1970 *Present :* Alles, J.

P. W. AMARASEKERA, Appellant, *and* K. Y. M. GUNAPALA *et al.*, Respondents

S. C. 36/69—C. R. Colombo, 88035/R.E.

Rent Restriction Act (Cap. 274), as amended by Act No. 10 of 1961—Section 9 (1)—Residential premises—Issue raised as to subletting only—Pleadings and evidence showing that tenant was not in physical occupation—Effect—" Non-occupying tenant "—Forfeiture of statutory protection.

Defendant took on rent from the plaintiff for residential purposes certain premises which were subject to the provisions of the Rent Restriction Act. Plaintiff claimed ejectment and damages on the ground that the defendant sublet the premises to the added defendants. The defendant averred that he had his business office on the premises and that the added defendants were his servants. The only substantial issue raised at the trial was that of subletting. It was the plaintiff's case that the defendant, by not occupying the premises and permitting his employees to be in physical occupation, had sublet the premises. The issue of subletting was relevant only because the plaintiff pleaded that the defendant was not in occupation and had sublet the premises to the added defendants in contravention of section 9 (1) of the Rent Restriction Act as amended by Act No. 10 of 1961.

The evidence showed that the defendant, having taken the premises for residential purposes, was not in physical occupation of them after some time but resided elsewhere and that it was his intention never to come into residence of the premises except to use them, at most, as an office and a store and as sleeping quarters for his employees.

Held, (i) that, although the allegation that the defendant was a non-occupying tenant was not one that was specifically raised as an issue, it was open to the Court, on the pleadings, to consider whether the defendant was entitled to seek the protection of the Rent Restriction Act.

(ii) that the defendant was not entitled to claim that he was in occupation through his employees when it was clear on the evidence that he was not in physical occupation. Accordingly, the plaintiff was entitled to eject the defendant and the added defendants from the premises.

APPEAL from a judgment of the Court of Requests, Colombo.

D. R. P. Goonetilleke, for the plaintiff-appellant.

K. Jayasekara, for the defendant-respondent and the added defendants-respondents.

Cur. adv. vult.

October 20, 1970. ALLES, J.—

The plaintiff, who was the owner of premises bearing Assessment No. 155/10, Messenger Street, Colombo, instituted this action against the defendant for ejectment and damages. In the course of the trial the plaintiff died and his son was substituted in his place. The 1st to the 4th respondents were added as defendants before the trial date because it was alleged by the plaintiff in his amended plaint that the defendant had sublet the premises to the added defendants in contravention of Section 9 (1) of the Rent Restriction Act No. 29 of 1948 as amended by Act No. 10 of 1961. The defendant in his amended answer averred, *inter alia*, that he was in occupation of the premises in suit as a monthly tenant and that the added defendants were his servants. The added defendants also filed answer to the same effect and denied that they were sub-tenants of the defendant. The same position was also taken by the defendant in his statement of objections where he further averred that he had his business office on the premises and that he had at no stage sublet the premises.

When issues were framed on the first date of trial the plaintiff raised the issue of subletting and the defendant's Counsel raised the following issues among others :—

5. Is the defendant in occupation of the premises in suit as a monthly tenant ?
6. Are the added defendants servants of the defendant ?

On a subsequent date however the parties moved to raise issues afresh and the only substantial issue raised was that of subletting. Counsel for the defendant did not raise any issues. The premises in question were subject to the provisions of the Rent Restriction Act and it was the plaintiff's case that the defendant by not occupying the premises and permitting his employees to be in physical occupation had sublet the premises. In *Suriya v. Board of Trustees of Maradana Mosque*[1] the evidence established that the subtenancy complained of had been created before the prohibition contained in Section 9 (1) of the Act became law and Gratiaen J. therefore considered it unnecessary to deal with the theory of forfeiture by the "non-occupying" tenant. In the present case the issue of subletting only became relevant because the landlord pleaded that the tenant was not in occupation and had sublet the premises

[1] *(1954) 55 N. L. R. 309.*

to the added defendants in contravention of the provisions of the Act. Therefore, I think, that although the allegation that the defendant was a non-occupying tenant was not one that was specifically raised as an issue, it was open to the Court, on the pleadings, to consider whether the defendant was entitled to seek the protection of the Act. The learned Commissioner dismissed the plaintiff's action and held that the facts did not warrant a finding that the defendant had forfeited the protection of the Act on the ground of a subletting. I however propose to consider the case from the broader angle whether the tenant is entitled to claim the protection of the Act under any circumstance.

