

ABEYPALA

v.

ABEYAKIRTHI

SUPREME COURT.

SAMERAWICKRAME, J., ISMAIL, AND WANASUNDERA, JJ.

S. C. APPEAL No. 40/80 - D. C. NEGOMBO 347/RE.

JANUARY 15, 1981.

Lease—Whether letting of business or of premises—Defendant not tenant of premises but a licensee—Whether letting is of the business only—Errors in typing of prayer to amended plaint—Plaintiff not to be denied relief in such circumstances.

The plaintiff sued the defendant on the basis that he had leased to the defendant by a document marked "A" a business of a hotel and bakery and that the defendant wrongfully continued to carry on business after the expiry of the lease. The defendant, *inter alia*, pleaded that he was sub-tenant under the plaintiff of the premises in suit and was protected by the provisions of the Rent Act. In regard to the plaintiff's right to obtain a decree for ejection, the defendant further relied on the fact that the amended plaint filed by the plaintiff had omitted to include a prayer for ejection, although in the body of the amended plaint it was pleaded, as it had been in the original plaint, that a cause of action had accrued to the plaintiff for ejection.

Held

(1) On the evidence and a construction of the lease agreement, the plaintiff only let the business carried on by him in the premises to the defendant. Possession of the premises by the defendant was therefore not on the basis of a tenancy but only as licensee to enable him to conduct the business during the stipulated period.

(2) The finding of the Court of Appeal that the omission in the prayer to the amended plaint filed by the plaintiff, of a prayer for ejection, was a typist's error, must on an examination of the circumstances of the case be affirmed. The plaintiff is therefore entitled to a decree for ejection.

Cases referred to

- (1) *Nicholas Hamy v. James Appuhamy*, (1950) 52 N.L.R. 137.
- (2) *Andiris Appuhamy v. D. B. M. Kuruppu*, (1963) 65 N.L.R. 21.
- (3) *Abdul Latif v. Seyed Mohamed*, (1967) 72 N.L.R. 20.
- (4) *Charles Appuhamy v. Abeyskera*, (1954) 56 N.L.R. 243.
- (5) *Jayasinghe v. Goolam Hussein*, (1955) 56 N.L.R. 381.
- (6) *Devairakkam v. Samarasinghe*, (1962) 65 N.L.R. 18.
- (7) *Sadiris Singho v. Wijesinghe*, (1965) 70 N.L.R. 185.

APPEAL from a judgment of the Court of Appeal.

E. D. Wickremnayake, with *D. S. Wijesinghe*, for the defendant-appellant.

J. W. Subasinghe, with *J. C. Nilanduwa*, for the plaintiff-respondent.

April 6, 1981.
ISMAIL, J.

The plaintiff has filed this action on the basis that he had been carrying on the business of hotel and bakery known as Sri Lanka Hotel and Bakery in the lands and premises rented out by him on a monthly tenancy as described in schedule "X" to the plaint from about the year 1967. He further avers that by written lease agreement of 13th September, 1971, marked "A" he had leased the above business, including the management and control, and the right to carry on the business and enjoy the goodwill and profits and the right to use movable property and accessories ancillary to the said business to the value of Rs. 8,341/21 to the defendant for a period of one year from the date of the lease agreement "A" at a monthly rental of Rs. 400. According to this document the defendant had also undertaken to pay the dues in respect of the electricity supplied to the premises in the name of the plaintiff. In consequence of the lease agreement the defendant had been placed in possession. The plaintiff had averred that after the expiry of the lease on 14th September, 1972, the defendant maliciously, wrongfully and unlawfully continued in occupation of the said lands and premises and continued to use the said movable properties and accessories and to have carried on the said business, enjoyed the goodwill and profits and had refused to hand over possession of the business and the premises to the plaintiff though demand had been made.

The defendant in his answer while admitting the execution of the lease agreement "A" takes up the position that firstly, the plaintiff had represented to him that he was the owner of the premises where the business was carried on, and that after he had carried on the business for some time he became aware of the fact that the plaintiff was not the owner of the premises in suit but only the tenant of these premises, and that the owner of the premises was one Mrs. V. Beatrice Fernando who had instituted the action D. C. Negombo 297/RE and secondly, he takes up the position that the lease agreement 'A' is illegal and unenforceable and the plaintiff has accepted him as a sub-lessee, he cannot evict him and that he is protected by the provisions of the Rent Act.

