SIRISENA
v.
MUTUKUMARANA AND OTHERS

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
BALAPATABENDI, J.
CA NO. 850/94 (F)
DC HAMBANTOTA NO. 169/RE
NOVEMBER 12, 13 AND 15, 2001

Rent Act, No. 7 of 1972 – Subletting – Waiver – Acquiescence – Consent – Condonation – Applicability – When there is no prior written consent – Is the right to a decree for ejectment extinguished by condonation?

The plaintiff-respondent instituted action against the 1st defendant-respondent and 2nd defendant-appellant seeking their ejectment on the ground that the 1st defendant-respondent has sublet the premises to the 2nd defendant-appellant without prior written authority. The 1st defendant-respondent averred that he handed over the premises to the plaintiff-respondent, the 2nd defendant-appellant claimed that he was the tenant of the premises.

The District Court held with the plaintiff-respondent.

On appeal –

Held:

(1) The plaintiff-respondent on her own admission knew for certain in 1981, that premises had been sublet to the 2nd defendant-appellant, she made no protest of any kind and continued to accept rent from the 2nd defendant-appellant.

(2) It was open to the plaintiff-respondent to terminate the tenancy which was not availed of.

(3) Condonation or waiver would operate as a bar to the exercise of the landlords statutory rights to secure the ejectment of the tenant on the ground of subletting.

(4) There was privity of contract established between the plaintiff-respondent and the 2nd defendant-appellant.

(5) There is overwhelming evidence of waiver of the statutory right of the plaintiff-respondent to have the 1st defendant-respondent and 2nd defendant-appellant evicted.

APPEAL from the judgment of the District Court of Hambantota.

Cases referred to :

1. *Robert v. Rashad* – 55 NLR 517.
2. *Pigera v. Mackeen* – 59 NLR 21.
3. *Chettinad Corporation v. Gamage* – 62 NLR 86.
4. *Hyde v. Pimley* – 1952 2 All ER 102.
5. *Elphinstone v. The Monkland Iron and Cane Ltd.* – 1986 11 AC 332.
6. *Abdul Cader v. Menike* – 1983 BASL Journal Reports vol. I part I.
7. *Fernando v. Samaraweera* – 52 NLR 278.

Rohan Sahabandu with Ms. Sitari Jayasundera for 2nd defendant-appellant.

W. Dayaratne with *Ms. K. Kulatunga, Ms. Ganga Kumarasinghe* for the plaintiff-respondent.

Cur. adv. vult.

February 22, 2002

WEERASURIYA, J. (P/CA)

The plaintiff-respondent brought this action against the 1st defendant-respondent and 2nd defendant-appellant, seeking their ejectment from the premises morefully described in the schedule to the plaint on the ground that 1st defendant-respondent had sublet the premises to the 2nd defendant-appellant without prior written sanction. 1

The 1st defendant-respondent in his answer averred that he handed over the premises to the landlord and that from 09. 10. 1990, he had ceased to be in possession. The 2nd defendant-appellant in his

answer, claiming that he was the tenant of the premises from 1979 prayed for dismissal of the action.

This case proceeded to trial on 9 issues and the learned District Judge by his judgment dated 04. 10. 1994, entered judgment for the plaintiff-respondent. The present appeal is from the aforesaid judgment.

At the hearing of this appeal, learned Counsel appearing for the 2nd defendant-appellant submitted that learned District Judge has failed to consider the question whether the plaintiff-respondent's right to a decree for ejectment of the tenant and the subtenant on the ground of subletting of the premises is extinguished by condonation on the part of the plaintiff-respondent.

The parties had admitted the following matters at the commencement of the trial in the District Court.

(a) That the plaintiff-respondent's mother Samarawickrema Sumanawathie by deed of lease bearing No. 2209, dated 09. 09. 1974, had leased the premisies for a period of 15 years to the 1st defendant-respondent.

(b) That the said Samarawickrema Sumanawathie by deed of gift bearing No. 2034, dated 30. 05. 1980, gifted the aforesaid premises to the plaintiff-respondent and by operation of law she became the landlord of the premises.

(c) That the 1st defendant-respondent was the tenant of the plaintiff-respondent.

(d) That the 1st defendant-respondent abandoned the premises and that he had ceased to possess the said premises.

(e) That the notice of termination had been received.

In the light of the above admissions what was in issue was whether the 2nd defendant-appellant was in unlawful possession of these premises from 09. 09. 1989.

It is not in dispute that Samarawickrema Sumawathie, the mother of the plaintiff-respondent died on 06. 08. 1980, having given a lease of the premises for a period of 15 years to the 1st defendant-respondent, in terms of the lease bond No. 2209, dated 09. 09. 1974 (P1).

It is necessary to ascertain the 2nd defendant-appellant's date of entry into the premises as a subtenant under the 1st defendant-respondent.

The 2nd defendant-appellant in his testimony asserted that he came into the premises in 1974 and that the 1st defendant-respondent left his business in 1979 handing over all the utensils at the premises. The position of the 2nd defendant-appellant was that, from 1979 he carried on the business without the 1st defendant-respondent with the knowledge and acquiescence of Samarwickrema Sumanawathie.

Several rent receipts were produced by the 2nd defendant-appellant marked 2D2 – 2D11, covering the period from 1979 - 1989. The plaintiff-respondent conceded that 2nd defendant-appellant brought the rent money and that rent was accepted on behalf of the 1st defendant-respondent. It is to be noted that except in the rent receipt marked 2D4, no express reference has been made in other receipts that money was accepted from the 1st defendant-respondent. The other receipts indicate that money was being accepted as rent on account of the deed of lease given in favour of K. A. Danny (1st defendant-respondent). Therefore, it is to be seen that the assertion of the 2nd defendant-appellant that he paid rent money has been substantiated by documentary evidence as well as oral testimony of the plaintiff-respondent.

