

IBRAHIM

v.

KARIAPPER

COURT OF APPEAL.

G. P. S. DE SILVA, J. (PRESIDENT C/A) AND GOONEWARDENA, J.

C.A. 560/79 (F).

D.C. COLOMBO 2104/RE.

MARCH 13 AND 14, 1986.

Landlord and Tenant—Sub-letting—S. 10(1) of Rent Act.

Section 10(1) sets out the criteria for determining whether in law there is a letting or sub-letting of a part premises, viz:

- (1) The occupant must be in exclusive occupation of the part of the premises in consideration of the payment of rent.
- (2) That part must be 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.

Where the evidence does not show that the alleged sub-tenant is in exclusive occupation of a defined and separate part of the premises or indeed that any person other than the tenant was in physical occupation, the finding that sub-tenancy has been established, cannot stand.

Sub-letting prior to 1st March 1972, cannot ground an action in ejectment.

Cases referred to:

- (1) *Mrs. Warnakulasinghe v. Subramaniam*—S.C. Appeal No. 66/84-D.C. Trincomalee 9834, S.C. Minutes of 2.4.1986.
- (2) *Seyed Mohamed v. Meera Pillai*—(1967) 70 N.L.R. 237..

APPEAL from judgment of the District Court of Colombo.

P. A. D. Samerasekera, P.C., with *G. L. Geethananda* and *M. Illiyas* for the defendant-appellant.

A. A. M. Marleen for the substituted plaintiffs-respondents.

Cur. adv. vult.

May 21, 1986.

G. P. S. DE SILVA, J. (President C/A)

The plaintiff brought this action in October 1976 to eject the defendant who was her tenant from premises No. 156, Main Street, Pettah. Ejectment was sought on three grounds:—

- (1) Arrears of rent from 1.11.69 to 30.9.76;
- (2) That a person residing or lodging with the defendant was convicted of using the premises for an illegal purpose;
- (3) That the defendant has sub-let a part of the premises without the prior consent in writing of the plaintiff (landlord), to Ismail Mohamed Ibrahim, to S.C.M. Sanoon, besides others whose names are not known to the plaintiff.

After trial, the District Judge held against the plaintiff on the issues of arrears of rent and conviction for using the premises for an illegal purpose. However, judgment was entered for the ejectment of the defendant on the ground of sub-letting. Hence this appeal preferred by the defendant.

The issue relating to sub-letting reads thus—

“Has the defendant sub-let a part of the premises in suit as pleaded in column 1, paragraph 7 (c) of the plaint?”

The submission of Mr. Samerasekera, counsel for the defendant-appellant, was that there was no evidence to support the finding of the trial judge on this issue. Counsel contended that the District Judge has altogether failed to address his mind to the requirements of section 10(1) of the Rent Act No. 7 of 1972.

The only oral evidence in regard to sub-letting was that of Mr. Kariapper, the husband of the plaintiff. He stated that he had visited the premises on two occasions, once in 1965 and thereafter in 1975. In 1975 he had visited the premises along with a police officer. He had gone upstairs and "found a number of people there". These were business premises and there was no evidence as to what those persons were doing upstairs, as to whether they were customers or persons in residence. Mr. Kariapper further stated "I inquired for Sanoon and he was not there. A number of cubicles had been made in the first floor. The Inspector wanted to see those rooms. But he could not, because the key was not available. At that time there was a man whose name I did not know. He said he was the agent of the defendant and he is holding the power of attorney.....The defendant was not there..... Then I had a look at the certificate framed. I found a man from Dewalagala, Kandy, running the shop. He was also not in the shop. Ismail Mohamed Ibrahim is the man I have referred to in the plaint. The premises had been sub-let to this man, Sanoon and several others".

This was all the evidence given by Mr. Kariapper in regard to 'sub-letting'. He did not find either Sanoon or Ibrahim in actual occupation of the premises. The person whom he found at the premises was an agent of the defendant, his son-in-law. The person whose name appeared in the certificate of registration was Ibrahim, but he was not to be seen in the premises. Thus Mr. Kariapper did not even claim that he saw the persons whom he alleged were the sub-tenants. Nor did Mr. Kariapper see any persons in occupation of the cubicles upstairs.

Section 10(1) of the Rent Act reads thus:-

"10(1). For the purposes of this Act, any part of any premises shall be deemed to have been let or sub-let 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 sub-tenant 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".

