

**KANTHASAMY
V.
GNANASEKERAM AND ANOTHER**

SUPREME COURT

WIMALARATNE, J., VICTOR PERERA, J., AND COLIN THOME, J.

S.C. APPEAL NO. 60/82; C.A. APPEAL NO. 629/79(F); D.C. COLOMBO

CASE NO. 2896/RE.

MAY 4 AND 5, 1983.

Landlord and tenant — Ejection of tenant — Denial of tenancy — Whether premises reasonably required - Section 22 of the Rent Act, No. 7 of 1972.

The Plaintiffs-Respondents, landlords of premises No. 115, Rosmead Place, Colombo 7, duly filed this action to terminate the tenancy of the Defendant-Appellant. The Defendant-Appellant filed answer admitting his residence in part of the said premises but denying his occupation stating that he had been paying rent as an agent of Sittampalam and not as the tenant of the said Plaintiffs-Respondents.

Issues that have arisen are, (1) is the defendant the tenant of the premises in suit ? (2) in denying the tenancy, is the defendant acting in collusion with Sittampalam? (3) (a) is the plaintiff entitled for a writ of ejection against the defendant ? (b) what damages is the plaintiff entitled to ? (4) are the said premises reasonably required for the use and occupation of the plaintiffs as their residence ? (5) if issue 4 is answered in the negative, are the plaintiffs entitled to the relief prayed for in the plaint ? (6) even if the premises are not required by the plaintiffs for their residence and if issue 1 is answered in the affirmative as the defendant denies tenancy are the plaintiffs entitled to judgment as prayed for ? (7) if issue 1 is answered in the affirmative and issue 4 in the negative, can the plaintiffs have and maintain this action ?

The District Judge, held that the Defendant-Appellant was the tenant and was liable to be ejected. He also held that the Plaintiffs-Respondents were entitled to an order of ejection on the ground of reasonable requirement as well, though this was not a claim which appears to have been persisted on by the Plaintiffs-Respondents at the trial. The Court of Appeal has failed to make a critical analysis of the meagre evidence on which the District Judge had come to the finding that the Plaintiffs-Respondents reasonably required the said premises for their use and occupation as a residence. However, it also has held that the District Judge's decision on this was correct.

Held —

The District Judge came to a correct finding that the Plaintiffs-Respondents were entitled to the order for the ejection of the Defendant-Appellant on the basis of the Defendant-Appellant's own conduct.

Cases referred to :

1. *De Alwis v. Perera* (1951) 52 N.L.R. 432 at page 444.
2. *Maroof v. Leaff* (1944) 46 N.L.R. 25.
3. *Hameed v. Annamalay* (1946) 47 N.L.R. 558
4. *Cassim Hadjar v. Umamlebbe & another* (1963) 67 N.L.R. 22
5. *Edirisinghe v. Patel I* (1979 — (1) N.L.R. 217
6. *Muthu Natchia v. Pathuma Natchia* (1895) 1 N.L.R. 21.

APPEAL from an order of the Court of Appeal.

H. L. de Silva, Senior Attorney-at-Law, with S. C. Crossette Thambiah and K. Thewarajah for Defendant-Appellant.

Eric Amerasinghe, Senior Attorney-at-Law, with P. A. D. Samarasekera, Varuna Basnayake and Miss D. Guniyangoda for the Plaintiffs-Respondents.

Cur. adv. vult

JUNE 16, 1983

VICTOR PERERA, J.

The Plaintiffs-Repondents are admittedly the landlords of premises No. 115, Rosmead Place, Colombo 7, in respect of which they had filed this action on the 5th July 1978 to have the Defendant-Appellant ejected. The Plaintiffs-Respondents averred that they had let the said premises to the defendant-appellant on a monthly tenancy on a monthly rental of Rs. 675/12, that they had terminated the tenancy on 31st July 1977 by giving one year's notice in July 1976 and that the Defendant-Appellant continued in wrongful occupation of the premises after the termination of the tenancy. The Plaintiffs-Respondents had pleaded in their plaint that the premises were reasonably required for their use and occupation as a residence and that they had therefore given the Defendant-Appellant one year's notice in writing of the termination of the tenancy.

