WEERASINGHAM AND ANOTHER
v.
DE SILVA

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 614/93 (F)
DC MT. LAVINIA NO. 2652/RE
APRIL 27, 2000
MAY 26, 2000 AND
JUNE 21, 2000

Rent Act – s. 28 – Non-occupation for more than 6 months – Abandonment – Mental element? – Cause of action – Whether premises is residential premises? – Not pleaded – Nunc pro tunc.

It was contended by the defendant-appellant that the District Court had misdirected itself in holding that the defendant-appellant had ceased to occupy the premises without reasonable cause for a continuous period of not less than 6 months within the meaning of s. 28 and further that the plaint did not disclose a cause of action in that there is no averment that the premises are residential premises.

Held:

(1) The plaint failed to mention that the premises were residential premises which is a necessary element to claim ejectment on the ground of non-occupation by the tenant within the meaning of s. 28 (1). The journal entries of the case do not disclose that either before or after acceptance of the plaint the defendant-appellant made any endeavour to call the attention of the Court of this lapse. Thus, the principle of *nunc pro tunc* has no application to the facts of this case.

(2) The defendant-appellant without resorting to call the attention of Court to the purported 'defect' proceeded to 'legitimize' the plaint by admitting that premises in suit were 'residential premises'. Therefore, whatever defects the plaint contained, was rectified by the defendant himself.

(3) Temporary absence of a tenant who intends to return to live in the premises within a reasonable period will not deprive him of the protection of the

Rent Act. However, where a house is kept closed or unoccupied by the tenant in circumstances from which an inference could be drawn that tenant does not intend to occupy any longer – be it exclusively occupied by strangers or by business employees, tenant cannot avert eviction.

(4) The indefinite period within which defendant-appellants in the instant case had been away from the premises coupled with his admission that his intention was to have his children educated in a foreign country would establish that his staying away from the premises was not founded on reasonable cause.

(5) The common law concept of abandonment of tenancy has no application to an action instituted in terms of s. 28.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. *Reid v. Samsudeen* – 1 NLR 292.
2. *Soyza v. Soyza* – 17 NLR 118.
3. *Avva Umma v. Cassindar* – 24 NLR 199.
4. *Jinadasa v. Peiris* – 1988 2 SLR 417.
5. *Brown v. Brash* – 1948 1 ALL ER 922.
6. *Sabapathy v. Kularatne* – 52 NLR 425.
7. *Amarasekera v. Gunapala* – 72 NLR 469.
8. *Fonseka v. Gulamhussain* – 1981 1 SLR 77.
9. *Wijewardena v. Dixon* – 77 NLR 157.

Romesh de Silva, PC with Ms. *S. Samarasekera* for defendant-appellant.

M. R. de Silva for plaintiff-respondent.

Cur. adv. vult.

September 15, 2000

WEERASURIYA, J.

The plaintiff-respondent by plaint dated 04. 06. 1987, instituted action against the defendant-appellants, seeking ejectment of the defendant-appellants from the premises described in the schedule to the plaint and damages. 1

The defendant-appellants in their answer whilst denying averments in the plaint prayed for dismissal of the action. This case proceeded to trial on 10 issues and at the conclusion of the case, learned District Judge by his judgment dated 19. 08. 1993, entered judgment for the plaintiff-respondent. It is from the aforesaid judgment that this appeal has been preferred.

At the hearing of this appeal, learned President's Counsel for the defendant-appellants contended that learned District Judge has misdirected himself in holding that the defendant-appellant had ceased to occupy the premises without reasonable cause for a continuous period of not less than 6 months within the meaning of section 28 of the Rent Act. This contention of the learned President's Counsel was based on the following grounds:

(*a*) that in common law, abandonment of premises necessarily entails a mental element; and

(*b*) that the plaint does not disclose a cause of action in that there is no averment that the premises are residential premises.

