

SANGADASA
v.
HUSSAIN AND ANOTHER

SUPREME COURT
FERNANDO, J.,
DHEERARATNE, J. AND
GOONEWARDENE, J.
S.C. APPEAL NO. 36/93
COURT OF APPEAL NO. 180/84
D.C. KURUNEGALA NO. 13322
JANUARY 26, 1994.

Landlord and tenant – Action for ejectment of tenant – Subletting – Exclusive possession of premises by the subtenant – Burden of proof – Defence of partnership agreement.

The plaintiff filed action to have the defendants ejected from business premises let to the 1st defendant on the ground that the 1st defendant tenant had sublet the premises to the 2nd defendant. The defendants while denying subletting, pleaded that by virtue of a notarially executed agreement they had entered into a partnership to run a business at the premises.

Held:

1. It is sufficient for a landlord to establish a *prima facie* case of subletting and the burden then shifts to the tenant to explain the nature of the occupation of the alleged subtenant.
2. Exclusive possession of premises by a subtenant is a necessary ingredient of subletting.
3. The plaintiff led sufficient *prima facie* evidence of a subletting by proof of the fact that the 2nd defendant was in the premises doing business and that the 1st defendant appeared to have relinquished his control of the premises. Consequently, the burden shifted to the 1st defendant to explain the presence of the 2nd defendant on the premises doing business. This the 1st defendant failed to do.

4. The partnership agreement was demonstrably a sham. The inference could, therefore, be drawn that the 2nd defendant was in exclusive possession of the premises, managing a business which admitted no owner but himself. On a balance of probability, the only inference the Court could draw was that the 1st defendant had rented out the premises to the 2nd defendant. Hence, the plaintiff was entitled to judgment.

Cases referred to:

1. *Thaha v. Sadeen* – (1969) 72 NLR 142.
2. *Britto v. Swamikandu* – (1972) 74 NLR 209.
3. *Seyed Mohamed v. Meeralebbe* – (1968) 70 NLR 237.
4. *Suppiah Pillai v. Muttukaruppa Pillai* – (1953) 54 NLR 572 at 574, 575.

APPEAL from the judgment of the Court of Appeal.

H. L. de Silva, PC with *G. L. Geethananda* for appellant.

N. R. M. Daluwatta, PC with *M. S. A. Hassen* for 1st respondent.

No appearance for the 2nd respondent.

Cur. adv. vult.

May 9, 1994.

DHEERARATNE, J.

Plaintiff-appellant filed this action on 11.3.1981 to have the defendants ejected from business premises No. 45, Perakumba Street, Kurunegala, on the ground that his tenant, the 1st defendant, had sublet the premises to the 2nd defendant on or about March, 1980. The premises is admittedly rent-controlled. Defendants in their joint answer, while denying subletting, pleaded that by virtue of notarially executed agreement No. 496 dated 18.3.1980 (produced at the trial marked D18) they had entered into a partnership to run a business called 'Hussain Stores' at the premises. The learned trial Judge dismissed plaintiff's action and his judgment was affirmed by the Court of Appeal. Both Courts took the view that the plaintiff failed to establish that the premises was sublet.

Plaintiff obtained leave from the Court of Appeal to appeal to this Court on the following four points of law, of which, the first two were formulated by counsel for plaintiff and the last two by counsel for defendants:

- (1) Whether having regard to the facts and circumstances of the case the partnership agreement D18 was merely a cloak or device to conceal the unlawful subletting of premises.
- (2) Whether the Court of Appeal has correctly applied the principles governing the burden of proof in such a dispute in this case.
- (3) Whether the plaintiff has failed to establish exclusive occupation by the alleged subtenant, the 2nd defendant, in this case, and as such does the subtenancy arise in this case.
- (4) Where the plaintiff has failed to establish exclusive possession by the alleged subtenant the 2nd defendant, does the question of legal relationship between the 2nd defendant and the 1st defendant arise for determination by the Court.

What is the nature of the burden cast on a plaintiff landlord who alleges subletting? It is too well-known that the act of subletting (without the permission of the landlord) of rent-controlled premises is done in stealth for obvious reasons. (see *Thaha v. Sadeen*⁽¹⁾). The landlord may not be able to ascertain the true nature of the occupation of the alleged subtenant with precision because that is usually a matter within the exclusive knowledge of the tenant and subtenant only. (see *Britto v. Swamikandu*⁽²⁾). In these circumstances it is sufficient for a landlord to establish a *prima facie* case of subletting and the burden then shifts to the tenant to explain the nature of the occupation of the alleged subtenant. (see *Sayed Mohamed v. Meeralebbe*⁽³⁾).