The facts of the case are not in dispute and may be briefly stated. The defendant who hails from Matara was carrying on the business of a vegetable dealer at the Pettah Market. He became the tenant of the premises, which consisted of two rooms, in 1956 and used to sleep on the premises with his employees. He also used the premises as a store and an office. According to the unchallenged evidence of the plaintiff the defendant intended to use the premises for residential purposes and bring his wife after marriage to live with him. This contingency, however never took place although he got married in 1958. Except for the 2nd added defendant, who was his nephew, his employees (referred to in the pleadings as his servants) were never the same and there were frequent changes among them in the personnel and the numbers. The defendant resided on the premises from 1956 to 1959. From 1959 onwards he resided with his wife at Wellampitiya and thereafter at Dehiwala with his wife and family. The added defendants continued to be in physical possession of the premises in suit. It is not denied that after 1959 the defendant never resided on the premises although he states that he visited it for the purposes of his business. The plaintiff has produced the Householders Lists for the premises in suit and the premises occupied by the defendant at Dehiwala (P 3 to P 7). P 3 to P 5 are the Lists for the premises in suit for the years 1960, 1964 and 1966 according to which the Chief Occupant's name has been given as that of the 2nd added defendant. The defendant's name only appears as an occupant in P 3 but not in P 4 and P 5. The names of the other occupants vary. P 6 and P 7 are the Lists for the premises occupied by the defendant at Dehiwala for the years 1966 and 1968 and the Chief Occupant's name is given as that of the defendant. The other occupants are his wife and children.

The learned Commissioner in dismissing the plaintiff's action has accepted the position that the added defendants are the defendant's employees and not his sub-tenants. Even assuming this to be the case the question arises whether the defendant, having taken the premises for residential purposes, is entitled to claim that he is in occupation through his employees when it is clear on the evidence that he is not in physical occupation, that he resides elsewhere, and it is his intention never to come into residence of these premises and at most to use it as an office

and a store and as sleeping quarters for his employees. If this is the law it would mean that a tenant can take on rent a number of premises on the pretext of using them for residential purposes, thereafter ceasing to be in occupation after some time and using them for purposes other than residential. He could then claim to be in occupation as the statutory tenant by placing one or more of his employees in occupation, even though the employee concerned describes himself as the Chief Occupant. This would be an intolerable situation as far as the landlord is concerned and I do not think the Rent Restriction Acts ever contemplated such a situation. As Scrutton L.J. stated in the leading case of *Skinner v. Geary* [1]—

> " One object of the Acts was to provide as many houses as possible at a moderate rent. A man who does not live in a house and never intends to do so, is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people. To treat a man in the position of the appellant as a person entitled to be protected, is completely to misunderstand and misapply the policy of the Acts. "

The concept of the " non-occupying tenant " has not received that degree of attention in Ceylon as it has in England. As far as I am aware the only occasion when it arose for consideration in our Courts was in *Sabapathy v. Kularatne* [2] where Gratiaen J. held that a " non-occupying tenant " should be regarded as having forfeited the special statutory protection afforded by the Rent Restriction Ordinance. That was a case where the landlord required the premises at Matale for his own occupation and the evidence disclosed that the tenant, who was employed in Colombo, claimed that he required the premises for the purpose of a business carried on by his brother who was in no sense privy to the contract of tenancy. In the later case of *Suriya v. Board of Trustees of Maradana Mosque* [3] the same Judge sought to explain his observations in *Sabapathy v. Kularatne* and said that he intended the dictum that " a non-occupying tenant prima facie forfeited his status as a statutory tenant " to be applied when a question of relative hardship arose between landlord and tenant. In the same case the learned Judge remarked that instances, where a tenant who defeats the object of Rent Restriction legislation by renting a house and then completely abandoning it, had not arisen in any action instituted in Ceylon and if they did he did not doubt that " the Courts would refuse to interpret the local Act so as to permit the tenant to claim protection ".

The object of Rent Restriction legislation being to put as many houses " into circulation " at a reasonable rent—a phenomenon which is equally applicable in Ceylon as it is in England—the position of the " non-occupying tenant " is one of importance. In England the judicial decisions have

[1] *(1931) 2 K. B. 546 at 564.*
[2] *(1951) 52 N. L. R. 425.*
[3] *(1954) 55 N. L. R. 309.*

gone very far in dealing with the problem, a fact which provoked Greer L.J. in *Skinner v. Geary* at p. 565 to observe that " to add.....that non-residence shall be a ground for taking the house out of the protection of the Acts seems to me to be legislation and not a decision of the meaning of the Acts ". In spite, however, of this observation of the learned Judge the decision in *Skinner v. Geary* and in particular the observations of Scrutton L.J. in that case have been approved of until recent times.

