

AKBERALLY

v.

ANNA FERNANDO

COURT OF APPEAL.

G. P. S. DE SILVA, J. (PRESIDENT) AND GOONEWARDENA, J.

C. A. 474/79 (F).

D. C. COLOMBO D/2796/RE.

MARCH 4, 1986.

Landlord and tenant—Notice to quit—Return of notices undelivered—Service on agent.

The defendant was admittedly the tenant of the premises in suit. Attempts to service notice to quit on the defendant at his residence, 97/4, Brass Founder Street and at the premises in suit (Nos. 87/2, 87/4 and 87/5, Brass Founder Street) failed.

Held—

The persons in occupation of premises Nos. 87/2, 87/4 and 87/5 were agents of the defendant and service on them is sufficient service on the defendant. In all the circumstances, it is reasonable for the court to presume that the agent of the defendant has deliberately failed or refused to accept the notice and this would amount to a failure or refusal on the part of the defendant to accept notice. If the tenant does not occupy the premises, a person whom the tenant leaves in physical possession to manage and control the premises may be deemed his agent for receiving service of a notice to quit.

APPEAL from the District Court of Colombo.

Cases referred to:

- (1) *Harrowby v. Snelson and Another* — [1951] 1 All E.R. 140.
- (2) *Ranasinghe v. Premadharm* — [1985] 1 S.L.R. 63.

H. L. de Silva, P.C. with *Shanthi Perera* for plaintiff—appellant.*P. A. D. Samarasekera, P.C.* with *K. Abeyapala* for the substituted defendant—respondent.*Cur adv. vult.*

May 9, 1986.

G. P. S. DE SILVA, J. (President C/A)

The plaintiff as landlord instituted this action in June 1977 for the ejection of his tenant, the defendant, from premises Nos. 87/1 to 87/6, Brass Founder Street, Colombo. The ground of ejection pleaded in the plaint and relied on at the trial was arrears of rent from 01.01.1974.

In his evidence the defendant admitted that he was the tenant of the premises in suit which consisted of rooms under one roof. What is more, he admitted that he failed to pay rent since January 1974. He, however, took up the position that he did not receive any notice of termination of the tenancy. After trial, the District Judge while holding that the plaintiff is in arrears of rent and is entitled to a money decree for the arrears of rent, refused to order ejection on the ground that the contract of tenancy between the plaintiff and the defendant had not been terminated by a valid notice to quit.

The evidence disclosed that the plaintiff's Attorney-at-law sent by post to the defendant the following notices to quit:

- (i) P4 dated 26th May 1976 addressed to the premises in suit;
- (ii) P5 dated 4th June 1976 addressed to 94/4, Brass Founder Street;
- (iii) P6 dated 12th July 1976 addressed to 94/4, Brass Founder Street;
- (iv) P7 dated 12th July 1976 addressed to 94/4, Brass Founder Street;
- (v) P8 dated 14th September 1976 addressed to 94/4, Brass Founder Street;
- (vi) P9 dated 14th September 1976 addressed to the premises in suit; and
- (vii) P10 dated 20th January 1977 addressed to 94/4, Brass Founder Street.

It is common ground that all the notices to quit were returned undelivered. The plaintiff raised the issue:

"Did the defendant deliberately refuse or neglect to accept the notice to quit?"

The answer to this issue was "Not proved". The District Judge held that—

"..... there is no evidence that the notice to quit was returned undelivered for the reason that the addressee refused to accept the said letters. The only evidence is that the notice has been returned undelivered".

Mr. H. L. de Silva for the plaintiff-appellant submitted that on a consideration of the totality of the facts and circumstances of this case, there has been a sufficient and valid service of the notice to quit on the defendant. Mr. Samarasekera, on behalf of the substituted defendant-respondent, contended that this was a finding on a pure question of fact and as such should not be interfered with.

It is to be noted that P4 and P9 were addressed to the premises in suit. The defendant admitted that two of his daughters who were married were residing at Nos. 87/2, 87/4 and 87/5, Brass Founder Street. He also admitted that since 1974 his daughters were not paying him rent. It is not in dispute that the defendant was the tenant of these premises which were residential premises. He, however, stated that he resided at No. 97/4, Brass Founder Street, although the plaintiff's position was that the defendant had informed him that he resided at 94/4, Brass Founder Street.

Woodfall on Landlord and Tenant (Vol. I, 26th Ed.) at page 989 states:

"If the person in whom the possession is legally vested as tenant does not personally occupy the premises, it seems that a person whom the tenant leaves in physical possession to manage and control the premises may be deemed his agent for receiving service of a notice to quit".

It seems to me that this statement is sound in principle. It is supported by dicta in *Harrowby v. Snelson and Another* (1) and is applicable to the instant case.

I accordingly hold that the persons in occupation of premises 87/2, 87/4 and 87/5 were the agents of the defendant and service on them is sufficient service on the defendant. In all the circumstances, it is reasonable for the court to presume that the agent of the defendant

has deliberately failed or refused to accept the notice and this would amount to a failure or refusal on the part of the defendant to accept the notice. Therefore, in my view, the District Judge was in error when he held that the contract of tenancy has not been terminated.

This would dispose of the appeal, but Mr. de Silva relying on the authority in *Ranasinghe v. Premadharma* (2), next submitted that the defendant having disclaimed tenancy is, in any event, not entitled to a notice of termination of the tenancy. I do not agree. The plaintiff averred in his plaint that "prior to the dates material to this action the plaintiff let to the defendant and the defendant took on rent on one contract of tenancy the premises bearing assessment Nos. 87/1, 87/2, 87/3, 87/4, 87/5 and 87/6, Brass Founder Street, Colombo 13". It is relevant to note that the defendant in his answer admitted these averments; but he took up the position that the action cannot be maintained because the contract of tenancy has not been terminated. In his evidence too the defendant admitted tenancy. It is true, as pointed out by Mr. de Silva, the defendant also pleaded that the plaintiff cannot maintain the action because by operation of law the premises in suit have vested in the Commissioner of National Housing. In my view, this averment by itself does not constitute a denial of the contract of tenancy. Therefore the case of *Ranasinghe v. Premadharma* (*supra*) has no application.

For these reasons, we set aside that part of the judgment of the District Judge refusing to order ejectment of the defendant. The defendant died while the appeal was pending. We direct that decree be entered for the ejectment of the substituted defendant-respondent, her servants, agents and all persons holding under her from the premises in suit. The plaintiff will be entitled to costs of appeal fixed at Rs. 315.

GOONEWARDENA, J. – I agree.

Appeal allowed.