

PRINS  
v.  
PATERNOTT

COURT OF APPEAL.

WIJERATNE, J. AND

WEERASEKERA, J.

C.A. NO. 374/86 (F).

JULY 31, OCTOBER 27 AND NOVEMBER 4, 1992.

*Rent and ejection – Distinction between tenant and licensee – Section 10(1) Rent Act, No. 7 of 1972.*

The tests to be applied for determining whether a tenancy has been created are –

1. Is the person claiming tenancy in exclusive occupation of a defined and separate portion over which the landlord has for the time being relinquished his right of control?
2. Was there payment of rent?
3. No person is to be deemed a tenant, by reason solely of the fact that he is permitted to use rooms in such premises.

In the last resort it is the intention of the parties that determines the question whether a person is a tenant or a licensee.

**Cases referred to:**

1. *Cobb v. Lane* [1952] 1 All ER 119.
2. *Errington v. Errington* [1952] 1 KB 290.
3. *Booker v. Palmer* [1942] 2 All ER 674, 677.
4. *Marcroft Wagons Ltd. v. Smith* [1951] 2 KB 496.
5. *Isaac v. Hotel de Paris Ltd.* [1960] 1 All ER 348.
6. *Swami Sivagnanda v. The Bishop of Kandy* 55 NLR 130.
7. *Britto v. Swamikannu* 74 NLR 209.

**APPEAL** from judgment of District Court of Colombo.

*Miss Maureen Seneyiratne P.C. with G. L. Geethananda and Rohana Jayawardena for plaintiff-appellant.*

*P. A. D. Samarasekera P.C. with Keerthi Sri Gunawardena for the substituted defendant-respondent.*

April 8, 1993.

**WIJERATNE, J.**

The plaintiff-appellant filed this action on 29.9.83 against the original defendant (since deceased) stating that prior to the dates material to the action the plaintiff-appellant permitted the defendant to occupy three rooms in premises No. 3, 37th Lane, off Queen's Road, Colombo, for which the plaintiff-appellant charged Rs. 750/- per month. These three rooms were described in the schedule to the plaint.

The defendant had made payments up to 31.1.83. The plaintiff had sent a notice dated 22.2.83 through her Attorney-at-Law to the defendant to quit and vacate the premises, which he had been occupying, on or before 31.3.83, which he had failed to do. Therefore she sought ejectment of the defendant from the said premises and payment in a sum of Rs. 1500/- on account of occupation for the months of February and March 1983 and damages in Rs. 5000/- for the period from 1.4.83 to 31.8.83 and thereafter damages at Rs. 1000/- per month from 1.9.83 till possession is restored to her.

The defendant filed answer claiming to be a lawful tenant of these premises.

When the trial was taken up on 30.8.85 the receipt of the notice to quit was admitted. The following issues were framed :-

**On behalf of the Plaintiff:**

- "1. Did the plaintiff give the defendant permission to occupy the premises in suit as indicated in paragraph 2 of the plaint ?
2. If issue No. 1 is answered in the affirmative, is the plaintiff entitled to relief(s) prayed for in the plaint ?"

**On behalf of the Defendant:**

- "3. Is the defendant the lawful tenant of a part of the premises bearing No. 1 (~~sic~~), 37th Lane, Colombo 3 ?

4. If so, can the plaintiff maintain this action ?
5. In any event can the plaintiff maintain this action as the subject matter had not been properly described ?"

At the trial only the plaintiff-appellant gave evidence on her behalf and produced documents marked P1 to P15.

On behalf of the defendant he himself gave evidence and documents D1 to D63 were marked and produced.

The learned Additional District Judge by his judgment dated 1.9.86 held that the defendant was the lawful tenant of these premises and dismissed the plaintiff's action with costs, from which judgment and decree this appeal has been filed.

The main question to be decided is whether the defendant-respondent was a tenant or a licensee.

In this case there is no formal document setting out the terms and conditions on which the plaintiff-appellant's husband gave these premises to the defendant-respondent for his occupation. In the absence of any formal documents the intention of the parties must be inferred from all the surrounding circumstances having regard to any documentary evidence which may have been produced.

