

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRILANKA

Mrs. K. Ranjani Rajapathirana
No. 16, Robertson Street,
Curtin A.C.T. 2605, Australia And
Presently of No. 11, Flanagan Street,
Garren A.C.T. 2605. Australia.
Plaintiff

C A 94 / 96 (F)

Vs.

D.C. Bandarawela 183 / RE

J. W. Lee
Chinese Union Hotel,
No 2 Mount Pleasant,
Bandarawela.
Defendant

NOW BETWEEN

Mrs. K. Ranjani Rajapathirana
No. 16, Robertson Street,
Curtin A.C.T. 2605, Australia And
Presently of No. 11, Flanagan Street,
Garren A.C.T. 2605. Australia.
Plaintiff Appellant

Vs.

J. W. Lee
Chinese Union Hotel,

No 2 Mount Pleasant,
Bandarawela.

Defendant Respondent
(deceased)

Mrs. Babynona Rajapaksha,
Chinese Union Hotel,
No 2 Mount Pleasant,
Bandarawela.

Substituted Defendant Respondent

BEFORE : UPALY ABEYRATHNE, J.
COUNSEL : C. E. de Silva with Herath Walgama for the
Plaintiff Appellant
H. Withanachchi for the Substituted
Defendant Respondent
ARGUED ON : 11.07.2011
WRITTEN SUBMISSIONS : 18.07.2011
DECIDED ON : 04.08.2011

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted an action bearing No. 183 / RE in the District Court of Bandarawela praying for a judgement to eject the deceased Defendant Respondent from the premises described in the schedule to the plaint and for damages. The case proceeded to trial upon 19 issues. After trial the learned District Judge dismissed the Appellant's action with costs. Being aggrieved by the said judgment dated 05.03.1996 the Appellant preferred the instant appeal to this court.

The Appellant's case was that the Respondent became the tenant of the Appellant in terms of a monthly tenancy of the premises bearing assessment No. 2 Mount Pleasant Bandarawela at a monthly rental of Rs. 975/- per mensem payable on or before the end of each and every month. Said premises were assessed as a business premises by the Urban Council of Bandarawela at an annual value of Rs. 2034/- on 1st January 1968 and up to date has been assessed at an annual value exceeding Rs.2000/-. Therefore the Appellant had pleaded that the premises were excepted premises in terms of Regulation 3 of the schedule to the Rent Act No 7 of 1972.

The Respondent whilst admitting the tenancy took up the position that the premises were not business premises and was not excepted premises and pleaded that he with his wife Babynona was carrying on a hotel in the premises under the name "Chinese Union Hotel". The Respondent further pleaded that in the said hotel lodging and temporary residence facilities were provided to the guests and the premises in suit were used or occupied or mainly used or occupied for the purpose of residence and therefore the premises are governed by the provisions of the Rent Act. The Respondent did not maintain his claim in reconvention before this court.

Since the Respondent had admitted the tenancy and the receipt of the quit notice at the commencement of the trial the only question to be dealt with is whether the premises as alleged by the Appellant, are business premises and are excepted premises?

"Residential Premises" have been defined in section 48 of the Rent Act in the following manner; Namely "Residential Premises" means any premises for the time being occupied wholly or mainly for the purpose of residence.

In the same way “Business Premises” have been defined as follows; “Business Premises” means any premises other than residential premises.

It should be noted that the fact that the premises in suit situated within the area of Bandarawela Urban Council and the annual value of the said premises in 1968 was Rs. 2034/- were not in dispute. In the above context the sole contention of the Respondent was that the premises in suit was not business premises. I now deal with the said contention.

