

DONDENU
v
EARNEST PERERA

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
BALAPATABENDI, J.
C.A NO. 956/92 (F)
D.C. NEGOMBO 1344/RE
MARCH 8,15 AND 18, 2002

Rent Act, No. 7 of 1972 – Tenant convicted of using premises for illegal purpose – Condonation – Waiver – Will mere delay amount to waiver?

Action was instituted to evict the defendant-respondent from the premises in question on the ground that he has been convicted of using the premises for an illegal purpose.

The defendant-respondent contended that there was condonation of the ground for ejection based on the illegal conviction.

The trial judge dismissed the action.

Held:

- (i) The defendant-respondent was convicted on his own plea for sale of beer and exhibition of beer for sale on 28.1.1980. The plaintiff-appellant having known this fact renewed the lease for another year from 1.6.1980 to 1.7.1981. Thereafter it was extended upto 2.6.1983. Notice to quit was sent on 25.2.1985.
- (ii) The conduct of the plaintiff-appellant amounts to a waiver of his statutory rights to forfeit the tenancy.
- (iii) Waiver is the voluntary abandonment with full knowledge of the relevant facts of a right or benefit. Condonation is a variant of the term waiver and amounts to complete forgiveness of a wrong of which all the material facts are known to the innocent party on condition that the wrong will not be continued.
- (iv) Therefore the failure to forfeit the tenancy is not mere delay, but amounted to a conscious and deliberate act on the part of the plaintiff-appellant to renew the lease agreement in spite of the conviction for using the premises for an illegal purpose.

APPEAL from the judgment of the District Court of Negombo.

Case referred to:

1. *Fernando v. Samaraweera* 52 NLR 278.

M.C. Jayaratne with *T.C. Weerasinghe* for substituted plaintiff-appellant.

Anil Silva for defendant-respondent

Cur.adv.vult.

April 5, 2002

WEERASURIYA, J. (P/CA))

The deceased plaintiff instituted this action against the defendant-respondent seeking his ejection from the premises more fully described in the schedule to the plaint on the ground that he has been convicted of using the premises for an illegal purpose. The defendant-respondent whilst denying averments in the plaint, prayed for dismissal of the action. This case proceeded to trial on 20 issues and the learned District Judge by his judgment dated 19.02.1992, dismissed the action. The present appeal is against the aforesaid judgment. 01

At the hearing of this appeal, learned Counsel for the plaintiff-appellant contended that the learned District Judge has misdirected himself in holding - 10

- (a) that the notice to quit was bad; and
- (b) that the plaintiff-appellant had waived his right to forfeit the tenancy arising from the conviction of the defendant-respondent for using the premises for an illegal purpose.

The plaintiff-appellant based his case for ejection of the defendant-respondent on the ground that he was convicted for using the premises for an illegal purpose. He relied on three convictions of the defendant-respondent namely:- 20

- (1) conviction for using the premises for sale of liquor;
- (2) conviction for using the premises for exhibiting liquor for sale; and
- (3) conviction for causing hurt to the plaintiff-appellant.

The defendant-respondent on the other hand took up the following defences:

- (a) that notice to quit was bad; and
- (b) that there was condonation of the ground for ejectment based on the alleged conviction for using the premises for an illegal purpose. 30

The finding of the District Judge that notice was invalid was solely on the ground that tenancy has commenced on 2nd June and the notice sought to terminate the tenancy from 31st May.

