

ATTANAGODA
v.
LIYANARACHCHI

COURT OF APPEAL.

WEERASEKERA J.,

JAYASINGHE, J.

C.A. NO. 386/88 (F).

D.C. MT. LAVINIA NO. 1729/RE.

SEPTEMBER 8, 12, 1997.

Rent Act – S. 21 (2) – Tenancy – Husband and wife living apart – Wife paying rent – Does she become the tenant – Privity of contract – Right of a deserted wife.

The plaintiff-appellant filed action seeking to eject the defendant-respondent from the premises in question alleging that she was in arrears of rent and on the ground of subletting. The defendant-respondent in her answer denied tenancy, and claimed that the tenancy agreement was between the plaintiff and her husband and that, the tenant was not in arrears, and moved for the dismissal of the action. The defendant-respondent and her husband were living apart. It was contended that the defendant by a long and continued payment of rent became the tenant, the defendant-respondent had paid rent to the Municipal Council in her own name from 1976-1981, and not in the name of the husband, and as rent has been accepted by the landlord, there was a contract of tenancy between the plaintiff and the defendant. The action was dismissed. On appeal –

Held:

- (1) The burden was on the plaintiff-appellant to establish that there was an abrogation of the agreement between the plaintiff and the defendant's husband and that there was the emergence of a new contract of tenancy between the plaintiff and the defendant.
- (2) Payments had been made by the defendant, the wife of the tenant husband. Even though they were living apart the marriage was still subsisting. It is the evidence of the tenant that his wife and children lived at the premises and that he came home every week-end, his furniture was in the premises, and that his wife paid the rent out of the money that was advanced by him.

- (3) It is now settled law that the deserted wife cannot be ejected by the husband nor the landlord. The landlord can only get possession if the rent is unpaid or some other condition of the Act is satisfied entitling him to possession.
- (4) The plaintiff-appellant's action must fail on the basis that there is no privity of contract between the plaintiff and the defendant.

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

Cases referred to:

1. *Alwis v. Kulatunga* – 73 NLR 337.
2. *Middleton v. Baldock* – 1950 1 ALL ER 708.
3. *Old Gates Estate Ltd. v. Alexander and Another* – 1949 2 ALL ER 822.
4. *National Provincial Bank Ltd. v. Ainsworth* – 1965 AC 1175.
5. *Husseniya v. Jayawardane, 1981* – Sri L.R. 93.
6. *M. M. Perera v. D. M. J. de Silva* – [1988] 1 Sri L.R. 1.
7. *D. M. J. de Silva v. Mallika Perera* – [1989] 2 Sri L.R. 353.

A. K. Premadasa, PC with C. E. de Silva for plaintiff-appellant.

P. A. D. Samarasekera, PC with L. V. P. Wettasinghe for defendant-respondent.

Cur. adv. vult.

November 26, 1997.

JAYASINGHE, J.

The plaintiff filed action in the District Court of Mount Lavinia seeking to eject the defendant from the premises No. 109, Jayasumana Road, Ratmalana alleging that the defendant was in arrears of rent from March, 1981 to February, 1982, and that the defendant had sublet the premises to one Leonard from January, 1980. The plaintiff also pleads for arrears of rent and damages in a sum of Rs. 613/20.

The defendant in her answer denied tenancy. Claimed that the tenancy agreement was between the plaintiff and her husband one

S. Liyanarachchi. That her husband the said Liyanarachchi had tenanted the said premises from one Charles Subasinghe the father-in-law of the plaintiff in February, 1957 and that on the death of the said Charles Subasinghe the defendant's husband became the tenant of the plaintiff and that all the rents payable were settled by her husband and pleaded for the dismissal of the action. The learned District Judge dismissed the plaintiff's action. This appeal is from the said order.