The Appellant had closed his case leading documents P 1 to P 31 in evidence and the Respondent had closed his case leading documents D 1 to D 47 in evidence at the trial. P 1 is a menu card of the Chinese Union Hotel. P 2 and P 3 are receipts issued by Chinese Union Hotel for certain food items. P 4, P 5 and P 6 are photographs showing an area where textiles and cosmetics had been displayed for sale. P 7 is a photograph of a name board which displays “Chinese Union Hotel” “Rooms and Meals”. P 8, P 9 and P 10 too are photographs showing an area where food was being served to people. P 12 is a certified copy of the Assessment Register from 1955 to 1993 maintained by Bandarawela Urban Council. P 12 describes the premises in suit in some years as Chinese Union Hotel and in some years as tile roofed hotel. P 13 to P 29 is copies of the register of the annual trade licence pertaining to the premises in suit. P 18 (the trade license issued for the year 1981) describes the premises in suit as a tourist hotel. According to P 19 (the trade license issued for the year 1982) the premises in suit is a restaurant. P 25 (the trade license issued for the year 1988) has been issued to run a hotel/bakery. P 26 (the trade license issued for the year 1989) describes the premises in suit as a hotel.

It is important to note that the Respondent did not challenge the said evidence of the Appellant.

Witness Rohan Horadagoda, who testified on behalf of the Appellant, producing documents P 1 to P 11 stated that the Respondent was running a hotel, a textile business and a restaurant in the premises in suit. He further said that food take away facility was available at the said hotel. He further said that there were five bed rooms with beds in the premises in suit but he was unaware of the purpose the beds being used and what he knew was that it was a hotel. Said evidence also had not been challenged by the Respondent.

The Respondent in his evidence had stated as follows;

- Since 1958 he had been carrying on a hotel called Chinese Union Hotel in the premises in suit as the tenant of the father of the Appellant and the rooms of the said premises were used to provide accommodation to both local and foreign guests.
- Readymade garments, cosmetics, winter clothes, toys and goods needed for day to day use had been selling to the guests who stayed in the hotel rooms and to the people who came to purchase from the neighbourhood.
- Chinese food and Sri Lankan food had been selling at the premises in suit to the guests who stayed in the hotel and to outside customers who came to the hotel.
- There was a restaurant in the premises in suit.
- A food catering service had been carrying on in the premises in suit to facilitate outdoor functions.

In the light of the said evidence the learned counsel for the Respondent contended that the premises in suit had been used mainly for the purpose of residence and therefore it cannot be treated as business premises. The learned

counsel drawing the attention of court to the cases of Standard Vacuum Oil Company Vs Jayasuriya 53 NLR 22, Hussain Vs Ratnayake 69 NLR 421, Gunatilake Vs. Fernando 56 NLR 105 and Wimalaratne Vs Linganathan [1984] 1 Sri LR 247 submitted that the paying guests or the lodgers who occupy the rooms of the premises in suit would use them wholly or mainly for the purpose of residence and on the application of the “user test” which was laid down in the above cases the only conceivable conclusion is that the premises in suit are residential premise.

The question arisen in the case of Wimalaratne Vs Linganathan and Another (supra) was whether premises where a guest house was being run for profit were business premises or residential premises within the meaning given to these terms in the Rent Act. It was held that “Though the definitions given in the Rent Act of "residential premises" and "business premises" exclude each other the expressions “purposes of residence ” and purposes of business do not, and in a given case one may include the other. The purpose that is material is the tenant's purpose. The occupation contemplated in the definition of residential premises is not limited to actual physical occupation. The test for deciding whether premises are residential premises or business premises within the meaning of the Rent Act is the user to which the premises are wholly or mainly put by the occupiers for the time being. The user to which a tourist puts the room he occupies in the guest house is that of residence for how short a period it may be. It is his temporary residence. Hence the premises in suit are residential premises.”

It is important to note that the plaintiff in the said case had let the premises to the 1st defendant in 1968 at a rental of Rs.1000 per month. In 1971 the 1st defendant had sub-let the premises to the 2nd defendant. The former tenant of the premises was one M. S. A. Gaffoor who ran a guest house in the premises and this

business was bought by the 1st defendant, who in turn sold that business to the 2nd defendant. The guest house contained ten furnished rooms, and the charges were Rs.55.00 per double room and Rs.45.00 per single room per day. No meals were provided for guests. The guests occupied the rooms usually for a day or two, and some guests stayed on for as long as two months.

It is apparent from the facts of the said case that there had been no any other business running in the premises. The premises were used wholly for the purpose of residence of the guests only. At least no meals were provided to the guest who stayed in the rooms. It seems that in the said premise the court had arrived at the conclusion that the premises were residential premises.