Section 10 (1) of the Rent Act, No. 7 of 1972 specifies when any *part of a premises* shall be deemed to have been sublet to any person. That is 'if, and only if, such person is in *exclusive occupation*, in

consideration of the payment of rent, of such *part*, and such *part* is a defined and separate *part* over which the landlord or the tenant, as the case may be, has for the time being relinquished his right of control; and no person shall be deemed to be the tenant or the subtenant of any *part* of any premises by reason solely of the fact that he is permitted to use a room or rooms in such premises'. (emphasis added). Prohibition for a tenant to sublet rent-controlled premises is spelt out in section 10 (2) of the Rent Act, No. 7 of 1972. Section 10 (2) (a) deals with the prohibition relating to (whole) premises, whereas section 10 (2) (b) deals with the case of part premises. Therefore, the statutory definition of subletting part premises specified in section 10 (1) is linked only to the prohibition contained in section 10 (2) (b). As far as subletting of whole premises is concerned, one has to look for the common law concept of letting/subletting. This common law concept was considered in the case of *Suppiah Pillai v. Muttukaruppa Pillai*⁽⁴⁾, which dealt with section 9 (1) of the Rent Restriction Act, No. 29 of 1948 containing a prohibition on a tenant to sublet either (whole) premises or part premises; that Act contained no definition of subletting part premises, as contained in Act No. 7 of 1972. In that case Gratiaen, J. having considered the Roman Dutch Law (and English Law which appears to be identical) on general principles of incidence of subletting, reached the conclusion that exclusive possession of premises by a subtenant was a necessary ingredient of subletting (pages 574 & 575). It seems to me that incidence of the right of exclusive occupation by a subtenant has the corollary incidence of relinquishment of the right of occupation by a tenant; generally proof of one right may occasion the inference of the other.

Plaintiff giving evidence, stated that he was a trader who carried on business at premises No. 57, Perakumba Street, Kurunegala, which was situated in close proximity to the premises in question. From about March, 1980, 1st defendant was not seen in the premises but was seen once in two or three months. The business in the premises was seen to be done by the 2nd defendant. Plaintiff stated that when he questioned the 2nd defendant, the latter informed him that he had taken on rent the premises from the 1st defendant. Plaintiff was not

cross-examined on this item of evidence and 2nd defendant failed to contradict this position as he chose not to give evidence. The Gramasevaka of the area who was called to give evidence on behalf of the plaintiff too stated that it was the 2nd defendant who was seen running the business at the premises. Under cross-examination he did say that the 1st defendant was registered as a voter at the premises by virtue of his residence; however, no documentary evidence which should have been readily available was produced to support this position.

The main thrust of the defence as stated before was the partnership agreement dated 18.3.1980 to explain away occupation of the premises by the 2nd defendant. By this agreement, the party of the 1st part (1st defendant) "being ill and unable to carry on the said business without some assistance," agreed with the party of the second part (2nd defendant) to carry on the business called "Hussain Stores" already carried on in the premises, in partnership for a period of five years commencing on 15.3.1980 and ending on 14.3.1985. Principal covenants of the agreement are briefly these. The capital of the partnership business for the time being agreed upon was Rs. 150,000 to be contributed in equal shares. 1st defendant agreed to contribute Rs. 25,000 in cash and the balance Rs. 50,000 by way of the value of the furniture, fittings, sewing machines and other items belonging to him lying in the premises mentioned in the schedule to the agreement. Provision was made for adjustment of profits in the event of any party failing to contribute his share of the capital in the aforesaid proportions. 2nd defendant was to be the managing partner of the business and the management and control and conduct of business was to be in consultation with the 1st defendant. Notwithstanding, the last covenant 1st defendant was entitled to be present at the place of business and look after his interests in the said business without any hindrance by the 2nd defendant. 2nd defendant as the managing partner was to keep books of account which were to be kept at the place of business. Profit and loss was to be shared by the partners. Although the use and occupation of the premises was to be utilized for the partnership business, all rights relating to the tenancy and right of occupation of the premises for all purposes was

deemed to have vested and exercised by the 1st defendant. On winding up the partnership 1st defendant was to resume occupation of the premises.

