

SALEEM
v.
BALAKUMAR

COURT OF APPEAL.
ABDUL CADER, J. AND SENEVIRATNE, J.
C. A./L. A. APPLICATION 56/81—D. C. COLOMBO 2764/RE.
JULY 21, 1981.

Civil Procedure Code, sections 754, 756—Application for leave to appeal from order of District Court issuing writ of ejectment against tenant—Writ issued pending appeal—Action based on section 29 of Rent Act—Agreement relied on by landlord challenged by tenant as being contrary to Prevention of Frauds Ordinance—Substantial question of law to be determined—Leave to appeal granted.

The defendant-petitioner sought for leave to appeal against an order of the District Court allowing issue of writ of ejectment against him. The plaintiff-respondent had filed this action against the defendant-petitioner for ejectment relying on section 29 of Rent Act, No. 7 of 1972; judgment had been entered in favour of the plaintiff and the defendant had appealed against the said judgment.

It was submitted on behalf of the defendant-petitioner, *inter alia*, that the agreement sued upon, violated the provisions of the Prevention of Frauds Ordinance as it was not notarially attested and therefore was not an enforceable agreement. Reliance was also placed on a judgment reported in 63 N.L.R. 548. The application for leave to appeal was opposed by the plaintiff-respondent.

Held

in this case the very agreement on which the plaintiff relies to seek judgment is being assailed as being contrary to law and this was a substantial question of law to be adjudicated upon at the hearing of the appeal. The premises were not excepted premises and if the defendant-petitioner's submission was upheld then he would be a statutory tenant entitled to the protection of the Rent Act. Accordingly leave to appeal should be granted in the circumstances of this case and writ stayed till the disposal of the appeal.

Case referred to

Vethamanickam v. Dewoodbhoy, (1962) 63 N.L.R. 548.

APPLICATION for leave to appeal from an order of the District Court, Colombo.

C. Ranganathan, Q.C., with N. S. A. Goonetilleke and J. P. de Almeida, for the petitioner.

A. K. Premadasa, with T. B. Dillimuni, for the respondent.;

Cur. adv. vult.

August 13, 1981

ABDUL CADER, J.

The plaintiff-respondent filed action against the defendant-petitioner for ejectment, relying on section 29 (2) of the Rent

Act, No. 7 of 1972. On a written agreement entered into by the defendant-petitioner, the defendant-petitioner agreed to return the premises to the plaintiff-respondent on her return to Sri Lanka. Judgment was entered in favour of the plaintiff and on an application made by the plaintiff-respondent for issue of writ, the learned District Judge allowed the execution of the decree subject to the deposit of a sum of Rs. 250,000 as security.

The defendant-petitioner sought leave of this court to appeal against that order. At the hearing before us, counsel for the defendant-petitioner raised three issues as worthy of consideration in appeal :

- (1) the plaintiff was not properly before court as the agreement was made with the plaintiff's father and not with the plaintiff;
- (2) the agreement was not registered properly with the Colombo Rent Board in terms of section 29; and
- (3) that the agreement violated the provisions of sub-section (2) of the Statute of Frauds as it was not notarially attested and, therefore, was not enforceable and therefore no writ can issue.

Although we heard counsel on the first two points, we do not propose to make any order in respect of those in these proceedings.

In respect of the third contention, counsel submitted that, although section 763 of the Civil Procedure Code as amended by section 53 of 1980 states that "The Court may order execution to be stayed upon such terms and conditions as it may deem fit where—

- (a) the judgment-debtor satisfies the court that substantial loss may result to the judgment-debtor unless an order for stay of execution is made—"

this section is not exhaustive in respect of the relief available to the judgment-debtor. He referred us particularly to the judgment of T. S. Fernando, J. in *Vethamanickam v. Davoodbhoy* (1) and submitted that the Court has a very wide discretion to

grant relief to a tenant, and, therefore, the Court should take into consideration the hardships caused to the defendant if the defendant is ejected from the premises. He also pointed out the word "may" in the clause quoted by me and the requirement on the plaintiff to make the defendant a respondent, all point to a wide discretion in favour of the tenant if good cause is shown by the tenant.

We do not propose to come to any decision on this contention because, even assuming that Mr. Ranganathan is right, we are of the opinion that section 29 of the Rent Act limits such a wide discretion in the District Judge. Section 29 was amending legislation introduced to help landlords as against the hardships caused to them by the Rent Act which was tilted very much in favour of the tenant. This section was introduced so that landlords could enter into enforceable agreements requiring the tenant to vacate the premises. Thus, section 29 (3) states the tenant is obliged to vacate the premises at the end of such period specified in such agreement, or, as the case may be, on the happening of the event specified therein.

But in this case, the very agreement on which the plaintiff relies to seek ejection is being assailed as being contrary to the law. Counsel for the plaintiff-respondent submits that there is no requirement to enter into a notarial agreement as the agreement in question is not a lease as set out in terms of section 2 of the Prevention of Frauds Ordinance and that even if the Court is of the view that this agreement is in the nature of a lease, since in this particular case the agreement provides for the return of the premises on the plaintiff's return to the Island, this could well have happened within a month of the date of the agreement so as to take it out of section 2.

It is not for us to express an opinion on this question at this stage. Though this is not a binding opinion, Rustomjee's exposition of the Rent Act, No. 7 of 1972, has expressed the view at page 80 that the agreement referred to in section 29 (2) must comply with the provisions of section 2 of the Prevention of Frauds Ordinance in order to bind the tenant with regard to his obligations to vacate the premises. We are of the opinion that this is a substantial question of law to be adjudicated in appeal.

It was not contended before us that if we hold against the plaintiff-respondent on this point, even then the plaintiff-respondent would be entitled to writ of execution. These premises are not excepted premises and, therefore, if it is found that the agreement requires a notarial attestation, then the defendant would be a statutory tenant and, consequently, entitled to all the protection of the Rent Act.

We grant the defendant-petitioner leave to appeal and we stay the execution of the writ till the disposal of the appeal.

We direct the Registrar to accelerate the typing of the appeal briefs and list this appeal for argument as early as possible.

SENEVIRATNE, J.—I agree.

Leave to appeal granted.