and were so used with the knowledge and/or consent of the landlord. However, such user commenced and continued at a time when the provisions of section 10 of the earlier Rent Act as amended by Act No. 10 of 1961 were in operation, the trial judge took the view that as such user as business premises was unlawful and constituted an offence punishable under the provisions of the earlier Rent Restriction Act, the premises in question should for the purpose of this case be treated as residential premises as a person cannot in law, be permitted to take advantage of his own wrongful act.

Held

That this finding of the trial judge was correct and the premises in question must accordingly for the purpose of this case be treated as residential premises and not as business premises.

Cases referred to

(1) *Muttucumaru v. Corea, (1958) 59 N.L.R. 525.*
(2) *Wijetunga v. Senanayake, (1967) 69 N.L.R. 445.*
(3) *Sabapathy v. Kularatne, (1951) 52 N.L.R. 425.*
(4) *Suriya v. Trustees of Maradana Mosque, (1954) 55 N.L.R. 309.*
(5) *Mohamed v. Kadhiboy, (1957) 60 N.L.R. 186*
(6) *Amarasekera v. Gunapala, (1970) 73 N.L.R. 469.*
(7) *Wijeratne v. Dschou, (1974) 77 N L.R. 157.*
(8) *Ludovici v. Nicholas Appu, (1900) 4 N.L.R. 12.*

APPEAL from the Court of Requests, Colombo.

C Ranganathan, Q.C. with *N. S. A. Goonetilleke* and *N. Mahendra,* for the defendant-appellant.
H. W Jayewardene. Q.C. with *D. R. P. Goonetillake* and *Laxman Perera,* for the plaintiff-respondent.

Cur. adv. vult.

December 4, 1978.

RANASINGHE, J.

The plaintiff-respondent instituted this action to have the defendant-appellant ejected from premises bearing No. 62, Dematagoda Road, Colombo, described in the schedule to the plaint, on the ground that the premises, which are residential premises were let out by him to the defendant-appellant : that the defendant-appellant has ceased to occupy the said premises without reasonable cause for a continuous period of not less than 6 months : that, therefore, in terms of the provisions of section 28 (1) of the Rent Act, No. 7 of 1972, he is entitled to have the defendant-appellant ejected from the said premises.

The defendant-appellant has in his answer taken up the position that the defendant-appellant became the tenant of the plaintiff-respondent in respect of the said premises in or about 1954 : that from about 1st of February, 1962, the premises have been used by him wholly or mainly as business premises with the knowledge and/or consent of the plaintiff-respondent : that he still continues to be is occupation of the premises : that, therefore, the plaintiff-respondent is not entitled to have and maintain this action.

After trial, the learned trial Judge has held : that the premises in question have been used from February, 1962, for the purpose of conducting a Montessori School with the knowledge and/or consent of the plaintiff-respondent: that the premises have not, within a period of 10 years prior to the commencing of Act No. 7 of 1972, been occupied wholly or mainly for the purpose of residence : that the change in character of the premises in question, from residential to business, was in violation of the provisions of the Rent Laws in existence at that time : that, therefore, the premises should still be considered as residential premises within the meaning of Rent Act, No. 7 of 1972 for the purpose of this case : that, the defendant-appellant has, however, ceased to occupy the premises in suit for residential purposes from February, 1962 : that the defendant-appellant has failed to show that such non-occupation of the premises in question was for reasonable cause within the meaning of the said Rent Act : that, therefore the plaintiff-respondent is entitled to have the defendant-appellant ejected from the premises in question.

Learned counsel appearing for the defendant-appellant maintained: that on the learned trial Judge's finding the defendant-appellant has continuously been in occupation of the premises for the purpose of the business of running the Montessori School, which was being conducted by his daughter, that as the defendant-appellant was throughout the relevant period in fact in occupation, the allegations that the defendant-appellant had ceased to occupy the said premises must fail: that, in view of the learned trial Judge's finding that from 1. 2. 62 the premises had in fact been used for business purposes the premises are not residential premises within the meaning of the said Rent Act: that, as the non-occupation, if any, had in fact been with the knowledge and/or consent of the plaintiff-respondent such non-occupation has not been without reasonable cause: that, in any event, the plaintiff has failed to prove that the defendant has ceased to occupy the said premises for a continuous period of six months since 1.3.72 the date on which the provisions of the Rent Act No. 7 of 1972 came into operation: that therefore, the provisions of neither section 12(1) (2) nor section 28 (1) of the Rent Act No. 7 of '72 could be called in aid by the plaintiff-respondent.

"Residential premises" have been defined in section 48 of the Rent Act No. 7 of 1972, to mean, unless the context otherwise requires, "any premises for the time being occupied wholly or mainly for the purposes of residence"; and "business premises" have been defined to mean any premises other than residential premises as defined in the said section 48.

Section 12 of Act No. 7 of 1972 provides for the use of residential premises for other purpose in certain circumstances. There is a definition of the term "residential premises" in section 12 (2) as "any premises which at any time within a period of 10 years prior to the date of commencement of this Act had been occupied wholly or mainly for the purpose of residence." This definition, however, is specifically restricted for the purposes of section 12 (2).

