

NIRMALA DE MEL
v.
SENEVIRATNE AND OTHERS

SUPREME COURT
SHARVANANDA, J., RATWATTE, J., AND VICTOR PERERA, J.
S.C. 8/81, C.A. 923/73
JUNE 28 AND JULY 1, 1982.

Appeal – Supreme Court Rules 16 and 35 – Lacuna – Substitution on death of petitioner after grant of leave to appeal but before lodging appeal – Interpretation Ordinance, section 8(1) – Computation of time – Evidence Ordinance, section 109.

One Mrs. Annie Jayasuriya was the landlady and Attorney for the other co-owners of premises No. 382, 384 and 386 Main Street, Panadura. Her tenant was one Paulus who carried on a pharmacy and grocery business on the aforesaid

premises. Paulus sold the business to the petitioner-respondent and petitioner-respondent went into occupation on 21.10.71. Annie Jayasuriya refused to accept him as tenant and complained to the Police. But petitioner-respondent stayed on and obtained an order from the Rent Board on 9.9.72 that he was the tenant. On appeal by Mrs. Annie Jayasuriya the Board of Review set aside the order of the Rent Board. The petitioner-respondent thereupon applied for a Writ of Certiorari claiming there was an error of law on face of the record.

Annie Jayasuriya died on 26.4.76 and Mrs. Cynthia de Mel, her executrix was made respondent. Cynthia de Mel died on 28.1.81. Miss Nirmala de Mel sole heir to Cynthia de Mel and sole heir to 1/6 share of premises owned by Annie Jayasuriya applied to be substituted on 16.2.81 and also filed petition of appeal praying that the order of the Court of Appeal dated 18.12.80 be set aside.

The petitioner-respondent made a preliminary objection stating that Nirmala de Mel had no status to file appeal before the Order of Court to substitute her and also that the appeal was out of time.

Held -

- (1) That though the petition of Appeal was filed by the substituted respondent petitioner prior to being ordered to be substituted such filing should, because there was a lacuna in the Supreme Court Rules, be regarded as regular.
- (2) That the petition of Appeal filed on Monday the next working day was within time.
- (3) That the burden to prove that tenancy with Paulus had ceased and that his tenancy was accepted was on the tenant who was asserting it.

APPEAL from judgment of the Court of Appeal.

H.L. de Silva, S.A., with M.Y.M. Faiz for the substituted-respondent-appellant.

K. Shinya with Kithsiri Gunaratne, Miss. S.M. Seneviratne and Saliya Mathew for the petitioner-respondent.

Cur.adv.vult.

August 2, 1982.

SHARVANANDA, J.

The petitioner-respondent made an application to the Rent Board, Panadura, to have the authorised rent of premises bearing Nos. 382, 384, 386 & 388, Main Street, Panadura, determined and for the grant of a certificate of tenancy under section 35 of the Rent Act. He made one Mrs. Annie Jayasuriya, the landlady and Attorney for all co-owners of the aforesaid premises, respondent to the application. The Rent Board by its order dated 9th September, 1972 held that the petitioner-respondent was the tenant of Mrs. Jayasuriya and directed a certificate in terms of section 35(2) of the Rent Act No. 7 of 1972 to be issued to him. Mrs. Jayasuriya appealed against the

said order to the Board of Review established under section 40 of the Rent Act. The latter, by its decision dated 13th September, 1973 set aside the order of the Rent Board of Panadura. The petitioner-respondent, thereupon, made an application for the issue of a Writ of Certiorari quashing the decision of the Board of Review, on the ground that there was an error of law on the "face of the record." Whilst the said proceedings No. 923/73 were pending in the then Supreme Court, Mrs. Annie Jayasuriya, who was the 4th respondent to the said proceedings died on the 26th of April 1976. Thereafter on an application for substitution by the petitioner-respondent, M/s. Neville E.S. Fernando, Ronald de Mel and Terrance Fernando were substituted as added respondents in the room of the deceased Mrs. Annie Jayasuriya. In addition Mrs. Amabel Cynthia de Mel was made a respondent as an executrix of the premises in suit after Mrs. Jayasuriya's death.

The Court of Appeal by its order dated 18.12.1980 allowed the Writ and made order quashing the decision of the Rent Board of Review dated 13th September 1973, on the ground that there was an error on the "face of the record" in the decision of the Board of Review. On 15.1.81 the Court of Appeal granted leave to appeal to this Court, to the substituted-respondent to appeal against its order dated 18.12.80. On the 28th January 1981 Mrs. Amabel Cynthia de Mel, 4th substituted respondent-petitioner died. Thereupon Miss Nirmala de Mel, claiming to be the sole heir to 1/6 share of the premises in suit owned by the said Mrs. Jayasuriya and as the sole heir to late Mrs. Cynthia de Mel the 4th substituted respondent petitioner and as the Attorney representing the co-owners of the premises in suit, applied to this Court, on 16.2.81 to be substituted in the room of the substituted respondent-petitioner and also filed on that date, namely 16.2.81, petition of appeal praying that the order of the Court of Appeal dated 18.12.80 be set aside.

