

DEEN
v.
DISSANAYAKE

COURT OF APPEAL
WIGNESWARAN, J.
TILAKEWARDANE, J.
C.A. 348/92(F)
D.C. COLOMBO 7541/RE
MAY 12, 1999
JUNE 21, 1999
SEPTEMBER 2, 1999
JANUARY 24, 2000

Rent Act, No. 7 of 1972 - S. 10(1) - Subletting - Long occupation of a Room - Boarders - Exclusive possession and occupation.

Held :

- (1) The essence of sub-letting is that the sub-tenant must be -
 - (i) in exclusive occupation of a part of the premises originally let;
 - (ii) such part being a defined and separate portion over which;
 - (iii) the tenant had relinquished his right of control
 - (iv) for the time being;
 - (v) in consideration of the payment of rent
- (2) A boarder is not a sub tenant -
- (3) Long occupation of a room by a lodger does not create a tenancy.

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to :

1. *A. L. T. Peiris v. L. T. P. De Zoysa* - 73 NLR 557
2. *Raja v. Visvanathan* - Srikantha's Law Report - Vol. II page 77
3. *Suppliah Pillai v. Muthu Karuppan Pillai* - 54 NLR 572 at 575.
4. *Britto v. Swamikannu* - 74 NLR 209 at 214.

5. *M. H. John Singho v. Martan Beebee* - CLW Vol. 75, 107
6. *Hussain v. Ratnayake* - 69 NLR 421

F. C. Perera for Substituted Plaintiff - Appellant.

P. A. D. Samarasekera, P. C., with *Keerthi Sri Gunawardena* for Substituted Defendant - Respondent.

Cur. adv. vult.

January 24, 2000.

WIGNESWARAN, J.

The original Plaintiff filed this action against the original Defendant for ejection on the grounds of arrears of rent and subletting, for the recovery of arrears of rent, damages and costs.

The original Defendant denied being in arrears of rent and also denied subletting.

The issues raised were limited to subletting.

After trial the District Judge of Colombo by judgment dated 28.08.1992 dismissed the Plaintiff's action with costs.

This is an appeal against the said judgment.

The only question to be considered in this case is whether the evidence led by the Plaintiff was sufficient proof of the fact of subletting of a portion of the premises in suit. The District Judge concluded that issue No. 1 based on subletting was "not proved".

It was the contention of the original Plaintiff that the original Defendant without his written permission had sublet a portion of the premises in suit to a number of persons thus converting the residential premises in suit to an unlicensed boarding house. (Vide para 4 and 5 of the plaint - page 24 of the Brief). Neither the portion sublet nor the persons whom such portion was sublet was described in the plaint.

The Plaintiff himself and a broker by the name of George Walter Aloysius Perera gave evidence on behalf of the Plaintiff. P1 to P6 were led in evidence. The Defendant's son gave evidence on behalf of the Defendant. D1 to D4 were led in evidence.

The facts enumerated by the Plaintiff and his witness briefly are as follows :-

1. The original Plaintiff purchased the premises in suit while the original Defendant was already a tenant.
2. Only from broker Perera did the original Plaintiff come to know that the premises in suit had been sub-let to boarders.
3. Broker Perera came to occupy a room in the premises in suit which was already in the occupation of three others. They all shared the room each having a bed.
4. Each occupant of the room had a duplicate key to the room. Some occupants paid for occupation only while others paid for food as well. (Vide page 54 of the Brief). The occupants came in and went out with the permission of the original Defendant. No single occupant had complete control over the room (Vide page 56 of the Brief).

At this stage it is appropriate to examine the provisions of Section 10(1) of the Rent Act No. 7 of 1972.

"10. (1) For the purpose of this Act, any part of any premises shall be deemed to have been let or sublet to any person, if, and only if, such person is in exclusive occupation, in consideration of the payment of rent, of such part, and such part is a defined and separate part over which the landlord or the tenant, as the case may be, has for the time being relinquished his right of control; and no person shall be deemed to be the tenant or the subtenant of any part of any premises by reason solely of the fact that he is permitted to use a room or rooms in such premises."

The essence of subletting is that the sub-tenant must be -

- (a) in exclusive occupation of a part of the premises originally let,
- (b) such part being a defined and separate portion over which,
- (c) the tenant had relinquished his right of control,
- (d) for the time being,
- (e) in consideration of the payment of rent.

Clearly in this case what has been made out^c by witness Perera is that he was a boarder. He had no exclusive occupation nor exclusive right of control of a part of the premises since he had to share it with others unknown (at the time of entry) and his ingress and egress were controlled by the original Defendant.

Thus the question that arose for consideration by the learned Additional District Judge, Colombo was whether a boarder could be considered as a sub-tenant.

In *A. L. T. Petrits Vs. L. T. P. De Zoysa*⁽¹⁾ it was held that a tenant of rent controlled premises is not liable to be ejected on the ground of "sub-letting" if the evidence, taken as a whole, shows that the occupants (other than the tenant) are boarders and not sub-tenants.

In *Raja Vs. Visvanathan*⁽²⁾ the Court of Appeal rejected the argument that long occupation of a room by a lodger created tenancy.

Justice Gratian in *Suppiah Pillai Vs. Muttu Karuppan Pillai*⁽³⁾ at 575 interpreting Section 9(1) of the Rent Restriction Act No. 29 of 1948 stated that the essential test in every case is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has, by agreement, placed the sub tenant in exclusive possession.

Justice Weeramantri in *Britto Vs. Swamikannu*⁽⁴⁾ at 214 confirmed that our Courts had laid down the necessity for exclusive possession of a defined area as a requisite to the proof of subletting.

Wijayatillake, J. in M. H. John Singho Vs. Marian Beebee⁽⁵⁾ stated that there should be proof that the sub tenant had the exclusive possession and occupation of a separate portion of the premises.

The evidence of broker Perera in this case brought out the fact that the Original Defendant was still in control of the area occupied by the said witness and that he himself had no exclusive possession over such area.

Therefore we find that a boarder such as broker Perera did not fall into the category of a sub tenant as envisaged by Section 10(1) of the Rent Act. (*Vide Hussain Vs. Ratnayake*)⁽⁶⁾ The learned District Judge was therefore right in holding that subletting had not been established in this case.

We therefore dismiss the appeal of the substituted Plaintiff-Appellant with taxed costs payable to the substituted Defendant-Respondent.

TILAKAWARDANE, J. - I agree.

Appeal dismissed.