

1958

Present: Sinnetamby, J.

S. MUTTUCUMARU *et al.*, Appellants, and DR. C. V. S. COREA,
Respondent

S.C. 222—C.R. Colombo, 61,438

Rent Restriction Act No. 29 of 1918, as amended by Act No. 6 of 1953—"Excepted premises"—"For the time being"—Sections 2 (A) (5), 10, 27—Schedule, Regulation 2.

In order to ascertain whether premises are "excepted" within the meaning of Regulation 2 of the Schedule to the Rent Restriction Act as amended by Act No. 6 of 1953, one must ascertain the annual value "for the time being". The expression "for the time being" relates to the date of action.

The words "for the time being" used in the definition of residential premises in section 27 of the Rent Restriction Act relate to the date of the letting or to the date on which by subsequent agreement between the parties the character of the tenant's occupation has been changed. They do not relate to the date of action.

Ganatileke v. Fernando (1954) 56 N. L. R. 105, considered.

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

G. B. Chitty, Q. C., with *Walter Jayawardene*, for plaintiffs-appellants.

H. V. Perera, Q. C., with *M. L. de Silva*, for defendant-respondent.

Cur. adv. vult.

March 11, 1958. SINNETAMBY, J.—

This is a tenancy action in which the plaintiffs sued the defendant for ejection from premises No. 28, Ward Place, Colombo, alleging that the premises were "excepted" premises within the meaning of the Rent Restriction Act. Notice to quit was admitted and the only question on which the parties went to trial related to whether the premises in suit were "excepted" premises within the meaning of the Rent Restriction Act. The evidence of an officer of the Municipality was to the effect that the annual value of the premises from 1/1/55 was assessed at Rs. 2,540.

Having regard to this evidence the only point that arose for decision was whether the premises were business premises or residential premises. The plaintiff did not expressly aver that the premises were residential premises the annual value of which exceeds Rs. 2,000. The answer did not allege that the premises were business premises and therefore not "excepted" premises as the annual value was below Rs. 6,000. It would in my view have been much more satisfactory if, in this

state of the pleadings, the issues had been framed after the learned Commissioner had ascertained from the parties the actual points on which they were at issue. The learned Commissioner after trial dismissed the action for ejection and the appeal is against that decision. He apparently followed the decision in *Gunatilleke v. Fernando*¹ and held that there was no evidence placed before him to show that the annual value of the premises in November, 1941, even on the basis that they were residential premises, was less than Rs. 2,000. *Gunatilleke v. Fernando* decided that, as the law then stood, in order to determine whether premises were business or residential one had to ascertain the annual value as on 1st November, 1941. The learned Commissioner completely overlooked the fact that there has since been an amendment of the schedule to the principal Ordinance by Act No. 6 of 1953. Reference to this has been made, I notice from the record, by learned Counsel who addressed the Court. Fernando, J. also in the course of his judgment in *Gunatilleke v. Fernando* refers to the amendment. The learned Commissioner without going fully into the matter took the view that the building in question was not wholly or mainly used for the purpose of residence but apparently in view of the other ground on which he dismissed the action he did not think it necessary to address his mind sufficiently to this question.

I propose at this stage to consider how the amending Act of 1953 affected the legal position as determined in *Gunatilleke v. Fernando*. Section 2(4) of the Act of 1948 provides that it shall apply to premises in a proclaimed area which are not "excepted" premises. Sub-section 5 is to the effect that for the purposes of determining whether premises are "excepted" premises one must look to the schedule. The schedule as amended provides in regulation 1 that all new construction completed after a certain date shall be "excepted" premises. Regulation 2 which is the regulation applicable to the present case provides as follows :

"Any premises situated in any area specified in column 1 hereunder shall be excepted premises for the purposes of the Act if, being premises of the description mentioned in column 2, the annual value thereof as assessed for the purposes of any rates levied for the time being by any local authority under any written law exceeds the amount specified in the corresponding entry in column 3."

