

JINASENA

v.

THE COMMERCIAL INVESTMENT AND FINANCE CO., LTD.

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND MOONEMALLE, J.

C.A.214/80(F) -D.C. MOUNT LAVINIA 319/RE.

FEBRUARY 7, 1985.

*Rent and ejection - Excepted premises under Regulation 3 of the Rent Act No. 7 of 1972 - Business premises as distinct from residential premises - S.48 of the Rent Act No. 7 of 1972 - Contract of tenancy - Rent Act No. 7 of 1972 (S.4(1)).*

Treating the defendant Company as his tenant the plaintiff (Jinasena) sued it for ejection after due notice on the footing that the premises were business premises and therefore excepted premises to which the Rent Act did not apply. The main questions for decision were whether the premises were business premises or residential premises and whether there was a contract of tenancy between the plaintiff and the defendant-company. The District Judge found against the plaintiff on both these matters and the plaintiff appealed.

Held –

(1) Although the description given in the Assessment Register is relevant to determine whether the premises are business premises or residential premises and affords prima facie evidence as to whether the premises have been assessed as residential or business premises, such description is not conclusive on the issue whether the premises are business premises or residential premises.

Residential premises are premises for the time being occupied wholly or mainly for purposes of residence and business premises mean any premises other than residential premises. The test is whether in fact persons reside (in the ordinary connotation of the word) in the premises or in the majority of the rooms which it comprises and if so they are residential premises. Despite the description in the assessment register that the premises were business premises the premises were occupied mainly for residence, by Vithanage, his wife and his son who were Directors of the defendant-company and Vithanage's children. Hence the premises were residential premises and protected by the Rent Act and the suit fails.

(2) *Semble*

The defendant's claim that the tenant was Vithanage and not the defendant and that the defendant-company could not have attorned to the plaintiff was rightly accepted by District Judge.

Cases referred to :

- (1) *Aloysius v. Pillaipody* – S.C. Appeal No.4/82, C.A. Appeal No. 72/77, M.C. (Civil) Jaffna 1167/L, S.C. Minutes of 2.12.82.
- (2) *Gunatilleke v. Fernando* (1954) 56 NLR 105.
- (3) *Hussain v. Ratnayake* (1967) 69 NLR 421.

APPEAL from the District Court of Mount Lavinia.

*H. L. de Silva*, P.C. with *K.I. Tillakeratne* for plaintiff-appellant.

*Nimat Senanayake*, P.C. with *Mrs. A. B. Dissanayake* and *L. M. Samarasinghe* for defendant-respondent.

*Cur. adv. vult*

April 3, 1985.

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

This is a tenancy action instituted in April 1976 wherein the plaintiff sued the defendant for recovery of arrears of rent and for ejection from the ground floor of premises No. 17, Dickman's Road, Colombo 5. The defendant is a Company named Commercial Investments and Finance Co. Ltd. The action was on the basis that the premises in suit were "excepted premises" within the meaning of regulation 3 of the schedule to the Rent Act, No. 7 of 1972. The plaintiff further pleaded

that on 24.2.76 the defendant was given notice to quit and to hand over vacant possession of the premises on 31.3.76 but the defendant, notwithstanding the termination of the tenancy, continued to remain in unlawful occupation.

The defendant in its answer averred (i) that a Company named Genages Ltd. became the tenant under the plaintiff in respect of the entirety of the premises No. 17, Dickman's Road, Colombo 5, in June 1969 ; (ii) that on or about 1st August 1971, Genages Ltd. rented out on a written agreement (D1) to one B. A. Vithanage and his wife the premises in suit (ground floor) ; (iii) that Vithanage went into occupation of the ground floor on 1.8.71 having paid a deposit of Rs. 4500 to Genages Ltd. and paid a monthly rental of Rs. 750 to Genages Ltd. ; (iv) that on or about 1st July 1972, Vithanage became the tenant under the plaintiff and continued to pay rent at the rate of Rs. 700 up to November 1972 and thereafter at the rate of Rs. 750 up to November 1975 ; (v) that the defendant Company specifically denies that the Company is the tenant of the plaintiff ; (vi) that the premises in suit are residential premises and are subject to the Rent Act No. 7 of 1972.

The main questions that arose for decision were, first, whether the premises were business premises as contended for by the plaintiff and secondly, whether there was a contract of tenancy between the plaintiff and the defendant Company. After trial, the District Judge answered both these issues against the plaintiff and this appeal is from that judgment.

It is not in dispute that if the premises are "residential premises" the provisions of the Rent Act No. 7 of 1972 would apply and the plaintiff's action must fail. The foundation of the action was that the premises were "business premises" to which the Rent Act did not apply. On this issue, Mr. H. L. de Silva, Counsel for the plaintiff-appellant relied very strongly on the assessment registers P1, P2 and P3 wherein the premises were described as "auctioneer's show rooms". This description continued from 1969 to 1977. Mr. de Silva, submitted that P1, P2 and P3 afford at least strong prima facie evidence, if not conclusive evidence, in regard to the character of the premises. On the strength of these documents, counsel contended that the trial judge was in error when he held that the premises were "residential premises" within the meaning of the Rent Act. It was urged that P1, P2 and P3 clearly show that they were "business premises" at all relevant times.