This plaintiff-respondent conceded that after the death of her mother in 1980, she met Danny, 1st defendant-respondent at Colombo and asked him to attorn to her and that she came to know that he had sublet the premises to 2nd defendant-appellant. She stated that she never consented to this arrangement and the 1st defendant-respondent has committed a wrong on her.

It was the position of the 2nd defendant-appellant that both Samarawickrema Sumanawathie (mother) and the plaintiff-respondent knew in 1978 that premises in suit had been sublet by the 1st defendant-respondent to him.

The plaintiff-respondent admitted that in 1981, after the death of her mother, she met the 1st defendant-respondent at Colombo to request him to attorn to her and that she came to know that the premises had been sublet to 2nd defendant-appellant. Taking into consideration the evidence of the plaintiff-respondent, it would be manifest that at least from 1981, she knew that the 1st defendant-respondent had sublet the premises to 2nd defendant-appellant.

The assertion that premises were governed by the provisions of the Rent Act has not been disputed by the plaintiff-respondent. The parties seem to have proceeded on the basis that premises in suit were governed by the provisions of the Rent Act.

However, the question to be examined is whether the plaintiff-respondent's right to a decree for ejectment of the 1st defendant-respondent and the 2nd defendant-appellant is extinguished by condonation on the part of the plaintiff-respondent.

In the case of *Robert v. Rashad*[1] where a tenant wrongfully sublet a portion of the premises without the landlord's prior written consent, it was held that –

"When the landlord becomes aware of the contravention, he must forthwith elect whether or not to treat the contract as terminated. If he elects to enforce this statutory remedy, the tenant's statutory protection under section 13 is automatically forfeited. But, if he does not so elect, the contravention is condoned, and the contractual tenancy continues."

This decision was followed in *Pigera v. Mackeen.*[2] However, a contrary view was taken in the case of *Chettinad Corporation v. Gamage*[3] on the basis that reasoning in *Robert v. Rashad* (*supra*) was based on the English case which construed an enactment different from our own to cover a case of implied consent. In *Robert v. Rashad* (*supra*) Gratien, J. referred to certain dicta in English cases of *Hyde v. Pimley*[4] and *Elphinstone v. The Monkland Iron and Coal, Ltd.*[5] in support of the principle that the conduct of the landlord in accepting rents for subsequent periods with clear knowledge of the subletting amounts to a waiver of his statutory right to forfeit the tenancy and also to an implied consent.

It is to be observed that decision in *Hyde v. Pimley* (*supra*) was based not only on consent but also on waiver. Therefore, the decision in *Robert v. Rashad* (*supra*) was founded on sound reasoning.

The decision in *Robert v. Rashad* (*supra*) was further explained by Sinnathamby, J. in *Pigera v. Mackeen* (*supra*) in the following manner :

"I do not take the view that Gratien, J. intended to state that the landlord should immediately file action. He may elect forthwith to terminate the tenancy and nevertheless give the tenant time. All that is required is that election should be made forthwith and not so long afterwards as to suggest condonation."

Waiver is the voluntary abandonment with full knowledge of the relevant facts of a right or benefit. The waiver would be express when

the person entitled to the right or benefit expressly and in terms gives it up and implied when such person does or acquiesces in something which is inconsistent with the right or benefit to which he is entitled. (Vide *Abdul Cader v. Menike).*[6]

It was held in *Fernando v. Samaraweera*[7] :

"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. The onus of proof of waiver is on the person who asserts it. Where the tenant alleges that the landlord waived his rights he must prove that the landlord with full knowledge of his rights decided to abandon them either expressly or by unambiguous conduct inconsistent with an intention to enforce them."

The question before us is whether there was a condonation or waiver established in the present case.

The plaintiff-respondent on her own admission knew for certain in 1981, that premises had been sublet to the 2nd defendant-appellant by the 1st defendant-respondent.

However, she made no protest of any kind and continued to accept rent from the 2nd defendant-appellant purporting to issue receipts in the name of the 1st defendant-respondent. It was open to the plaintiff-respondent to terminate the tenancy which was not availed of.

It could be contended that mere delay to seek the enforcement of statutory right should not deprive a landlord from seeking its invocation. However, this is not a mere delay on the part of the plaintiff-

respondent in that she has allowed the 2nd defendant-appellant to pay rent from 1979-1989 purporting to issue receipts in the name of the 1st defendant-respondent. Therefore, she has accepted the fact that 2nd defendant-appellant was the subtenant under the 1st defendant-respondent. The fact that lease bond would expire in 1989 is no bar to the plaintiff-respondent to terminate the tenancy agreement, in 1981 when she found that the premises had been sublet without her written consent. Therefore, condonation or waiver should operate as a bar to the exercise of the landlord's statutory right to secure the ejectment of the tenant on the ground of subletting.

The 2nd defendant-appellant has gone further to assert that he has established privity of contract with the plaintiff-respondent. His contention was that he paid the rent out of his money and that he never paid rent to the 1st defendant-respondent. To decide this appeal, it is not necessary to go into the question whether there was a privity of contract between the plaintiff-respondent and the 2nd defendant-appellant since there is overwhelming evidence of the waiver of statutory right of the plaintiff-respondent to have the 1st defendant-respondent and 2nd defendant-appellant evicted.

Learned District Judge has failed to consider the question of waiver. He has answered issue No. 6 in the negative which was the issue relating to the question of waiver by the plaintiff-respondent without any consideration of the evidence.

For the above reasons, the judgment of the learned District Judge dated 04. 10. 1994 is set aside. This appeal is allowed without costs.

BALAPATABENDI, J. – I agree.

Appeal allowed.