WIJESINGHE

v.

NADARAJAH ESWARAN AND WIFE AND ANOTHER

COURT OF APPEAL

H. A. G. DE SILVA, J. and MOONAMALLE, J.

C.A. 505/83–D.C. JAFFNA 1895/L

NOVEMBER 24, 1983.

Setting aside of a consent judgment – Averments necessary in a plaint for rent and ejectment under sections 22 (1) (bb), 22 (1A) and 22 (1C)– Notice to the Commissioner of National Housing–Is non-compliance fatal or a mere irregularity ?

The plaintiffs (respondents) instituted this action for ejectment of the defendant (petitioner) from premises No. 445, Stanley Road, Jaffna. The monthly rental was not averred in the plaint, but it was averred that the premises in suit were the only house available to the plaintiffs as a residence and they required the said house for their personal residence. Notice was given to the defendant by the plaintiff's attorney-at-law on 19.1.1980 requiring the defendant to quit the said premises and hand over possession on or before 31st July 1982. The defendant did not vacate the premises and the present suit was filed for rent and ejectment and damages at Rs. 150 per month for unlawful possession. The defendant opposed the maintenance of the action mainly on the grounds that there were no averments that the Commissioner of National Housing was informed of the notice of termination of tenancy within the prescribed time and the prayer to the plaint did not state that the decree will not be executed until other accommodation was provided for the defendant by the Commissioner of National Housing. On 15.2.1983 when the case was taken up for trial, a settlement was reached whereby the defendant consented to judgment being entered for the plaintiff in ejectment subject to certain conditions. The terms of settlement made no provision that the decree will not be executed until other accommodation was provided for the defendant by the Commissioner of National Housing.

The defendant contended that the settlement was a nullity in view of the mandatory provisions of the Rent Act, No. 7 of 1972.

Held –

Section 22 (1) *(bb)* and section 22 (1A) permit a suit in rent and ejectment for premises whose standard rent is below Rs. 100 under the following circumstances :

(1) The tenancy should have begun prior to the date of commencement of the Act.

(2) The landlord should not be the owner of more than one residential premises

(3) The landlord should have caused a notice of such action or proceeding to be served on the Commissioner of National Housing.

Compliance with these requirements must be pleaded.

Failure to give notice to the Commissioner of National Housing is not a mere irregularity but a fatal defect. In these circumstances the settlement of 15.2.1983 was a nullity.

Cases referred to

(1) *Arnolda v. Lawrence C.A.(S.C.) Application No. 45/80–C.A. Minutes of 11.4.80.*

(2) *Lawrence v. Arnolda S.C. Appeal No. 39/80–S.C. Minutes of 6.2.81.*

(3) *Idroos Lebbe v. Tamby Maricar, (1907) 10 NLR 206.*

(4) *Lorensz v. S. L. M. Abdul Cader (1962) 66 NLR 523.*

(5) *Dheerananda Thero v. Ratnasara Thero (1958) 60 NLR 7.*

APPEAL from an Order of the District Court of Jaffna.

T. B. Dilimuni for the defendant-petitioner.

S. C. B. Walgampaya for the plaintiff-respondent.

Cur. adv. vult.

January 27, 1984

H. A. G. DE SILVA, J.

This is an application for the setting aside of the consent judgment entered on 15.2.1983.

The plaintiff-respondents (hereinafter called the plaintiffs) instituted this action for the ejectment of the defendant-petitioner (referred to hereafter as the defendant) from premises No. 445, Stanley Road, Jaffna. The plaintiffs have not averred in the plaint the monthly rental of the house. They have averred that the premises in suit are the only house available to the plaintiffs as a residence and that they required the said house for their personal residence. They further averred that the plaintiffs noticed the defendant through their Attorney-at-Law on 19.1.1980, that the said house was required by them to reside and to vacate the said premises and deliver vacant possession thereof on or before 31st July, 1982. The plaintiffs have stated that as a result of the defendant's unlawful and forcible occupation, they are incurring damages at Rs. 150 per month.

The defendant has also not in his answer averred the monthly rental he pays to the plaintiffs. He denies having received the notice terminating his tenancy. He further pleads the protection of the Rent Act, No. 7 of 1972 as the premises in suit are premises to which the Rent Act applies. He further pleads that, in the plaint, there is no averment that the Commissioner of National Housing was informed of the notice of termination of tenancy and that within the prescribed time, and in the prayer to the plaint that decree will not be executed until other accommodation is provided to the defendant by the Commissioner of National Housing.