By its order dated 20th November 1981 this Court made order that Miss Nirmala de Mel be substituted in place of the late Mrs. Jayasuriya and reserved to the petitioner-respondent the right to take in due course his objection that the appeal was out of time.

At the hearing of the appeal preliminary objection was taken by Counsel for the petitioner-respondent that:-

- a. The appeal was not properly constituted and was irregular as the petition of appeal was filed by Miss Nirmala de Mel, the substituted respondent-appellant, along with her

application for substitution, prior to order being made by this Court substituting her. It was contended that the substituted-respondent-appellant had no status to file the petition of appeal dated 16.2.81, prior to any order being made by this Court substituting her as a legal representative.

- b. In any event that appeal was filed out of time, in breach of rule 35 of the Supreme Court Rules of 1978 which provides that "where a Court of Appeal grants leave to appeal, an appeal to the Supreme Court shall be made within 30 days of the delivery of the judgment granting such leave."

In this case leave was granted on 15.1.81 and the petition of appeal was filed on 16.2.81.

Rule 16 of the Supreme Court Rules provides for substitution being made "where at any time *after the lodging of an application for special leave to appeal*, the record becomes defective by reason of the death or change of status of a petitioner to an application." And Rule 34 provides for substitution where at any time *after lodging of an appeal* the record becomes defective for similar reasons. There appears to be a lacuna, in the rules for the case where at any time after leave being granted by the Court of Appeal to the Supreme Court the applicant dies before an appeal to the Supreme Court could be lodged, within the period stipulated by Rule 35.

Counsel contended that according to Rule 35, the petition of appeal should have been filed latest on 14th February 1981, which fell on a Saturday, a day on which the office was closed. In this connexion section 8(1) of the Interpretation Ordinance embodies a relevant rule of interpretation. It states that -

"Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or taking proceedings in a Court or office and the last day of the limited time is a day on which the Court or office is closed, then the act or proceedings shall be construed as done or taken in due time if it is done or taken on the next day thereafter on which the Court or office is open."

On the application of this rule of interpretation it would appear that the petition of appeal filed on Monday the 16th February 1981, which was the next working day was within time.

In my view the substituted-respondent-appellant has taken all steps within her power to perfect her appeal and to conform to the law. Justice requires that she shall not suffer because of a lacuna in the Supreme Court Rules. Though the petition of appeal was filed by the substituted-respondent-appellant prior to her being ordered to be substituted, such filing should, in the circumstances, be regarded, *nunc pro tunc*, as regular.

The preliminary objections raised by Counsel for the petitioner respondent are therefore overruled.

At all material times, prior to the petitioner coming into the picture, one Paulus was admittedly the tenant of the premises paying a monthly rent of Rs. 200/-, under the deceased Mrs. Annie Jayasuriya. The said Paulus was carrying on the business of pharmacy and groceries under the name and style of 'Victory Pharmacy' in the said premises Nos. 382, 384, 386, 388, Panadura. The petitioner-respondent purchased the business from Paulus and went into occupation of the premises on 21.10.71. It is admitted that he went into occupation of the premises without any prior agreement with the landlady Mrs. Jayasuriya. When the landlady became aware that the petitioner-respondent had gone into occupation of the premises she objected to his doing so and made a complaint to the Police on the 29th October 1971. According to the petitioner-respondent he had subsequently discussed with her the purchase of the property. When his negotiations failed, he had negotiations with her about the tenancy. Petitioner respondent stated that the landlady only wanted the rent of Rs. 200/- per month be paid in cash to her, and that he agreed and paid for the month of October. He subsequently paid the rent for the months of November, December and January. He produced his counterfoils from his cheque book to show that he had cashed cheques for Rs. 200/- and paid the rent to Mrs. Jayasuriya. He produced the cash book and ledger of his business where entries had been made for the payment of rent for the premises to Mrs. Jayasuriya. According to the petitioner-respondent, as Mrs. Jayasuriya wrongly refused to accept rent for February 1972 thereafter those rents were deposited in the Urban Council, Panadura. Mrs. Jayasuriya has denied these payments to her. According to her she never received any payment of rent from the petitioner-respondent and she has not accepted him as her tenant. Paulus continued to be her tenant of the premises even after the sale of his business to the petitioner-respondent. The petitioner did not produce any receipts from Mrs. Jayasuriya for payment of any rent, nor any document acknowledging him as her

tenant. On his own showing no advance rent was demanded by Mrs. Jayasuriya, nor was paid to her. According to him when the negotiations for purchase failed the landlady did not ask for any enhanced rent but was satisfied with the sum of Rs. 200/- as monthly rent as paid by Paulus earlier. Even though she had originally objected to the petitioner's occupation of the premises without her consent and had even made a complaint to the Police, it is strange that he had not chosen to get any writing from her to secure his tenancy.

