

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

SC Appeal No. 67/2017

**S.C. (SPL) L.A. Application No.
274/2015**

C.A.L.A. Application No. 148/2006

D.C. Colombo Case no. 9606/RE

O.L.M. MACAN MARKAR LIMITED

No: 26, Gall Face Court

Sir Mohamed Macan Markar Mawatha

Colombo 03.

PLAINTIFF

-VS-

AL- HAMBRA HOTEL LIMITED

No. 30, Sir Mohamed Macan Markar Mawatha,

Colombo 03

DEFENDANT

AND

AL- HAMBRA HOTELS LIMITED

No. 30, Sir Mohamed Macan Markar Mawatha,

Colombo 03

DEFENDANT - PETITIONER

-VS-

O.L.M MACAN MARKAR LTD

No. 26, Galle Face Court, Sir Mohamed Macan
Markar Mawatha, Colombo 03.

PLAINTIFF-RESPONDENT

AND NOW

AL- HAMBRA HOTELS LTD.

No. 30, Sir Mohamed Macan Marker Mawatha
Colombo 03.

DEFENDANT- PETITIONER- APPELLANT

Vs.

O.L.M MACAN MARKAR LTD

No. 26, Galle Face Court, Sir Mohamed Macan
Markar Mawatha

Colombo 03.

PLAINTIFF-RESPONDENT- RESPONDENT

Before: B.P Aluwihare, PC, J.
L.T.B Dehideniya J.
P. Padman Surasena J.

Counsel: Harsha Soza, PC with N. Kandeepan for the
Defendant –Petitioner- Appellant

Avindra Rodrigo, PC, with Ashiq Hassim and
Ms.Kasuni Jayaweera for the Plaintiff-
Respondent- Respondent

Argued on: 08.06.2020

Decided on: 11.02.2022

L.T.B Dehideniya J.,

The Plaintiff- Respondent- Respondent (hereinafter sometimes called and referred as the Respondent) instituted this action in the District Court seeking for ejectment of the Defendant- Appellant- Appellant (hereinafter sometimes called and referred as the Appellant) and the damages. The Appellant was the tenant of the Respondent. The Appellant and the Respondent both were limited liability companies registered under the Companies Act. The Appellant came into the occupation as a tenant prior to the September 2003. These facts were admitted by the parties, and the Respondent further admitted that he received the quit notice.

Both parties admitted that the Rent Act No. 7 of 1972 as amended, is in operation of the area where the premises described in the schedule to the plaint was situated. The Plaintiff's case is that the Minister has issued the Extra Ordinary Gazette Notification No. 1305/17 of 09th September 2003 declaring that if the landlord or the tenant is a company registered under the Companies Act, the said premises become exempted premises. Since the Petitioner and the Respondent both are limited liability companies registered under the Companies Act, the Plaintiff's contention is that the premises in suit becomes an excepted premises.

At the beginning of the trial two preliminary issues of law were raised,

05. (c) Do those regulations (in Gazette No. 1305/17 of 09-09-2003 act retrospectively?
- (d) If not, is the premises in suit not an excepted premises?
- (e) Hence can the Plaintiff have and maintain this action?

11. (a) Is it only for the purpose of carrying out or giving effect to the provision and principles of the Rent Act that regulations could be made under Section 43(1) of the Rent act ?
- (b) Is the protection granted to a rent controlled premises a preliminary principle of the Rent Act?
- (c) If the aforesaid regulation relied on by the Plaintiff receives retrospective effect, can the aforesaid regulations remove the protection enjoyed by the tenant?
- (d) If the above issues “a”, “b”, “c” are answered in favour of the defendant is the authority granted under Section 43(1) of the Rent Act to make the aforesaid regulations rendered Ultra Virus and not enforceable or effectual at law.
- (e) If so can the Plaintiff ever have and maintain this action?

The District Court held in negative to issues No. 5 and decided that the action can proceed. For issue No. 11, held positive and allowed the plaintiff to maintain the action.

Aggrieved by the said order, the Defendant – Appellant appealed to the Court of Appeal and the said appeal has been dismissed. Being aggrieved by the said order of the Court of Appeal, the Appellant presented this appeal.

This Court granted leave to appeal on the following questions of law.