With regard to the first of the grounds set up in the answer it is clear that even at the execution of the document "A", which is also marked P1, in paragraph 4 it is stated that if there is any rent

owing to the landlord the party of the first part shall pay the same, which clearly indicates that it was within the knowledge of both the plaintiff and the defendant at the execution of this document "A" that the plaintiff was only a lessee of the premises in question and that the defendant was aware of this fact. Therefore the defendant's averment in his answer that he became aware of the fact that the plaintiff was a lessee only after the execution of the document "A" is manifestly untruthful and must affect his credibility.

After the trial had been proceeded with and the evidence of the parties had been fully led it was discovered by the plaintiff that the premises in question had been incorrectly described since there had been an alteration in the assessment number of the premises. For that specific purpose counsel for plaintiff had applied to Court for permission to amend the plaint. There had been no objection raised by the defendant to the application and the application had been allowed. Subsequently amended plaint had been filed dated 25.10.74. In the original plaint one of the reliefs asked for was for ejection of the defendant from the premises in suit. This particular paragraph in the prayer had not been reproduced in the amended plaint but there is the averment in paragraph (7) of the amended plaint that a cause of action had accrued to the plaintiff to eject the defendant from the lands and premises in which the said business was being carried on and for the restoration to the plaintiff of peaceful possession of the said lands and premises, etc. Further, issue No. 7 which had been raised by the plaintiff as to whether the plaintiff was entitled to eject the defendant from the premises in which the business was carried on remained on the record and was not deleted in consequence of the plaint being amended.

I am of the view that the reasons advanced in the judgment of the Court of Appeal which indicated that the omission in the plaint of the prayer for ejection is an error by the typist is amply substantiated and appears to me to be the correct assessment in respect of this matter. As stated in the judgment the whole purpose of the plaintiff's action was to get these premises back and a mere declaration that he is entitled to the business and movable property would not be of much benefit to the plaintiff. Further the numbering of the several paragraphs of the prayer to the amended plaint as (a), (b), (c), (e) and (f) and the omission of paragraph (d) clearly indicates that this is an inadvertent omission,

otherwise the paragraphs would have been marked as (a), (b), (c), (d), and (e) in that order and not as (a), (b), (c), (e), and (f), omitting (d) in that sequence. I am therefore of the opinion that the Court of Appeal judgment making order that the plaintiff is entitled to decree for ejectment is correct.

The next matter that arises for consideration is whether by this document the plaintiff had really leased the business carried on in these premises to the defendant, the occupation of the premises therefore being ancillary to the carrying on of the business, or whether by this document the plaintiff had sought to circumvent the provisions of the Rent Act and it in reality was a lease of the premises to the defendant.

Both the original Court and the Court of Appeal on a consideration of the facts before them had arrived at the identical conclusion that by document "A" the plaintiff had only leased the business carried on on these premises to the defendant and that the occupation of the premises by the defendant was in order to carry on this business and that the plaintiff had therefore not surrendered his right to occupy the premises to the defendant.

Several cases were cited to us and I shall refer briefly to those cases. What emerges on a consideration of these several authorities is that one has to examine the documents by which possession had been handed over in order to determine whether there has been a letting or sub-letting of premises or whether the lessee was merely permitted to occupy the premises as a licensee for the sole purpose of carrying on the business until the business was handed back to the lessor. I shall now refer to these cases.

In the case of *Nicholas Hamy v. James Appuharny* (1) the facts indicate that the defendant had taken charge from the plaintiff a "workshop" called "The City Engineering Works", together with certain tools, machinery and implements. The defendant undertook to pay a sum of Rs. 160 per mensem "for the above workshop until such time as I am in occupation". The defendant also agreed to quit on receiving three months' notice. It was held that what was let was a building and not a "a business" and that the agreement contained all the ingredients necessary to constitute a valid letting of "premises" within the meaning of the Rent Restriction Ordinance.

In the case of *Andiris Appuhamy v. D. B. M. Kuruppu* (2) where a tenant who carried on a business in a portion of rent-controlled premises purported to lease out the "business" to a third party but, according to the evidence, the transaction was in reality sub-letting of a distinct portion of the premises, it was held that the landlord was entitled to eject the tenant and sub-tenants on the ground of sub-letting.

