VITHANARACHCHI
v.
MABEL PERERA

COURT OF APPEAL.
WIJEYARATNE, J. AND EDUSSURIYA, J.
C.A./L.A. 106/87 (L.G.)
D.C. COLOMBO CASE NO. 6082/RE
JANUARY 20, 1992.

Landlord and tenant – Notice to quit-Waiver of notice.

Where the plaintiff landlord sent a notice to quit dated 25.6.84 terminating the tenancy from 30.9.84 and filed action on 5.10.84 against the defendant tenant on the ground of (1) arrears of rent for more than three months, and (2) causing deterioration of the premises by wrongfully constructing an internal wall obstructing a doorway, and thereafter sent another notice to quit dated 28.11.84 terminating the tenancy from 31.12.84, without prejudice to the earlier notice, on the ground that the defendant had interfered with the common water supply by taking an illegal supply line to her premises, compelling the Water Supply and Drainage Board to disconnect the entire water supply, and thereby constituting a nuisance under section 22(1) (d) of the Rent Act, which cause of action arose after the institution of the action and it was contended that the plaintiff had cancelled or waived the earlier notice –

Held:

Waiver must be strictly proved. The second notice did not amount to a waiver of the earlier notice because it was sent in respect of a new ground of ejectment which arose after the institution of the present action and without prejudice to the earlier notice.

Cases referred to:

1. *Virasinghe v. Peris* 46 NLR 139, 141.
2. *Joosub Ltd. v. Moosa* 1947 (2) SA 1120(T).
3. *Ellis & Others v. Laubscher* 1956(4) SA 692 AD.
4. *Kannemeyer v. Gloriosa* 1953 1 SA 590(w).
5. *Hepner v. Roodepoort Maraisburg Town Council* 1962(4) SA 772(AD).
6. *Karunaratne v. Fernando* 73 NLR 457, 459.
7. *Dias Bandaranayake v. Perera* 49 NLR 212.
8. *Loe Wenthal v. Vanhoute and Another* (1947 – 1 A.E.R. 116.)
9. *Doe d. Brierly v. Palmer* (1812 16 East 53, 104 ER 1009 31 Digest 457, 6049.)

APPEAL from order of District Court of Colombo.

T. B. Dillimuni with *Miss P. Malalasekera* for plaintiff-appellant.

Rohan Jayawardena for defendant-respondent.

Cur adv vult.

January 7, 1992.

WIJEYARATNE, J.

The plaintiff-appellant filed this action bearing No. 6082/RE on 5th October 1984 in the District Court of Colombo against the defendant-respondent on the ground that he had let premises No. 45/6 Maligakanda Road, Colombo 10, to the defendant-respondent on a monthly tenancy and that:

(1) she was in arrears of rent for a period of more than three months;

(2) she had caused deterioration of the premises by wrongfully constructing an internal wall obstructing a doorway.

The plaint also averred that notice to quit dated 25.6.84 (P.23) terminating the tenancy from 30.9.84 had been sent to the defendant-respondent.

The plaintiff-appellant sought ejectment, arrears of rent and a mandatory order for the removal of the obstruction.

The defendant-respondent filed answer admitting the tenancy but denying the other allegations.

The answer averred that the defendant-respondent had received a second notice of termination of tenancy dated 28.11.84 (D6) terminating the tenancy from 31.12.84 and hence the notice to quit dated 25.6.84 (P.23) was of no force or avail in law.

Issues were framed on 30.1.86 and the trial taken up.

The plaintiff-appellant's case was concluded on 19.2.87 leading in evidence documents P.1 to P.29.

At that stage before the defendant-respondent began her case, at the request of court parties filed written submissions regarding issue No. 11.

Issue No. 11 reads as follows:-

"11 Since the plaintiff has sent, after the notice of termination of tenancy referred to in paragraph 15 of the plaint, another notice of termination of tenancy dated 28.11.84, is the earlier notice valid in law."

The present action bearing No. 6082/RE was filed on 5.10.84 after the notice to quit dated 25.6.84 (P.23) had been sent.

It was submitted on behalf of the plaintiff-appellant that the defendant-respondent had, after this action was filed interfered with the common water supply by taking an illegal supply line to her premises and thereby compelling the Water Supply and Drainage Board to disconnect the entire water supply. It was submitted that this constituted a nuisance and thereby a new ground of ejectment under section 22(1) (d) of the Rent Act and this cause of action had arisen after the institution of the present action. Consequently a fresh notice dated 28.11.84 (D6) had to be sent.