That was ostensibly a perfect partnership agreement where all rights of tenancy of the premises remained in the hands of the 1st defendant. However, the picture which emerged from the cross-examination of 1st defendant was completely different. As regards the balance stock in trade of the sole business of 1st defendant, remaining at the commencement of the alleged partnership, he sold outright to the 2nd defendant for a sum of Rs. 8,000 and obtained cash. Although this stock consisted of textiles that was not utilized as a part of 1st defendant's contribution towards the capital. The 1st defendant, admittedly a businessman of about 25 years standing, could not say what the terms of the partnership agreement were. He made no contribution whatsoever in cash towards the partnership; only 2nd defendant "contributed" Rs. 25,000 in cash. Some time soon after the partnership agreement was signed, 1st defendant obtained a sum of Rs. 50,000 from 2nd defendant on two cheques which money was never returned. A receipt was given by 1st defendant to 2nd defendant in respect of that sum but that was not produced by either defendant. At one stage 1st defendant stated that Rs. 50,000 was taken as security for his furniture and fittings. This position does not seem to be consistent with the position that the value of his furniture and fittings was his sole contribution towards the capital of the partnership. Next comes the question of sharing profits and losses. No accounts have been maintained or produced. 1st defendant was unable to say with any degree of clarity or precision what profit or loss the partnership made for any particular years; or indeed how much he obtained as profits or incurred as losses. His evidence was nothing but a ramble of his so-called borrowing money from the 2nd defendant and repaying the same which had nothing to do with the partnership business.

1st defendant's address in the plaint was given as "No. 27, Meeripenne Road, Dharga Town, Aluthgama". This was the address which was given by 1st defendant as his "general address of residence" on 7.8.1980 in his application for registration of business names

of the partnership business as "Hussain Stores". However, on an application made by plaintiff's attorney-at-law on 27.3.1981 stating that 1st defendant was no more resident at the address given in the caption and 'was now residing at the shop premises', summons was served at the latter address on 10.4.1981. Meanwhile, summons on 2nd defendant was served on 16.3.1981; it is likely, therefore, that 1st defendant had prior knowledge of the action before summons was served on him. In my view plaintiff led sufficient *prima facie* evidence to establish that there was subletting by proof of the fact that 2nd defendant was in the premises doing business and that 1st defendant appeared to have relinquished his control of the premises. The burden must then necessarily shift to the 1st defendant to explain the presence of the 2nd defendant on the premises doing business – a right 1st defendant was entitled to exercise by virtue of his tenancy.

1st defendant produced several receipts for payment of electricity bills in respect of the premises – receipt (IV9) dated 21.9.1981 relating to the month of August, 1981, receipt (IV10) dated 20.1.1982 relating to the months of September and October, 1981, and receipt (IV11) dated 8.9.1981 relating to the month of July, 1981. He also produced business licences for the year 1981 issued on 16.4.81 (IV12), for the year 1982 issued on 20.5.1982 (IV13) and for the year 1983 issued on 8.8.1983. All these documents issued in the name of the 1st defendant seem to have impressed the learned trial Judge notwithstanding the fact that they had originated after the case was filed, leading him to believe that 1st defendant retained control of the premises.

In the light of the foregoing circumstances neither the original Court nor the Court of Appeal did consider whether the alleged partnership agreement was a sham or a blind to hide the true nature of the transaction between 1st and 2nd defendants, and if it was not a partnership what inferences could be drawn from the totality of evidence on the actual relationship between the two defendants. This failure was probably due to the assumption that the plaintiff must first prove "exclusive possession" of the premises by the 2nd defendant before the Court should embark upon a consideration of the defence case.

The partnership agreement is demonstrably a sham. According to 1st defendant's own evidence, he appears to have had no interest in the premises or a stake in the business run in the premises which leads to the conclusion that he had relinquished his right of control of the premises. The inference therefore could be legitimately drawn that 2nd defendant was in exclusive possession of the premises with his own stock in trade, managing a business which admitted no owner but himself. It is not the defendants' case that 1st defendant sold, leased or assigned his business to 2nd defendant. What then was the relationship between 1st and 2nd defendants hidden behind a facade of a partnership agreement? On a balance of probability the only inference this Court could draw is that 1st defendant rented out the premises to 2nd defendant and 1st defendant's bi-monthly or tri-monthly visits to the premises, was for the purpose of collecting rent.

The appeal is allowed with costs of this Court and of both Courts below payable to the plaintiff-appellant. Judgment is given for the plaintiff as prayed for in the plaint.

FERNANDO, J. – I agree.

GOONEWARDENE, J. – I agree.

Appeal allowed.