

WICKRAMARATNE,
v.
THAVENDRARAJAH

SUPREME COURT
SAMARAKOON, C.J., WANASUNDERA, J., AND COLU THOMÉ, J.
S.C.17/82.
CA/LA 6/82; C.A.(S.C.)71/75(F).
D.C. MT. LAVINIA 2501/ZL.
OCTOBER 27, 1982.

Landlord and tenant - Lease of business - Whether really lease of premises - Evidence Ordinance, section 92 - Admissibility of parol evidence - Illegal contract - Whether payment of excess rent can be recovered.

By Indenture of Lease (P4) the plaintiff leased a business called Modern Drapery Stores to the respondent for a period of 3 years. The plaintiff sued the respondent for failure to pay the rent for 3 consecutive months and sub-letting/assigning/parting with possession of the said premises and praying inter alia for cancellation of the lease, ejection of the respondent and restoration of the premises and the business along with certain movables alleged to have been handed over with the business. The respondent in the answer denied the plaintiff's claims and alleged that P4 was a camouflage in order to recover rent in excess of the authorised rent and therefore claimed in reconvention, the excess rent and deposit that had already been paid. The learned District Judge held that P4 was a camouflage and really was a lease of the premises and therefore dismissed the plaintiff's action and gave the respondent judgment in reconvention in the sum recovered in excess of the authorised rent. The appellant appealed unsuccessfully to the Court of Appeal and from the order of that court to the Supreme Court. The appellant had earlier conducted a business in groceries and provisions in the premises referred to in P4 under the name Ratna Stores. He leased the business along with the equipment to one T. and later to the respondent. On 17.6.1969 the appellant registered a new business under the name Modern Drapery Stores as being run in these premises although he had truly not run such a business.

Thereafter on P4 he purported to lease the business with only some of the movables of the business of Ratna Stores which could be used for a drapery store to the respondent.

Held -

- (1) The lease P4 was a sham and an attempt to evade the punitive provisions of the Rent Restriction Act: There was in fact no agreement as was recited in (P4). Parol evidence to prove such a fact is admissible and is not barred by s.92 of the Evidence Ordinance.
- (2) As the excess rent was paid to the appellant on an illegal contract - illegal to the knowledge of both the respondent and the appellant the respondent is not entitled to recover the sum paid in excess of the authorised rent.

Case referred to:

(1) *Vitharne v. De Zylva* (1954) 56 N.L.R.57

APPEAL from judgment of Court of Appeal.

Nimal Senanayake, S.A., with K.P. Guneratna, Mrs. S.M.Senaratne, B. Jayamanne and Miss A.D.D.N. Telespha for plaintiff-appellant.

Defendant-respondent absent and unrepresented.

November 10, 1982.

SAMARAKOON, C.J.

The appellant complained that by Indenture of Lease No. 849 dated 26.6.1969 (marked P4) he had leased a business called and known as Modern Drapery Stores carried on by him at No.5, High Street (now W.A.De Silva Mawatha), Colombo 6 to the respondent for a period of 3 years at a monthly rental of Rs. 275/- but that the respondent had in contravention of the express terms of the agreement sublet and/or assigned and/or parted with possession of the said premises to one Mohideen. He also complained that the respondent failed to pay rents for three consecutive months ending 31.03.1971. He therefore prayed for the cancellation of the lease, for the ejection of the respondent, for restoration of the premises and the business and for the return of the movables set out in the second schedule to the plaint to the value of Rs.3,625/-. He also claimed the return of the movables set out in the third schedule to the plaint or the payment of their value of Rs.6,596/-. The respondent in his answer denied liability on the lease and alleged that it was a subterfuge or a camouflage to cloak the recovery of rent in excess of the authorised rent of the premises. He claimed in reconvention a sum of Rs.11,421/30 being excess rent recovered during the period

September 1966 to February 1972 and a further sum of Rs. 2,694/15 deposited by him in excess of the three months' deposit of Rs. 305/89 which the appellant was entitled to in law. The learned District Judge held that the lease P4 was a subterfuge and a camouflage and that it only let the premises to the respondent at Rs. 275/- per mensem. There was no dispute in regard to the authorised rent of the premises and on that basis the District Judge gave the respondent judgment in a sum of Rs. 6,046/62 recovered by the appellant in excess during the period July 1969 to 31st July 1974. He dismissed the appellant's action. The appellant appealed unsuccessfully to the Court of Appeal. Hence this appeal to this Court.