It should be noted that D6 states on the face of it that this notice was sent without prejudice to the notice of termination of tenancy dated 24.6.84 (P.23) and without prejudice to the (present) action bearing No. 6082/RE.

On the other hand it was submitted on behalf of the defendant-respondent that the termination of the tenancy by notice P.23 had been waived by the subsequent notice D6.

The learned District Judge by his order dated 28.7.87 answered Issue No. 11 as follows:

"11. The earlier notice P.23 is deemed in law to have been cancelled by D6."

The present application was an appeal against the said order to have it set aside.

The question arises whether the plaintiff landlord can be regarded as having withdrawn or cancelled the first notice to quit (P.23) by the second notice to quit (D6).

As stated by Wijeyewardene, J. in the case of *Virasinghe v. Peris*[1]–

> "The question of waiver of notice – if one may use an expression which has been condemned as a loose and unscientific expression – cannot be discussed as an abstract question of law but should be considered with reference to the facts of each particular case."

The party alleging waiver must prove that the other party with full knowledge of his right abandoned it either expressly or by conduct which is inconsistent with an intention to cancel the lease. (*Joosub Ltd. v. Moosa*[2]).

The abandonment of a right will not be presumed and the onus of proving waiver is strictly on the party alleging it. (*Ellis & Others v. Laubscher*[3]).

Waiver must be proved on a balance of probabilities, but in deciding whether the onus had been discharged, the court must take into account the improbability that a person will lightly waive a right. *Kannemeyer v. Gloriosa*[4]; *Hepner v. Roodepoort Maraisburg Town Council*[5].

The learned District Judge has held that the subsequent notice cancelled the previous notice and compared it to the case where a subsequent last will is deemed to revoke and cancel an earlier one.

It seems to me that the matter is not so simple. In the case of *Karunaratne v. Fernando*[6] A. L. S. Sirimanne J. Stated –

> "When there is a clear expression of the intention of one party to terminate the contract, for example, by a notice to quit – there must be strong evidence to indicate that there was a change in this intention."

In this case it was held that acceptance of rents by a landlord after notice to quit does not by itself operate to renew the contract of tenancy if there is evidence showing that there was no *consensus ad idem* between the parties for such a renewal of the contract.

In the case of *Dias Bandaranayake v. Perera*[7] it is stated as follows:-

> "It is settled law that a valid notice to quit cannot be waived by the party giving it, so as to restore the tenancy determined by it, except by acts or conduct of both parties which amount to the creation of a new tenancy."

The question of a second notice to quit came up directly for consideration in England in the case of *Loewenthal v. Vanhoute and Another*[8] where it was held that where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice.

It was also held in this case that if there is no agreement, express or implied, for a new tenancy, the mere fact that the landlord's solicitor to get possession gives another notice to quit is not any reason for inferring any agreement for a new tenancy and the first notice is not waived by the subsequent notice.

Denning, J. (as he then was) stated in the said case at page 117 -

> "Counsel for the tenants cited a passage from Woodfall's Landlord and Tenant, 24th ed., P.981, which says:
>
> > Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given ...
>
> In my judgment, that statement in the textbook is not accurate. It is based on a decision of Lord Ellenborough in *Doe d. Brierly v. Palmer*[9], but when that case is examined it does not support the proposition. There is an observation by Lord Ellenborough in the course of the argument (16 East 53, at p. 56), which is the apparent basis for the proposition, but it is not in itself sufficient to carry it."

In the case before us the second notice was sent because the defendant had after the action was filed interfered with the common

water supply by taking an illegal supply line to her premises and thereby compelled the National Water Supply and Drainage Board to disconnect the entire water supply. This constituted a nuisance and thereby a new ground of ejectment under section 22(1) (d) of the Rent Act and this cause of action has arisen after the institution of the present action. Therefore the second notice (D6) had been sent and this had the wording without prejudice to the earlier notice and without prejudice to this action bearing No. 6082/RE. Hence the defendant very well knew that this second notice was sent **without prejudice** to the first notice.

Having regard to all the circumstances of this case and in particular in view of the fact that the second notice was sent in respect of a new ground for ejectment and that it was sent **without prejudice**, I am of the view that the answer to issue No. 11 should be, "Yes, there has been no waiver of the earlier notice and hence it is valid in law."

Therefore I set aside the order of the learned District Judge dated 28.7.87 and also his answer to issue 11.

Issue 11 is answered as above.

I remit the case back for continuation of the trial. The defendant-respondent will be entitled to begin her case and call her evidence.

I direct the defendant-respondent to pay to the plaintiff-appellant the costs of this appeal.

Edussuriya, J. – I agree.

Order set aside. Trial to continue.