PREMATHILAKE
v.
A. I. PERERA

COURT OF APPEAL
UDALAGAMA, J
CA NO. 636/93 (F)
DC MT. LAVINIA NO. 2161/RE
JULY 22, 2002

Rent Act, No. 7 of 1972 – Tenancy denied – Agreement to sell – Claim on prescriptive title – Contract of tenancy – Standard of proof – Balance of probability – Evidence Ordinance, section 101 – Notice to quit – Absence of a repudiation of the contents – Is it fatal? – Prevention of Frauds Ordinance, section 2.

The plaintiff-respondent instituted action seeking to eject the defendant-appellant from the premises in question. The defendant-appellant while denying tenancy prayed that he be declared entitled to the premises on the basis of prescriptive title.

Held :

(1) The agreement to sell, being a non-notarial document it contravenes the provisions of section 2 of the Prevention of Frauds Ordinance and is therefore invalid.

(2) A notice to quit is a condition precedent to a successful action for ejectment. The absence of a repudiation of the contents considered together with the averments in the pleadings and the evidence of the plaintiff-respondent under oath are adequate to come to a finding that the plaintiff-respondent had a valid contract of tenancy with the defendant-appellant.

(3) Standard of proof to establish the contract of tenancy is on a balance of probability. On a preponderance of evidence led at the trial, the trial court has come to a finding on a balance of probability that a contract of tenancy existed.

(4) When the defendant-appellant entered the premises as a tenant he is precluded from claiming the premises for himself.

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

Case referred to:

1. *Bandula v. Carthelis Appuhamy* – (1988) 2 Sri LR 114.

Rohan Sahabandu for defendant-appellant.

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

Cur. adv. vult.

August 30, 2002

UDALAGAMA, J.

The plaintiff-respondent instituted DC Mt. Lavinia case No. 2161/RE seeking, *inter alia,* to eject the appellant from the premises morefully described in the schedule to the plaint, to recover arrears of rent and damages.

The defendant-appellant while denying tenancy moved that he be declared entitled to the premises on the basis of prescriptive title. The defendant-appellant also claimed compensation for the improvements aggregating to a sum of Rs. 161,800 and the right to a *jus retentionis.*

The case went to trial on 3 issues suggested by the plaintiff-respondent and 7 issues suggested by the defendant-appellant. Subsequent to the leading of evidence, at the conclusion of the trial

the learned District Judge having called for written submissions, *vide* his judgment dated 07. 09. 1993, pronounced judgment for the plaintiff as prayed for in the plaint.

Aggrieved, the defendant-appellant appeals therefrom.

Although by his petition of appeal, *vide* paragraph 11 (*d*), the appellant, *inter alia,* sought to canvass the judgment on the basis that the learned District Judge failed to consider the evidence led at the trial to establish the appellant's independent and adverse possession of the premises, the subject-matter of this action, the learned counsel for the appellant, however, before this court, conceded the fact of the inability on the part of the appellant to have established prescriptive title. The learned counsel's argument before this court appeared to be, that the mere failure of the appellant to have proved prescriptive title was not a ground *per se* to enter judgment for the plaintiff-respondent. He urged this court to set aside the impugned judgment on the basis that the plaintiff-respondent had failed to adduce evidence to substantiate the existence of a valid tenancy, in particular the arrears of rent. Learned counsel for the appellant referred this court to the provisions of section 101 of the Evidence Ordinance in respect of the burden of proof and urged this court to consider the failure on the part of the plaintiff-respondent to prove that the defendant-appellant in fact was the former tenant and that a valid tenancy existed between the parties.

It was the submission on behalf of the appellant that no rent receipts were produced in evidence and that the plaintiff-respondent failed to fulfil her admitted burden to prove a tenancy.

The basis on which the defendant-appellant seeks to resist tenancy is that he came into occupation of the premises, the subject-matter

of this action, in the year 1968, on the understanding that the latter would redeem the admittedly existing mortgages that bound the premises. Even though the defendant-appellant sought to substantiate the above averment by producing V2 to establish an agreement to sell, I am inclined to the view, as clearly held by the learned District Judge, that V2 being apparently a non-notarial document that same contravenes the provisions of section 2 of the Prevention of Frauds Ordinance, and therefore invalid. In the circumstances I am also inclined to the view that the defendant-appellant is not entitled to claim that a valid agreement existed for the purported sale of the premises, the subject-matter of this action, by the plaintiff-respondent to the appellant on V2 referred to above, and that the latter's claim was therefore correctly rejected.

The appellant appears to have led evidence to establish the fact that he had sublet the premises without objection from the landlord, namely the plaintiff-respondent thereby attempting to prove title by prescriptive possession. However, I would not delve on that aspect of the matter as stated earlier since the learned counsel for the appellant stated in this court that he would not pursue the right of the defendant-appellant in the matter of prescriptive title. Accordingly, the only matter left for determination by this court appears to be confined to the question as to whether the learned District Judge did in fact on a preponderance of evidence led at the trial come to a finding on a balance of probability as to whether a contract of tenancy existed between the plaintiff-respondent and the defendant-appellant as landlord and tenant, respectively.