The main question for determination at the hearing of the appeal was whether the defendant was the tenant of the plaintiff as alleged or whether the original tenancy agreement between the defendant's husband survived even though the defendant and her husband were living apart. If this Court is to hold with the defendant notwithstanding the separation that the tenancy survived, then there appears to be no useful purpose in going into the question of arrears of rent and the question of subletting. The plaintiff-appellant's action must fail on the basis that there is no privity of contract between the plaintiff and the defendant.

Mr. Premadasa presented his case on the basis that the defendant-respondent was the tenant of the original plaintiff of the premises. The main thrust of his argument was on the basis that the defendant by a long and continued payment of rent became the tenant and when she defaulted payment or rent the tenancy was at an end even though in the case of a denial of tenancy, the plaintiff need not prove any ground under the Rent Act. He relied heavily on the statement marked P2 issued by the Municipal Council according to which the rent has been paid by the defendant-respondent from 1976 upto 1981 in her own name and not in the name of her husband. This rent has been accepted by the landlord and consequently there was a contract of tenancy between the plaintiff and the defendant. He argued that the respondent did not give evidence and that, therefore, there was no evidence to show that the rent was paid on behalf of the husband. A presumption has to be drawn that she could not support her position that her husband was the tenant. Mr. Premadasa's other flak of attack

was on the construction he placed on s. 21 (2). Mr. Premadasa argued that by a long and continued payment of rent by the defendant, there arose a tenancy agreement between the plaintiff and the defendant. He stated that the word "deemed" in section 21 (2) of the Rent Act meant that the person who paid the rent was the tenant. I cannot agree. What is "deemed" there is that payment received on that day by the landlord of the premises from the tenant thereof. In *Violet Perera v. Asilin Nona*, Bar. Ass. LJ. 1995 vol. 6 part 1 page 2 it was held that section 21 was intended to cater to tenants who experience difficulty or dilemma in making payment to the landlord. It confers no tenancy rights nor does it operate to deny tenancy rights.

At the trial before the learned District Judge Chandradasa Subasinghe who held a power of Attorney on behalf of the plaintiff gave evidence. He stated that the premises in question belonged to his father and that it was devised to his sister as the dowry. Consequently, his brother-in-law became the landlord. That it was rented out to one Liyanarachchi who paid rent upto 1976. That he had information that the rent was being paid by his wife. That she had fallen into arrears of the rent payable. That a portion of the premises had been sub-let to one Leonard without the consent of the landlord. That for the said reasons a quit notice was sent on 25.9.1981. That the plaintiff failed to hand over possession. Under cross-examination he denied that the tenant was the husband of the plaintiff. No other evidence was called for the plaintiff.

Sirisena Liyanarachchi the husband of the defendant gave evidence for the defendant. He stated that he was originally the tenant of Charles Subasinghe from 1957 and thereafter on the death of the said Subasinghe, he paid rent to Attanagoda the plaintiff. That there was a breakdown of matrimonial relations around the year 1976 and he came home for the week-ends. The household expenses were met by him; thereafter there was a reconciliation. He admitted that there was a maintenance action filed by the wife. He also stated that the plaintiff through his Attorneys by D17 sent his wife a quit notice and that he promptly replied repudiating the allegations while maintaining

that he is still the tenant. The said letter was marked D18. It is pertinent to note that this letter was written while the estrangement was continuing. His wife also wrote to the plaintiff denying that she was the tenant. The said letter is marked D16. The rest of the evidence led did not touch the merits of the case and can be disregarded.

Mr. Samarasekera argued that the tenant of the premises was the husband of the defendant and that the tenancy has not been terminated by a quit notice by the landlord. He relied on D18. He submitted that the defendant's husband has by his letter marked D14 reiterated his tenancy rights and warned both M. D. Attanagoda and Chandrasiri Subasinghe not to trespass on his rights also urging them to take action according to law. Mr. Samarasekera further stated that the husband has not abandoned his tenancy and that his wife and children continue to live in the said premises. His furniture was yet at the premises. The rent paid by the wife was, in fact, advanced by him and that the husband came home for the week-ends. When the wife paid the rent she did, in fact, pay such rent as the agent of the husband.