It was clearly established from the oral evidence in the case, namely that of S. Gnanasekeram, the father of the Plaintiffs-

Respondents, that he was the original landlord of the premises and that the Defendant-Appellant was the tenant. He had sometime after 1972 conveyed the premises to the Plaintiffs-Respondents. The Plaintiffs-Respondents by their joint declaration dated 17th May 1976 made under Section 37 of the Rent Act No. 7 of 1972 claimed to be the landlords of the said premises (P9) stating that the defendant-appellant was the tenant. An identical copy of this document was produced from the Defendant-Appellant's custody marked P10. From the evidence it would appear that the said S. Gnanasekeram had made an application to the Rent Control Board of Colombo dated 10.5.72 (P2) to have a determination of the authorised rent for the said premises. This application had ultimately come for inquiry only on the 17th June 1974 and at the inquiry (P33) S. Gnanasekeram as applicant and the defendant-appellant as respondent were present. The said S. Gnanasekeram on that date moved to withdraw his application as he stated that he had already ascertained the authorised rent. The Defendant-Appellant, however, wanted it recorded that **he was not the tenant of the premises** and that **the tenant of the premises was one Sittampalam**. The Defendant-Appellant had no objection to the withdrawal of the application.

Thereafter the Defendant-Appellant having so categorically taken up this position continued to forward cheques P16 to P20 as the rent to the said S. Gnanasekeram from 25th June 1974 to June 1977. However, the Defendant-Appellant continued to forward the rents to the landlord who according to him was not his own landlord. The Plaintiffs-Respondents when they became the landlords duly sent a notice dated July 1976 terminating the tenancy of the defendant-appellant from 31st July 1977. The plaint in this action was filed one year later, that is July 1978. When the Defendant-Appellant filed answer in July 1979 he reiterated this position that he was not the tenant and that the rents he had remitted were **"as an agent of Sittampalam"**. He further pleaded that he resided only in a part of the premises and that he had been paying rent as agent of Sittampalam.

The answer of the Defendant-Appellant filed on 9th July 1979 in this action while admitting his residence in the said premises denied his occupation as the tenant. In the following paragraphs of his answer he categorically pleaded :—

“(3) The defendant states that S. Sittampalam has been and is the tenant of the premises referred to in paragraph 2 of the plaint. The defendant **resides in a part of the premises** with the leave and licence of the said Sittampalam.

(4) Answering paragraph 3 of the plaint the defendant admits he received the notice to quit but denies that the said notice to quit has **terminated the contract of tenancy between the said Sittampalam and the plaintiff.**

(6) Answering paragraph 6 of the plaint the defendant states that the said Sittampalam either directly or **by his agent** the defendant has paid all rents due right up to date.

(8) The defendant states that at all time the plaintiffs were aware that **Sittampalam has been and is the tenant of the premises.**

The Defendant-Appellant did not claim any benefits for himself under the Rent Act No. 7 of 1972 and only prayed for dismissal of the action.

In that state of the pleadings it is clear that the plaintiffs-respondents sought to have the Defendant-Appellant his tenant ejected from the premises on the basis of the averments in the answer. The Defendant-Appellant disclaimed tenancy and pleaded specifically that he was occupying only a portion of the premises as a licensee of another. When the matter ultimately came up for trial on the 19th October 1979, Mr. C. Thiagalingam Q.C. Senior Counsel for the Plaintiffs-Respondents raised the following issues arising on the pleadings :—

- (1) Is the defendant the tenant of the premises in suit ?
- (2) In denying the tenancy, is the defendant acting in collusion with Sittampalam ?

(3) a. Is the plaintiff entitled to a writ of ejectment against the defendant ?

b. What damages is the plaintiff entitled to ?

There was no objection by the Defendant-Appellant's Counsel to these issues which were clearly confined to the tenancy, the denial of tenancy, and the right of ejectment and damages based on the Defendant-Appellant's repudiation of the tenancy which did not arise as such on his plaint. Apparently he had abandoned the plea of reasonable requirement which would arise if the Defendant-Appellant claimed to be the actual tenant. Counsel for the Plaintiffs-Respondents did not therefore quite correctly put in issue their rights to have the Defendant-Appellant ejected on the ground that they reasonably required these premises for their residence.