On 15.2.83 the first date of trial a settlement had been reached and the terms of settlement recorded and the record signed by the plaintiffs and defendant. Both parties appear to have been represented by counsel. The settlement recorded is as follows :

"Of consent judgment for the plaintiffs in ejectment. No costs. If plaintiff will deposit in Court Rs. 12,500 within 3 months from today defendant will vacate the land and premises before 1.1.84. Defendant will be entitled to withdraw this sum after he quits and hands over vacant possession. Defendant will undertake to pay damages at Rs. 30 p.m. on or before end of each and every month from 1.3.83. In default of payment for any 3 consecutive months Courts will issue writ without notice. If the sum of Rs. 12,500 is deposited as aforesaid writ will issue in any event on or after 1.1.84".

The defendant filed this application on 18th April, 1983, and in his petition he has stated that the monthly rental of the premises in suit was Rs. 30. The plaintiffs are silent regarding the quantum of the rent and except for a general denial of the averments of the defendant contained in his petition and affidavit, the paragraph containing the averment regarding the quantum of rent has not been specifically denied. In this situation, having regard to the terms of settlement which mention the quantum of damages payable by the defendant as Rs. 30 per month, it can be safely accepted that the rent of these premises was that amount and therefore less than Rs. 100 per month. Even learned Counsel for the defendant and plaintiffs addressed Court on this basis.

Learned Counsel for the defendant both in his oral and written submissions has taken up the position that the settlement reached is of no avail as the action itself is a nullity in that certain mandatory provisions of the Rent Act, No. 7 of 1972, as amended have been contravened or not complied with and that a person cannot even by consent confer jurisdiction on a Court which it does not have unless these mandatory provisions have been complied with.

None of the pleadings filed in the District Court or in this Court specifically state when the premises in suit was taken on rent by the defendant but in paragraph 11 of the petition the defendant states that he has been a tenant of these premises for a period of twenty-four years, i.e., prior to the coming into operation of the Rent Act, No. 7 of 1972, on 1st March, 1972.

Section 22 (1) (*bb*) of the Rent Act as amended by Law No. 10 of 1977 states that–

"Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises the standard rent (determined under section 4) of which for a month does not exceed one hundred rupees shall be instituted in or entertained by any Court, unless where–

(*bb*) such premises, being premises which have been let to the tenant prior to the date of commencement of this Act, 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".

Section 22 (1A) enacts that–

"Notwithstanding anything in sub-section (1), the landlord of any premises referred to in paragraph (*bb*) of that subsection shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises on the ground that such premises are required for occupation as a residence for himself or any member of his family, if such landlord is the owner of more than one residential premises and unless such landlord has caused notice of such action or proceedings to be served on the Commissioner of National Housing"

Sub-section (1C) of section 22 states that–

"where a decree for the ejectment of the tenant of any premises referred to in paragraph (*bb*) of sub-section (1) is entered by any Court on the ground that such premises are reasonably required for occupation as a residence for the landlord or any member of the family of such landlord, no writ in execution of such decree shall be issued by such Court until after the Commissioner of National Housing has notified to such Court that he is able to provide alternate accommodation for such tenant"

Learned Counsel for the defendant submits (1) that these provisions of the Rent Act impose a complete statutory bar to the common law right of a landlord to institute an action to eject his tenant from any residential premises and (2) that they also fetter the right given to a Court of law to entertain an action for the ejectment of a tenant from any such premises, inasmuch as the jurisdiction given to a District Court by section 19 of the Judicature Act, No. 2 of 1978, to entertain an action by a landlord to eject an overholding tenant is taken away.

As I understand it, these provisions are twofold. (1) they bar the entertainment of an action by the Court unless certain pre-conditions are fulfilled and (2) do not empower the Court to enter decree in ejectment except on the happening of a certain event viz : the notification to Court by the Commissioner of National Housing referred to in sub-section (1C).

In the unreported case (1) Soza J. in his judgment has stated *inter alia* as follows :–

"A person who claims that the prohibition imposed by section 22 of the Rent Act does not apply to him must *aver* in the plaint the facts and circumstances that exempt him from the prohibition. It is these exempting circumstances that constitute his cause of action. As it is the exempting circumstances that constitute his cause of action the plaintiff must plead them. Otherwise the general bar against suits for rent and ejectment where the standard rent of the premises does not exceed Rs. 100 per month will operate and the plaint will have to be rejected under the provisions of section 46 (2) (1) of the Civil Procedure Code which requires the Court to reject the plaint when the action appears from the statements in the plaint to be barred by a positive rule of law.

Section 22 (1)(*bb*) and section 22 (1A) of the Rent Act permit a suit in rent and ejectment to be filed for premises whose standard rent is below Rs. 100/- under the following circumstances : Firstly the tenancy should have begun prior to the date of commencement of the Act. . . . . Secondly the landlord should not be the owner of more than one residential premises Thirdly the landlord should have caused a notice of such action or proceeding to be served on the Commissioner of National Housing."

