# JINADASA

# V.

# PIERIS

COURT OF APPEAL
RANASINGHE, J AND RODRIGO, J.
C A 62 78 (M. C CIVIL.
C.M.C COLOMBO 1627 RE
NOVEMBER 4 AND 6, 1981.

*Rent and ejectment - non occupying tenant - s.28(1) of the Rent Act of 1972*

Under s.28(1) of the Rent Act a tenant can be absent from the premises assigned to him for six months with or without cause but if he is away for a longer period he must give an explanation which will amount to reasonable cause.

Where without the landlord's consent a tenant keeps his dependents in the premises for longer than six months without any intention to occupy them himself he is liable to be treated as a non-occupying tenant and evicted.

**Cases referred to:**

*(1) Fonseka v. Gulamhussein [1981] (1) Sri LR 77.*
*(2) Brown v. Brash [1948] 1 All ER 922.*
*(3) Sabapathy v. Kularatne (1957) 52 NLR 425.*
*(4) Suriya v. Board of Trustees of the Maradana Mosque (1954) 55 NLR 309.*
*(5) Amarasekera v. Gunapala (1970) 73 NLR 469.*
*(6) Wijeratne v. Dschou (1974) 77 NLR 157.*
*(7) Cave v Flick [1954] 2 All ER 441.*
*(8) Dando v. Hitchcock [1954] 2 All ER 535.*
*(9) Skinner v. Geary [1931] 2 KB 346.*

R. B. Weerakoon, for defendant-appellant.
K. Thevarajah for plaintiff-respondent.

*Cur adv vult*

RODRIGO, J.

The plaintiff-respondent (landlord) has obtained an order for the ejectment of the defendant-appellant (tenant) on the ground of the tenant having ceased to occupy the premises without reasonable cause for a period of not less than six (6) months within the meaning of s.28(1) of the Rent Act of 1972. The landlord pleaded and relied on two other grounds of ejectment, namely, that the rent had been in arrears for three months or more after it became due and sub-letting of the premises without the prior consent in writing of the landlord. The trial Judge had found in favour of the tenant on each of these two pleas. The matter argued on this

appeal is therefore the one relating to the issue of non-occupation without reasonable cause by the tenant for a period of six months or more.

The premises is below Rs. 100/- in respect of the standard rent per mensem. The tenant had rented the premises in 1962. He appears to have moved into the prernises with his wife and some in-laws. In 1969 he had physically left the premises with his wife and children and taken residence at his father's house. He, however, left behind his in laws and more particularly an unmarried elder sister of his wife aged 40 years. He had also left behind some articles of furniture not required by him at his new residence.

The tenant at the time of his residence in the premises in suit owned four or five hiring cars. He had disposed of them one by one until he was left with none by 1969. When he had the cars he had plied them for hire and that was his substantial source of income. Having taken residence at his father's house, he had done a business in the manufacture and sale of coir. This business had taken him to Colombo once a month. Each time he came to Colombo he has spent two or three days together and occasionally a week at the premises in suit where his in-laws were. The premises were situated in Colombo while his father's house was elsewhere.

The unmarried sister-in-law was dependent on him for her living. She had now and then relieved his burden by engaging herself as a hospital attendant. Some of the other in-laws had found casual employment. But generally all of them looked to the tenant for support though all the male dependents were grown-ups.

The tenant testified that neither he nor his wife nor any other member of his family resided in these premises after he left it in 1969. To a pointed question by Court as to why he was keeping these premises and paying rent his answer was that the occupants of the house were all dependent on him.

The sister-in-law and a nephew of the tenant also gave evidence supporting the version of the tenant.

The house-holder's lists for the period commencing November 13, 1971 to October 9, 1973 in respect of these premises had been produced by the landlord. The action was instituted on November 25, 1974. There were two lists for this period. In the list for 1971/73 the tenant's name is the 8th in the list. The space for chief house-holder has been left blank. No rice ration book has been entered in the list against the name of the tenant. No member of his family had appeared in the list. In the second list

for 1973 onwards the name of the tenant does not appear at all. Instead the chief house holder is entered as the sister-in-law.