Mr. Navaratnarajah, Q.C., who appeared for the Defendant-Appellant, however, raised the following issues :—

(4) Are the said premises reasonably required for the use and occupation of the Plaintiffs as their residence ?

(5) If issue 4 is answered in the negative, are the Plaintiffs entitled to the relief prayed for in the Plaint ?

Thereupon Mr. Thiagalingam, Q.C. raised the following issue :—

(6) Even if the premises are not required by the Plaintiffs for their residence and if issue 1 is answered in the affirmative, as the defendant denies tenancy are the plaintiffs entitled to judgment as prayed for ?

Mr. Navaratnarajah, Q.C. raised the additional issue :—

(7) If issue 1 is answered in the affirmative and issue 4 in the negative, can the plaintiffs have and maintain this action?

Thereafter Mr. Thiagalingam, Q.C., called as his witnesses an Officer from the Municipal Council and Mr. S. Gnanasekaram, the Plaintiffs-Respondents' father. Learned Queen's Counsel for the Defendant-Appellant elicited from this second witness in cross-examination that in 1972 Sittampalam was living in the premises and that at some later stage the Defendant-Appellant was a boarder in that house under one Upali Silva who had become related to Sittampalam through marriage. This showed clearly that the Defendant-Appellant persisted in his claim that he resided in a part of the premises (as stated in his answer) as a licensee of Sittampalam and that he repudiated any claim to be the tenant or any rights of tenancy in himself.

The Defendant-Appellant did not give evidence at all but apparently stood by the averments of facts pleaded in his answer. The cross-examination of the Plaintiffs-Respondents' witness shows an attempt to establish that though the Defendant-Appellant remitted the rent, he was not the actual tenant. The Defendant-Appellant did not claim any rights for himself as tenant nor did he claim any protection for himself under the Rent Act. However, his entire defence on the pleadings and during the conduct of the trial was that though he was residing **in a part of the premises** he was only the agent of one Sittampalam the tenant.

The learned District Judge on the evidence could not have come to any other conclusion than that the Defendant-Appellant had been regarded as the tenant of the Plaintiffs-Respondents, having remitted rents by cheques first to Gnanasekaram and later to the 1st Plaintiff-Respondent. The District Judge on the basis of the Defendant-Appellant paying the rents to the Plaintiffs-Respondents and on the averments in the plaint and the evidence of Gnanasekaram, answered issue 1 in the affirmative, namely that the Defendant-Appellant was the tenant. The learned District Judge, however, on the basis of the Defendant-Appellant's answer held that the Defendant-Appellant was liable to be ejected and he therefore answered issue 3 and issue 6 also in the affirmative. The learned District Judge, however, answered issue 4 raised by the Defendant-Appellant also in the affirmative, namely that the Plaintiffs-Respondents were entitled to an order of

ejection on the ground of reasonable requirement as well, though this was not a claim which appears to have been persisted on by the plaintiffs-respondents at the trial. Accordingly he entered judgment for the Plaintiffs-Respondents for ejection of the Defendant-Appellant, damages and costs.

The Defendant-Appellant thereupon filed an appeal in the Court of Appeal. At the argument before the Court of Appeal, Senior Counsel for the Defendant-Appellant had stated that he was not canvassing the finding of the District Judge that the Defendant-Appellant was a tenant but that he was contesting the answer to issue 4, namely that the premises were reasonably required for the Plaintiffs-Respondents' use and occupation.

The Plaintiffs-Respondents did not lead any substantial evidence that the Plaintiffs-Respondents reasonably required the premises for their residence. The evidence of the Plaintiffs-Respondents' father was that the two plaintiffs had left the country, one was living in Saudi Arabia and the other in England. The only evidence on this issue is the following answer by this witness :—

“They tried to get this property and they wanted to live in there; being frustrated they left the Island for a short period”.

The learned District Judge could not on this evidence justifiably form an opinion that the premises were reasonably required for the occupation as a residence for the landlord as required by Section 22(2)(c) of the Rent Act.