- 1) Was the Court of Appeal in coming to conclusion that the regulations were prospective in their application, in error in proceeding on the contrary basis that the regulations would cover the tenancy in this case and that therefore the Plaintiff was entitled to invoke the regulations to eject the Defendant from the premises in suit?

- 2) Did the Court of Appeal err in failing to consider the fact that the rule making power conferred by a statute on any public functionary should be exercised strictly within the ambit of the powers conferred by the statutes and, any rule or regulation which falls outside the powers conferred or is inconsistent with/repugnant thereto would be ultra vires?

- 3) Did the Court of Appeal err in coming to conclusion that the Regulation in question would cover those tenancies where the tenant had been a company and the tenancy commenced before the said regulation was published on the purported basis that the rights of the parties are decided as at the date of the action?

The main issue in this case is whether the Extra Ordinary Gazette Notification No. 1305/17 of 09.09.2003 is applicable to the premises in suit or not.

The Rent Act applies only to the premises where it has been declared that it applies. The Act may not apply to certain premises which belongs to certain persons. Section 2 of the Rent act specifies the applicability of the Act. Section 2(4) specifies the premises on which this Act does not apply. Under Section 2(4) (a), the Act does not apply to excepted premises, and under Sub Section 5, the schedule to the Act shall have the effect for the purpose of determining the premise which shall be excepted for the purpose of the Act.

Section 2(4)

So long as this Act is in operation in any area, the provisions of this Act shall apply to all premises in that area, other than—

(a) excepted premises;

Section 2(5)

The regulations in the Schedule to this Act shall have effect for the purpose of determining the premises which shall be excepted premises for the purposes of this Act, and may be amended from time to time by regulation made under Section 43.

This Sub Section 5 permits the Minister to amend the schedule by way of regulations made under Section 43.

As per the scheme set out in the Rent Act, it applies only to certain premises and certain premises were except from its application. The Legislature has declared that certain premises were excepted and further permitted the Minister in charge of the subject to amend the schedule of the excepted premises by publishing a Gazette Notification. Under Section 43(1), the Minister may make all such regulations, may be necessary for the purpose of carrying out or giving effect to the provisions and the principals of the Rent Act. Applying the Rent Act to certain premises, as well as removing the applicability to the certain premises is a matter of giving effect to the Rent Act. As I have stated above, the principal of the Rent Act is to apply it only to certain premises and not to all rented premises. Therefore, the Minister is authorized to amend the schedule by adding new items or removing the existing items in the schedule.

The Minister, exercising his statutory powers, published the Extra Ordinary Gazette Notification No. 1305/17 of 09.09.2003, removing the applicability of the Rent Act on certain premises.

Under Sub Section 2 of Section 43, the Gazette comes into operation on the date of the publication. It has to be presented to the Parliament under Sub Section 3,

and if the Parliament does not approve the regulation, it has to be published under Sub Section 4. Under Sub Section 5, any Gazette Notification approved by the Parliament becomes valid and effectual, as it was enacted by the Rent Act. Therefore, the Gazette Notification dated 09.09.2003 becomes a law from the date it was published.

Section 43

(1) The Minister may make all such regulations as may be necessary for the purpose of carrying out or giving effect to the provisions and principles of this Act.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation.

(3) Every regulation made by the Minister shall, as soon as convenient after its publication in the Gazette, be brought before the House of Representatives for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done thereunder.

(4) Notification of the date on which any regulation made by the Minister is so deemed to be rescinded shall be published in the Gazette.

(5) Any regulation made by the Minister shall when approved by the House of Representatives, be as valid and effectual as if it were herein enacted. Notification of such approval shall be published in the Gazette.

The Counsel for the Appellant argued that the Gazette Notification cannot be published with retrospective effect. He argued that the Appellant became the tenant prior to the Gazette Notification; therefore, this Gazette Notification does not apply to the Appellant. The Respondent agreed that the Gazette Notification has no retrospective effect. Further the Court of Appeal also held that the said Gazette Notification only has a prospective effect.

Under Section 43(2), the regulation made by the Minister shall be published in the gazette and it shall come into the operation on date of such publication or on such later date, as may be specified in the regulations. Under this Section, the Minister was given authority to declare a later date than the date of publication when the Gazette should come into operation. But Minister was not empowered to declare a date anterior to the date which it was published.

