SAMAD
v
SAMSUDEEN AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. 644/90 (F)
D.C. KANDY NO. 1695/RE
APRIL 4 AND
JUNE 22, 2001 AND
SEPTEMBER 5, 2002

Rent Act, No.7 of 1972, sections 10, 12(1), 12(2), 28 and 48 – Residential or business premises ? – User test – Non occupation of premises – Res judicata – Sub-letting – Continuing wrong – Rent Restriction, Act, section 9.

The plaintiff-respondent instituted action seeking ejectment of the 1st defendant appellant and the 2nd defendant respondent on the basis of (i) unlawful sub-letting – (section 10 (2)) and cessation of occupation for a continuous period of 6 months (section 28).

The 1st defendant contended that the premises in suit is business premises, that he is resident and is also carrying on a business at the premises and that the plaintiff-respondent's father sought the same reliefs on the same grounds earlier, and the said action was dismissed and contended that the said dismissal operates as *res judicata*. The trial court held with the plaintiff-respondent.

Held :

(i) The uncontested evidence is that the premises in suit was in fact occupied within 10 years prior to commencement of the Rent Act which was in March 1972, wholly for the purpose of residence first by the plaintiff-respondent's family and thereafter section 12(1) applies. In terms of section 12(1) the character of the premises in suit must continue to be residential as there is no material placed before court that the Commissioner of National Housing has authorized the use of the premisers wholly or mainly for any purpose other than that of residence. 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 occupiers for the time being.

(ii) The defendant appellant did not show any reasonable cause for his

non-occupation. He did not consider it necessary to testify in court in order to give any reasonable cause for his ceasing to occupy the premises in suit.

Per Somawansa, J.

"Burden of proving the grounds for ejectment – sub-letting, is with the plaintiff-respondent. However, once the plaintiff-respondent proves that the premises had been in the exclusive occupation of a third party other than a tenant as in the instant case in the absence of any explanation by the tenant or the third party showing that there is no sub-letting court has to draw the presumption that it is a case of sub-letting by the tenant to the said third party."

(iii) Sub-letting is a continuing wrong, and the plea of *res judicata* cannot have any application. When sub-letting is continued, there is a continued breach by the tenant of the statutory provisions against sub-letting.

APPEAL from the judgment of the District Court of Kandy.

Cases referred to :

1. *Wimalaratne* v *Linganathan and another* – (1989) 1 Sri LR 247
2. *Seyed Mohamed* v *M.H.M. Meera Pillai* – 70 NLR 237
3. *D.E. Edirisinghe* v *I.A. Patel* - 79 NLR 217
4. *P.K. Kalandankutty* et al v *C.W. Wanasinghe* – 60 CLW 307 at 308

Faiz Musthapa, P C. with *Hemasiri Withanachchi* for 1st defendent-appellant.

S.F.A. Cooray with *Inoka Randeny* for plaintiff-respondent

Cur.adv.vult

October 11, 2002

SOMAWANSA, J.

The plaintiff-respondent instituted action in the District Court of Kandy seeking ejectment of the 1st defendant-appellant and the 2nd defendant-respondent from premises No.79/12, Katugastota Road, Kandy on the basis of – 01

(a) unlawful sub-letting in violation of section 10 of the Rent Act, and

(b) Cessation of occupation of the said premises for a continuous period of six months without reasonable cause as

specified in section 28 of the Rent Act No. 07 of 1972.

She also claimed continuing damages at the rate of Rs.17.10 per month from 01.07.1982 until recovery of possession. The 2nd defendant-respondent did not file an answer while the 1st defendant-appellant took up the position that the premises in suit is a business premises and not a residential premises, that the Rent Act No.07 of 1972 applies to the said business premises, that he is resident and is also carrying on a business at the premises in suit and that the plaintiff-respondent's father had earlier instituted action No. RE 1119 in the District Court of Kandy seeking the same reliefs on the same grounds which was dismissed and the said dismissal operates as *res judicata*. In the circumstances the 1st defendant-appellant prayed for a dismissal of the plaintiff-respondent's action.

At the trial the following admissions were recorded –

(a) that the 1st defendant-appellant was the tenant of the plaintiff-respondent in respect of the said premises.

(b) the receipt of the notice to quit,

(c) that the premises in suit are situated within an area governed by the Rent Act, No.7 of 1972.

