
JOHN WILSON

v.

PERERA AND ANOTHER

SUPREME COURT.

SHARVANANDA, C.J., COLIN-THOMÉ, J. AND TAMBIAH, J.

S.C. APPEAL No. 19/85.

C.A. (S.C.) No. 881/75 (F).

D.C. COLOMBO 13690/L.

FEBRUARY 3, 1986.

Rei vindicatio action by executor—Claim of tenancy by devise by Last Will of deceased tenant a Buddhist priest—Partnership with deceased tenant—S. 36 of Rent Act, No. 7 of 1972—Dismissal by Rent Control Board of application by executor to Rent Control Board under s. 18 (3) of Rent Restriction Act for declaration that defendant is not the tenant—Does such dismissal support inference that defendant is tenant?

Where a person claiming to be the heir and partner in business of a deceased Buddhist priest who was the tenant of certain premises gave notice to the landlord under section 18 (2) of the Rent Restriction Act that he would be continuing as the tenant and the landlord sought a declaration from the Rent Control Board that the claimant should not be deemed to be the tenant and that application was dismissed in view of the passage of the new Rent Act, No. 7 of 1972—

Held—

(1) The defendant was not entitled to give notice under s. 18 (2) of the Rent Restriction Act as he was not the surviving spouse or child, parent, brother or sister of the deceased tenant or a dependant of the deceased tenant immediately prior to the death of the tenant and not a member of the deceased tenant's household during the whole of the period of three months preceding his death. A decision by the Rent Control Board that the defendant is entitled to give notice would be a nullity on grounds of jurisdictional error.

(2) The notice under section 18(2) of the Rent Restriction Act must give the basis and particulars of the claim to be entitled to be deemed to be a tenant (*Wickremasinghe v. Abdul Rahim* (1954) 56 NLR 280 not followed on this point

Semie:—

The passage of the Rent Act No. 7 of 1972 could not have made the pending proceedings to have come to an end because s. 46 (2) provides for the continuance of such proceedings under the repealed law.

Cases referred to:

(1) *Wickremasinghe v. Abdul Rahim* (1954) 56 NLR 280.

(2) *Karunaratne v. Fernando* (1970) 73 NLR 457.

APPEAL from judgment of the Court of Appeal.

H. L. de Silva, P.C. with *S. C. Crosette Tambiah* and *V. R. Selvarajah* for the substituted-defendant-appellant.

J. W. Subasinghe, P.C. with *D. J. C. Nilanduwa* for plaintiff-respondent.

Cur. adv. vult.

February 27, 1986.

SHARVANANDA, C.J.

This is a rei vindicatio action filed by the plaintiff as executor of the estate of late Dr. T. Sivapragasam. In his plaint he averred that Dr. Sivapragasam, was the owner of premises No. 102, Deans Road, that he died on 30.5.1970 leaving a last will which was admitted to

Probate, by which he appointed the plaintiff as executor. He further averred that the defendant without any manner of right, title or interest in the said premises was since December 1970 in wrongful and unlawful occupation of the premises. He therefore prayed for a declaration of title to the premises, for ejection of the defendant therefrom and for damages which was later agreed at Rs. 75 per month from December, 1970. The defendant in his answer stated that Rev. Rewata was the tenant of the premises and that he died leaving Last Will bearing No. 1433 dated 21.5.1967, by which he appointed the defendant as his Executor and heir of the business carried out in the premises. He further averred that he was a partner of the said business carried on by him and the deceased-tenant in the premises. He asserted that by virtue of section 36 of the Rent Act, No. 7 of 1972, the plaintiff cannot have and maintain the said action.

The premises, the subject-matter of the action are business premises governed by the provisions of the Rent Restriction Act of 1948.

