JAYASIRIWARDENA

v

PIYARATNE

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A.NO. 529/91(F)
D.C. COLOMBO NO. 5652/ZL
MARCH 27, 2003

Rei vindicatio action – Rent Act, No.7 of 1972, section 22 – Lease of bare land – Option to construct and remove same at the end of lease period – Applicability of the Rent Act – Can a contract of tenancy be entered in respect of a building belonging to the tenant ? – Ingredients necessary to create ten-

ancy – Non est factum – Can findings of fact be reversed ?

The plaintiff-appellant leased out a bare land, with the lessee having the option to construct a building and to remove same at the end of the lease period. The plaintiff-appellant instituted a *rei vindicatio* action. The defendant respondent claimed tenancy and succeeded.

Held:

(i) Where the lease of a bare land provided for monthly payment of ground rent, containing a condition enabling the lessee to put up with the approval of the owner, buildings and structures of a temporary nature which the lessee would be entitled to remove at any time, the provisions of the Rent Act do not apply, as it would not be possible to enforce certain rights and duties under the Rent Act.

"Where findings of fact by a trial Judge are based on the trial judge's evaluation of facts, the appellate court is then in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such an appellate court that on either of these grounds, the findings of fact by a trial judge should be reversed, then the appellate court ought not to shrink from that task."

(ii) Ingredients necessary to create a tenancy are –

(a) that the object of the contract is to let ;

(b) ascertained property ;

(c) at a fixed rent ;

(iii) A plea of non *est factum* will rarely succeed if a document was signed by an adult or a literate person;

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Fernando* v *Wijesekera* - 73 NLR 110
2. *Padmanaba* v *Jayasekera* - 72 NLR 132
3. *Madanayake* v *Senaratne* - 75 NLR 349
4. *Jayawardena* v *Bandaranayake* - (1998) 3 Sri LR 72
5. *Saunders* v *Anglia Building Society* - 3 All ER 961 (1970).
6. *De Silva v Seneviratne* - (1981) 2 Sri LR 7

Rohan Sahabandu for plaintiff-appellant.

Varuna Basnayake, P.C. with *Rohana Jayawardena* for defendant-respondent.

Cur.adv.vult

July 21, 2003

DISSANAYAKE, J.

The plaintiff-appellant instituted this action against the defendant-respondent seeking a declaration that the defendant-respondent was in unlawful occupation of the land morefully described in the schedule to the plaint, to eject the defendant-respondent and damages.

The defendant-respondent in his answer whilst denying the averments in the plaint prayed for dismissal of the action.

The case proceeded to trial on thirteen issues and at the conclusion of the trial the learned Distict Judge dismissed the action.

It is from the aforesaid judgment that this appeal is preferred.

Learned counsel who appeared for the plaintiff-appellant contended that the learned Distirct Judge was in error when he dismissed the action. The above contention of the learned counsel was based on the grounds that the learned District Judge had failed to :

(a) embark on a proper analysis and evaluation of the oral and documentary evidence led on behalf of the plaintiff-appellant.

(b) consider the plea of the *non-est factum* of the defendant-respondent in the proper perspective;

(c) consider whether the Rent Act applies to the contract of lease entered between the two parties.

The pivotal issue in this case is whether the subject matter that was leased out was the bare land or the land along with the buildings.

The plaintiff-appellant in her evidence stated that originally the land was leased to the defendant-respondent on 01.03.1970 for Rs.150/- on an oral agreement. She stated that the reason for not entering into a written agreement was because there was a partition action pending in respect of this land. She was emphatic that after the conclusion of the partition action in 1981, the land was leased to the defendant-respondent by deed No.4227 dated

02.06.1982 for 2 years (P1). According to the major terms and conditions of P1 the parties have agreed that :

(i) the land was a bare land,

(ii) that the lessee had the option to construct a building,

(iii) that at the end of the lease period the lessee was to remove the structures.

In the extracts of the Municipal Council assessment register pertaining to the years 1963 to 1969 the description of property is given as "land". It is to be observed that the extracts of the assessment register which has been produced marked P2 and P3 are not found in the record. However oral evidence of the contents of P2 and P3 have been elicited in evidence of M. Dickson Perera, clerk of the Colombo Municipal Council who had produced 'P2' and 'P3' while giving evidence.