On behalf of the plaintiff-respondent 4 issues were raised and 10 issues were raised on behalf of the 1st defendant-appellant. At the conclusion of the trial the learned District Judge by his judgment dated 06.03.1990 held in favor of the plaintiff-respondent. It is from the said judgment that the 1st defendant-appellant has preferred this appeal.

At the hearing of this appeal it was contended by the counsel for the 1st defendant-appellant that the learned District Judge misdirected himself in determining the issue whether the premises in suit is residential or business. In that he has failed to appreciate that the test applicable is the user for the time being as defined in section 48 of the Rent Act and by the application of section 12 of the Rent Act which prohibits the conversion of residential premises to business premises without the sanction of the Commissioner of National Housing. He had in the process over-looked the fact that at least from 1967 "Ismail Industries" had been run at the premises in suit. It was also contended that in the light of the finding by the

learned District Judge that a business was being conducted in the premises in suit and with the assertion that the 1st defendant-appellant lived at No. 196, Trincomalee Street, the only logical conclusion is that the premises in suit was mainly or solely used as a business premises. In support of this contention he cited the decision in *Wimalaratne* v *Linganathan and Another*(1). In the said case the short point for decision was whether premises where a guest house was being run for profit were business premises or residential premises within the meaning given to these terms in the Rent Act. It was held in that case – though the definitions given in the Rent Act of "residential premises" and "business premises" exclude each other the expressions "purposes of residence" and "purposes of business" do not, and in a given case one may include the other. The purpose that is material is the tenant's purpose. The occupation contemplated in the definition of residential premises is not limited to actual physical occupation. 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 for the time being. The user to which a tourist puts the room he occupies in the guest house is that of residence for how short a period it may be. It is his temporary residence. Hence the premises in suit are residential premises. The facts as stated on page 248 of the said case are –

> "The plaintiff let these premises to the 1st defendant in about the year 1968 at a rental of Rs. 1,000 per month. In about 1971 the 1st defendant sub-let the premises to the 2nd defendant. The former tenant of the premises was one M.S.A. Gaffoor who ran a guest house in the premises and this business was bought by the 1st defendant, who in turn sold that business to the 2nd defendant."

In the said case it is not clear as to whether the premises in question were let to the tenant as residential premises or business premises. However in the instant case it transpired in the evidence of the plaintiff-respondent that the premises were let to the 1st defendant-appellant as residential premises and not as business premises. It is to be noted that the 1st defendant-appellant did not give evidence but called a clerk from the Kachcheri who produced marked D1 the Business Registration Certificate according to which

the business "Ismail Industries" had been first registered on 27.05.1967 and the place of business indicated as the premises in suit. Statement of change under section 7 of the Business Names Ordinance dated 27.05.1967 marked V2, Certificate of Registration of a firm dated 06.06.1967 marked V3 and Certificate of Registration of an individual dated 18.07.1967 marked V4. Though these documents indicate that the business commenced on 01.04.1962 there is no evidence forthcoming to establish that the premises in suit were given on rent to the 1st defendant-appellant to run a business. The only evidence available on this point is that of the plaintiff-respondent who says that the premises in suit were given to the 1st defendant-appellant as residential premises. Hence unlike in the case cited by the 1st defendant-appellant in the instant case there is evidence that the premises in suit was given to the 1st defendant-appellant as residential premises.

According to the interpretation of section 48 of the Rent Act, No.7 of 1972 "business premises" means any premises other than residential premises as hereinafter defined and "residential premises" means any premises for the time being occupied wholly or mainly for the purpose of residence. At this point it is pertinent to note the applicability of section 12(2) of the Rent Act, No. 7 of 1972 which defines "residential" premises to mean any premises which at any time within a period of 10 years prior to the date of commencement of this Act had been occupied wholly or mainly for the purpose of residence.

The plaintiff-respondent has given evidence which conclusively establishes that the premises in suit is residential premises within the meaning of the said definition and the said evidence is not challenged by the 1st defendant-appellant. Her evidence revealed that from 1957 her parents and other members of her family resided in the premises in suit and her younger brother was born in the said premises and that in 1963 her father rented out the said premises to the 1st defendant-appellant who continued to use the same for his residence. Accordingly the uncontested evidence in this case is that the premises in suit was in fact occupied within ten years prior to the commencement of the Rent Act which was in March 1972 wholly for the purpose of residence first by the plaintiff-respondent's family and thereafter by the 1st defendant-appellant and therefore

section 12(1) of the Rent Act, No. 7 of 1972 comes into operation. Section 12(1) of the Rent Act reads thus:

> "Notwithstanding anything in any other law, no landlord or tenant of any residential premises shall, unless so authorized by the Commissioner for National Housing, use or permit any other person to use such premises wholly or mainly for any purpose other than that of residence".