At the trial it was conceded that the plaintiff was the owner of the premises in suit. The case proceeded to trial mainly on the issue whether the defendant was a lawful tenant. The plaintiff's agent alone gave evidence. Defendant did not give any evidence. The District Judge dismissed the plaintiff's action on the ground that the plaintiff could not maintain this action in view of the fact that the plaintiff had made an application to the Rent Control Board in terms of section 18(3) of the Rent Restriction Act, to have it declared that the "defendant shall not be deemed to be the tenant of the premises." The District Judge reasoned that as the application of the plaintiff was dismissed by the Rent Control Board the defendant must be deemed to be a tenant of the premises. He therefore dismissed the plaintiff's action. The plaintiff preferred an appeal to the Court of Appeal and that court by its order dated 12th November 1984, allowed the appeal and set aside the judgment of the District Judge and held that the District Judge had erred in holding that the defendant should, in law, be deemed to be a tenant of the premises. The defendant has preferred this appeal from the order of the Court of Appeal.

It is admitted that the original tenant of the premises was one Rev. Rewata, that he died on 12.12.1970, and that the defendant-appellant was the tenant of the adjoining premises at Deans Road. After the death of Rev. Rewata, the defendant sent notice marked P1 to the plaintiff. The notice runs as follows:—

*Ay. Dr. P. P. Perera

No. 100, Deans Road,
Colombo 10.
17th January, 1971.

John Wilson Esqr.,
Proctor S.C.,
Dam Street,
Colombo.

Dear Sir,

Premises No. 102, Deans Road, Maradana, Colombo

This is to inform you that Rev. Rewata, the tenant of the above premises died on the 12th day of December, 1970.

I hereby give you notice under section 18(1) of the Rent Restriction Act that I propose to continue in occupation of the premises as tenant thereof.

All rents up to the end of December 1970, have been paid.

I am herewith forwarding a Money Order in your favour for the sum of Rs. 71.95 being rent for the month of January, 1971.

Please acknowledge receipt.

Yours faithfully,
Sgd . . .

The plaintiff's Attorney-at-Law replied by P2 of 24.03.1971. In P2 he stated that the plaintiff "is unable to accept you as the tenant of the above premises as you are not a person entitled to give notice under section 18 of the Rent Restriction Act." He returned the Money Order. Thereafter on 17.09.1971 the plaintiff made an application to Colombo Rent Control Board under section 18(3) of the Rent Restriction Act. In that application he stated that the tenant Rev. Rewata died on 12.12.1970 and that the defendant gave notice under section 18 of the Rent Restriction Act, dated 17.01.1971 proposing to continue occupation of the premises as tenant. He

averred that the defendant was not a person entitled to give the said notice under section 18(2) of the Act and prayed that "the Board do make an order under section 18(3) that the respondent is a person not entitled to give notice under section 18(3) of the Rent Restriction Act"; while the proceedings of the Rent Control Board were pending the Rent Restriction Act was repealed and was replaced by the Rent Act, No. 7 of 1972 which came into force on 01.03.1972. On 02.09.1972 the Colombo Rent Control Board made order that "since the Rent Restriction Act under which the application had been made to the Board was repealed and as there was no section in the present Rent Act similar to section 18 of the Rent Restriction Act, the Board considers that this application cannot be maintained any further," and dismissed the application. This is clearly a per incuriam order for the reason that section 46(2) of the Rent Act, No. 7 of 1972 provided for the continuance of the proceedings by the Rent Control Board, constituted under the Rent Restriction Act, upon applications which were made under the provisions of the repealed Rent Restriction Act. The decision of the Board to dismiss the plaintiff's application on the ground stated by it is a decision which the Board had no jurisdiction to take because it was declining to adjudicate on a matter which it was its duty to adjudicate and hence it is a nullity. The plaintiff however did not appeal to the Board of Review against the said order nor did he take steps by way of a Writ of Certiorari or Mandamus to have the said order set aside and for directions that the Board continue with the proceedings. Instead he filed the present action on 14.08.1973. The defendant-appellant contends that since the plaintiff's application to the Rent Control Board under section 18 of the Rent Restriction Act had been dismissed by the Board, the defendant should be deemed for the purpose of the Rent Act to be the tenant of the premises. It was also submitted that the plaintiff could not maintain this action in a court of law as the Rent Restriction Act provides special machinery to which the landlord must resort to have it declared that the defendant was not entitled to give the notice P1. In support of his contention Counsel for the defendant-appellant referred us to the judgments in *Wickremasinghe v. Abdul Rahim* (1) and in *Karunaratne v. Fernando*