In the case of Standard Vacuum Oil Co. Vs Jayasuriya (1951) 53 NLR 22 the defendant appellant was a limited Company. The premises were used by it as a residence for its manager, who lived there with his wife. According to the case for the appellant Company the premises were furnished as a residence and provided with a staff of domestic servants, all at its expense, and the Company also paid the electricity and telephone bills ; two motor cars belonging to the Company were garaged there, one of which was intended for the manager's use and both of which were used by him on the Company's business; the manager was required to entertain from time to time, as the Company's guests, various persons with whom it had business, and he would entertain in this way, possibly twice a month, about 15 to 60 persons at a time ; he was also required to accommodate in these premises, as the Company's guests, visiting executives from overseas, and he would put up such visitors on about 15 occasions in the course of a year ; the house was also used for business conferences held after office hours, for receiving telephone messages or telegrams relating to the Company's business that were received after office hours,

and for the custody of the Company's confidential papers, which were stored in the cupboard of a writing table.

Gunasekera, J. Stated that "The learned District Judge holds that the business that is transacted in the premises " is the sort of business any business man would conduct in his house after business hours "; and that " it appears to be quite evident that although certain business transactions are effected in the premises it is used mainly for the residence of the manager and his wife and on some occasions for the residence of guests of the Company." I do not think there can be any doubt that this is the correct view of the use to which the premises were put."

In the case of *Gunatilake Vs. Fernando* (1954) 56 NLR 105, 110 the same question again came up for decision. There Gunasekera, J. held that premises taken on rent by the proprietor of a school and used by him as a hostel for the students and as a place of residence for the warden of the hostel and some of the teachers were residential premises within the meaning of the Rent Act.

In that case H. N. G. Fernando A. J. (as he then was) whilst agreeing with Gunasekera, J. stated at page 110: "The Legislature has not in reality differentiated between *residential purposes and business purposes*; the relevant definitions pose only the question whether the premises are occupied for the purposes of residence, and if not they are to be regarded as business premises whether or not they are actually business premises. Nor is the Legislature concerned with the character of the tenant's occupation. In my view therefore, the only issue to be determined is whether in fact persons actually 'reside' (in the ordinary connotation of the word) in the premises or in the majority of the rooms which it comprises. If such is the case, the premises are residential within the meaning of the Act, and the circumstances

in which the residents came to reside in the premises and their contractual relationships, if any, with the tenant, do not alter the character which the premises acquire by reason that persons reside there " .

The question whether premises taken to be run mainly as a boarding house are 'residential premises' or 'business premises' within the meaning of the Rent Act was referred to a bench of three judges in view of the conflict of authorities on this point. That is the case of Hussain Vs Ratnayake (1967) 69 NLR 421. In this case it was held that premises taken to be run as a boarding house are 'residential premises' and not 'business premises'.

When I consider the present case before me it is manifest from the evidence of the case that the premises in question had been used mainly to run a hotel called "Chinese Union Hotel." Apart from the running of the said hotel in the premises, a business of selling readymade garments, cosmetics, winter clothes, toys and goods needed for day to day use had been carrying on in the premises in question. Evidence further revealed that the Respondent was running a restaurant (vide P 19) in the premises and also a food catering service to facilitate outdoor functions. The assessment extract (P 12) for the period of 1955 to 1993 shows that the premises in suit were a Hotel throughout the period.

D 35 is the Certificate of Registration of the Business which was running in the premises in suit, dated 28.08.1962 issued under the Business Names Ordinance (Chapter 120). According to the document D 35 (which was produced by the Respondent) the business name is "Chinese Union Hotel". The general nature of the said business is "Hotel and Caterers and Dealers in Gift Articles". The Receipts Books D 13 to D 31 demonstrates that meals too had been sold to the guests who occupied in the premises in suit.

In my view the said evidence negates the fact that the premises in question were used wholly or mainly to accommodate guests who occupied the rooms.