In support of his submission, Mr. de Silva cited the case of *Aloysius v. Pillaipody* (1). This was a case where, as stated by Wimalaratne, J. at the commencement of the judgment, "Admittedly the premises were, on the date of action, business premises to which the Rent Act No. 7 of 1972 applied . . . . .". The question that arose for decision related to the calculation of the standard rent in terms of section 4(1) of the Rent Act. Section 4(1) enacts, inter alia, that the standard rent per annum means the amount of the "annual value" specified in the assessment made by the local authority in respect of the premises. "Annual value" is defined in section 48 of the Rent Act as "the annual value of such premises assessed as residential or business premises, as the case may be, for the purpose of any rates levied by any local authority under any written law and as specified in the assessment under such written law . . . . .". It is in this context that Wimalaratne, J. stated :

"Therefore the annual value entered in the register is necessarily linked with the description of the property. The description of the property as entered in the register thus affords prima facie evidence as to whether the property has been assessed as residential premises or as business premises . . . . . The entries also afford material for determining . . . . . whether premises are or are not excepted premises".

The judgment therefore is an authority for the proposition that the description of the premises in the assessment register is relevant to determine whether the premises are business premises or residential premises and affords prima facie evidence as to whether the premises have been assessed as residential or business premises. The entry in the assessment register is certainly not conclusive on the matter in issue in the present appeal.

Now, it is important to note that section 48 of the Rent Act defines "residential premises" as "any premises for the time being occupied wholly or *mainly* for purposes of residence". The same section defines "business premises" to mean "any premises other than residential premises". These definitions are identical with the definitions contained in the repealed Rent Restriction Act (Chap. 247). One of the early decisions which considered the meaning of the expression "residential premises" in the Rent Restriction Act was *Gunatilleke v. Fernando*, (2). In an illuminating passage in the judgment of Fernando, A.J. (as he then was) he has expressed himself thus :

"The legislature has not in reality differentiated between residential purposes and business purposes; the relevant definitions pose only the question whether the premises are occupied for the purpose of residence; and if not they are to be regarded as business premises whether or not they are actually business premises. Nor is the legislature concerned with the character of the tenant's occupation. In my view, therefore, the only issue to be determined is whether in fact persons actually "reside" (in the ordinary connotation of the word) in the premises or in the majority of the rooms which it comprises. If such is the case, the premises are residential within the meaning of the Act: . . . . .".

This test was cited with approval by Tambiah, J. in the Divisional Bench case of *Hussain v. Ratnayake*, (3). Sivasupramaniam, J. in a separate judgment in *Hussain's Case (supra)* took the view that "under the Act, the character of the premises, 'residential' or 'business' depends not on the purpose for which the premises are taken on rent by the tenant or let by the landlord but on the nature of the physical occupation. The only test for 'residential premises' is whether the premises are occupied (by the occupier or occupiers) wholly or mainly for the purpose of residence".

Turning now to the evidence in the instant case, the plaintiff stated that the ground floor of the premises consists of 3 bed rooms, verandah, hall, kitchen, servants' room, and two bath rooms. His position was that B. A. Vithanage was residing there and carrying on a business. Vithanage himself gave evidence and stated that while the office room was used for the purpose of the business of Commercial Investments and Finance Co, Ltd. of which his wife, his son and he were the directors, the rest of the ground floor was occupied by the members of his family. The householder's list D13 shows that besides Vithanage and his wife 8 of his children reside in the premises in suit. The defendant's contention that the premises are residential premises is further supported by the agreement D1 upon which Vithanage and his family entered into occupation of the premises on 1.8.71. Clause 5 of D1 states "The tenants shall use the said premises for the purpose of their residence save and except one room in the front portion of the said premises which may be used as an office only". Clause 6 provides, "The tenants shall not use the said premises for any other purpose". The finding of the trial Judge was that the plaintiff was aware of D1. The mere fact that one of the rooms was used for the purpose of the business of the Company does not make the premises

"business premises". Having regard to principles enunciated in the decisions referred to above and on a consideration of the evidence in the case I am satisfied that the District Judge was right in his finding that the premises were "residential premises" within the meaning of the Rent Act, for they are premises occupied mainly for the purpose of residence.

In this view of the matter, the plaintiff cannot succeed in his action and the question whether the tenant was the defendant-company or B. A. Vithanage does not really arise for consideration. Since this issue was argued before us, I wish to briefly state my views. In support of the plaintiff's contention that the tenant was the defendant-company and not Vithanage, Mr. H. L. de Silva, relied very strongly on the receipts issued by the plaintiff for the payment of rent for the period September 1972 to November 1975. Mr. de Silva emphasised the fact that all the receipts were issued by the plaintiff in the name of the defendant-company and not in the name of Vithanage. Mr. de Silva further pointed out (i) that the notice to quit (P10) was addressed to the defendant-company, (ii) that by P12, Vithanage was specifically informed that the premises were rented out to the defendant-company and not to him personally. There was no reply either to P10 or P12. Mr. de Silva is no doubt right in his submission that the receipts for payment of rent and the failure to reply to P10 and P12 are relevant and important items of evidence which support the plaintiff's contention that the tenant is the defendant-company. On the other hand, there are the tenancy agreement D1 and the other documents D2 to D9, D13, D14, D18 and D24 which support the defendant's case. Moreover, having regard to the terms of D1, it seems to me that the submission of Mr. Nimal Senanayake, counsel for the defendant-respondent, that the defendant-company could not have attorned to the plaintiff is well founded. On a consideration of the totality of the evidence in the case, I find myself unable to take the view that the trial judge was wrong in concluding that the plaintiff has failed to prove that the contract of tenancy was with the defendant-company.

For these reasons the appeal fails and is dismissed with costs fixed at Rs. 210.

**MOONEMALLE, J.**— I agree.

*Appeal dismissed.*