The question for determination before us is that whether there was a new contract of tenancy between the landlord and the defendant, by reason of the fact that the rents had been paid by the defendant for a long period consequent upon the husband leaving the matrimonial home. It is now a well-settled proposition of law that the deserted wife cannot be ejected by the husband nor the landlord. ". . . The landlord can only get possession if the rent is unpaid or some other condition of the Act is satisfied entitling him to possession" – Alles, J. in *Alwis v. Kulatunge*⁽¹⁾. In the same case Alles, J. went on to discuss the rights of a deserted wife. ". . . where the husband has deserted his wife and she has nowhere else to go, no Court would order her out. She is, therefore, lawfully there, and, so long as she remains lawfully there, he remains in occupation by her. If he desires to cease to be in occupation – and cease to be responsible for her occupation – then he must go to Court and persuade it, if he can, to order her out. But, until that time arrives she is lawfully there, and she can claim

in his right, even against his will, to be there. The landlord can get possession if the rent is unpaid or some other condition of the Act is satisfied entitling him to possession". – Lord Denning in *Middleton v. Baldock*⁽²⁾. Bucknill, L.J. *Old Gates Estate Ltd. v. Alexander and Another*⁽³⁾ took the view that as long as the husband's furniture was on the premises he retained possession to that extent . . ." In the case of *National Provincial Bank Ltd. v. Ainsworth*,⁽⁴⁾ Lord Hodson stated that ". . . where a husband even when he has deserted his wife has been treated as still in occupation of the premises since he remained in possession of them through his wife . . ." Lord Wilberforce stated that ". . . the Courts in a number of instances have given protection to deserted wives of tenants of rent-controlled premises. They have done this by the device of holding that the husband-tenant cannot put an end to the tenancy, even by such acts as delivering the keys to the landlord, so long as his wife remains on the premises; he remains there by her, and as long as he does so, whatever else he does or says, the tenancy remains . . . This doctrine now seems to be firmly established . . ." (cited by Alles, J. in *Alwis v. Kulatunge*), (*supra*). Implicit in these dicta is that a deserted wife remains in occupation for or on behalf of the husband and, therefore, any rents paid by the wife is deemed to be the rents paid on behalf of the husband. It is settled law that where payment is made by a third party, it must be made on behalf of the debtor in order to constitute a valid discharge. Mr. Premadasa conceded that agents can pay the rent on behalf of the tenant. But, argued that it must be in the name of the tenant. Relying on *Husseniya v. Jayawardene*⁽⁵⁾. He said that the burden was on the payer to establish that the rent was paid on behalf of the tenant. The defendant failed to discharge this by giving evidence. That was a case where the plaintiff sued the 1st and 2nd defendants for ejectment on the ground that the tenant, the 1st defendant was in arrears of rent and also on the ground that the 1st defendant had sublet the premises to the 2nd defendant. The second defendant's position was that he was not a subtenant but that he was the tenant under the plaintiff. This case can be distinguished on the basis that payment was made on his own behalf as the tenant. However, the evidence led at the trial was to the effect that the tenant was, in fact,

D I G E S T

Page

CAVEAT EMPTOR – See Land Development Ordinance.

CIVIL PROCEDURE CODE – S. 18, S 21, S. 93 (2) – Addition of parties – Delay – Discretion – Due diligence.

Rohana v. Shyama Attygala and Others 381

CIVIL PROCEDURE CODE S. 14, S. 18 – Addition of a party.

Mackie & Sons v. Mackie and Another 386

CONTRACT – See Rent Act.

ESTOPPEL – See Land Development Ordinance.

EVIDENCE ORDINANCE – See Land Development Ordinance.

GIFT – See Land Development Ordinance.

LAND DEVELOPMENT ORDINANCE – S. 2, s. 161, s. 162 – Permitter – Gift – Transfer to third party – Written consent of Government Agent prior to transfer – Prescriptive title – Evidence Ordinance, s. 115 – Estoppel – Caveat Emptor.

