

FERNANDO
v.
EDWARD SOYSA

COURT OF APPEAL.
C.A. 80/89
D.C. MT. LAVINIA 391/ZL
WEERASEKERA, J.
DR. ANANDA GRERO, J.
OCTOBER 3, 1994.

Land Lord and Tenant – Demolition of tenanted premises – S. 48 of the Rent Act – Definition of premise – Standard Rent Determined by Rent Board.

Plaintiff-Respondent was the owner of premises No. 29/1 and No. 29/2, Visaka Road, in order to widen the Duplication Road premises No. 29/1 was completely demolished and greater part of premises No. 29/2, in occupation of the Defendant-Appellant the Tenant was also demolished.

The question arose whether the contract of Tenancy between the parties still exist or whether it has come to an end.

Held:

(i) It is in respect of premises No. 29/2, the parties have entered into a contract of Tenancy; after the demolition of 3/4 the part of the premises, one cannot say that the premises that was given on rent still exists.

(ii) The part of the premises now remaining although some temporary unauthorised structures have been put up by the Defendant in order to remain in occupation does not in any way come within the definition of "part of the premises" as contemplated under the Rent Act. Nor does this premises fall into the category of premises for human habitation in the strict sense of the term.

(iii) The contract of Tenancy was not in respect of such part of the building but for the entire premises and that premises ceased to exist after the demolition.

Per Dr. Ananda Grero, J.

"The mere fact that the Rent Board made order that the Defendant could make an application to determine the Standard Rent to the Board does not in our view make us to come to the finding that there still exists a contract of tenancy between the Plaintiff and the Defendant."

Appeal from the Judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Girtry v. de Silva* – 69 NLR 281.
2. *Premadasa v. Atapattu* – 71 NLR 62.

M. A. Marleen for Defendant-Appellant

H. L. de Silva, P.C. with Ms. Chamantha Weerakoon for Plaintiff-Respondent.

December 9, 1994.

DR. ANANDA GRERO, J.

This is an appeal preferred to this Court by the defendant-appellant (hereinafter referred to as defendant) against the judgment of the learned District Judge of Mount Lavinia dated 19.4.1988, whereby he entered judgment in favour of the plaintiff-respondent (hereinafter referred to as the plaintiff).

It is common ground, that the plaintiff in this case became the owner of premises numbers 29/1 and 29/2 respectively Visaka Road, Bambalapitiya and in order to widen the Duplication Road premises No. 29/1 was completely demolished.

It is the position of the plaintiff, that to widen the Duplication Road, the Colombo Municipal Council acquired part of the land where the house bearing No. 29/2 stood, and took steps to demolish a greater part of the house and after the demolition what was remaining was not fit for human habitation. It was the position of the plaintiff that the contract of tenancy entered into between the parties was in respect of the entire premises, bearing No. 29/2 and not in respect of a remaining part of the premises which became unfit for human habitation.

The defendant who was the tenant of the plaintiff of premises No. 29/2, admitted that part of the said premises was demolished to widen the Duplication Road, but stated that the remaining portion of the premises was quite adequate and fit for human habitation and the said remaining portion still falls within the definition of "premises" under the Rent Act.

When this matter was taken up for hearing, the learned Counsel for the defendant contended although a part of the premises bearing No. 29/2 was demolished by the Colombo Municipal Council for the widening of the Duplication Road, the remaining portion comes within the definition of "premises" as defined in the Rent Act. He further contended that the existing premises has all the facilities of a small house and therefore it is not correct to state that it is not fit for human habitation.

The learned President's Counsel for the plaintiff contended that major part of premises No. 29/2 (i.e. about 3/4 of the building) has been demolished, the remaining part of the roof has to be propped up and the contract of tenancy was in respect of the entire premises bearing No. 29/2 Visaka Road, Bambalapitiya. As the original contract of tenancy got frustrated there is no such contract that exists between the parties and he further contended that the defendant is in unlawful occupation of the premises. He further contended that the learned District Judge quite correctly decided the case in favour of the plaintiff.