Accordingly in terms of section 12(1) of the Rent Act character of the premises in suit must continue to be residential as there is no material placed before Court that the Commissioner for National Housing has authorized to use the premises in suit wholly or mainly for any purpose other than that of residence.The finding of the learned District Judge that the premises in suit was residential premises in which a business had been carried out coupled with the assertion that the 1st defendant-appellant lived at No.196, Trincomalee Street will not be a sufficient factor to come to a finding that the character of the premises in suit has changed from residential to business, for premises in suit being residential premises within 10 years prior to the coming into operation of the Rent Act is in law considered to be residential premises.

The 1st defendant-appellant did not give evidence and he did not dispute the fact that he ceased to occupy the premises for a continuous period of over six months prior to the filing of this action. The statement of the 1st defendant-appellant to the police dated 15.03.1982 marked P7 also supports this contention. In fact in the said statement the 1st defendant-appellant had asserted that he ceased to occupy the premises in suit six years prior to the date of the said statement which would be in 1976.

It should also be noted here that the defendant-appellant did not show any reasonable cause for his non occupation. He did not consider it necessary to testify in Court in order to give any reasonable cause for his ceasing to occupy the premises in suit. In the absence of such reasonable cause being shown it is clear that the plaintiff-respondent would be entitled to avail herself of the provisions contained in section 28(1) of the Rent Act to eject the 1st defendant-appellant. Section 28 (1) of the Rent Act reads as follows :

"Notwithstanding anything in any other provisions of this Act, where the tenant of any residential premises has ceased to occupy such premises,without reasonable cause, for a continuous period of not less than six months, the landlord of such premises shall be entitled in an action instituted in a court of competent jurisdiction to a decree for the ejectment of such tenant from such premises."

On a consideration of the above facts I am inclined to take the view that the plaintiff-respondent is entitled to have the 1st defendant-appellant ejected from the premises in suit in terms of section 28 (1) of the Rent Act.

It was also contended by the counsel for the 1st defendant-appellant that the learned District Judge erred when he came to the finding that the ground of ejectment based on sub-letting had been established beyond any doubt by the plaint in case No.1119/RE dated 13.06.1979 marked P1. I am inclined to agree that the learned District Judge has misdirected himself on this point. However on an examination of the evidence led in this case, I am inclined to take the view that on a balance of probability there is evidence to establish that there has been sub-letting by the 1st defendant-appellant to the 2nd defendant-respondent in violation of section 10 (5) of the Rent Act, No. 7 of 1972. Section 10 (5) of the Rent Act reads as follows :

"Where the tenant of any premises sublets such premises or any part thereof without the prior consent in writing of the landlord, the landlord of such premises shall, notwithstanding the provisions of section 22, be entitled in a court of competent jurisdiction to a decree for the ejectment of such tenant from such premises, and also for the ejectment of the person or each of the persons to whom the premises or any part thereof had been sublet".

It is the evidence of the plaintiff-respondent that when this action was instituted in 1982 it was the 2nd defendant-respondent who was occupying the premises in suit and not the 1st defendant-appellant and that by about 1971 the 1st defendant-appellant left the premises in suit and went to occupy premises No.196, Trincomalee Street and thereafter the premises were kept closed

for some time. The fact that the 1st defendant-appellant went into occupation of No.196, Trincomalee Street is established by the plaint in case No.1119/RE marked P1 and the answer of the 1st defendant-appellant in that case is marked P2. The statement made by the 1st defendant-appellant to the police on 15.03.1982 marked P7 also confirms this fact. In the said statement to the police marked P7 the 1st defendant-appellant admitted that about six years ago he handed over the business that he carried on at the premises in suit to the 2nd defendant-respondent, that on 13.03.1982 he along with his wife came back to the premises in suit, that the 2nd defendant-respondent objected to his coming to stay in the premises and asked him to leave and that he accordingly agreed to leave the premises before 6.00 p.m. This cannot be the attitude of a person who as a tenant had possession of the premises let and is in control of even a portion of the premises and is a clear admission that it is the 2nd defendant-respondent who was in exclusive occupation of the premises and the 1st defendant-appellant had no occupation whatsoever.

