

CANDAPPA NEE BASTIAN
v.
PONNAMBALAMPILLAI

SUPREME COURT.
G.P.S. DE SILVA, C.J., KULATUNGA, J. AND
RAMANATHAN, J.
NOVEMBER 02, 03, 1992 AND
FEBRUARY 03 AND 23, 1993.

Re-vindicatory suit – Tenancy as defence – Partners as tenants – Payment of rent by a new partner without consensus ad idem – Subtenant – Licence – Section 150 Explanation 2 (C.P.C.).

One Brenda Bastian had let the premises in suit to a firm called S. M. R. & Co. of the four partners of which one was Mandirampillai, father of the defendant. Later the defendant was admitted as a partner. The father continued to be a partner but the other three partners ceased to be partners of the firm. The defendant ceased to be a partner from 1st April 1959 till June 1975. On 15 June 1975 the defendant became the sole partner, all the original partners having left the firm. Title was admitted and the question was whether the tenant was entitled to continue as the tenant of Mrs. Brenda Bastian. The burden was on the defendant to satisfy court that the defendant as partner carried on the business called S. M. R. & Co., as the tenant of Mrs. Brenda Bastian from June 1975 to December 1978.

Held :

1. The Partnership not being a legal person did not have the capacity to enter into a contract of tenancy with Brenda Bastian. The tenancy was between the 4 partners of the firm as on 01 April 1945 on the one hand and Mrs. Brenda Bastian on the other. By 15 June 1975 all the 4 original partners, including the father of the defendant, Mandirampillai ceased to be partners of the firm. At this point of time the contract of tenancy came to an end.

2. The fact that the defendant as sole partner of the firm purported to pay "rent" to Brenda Bastian does not, on the proved facts and circumstances of this case, make him a tenant under Brenda Bastian. One of the essentials of a valid contract of tenancy is *consensus ad idem* between the parties to the contract. Here there was no evidence of "mutual assent", of an intention to create a tenancy between the defendant and Mrs. Brenda Bastian.

A new contract of tenancy under Brenda Bastian was not created whenever there was a change of partners as there was no *consensus ad idem*.

The defendant was not in occupation as a subtenant or licensee because his position always was that he was tenant under Brenda Bastian. He cannot now change his position (*vide* Section 150 Explanation 2 (C.P.C.).

A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.

Cases referred to :

1. *Ibrahim Saibo v. Mansoor* 54 NLR 217.
2. *Samsudeen v. Farook* [1986] 2 Sri LR 187, 189.
3. *Theivandran v. Ramanathan Chettiars* [1986] 2 Sri LR 219.
4. *The Tasmania* (1890) 15 App. Cases 233.
5. *Setha v. Weerakoon* 49 NLR 225, 228, 229.

APPEAL from Judgment of the Court of Appeal.

H. L. de Silva, P.C. with *Chula de Silva, P.C.* and *N. M. Musaffer* for the plaintiff-appellant.

P. A. D. Samarasekera, P.C. with *Keerthi Sri Gunawardena* and *D. J. H. Gunawardena* for the defendant-respondent.

Cur. adv. vult.

March 19, 1993.

G. P. S. DE SILVA, C.J.

The plaintiff instituted these proceedings in March 1979 seeking a declaration that she is the owner of an undivided half share of premises bearing assessment Nos. 58 and 62, Fourth Cross Street, Colombo 11, for ejection of the defendant and for damages. In her plaint she pleaded, *inter alia*, (i) that the owner of these premises was her mother, Mrs. Brenda Bastian who in May 1958 gifted and

conveyed a half share to her ; (ii) that from about 19th March 1979 the defendant is in wrongful and unlawful occupation thereof. The plaintiff relying on her title alleged that the defendant was a trespasser and sought the ejectment of the defendant. At the trial, the title of the plaintiff was admitted and damages were agreed upon at Rs. 593/60 per month.

