

ARNOLDA
v.
LAWRENCE (No. 2)

COURT OF APPEAL

RANASINGHE, J. (PRESIDENT C/A) AND ATUKORALE, J.
C.A. APPLICATION NO. 92/82 - D.C. COLOMBO R 563/RE.
SEPTEMBER 30, 1982.

Landlord and tenant - Rent and ejectment - Section 22(1) (bb) of the Rent Act No. 7 of 1972 (as amended by Law No. 10 of 1977) - Requisites for such a suit - Necessary pleadings -

Held -

(1) In a suit for rent and ejectment under s. 22(1) (bb) of the Rent Act No. 7 of 1972 (as amended by Law No. 10 of 1977), apart from the requirement that the standard rent of the premises does not exceed Rs.100/- per month and that the premises are reasonably required for the use and occupation as a residence for the plaintiff and the members of her family (and service of notice of the action on the Commissioner of National Housing as required by s.22(1A) of the Rent Act), the plaintiff must plead in the plaint and establish -

- (i) the fact of non-ownership of more than one residential house;
- (ii) the fact of letting the premises to the defendant prior to the commencement of the Rent Act, i.e. prior to 1.3.1972.

(2) Under s. 36 of the Rent Act on the death of a monthly tenant by operation of law the contract of tenancy does not terminate but continues between the landlord and the legal representative or heir of the deceased tenant.

(3) A tenant may seek to establish that he became tenant not in succession to his deceased father who was tenant before him but on a fresh contract of tenancy entered into after 1.3.1972.

Cases referred to:

(1) *Ariyanandhi v. Sideek S.C. 520/69(F); D.C. Galle No. L/7595; S.C. Minutes of 26.6.1975*

(2) *Fernando v. de Silva (1966) 69 N.L.R. 164*

(3) *Mohamed v. Public Trustee (1978-79) 1 Sri L.R. 1*

APPLICATION for revision of the order of the District Court of Colombo.

C. Renganathan, Q.C. with N.S.A. Gunatilleke and N. Mahenthiran for the petitioner.

A. K. Premadasa with T. B. Dilimuni for the respondent.

Cur. adv. vult.

November 10, 1982.

ATUKORALE, J.

The plaintiff, who is the respondent to the present application to revise the order of the learned Additional District Judge of Colombo dated 4.1.1982, sued the defendant, who is the present petitioner to have him ejected from premises No. 129, Pickering's Road, Kotahena, on the ground that the premises were reasonably required for use and occupation as a residence for herself and the members of her family. The plaintiff's case was founded on the provisions of s. 22 (1) (bb) of the Rent Act, No. 7 of 1972, as amended by Law No. 10 of 1977. These provisions would apply only if the premises had been let to the tenant prior to the date of commencement of the Rent Act, namely, 1.3.1972. It was not in dispute that the defendant's father was the tenant of the premises under the plaintiff until his death on 31.8.1972; that the plaintiff had on 27.2.1978 given the defendant six months' notice in writing of the termination of the tenancy requiring the defendant to vacate the premises on 31.8.1978 and that notice of the action had been served on the Commissioner of National Housing as required by s. 22(1A) of the Rent Act as amended. After trial the learned Judge held that the standard rent of the premises did not exceed Rs.100/- per month and that the premises were reasonably required for the use and occupation as a

residence for the plaintiff and the members of her family. In addition to the above admissions and findings of fact in her favour, the plaintiff, to succeed in her claim, had also to plead and establish firstly that she was not the owner of more than one residential premises and, secondly, that the premises were let to the defendant prior to the date of commencement of the Rent Act, i.e. prior to 1.3.1972.

In regard to the first matter aforementioned, the plaint did not contain any averment that the plaintiff was not the owner of more than one residential premises. Nor was an issue raised on this point at the hearing in the lower court. A large volume of evidence was, however, led on both sides relating to this matter and the learned Judge came to the conclusion that it was not necessary to plead the fact of non-ownership of more than one residential house in the plaint. He also held that the plaintiff had on the evidence established that during the relevant period she did not own any house other than the premises in suit. In regard to the second matter aforementioned the following issue was raised at the hearing on behalf of the defendant as issue No. 7:

“Did the defendant become the tenant of the plaintiff as from 1.9.1972?”

Issue No. 10, also raised on behalf of the defendant, was as follows:

“If any one or more of the issues are answered in favour of the defendant, can the plaintiff have and maintain this action?”

