

JAYAWARDENE
v.
BANDARANAYAKE AND OTHERS

COURT OF APPEAL
RANARAJA, J.,
C.A APPEAL NO. 482/92(F)
D.C COLOMBO NO. 7184/RE
APRIL 03, 1997.

Lease – Lease of bare land – Tenant erecting building on the land – Applicability of Rent Act.

Where the lease was only of a bare land and the lessee erected a timber shed, the Rent Act does not apply. The tenant must quit the premises at the end of the lease. A lease is formed by the consent or agreement of the parties on three essential points:

1. The object of the contract is to let and hire.
2. Ascertained property.
3. Fixed rent.

Cases referred to:

1. *Soyza v. Mohideen* 17 NLR 279, 286.
2. *Punchirala v. Mohideen* 13 NLR 193.
3. *Madanayake v. Senaratne* 75 NLR 349.
4. *Padmanatha v. Jayasekera* 72 NLR 132.
5. *Paul v. Gaverappa Reddiar* 59 NLR 402.
6. *Nallatamby v. Leitan* 58 NLR 56.

APPEAL from judgment of the District Court of Colombo.

A. K. Premadasa, PC with C. E. Silva for appellant.

Romesh de Silva, PC with Harsha Amerasekera for respondent.

Cur. adv. vult.

April 03, 1997.

DR. RANARAJA, J.

One S.W.C.D.W. Bandaranayake was the owner of premises bearing assessment Nos. 70 and 76 (part) Jethawana Road, Colombo 14, described in the schedule to the plaint. The said Bandaranayake leased the premises, which was a bare land in 1950 to the defendant's father at monthly rental of Rs. 400. The defendant's father filled the land which was subject to flooding, constructed a building and commenced a Timber business thereon. By Deed 1334 dated 13.10.72 the said Bandaranayake conveyed the property to the three plaintiffs. However, he continued to receive the rentals till his death. The defendant who by then had become lessee attorned to the plaintiffs. The monthly rental was then Rs. 750. In the year 1984, there were negotiations between the plaintiffs and the defendant for the latter to purchase the said land. The negotiations failed over the sale price. By letter dated 25.9.86, the plaintiffs through their attorney-at-Law gave notice to the defendant to quit and deliver vacant possession of the land at the expiry of 31st October, 1986. On the defendant's failure to comply, the plaintiffs instituted action against the defendant for a declaration of title to the said land, ejection of the defendant and damages. The defendant whilst admitting the title of the plaintiffs denied the right of the plaintiffs to eject him from the said land claiming protection of the Rent Act. The trial Judge entered judgment in favour of the plaintiffs, but restricted the damages to Rs. 750 per month. This appeal is from that judgment.

Learned counsel for the defendant-appellant submitted that there were two matters for decision in appeal, viz: (a) was a tenancy between the plaintiffs and the defendant created in respect of the buildings constructed by the defendant's father. (b) In any event, even if the tenancy was in respect of a bare land, is the defendant entitled to the protection of the Rent Act inasmuch as the plaintiffs are seeking to eject the defendant from the buildings.

There was no evidence of the terms of the original lease between the said Bandaranayake and the defendant's father. It is conceded that the subject of the lease was a bare land at a monthly rental of Rs. 400. It could be implied that the defendant's father was entitled to construct buildings thereon at his expense. Thus the burden was on the defendant to establish that at a point of time subsequent a tenancy was created between the plaintiffs and himself in respect of the buildings. Learned counsel relied heavily on the receipts V1 to V19 issued by the plaintiffs over the period 3.1.80 and 3.3.84 which refer to a "timber shed" situated at No. 70, Jethawana Road, Colombo 14. He submitted that the receipts imply that a new tenancy was created in respect of the buildings, and that the increase of rent from Rs. 400 to Rs. 750 per month was a clear indication of that fact. It was his contention that the receipts V1 to V19 constituted *prima facie* evidence of a new tenancy.

Learned counsel for the plaintiffs-respondents on the other hand submitted the receipts produced by the defendant did not constitute *prima facie* evidence of the creation of a tenancy in respect of the buildings constructed on the land. The burden lay on the defendant to prove that it was agreed between the parties to do so. The receipts merely described the premises let as a 'timber shed' since it was convenient to so describe the premises. There was no substantial increase of rent over the period 1950 to 1971 to draw the presumption that a tenancy had been created in respect of the buildings. The documents P7, P8, D22 to D29 clearly showed that the defendant himself considered the Rent paid as "ground rent", due on the original lease of the bare land. The defendant, it was submitted, had failed to establish that a new contract of tenancy was created between the parties.