Although the learned counsel for the defendant-appellant strenuously argued that it was in fact not so, I would venture to disagree, *inter alia,* on the following ground. Admittedly, the defendant-appellant's occupation of the premises, the subject-matter of this action, began

with the payment of Rs. 1,000 which sum appears to have been paid on 02. 11. 1967 (V2). Although the learned counsel for the defendant-appellant maintains that this above sum was paid as an advance against the purchase price of the premises, the learned District Judge in the course of his judgment had come to a finding of fact on a consideration of the evidence led at the trial notwithstanding the denial of the signature on V2 by the plaintiff-respondent that the latter had accepted the sum stated therein as an advance against rent. The learned District Judge had importantly considered the fact that the defendant-appellant being a lawyer that he had not denied receipt of the document, marked 72. Accordingly, the learned District Judge had come to a finding based on the contents of the said document, P2, and also on the fact that P2 was not denied or the contents therein refuted by the defendant-appellant, that there did in fact exist a contract of tenancy as between the plaintiff-respondent and the defendant-appellant on the basis of landlord and tenant, respectively.

It is manifest that the defendant-appellant had not responded to P2 and importantly not denied the contents therein whereby unambiguosly the defendant-appellant was referred to as the tenant of the plaintiff-respondent in respect of the premises, the subject-matter of this action.

In the circumstances I am inclined to agree with learned District Judge that in the absence of repudiation of the contents of P2 or in the absence of reasonable ground to explain the failure on the part of defendant-appellant to respond to the aforesaid P2 that it was reasonable to come to a finding that the arrangement that existed between the plaintiff-respondent and the defendant-appellant in respect of the premises, the subject-matter of this action, was in fact a contract of tenancy.

It is also my view that the standard of proof to establish the existence of a contract of tenancy as in the instant case is on a balance of probability and considered together with the other evidence led at the trial, the above finding is relevant and adequate to arrive at such a determination.

In the course of the submissions of the learned counsel for the defendant-appellant, he was heard to say, that the fact of the inability on the part of the defendant-appellant to establish a title based on prescription was by itself inadequate to enter judgment for the plaintiff-respondent which I recall was the crux of the learned counsel's argument. It was also the argument of the learned counsel for the defendant-appellant that the plaintiff-respondent failed to prove arrears of rent. Considering the same document P2 referred to above, by its contents there appears to be a demand from the defendant-appellant, arrears of rent for 3 months or more from 01. 01. 1978 at the rate of Rs. 100 per month. As also stated earlier there was for some unexplained reason, no response from the defendant-appellant to this demand. In the circumstances also considering the fact that the defendant-appellant was himself admittedly a lawyer, I am unable to fault the learned District Judge's finding that the denial by the defendant-appellant of a tenancy was untenable. The amount as stated in P2 referred to above which went unchallenged specified the rent legally due to the plaintiff-respondent as arrears of rent. This contention of the learned counsel for the defendant-appellant that the amount paid on P2 was an advance against the purchase of the premises had been rejected by the learned District Judge on the basis that such document not being notarially executed is contrary to the provisions of section 2 of the Prevention of Frauds Ordinance which I would, hold as stated earlier, to be correct notwithstanding the purported signature of the plaintiff-respondent appearing thereon. I would reiterate the fact that P2 referred to above admittedly received

by the defendant-appellant unequivocally repeated the submissions as contained in the pleadings and as deposed to by the plaintiff-respondent in evidence that the plaintiff-respondent was the landord of the premises, the subject-matter of the action, and that the defendant-appellant occupied same as her tenant and that the defendant-appellant was in arrears of rent and thereby contravened section 22 (1) (*a*) of the Rent Act, No. 7 of 1972. A notice to quit is a condition precedent to a successful action for ejectment. The absence of a repudiation of the contents in P2 considered together with the averments in the pleadings and the evidence of the plaintiff-respondent at the trial under oath are in my view adequate to come to a finding that the plaintiff-respondent had a valid contract of tenancy with the defendant-appellant. It was also admitted that the plaintiff-respondent did also pay rates in respect of the premises to the local body which matter too corroborates the fact that the plaintiff-respondent was the landlord.

In the circumstances I would reject the argument of the learned counsel for the defendant-appellant that the plaintiff-respondent failed to prove her case, *inter alia*, as to arrears of rent and further reject the argument that the learned District Judge entered judgment for the plaintiff purely on the basis of the failure on the part of the defendant-appellant to prove prescriptive title.

In any event the initial occupation of the premises by the defendant-appellant was obviously as a tenant prior to the purported agreement to transfer became effective, which agreement in any event was invalid. I would also hold that when the defendant-appellant entered the premises as a tenant, he is precluded from claiming the premises for himself – (*Bandu v. Carthelis Appuhamy).*

In the matter of compensation for improvements, this matter had not been canvassed in this court. I would, accordingly, not venture to deal with that aspect of the matter. In any event there appears 160
to be a dearth of evidence as to a specific claim to compensation.

For the aforesaid reasons there appears to be no reason to disturb the findings of the learned District Judge and this appeal is dismissed with costs.

Appeal dismissed.