Counsel for the appellant contended that the learned District Judge misconstrued the evidence. He referred us to the earlier documents relating to leases of the business at these premises and argued that they showed that P4 was a genuine lease. The burden of his song was that the appellant had fallen into a trap cleverly set by the respondent. A close scrutiny of the documents becomes necessary. The Certificate of Registration (P1) issued under the Business Names Ordinance (Cap.149) dated 04.09.1958 shows that the appellant had commenced a business in Groceries and Provisions under the name "Ratna Stores" at the said premises from 1st September 1958. By Indenture of Lease No.355 dated 7th November 1964(P2) he leased the business of "Ratna Stores" for a period of 3 years commencing 1st November 1964 to one S. Thedchanamoorthy. This lease was due to expire on 31.10.1967. Before this lease expired the appellant entered into another lease of the said business by Indenture of Lease No.558 dated 16th September 1966(P3) whereby he leased the said business to the respondent for a period of 3 years commencing 16th September 1966. This lease was due to expire on 16th September 1969. The Schedule to each of the leases P2 and P3 describe the business and the movables belonging to the business. They are identical. By Indenture No.791 dated 21st November 1968 (P9) it was agreed between the parties that upon the expiration of the lease P3 the lease would continue for a further period of 4 years commencing 17th September 1969. The Schedule describing the business and its movables is identical with the Schedules in P2 and P3. Then comes a significant change. A business by the name of Modern Drapery Stores was registered on the 17th June 1969 (P5). This business is stated to have been commenced by the appellant at the said premises on the 13th December 1968. The appellant then enters into an Indenture of Lease No.849 dated 26th June 1969(P4) whereby he

leased the business of Modern Drapery Stores carried on at the said premises to the respondent for a period of 3 years commencing 1st June 1969. The Schedule to P4 describes the business and only some of the movables of the business of Ratna Stores which obviously could be used for a Drapery Store. They consisted of two large show cases, one small show case and a glass fronted almirah. All the other movables which were useful for a grocery store were described in a separate list (marked P6) signed by the respondent whereby he acknowledged that he held them for and on behalf of the appellant. The conclusion is obvious. The respondent had ceased to carry on the grocery business of Ratna Stores and had commenced the business of Modern Drapery Stores. Therefore the lease had to be renewed and for that purpose the business of Modern Drapery Stores had to be registered in the appellant's name. Otherwise the lease would have to be purely a lease of the premises. Herein lies the sham transaction. This conclusion is further strengthened by the appellant's admission in evidence that he did not at any time carry on the business of Modern Drapery Stores. It was indeed a camouflage. The true agreement was not in it and was otherwise. It was a subterfuge and it was an attempt to evade the punitive provisions of the Rent Restriction Act. It was a concerted effort of both appellant and respondent to evade the law. They were both culpable – each for his own part in the circumvention of the rigours of the Statute. The resulting position is that there was in fact no agreement as is recited in P4. It was a sham from beginning to end. The proof of such a fact is not precluded by the provisions of section 92 of the Evidence Ordinance. Parol evidence is admissible to prove such fact. "All that this section excludes is oral evidence to contradict, vary, add to or subtract from the terms of the contract which has been reduced into writing. It does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else". (Woodroffe & Ameer Ali's Law of Evidence, Eleventh Edition, page 1549.) The appellant's action was therefore rightly dismissed.

The learned District Judge has entered judgment for the respondent in a sum of Rs. 6,046/62 being excess rent paid to the appellant. This was money recovered on an illegal contract. It was given colour of legitimacy by a lease of a business in terms of P4. The respondent has acquiesced in this mode of recovery and thereby colluded with and assisted the appellant in his attempt to evade the law and punishment thereunder. They were both aware that it was an offence

for the appellant to receive and for the respondent to pay any sum exceeding the authorized rent. It is an illegal contract in that it was as much an offence to give as to receive. The Court cannot help the respondent to recover monies paid under such circumstances. *Vitharne vs. De Zylva*. (1) I would therefore set aside the decree entered in favour of the respondent in the said sum of Rs. 6,046/62.

The Court of Appeal has ordered the respondent to deliver to the appellant the movables set out in Schedule 2 to the plaint and ordered the appellant to refund a security deposit of Rs. 3,000/- to the respondent on such return, the appellant being entitled to deduct from this sum the value of any article not returned. The Court has also ordered the respondent to return the movables set out in the list P6 and on his failure to return any article on or before a date stipulated by the District Judge he will pay its value to the appellant. These two orders will stand. Subject to this the appeal is dismissed without costs.

WANASUNDERA, J. - I agree.

COLIN-THOMÉ, J. - I agree.

*Decree varied and
appeal dismissed.*