It is conceded that the burden of proving the grounds for ejectment including unlawful sub-letting is with the plaintiff-respondent. However once the plaintiff-respondent proves that the premises had been in the exclusive occupation of a third party other than a tenant as in the instant case in the absence of any explanation by the tenant or the third party showing that there is no sub-letting Court has to draw the presumption that it is a case of sub-letting by the tenant to such third party. In the instant case no evidence was led to give any explanation to the effect that the 2nd defendant-appellant is not paying any rent to the 1st defendant-appellant for occupation by him of the premises in suit. It should be noted that the 1st defendant-appellant for reasons best known to him did not consider it necessary to give any reasonable explanation.

In *Seyed Mohamed* v *M.H.M. Meera Pillai*[2] the question was whether the defendant had, in contravention of section 9 of the Rent Restriction Act, sub-let a part of the premises rented to him by the plaintiff. The evidence disclosed that one A.C. was in sole and exclusive occupation of a room of the premises and that he carried on business in that room. The defendant took up the position that no rent was paid to him by A.C. and that the latter had been let into

occupation of the room before the defendant became the tenant of the premises. It was held, that, in the absence of acceptable evidence to explain A.C.'s occupation, the only inference was that A.C. was in occupation as a sub-tenant paying rent to the defendant.

In *D.E. Edirisinghe* v *I.A. Patel*[3] the head note reads as follows :

"Although proof by a landlord that someone other than his tenant is in exclusive possession of the rented premises would generally lead to the inference of sub-letting, no such inference of sub-letting can be drawn if the tenant explains satisfactorily the occupation of the premises by the third party on some footing other than a sub-letting. Accordingly, where there is an agreement between the landlord and another person that the latter is the tenant of certain premises and a further agreement between the landlord and a third party that the third party is to carry on a business in the same premises under the name of the tenant and to pay rent, it cannot be inferred that the tenant sub-let the premises to the third party".

In that case at page 226 Sirimanne, J, observed :

"..... in most cases of sub-letting as it would be almost impossible to prove an actual payment of rent by a sub-tenant to a tenant. This is undoubtedly so and the proof by a plaintiff that someone other than his tenant is in exclusive possession of the rented premises, would in the absence of an acceptable explanation lead to the necessary inference of a sub-letting. This is what has been held in the case relied on by learned counsel for the respondent reported in 70 NLR 237. It must be remembered however that the burden of proving a sub-letting rests with the plaintiffs and that the inference of sub-letting above referred to can be drawn only where there is no explanation of the third party's possession or where an explanation is given which is found to be unsatisfactory or rejected as being false. If the defendant (as in this case) gives an explanation which is accepted by the Court as it explains the occupation of the rented premises by a third party on some footing other than a sub-letting, then no inference of sub-letting can be drawn and in such circumstances it means that the plaintiffs have failed to discharge the burden of proving a sub-letting."

In passing I might also refer to the plea of *res judicata* relied on by the 1st defendant-appellant. It is conceded that the earlier action No.1119/RE marked P1 was filed by the father of the plaintiff-respondent. However this action was withdrawn as it is evident from the proceedings dated 13.02.1981 marked P3, with liberty to file a fresh action and as the 1st defendant-appellant did not object to this application to withdraw the action the said application was allowed. Hence the question of *res judicata* cannot arise. In any event sub-letting is a continuing wrong and the plea of *res judicata* cannot have any application as was observed by Sansoni, J. in *P.K. Kalandankutty* et al v *C.W. Wanasinghe*[4]:

> "The plea of *res judicata* would have been a good one if the sub-letting had ceased with the termination of action No.5498 in October 1955. It would not have been open to the plaintiff, in that event, to sue again on the earlier sub-letting. But the sub-letting has been shown to have continued in spite of the earlier decree. There was thus a continuing breach by the 1st defendant of the statutory prohibition against sub-letting, which enabled the plaintiff to institute a fresh action in respect of the subsequent breach, for such breach constituted a new cause of action".

Also in *M. Seyed Mohamed* v *M.H.M. Meera Pillai*[2] it was held that, where the subletting is continued, there is a continued breach by the tenant of the statutory provision against sub-letting.

In the light of the above reasoning I see no reason to interfere with the judgment of the learned District Judge. Accordingly I dismiss the appeal of the 1st defendant-appellant with costs.

DISSANAYAKE, J. - I agree.

Appeal dismissed.