Then follow three columns containing particulars as in the original unamended schedule. The result of the amendment is that in order to determine whether premises are "excepted" or not one has not to look to the annual value as on November, 1941, but to ascertain the annual value "as assessed for the purposes of any rates levied for the time being." The effect of the amendment is twofold : first, it excepts from the operation of the Act new construction after a certain date and, secondly, a fixation of the annual value is related not to November, 1941, but to 'the time being'. The result is that if the assessment of the annual value of any premises which is below the figures in column 3. is at any

¹ (1954) 56 N. L. R. 105.

stage increased the premises would become "excepted" if the total increased amount in the case of residential premises exceeds Rs. 2,000, and in the case of business premises exceeds Rs. 6,000. It is no longer fixed and inflexible. In order therefore to ascertain whether premises are "excepted" one must ascertain the annual value "for the time being". That expression, it seems to me, must relate to the date of action. In regard to this both Counsel were agreed.

The next question for determination is whether the premises were residential or business. To ascertain this one must examine the provisions of section 27 which defines residential premises to mean "any premises for the time being occupied wholly or mainly for the purpose of residence." All other premises are defined as business premises. It is to be noted that the words "for the time being" appear here also. Does it relate to the time at which the action was brought or the time at which the property was let to the tenant? Some guidance is to be obtained from the provisions of section 10 which renders it unlawful for a tenant to whom residential premises had been let to use it for any purpose other than that of residence. Quite apart from that under the Roman Dutch Law a tenant is under a duty not to use a leased premises for any purpose other than that for which he hired it; and, in the absence of an agreement, to use it for the purpose for which such property is by its nature intended to be used (Landlord and Tenant by Wille 427—1910 Ed.) It will thus be logical to assume that the words "for the time being" used in the definition of residential premises relate to the date of the letting. Mr. H. V. Perera who appeared for the respondent, conceded that this would be a rational interpretation but he argued that the burden which was on the plaintiffs had not been discharged and that the action was rightly dismissed. If the words "for the time being" is to be related to the date of action it would mean that a tenant at his own will and pleasure may at any time change the character of his occupation from residential to business to the prejudice of his landlord and would be able to create a situation of uncertainty and variability in regard to the respective rights of the landlord and the tenant under the Act. I am, on a consideration of the relevant provisions of the Act taken together with the obligations of a tenant under our law, of the view that the words "for the time being" in section 27 should relate to the date of the letting or to the date on which by subsequent agreement between the parties the character of the tenant's occupation has been changed: it is needless to add that such a change cannot be effected by the unilateral act of the tenant.

It is thus apparent that, in view of the amendment to the Act, in order to decide this case the learned trial judge would have had to come to a finding on the following matters:

- (1) On what date were the premises let to the tenant?
- (2) When the premises were let to the defendant was there an agreement, express or implied, as regards the character of his occupation, *i.e.*, was it let for residential or business purposes?

- (3) If there was no agreement what was the purpose for which the property by its nature intended to be used—business or residential ?
- (4) What was the annual value at the date of action ?

None of these matters, except the last one, seems to have received sufficient attention in the course of the trial. This I think is partly due to the unsatisfactory nature of the issues framed. When the plaintiffs gave evidence there was nothing either in the issues or in the pleadings to suggest that the defendant's contention was that the premises were business premises and not residential premises. Indeed, in his examination-in-chief the second plaintiff proceeded on the footing that the premises were residential. Even in his cross-examination the only suggestion that the premises were business premises came at the very end when the second plaintiff was asked about the defendant's practice and whether in the case of business premises they become "excepted" only if the annual value is over Rs. 6,000. Also it was only when giving evidence that the defendant for the first time took up the stand that he used the premises for the purpose of his business as a practitioner of homeopathic medicine and that they were therefore not "excepted" premises. Even the evidence relating to the accommodation available in the house is indefinite and uncertain. Most medical men do have a portion of their residences set apart for the practice of their profession but that alone would not make them business premises. The learned Commissioner has not, as I stated earlier, analysed this aspect of the evidence fully. There is besides, having regard to the various matters to which I have adverted earlier, in my view insufficient evidence on which a satisfactory finding can be reached. The burden is no doubt on the plaintiffs to establish that the premises are "excepted" and in the absence of an issue which sets out the real contest between the parties it is not surprising that the plaintiffs assumed that the character of the occupation as residential would not be disputed.

In the circumstances it seems to me the most equitable order to make in this case is to set aside the judgment of the learned Commissioner and send it back for retrial before another Commissioner upon fresh issues so that the matters I have referred to may be fully investigated and adjudicated upon. I make order accordingly. The costs of the trial already had and of this appeal shall be costs in the cause.

Sent back for retrial.