The factual situation then is that a dependent of the tenant who was a member of the tenant's household in the premises in suit has been left behind in these premises together with some of her relatives who are partially dependent on the tenant when the tenant left it with his family to reside elsewhere at his father's house. The tenant, however, continued to maintain and support his dependents and particularly his sister-in-law in the premises in suit.

This brings me to a consideration of English decisions on "non-occupying tenant" and Sri Lankan decisions that follow these English decisions.

Wanasundera, J has expressed the view that English decisions and doctrines on these matters must be used carefully and with discrimination. See *Fonseka v. Gulamhussein.*[1]

The concept of a "non-occupying tenant" as explained in *Brown v. Brash*[2] has dominated judgments in the few local cases in which this point arose consideration. In that case the concept was expressed as follows:--

> "The absence of the tenant from the premises may be averted if he coupled and clothed his inward intention to use it as his home with some formal, outward and visual sign such as installing a care-taker or representative, be it a relation or not, with the status of a licencee and with the function of preserving these premises for his ultimate home-coming . . . . . Apart from authority, in principle, possession in fact (for it is possession in fact and not with possession in law we are here concerned) requires not merely an 'animus possidendi' but a 'corpus possessionis' viz: some visible state of affairs in which the 'animus possidendi' finds expression."

*Sabapathy v. Kularatne*[3] was concerned with the reasonable requirement by the plaintiff of his premises for his own use and occupation. The defendant-tenant was not in occupation of the premises but a brother of his was doing business in the premises. Gratiaen, J was careful to observe that the tenant did not require the premises for any member of his family or a dependent of his

1. 1981 (1) Sri L. R. 77.
2. (1948) 1 A.E.R. 922.
3. 52 N.L.R. 425

but for his brother who was neither a member of his family nor a dependent. Gratiaen, J in the circumstances applied *Brown v. Brash* (supra) and held that the tenant forfeited the protection of the Rent Act.

But in *Suriya v. Board of Trustees of the Maradana Mosque*[4] Gratiaen, J held that the principle of *Brown v. Brash* correctly understood did not penalise a tenant who had lawfully sub- . the premises.

In *Amarasekera v. Gunapala*[5] the tenant who had taken the premises for his own residence resided there for three or four years and thereafter, having got married, resided elsewhere with his wife and family. The premises were used for occupation by his business employee and also for a store and a office. Alles, J applied the concept of non occupying tenant stated in *Brown v. Brash* and held with the plaintiff landlord. This was the first time in our Courts that a judgment was entered against a tenant in ejectment for non occupation by him personally. This was in 1970.

But in 1974 *Wijeratne v. Dschou*[6] came up for consideration and Sharvananda, J delivered the judgment. In this case, the "Shanghai Restaurant" in Bambalapitiya had been closed down by the tenant and following a dog in the manger attitude the tenant continued to keep the premises closed and unoccupied by anybody for a number of years resulting in considerable damage to the premises but Sharvananda, J held that non occupation of the premises by the tenant was not a ground of ejectment under the Rent Act of 1948 as amended. He did not apply the concept of *Brown v. Brash.*

We have now the recent case of *Fonseka v. Gulamhussein* (supra) in which Weeraratne, J has written the judgment. In this case the ejectment of the tenant was sought in terms of s.28(1) of the Rent Act of 1972 on the ground that the tenant who was the Managing Director of Savoy Theatres Ltd., has put in as the occupants of the premises rented the employees of the Cinema and the tenant is residing elsewhere. The view was taken by Weeraratne, J that the premises are in the occupation of strangers, the Cinema being a separate legal entity. The premises had been rented by the tenant personally for occupation as a residence by him and his family. In the result, the tenant was held liable to be ejected on the doctrine of *Brown v. Brash.* In *Cave v. Flick*[7] the

4. 55 N.L.R. 309.
5. 73 N.L.R. 469.
6. 77 N.L.R. 157.
7. 1954 (2) A.E.R. 441.

premises were occupied by the tenant's parents and sister. It was held there the tenant forfeited the protection of the Act. In *Dando v. Hitchcock*[8] Lord Coddard observed that the tenant will not be able to avert ejectment if the premises are being used for the convenience of the tenant's Manager or partner and not for his residence.