In the case of *Abdul Latif v. Seyed Mohamed* (3) the facts indicated that the tenant of a rent controlled premises had entered into what was stated to be in the document a partnership agreement but the facts indicated that this agreement was only a plan to cover the sub-letting of premises. It was held that the tenant and the sub-tenant were liable to be ejected by the landlord, if the landlord had not given his written consent to the agreement. In the course of the judgment in that case the dictum of Nagalingam, S.P.J. in *Charles Appuhamy v. Abeysekera* (4) at 244, was quoted with approval. "The mere affixing of a label to a transaction by the parties or by their legal advisers does not control or govern the true nature of the rights and liabilities created which have to be determined by an examination of the terms and conditions of the instrument itself." In that reported case where a business of the nature of a hotel and tea kiosk was "leased" by A to B and, under the contract, A gave over to B the management, control and conduct of the business for a term of years. It was held that at the end of this specific period B was not entitled to the protection of the Rent Restriction Act with regard to the premises in which the business was carried on. In the course of that judgment Nagalingam, S. P. J. examined the document P1 in that case and came to the conclusion that it cannot probably be said that there was a letting of immovable property to which the provisions of the Rent Restriction Act apply. On a consideration of the document P1 in that case he further stated: "On a proper reading of the document P1, it is impossible to resist the conclusion that the transaction entered into between the parties was one not of letting any immovable property for the purpose of enabling one party to carry on a business, nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the "lessee" in charge of a business that had been and was being carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the

goodwill and the improvements and the advantages gained or accrued thereto in the meantime; and as ancillary to the object which the parties had in contemplation, it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and is far removed from that of a tenant."

In the case reported in 56 N.L.R. page 381 (5) it was held where a tenant who carries on a business in the rented premises transfers the business to a third party for a stipulated period without obtaining the landlord's consent in writing, such transfer does not amount to sub-letting within the meaning of section 9 of the Rent Restriction Act if the possession of the premises by the transferee is only incidental to the transaction relating to the business.

In the case of *Devairakkam v. Samarasinghe*, (6) the facts indicate that where a tenant of rent-controlled premises, who carried on a business therein leased the business to another person and moved to other premises, where he opened a new business, it was held that the lease of the business did not amount to sub-letting of the premises in which the business was carried on.

In the case of *Sediris Singho v. Wijesinghe* (7) the facts indicate that the plaintiff leased to the defendant for a period of three years the business of a hotel carried on at certain premises, together with goodwill, shop fittings, furniture, utensils and implements of trade. At the expiry of the period of three years the defendant was to yield up peaceful possession of the business and premises to the plaintiff. The defendant claimed that what was leased to him was a furnished apartment and that it was governed by the Rent Restriction Act. It was held that the transaction between the parties was not a lease of a building but of a business. The defendant's position while he was in occupation of the premises was no more than that of a licensee. The Rent Restriction Act, therefore, had no application to the case.

Therefore when one considers the facts of the present case, the construction of the document "A" and the circumstances indicated in the evidence clearly establish that what the plaintiff did was merely to let the business carried on by him to the defendant and therefore there is no sub-letting. The plaintiff had handed over the business to the defendant as a going concern and the defendant had to give it back to the plaintiff on the

termination of the agreement in similar conditions. In order to achieve this object the defendant had been given possession of the premises but such possession had not been given on the basis of a tenancy. The defendant was only occupying the premises as a licensee enabling him to conduct the business during the stipulated period. The clause in the agreement "A" that the defendant was to pay the electricity bills in this case in the name of the plaintiff is clearly indicative of the fact that the defendant was only in the premises as a licensee of the plaintiff. Clause 4 of the agreement further indicated that if there were any rents due to the landlord it was the party of the first part, that is the plaintiff who shall pay the same. Further the clause 6 of the agreement indicates that it was the plaintiff who had to fulfil all the requirements in connection with the buildings of this business and the defendant had agreed not to come to any agreement with the owners of the building. The stipulations in the agreement clearly indicate that occupation of the premises in suit by the defendant was in the nature of a licensee under the plaintiff and does not confer any tenancy rights in respect of these premises to the defendant.

I am therefore of the view that the Court of Appeal has come to the correct finding in respect of matters in issue in this case and the defendant's appeal in this case must necessarily fail. I accordingly dismiss the appeal with costs.

SAMERAWICKRAME, J.—I agree.

WANASUNDERA, J.—I agree.

Appeal dismissed.