In *Mrs. Warnakulasinghe v. Subramaniam* (S.C. Appeal 66/84, D.C. Trincomalee 9834, S. C. Minutes of 2.4.86) the Supreme Court had occasion to consider the provisions of section 10(1) of the Rent Act.

In the course of his judgment Atukorale, J. stated. "Sub-section 1 to section 10 sets out plainly and explicitly the circumstances under which for the purposes of the Act, a part of any premises shall be deemed to have been let or sub-let to an occupant. It postulates two criteria for determining whether in law there is a letting or a sub-letting of a part of premises. They are firstly, that the occupant must be in exclusive occupation of the part in consideration of the payment of rent and, secondly, that the part must be 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....." In my view, the evidence of Mr. Kariapper does not show that Ibrahim or any other person was in exclusive occupation of a defined and separate part of the premises. Indeed there is no evidence of the physical occupation of the premises by any person other than the defendant. I, therefore hold that the finding of the District Judge that Ibrahim was a sub-tenant of the defendant cannot stand.

Apart from the evidence of Mr. Kariapper, Mr. Marleen, counsel for the plaintiff-respondent, relied on the plaint in case No. 627/22 of the District Court of Colombo marked P9 and the evidence of Bawa, the husband of the plaintiff, in that case, marked P10. A perusal of P9 shows that it was an action for ejection filed on 12th May 1967 by Haniffa Hussain, wife of Bawa, carrying on business under the name of Messrs Hussain Ibrahim and Sons. The premises were 'the upstairs portion' of the premises which are the subject-matter of the present action. Bawa who gave evidence (P10) is the father of the defendant and is the only witness for the defendant in the present action. On a consideration of P9 and P10 the trial Judge concluded that ".....Hussain Ibrahim the defendant in this case has sub-let the premises to Hasheem Abdul Careem and Hasheem Abdul Careem has sub-let the premises to various other people..... It is quite clear from P9 and P10 that the defendant has been sub-letting the premises from 1967 and a portion of these premises has been occupied not by sub-tenants but by tenants of the sub-tenants".

It seems to me, however, that this finding of sub-letting based on P9 and P10 overlooks the provisions of sub-section 7 of section 10 of the Rent Act which enacts that 'sub-letting prior to 1st March, 1972, cannot ground an action in ejection. As stated earlier, P9 was an action filed as far back as May, 1967, that is almost 5 years prior to the enactment of the Rent Act No. 7 of 1972. Moreover, the District Judge failed to consider or even answer issue No. 21 based on section 10(7) of the Rent Act raised on behalf of the defendant.

Mr. Marleen placed great reliance on the judgment of Samerawickrema, J. in *Seyed Mohamed v. Meera Pillai* (2). That was a case where the evidence disclosed that this sub-tenant "was in sole and exclusive occupation of a room and that he carried on business in that room. In the absence of acceptable evidence to explain his occupation, the only inference is that he is in occupation as a sub-tenant of the defendant and on payment of rent to him". In the case before us, there is no evidence of the actual physical occupation of the premises (or part thereof) by any person other than the tenant. Seyed Mohamed's case (supra) is therefore of no assistance to the plaintiff-respondent.

Finally, Mr. Marleen urged that though the case for the defendant was that he along with others were carrying on business in partnership with the assistance of persons in occupation of the premises, the partnership agreement was not produced but what was in fact produced as D85 was the "dissolution of the partnership". In the circumstances Mr. Marleen maintained that the District Judge rightly drew an adverse inference from the failure of the defendant to produce the partnership agreement. But the point is, as submitted by Mr. Samerasekera, the plaintiff must first establish the fact of exclusive occupation by the alleged sub-tenant and it is only thereafter that the court has to consider the character of such occupation, that is, as a sub-tenant or as a licensee or in some other capacity. It is at the stage when the court considers the capacity in which the occupier is on the premises, that the terms of the partnership agreement are relevant. But in the instant case the initial fact of exclusive occupation by the alleged sub-tenant was not established. Hence there was no occasion to draw an adverse inference from the failure to produce the partnership agreement.

Thus it is seen that Mr. Samerasekera's submission that there is no evidence to support the finding of 'sub-letting' is entitled to succeed. Accordingly, the appeal is allowed and the action is dismissed with costs. The defendant-appellant is entitled to costs of appeal fixed at Rs. 210.

GOONEWARDENA, J.—I agree.

Appeal allowed.