

1957

Present : H. N. G. Fernando, J.

M. A. NOORBHOY, Appellant, and SELLAPPA CHETTIAR
et al., Respondents

S. C. 26—C. R. Colombo, 51,797

Rent Restriction Act—Purpose for which landlord requires premises—Difference between averment in plaint and issue raised at trial—Effect on bona fides of landlord's claim—Alternative accommodation—Should sub-tenants' needs be considered?

The fact that the plaintiff stated at the trial that he required the premises as a place of residence and proceeded to trial upon that footing without objection, though in his plaint he had stated that he required them as a place of business, is not a circumstance that negatives the *bona fides* of the plaintiff's claim.

The premises were occupied by the 1st defendant as tenant, who had sublet portions of them to the 2nd and 3rd defendants. No attempt was made by the tenant to get alternative accommodation for himself alone, but it was said that alternative accommodation for him and his sub-tenants was not available.

Held, that in determining the reasonable needs of the plaintiff as against the tenant, the needs of the sub-tenants should not be taken into consideration.

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

Sir Lalita Rajapakse, Q.C., with *Carl Jayasinghe* and *D. C. W. Wickremesekera*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *C. Manohara* and *P. Ranasinghe*, for the defendants-respondents.

Cur. adv. vult.

March 21, 1957. H. N. G. FERNANDO, J.—

In this case the landlord, who presently resides and carries on business in Galle, seeks to eject his tenant the 1st defendant from premises at Silversmith Street, Colombo, on the ground that the landlord requires the premises for occupation as a residence. The learned Commissioner has dismissed the action holding that the plaintiff's claim that he requires the premises for a residence is not *bona fide*.

One reason for this opinion is that in his plaint the plaintiff had averred that he required the premises for occupation as a place of business, but at the commencement of the trial plaintiff's counsel put in issue the question whether the premises are required for purposes of residence; no objection was taken to this issue and a large volume of evidence relevant to it was given at the trial. In these circumstances I do not think it is open to the defendants at the end of the trial to rely on the different averment in the plaint; if that averment had been mistaken and if objection had been taken to the issue, the plaintiff would have been able without risk of criticism to amend his plaint on terms as to costs.

Another reason on which the learned Commissioner thought that the claim was not *bona fide* requires some explanation. The plaintiff is also the owner of premises adjoining those now in suit and had instituted an action for ejectment of the tenant of those premises on the ground that he required it for purposes of residence. At the time of the present trial he had obtained decree for ejectment in the other action. The learned Commissioner seems to have thought that having succeeded in that other action, the plaintiff has changed his original ground in the present one by going to trial on the issue (not raised in the plaint) that he requires those premises also for purposes of residence. I do not quite understand this reasoning. If the plaintiff had originally intended to seek ejectment in order in the one case to reside in the premises and in the present case to carry on his business, his chances of success in the present one would have been greater provided he showed a *bona fide* desire to carry on business at these premises. But by now seeking ejectment of the tenant of these premises also on the same ground, the plaintiff has, if at all, to rely on less strong ground.

The evidence is that plaintiff owns considerable property in Colombo from which he derives a fairly substantial income. His family consists of his wife and six children, the eldest of whom is married and independent. Of the other five, four are daughters. The apartment in which they now live in Galle adjoins the premises in which the plaintiff carries on a business in cement. He states that he has decided to leave that apartment because the cement dust makes the living quarters unhealthy. He also wishes to educate his children at a school in Colombo for Borah people, there being no similar school in Galle, and he has made arrangements to admit his teen-age son to Zahira College, Colombo. While it is true that the whole family presently occupies a single room in Galle, there is nothing inherently suspicious or *mala fide* in the evidence that the plaintiff now desires to live in greater comfort and to educate his family in Colombo. For these reasons I am unable to agree with the learned Commissioner that the present action is not a *bona fide* one.

In the view taken by the Commissioner the question of comparative needs did not directly arise, but it is indirectly referred to in the judgment. The 1st defendant is a member of the Chetty community who carries on business in Colombo as a pawnbroker. He left for India four years before the trial and has not returned to Ceylon since. He is himself an Indian citizen and carries on business through his attorney who also is an Indian citizen whose temporary residence permit has expired. The second defendant is a sub-tenant under the first defendant. He also is not a resident of Ceylon and carries on business through an attorney whose temporary residence permit has also expired. The 3rd defendant is similarly an attorney, whose temporary residence permit has now expired, of a non-resident money-lender. It must be assumed in the absence of evidence to the contrary that the persons who actually carry on business in Ceylon on behalf of these principals are lawfully resident despite the expiration of their permits. But I do not think that the needs of the 2nd and 3rd defendants should be taken into account in determining whether as against the plaintiff the premises are reasonably required by the tenant who is the 1st defendant. As to this tenant,

the attorney's evidence is that all three principals carry on their business in these premises and that the employees of all the principals reside there. The evidence shows that the principals consider it desirable "for protection's sake" that the business of the three principals should be carried on in one place and that the employees should reside together. I doubt whether this desire should be allowed to weigh in balance against the plaintiff's desire to have a residence in Colombo for his family. So far as the tenant himself is concerned, his attorney searched for premises for all three businesses and all the employees. He stated quite frankly "If I got a place only for my occupation, I would not have taken it." This shows that the tenant has made no serious attempt to secure alternative accommodation and it has therefore not been proved that suitable alternative accommodation is not in fact available for the tenant. That being so, the plaintiff has made out a case for ejection which has not been rebutted by his tenant.

I think therefore that this appeal must be allowed with costs in both Courts. Decree will be entered for the ejection of the defendants from the premises in suit, but writ will not issue until 1st January, 1958.

Appeal allowed.