Soza, J goes on to say later in his judgment–

"Should the fact that the landlord owns not more than one residential house be pleaded or not ? Is it a fact material to constitute the cause of action ? In my opinion it is. It is not a mere disability that has been placed on the landlord. It is a requirement insisted upon as a matter of public policy. It is a special qualification the landlord should have to avoid the bar against suits in rent and ejectment imposed by section 22 of the Rent Act. It is a necessary ingredient of his cause of action. Any landlord who sues under the provisions of section 22 (1) (*bb*) would not have a cause of action if he is the owner of more than one residential premises. Hence there should be a specific averment in the pleadings on the matter . . . . . .Under section 40(*d*) of the Civil Procedure Code the plaintiff must plead all the circumstances which constitute his cause of action, that is, the media on which relief is claimed. Under section 46(2) (i) the plaint must show that the cause of action is not barred by any positive rule of law. The requirement that the landlord should not be the owner of more than one residential premises is a rule of law. It is a bar to the action if the landlord is owner of more than one premises. If it is not pleaded the Plaint should be rejected in terms of section 46 (2) (i) of the Civil Procedure Code. Even though the plaint was originally accepted it is open to the Court when its attention is drawn to the omission by the opposing side to reject the plaint"

The judgment went on thereafter to allow the application for revision and dismiss the plaintiff's action.

In the appeal from the above judgment of Soza, J. to the Supreme Court (*vide* SC Appeal No. 39/80, SC minutes of 6.2.81) Ismail, J. stated as follows :–

"It will be noted that under (1A) there had to be two essential prerequisites before institution of any action or proceedings for ejectment of a tenant. These are, firstly, that the landlord will not be entitled to institute any action or proceedings for ejectment of a tenant if he is the owner of more than one residential premises and secondly, the said landlord had caused notice of such action or proceeding to be served on the Commissioner of National Housing. The plaintiff had complied with the latter of these requirements for he states in paragraph (7) of the plaint that he has sent a copy of the notice to quit to the Commissioner of National Housing. But there is no averment at all in the plaint that he is not the owner of more than one residential premises or that he is the owner of only one residential house . . . . . It appears to me that this question of owning only one residential premises is fundamental to the invoking of the provisions of Law No. 10 of 1977 and is a matter that should have been pleaded in the plaint in order to enable the plaintiff to invoke provisions of this Act. . . . . To invoke the provisions of Law 10 of 1977 it is an essential requisite that the person should be possessed of only one residential premises, and it appears to me that if this is clearly pleaded only, would the Court have jurisdiction to entertain and proceed with the case instituted under the provisions of this Law. Therefore it appears to me that this objection cannot be dismissed by purely contending that it is only a matter of evidence when *ex facie* it is a fundamental requirement under this Law".

The judgment went on to set aside the judgment of the Court of Appeal and remit the case for further trial on four additional issues relating to the plaintiff's ownership of more than one residential premises and in the event of this issue being answered in the affirmative whether the plaintiff could maintain the issue in terms of the relevant provisions of the Rent Act and the amending law. The other two issues similarly dealt with the date of creation of the contract of tenancy.

From these paragraphs I have quoted from the above two judgments, it is clear that the plaintiff is obliged to plead the prerequisites for him to institute and maintain this action for ejectment.

Learned Counsel for the plaintiff has submitted that as regards an averment that a copy of the notice to quit has been sent to the Commissioner of National Housing is concerned, the Rent Act does not require this fact to be pleaded as for example in the case of section 461 of the Civil Procedure Code, where it is stipulated that one month's notice has to be given before an action is instituted against the Attorney-General and the plaint in such action must contain a statement of the giving of such notice.

Section 461 of the Civil Procedure Code states :

"No action shall be instituted against the Attorney-General as representing the Crown . . . . . until the expiration of one month next after notice in writing has been delivered to such Attorney-General . . . . . ;and the plaint in such action must contain a statement that such notice has been delivered or left".

Section 461 (A) introduced by Law No. 20 of 1977 permits the Court to stay further proceedings of the action for a period of one month . . . . . where no notice as required by section 461 has been given prior to the institution of the action.

Sub-section 2 states that where after giving of such notice as required by section 461, the plaint fails to aver the fact of such notice having been given, the Court shall permit an amendment of the plaint averring the giving of such notice.

Sub-section 3 states that no such action as is referred to in section 461 shall be dismissed only for the reason that no notice prior to the institution of action had been given as required by the said section, or that a statement that such notice of action has been duly delivered or left has not been averred in the plaint.

In view of all these provisions of section 461 and 461A one cannot draw an analogy between the requirements of section 461 and the provisions of section 22(1A) of the Rent Act.

hold that as stated in the judgments that I have referred to earlier, it is an essential requirement that the prerequisites that would entitle a plaintiff to institute an action in respect of the ejectment of a tenant falling within the ambit of section 22 (1) (*bb*) must be pleaded in the plaint.