The facts in *Wickremasinghe v. Abdul Rahim* (*supra*), were as follows: The plaintiff was the owner of premises bearing assessment No. 371, Dam Street, Colombo. She let the same on a monthly tenancy at a rental of Rs. 108.50 to one S. A. Seyad Hamid. Seyad Hamid died on the 24th December, 1951 and thereafter on

09.01.1952 his brother the defendant gave notice to the plaintiff in terms of section 18(2) of the Rent Act that he proposed to continue in occupation of the premises as tenant thereof. The plaintiff replied to this letter on 12.01.1952 expressing unwillingness to accept the notice and also denying the right of the defendant to avail himself of the provisions of section 18(2) of the Rent Restriction Act. The plaintiff instituted the action to eject the defendant on the ground that he was in wrongful and unlawful occupation of the premises. The defendant claimed that he should be regarded as plaintiff's tenant as he had complied with the provisions of section 18(2) by giving the required notice. He contended that in view of the failure on the part of the plaintiff to make an application to the Rent Control Board under section 18(3) on receiving the notice he must be deemed to be the tenant of the premises. The contention was upheld by the Supreme Court which stated "that the subsection (2) is one of the many instances to be found in the Act where a statutory fiction has been created—in this case an artificial construction being given to the word 'tenant'. The subsection also provides the only method by which the 'tenant' so created can be divested of this artificial character viz: by an order of the Board obtained on an application made to it by the landlord of the premises as provided in subsection 3. In that case Counsel for the plaintiff also contended that the notice given by the defendant under section 18(3) was not valid as it did not set out that the defendant had been a member of the deceased's household during the required period. The court held that—

"that this subsection does not provide that the requirement under subsection 2(a) and (b) must be inserted in the notice although it is desirable that those particulars should be given. The notice given by the defendant states *that he is the brother of the deceased tenant* and that he proposes to continue in occupation in terms of section 18(2)(b). In my view that is sufficient compliance with the provisions of subsection (2)."

In *Karunaratne v. Fernando (supra)*, the defendant's husband was a tenant of the premises in suit. He died on 13.1.64 and on 21.1.64, his widow the defendant sent a notice to the plaintiff under section 18 of the Rent Restriction Act. The plaintiff replied that the defendant was not entitled to send such a notice in view of the fact that her husband's tenancy had already been terminated on 30.11.1963. The plaintiff then filed action for declaration of title and ejection of the defendant. The Supreme Court held that if a landlord challenges the

right of a person who has given him notice under section 18 (2) to continue the tenancy, he should have taken the matter to the Rent Control Board under section 18 (3) of the Act, instead of filing action particularly for title and ejection. It observed that—

“The legislature has thought it fit that the Board should decide certain questions which arise under the action without the necessity for expensive and often tardy litigation of the court.”

Section 18 of the Rent Restriction Act provides as follows:

“18. Notwithstanding anything in any other law, but subject to any provision to the contrary in any written contract or agreement, the succeeding provisions of this section shall have effect in the event of the death of the tenant of any premises to which this Act applies—

(2) Any person who

- (a) is the surviving spouse or the child, parent, brother or sister of the deceased tenant of the premises, or was a dependant of the deceased tenant of the premises immediately prior to his death; and
- (b) was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death”

shall be entitled to give written notice to the landlord, before the tenth day of the month succeeding that in which the death occurred, to the effect that he proposes to continue in occupation of the premises as tenant thereof; and upon such written notice being given, such person shall, subject to any order of the Board as hereinafter provided, be deemed for the purposes of this Act to be the tenant of the premises with effect from the first day of such succeeding month, and the provisions of this Act shall apply accordingly.

(3) The landlord of the premises in relation to which any written notice is given under subsection (2) by any person may make application to the Board for an order declaring that such person shall

not be deemed as provided in that subsection to be the tenant of the premises; and the board may make order accordingly if satisfied that such person is not entitled to give the notice for which provision is made by that sub-section.

(4) In the event of written notice being given under subsection (2) by more than one person, the Board may in its discretion, upon application made either by the landlord or by any such person, make order declaring which, if any, of such persons shall be the person who shall for the purposes of this Act be deemed to be the tenant of the premises."