It was revealed in the evidence that in 1970, the annual value of the property had gone up to Rs.500/- and the date for which the altered value was to accrue had been given as 01.06.1970. The rate per quarter is Rs.25/- and the description had been altered (in red) from 'land' to 'motor repair garage'. This change is referable to the date 01.06.1970 in column 5. (Vide PBC) Prior to 1962 there had been a "firewood shed". However from the year 1963 the description of the property has changed to "land". It was the plaintiff-appellant's position that after the defendant-respondent entered the land in March 1970 on an oral agreement with him he had thereafter constructed a temporary building.

Subsequently the defendant-respondent entered into two indentures of lease of the land. He first entered into deed of lease bearing No.4227 dated 03.06.1982 (P1) to be valid from 01.06.1982 to 31.05.1983. Thereafter he entered into deed of lease deed bearing No.4836 dated 30.06.1985 (P4) to be valid from 30.05.1985 to 30.07.1981.

The following features in the two indentures of lease throw some light to arrive at a conclusion as to the subject matter that was intended to be given on lease by the plaintiff-appellant and what was intended to be accepted on lease by the defendant-respondent was the bare land. The land that is described in the

schedule of both P1 and P4 specifically state that it is a "bare land". The rent that is specified is called the "ground rent". Both deeds of lease have the same terms and conditions. According to which the lessee has undertaken not to construct any building, permanent or temporary on the land without prior permission of the lessor. Another unique feature that is found in both these deeds is that the lessee has undertaken to remove all structures and buildings erected by him and restore to the lessor the bare land. There are further conditions that if the tenant did not remove the structure at the end of the lease, the landlord was empowered to remove the structure and appropriate the proceeds after sale of the building materials. It has been also provided that in the event the tenant constructs a structure without the consent of the owner, the tenant has agreed to pay the enhanced rates that were charged as a result of such building.

The defendant-respondent relied on the receipts issued by the plaintiff-appellant which were produced V1 to V23 to bolster his case. Document V1 is a receipt issued for a sum of Rs.500/- as a deposit when the defendant-respondent entered into an oral agreement to occupy the bare land. This receipt was produced "VI". Receipt V1 states that this is in respect of a house. Receipts V2 to V23 state that they are receipts for rent of premises.

It is interesting to note that these receipts have been issued by filling up of printed receipts forms from a receipt book that is normally used for issuing house rent receipts. The plaintiff-appellant explaining the circumstances under which receipt V1 was issued stated in her testimony that she issued receipt V1 after accepting a deposit of Rs.500/= as against ground rent and inadvertently she had failed to strike off the word house in V1.

According to the testimony of the plaintiff-appellant after the defendant-respondent entered into possession of the bare land on 11.03.1970, he subsequently in June 1970 constructed a shed with zinc sheets and constructed a small room out of single brick wall which was used as an office. The plaintiff-appellant was emphatic that she only leased the bare land to the defendant-respondent, on the understanding that when he left the land at the end of the lease he would remove the temporary buildings and structures and hand over vacant possession of the bare land. Subsequently they

entered into the lease deeds P1 and P4 on the same terms and conditions.

The receipts that were issued by the plaintiff-appellant were all on the same printed forms. She had scored off the word house in the receipt and had entered the abbreviation, 'pre' to indicate the word premises. The evidence bears out that she was a house-wife and according to her testimony she stated her understanding of the word "premises" was "bare land" and hence she had scored off the word house and entered the abbreviation 'pre' on the receipts that were issued.

Learned counsel appearing for the defendant-respondent relied on the decisions of *Fernando* v *Wijesekara*,[1] and *Padmanaba* v *Jayasekara*[2] in support of his arguments.

In the case of *Fernando* v *Wijesekara (supra)* the tenant had let a block of bare land, constructed a house subsequently on the land and occupied it. Sometime later the land was amicably divided between the landlord and his brother (plaintiff) and the new landlord (plaintiff) became the owner of that part of the land which contained the dwelling house constructed by the tenant. Thereupon the tenant attorned to the new landlord on the basis of a new contract of tenancy. The plaintiff sued the defendant tenant for eviction. Weeramantry, J. held that the legal background existing at the time when the second contract of tenancy was formed was fundamentally different from the one existing at the time of the first contract. The subject matter of the contract, at the time the second contract was entered into was not the bare land but the land and the buildings standing thereon and the learned District Judge held that in these circumstances the Rent Act is applicable.