The defendant-respondent produced marked D1 - D7 the lease agreements for the years 1977-1983. The agreement entered into on 02.06.1977 (D1) was valid for a period of one year from 01.01.1977 to 01.06.1978. However, the agreement entered into on 02.06.1978 (D2), stipulated that the said agreement would be valid from 02.06.1978 - 02.06.1979. Nevertheless, in the agreement entered into on 02.06.1980 (D4), the effective period had been stated as from 01.06.1980 - 01.06.1981. This basis was maintained in the subsequent agreements. Therefore, it is to be noted that though in the 1977 agreement, the period of validity of the lease agreement was for one year, namely from 02.06.1977-01.06.1978, in the subsequent agreements the effective period was from 1st of June to 1st of June the following year. 40

The notice to quit dated 25.02.1985 (P1), required the defendant-respondent to leave the premises on or before 31.05.1985. Therefore, it would appear that plaintiff-appellant had intended to give 3 months notice requiring the defendant-respondent to leave the premises. 50

Learned counsel for the defendant-respondent contended that this notice is defective for the reason that it does not contain a calendar months' notice to terminate the tenancy.

It is to be emphasized that the ground for ejectment is on the basis that the defendant-respondent had been convicted for using the premises for an illegal purpose. Therefore, one months' notice is sufficient to maintain an action on that ground. Since notice P3 was intended to give 3 months' notice there is compliance with the 60

requirement to give one calendar months' notice to terminate the tenancy.

The plaintiff-appellant contended that learned District Judge has misdirected himself on the question of condonation of the conduct of the defendant-respondent for having used the premises for an illegal purpose. He has taken the view that the conviction for using the premises for sale of liquor and exhibiting liquor for sale took place on 28.01.1980 and by renewing the contract, to be effective till 1983, amounted to a waiver of his right to forfeit the tenancy.

70

It is true that the defendant-respondent was convicted on his own plea for sale of beer and exhibition of beer for sale on 28.01.1980. The plaintiff-appellant having known this fact, renewed the lease for another year from 01.06.1980 to 01.07.1981 (D4). Thereafter, by lease agreements D5, D6 and D7 he renewed the lease to be valid till 02.06.1983. The question in issue is whether this conduct of the plaintiff-appellant amounts to a waiver of his statutory right to forfeit the tenancy.

Waiver is the voluntary abandonment with full knowledge of the relevant facts of a right or benefit. Condonation is a variant of the term waiver and amounts to complete forgiveness of a wrong of which all the material facts are known to the innocent party on condition that the wrong will not be continued. It is also necessary to state that mere delay will not amount to waiver. It was held in *Fernando v Samaraweera* ⁽¹⁾ that -

80

“An intention to waive a right or benefit to which a person is entitled is never presumed. The presumption is against waiver, for though everyone is under our law at liberty to renounce any benefit to which he is entitled the intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct.”

90

Therefore, the onus of proof of waiver is on the person who asserts it.

In the instant case, having known that the defendant-respondent was convicted for using the premises for an illegal purpose on 28.01.1980, the plaintiff-appellant proceeded to renew the agree-

ment on 01.06.1980 and thereafter for the years 1981, 1982 and 1983. In fact, notice to quit has been sent on 25.02.1985. Therefore, the failure to forfeit the tenancy is not mere delay, but amounted to a conscious and deliberate act on the part of the plaintiff-appellant to renew the lease agreement in spite of the conviction for using the premises for an illegal purpose. 100

Megarry on *The Rent Act* (Vol.1 Text 11th Edition – page 396) recognizes the concept of waiver as applying to the grounds of ejection in the following terms.

“In general these grounds for possession appear to be subject to the common law doctrine relating to the waiver of non-continuing breaches of covenant if with knowledge of the breach the landlord accepts without qualification rent accrued due after the breach.” 110

In Cooper's *South African Law of Landlord and Tenant* (1973 Edition – page 153) waiver is described as follows:-

“A lessor waives his right to cancel if he manifests his intention to do so either expressly or by conduct.”

Therefore, in the instant case, there is sufficient material to come to a conclusion that the plaintiff-appellant has waived his statutory right to forfeit the tenancy arising from the conviction of the defendant-respondent for using the premises for an illegal purpose.

In the circumstances, I see no reason to interfere with the finding of the District Judge. Therefore, I dismiss this appeal. However, I make no order as to costs. 120

BALAPATABENDI, J.

- I agree.

Appeal dismissed