The provisions of the Rent law which were in operation in 1954 was the Rent Restriction Act No. 29 of 1948 (Chapter 274) as amended by Act No. 10 of 1961, which came into operation on 6th March, 1961. Section 10 of Act No. 29 of 1948 provided that the tenant of any residential premises shall not use them for any purpose other than that of residence except with the prior consent of the landlord. Section 4 of Act No. 10 of 1961 repealed section 10 of the principal Act and substituted a new section in its place whereby the use of residential premises for any purpose

other than that of residence was permitted only with the prior written consent of the landlord and, where such premises are within the limits of a local authority, with the prior written consent of the Mayor or Chairman of such local authority. Thus, in February 1962, any change in the character of the said premises, from residential to business required not only the prior written consent of the plaintiff but also the prior written consent of the Mayor of the Colombo Municipality.

The corresponding provisions in the Rent Act No. 7 of 72 with regard to the use of residential premises for other purposes are found in section 12. Under the provisions of this section both the tenant and the land-lord are prohibited from using or permitting the use of residential premises for any other purpose. Section 42 of this Act No. 7 of 1972 penalizes the contravention of or the failure to comply with the provisions of, *inter alia*, section 12 (1) and (2) of the said Act.

Learned counsel for the appellant contended that the term "for the time being" appearing in the definition of residential premises should be construed to mean the time at which the action is instituted. In this connection the judgment of Sinnathamby, J., in the case of *Muttucumaru v. Dr. Corea* (1) and the judgment of Samerawickreme, J., in the case of *Wijetunga v. Senanayake* (2) had been cited to the learned trial judge and were also relied on at the argument before us. On a consideration of these two judgments it appears to me, with respect that the construction placed by Samerawickreme, J. is the more acceptable approach to this problem. The relevant time should be the time at which the question comes up for consideration. Such time is clearly the time of the institution of the proceedings. As the character of the premises is not inflexible and its character at the time of the institution of the proceedings could be different from its original character and any such change could have been effected either according to law or otherwise it is relevant and necessary to have reference to its character at the inception of the contract of tenancy.

The learned trial Judge has as stated earlier, found that, although the premises in question, both at the date the Rent Act of No. 7 of 72 came into operation and also on the date of the institution of these proceedings, were being used for business purposes, they were at the time of the original contract of tenancy residential premises, and that it was only in February 1962 that the premises had ceased to be used for residential purposes, and that such change, though effected by the tenant with the knowledge and/or consent of the landlord, was unlawful and constituted an offence punishable under the provisions of the Rent

laws which were in force in 1962 and thereafter. That a person cannot in law be permitted to take advantage of his own wrongful act is quite clear—*vide* (2)—at page 447, I am, therefore, of opinion that the learned trial Judge's findings that the premises in question must for the purposes of this case be treated as "residential premises" is correct and should be upheld.

It was urged on behalf of the defendant-appellant that the learned trial Judge has misdirected himself in holding that the defendant-appellant had not been in occupation of the premises during the relevant time, in view of his earlier finding that the defendant-appellant and his daughter had in fact been carrying on the business of a Montessori School on the premises. It was, therefore, contended that, the defendant-appellant had, throughout the period, been in fact in occupation of these premises even though it had been for the purposes of his business.

Learned counsel for the respondent has urged that the occupation contemplated by the provisions of section 28(1) of the Act No. 7 of '72 is occupation of the premises as a residence, and that, even if the defendant has in fact been in occupation of the premises for the purposes of his business, such occupation is not protected by the provisions of section 28(1).

The provisions of section 28 (1) admittedly apply only to residential premises. They have no application to business premises. It has to be noted that, unlike in England, our Rent laws apply to both residential and business premises. The intent and object of the provisions of section 28 (1) seem to be similar to the policy of the Rent laws in England, with regard to "non-occupying tenants" which is to "economise rather than sterilise housing accommodation" and, to see that premises, which are not meant to be used for other purposes are thereby "withdrawn from circulation."

I am inclined to the view that the occupation required by the provisions of section 28 is occupation of the premises as a residence. The occupation of such premises otherwise than as an actual residence will not, in my opinion, give protection from the operation of the provisions of section 28 (1).

Learned counsel for the respondent also referred us to the judgments which deal with the position of "non-occupying tenants". The concept of a "non-occupying tenant" forfeiting the protection of the rent laws was first discussed in this island, by Gratiaen J. in the case of *Sabapathy v. Kularatne* (3) wherein it was laid down that a tenant

who was not actually in residence in the premises and did not require the premises, either for his own use or for the use of any member of his family who was dependent on him and merely wanted it to permit his brother to carry on a business, was a "non-occupying tenant", and should be regarded as having forfeited the special statutory protection offered by the Rent Restriction Ordinance. Thereafter Gratiaen J. had occasion to consider the position of a "non-occupying tenant" once again in the case of *Suriya v. Board of Trustees of Maradana Mosque* (4). Gratiaen, J. held that the theory of forfeiture of the rights by non-occupation is not applicable in a case where the tenant lawfully sublit the premises without violating either the terms of his contract of tenancy or the provisions of any statute, and, in the course of the judgment, also observed that the decision in (3) has no application to the facts of this case and that he intended to apply the theory of forfeiture by non-occupation only for the determination of the question of relative hardships of the landlord and the tenant with regard to the reasonableness of the requirements put forward by the landlord to evict the tenant.