The contention that the plaint does not disclose a cause of action was solely based on the premise that the plaint failed to mention that the premises were residential premises. It is to be noted that in paragraph 3 of the plaint, there is an averment that the defendant-appellant had ceased to occupy the premises bearing No. 28 for a period of not less than 6 months in terms of section 28 (1) of the Rent Act. Therefore, there is notice of the invocation of section 28 (1) as a ground of ejectment in this action. However, it is to be observed that there is no explicit reference to the fact that premises in question were residential premises. It is correct to state this being one of the ingredients of the ground upon which ejectment is sought that it is vital to aver that the premises in suit are residential premises. However, it is significant that before the commencement of the trial an admission was recorded that the premises in question were residential premises.

Therefore, there was no need to have a specific issue framed for a finding on this matter as the parties seem to have agreed that the premises in question were residential premises.

Learned President's Counsel sought to argue that despite the admission that the premises were residential premises, learned District Judge before issuing summons ought to have either dismissed the action or in the alternative before summons being ordered, upon his attention being drawn to it, either reject it or return it for amendment.

He cited the following cases in support of this proposition:

(1) *Reid v. Samsudeen.*[1]

(2) *Soyza v. Soyza.*[2]

(3) *Avva Umma v. Cassindar.*[3]

In *Reid v. Samsudeen (supra)* at 295 it was observed that if the plaint is defective in some material points and that appears on the face of the plaint, but by some oversight the Court has omitted to notice the defect, then the defendant on discovering the defect may properly call the attention of the Court to the point and then it will be the duty of the Court to act as it ought to have done in the first instance either to reject the plaint or return it to the plaintiff for amendment. If the plaint is a good one on the face of it but the defendant has reason to urge why the plaintiff is not entitled to sue him that objections must be taken by the answer.

In *Soyza v. Soyza (supra)* it was held that if on the footing of the averments in a plaint the claim made therein is clearly prescribed, the claim is liable to be dismissed without evidence being gone into or consideration of the averments in the answer.

In *Avva Umma v. Cassindar* (*supra*) it was held that where the plaint did not allege anything on the face of it, which gave it jurisdiction and the Court may by an oversight omitted to notice the defect and accepted the plaint and where the attention of the Court is called to the point by the defendant, that the Court ought either to reject the plaint or to return it to the plaintiff for amendment.

The principle which emerges from the decisions of *Reid v. Samsudeen* and *Avva Umma v. Cassindar* is that if the plaint is defective *ex facie* and the Court by an oversight omitted to notice the defect and accepted the plaint, once the defendant drew the attention of the Court to the point, the Court ought either reject it or return it for amendment. This proposition is based on the principle of *nunc pro tunc* (now for then) which would apply where there is something *ex facie* defective in the plaint which necessitates its rejection, but due to an oversight it has not been rejected.

In the instant case, the plaint failed to mention that the premises in suit were residential premises which obviously is a necessary element to claim ejectment on the ground of non-occupation by the tenant within the meaning of section 28 (1) of the Rent Act. The journal entries of the case do not disclose that either before or after acceptance of the plaint, the defendant-appellant made any endeavour to call the attention of the Court of this lapse. Thus, the principle of *nunc pro tunc* has no application to the facts of this case. What is most significant is the fact that the defendant-appellant without resorting to call the attention of Court to the purported 'defect', proceeded to 'legitimize' the plaint by admitting that premises in suit were 'residential premises'. Therefore, whatever defects the plaint contained, was rectified by the defendant-appellant himself. In the circumstances, the principles enunciated in the cases of *Reid v. Samsudeen* and *Avva Umma v. Cassindar* have no bearing to the facts of this case.

The case of *Soyza v. Soyza (supra)* stands on a different footing in that the claim set forth in the plaint appeared to be prescribed.

Section 46 (2) of the Civil Procedure Code enacts that when a plaint is presented if the action appears from the statement of the plaint to be barred by any positive rule of law, the Court should reject the plaint. Therefore, the facts in *Soyza v. Soyza (supra)* are clearly distinguishable from the facts of this case which did not offend any positive rule of law preventing its acceptance.

Learned President's Counsel for the defendant-appellants submitted that in terms of section 28 of the Rent Act non-occupation of the 100
premises for a period of not less than 6 months would entail the mental element namely, whether it was intended to be permanent.