In *Skinner v. Geary* [1] the tenant Geary had lived elsewhere for ten years and the premises were occupied by his relations and his sister presumably as tenants at will. The occupation of the relations and the sister was not for the purpose of preserving the house for the tenant and at no time did the tenant contemplate residing in the house again. Scrutton L.J. dealt with the history of the Rent Restriction Acts and observed that the statutory tenant's right was not a right of property but a purely personal right to occupy the house as his home. In his view, the fundamental principle of the Act was " to protect a resident in a dwelling house, not to protect a person who is not resident in a dwelling house...." He again referred to the principle underlying the Acts when he said at p. 560—

> ".....these Acts were passed during war time owing to the scarcity of houses, and the fact that very high rents were being claimed by landlords from tenants led to the intervention of Parliament, which fixed the rents which could be exacted, and in fact enacted that if a tenant paid the rent so fixed he should be allowed to remain in occupation. Parliament was dealing with a tenant who was in occupation and who was not to be turned out; it was not dealing, and never intended to deal, with a tenant who was not in occupation but who wished to say: 'Although I am not in actual occupation I claim the right so long as I pay the rent to retain my tenancy'. If that had been put forward Parliament would have received the suggestion with contempt. "

and again at p. 561—

> " A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing with an occupying tenant who had a right to stay and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and has no intention of returning to it. I except, of course, such a case as that to which I have already referred—namely, of temporary absence, the best instance of which is that of a sea captain who may be away for months but who intends to return, and whose wife and family occupy the house during his absence. "

[1] *(1931) 2 K. B. 546.*

and finally at p. 564—

> ".....the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return. If it were held otherwise odd consequences would follow. The appellant in this case has contented himself with living in one house and claiming another."

These observations of Scrutton L.J. have been consistently followed in England and have been adopted in the "deserted wife's case" and those cases where the premises let have consisted of a combination of business and residential premises– per Acton J. in *Reidy v. Walker* [1] and per Lord Wright in *Hiller v. United Dairies (London) Ltd.*[2]. In *Robson v. Headland* [3] Lord Tucker in the Court of Appeal applied the principle to the case of a divorced wife who the Court held was a stranger to the husband leaving for future consideration the position of the wife of the tenant. In *Brown v. Brash & Ambrose*[4] the Court of Appeal (Scott, Bucknill and Asquith L.JJ.) sought to explain what was meant by a "non-occupying tenant" and Asquith L.J. at p. 254 explained the legal result involved. He conceded that the absence of the tenant from the premises may be averted if he coupled and clothed his inward intention with some formal, outward and visible sign such as installing a caretaker or representative, be it a relative or not, with the status of a licensee and *with the function of preserving the premises for his ultimate home coming.*

> "Possession in fact" said he "requires not merely an *animus possidendi* but a *corpus possessionis*, namely, some visible state of affairs in which the *animus possidendi* finds expression."

Both these conditions are absent in the present case. It can hardly be maintained that the 2nd added defendant, who described himself as the Chief Occupant of the premises, had the status of a licensee who was preserving the premises for the defendant's ultimate home coming. Nor could it be legitimately urged that the use of the premises as an office, where some account books and stores were kept, fulfilled the concept of the "corpus possessionis" in which the "animus possidendi" finds expression.

In *Cove v. Flick* [5] the tenant who had taken the premises on rent in 1938 informed the landlord that the premises were to be used as a home for his parents, his sister and himself. In 1949 he married and lived elsewhere but he left his furniture and intended to return and live there if one of his parents should die or his sister should leave. In an action by the landlord for possession the Court of Appeal (Somervell, Denning and Romer JJ.) held that neither the fact that the tenant informed the landlord that his parents and sister would occupy the premises nor the fact

[1] *(1933) 2 K. B. 266 at 271.*
[2] *(1934) 1 K. B. 57.*
[3] *(1948) 54 Law Times 596.*
[4] *(1948) 2 K. B. 247.*
[5] *(1954) 2 A. E. R. 441.*

that he had left his furniture thereon and intended to return thereto in the circumstances mentioned by him (circumstances which were contingent) rendered him in such occupation or possession of the premises as to take him out of the principle of *Skinner v. Geary* and the Court held that the landlord was entitled to possession.

As Lord Goddard C.J. observed in the subsequent case of *S. L. Dando v. Hitchcock*[1] where the Court of Appeal ordered possession to be delivered to the landlord—

> "Where there is a personal tenant who does not live in the house, never intends to live in the house and declares that his intention is never to live in it, I can see no reason why his tenancy should be protected to enable him to keep in the house a manager or a partner or anyone else whom it may be convenient to have there."

The added defendants in the present case, who have been found by the Court to be the defendant's employees stand in the category of persons referred to by Lord Goddard in the above passage and cannot on any view of the law be said to be persons through whom the defendant can claim to be in occupation of the premises.

I am of the view that, as the evidence establishes that the defendant is a non-occupying tenant, he is not entitled to claim the protection of the Act. I therefore hold that the plaintiff is entitled to eject the defendant from the premises. The added defendants have no privity of contract with the plaintiff and are not entitled to be in occupation. The plaintiff is entitled to an order of ejectment and for damages as prayed for in his plaint. The appeal is therefore allowed with costs in both Courts.

Appeal allowed.