"A lease is formed by the consent or agreement of the parties on three essential points: (1) that the object of the contract is to let and

hire, (2) ascertained property, (3) at a fixed rent - Wille - Landlord and Tenant in South Africa - 193. The consent should be unequivocal on the essential matters. The interest of a tenant under a short term lease is merely personal enforceable only against the lessor. Where the defendant himself has continued to treat the rent payable as 'ground rent' long after receipts V1 to V18 were issued, there can be no doubt that the consent of the parties on the nature of the property let was not identical or ad idem. In other words, the defendant had failed to prove that the original lease of bare land in respect of which ground rent was due, was later converted by agreement of parties to a tenancy in respect of the buildings erected on the land by the defendant's father, for which a monthly rental was due. The first argument of learned counsel for the defendant-appellant has to fail.

Learned counsel then submitted under the common law a building accrues to the soil. If the plaintiffs sought to eject the defendant from the premises described in the schedule to the plaint, which includes the buildings, the plaintiffs must aver explicitly the ground on which they claim such relief. Elaborating on the theme he submitted the buildings are located within the limits of the Colombo municipality and therefore brought under the operation of the provisions of the Rent Act. The defendant can be ejected only on a ground set out in that Act. In the alternative he submitted the defendant is entitled to compensation for improvements and *jus retentionis*.

The Courts of this country have not regarded the lessee as a bona fide possessor - See: *Soysa v. Mohideen*,⁽¹⁾ and a lessee cannot in the absence of agreement make a claim for improvements which are mere repairs. However useful improvements rendering the property more valuable or serve a useful purpose may be recovered. If he did it with the consent and acquiescence of the lessor *Punchirala v. Mohideen*,⁽²⁾. It is to be noted however that this is a matter which was not pleaded by the defendant nor any issues framed on to enable the trial Judge to come to a decision. The defendant cannot therefore take up in appeal for the first time, a matter which involves a question of mixed fact and law.

The proposition put forward by counsel for the defendant-appellant that despite the lack of any agreement between parties, the erection of buildings on a bare land leased to the lessee automatically attracts

the provisions of the Rent Act since the building accrues to the soil is a matter which has been dealt with by our courts. In *Madanayake v. Senaratne*,⁽⁹⁾ the plaintiff leased to the defendant for a period of three years a bare land at a monthly rental of Rs. 205. The lease provided *inter alia*, for the lessee to erect buildings and structures of a temporary nature with the approval of the plaintiff which at the termination of the lease, the lessee would be entitled to remove at his expense. Kretser, J. there stated: "It appears to me that the more correct issue to have been formulated in the instant case would be whether the defendant could claim the protection of the Rent Restriction Act. It appears to me that once the factual position was clarified, viz that plaintiff could only let and did in fact only let the bare land, the provisions of the Rent Restriction Act had no application to the letting, for it has repeatedly held that the Act has no application to the letting of bare land. The fact that the defendant had put up temporary buildings which he could remove at any time pleasing to him, on the land he had taken on rent and made use of them, in any view makes no difference on the question whether the Act applies or not".

The rationale of the principle laid down in that case is that a lessor can let what is in existence at the commencement of the lease. In the absence of any agreement that the lessee is entitled to put up buildings thereon at his expense in respect of which a fresh tenancy would be created, no question regarding the applicability of the Rent Act arises. The submission of counsel that the Rent Act applies to buildings and not to a contract of tenancy cannot be accepted. The Rent Act is an Act which seeks to consolidate the law relating to Rent restriction. The question of payment of rent arises on the agreement of the landlord to let on rent to the tenant premises for the latter's occupation. "The premises" is only one of the three ingredients referred to earlier, which constitute a contract of tenancy. In the absence of such a contract the lessee continues to enjoy the improvements effected on the bare land until the lease is terminated at which time the land with the improvements will revert back to the lessor. Till then the lessor cannot lay claim to the improvements, let alone letting the improvements to the lessee. The plaintiffs came to court on the basis of letting of a bare land. The buildings that were subsequently constructed thereon did not belong to them. The argument of counsel that the definition of "premises" in the Rent Act includes any building or part of a building together with the land appertaining thereto" does

not apply in the instant case as what was originally let was admittedly a bare land. See: *Padmanaba v. Jayasekera*,⁽⁴⁾ *Paul v. Gaverappa Reddiar*⁽⁵⁾, *Nallathamby v. Leitar*⁽⁶⁾. The trial Judge found that the increase in the rent from Rs. 400 to Rs. 750 was not due to the construction of the buildings to be occupied by the defendant for the period of the lease but due to the normal increase over the years in rental value of bare land in the area it was located. In any event, there was no evidence that the increased rent was for the bare land and buildings thereon. As observed earlier, the defendant failed to establish the creation of a fresh contract of tenancy with the plaintiffs. It was the duty of the defendant to return to the landlord the bare land leased to him at the expiry of the lease. He had not done so and is therefore liable to be ejected. I see no error in the judgment of the District Judge which is affirmed. The appeal is dismissed with costs fixed at Rs. 1,500.

Appeal dismissed.