Mrs. Jayasuriya's case is that Paulus continued to be the tenant and was paying that rent to her. She produced counterfoils of receipts for payments of rent for the relevant months by Paulus. It was suggested to her that after the sale of his business to the petitioner-respondent, Paulus could not have had any interest in paying rent for the premises where the business has been carried on. Everything depended on the arrangement between the petitioner and Paulus and what assurance Paulus gave to petitioner about the tenure of the premises. Mrs. Jayasuriya had told the Board that she was not calling Paulus as a witness for her to corroborate what she said, namely that he continued to be the tenant of the premises. In the state of the evidence before the Board the materiality of Paulus's evidence cannot be over emphasised. It was contended by the petitioner-respondent that the Board should draw an adverse inference from the fact that Paulus was not summoned to give evidence by the landlady. It was not explained why he himself could not have summoned Paulus to support him, that he had ceased to be tenant.

The Rent Board speculated, in the absence of any evidence from Paulus, whether Paulus

“would have paid rent for the premises occupied by ‘Victory Pharmacy’, now in the occupation of the applicant when he had already sold it to Mendis and was getting ready to leave the Island for good.”

and held that it was more probable that Mrs. Jayasuriya accepted the petitioner-respondent as her tenant. On appeal, the Board of Review commented adversely on the Rent Board's observation that the landlady had not summoned Paulus to give evidence on her behalf. It stated that there was no burden cast on the appellant (the landlady Mrs. Jayasuriya) to prove that there was no tenancy agreement between her and the applicant and that the applicant should have summoned Paulus to substantiate his allegation. The Board of Review

therefore allowed Mrs. Jayasuriya's appeal. The Court of Appeal has held that the most important fact which arose for consideration was whether the rent had in fact been paid to Mrs. Jayasuriya by Paulus or by the petitioner-respondent. It concluded that

“Having regard to the respective positions taken by the 4th respondent (Mrs. Jayasuriya) and the petitioner the answer to the question whether it was Paulus or petitioner who actually paid the rent was, if not decisive, at least a very important consideration in deciding whether petitioner is a tenant of the 4th respondent or not. Thus any presumption to be drawn upon the failure to call Paulus to testify before the Rent Board having regard to the relevant circumstances, ought to be drawn, if at all against 4th respondent, rather than against the petitioner.”

The judgment of the Court of Appeal proceeds that the evidence showed that 4th respondent (Mrs. Jayasuriya) was aware at the time she was carrying on negotiations with the petitioner-respondent for the sale of the said premises to him, that it was he who was carrying on business of the said premises and it might therefore have been contended that it was for her to negative any intention on her part to accept the petitioner as the tenant, “holding that there was an error in the order of the Board of Review on the ‘face of the record.’ ” It allowed the application of the petitioner-respondent.

In my view there is no justification for the quashing of the decision of the Board of Review by the Court of Appeal. It was the petitioner-respondent who was claiming the relief of a certificate of tenancy, hence it was for him to establish that he was the tenant of the premises on 21st October 1971 without any prior agreement with the landlady. Apart from his self-serving documents there is nothing to support his oral evidence that having entered into occupation of the premises unlawfully, he had regularised the occupation by entering into an agreement with the landlady. It was for him to establish that though he came to occupy the premises without the consent of Mrs. Jayasuriya, he had subsequently become the tenant of the premises and not for Mrs. Jayasuriya to satisfy the Rent Board that she persisted in her intention of not accepting the petitioner as her tenant. He has to prove that Paulus has ceased to be tenant and that he had succeeded him as tenant of the premises. It was the case of Mrs. Jayasuriya that Paulus continued to be her tenant even though he had sold the business to the petitioner-respondent. Section 109 of the Evidence Ordinance provides that when the question is whether the persons are landlord and tenant and it has

been shown that they have been acting as such the burden of proving that they have ceased to stand to each other in the relationship is on the person who affirms it.

The burden of proof in the circumstances of the case therefore rested on the petitioner-respondent to show that Paulus and Mrs. Jayasuriya, has ceased to stand in the relationship of landlord and tenant and that though he had originally got into occupation of the premises without prior arrangement with the landlady of Paulus, he had subsequently regularised his occupation and was accepted as tenant in the place of Paulus by the landlady. In the circumstances of the case it was for the petitioner-respondent to have called Paulus who let him into the premises to support his evidence that Paulus had ceased to be the tenant of the premises.

In my view there was no error in the order of the Board of Review to justify its being quashed.

I allow the appeal, and set aside the order of the Court of Appeal and restore the order of the Board of Review dated 13th September 1973 reversing the decision of the Rent Board.

The petitioner-respondent shall pay the substituted respondent-appellant a sum of Rs.2,500/- as costs of this appeal and of the application before the Court of Appeal.

RATWATTE, J. — I agree.

VICTOR PERERA, J. — I agree.

Appeal allowed.