Weeramantry, J. observed the defendant by entering into a fresh contract by his conduct the defendant permitted the material to accede to the soil. Weeramantry J. observed further that the legal background existing at the time the second contract was formed was fundamentally different from that which existed at the time of the first contract and what was within the power of the plaintiff to let, *viz.* a building with appertanant land was entirely different from what was within his brother's power (original landlord) to let at any time (namely a bare block of land).

However it appears that the above ratio is applicable to the facts of the case presently before me. At page 116 Weeramantry, J. observed "in all the circumstance, I consider that a tenancy only in respect of a bare land seem both unlikely in fact and indeed impossible in law *after* the accession of the building to the soil." (emphasis is added).

Emphasis is made to the word *after* as observed in the judgment; the defendant has by her conduct permitted the material to pass on to the soil, and on entering into a fresh contract of tenancy to include the buildings a contract regarding the building was formed.

Thus *Fernando* v *Wijesekera (supra)* is distinguishable on the ground of:

(a) a fresh contract of tenancy to include the building was entered into, whereas the first contract was only for a bare land.

(b) by his conduct, the defendants have allowed the building material to accede to the soil and thereby the landlord-tenant relationship has come into existence

(c) what was let by the original landlord was different to what was let by the plaintiff. (bare land v building).

In the present action deeds P1 and P4 referred to a bare land, the rent is referred to as ground rent. And according to P1 and P4, the lessee was liable for increased tax if the constructions have come up without the lessor's consent. The lessor has given an undertaking to remove all structures and buildings at the end of the term of lease. The lessee was not entitled to receive any compensation for any improvements made and if the structures/buildings are not removed by the lessee, at the end of the term, the lessor had the power to dismantle them and appropriate the proceeds.

In the case of *Padmanaba* v *Jayasekara (supra)* the plaintiff leased to the defendant an allotment of land. Thereafter the defendant constructed certain buildings (houses). In 1962, by P7 the plaintiff once again leased to the defendant for 5 years the premises described in the schedule, there was no mention made of the

buildings. The question that arose was whether the Rent Act applies to the premises. It was held that when an allotment of land which is leased is described by metes and bounds, everything standing within these boundaries (unless expressly excluded) are also leased to the lessee and the defendant is a protected tenant. The decision in *Padmanaba* v *Jayasekara (supra)* is distinguishable from the present action. In that case there were no options given to the tenant, like in the case presently before me to remove the structure, and if not removed, the landlord was empowered to dismantle the building and appropriate the proceeds.

Learned counsel for the plaintiff-appellant cited the following two cases in support of his claim, i.e. *Madanayake* v *Senaratne*(3) and *Jayawardena* v *Bandaranayake*(4). In the case of *Madanayake* v *Senaratne (supra)* where the facts are similar to the present action in that, where the lease of a bare land which provided for monthly payment of ground rent, containing a condition enabling the lessee to put up, with the approval of the owner, buildings and structures of a temporary nature which the lessee would be entitled to remove at any time, it was held that the provisions of the Rent Restriction Act did not apply.

In the more recent case of *Jayawardena* v *Bandaranayake (supra)* of which the facts are, one B leased a piece of bare land to the defendant's father, the defendant's father constructed a building, "B" conveyed the property to the three plaintiffs, but received the rent till his death. The defendant who had become the lessee attorned to the plaintiffs. The plaintiffs thereafter sought to evict the defendant. The defendant claimed the protection of the Rent Act. The learned trial Judge held with the plaintiff. Dr. Ranaraja, J. observed that a lease is formed by the consent or agreement of the parties on three essential points, namely,

(i) object of the contract is to let and hire

(ii) ascertained property

(iii) fixed rent.

The defendant had failed to prove that the original lease of bare land in respect of which ground rent was due was later converted by agreement of parties to a tenancy in respect of the buildings erected on the land by the defendant.

Dr. Ranaraja, J. held that just because there are buildings on a land, if the aforesaid three ingredients are not satisfied there cannot be a contract of tenancy for a building, when originally the contract was for the letting of a bare land.

Thus it is up to the defendant to prove that there was a contract of tenancy regarding the building. In the present action the defendant-respondent could not prove that there was a contract of tenancy regarding the building.