The Court of Appeal held that on a consideration of the matters urged before him the District Judge was correct in his finding that the Plaintiffs-Respondents reasonably required the said premises for their use and occupation as a residence, and added that “in this view of the matter the interesting but not altogether easy question whether a defendant who denied a tenancy in his answer is entitled to plead the benefits of the Rent Act, does not arise for consideration”. The Court of Appeal has failed to make a critical analysis of the meagre evidence on

which the District Judge had come to this finding and I therefore do not agree with this finding by the Court of Appeal. It has to be appreciated that the Plaintiffs-Respondents had not raised or relied on this issue the burden of proving which would have fallen heavily on them. Senior Counsel for the Plaintiffs-Respondents before us was content to support the District Judge's finding on the other issues and argued that the Plaintiffs-Respondents were entitled to the ejection of the Defendant-Appellant on the ground of the denial of the contract of tenancy or a repudiation of the tenancy and the legal consequences flowing therefrom. He contended that on his own plea the Defendant-Appellant was not entitled to the protection of the Rent Act as he was not a "tenant" within the meaning of the Rent Act.

In the Rent Act No. 7 of 1972 and all previous legislation dealing with rent restriction, the term "tenant" was never defined. However, the term "landlord" in relation to any premises was defined to mean the person for the time being entitled to receive the rent of such premises. On the basis of this definition all the evidence adduced proved conclusively that the plaintiffs-respondents were the undisputed 'landlords'. On the question as to who was the 'tenant' the Plaintiffs-Respondents alleged and adduced evidence to satisfy the District Judge that they regarded the Defendant-Appellant who was remitting the rents as their tenant. Whilst so remitting rents the Defendant-Appellant never stated that he was doing so as the agent of Sittampalam. The Defendant-Appellant, however, notwithstanding any advantages or rights he may have claimed as a common law tenant or as a tenant protected by the Rent Act, categorically and in unambiguous terms asserted that he was not the **actual tenant**. He stated he was in occupation of only a portion of the said premises and that also only as a licensee of one Sittampalam who he asserted was always and is the tenant and that he had been remitting the monthly rents as an agent of Sittampalam. The Defendant-Appellant therefore did not even admit that the Plaintiffs-Respondents were his landlords, but that they were Sittampalam's landlords.

Under the common law of landlord and tenant, such a person if he was not the actual tenant could not be regarded

as the tenant. It is necessary to examine the status every landlord must necessarily enjoy before the common law can recognise his right to claim ejectment in the proceedings against his actual tenant. The essential pre-requisite to his cause of action qua landlord is that a privity of contract exists between himself and the tenant in occupation, and the pre-requisite to a defence that a tenant can set up against his landlord is again the same privity of contract existing at the date of action. In this case the defendant-appellant, who was regarded as the tenant by his occupation of the premises and by his remitting the rent, denied that there was ever any privity of contract between him and the Plaintiffs-Respondents. While the Plaintiffs-Respondents acted on this presumption that the Defendant-Appellant was their tenant, the Defendant-Appellant denied any contract of tenancy and repudiated even such a presumption of tenancy.

The Plaintiffs-Respondents filed this action seeking to eject the Defendant-Appellant, who they alleged was their tenant, on one of the grounds the existence of which they had to satisfy Court, namely, that the premises were reasonably required for their use and occupation as a residence. Section 22 of the Rent Act No. 7 of 1972 clearly provided that the Court could order the ejectment of a tenant at the instance of the landlord if the Court had sufficient evidence placed before it to form the opinion that the premises are so required. It was argued by Senior Counsel for the Defendant-Appellant that there was a complete bar to such an action being instituted in Court or entertained by Court and that therefore the court lacked jurisdiction to make any order in this case.

The answer to this contention is found in the judgment of Gratiaen, J. in *De Alwis v. Perera* (1) :—

“It is important to bear in mind in considering this question that section 8 of the Rent Restriction Ordinance of 1942 and section 13 of the Act of 1948 which superseded it were not designed to vest in Courts of Law some new jurisdiction affecting the rights and obligations of landlords and tenants in actions for ejectment. (*Maroof v. Leaff* (2)P. On the contrary as Keuneman J. points out, they ‘merely impose a curb or fetter on the existing jurisdiction’

to grant relief to a landlord who seeks, in the enforcement of his contractual rights under the common law, a decree for the ejectment of his tenant from the premises in the latter's occupation. The sections must therefore be regarded as pre-supposing that a cause of action would have accrued under the common law entitling the landlord to claim a decree for ejectment. If, therefore, no such cause of action exists either by reason of a termination of the tenancy by notice or effluxion of time, or for any other grounds which normally justify proceedings by a landlord for ejectment, the court would possess no jurisdiction to grant the landlord relief. In that event, no occasion arises for applying any fetters on a jurisdiction which already does not exist. If, therefore, the question be approached in relation to the rights of landlords under the common law, it seems to me, with great respect, that certain difficulties visualised in the judgment in *Hameed v. Annamalay* (3) would be found to disappear".