It is common ground that the defendant was the tenant of the plaintiff in respect of the premises bearing No. 29/2, which is described in the plaint of the plaintiff, and the contract of tenancy came into being prior to the demolition of the said premises.

P2 is the plan showing premises No. 29/2, Visaka Road, and position of the line of acquisition affecting such premises. A careful study of P2, reveals that about 3/4 of the aforesaid premises had been acquired and what is left behind is the balance 1/4 of the premises. Plan D3 shows the position of the part of three premises bearing No. 29/2, after the acquisition and the demolition of the major part of the said premises. According to this plan D3, what is shown in pink colour is the part of the permanent building remaining after demolition. Adjoining the remaining part of the building marked "A", is a temporary building constructed with planks which is shown as "D" in the said plan. There is also a wooden temporary building used as a store marked "E" in the said plan. Then there is a water closet marked "C" in the said plan. Only the portion marked "A" remains as the part of the permanent building of premises No. 29/2 after the demolition. It is not in respect of the portion of premises marked A in plan D3, the parties entered into a contract of tenancy; but only in respect of the entire premises bearing No. 29/2 (as it stood before the acquisition and demolition of the said premises.)

It is the contention of the learned Counsel for the defendant that the remaining part of the premises bearing No. 29/2 (which is the portion marked A) falls within the definition of "premises" as defined in the Rent Act. Section 48 of the Rent Act No. 7 of 1972 defines

premises as any building or part of a building together with the land appertaining thereto.

It is crystal clear, that in the instant case there is no complete or full building that exists today. No doubt such a building existed prior to the acquisition and demolition of part of premises bearing No. 29/2. What remains now is a small part of the original building bearing No. 29/2. This is shown as "A" in plan D3. According to the evidence of the defendant she says that after the demolition 3/4 of the building remains. A perusal of D2 and D3 contradicts her position. In fact these two documents (plans) clearly reveal that the major portion of the premises had been acquired and demolished. She has thereafter put up temporary buildings and got them added to the existing part which is marked A, and the temporary buildings are shown as D and E in the said plan D3. In fact she has been charged in the Municipal Magistrate's Court of Colombo for constructing unauthorized buildings in this premises (after the demolition of part of the premises 29/2) and pleaded guilty on 23.9.77 and moved for time to remove such unauthorized buildings. The learned Magistrate has given time till 31.8.78 and also ordered to issue a mandatory order after 31.8.78 (vide certified copy of the proceedings in M.C. Case No. 808 filed of record).

The learned Counsel for the defendant appears to rely on the second part of the definition of "premises" in the Rent Act which says **"part of a building together with the land appertaining thereto."**

The part of a building "which is described in the aforementioned definition is not a part which remains after a demolition of a building as in the instant case, that is contemplated in section 48 of the Rent Act, but a part of a existing house not partly demolished, with all the basic amenities, which a tenant can make use of for reasonable and wholesome habitation. It is unthinkable to imagine, that the legislature intended to assign the meaning of a "parts of a building" to a small part of a remaining building after the demolition of a major part of a substantial building. Such a remaining part of a building as in the instant case according to my view, is not what is contemplated under the definition of **"part of the premises"** in the Rent Act. Witness Somapala de Silva, the Chief Planning Officer of the Colombo

Municipal Council has given evidence in this case. P1 and P2 were shown to him. P1 is the plan showing premises 29/2 (the entire premises) and the portion acquired to widen the Duplication Road.

P2 is a plan showing clearly the part of the premises (29/2) acquired for widening the Duplication Road, and also the remaining part of the premises after the acquisition. Based on these two plans, he has stated that after the acquisition of the Major part of the premises No. 29/2 the remaining part of the premises was not fit for human habitation according to the rules and regulations of the Colombo Municipal Council. The learned District Judge has considered the evidence of this witness and it appears that he has relied on his evidence. This witness was shown D1, D2, and D3 (i.e. notice of acquisition, plan showing the acquisition and plan showing part of the premises after acquisition) in addition to the aforesaid P1 and P2. A perusal of his evidence reveals, that the defendant, after the acquisition of part of premises, has put up some temporary structures and on the whole the present building (partly temporary and partly permanent) is not fit for human habitation. There is no doubt that the part of the premises now remaining although some temporary unauthorized structures have been put up by the defendant in order to remain in the premises, does not in anyway come within the definition of "part of the premises" as contemplated in the Rent Act. Nor does this premises fall into the category of "premises for human habitation" in the strict sense of the term.