Learned counsel for the plaintiff-appellant argued that a contract of tenancy cannot be entered into in respect of a building that belongs to the tenant.

There is merit in this argument. If the building belonged to the tenant it would not be possible to enforce certain rights and duties under the Rent Act and will result in the following consequences :

(1) Under section 22 – a landlord would not be able to seek to retake possession of a building that was constructed by the tenant on reasonable requirement.

(2) A landlord will not be able to effect repairs to the building as it does not belong to him.

(3) If the tenant damages the building the landlord cannot complain as the tenant is the owner of the building.

(4) The landlord cannot be made liable for withholding amenities as the building belongs to the tenant.

(5) The landlord cannot be made liable if the building collapses due to faulty construction.

(6) If on the landlord obtaining a decree on reasonable requirement if the tenant demolishes the house and takes away the material, the landlord will be without a remedy.

(7) It would not be possible for any one to take on rent one's own house and make the owner of the land liable because one cannot lease to himself his own building.

(8) If the building was constructed by the tenant and if he causes damages or deterioration of the property, the tenant cannot be evicted by the landlord for causing damage

or deterioration of the property as he is not the owner of the building.

(9) If the building that was constructed by the tenant is sublet the landlord cannot evict him as the landlord has no control over the building.

(10) If the building was constructed by the tenant, the landlord cannot ask for vacant possession as the tenant is entitled to remove the structure.

It is pertinent at this stage to consider the ingredients that are necessary to create a contract of tenancy.

In the book "Landlord and Tenant in South Africa" by Wille, fourth edition, at page 2 under the heading of "Formation of the Contract" it is stated: "A lease is formed by the consent or agreement of the parties on three essential points :

(1) that the object of the contract is to let;

(2) ascertained property

(3) at a fixed rent.

The consent should be unequivocal on the aforementioned essential matters. Indentures of lease P1 and P4 are clearly in respect of a bare land. The terms in both P1 and P4 are unequivocal to mean a bare land. The terms and conditions prohibit construction of buildings and structures on the land. The undertaking by the tenant to remove any temporary structures erected and hand over vacant possession of the bare land at the end of the period of lease. Undertaking to pay the increase of rates in respect of buildings constructed without the landlord's consent and the provision for the landlord to remove the temporary structures and to appropriate to himself the proceeds of sale of them at the end of the lease. The use of the word ground rent in both agreements P1 and P4, are all features that establish that what the parties agreed to lease was the bare land. Further there was no dispute with regard to the fixed rent. There was agreement by the parties that the object of the agreement was to let, at a fixed rent.

Therefore I am of the view that the parties in the present action intended to enter into a lease of a bare land and therefore the Rent Act does not apply.

The defendant-respondent at the commencement of the trial admitted only the signing of indenture of lease P1 and P4. His position was although he placed his signature on P1 and P4, the contents of P1 and P4 were not explained to him hence he was not aware of the contents of P1 and P4.

It is interesting to note that despite documents P1 and P4 being in English his son-in-law who was an Inspector of Police, accompanied him to the lawyer notary who attested P1 and P4. He had signed as an attesting witness. Therefore the evidence of the defendant-respondent that the contents of P1 and P4 were not explained to him and as such he did not know the contents cannot be believed. It has been held in *Saunders* v *Anglia Building Society*(5) that a plea of *non-est factum*, will rarely succeed if the document was signed by an adult or a literate person.

The learned District Judge had failed to embark on a proper analysis and evaluation of the oral and documentary evidence in this case.

It has been held by Parinda Ranasinghe, J. (as his Lordship then was) with Victor Perera, J. concurring in the case of *De Silva* v *Seneviratne*(6) *inter alia* that where the findings of fact by the learned District Judge are based on the trial Judge's evaluation of facts, the appellate court is then in as good a position as the trial Judge to evaluate such facts and no sanctity attaches to such appellate court that on either of these grounds, the findings of fact by a trial judge should be reversed, then the appellate court "ought not to shrink from that task".

I set aside the judgment of the learned District Judge and direct him to enter judgment as prayed for in the plaint.

The appeal of the plaintiff-appellant is allowed with costs fixed at Rs. 5000/=.

SOMAWANSA, J. I agree.

Appeal allowed .