It is to be noted that the defendant in *Wickremasinghe v. Abdul Rahim (supra)*, who gave notice under section 18 (2) was admittedly the brother of the deceased tenant and the defendant in *Karunaratne v. Fernando (supra)*, who gave notice was admittedly the widow of the deceased tenant. In the present case the defendant is not the surviving spouse or child, parent, brother or sister of the deceased tenant or was the dependant of the deceased tenant and was not a member of the household of the deceased tenant. In his answer in the present action he claimed that he was an Executor and heir and a partner of the business carried on in the premises. The defendant did not give evidence to substantiate his claim to that status. In his submission, counsel for the defendant appellant stated that he was a dependant of the deceased tenant. The defendant who is an ayurvedic medical practitioner carrying on his business in premises, viz.: 100, Deans Road (vide P1) did not however choose to make such an untenable claim; the defendant was undoubtedly not a person entitled to give the notice authorised by section 18 (2).

In his notice P1 the defendant did not even claim that he was related to the deceased tenant in any one of the relationships set out in section 18(2) of the Act. Section 18(2) specifically says only "such person referred to earlier in 18(2) (a) & (b) shall, subject to any order of the Board, may be deemed for the purpose of the Act to be a tenant of the premises". So that unless such a person is, or, bona fide, claims to be any one of the persons postulated in section 18 (2) (a) and (b) who is entitled to give notice under section 18 (2), he cannot avail himself of the provisions of section 18 (2) of the Act and cannot be deemed to be a tenant of the premises in terms of that section. A person who admittedly does not come within the pale of section 18 (2) cannot be deemed to be a tenant of the premises just because

he had purported to give notice under that section. In my view only a person who is or bona fide claims that he or she is the surviving spouse or child, parent, brother or sister of the deceased tenant or was a dependant of the deceased tenant and was a member of the household during the relevant period preceding the death of the tenant is competent to give notice under section 18 (2) of the Rent Restriction Act and who can, unless the board orders otherwise, be deemed to be a tenant of the premises. Only a person who claims such relationship to the deceased tenant as postulated by section 18 (2) (a) & (b) of the Rent Restriction Act, can take advantage of the provisions of section 18 (2) of the Rent Act. When such a person does so the Rent Control Board can inquire into the validity of the claim and determine whether the person seeking to continue to be a tenant is in fact a spouse, child, parent, brother or sister of the deceased tenant or was a dependant of the deceased tenant, and was a member of the household of the deceased; the board has jurisdiction to decide that issue. The Board will be acting in excess of jurisdiction if it decides that a person who admittedly does not come within the description of the persons mentioned in section 18 (2) (a) & (b) is a person entitled to give the notice. Such a decision will be a nullity on the ground of jurisdictional error.

I cannot agree with that part of the judgment of *De Silva, J.* in *Wickremasinghe v. Abdul Rahim (supra)*, that the requirement under subsection 18 (2) (a) & (b) need not be inserted in the notice purported to be given under section 18 (2). Unless the landlord is apprised of the basis or capacity in which the person is giving notice under section 18 (2), he will not be able to inform himself and decide as to the validity of the notice. Otherwise, as this case shows, any trespasser can subvert the whole purpose of section 18 of the Rent Act by frivolously purporting to give notice under section 18 and imposing himself on the landlord. True in this case the plaintiff took proceedings before the Rent Control Board and the Rent Control Board acting on a misconception of the law dismissed the application. The undisputed facts show that the defendant was not entitled to give a notice under section 18 (2) of the Rent Restriction Act and hence could not qualify himself to be deemed a tenant succeeding the deceased tenant. I agree with the Court of Appeal that on the written notice P1, the defendant cannot in law be deemed to be a tenant of the premises. The word "deemed" creates a statutory fiction and unless all the facts giving rise to that fiction exist, the fiction cannot be

invoked or imported. I agree also with the Court of Appeal that the written notice purporting to be given under section 18 (2) of the Rent Act should set out the basis upon which the defendant claims to be entitled to give notice to the landlord. Since the notice P1 given by the defendant was invalid for the reason that it was not competent for the defendant to give that notice, it was void in law and no order of the Rent Control Board could have given validity to it.

The appeal is dismissed with costs.

COLIN-THOMÉ, J. – I agree.

TAMBIAH, J. – I agree.

Appeal dismissed.