The learned Judge answered issue No. 7 in the affirmative but held that the consequential issue No. 10 did not arise for consideration. He entered judgment for the plaintiff and ordered the ejection of the defendant.

The defendant appealed to this court from this judgment. This court held that the plaintiff should have in her plaint pleaded that she was not the owner of more than one residential premises since it was a necessary ingredient of her cause of action. As the plaint did not aver this fact, this court held that the plaint should have been rejected. The court further went on to consider the question as to when the tenancy of the defendant commenced. It took the view that on the pleadings filed it was clear that whilst the plaint proceeded on the footing that the plaintiff let the premises to the

defendant, this fact was admitted by the defendant in his answer; that the defendant averred that he became the tenant on 14.9.1982 after his father's death on 31.8.1982; that in his evidence, however, the defendant stated that he became the tenant on 1.9.1972, and that the learned Judge had reached the finding that the tenancy commenced on 1.9.1972. On a consideration of the above matters this court formed the opinion that the plaint was presented on the footing of a contract of tenancy between the plaintiff and the defendant and that the only point that remained for decision by the learned Judge was whether the tenancy commenced on 14.9.1972 or 1.9.1972. The learned Judge found that it commenced on 1.9.1972, a finding which this court held was fatal to the plaintiff's claim. This court thus held against the plaintiff on both matters aforementioned. Accordingly the appeal was allowed and the plaintiff's action was dismissed.

From this judgment the plaintiff appealed to the Supreme Court. The Supreme Court too held that the plaintiff should have pleaded that she was not the owner of more than one residential premises as this fact was a fundamental requisite to the invoking of the provisions of Law No. 10 of 1977. It observed that a court has jurisdiction to entertain and proceed with a case under this Law only if there is a specific averment to this effect in the plaint. But since a large volume of evidence had been led on this point in the lower court, the Supreme Court held that it was the duty of the court to have framed an issue even if the parties failed to do so. On the other question pertaining to the commencement of the tenancy, the Supreme Court observed that whilst the learned Judge had answered issue No. 7 in the defendant's favour, yet he had answered the consequential issue No. 10 as not arising for its consideration. Since the action could have been maintained only if the premises had been let to the tenant prior to 1.3.1972, the Supreme Court held that it was incumbent on the learned Judge to have determined whether the premises had been let prior to this date or not. In the course of its judgment the Supreme Court stated:

"It is also in evidence that the defendant's father was the original tenant of this premises since 1914 and the defendant had become the tenant of the premises only after the father's death in August 1972. Therefore it was necessary for court to have considered whether the defendant became a statutory tenant after the death of her (his) father or whether there was a fresh contract of tenancy between the plaintiff and the

defendant. No issues have been framed to this effect and therefore there is no determination as to whether the defendant was a statutory tenant succeeding to his father's tenancy of the premises in suit on the death of the father under the provisions of the Rent Restriction Ordinance or whether he became the tenant on a fresh contract of tenancy."

The Supreme Court took the view that on the evidence led there was no doubt that the real issues which arose for determination by the learned Judge were in respect of the above two legal positions on which no issues had been framed. Accordingly it set aside the judgment of this court and remitted the case for further trial in the original court on the following 4 additional issues:

15. Is the plaintiff the owner of more than one residential premises?
16. If this issue is answered in the affirmative can the plaintiff maintain this action in terms of paragraph 22 (1) of Rent Act 7 of 1972 as amended by Rent Amendment Law 10 of 1977?
17. Did the defendant become the tenant of the plaintiff as from 1.9.1972 on a fresh contract of tenancy?
18. Is so, can the plaintiff have and maintain this action under the provisions of the Rent Act 7 of 1972 as amended by aw 10 of 1977?"

The Supreme Court further directed that the answers to issues 1 to 14 already given by the learned Judge should stand and that they will not be affected by the 4 additional issues. It also indicated that the parties were at liberty to lead further evidence on matters raised on the above 4 issues only.