The theory of forfeiture by non-occupation came up for consideration once again in the case of *Mohomed v. Kadhibhoy* (5) and Basnayake, C.J. held that this English Law concept of a "non-occupying tenant" is not applicable to our Rent Restriction Laws.

Thereafter this matter came up for discussion by Alles, J. in the case of *Amerasekera v. Gunapala* (6) and it was held that, even though the allegation that the defendant was a non-occupying tenant had not been specifically raised as an issue, it was open to the Court to consider whether the defendent was entitled to seek the protection of the Rent Act and that it was not open to the defendant to urge that he was in occupation through his employees when it was clear that he was not in physical occupation. Alles, J., proceeded to grant relief to the landlord on the basis that as the defendant was a non-occupying tenant, the defendant was not entitled to claim the protection of the Rent Act.

In the case of *Wijeratne v. Dschou* (7) Sharvananda, J. having considered the three earlier judgments, held that a tenant was not liable to be ejected on the ground of non-occupation. It has to be noted that that too is a case, which had been instituted prior to the coming into operation of the provisions of Act No. 7 of 1972. In the course of the judgement delivered on 28.2.1974, Sharvananda, J. observed, at page 161, that

as the law stood prior to the coming into operation of Act No. 7 of 1972, a tenant could have snapped his fingers at the landlord by his unsocial act of keeping the premises closed and sterilising housing accomodation as long as he was not guilty of any of the acts or omissions set out in the provisions of the Act, but, that that *casus omissus* has been provided for by section 28 of Act No. 7 of 1972.

On a consideration of the relevant provisions of the rent laws in force prior to Act No. 7 of 1972, and also the judgments referred to above, it appears to me that the English law theory of a "non-occupying tenant" forfeiting the protection of the rent laws and being liable on that ground to be ejected had no application to the rent laws prevailing in this Island prior to 1.3.72. In view of the provisions of section 28 (1) of Rent Act No. 7 of 1972, it may now be open, in construing the provisions of the said section 28, to take into consideration the judgments delivered in England with regard to a "non-occupying tenant". It is however, not necessary for the purposes of this judgment to express my definite opinion on this matter.

It was contended on behalf of the appellant that, in any event, any period of non-occupation prior to 1.3.72 cannot be taken into consideration. As already indicated, prior to 1.3.72 non-occupation by a tenant of residential premises did not constitute a ground of ejectment. Hence, if any such period is taken into reckoning, it would be tantamount to the tenant being now made subject to a disability which he was not, in law, subject to at that time. The provisions of section 28 (1) should be taken to be prospective in operation unless they have expressly bten made retrospective in operation. There is, however, nothing in the language of section 28 (1) which requires any such construction being placed upon it. Section 47 of the Rent Act however has clearly and unambiguously been made retrospective in its operation. It is, therefore, clear that, when any provision of the Rent Act No. 7 of 1972 was intended to be retrospective in application, the legislature has expressly so ordained. I am, therefore, of opinion that any period of non-occupation by the defendant-appellant prior to 1.3.72 cannot be taken into consideration in reckoning the minimum period of 6 months required by the provisions of section 28 (1). This action has been instituted by the plaintiff-respondent on 13.7.72. The learned trial Judge has, in my opinion, misdirected himself on this point. Thus, as there had been, at the time of the institution of this action by the plaintiff-respondent, no non-occupation by the defendant-appellant for a continuous period of 6 months after the provisions of section 28 (1) became operative, the plaintiff-respondent is not entitled to

call in aid the provisions of section 28 (1) to eject, in these proceedings, the defendant-appellant from the premises in question.

Section 28 (1) does not apply to all cases of non-occupation. It is only a cessation of occupation for the requisite period without reasonable cause that would operate against the defendant-appellant. Thus where there has been reasonable cause, as contemplated by this sub-section, the tenant is not liable to be ejected. The term "reasonable cause" has been defined in section 48 of Act No. 7 of 1972 to include a cause approved or sanctioned by by the Board. The word "include" in a definition clause means ; "has the meaning given to the word in the Ordinance in addition to its popular meaning"'—*vide* (8). The learned trial Judge appears to have proceeded on the basis that the definition of these words set out in section 48 is exhaustive. Be that as it may, it appears to me that the ground urged on behalf of the defendant-appellant, viz., the knowledge and/or consent of the landlord, as constituting the "reasonable cause" for any such non-occupation is, in the circumstances of this case untenable. This however will be of no avail to the plaintiff-respondent in view of the opinion expressed by me with regard to the period of 6 months set out in section 28(1) referred to above.

In this view of the matter, I am of opinion that the defendant-appellant's appeal is entitled to succeed. The judgment and the decree appealed from are accordingly set aside and the plaintiff-respondent's action is dismissed with costs, in both courts.

COLIN THOME, J.—I agree.

Appeal allowed.