The defendant in his answer while denying that he is a trespasser pleaded : (a) that Brenda Bastian has been and continues to be the landlady of the premises ; (b) that the tenant was the firm of Sana Mana Ravanna and Company (hereinafter referred to as the " firm ");

(c) the defendant became the sole proprietor of the firm in June 1975 and that thereafter all payments of rent have been made by him and accepted by Brenda Bastian ; (d) that the defendant had correspondence with Brenda Bastian as sole proprietor of the firm ; (e) that the plaintiff and her mother Brenda Bastian are estopped by their conduct and have accepted the defendant and acquiesced in the tenancy of the defendant as sole proprietor of the firm.

The only issue raised on behalf of the plaintiff was whether the defendant was in unlawful and forcible occupation of the premises from 19.03.79. The defendant raised the following issues :-

- (a) Did Brenda Bastian let to the firm the premises in suit?
- (b) Has the defendant as sole proprietor of the firm paid Brenda Bastian rent for the period June 1975 to December 1978?
- (c) Did Brenda Bastian accept rent for the period June 1975 to December 1978?
- (d) If the above issues are answered in favour of the defendant, is the defendant the tenant of Brenda Bastian?

The trial Judge held that the defendant was in unlawful occupation of the premises and also held that Brenda Bastian did not let the premises to the firm. He took the view that, in these circumstances, the other issues did not arise, and entered judgment for the plaintiff.

The defendant appealed to the Court of Appeal which allowed the appeal, and set aside the judgment of the District Court subject to the declaration that the plaintiff is the owner of an undivided half share of the premises in suit. The plaintiff has now appealed to this court against the judgment of the Court of Appeal.

The following facts emerge from the documents produced in the case :- Brenda Bastian let the premises to the firm on 1st April 1945 (D19 and D20). At that time there were four partners of the firm, one of whom was Mandirampillai, the father of the defendant (P3 and P3A). On 1st June 1954 the defendant was admitted as a partner. His father continued to be a partner, but the other three partners ceased to be partners of the firm (P8 and P8A). On 1st April 1959 the defendant ceased to be partner (P11 and P11A). From April 1959 to June 1975 the defendant was not a partner of the firm. The evidence clearly shows that between 1945 and 1975 at different times new partners were admitted and some ceased to be partners. On 15th June 1975 the defendant became the sole partner of the firm (P14 and P14A), all the original partners having left the firm. There is also the evidence that the defendant's father left the Island in 1972 and never returned but continued to remain in India. While in India he fell ill, and his leg was amputated.

Since title to the premises was admittedly in the plaintiff, the burden was on the defendant to show by what right he was in occupation of the premises. The defendant commenced the case and led evidence. On a consideration of the pleadings, the issues and the evidence there was no doubt that the defendant's position was that by reason of the fact that he was the sole partner of the firm from June 1975, he was the tenant under Brenda Bastian. Indeed Counsel for the defendant in his closing address before the District Judge put the matter lucidly and succinctly when he stated : " The real point in this case for the Court to decide is *whether the defendant is entitled to continue as the tenant of Mrs. Brenda Bastian*. If the Court holds against him on that point, then the plaintiff has to succeed. The burden is on the defendant to satisfy Court that the defendant as partner carried on the business called S. M. R. & Co. as the tenant of Mrs. Brenda Bastian from June 1975 to December 1978".

The partnership not being a legal person did not have the capacity to enter into a contract of tenancy with Brenda Bastian. The tenancy was between the 4 partners of the firm as on 1st April 1945 on the

one hand, and Mrs. Brenda Bastian on the other. By 15th June 1975 all the 4 original partners, including the father of the defendant, Mandirampillai, ceased to be partners of the firm. The principal submission of Mr. H. L. de Silva for the plaintiff-appellant was that at this point of time the contract of tenancy came to an end. With this submission I agree. Reliance was placed on behalf of the appellant on *Ibrahim Saibo v. Mansoor* ⁽¹⁾ for the proposition that there were only two ways in which a tenancy could come to an end, viz. by the handing back of the premises to the landlord or by the order of a competent Court. This ruling has to be confined, as submitted by Mr. de Silva, to the question the Court was there considering, namely, " the statutory protection given by the Act to a tenant and of which a subtenant may avail himself " (at page 224). Under the common law there are other modes of termination of a contract of tenancy.