Does the contract of tenancy between the parties still exist, or has it come to an end?

As earlier stated it is in respect of premises bearing No. 29/2, the parties have entered into a contract of tenancy. After the demolition of 3/4th part of the said premises, one cannot say that the premises that was given on rent still exists. What was given on rent was, whole of the premises bearing No. 29/2 and not a remaining part of such premises. The defendant tenant went into occupation of the entire premises.

There is evidence to show that after the demolition of about 3/4th part of the premises, there was an open space facing the

Duplication Road. P2 reveals that unless this part of the house facing the Duplication Road is propped up with a wall or pillars the roof may come down and it is dangerous to occupy such remaining part of the building. The room that was remaining was 5 to 6 feet by 8 to 10 feet. There is evidence that the defendant after the demolition of the said premises has taken steps to construct unauthorized and temporary structures which were added to the remaining part of the premises for which there was no contract of tenancy between the parties.

After the demolition of the major part of premises bearing No. 29/2, I am of the view that there was no proper building to use and occupy by the defendant tenant. The defendant has subsequently by making some additions to the existing part of the building made it somewhat a house as one could see; but for which there was no contract of tenancy. But what remained (i.e. the part of the premises) soon after the demolition could not be called a building for the use and occupation of the defendant or any other person. Even if it was regarded as habitable, the contract of tenancy was not in respect of such part of the building, but for the entire premises, and that premises ceased to exist after the demolition.

Both Counsel relied upon the decision of the Supreme Court in the case of *Girty v. De Silva* ⁽¹⁾. In his judgment Sansoni C.J. quoted Wille, on Landlord and Tenant in South Africa (5th edition) as follows:-

"By the contract the tenant is entitled to the use and occupation of the building, and if there is no building to use and occupy, there is no existing contract" (Vide page 282 of the judgment)

In the aforesaid case the building that was given on rent was burnt down without the fault of the landlord and the tenant. The court held that the tenancy has come to an end. Such a complete destruction of the premises has not taken place with regard to the premises in the present case. But on the other hand a major part of the premises was demolished leaving behind a small part of it which was not let by the plaintiff to the defendant, and this small part of it as it stood then (i.e. prior to the defendant making alteration and addition) was not a proper building for the use and occupation of the tenant. In these circumstances one cannot say the contract of tenancy still exists, and

no sooner the demolition took place the contract of tenancy came to and end. Furthermore as earlier stated in this judgment, the remaining part of the building does not come within the preview of the definition of "premises" as contemplated in the Rent Act.

The case cited by the learned Counsel for the defendant *Premadasa v. Atapattu* ⁽²⁾ does not apply to the facts of the present case. The learned Counsel for the defendant relied upon D5, the determination of standard rent made by the Rent Board with regard to the present premises (after demolition) bearing No. 29/2. The mere fact that the Rent Board made order that the defendant could make an application to the Board does not in our view make us to come to the finding that there still exists a contract of tenancy between the plaintiff and the defendant.

We are in full agreement with the contention of the learned President's Counsel for the plaintiff that what was let to defendant was the entirety of the premises bearing No. 29/2 and now what remains is a different entity for which there is no contract of tenancy. We too agree with his contention that the original contract of tenancy has come to an end. We also agree with the findings of the learned District Judge that the plaintiff is entitled to judgment as prayed for in the plaint.

In the aforesaid circumstances, we affirm the judgment of the learned District Judge dated 3.5.88 and delivered on 19.4.88 and the appeal of the defendant is hereby dismissed, but without costs.

Considering the fact that the defendant is a lady with children we make order that writ of ejectment should not be issued till 1st of March, 1995, so that she can find alternative accommodation before she is ejected.

WEERASEKARA, J. – I agree.

Appeal dismissed.