At the further hearing on these issues in the District Court the plaintiff and the defendant gave evidence, oral and documentary. The learned Judge answered issue No. 15 in the negative and held that issue No. 16 would therefore not arise for consideration. Learned counsel for the defendant has not sought to canvass the correctness of the findings of the learned Judge on these two issues before us. On issue No. 17 the defendant stated in evidence that he telephoned the plaintiff on 14.9.1972 because of the plaintiff's delay in sending him the receipt for the rent paid on 9.9.1982 for the previous month (August). He stated that during the course of the telephone conversation

he asked the plaintiff for the tenancy in his name and that the plaintiff agreed to make him her tenant. The plaintiff in her evidence strenuously denied any telephone conversation with the defendant. The learned Judge rejected the defendant's evidence on this point and accepted the denial of the plaintiff. This finding of fact too has not been challenged by learned counsel for the defendant before us. The learned Judge thus held on the evidence that no fresh contract of tenancy has been proved to have been entered into between the parties after the death of the defendant's father on 31.8.1972. Following the unreported decision of the Supreme Court in *Ariyanandhi v. Sideek*, (1) the learned Judge held that on the death of the defendant's father the tenancy of the premises did not terminate but continued between the plaintiff and the defendant. Accordingly he answered issue No. 17 in the negative in the plaintiff's favour and the consequential issue No. 18 as not arising for his consideration. He thus entered judgment for the plaintiff in ejectment against the defendant. The present application by the defendant is to have this judgment revised.

Learned counsel for the defendant contended before us that the judgment in so far as the findings on issues 17 and 18 are concerned was wrong since what the Supreme Court directed the original court to determine thereon were pure and simple legal issues. He submitted that what the Supreme Court intended was that there should be a final adjudication on a purely legal issue as to whether a tenancy that was deemed to have come into existence between the parties by virtue of s. 36 (2) of the Rent Act as a result of the death of the defendant's father on 31.8.1972 was a fresh contract of tenancy or whether it was a continuance of the old tenancy between the plaintiff and the defendant's father which, admittedly, had been contracted prior to 1.3.1972. Learned counsel maintained that no fresh evidence was necessary to decide this legal issue and that the learned Judge had misconceived the true nature of the directions given by the Supreme Court. He also argued that a contract of tenancy can be created either by operation of law or by agreement of parties. A 'deemed' tenancy under s. 36 of the Rent Act, he submitted, is one created by operation of law and constitutes a fresh contract of tenancy coming into force on the death of the former tenant. It is a legal concept creating a new contract of tenancy and does not constitute a continuance of the old tenancy. He thus urged that the contract of tenancy between the plaintiff and the defendant being one that came into force on 1.9.1972 by operation of law on

the death of the defendant's father, the premises cannot in law be said to have been let to the defendant prior to the date of commencement of the Rent Act on 1.3.1972 and that therefore the plaintiff cannot maintain this action under s.22 (1) (bb) of the Act as amended by Law No. 10 of 1977.

If the contention of learned counsel for the defendant that issue No. 17 formulated by the Supreme Court constituted a purely legal issue the answer to which did not entail the consideration of the oral evidence is correct then, with utmost respect, I do not see any reason why the Supreme Court should have directed this issue to be tried by the learned Judge for the Supreme Court itself would then have been in a better position to determine the issue. If it was a purely legal issue there would, with respect, have been no purpose in remitting it to be decided by the original court. A careful perusal of the judgment of the Supreme Court seems to show that the court accepted the finding of the learned Judge on issue No. 7, namely, that the defendant became the tenant as from 1.9.1972, that is on the death of his father. But in view of the learned Judge's answer to issue No. 10, the Supreme Court appears to have taken the view that the real question for determination by the learned Judge remained undecided, namely, whether it was on a fresh contract of tenancy between the parties or whether it was in succession to his father that the defendant became a tenant as from 1.9.1972. With respect, it seems to me to be implicit in the judgment of the Supreme Court that if the defendant became the tenant of the premises on 1.9.1972 in succession to his father, then the original tenancy of the father continued on his death by operation of law unless of course the defendant was in a position to establish, as alleged in his evidence, that by agreement of parties a fresh contract of tenancy came into existence. The view that on the death of a monthly tenant the contract of tenancy does not terminate but continues between the landlord and the legal representative or heir of the deceased tenant has been considered and upheld by the Supreme Court in *Fernando v. de Silva* (2), *Ariyanandhi v. Sideek* (1) and in *Mohamed v. Public Trustee* (3). S.36 of the Rent Act deals with persons entitled to continue the contract of tenancy on the death of the tenant. In this state of the law I am of the opinion that the Supreme Court in the instant case granted the defendant an opportunity of establishing that he became the tenant not in succession to his deceased father but on a fresh contract of tenancy. The defendant attempted to prove such a fresh tenancy but failed. Under the circumstances I am unable

to agree with the contention of learned counsel for the defendant. I am of the view that the findings of the learned Judge on issues 17 and 18 are correct. The application is accordingly dismissed with costs fixed at Rs. 525/-.

RANASINGHE, J. – I agree.

Application dismissed.