The fact that the defendant as sole partner of the firm purported to pay ' rent ' to Brenda Bastian does not, on the proved facts and circumstances of this case, make him a tenant under Brenda Bastian. One of the essentials of a valid contract of tenancy is *consensus ad idem* between the parties to the contract. The District Judge on a careful and detailed consideration of the oral and documentary evidence held that there was no evidence of " mutual assent " of an intention to create a tenancy between the defendant and Mrs. Brenda Bastian. I can find no reasonable basis upon which this crucial finding of fact in favour of the plaintiff could be reversed.

It was the contention of Mr. Samarasekera for the defendant-respondent (if I understand counsel correctly) that a new contract of tenancy under Brenda Bastian was created whenever there was a change of partners. I find myself unable to accept this submission as it is contrary to the fundamental principle of "*consensus ad idem*" in the Law of Contract. Mr. Samarasekera relied on a passage from Lindley in his treatise on partnership, cited by the Court of Appeal in *Samsudeen v. Farook* ⁽²⁾. I cannot agree that this citation is an authority for so broad a proposition and one fraught with such grave consequences. Mr. H. L. de Silva characterized it as a " novel proposition " for it could result in the landlord entering into contracts of tenancy at different points of time with various persons, some of whom may not be even known to the landlord.

In the Court of Appeal it was contended on behalf of the defendant, a contention which was accepted by the Court of Appeal, that the District Judge was in error in holding that the defendant was in wrongful and unlawful occupation of the premises for the reason that occupation by a subtenant or licensee of the tenant is not in law unlawful occupation. Reliance was placed on the case of *Theivandran v. Ramanathan Chettiar*,⁽³⁾ for this proposition. What is relevant for present purposes, however, is that in the case before us neither in the pleadings nor in the issues did the defendant take up the position that he was either a licensee or a subtenant under the original partners of the firm or at any point of time thereafter. Nor did he in his evidence take up such a position. His evidence clearly was that he was a tenant under Brenda Bastian. What is more, the defendant's evidence that he was a tenant under Brenda Bastian is inconsistent with the claim of licence or subtenancy. The defendant set up a claim of tenancy in himself and in his own right, and thus negated a claim derived from a third party. In other words, by his evidence he excluded a claim based on a licence or a sub-tenancy. This was the clear implication of the position he took up at the trial.

Thus it is seen that the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to section 150 of the Civil Procedure Code. It reads thus :-

" The case enunciated must reasonably accord with the party's pleading, i.e. plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet". A *fortiori*, a party cannot be permitted to present in appeal a case different from the case presented before the trial Court except in accordance with the principles laid down by the House of Lords in *The Tasmania*⁽⁴⁾ and followed by Dias, J. in *Setha v. Weerakoon*⁽⁵⁾. The question of licence or subtenancy involved matters of fact which were not put in issue at the trial. This was certainly not a pure question of law which could have been raised for the first time in appeal. I find myself unable to agree with Mr. Samarasekera that these were matters which fell within the issue raised on behalf of the plaintiff relating to the unlawful occupation of the premises.

There is one further significant matter to which our attention was drawn by Mr. H. L. de Silva, namely, that there is no finding by the Court of Appeal that the defendant was either a licensee or subtenant. The defendant in his evidence expressly took up the position that he was a tenant under Mrs. Brenda Bastian. The claim of tenancy was rejected by the District Court. As stated earlier, the finding of the District Court that the defendant was not a tenant under Mrs. Brenda Bastian is supported by the evidence. The defendant sought to justify his occupation of the premises on the basis of a contract of tenancy with Brenda Bastian and on no other basis. In this the defendant failed. The Court of Appeal did not reach a finding that the defendant was a licensee or subtenant. The defendant is therefore in the position of a trespasser and the plaintiff is entitled to a decree in ejectment against him.

In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the District Court dated 10.12.80 is restored. The defendant-respondent must pay the plaintiff-appellant costs of appeal in both Courts fixed at Rs. 7,500.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.