Viewed in this way, the Court has to entertain such an action if the required averments necessary for the Court to exercise its jurisdiction are made in the plaint and the Court could order the ejectment of a tenant only when such requirements stipulated in section 22 are established. Therefore the Plaintiffs-Respondents' action was properly before Court, as he had an accrued right under the common law entitling him to a decree for ejectment on the termination of the tenancy or any other ground known to the common law. However, the provisions of section 22 of the Rent Act No. 7 of 1972 imposed a fetter on the Court to grant the landlord relief by way of ejectment, where there is the actual relationship of landlord and tenant if there arose an occasion for applying such a fetter on its jurisdiction which it otherwise had.

In the instant case, the Plaintiffs-Respondents satisfied all the requirements needed for the acceptance of the plaint. But the Court was absolved from applying any of the fetters enumerated in section 22 of the Rent Act when the Defendant-Appellant set up his defence in his answer that he was not the tenant. The Plaintiffs-Respondents thereupon abandoned their plea to have an order of ejectment under Section 22(2) (b) on the ground of

reasonable requirement, and founded their cause of action for ejection on the averments of fact pleaded by and relied on by the defendant-appellant in his answer. The Defendant-Appellant pleaded that, before the Rent Control Board of Colombo in June 1974 long prior to this action which was filed in July 1979 he had clearly asserted that he was at no time the tenant of the Plaintiffs-Respondents and that the actual tenant was Sittampalam. The Plaintiffs-Respondents therefore raised issues 1 to 3 without an amendment of the plaint and without any objection from the Defendant-Appellant and sought an order for ejection against the Defendant-Appellant as a trespasser although they had advisedly filed the action on the basis of the alleged tenancy. However, when the defendant-appellant reiterated this position so clearly in his answer the Plaintiffs-Respondents confined their claim for his ejection on the grounds other than those contemplated by section 22 of the Rent Act.

The Defendant-Appellant is now seeking to take advantage of the District Judge's answer to issue 1, namely that the Defendant-Appellant was the tenant. It is here that the principle which has its basis in common sense and common justice that "a man shall not be allowed to blow hot and cold — to affirm at one time and deny at another — making a claim on those whom he had deluded to their disadvantage and founding that claim on the very matters of the delusion" arises for application. (vide Selection of Legal Maxims — Herbert Broom, 8th Edn. 1911, p.136). A person who has deluded another to act on the basis that he was the tenant when according to him he was not the actual tenant cannot now get the benefit of that delusion by relying on the protection afforded by the Rent Act to an actual tenant. The law has recognised only the actual tenant to be a statutory tenant when a landlord seeks to have him ejected. The protection of the Rent Act even where the landlord claims to have terminated the common law contract of tenancy is given only to such a tenant. The Defendant-Appellant in this case who does not claim to be the actual tenant and has on his own plea proved himself to be a trespasser cannot be protected on the basis of the delusion practised by him on the Plaintiffs-Respondents whom he does not accept as his landlords. The

learned District Judge has therefore correctly answered issue 3 and issue 6 against the Defendant-Appellant though he has erred in his answer to the 4th issue relating to reasonable requirement, which was not put in issue by the Plaintiffs-Respondents and on which there was hardly any evidence led.