Lebbe v. Umma 367

LEASE OF STATE LAND – Cancellation – Failure to comply with certain conditions – Should he be given an opportunity to be heard – State Lands Ordinance, S. 2, S. 6, S. 17 (1), S.110 – Land Settlement Ordinance, s. 106 – 128.

Kalu Banda v. Upali 391

(Continued in Part 15)

RENT ACT, NO. 7 OF 1972 – S. 13 – Repairs effected by tenant – Set off against rent without permission.

Navamany v. Rosairo 375

RENT ACT – S. 21 (2) – Tenancy – Husband and wife living apart – Wife paying rent – Does she become the tenant – Privity of contract – Right of a deserted wife.

Attanagoda v. Liyanarachchi 365

(Continued from Part 13)

STATE LANDS ORDINANCE – See Lease of State Land.

the 1st defendant. There was also the allegation that the 1st defendant was acting in collusion with the plaintiff. To that extent that case can be distinguished from the present case. A similar situation arose in the case of *M. M. Perera v. D. M. J. de Silva*⁽⁶⁾. The plaintiff as landlord instituted action in the District Court of Panadura to eject the defendant who was the tenant from the premises for arrears of rent. Here, the payments were made not by the defendant who was the tenant but by one Mallika Perera who was the daughter of the defendant. There was nothing to show that the rents paid by Mallika Perera was on behalf of her father. Court of Appeal held that it would be quite unreal in the circumstances of the case to hold that rents were being deposited at the Urban Council by the tenant's daughter on her own behalf and not on behalf of her father. The Supreme Court upheld the findings of the Court of Appeal in the same case *D. M. J. de Silva v. Mallika Perera* (SC)⁽⁷⁾. In the present case payments had been made by the defendant, the wife of the tenant Liyanarachchi. Even though they were living apart the marriage was still subsisting. It is the evidence of the tenant that his wife and children lived at the premises and that he came home every week-end. This has not been challenged. His furniture was in the premises and that his wife paid the rent out of the money that was advanced by him. There was no evidence that the wife had an income of her own. As a matter of fact the wife had asked for an enhancement of the quantum of the maintenance paid by the husband. I am unable to accept that there was a consensus *ad idem* between the plaintiff and the defendant when the defendant's husband had been persistent in his assertion that he was the tenant.

Mr. Premadasa urged very strongly that the defendant did not give evidence to establish that rents were paid on behalf of the husband. There is no quarrel on this. But, then the burden was on the plaintiff to establish that there was an abrogation of the agreement between the plaintiff and Liyanarachchi the husband of the defendant and that there was the emergence of a new contract of tenancy between the plaintiff and the defendant. Except P2 there was nothing to establish that there was a new tenancy agreement. The plaintiff's Attorney who

gave evidence conceded that the premises was let to Liyanarachchi and that the contractual tenant was the husband. He had no personal knowledge of the emergence of a new contract between the plaintiff and the defendant. His position was that he became aware of the defendant's tenancy' only upon perusing P2. Apart from P2 there is no other evidence that he had any knowledge that the defendant assumed tenancy. Mr. Samarasekera argued that P2 does not say anywhere that Liyanarachchi is the tenant nor does it say that the tenant is the defendant. The person who deposits the rent may or may not be the tenant. He argued that if an officer at the local authority inserts the name of the depositor in the receipt, that entry cannot create a tenancy in favour of the depositor nor can it deprive the tenant of his tenancy. All that the receipt indicates is that payments have been made. I am inclined to accept this submission. An officer of the local authority was called by the defendant. But, no attempt has been made by the plaintiff to elicit any of the matters disputed by the plaintiff.

For the reasons stated above I do not intend to interfere with the findings of the learned District Judge.

The appeal is dismissed with taxed costs.

WEERASEKERA, J. – I agree.

Appeal dismissed.