

MAMUJEE
v.
MALA

COURT OF APPEAL.
DR. RANARAJA, J.
CA.397/92(F).
D. C. MT. LAVINIA.
MAY 15, 1997.

Rent Act No. 7 of 1972 – Section 48 of Act – Business premises or residential premises – Tests applicable – Burden of proof.

The plaintiff-appellant instituted action for ejection of the defendant-respondent from the premises in question. The defendant pleaded that the premises are governed by the provisions of the Rent Act. The District Court dismissed the plaintiff's action.

Held:

(1) As the premises is described as "Boutique and residence," *prima facie* the premises could be either a business or residential premises.

(2) The test for deciding whether premises are residential or business, within the meaning of the Rent Act is the user to which the premises are wholly or mainly put by the occupants of the premises for the time being.

(3) The plaintiff was under a duty to produce further evidence that the premises were not used wholly or mainly for residence but for conducting business by the defendant. As an issue whether the premises were excepted was framed by the plaintiff, the burden lay on him to prove the premises were "excepted."

APPEAL from judgment of District Court of Colombo.

Cases referred to:

1. *Aloysius v. Pillaipody* – [1982] 2 SLR 762.
2. *Jinasena v. The Commercial Investment & Finance Co. Ltd.* 1985 1 SLR 238.
3. *Atapattu v. Wickremasinghe* – 1986 2 CALR 289.
4. *Nalini v. Gunawardena* – Sri Skantha LR Vol 2 143.
5. *Wimalaratne v. Linganathan* 1984 1 SLR 247.
6. *Gunatilake v. Fernando* – 56 NLR 105.
7. *Hussain v. Ratnayake* – 69 NLR 421.

Ikram Mohamed with C. A. M. Faiz for Appellant.
Gamini Jayasinghe for Respondent.

Cur. adv. vult.

May 15, 1997.

DR. RANARAJA, J.

The plaintiff instituted action for the ejectment of the defendant from premises No. 164, Dam Street, Colombo, and recovery of damages at the rate of Rs. 3000/- per month from 01.03.88 till vacant possession thereof is restored to him, on the basis that the contract of tenancy between them was terminated by notice to quit dated 22.01.88. The defendant filed answer pleading *inter alia*, that the premises were governed by the provisions of the Rent Act. The learned District Judge after trial on five issues dismissed the plaintiff's action. This appeal is from that Judgment.

The main ground of appeal was that the learned Judge was in error in placing the burden of proving the premises were "Business" premises having an annual value of over Rs. 6000/- and therefore "excepted" from the Rent Act, on the plaintiff.

The plaintiff produced a certified copy of the extract from the assessment register for the year 1986 (P13), which describes the premises as a "Boutique" having an annual value of Rs. 24,000/-. The defendant has also produced a certified copy of the extract from the relevant register (D14), which describes the premises as a "Boutique and residence". However the annual value has been altered from Rs. 24,000/- to Rs. 19,200/- operative from 28.01.87. This was consequential upon an appeal being preferred by the defendant under the provisions of the Municipal Councils Ordinance. That remained the annual value when the action was instituted in 1988 (D14).

Section 48 of the Rent Act defines "Business premises" as any premises other than residential premises". "Residential premises" means any premises for the time being occupied wholly or mainly for

the purpose of residence". The description of the property entered in the register affords *prima facie* evidence as to whether the property has been assessed as residential premises or as business premises. See: *Aloysius v. Pillaipody*⁽¹⁾, *Jinasena v. The Commercial Investment and Finance Co Ltd.*⁽²⁾ However in the instant case the premises having been described in D14 as "Boutique and residence" *prima facie* the premises could be either a business or residential premises. Sharvananda C.J. in *Atapattu v. Wickremasinghe*⁽³⁾ adverted to the confusion caused by the use of the words "Business Premises" and "residential premises" in the Rent Act when there is no requirement by law for premises to be assessed as such.

A similar situation arose in *Nalini v. Gunawardena*⁽⁴⁾. Where the premises were described as an "Ayurvedic Dispensary and house" Samarakoon C.J. held that such a description is equivocal. Although there was evidence to establish that the premises were used both as a residence and a dispensary, it was insufficient to base a finding that one was the adjunct of the other. In that case the defendant who claimed tenancy rights and was personally aware of the manner of occupation and was in a position to clinch the issue failed to give evidence. As a result, it was held that she had failed to discharge the burden of proving the premises were mainly occupied for the purpose of residence.

Alwis J. in *Wimalaratne v. Linganathan*⁽⁵⁾ looked at the question from another angle when he stated "Business premises are not specifically defined. But "Business premises" means any premises that are not "residential premises". So that all premises that are not residential premises are business premises. Having considered the decisions in *Gunatilleka v. Fernando*⁽⁶⁾, *Hussain v. Ratnayake*⁽⁷⁾, *Alwis J.* held that the test for deciding whether premises are residential premises or business premises within the meaning of the Rent Act is the user to which the premises are wholly or mainly put by the occupiers of those premises for the time being.

De Silva, J. in *Jinasena (supra)* following *Aloysius*, *Gunatilleke* and *Hussein (supra)* set out the test as follows: "The test is whether in fact persons reside in the premises or in the majority of the rooms which it comprises and if so, they are residential premises".

Extracts of the assessment registers for the years 1951 to 1985 describes the premises as a House, first with an annual value of Rs. 500/- increasing to Rs. 925/-. The defendant's husband has given evidence that the defendant and members of her family reside in a major portion of the premises using a small portion for a business, selling soft drinks, bananas, soap and toothpaste, which evidence has been accepted by the plaintiff.

Issue 1, as to whether the premises were 'excepted' was framed by the plaintiff. The burden lay on him to prove the premises were "excepted". See: *Atapattu (supra)* where the plaintiff by evidence established that the premises in suit was used to conduct a private tutoring and not occupied for the purpose of residence. In the instant case the extracts from the assessment register D14 are equivocal. They do not provide *prima facie* evidence of the premises being "business premises". The plaintiff therefore was under a duty to produce further evidence that the premises were not used wholly or mainly for residence but for conducting business by the defendant. The learned District Judge has held that he has failed to discharge that burden. I see no error in that decision. The judgment is affirmed and the appeal is dismissed without costs.