A perusal of the plaint shows that the plaintiff has in para 3 pleaded that the premises in suit are the only house available to the plaintiff as a residence, in other words that he is the owner of only one residential house. In para 4 the plaintiff has pleaded that the plaintiffs require the said house for their personal residence *i.e* for their own use and occupation. What the plaintiff has failed to plead is that a copy of the notice of the action or proceeding has been given to the Commissioner of National Housing in terms of section 22 (1A). This is an essential requirement as by sub-section (1C) the Court is precluded from issuing a writ of execution until the Commissioner of Housing has notified the Court that he is able to provide alternate accommodation for such tenant. In the absence of such an averment that such notice has been given to the Commissioner of National Housing the plaint is prima facie bad and could have been rejected by Court.

The question that comes up for decision now is whether the settlement reached between the parties obviates this requirement and if so has it to be construed that the defendant by his acquiescence has forfeited the protection or advantage conferred on him by law.

Sub-section (1A) states that the landlord of premises referred to in paragraph (*bb*) of sub-section 1 shall not be entitled to institute any action or proceeding for the ejectment of a tenant . . . . . unless such landlord has caused notice of such action to be served on the Commissioner of National Housing. The defendant has raised this defence in paragraph 8 of his plaint.

I have already held that the giving of such notice and averring that fact in the plaint are mandatory.

Learned Counsel relies on the following authorities to buttress his submission that the settlement arrived at does not prevent him from agitating thereafter non-compliance with the mandatory provisions of the law.

In *Idroos Lebbe v. Tamby Maricar* (3) it was held that where the Court has no jurisdiction at all, consent of parties cannot confer such jurisdiction.

In *Lorensz v. S. L. M. Abdul Cader* (4) it was held that the effect of sub-section 3 of section 13 of the Rent Restriction (Amendment) Act. No. 10 of 1961, is that where an action of the kind referred to in this sub-section is pending on 6.3.61, the Court would have no jurisdiction to enter a decree for ejectment. This want of jurisdiction cannot be supplied even by the consent of parties.

In *Dheerananda Thero v. Ratnasara Thero* (5) it was held that want of jurisdiction in a Court amounting to an illegality and not merely to a procedural irregularity cannot be cured by consent of parties. T. S. Fernando, J. in the course of his judgment at page 12 states :

"Counsel for the plaintiff sought to maintain the judgment appealed from on the ground that the appellant having expressly consented in the trial Court to the substitution of himself as defendant is now estopped or precluded from asserting a want of jurisdiction in the Court to continue with the action. The point whether the appellant is estopped from questioning the maintainability of the action appears to me to depend on the further question whether the substitution and the proceedings subsequent thereto amounted to an illegality or only a mere irregularity or whether there was only a defect of contingent jurisdiction which was cured by the consent given by the appellants."

At page 14 T. S. Fernando, J. goes on to say–

"Where it is shown that the proceedings are illegal in the sense that the Court had no jurisdiction to proceed to make an order, there is, in my opinion no room for argument that it is too late at the stage of appeal to object to the proceedings taken and the order of Court consequent upon these proceedings"

Learned Counsel for the plaintiffs has in his submission quoted a passage from Spencer Bower and Turner–Estoppel by Representation (2nd Edition–1966) at page 136. This passage states that "not even the plainest and most express contract or

consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully experienced by any judicial tribunal ; it is equally plain that the same results cannot be achieved by contract or inaction or acquiescence by the parties . . . . . On the other hand where nothing more is involved then a mere irregularity of procedure (*e.g.*) non-compliance with statutory conditions precedent to the validity of a step in the litigation of such a character that, if one of the parties be allowed to waive the defect, or by contract or inaction to be estopped from setting it up no new jurisdiction is thereby impliedly created and no existing jurisdiction impliedly extended beyond its existing boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail".

In my view the failure to give notice to the Commissioner of National Housing and plead that fact in the plaint is not a mere irregularity. Sub-section (1C) prevents a Court from issuing a writ of execution, on a decree entered unless the Commissioner of National Housing informs Court that alternate accommodation is available to the tenant. This is a mandatory requirement of the law The parties cannot by consent give the Court jurisdiction to issue such a writ in cases coming within section 22 (1) (*bb*) if the Commissioner's communication to Court is absent and it will be absent unless notice of action or proceedings has been given to him by the plaintiff as required by sub-section (1A). In the circumstances I do not think this settlement entered into could be allowed to stand. I accordingly allow this application, set aside the judgment of consent entered on 15.2.83, and remit the case back for trial de novo. I make order that all costs in this action be costs in the cause.

MOONEMALLE, J. – I agree.

Judgment set aside and case sent back for trial de novo.