In the case of Nisthar Vs. Gurusamy and Others [2004] 1 Sri LR 79 the premises in suit was described from 1953 to 1971 as a house; from 1972 to 1987 it was described as office and house but the annual value appearing in the register of the Colombo Municipal Council had not reached the required amount for purposes of exception. However from 1988 to 1991 the premises was described as a store and the annual value was fixed at Rs.24,000/ -viz. above the requisite value in Regulation 3, for the Colombo Municipal Council.

It was held that "In considering whether the premises is excepted business premises or a residential premises when it is claimed to have been first assessed as business premises the use to which the premises is put into and the annual value should both be taken into account. Applying that test and the evidence in the case, the premises in suit became business premises for the first time in 1988. It was, therefore, excepted premises in terms of Regulation 3 in section 48 of the Act, as from 1988.

In the case of Aloysius Vs Pillaipody (1982) 2 Sri LR 762 (SC) The plaintiff was the landlord of premises No. 49, Grand Bazaar Road, Jaffna having acquired it in 1948. The defendant was the tenant of the said premises having come into occupation of the premises long before 1948. The plaintiff sued the defendant for ejection from the premises on the ground of reasonable requirement. In order to succeed under 22(2) (ii) (b) and 22(7) of the Rent Act he had to prove that the standard rent of the premises exceeded Rs. 100/- per mensem. No. 49, Grand Bazaar Road, Jaffna was described as a tiled house in 1941 and as a tiled boutique in 1956 in the Assessment Register. The question that arose was whether the

annual value of the tiled house in 1941 or whether the annual value of the tiled boutique in 1956 was relevant to determine the standard rent.

It was held that “The mere registration by the tenant of a business under the Business Names Registration Ordinance in 1954 will not have the effect of converting residential premises into business premises. The description of the property as entered in the Assessment Register affords prima facie evidence as to whether the property has been assessed as residential premises or business premises. It is not necessary to call an officer from the Municipal Council to prove the fact.”

In the case of *Jinasena Vs The Commercial Investment and Finance Co .Ltd* (1985) 1 Sri LR 238, treating the defendant Company as his tenant the plaintiff (Jinasena) sued it for ejectment after due notice on the footing that the premises were business premises and therefore excepted premises to which the Rent Act did not apply. The main questions for decision were whether the premises were business premises or residential premises and whether there was a contract of tenancy between the plaintiff and the defendant-company.

It was held that “Although the description given in the Assessment ‘Register is’ relevant to determine whether the premises are business premises or residential premises and affords prima facie evidence as to whether the premises have been assessed as residential or business premises such description is not conclusive on the issue whether the premises are business premises or residential premises. Residential premises are premises for the time being occupied wholly or mainly for purposes of residence and business premises mean any premises other than residential premises. The test is whether in fact persons reside (in the ordinary connotation of the word) in the-premises or in the majority of the rooms which it

comprises and if so they are residential, premises: Despite the description in the assessment register that the premises were business premises the premises were occupied mainly for residence, by Vithanage, his wife and his son who were Directors of the defendant-company and Vithanage's children. Hence the premises were residential premises and, protected by the-Rent Act and the suit fails.

In the case of *Nalini v Gunawardana Sri Skantha's L.R.* Vol II 143 where the premises were described as an "Ayurvedic dispensary and house" in the assessment sheet, Samarakoon, C.J. held that such a description is equivocal, in the absence of evidence to show that the premises were mainly occupied for the purpose of residence. In this case however, there is clear evidence that the premises in question was used for the purpose of residence. Hence, there is no difficulty in concluding that the premises in question was occupied wholly or mainly as a residence. In other words the plaintiff and the members of his family used the premises as their residence during this period and the plaintiff carried on his business as an accountant from this residence.

When I consider the totality of evidence I am of the view that the Appellant has proved his case on balance of probabilities that the premises in suit were not residential premises within the meaning of the Rent Act and they were business premises the annual value was over Rs. 2000/- and hence the premises in suit were excepted premises in term of Regulation 3 of the schedule to the Rent Act No. 7 of 1972. In the said circumstances I set aside the judgment of the learned District Judge dated 05.03.1996 and allow the appeal of the Appellant with costs.

Appeal Allowed.

Judge of the Court of Appeal