So that where a house is kept closed in circumstances from which an inference can be drawn that the tenant does not intend to occupy it any longer as in the "Shanghai Restaurant" case or where the house is being exclusively occupied by strangers as in *Fonseka v. Gulamhussein* or by business employees of the tenant as in *Amarasekera v. Gunapala,* the tenant cannot avert eviction. But it is urged that the tenant is protected where the house is exclusively occupied by a dependent of the tenant as in this case. This submission assumes that it has been established in this case that the sister-in-law of the tenant who continued in occupation was a dependent of the tenant when he was residing there and continued to be his dependent thereafter. The evidence on this question is meagre and desultory. It is not surprising. What the tenant had to satisfy the Court was that he had good reason not to be in occupation himself, beyond the specified period, and not that there was reasonable cause for his sister-in-law and her nephews to be there. Here, the tenant has moved with his family to his father's house. That is the reason why he is not in occupation of this house. He does not intend to return to the premises and make it his home again. He has ceased to be in occupation since 1969 and that is more than six months to the date of action.

The reasonable cause contemplated in the section is, among others, such as the house being under major repairs or the tenant has been on vacation or business which has taken him out of the area. The tenant is given a period of grace of six months. He can be absent with or without cause for this period. But, if he is away for a longer period he must give an explanation that is acceptable. This explanation must amount to reasonable cause within the meaning of s.28(1) of the Act. It is not possible or desirable to give an exhaustive definition of "reasonable cause." It is defined in the Act to "include a cause sanctioned by the Board." But the doctrine of "non-occupying tenant" as enunciated in *Brown v. Brash* and followed with reference to s. 28(1) of the Act in *Fonseka v. Gulamhussein* excludes occupation of the premises by relatives and strangers and business employees of the tenant as reasonable cause for non-occupation. That the tenant has found it more convenient to house his relatives or anybody else to whom he had

8. 1954 (2) A.E.R. 535.

obligations is not a reason or cause within the meaning of the provision to avert eviction. The provision, it is reasonable to assume, was intended by the legislature to provide for situations covered by the concept of "non-occupying tenant" that has received judicial consideration in Courts and for which no provision has been made earlier.

Section 28(1) is not directed at the relationship to the tenant of the occupants of the house that he is no longer occupying. The tenancy is personal. See *Skinner v. Geary*.[9] Therefore the tenant must occupy the house himself. He can, of course, temporarily keep anybody else in the house if he is not there but for the sole purpose and function of preserving it for his ultimate home-coming. That is the rationale of the judgments in cases cited above where the tenant has been held liable to be ejected.

The alleged dependents of the tenant in this case are not in occupation of the house temporarily to keep it for the tenant's ultimate home-coming. He could not presumably take his dependents with him to reside at his father's house. So, he had found it convenient to let them continue in the premises in suit. It is laudable that one should find accommodation for one's dependent relatives. But if the premises are going to be occupied by them exclusively without the tenant himself being in occupation the landlord should consent to it. Here the tenant rented the premises for his residence. He was there with his family initially. It is not open to him in view of the section under consideration to put anybody else in the premises permanently behind the landlord's back.

For these reasons the appeal, in our view, should be dismissed. The judgment of the Court of first instance is affirmed and the appeal is dismissed with costs.

RANASINGHE, J.

I agree.

*Appeal dismissed.*

9. (1931) 2 K.B. 546.