

YOUNG MEN'S BUDDHIST ASSOCIATION
v.
AZEEZ AND ANOTHER

SUPREME COURT

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

RAMANATHAN, J. AND

WADUGODAPITIYA, J.

S.C. APPEAL NO. 100/94

C.A. NO. 643/81(F)

D.C. KURUNEGALA NO. 4508/L

SEPTEMBER 17TH, OCTOBER 1ST AND 31ST AND

19TH, NOVEMBER, 1996

Declaratory action – Business premises – Non-occupation of premises by tenant – Whether co-partners of tenant are liable to ejectment.

The plaintiff sued the dependants who are partners of a business for a declaration of title and ejectment on the ground that M.R., one of the partners who was the tenant of the premises had ceased to occupy the premises and consequently, the dependants were in unlawful occupation of the premises.

Held:

Non-occupation of the premises by the tenant *per se* does not constitute a ground for ejectment in so far as business premises are concerned; and the defendants who were partners carrying on business with the acknowledged tenant as at the date of the action were not in wrongful occupation of the premises.

Cases referred to:

1. *Pir Mohamed v. Kadhibhoy* 60 NLR 186.
2. *Wijeratne v. Dschou* 77 NLR 157, 159.

APPEAL from the judgment of the Court of Appeal.

A. K. Premadasa, PC with Senaka Walgampaya for plaintiff-appellant.

Faiz Musthapha, PC with C. N. Geethananda for defendants-respondents.

Cur. adv. vult.

9th December, 1996.

G. P. S. DE SILVA, CJ.

The plaintiff (The Young Men's Buddhist Association, Kurunegala) instituted these proceedings in August, 1974, seeking a declaration of title to the premises in suit, ejection of the 1st and 2nd defendants and damages. It was averred in the plaint (i) that the plaintiff had let the premises on a monthly tenancy to M. Abubacker and Meera Rawther; (paragraph 4 of the plaint); (ii) that the said Abubacker and Meera Rawther carried on business at these premises under the name and style of S. M. M. Mohamed Abdulla and Bros, from 1st March, 1940; (iii) that "when the plaintiff discovered the said tenants had left the premises the plaintiff refused to accept rent"; that Meera Rawther had ceased to occupy the premises; (iv) that the defendants are in wrongful occupation of the premises.

The defendants in their answer pleaded (a) that Mohamed Abdulla and Abdul Rahiman carried on business in partnership at these premises from 1.3.1940 under the name and style of S. M. M. Mohamed Abdulla and Bros; (b) that the said partnership was the tenant of the premises; (c) that at all times material the 1st and 2nd defendants and Meera Rawther were the partners of the firm of S. M. M. Mohamed Abdulla Bros., and were the lawful tenants under the plaintiff; (d) that the partnership paid rent which the plaintiff accepted.

After trial the District Court entered judgment for the plaintiff. On appeal, the Court of Appeal set aside the judgment of the District Court and dismissed the plaintiff's action. Hence the appeal to this court by the plaintiff.

At the trial, the title of the plaintiff to the premises in suit was admitted. The burden therefore was on the defendants to prove by what right they were in occupation of the premises. Two issues were raised on behalf of the plaintiff. (i) Are the defendants in unlawful and wrongful occupation of the premises from 1971? (ii) If so, is the plaintiff entitled to the reliefs claimed in the prayer to the plaint?

On behalf of the defendants 6 issues were raised and issue No. 5 which is relevant for present purposes reads thus: "Are the defendants the partners of the business known as S. M. M. M. Abdulla

and Bros?". It is to be noted that the District Court answered issue No. 5 in the affirmative.

Mr. Mustapha for the defendants-respondents strenuously contended that the case for the plaintiff as set out in the plaint is that Meera Rawther is a tenant of the premises in suit. It is so averred in express terms in paragraph 5 of the plaint. What is more, this position is strongly supported by the letter P2. Now P2 is a letter dated 8th March, 1974. addressed to the 2nd defendant by the Secretary of the YMBA. The opening words of P2 read as follows: "I write to state that the above premises (ie the premises in suit) were *rented out by the YMBA to Meera Rawther* who was carrying on business at the said premises under the name "Abdulla and Bros" (emphasis added) P2 goes on to state "Now it has been found that Meera Rawther is not in occupation of the said premises and that you are a trespasser. You had been attempting to create a tenancy without disclosing that Meera Rawther has left the premises".

Mr. Premadasa for the plaintiff-respondent strongly urged before us that it was by reason of a mistake that it was averred in paragraph 4 of the plaint and in the letter P2 that Meera Rawther was a tenant of the premises in suit. I find myself unable to accept this submission for the reason that P2 was specifically put to witness H. V. Karunadasa, who was called by the plaintiff. His evidence on this crucial point reads thus: "Q. You don't know whether what is set out in P2 is correct? A. I think it is correct".

No doubt it is correct to say that on the documents filed of record Meera Rawther was not one of the original partners of the firm when the business commenced in 1940 at the premises in suit. It is also common ground that there were changes in the constitution of the firm of Abdulla and Bros. from time to time since 1940. However what needs to be stressed is that, on the plaintiff's own pleadings, the documents P2 and the oral evidence of the plaintiff's witness Karunadasa, it is not possible to resist the conclusion that Meera Rawther was an acknowledged tenant under the plaintiff even though he was not one of original partners of the firm at the commencement of business in 1940.

It would be wholly unreasonable to take the view that the averments in the plaint, the contents of P2 and the oral evidence adduced on

behalf of the plaintiff, are all the result of a "mistake". P2 in particular contained a clear and categorical statement that Meera Rawther was a tenant. In this connection explanation 2 to section 150 of the Civil Procedure Code is of intense relevance. It is in the following terms "The case enunciated must reasonably accord with the party's pleading . . . And no party can be allowed to make at the trial a case materially different from that which he has placed on record . . ."

The position then is that Meera Rawther was acknowledged to be a tenant under the plaintiff. On a reading of the plaint it would appear that plaintiff's cause of action is based on the non-occupation of the premises by Meera Rawther. However, the fact that Meera Rawther has ceased to occupy the premises is of no avail to the plaintiff, inasmuch as non-occupation per se does not constitute a ground of ejection in so far as business premises are concerned (*Pir Mohamed v. Kadhiboy*⁽¹⁾; *Wijeratne v. Dschou*⁽²⁾). Moreover the plaintiff has not pleaded an abandonment of the tenancy nor was it put in issue at the trial. In any event the evidence is that Meera Rawther left for India only in 1976. The action was filed two years prior to his departure.

It is not disputed that since August, 1962, Meera Rawther was a partner of the firm of Abdulla and Bros. The finding of the District Court is that since 1971, the 1st and 2nd defendants are themselves partners of the firm of Abdulla and Bros. (vide the answer to issue No. 5 referred to above). In short, the defendants are themselves partners carrying on business with an acknowledged tenant as at the date of action. It follows that the defendants are not in unlawful and wrongful occupation of the premises, and issue No. 1 has to be answered against the plaintiff. In the result, the plaintiff's action fails. The origin of the tenancy and the changes in the constitution of the partnership do not really arise for consideration having regard to the case as presented in the plaint and the evidence led on behalf of the plaintiff.

For these reasons, the appeal fails and is dismissed but without costs.

RAMANATHAN, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal dismissed.