Megarry in '*The Rent Acts*' (vol. 1, page 245) under the subhead Temporary Absence, has stated that temporary absence of a tenant who intends to return to live in the premises within a reasonable period will not deprive him of the protection of the Rent Acts. He had cited the following examples : The case of a tenant who may get absent due to war; or ship captain at sea; absence due to illness or for reasons of either business or pleasure even for few months with the intention to return. 110

In the case of *Jinadasa v. Peiris*[4] it was held under section 28 (1) of the Rent Act a tenant can be absent from premises let to him for 6 months with or without cause but if he is away for a longer period he must give an explanation which will amount to reasonable cause. Where without the landlord's consent the tenant keeps his dependents in the premises for longer than six months without any intention to occupy them himself he is liable to be treated as non-occupying tenant and evicted.

In the English case *Brown v. Brash*[5] the concept of a non-occupying tenant was explained in the following manner: "The absence of the tenant from the premises may be averted if he coupled and clothed his intention to use it as his home with some formal, outward and visual sign such as installing a caretaker or representative, be it relation or not with the status of a licensee and with the function of preserving those premises for his ultimate home-coming".

The principles enunciated in *Brown v. Brash (supra)* was applied in *Sabapathy v. Kularatna;*[6] *Amarasekera v. Gunapala*[7] and *Fonseka v. Gulamhussain.*[8] Nevertheless, in *Wijewardena v. Dixon*[9] decided in 1974, the concept of non-occupying tenant enunciated in *Brown v. Brash* (*supra*) was not applied.

The principles emerging on a survey of the above cases, would be that where a house is kept closed or unoccupied by the tenant in circumstances from which an inference could be drawn that tenant does not intend to occupy any longer be it exclusively occupied by strangers or by business employees, cannot avert eviction.

In the instant case the defendant enumerated the following reasons for non-occupation:

(*a*) That in 1984 he left the premises due to communal riots.

(*b*) That he left the country for education of his children.

He conceded that the communal riots were in 1983 and that his children had some trouble which he chose not to elaborate. There was no evidence to suggest that the trouble that he described was such a magnitude sufficient to compel him to leave the premises. Therefore, it would be apparent that during the period when communal riots existed he was unscathed and occupied the premises throughout this period till April, 1984.

In the circumstances, one cannot attribute his leaving the premises solely due to the existence of communal riots in 1983. In this regard it is significant to note that his brother and his family had lived in the premises during his absence which would mean that they never faced difficulties in staying in the premises despite the existence of the situation which as alleged by the defendant-appellant led to his departure from the Island. There was no material placed as to the reason why his children were taken out of the country when it was evident that even his youngest child was 19 years of age. This would be a situation where he had chosen that education of children in a foreign country would better their prospects for employment. Therefore, the decision to give them education in Australia was entirely his choice unhampered by the situation that prevailed in the country.

In the circumstances, question to be resolved is whether the defendant had reasonable cause for non-occupation. The first reason namely, the inability to live in Sri Lanka was contradicted by the fact that his brother remained in the premises during his absence. There was no material to suggest that their lives were in danger at any time or there was an imminent threat to their properties necessitating them to be away from the premises even for a short period.

The contention of learned President's Counsel that Court has to consider whether there was an abandonment of tenancy has no relevance. The common law concept of abandonment of tenancy has no application to an action constituted in terms of section 28 of the Rent Act.

The reasonable cause contemplated in this section would be, among others, such as the house being under major repairs or the tenant has been on vacation or business which would take him out of the area. He can be absent with or without cause for this period but if he is away for longer period he is bound to give an explanation that is acceptable. (vide *Jinadasa v. Peiris* (*supra)* at 421.

The evidence in this case would reveal that the tenant intended to be away indefinitely and that he was uncertain whether his children would return after their foreign education. The rationale behind the requirement to adduce reasonable cause for non-occupation for a continuous period of not less than six months is to give relief to the tenants who for genuine reasons are compelled to be away from the premises. The indefinite period within which defendant-appellant in the instant case had been away from the premises coupled with his admission that his intention was to have his children educated in a foreign country despite the fact that his youngest child was 19 years of age would establish that his staying away from the premises was not founded on reasonable cause.

For the above reasons, it seems to me that there is no basis to interfere with the findings of the District Judge. Therefore, I proceed to dismiss this appeal with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.