In the case of *Cobb v. Lane*<sup>(1)</sup> it was stated that in former days the distinction between a tenancy and licence was not so important as it has become after the Rent Restriction Act came into operation and the solution would seem to be found, as one would expect, on the intention of the parties.

In *Errington v. Errington*<sup>(2)</sup> it was held that although a person who was left into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.

Lord Green, M.R. said in *Booker v. Palmer* <sup>(3)</sup>:

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind."

In *Macrost Wagons Ltd. v. Smith* <sup>(4)</sup> Sir Raymond Evershed, M.R. (as he then was) stated as follows:-

"Until, in the present century, the Rent Restriction Acts came into force, the law, broadly speaking, necessarily inferred, when exclusive possession was granted to one of the property of another, at a rent payable to that other, that a tenancy had been created. The law did not recognise that those conditions were compatible with any other kind of relationship."

He also went on to state that consideration of similar facts today must be against the background of the conception of the statutory tenancy.

In this case it was held that though rent had been paid for about six months, no tenancy had been created.

In *Isaac v. Hotel de Paris Ltd.* <sup>(5)</sup>, which was a case from Trinidad in the West Indies where the appellant was let into occupation of the first floor of the Paris Hotel to run a night bar to be managed by the appellant on behalf of the hotel company; the appellant ran the night bar, paid all expenses, took all the profits and paid the monthly rent to the hotel company. It was held that the relationship between the parties was not that of a landlord and a tenant but of a licensor and licensee, even though there was exclusive possession by the appellant and acceptance of rent by the hotel company.

In a local case, *Swami Sivagnanda v. The Bishop of Kandy*, <sup>(6)</sup> it was held that the question whether or not the parties to an agreement intended to create between themselves the relationship of landlord

and tenant must in the last resort be a question of intention. The tests laid down in the case of *Britto v. Swamikannu*<sup>(7)</sup> are also helpful.

Section 10(1) of the Rent Act, No. 7 of 1972, also lays down certain tests to decide whether a person is a tenant.

Broadly speaking the tests to decide whether a tenancy has been created are as follows:-

- (1) Is the person claiming tenancy in exclusive occupation of a defined separate portion over which the landlord has for the time being relinquished his right of control ?
- (2) Was there payment of rent ?
- (3) No person is to be deemed a tenant by reason solely of the fact that he is permitted to use rooms in such premises.

Miss Maureen Seneviratne, P.C., for the plaintiff-appellant, in a lengthy oral and written submission, has strongly argued that despite the use of the word "rent" no tenancy was created.

In this case the evidence clearly shows that three rooms were let to the defendant-respondent for which rent was charged and a portion of these premises was used as a store. In D1, D2, D3, D4, D9, D13, D14, D15 and D16 there are references to rent. °

- Finally in the evidence given by the plaintiff-appellant on 20.8.85, towards the commencement of the cross-examination, she has stated as follows:-

"Q. When did the defendant come to reside; is it in 1973 ?

- A. In 1973 or 1974. I may say that my husband rented out these premises to the defendant, that the tenancy commenced in 1973, that the defendant paid a monthly rental, and that monthly rental was paid in respect of three rooms."

The plaintiff-appellant has clearly admitted that the defendant was a tenant and not a licensee.

The fact that a portion of these three rooms was used for storing goods supports the view that it was given on monthly rent. For these reasons the appeal has to be dismissed.

However I wish to add one more matter. Paragraph 2 of the plaint of the plaintiff-appellant states: "Prior to the dates material to this action the plaintiff permitted the defendant to occupy three rooms in premises bearing Assessment No. 3, 37th Lane, off Queen's Road, Colombo 3. . . ."

However, according to the evidence of the plaintiff-appellant it was her deceased husband who had given this permission. Paragraph 2 of the plaint is at variance with the evidence led on behalf of the plaintiff-appellant.

Having regard to the totality of the evidence, oral and documentary, the tenancy has been established. Therefore the appeal is dismissed with costs payable by the plaintiff-appellant to the substituted defendant-respondent.

**WEERASEKERA, J. – I agree.**

*Appeal dismissed.*