The question whether the Defendant-Appellant was still entitled to the protection afforded to an actual tenant was strenuously argued. In the case of *Cassim Hadjiar v. Umamlebbe & another* (4) the question arose whether a tenant who did not accept his new landlord as his own landlord could be treated as a protected tenant. The legal position that arose in that case was that the original landlord had transferred the premises in question to the Plaintiff and the Plaintiff had accepted the said transfer with the tenants in occupation and the new owner informed the tenants of the fact of the transfer and had given them a month's notice to quit. He had thereby implicitly accepted the position that he was accepting the premises with the Defendants in occupation as tenants and on that basis he purported to terminate the tenancy by giving notice. The Defendants while denying the rights of the Plaintiff, had refused to accept the Plaintiff as their new landlord. The premises were governed by the Rent Restriction Act. L. B. de Silva J. with whom Abeysondera J. agreed, held :—

“The defendants are entitled to take up the position and refuse to acknowledge the transferee of their landlord as their own landlord, but in such an event the defendants are not entitled to claim **any rights of tenancy** from the plaintiff in this action, or even to claim the **rights of a statutory tenant** as against the plaintiff”.

In the instant case a similar legal position arises on the facts. The Plaintiffs-Respondents who were the new landlords accepted the Defendant-Appellant as their tenant when they became the landlords by their joint declaration dated 17th May 1976. But on 17th June 1974 the Defendant-Appellant had before the Rent Control Board denied that he was the tenant, stated that he was the tenant of one Sittampalam and thus did not accept the Plaintiffs-Respondents as his landlords. When the Plaintiffs-Respondents gave him a notice dated July 1976 to quit the

premises on or before 31st July 1977, he had remained silent, but kept on remitting the rents on the basis clearly stated by him in his answer dated July 1979 as the agent of the said Sittampalam. In spite of the Plaintiffs-Respondents regarding him as the tenant, the Defendant-Appellant refused to accept the Plaintiffs-Respondents as his landlords. On the evidence placed before the District Judge, he accepted the position of the Plaintiffs-Respondents. But as the Defendant-Appellant clearly and in unequivocal language asserted that though he occupied a portion of the premises and remitted rents merely as the agent of one Sittampalam was not as a tenant of the Plaintiffs-Respondents but as a licensee of the said Sittampalam, the District Judge came to the correct finding that the Defendant-Appellant was not entitled to claim the rights of tenancy or even claim the rights of a statutory tenant entitled to protection under the Rent Act.

Senior Counsel for the Defendant-Appellant relied on the decision of two Judges of the former Supreme Court in the case of *Edirisinghe v. Patel* (5). The facts in that case were different from those in the instant case as the defendant there admitted that he was the tenant, then later pleaded that he was a joint tenant of the plaintiffs and then again pleaded that the other joint tenant alone continued to be the tenant. There was no denial of the rights of the Plaintiffs as the landlords of the premises and that the Defendant had been a tenant. However, with all due respect to the Judges who decided that case, I regret I am unable to agree with the conclusions arrived by Pathirana, J. on the basis of the two examples visualised by him, to form the view they had formed in that case in regard to the protection afforded by the Rent Restriction Ordinance to a defendant who attempted to repudiate his contract of tenancy. In that case Sirimanne, J. referring to the series of cases cited beginning with *Muthu Natchia v. Pathuma Natchia* (6) where the principle was enunciated that a tenant disclaims to hold of his landlord and puts him in defiance was not entitled to ask for the dismissal of an action for ejectment for want of a valid notice to quit, stated as follows :—

“The reason why such notice is not necessary and why a defendant who denies a tenancy cannot take up such a plea

is because by his denial he repudiates the contract of tenancy and **thus terminates it**. It is therefore not open to the defendant who has himself terminated the contract to say that the plaintiff has not terminated it by a valid notice. A contract of tenancy can be terminated not only by a valid notice, but also by a repudiation of that contract”.

If that was the correct legal position, the defendant in that case was not the tenant on his own plea and therefore could not invoke the protection of the Rent Restriction Ordinance then in force.

In view of all the circumstances of this case, I hold that the District Judge came to a correct finding that the Plaintiffs-Respondents were entitled to the order for the ejection of the Defendant-Appellant on the basis of the Defendant-Appellant's own conduct and the defence he set up before the action was filed and after the action was filed that he was never the tenant of the said premises under the Plaintiffs-Respondents.

The appeal is accordingly dismissed with costs payable to the Plaintiffs-Respondents.

WIMALARATNE, J. — I agree.

COLIN THOME, J. — I agree.

Appeal dismissed.