As I have previously stated, the Rent Act applies to the premises only. It does not apply to the persons or to the Contract of Tenancy. If the Rent Act applies to a certain premises, then there would be some restrictions in terms of contract. The Extra Ordinary Gazette Notification No. 1305/17 was published on 09.09.2003. From that date onwards, the premises belong to a company or the tenant is a company registered under the Companies Act, the Rent Act will not apply, because it will be excepted premises from that date onwards. Parties may have come into occupation or entered into rent agreement when the Rent Act was in operation. When a Minister publishes a Gazette Notification declaring that the said premises is excepted from that day onwards, the Rent Act will not apply to the said premises. The Law is above the private contract.

In the case of Queen's Bench decision in *Baily VS De Crespigny 1861-73 A.E.R 332* a case related to covenant of landlord and tenant the Chief Justice Cockburn held that,

“... in the absence of clear words showing contrary intention, parties must always be considered as contracting with the law as existing at the time of contract....”

Existing laws is interpreted in the Article 170 of The Constitution of the Democratic Socialist Republic of Sri Lanka 1978,

“Article 170 of the Constitution –

“Existing law” and “existing written law” mean any law and written law, respectively, in force immediately before the commencement of the Constitution which under the Constitution continues in force;”

As referred to earlier from the evidence led at the trial, it demonstrates that at a point of time the Rent Act was in operation both parties entered in to the rent agreement. But after the publication of The Extra Ordinary Gazette Notification No. 1305/17 said premises were except from the operation of the act and then Rent Act will not be applied to such premises. So the existing law will be the private contract law.

In the case of *Peiris vs. Rathnabhatthi Aratchy (50 NLR 138)* it was questioned about the commencement of tenancy before Ordinance came in to operation. In this case Justice Basanayake held that,

“ I think it is clear from section 3(1) and 3(1A) of the ordinance that regardless of the time which the tenancy commenced it is unlawful for any land lord to demand, receive or recover and for any tenant to pay , or offer to pay in respect of a period commencing on or after the date on which the Ordinance came into operation in any area , any rent in excess of the rent which may lawfully be received or paid under the Ordinance.

A retrospective status is a status that has affect from a date anterior to that on which it becomes law.... The fact that the ordinance interference with the future operation of existing contracts does not make it retrospective. Where a statute affects an existing contract the contract must yield to the status.”

Subsection (5) of Section 2 of the Rent Act declares that “The Regulation in the schedule to this shall have effect for the purpose of determining the premises which shall be excepted premises for the purpose of The Rent Act, and may be altered from time to time by regulation made under Section 43,” The aforementioned regulation No.1305/17, dated 2003.09.09, was introduced in accordance with Section 43 read with Section 2(5) of the Act to amend the Schedule to the Act in order to designate certain premises as "excepted premises." The effective date of the regulation may be the date of publication of the regulation, that is September 9, 2003.

“Section 43 (2),

Every regulation enacted by the Minister shall be published in the Gazette and shall take effect on the date of such publication or on such later date as the rule may specify.”

As a result, the regulation's effective date is regarded to be 09th September 2003. Since the premises become an excepted premises from that date, the Rent Act does not apply to the said premises thereafter.

I will consider the rule-making power conferred in a public functionary by a statute. The Subsection 2(5) of the Rent Act allows the Minister in charge of the subject to change the schedule by issuing regulations under Section 43. The

scheme outlined in the Rent Act only applies to specific types of properties, and certain types of properties have been exempted from its application. The legislator declared that some premises were excepted, and the Minister in charge of the Subject was given the authority to change the list of excepted premises by publishing a Gazette notification. The Minister may make all necessary regulations under section 43(1) for the purpose of carrying out or giving effect to the provisions of Rent Act. As a result, the Minister has the authority to change the schedule by adding new premises or removing old ones.

According to Article 168 (4) of The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, the Minister has the power to amend, vary, rescind or revoke such subordinate legislations.

“ 168 (4) Whenever the Constitution provides that any provision of any existing written law shall continue in force until or unless Parliament otherwise provides and the existing written law referred to consists of subordinate legislation, the provision that such existing written law shall continue in force until or unless Parliament otherwise provides shall not in any manner be deemed to derogate from the power of the person or body on whom the power to make and when made, to amend, vary, rescind or revoke such subordinate legislation is conferred to exercise the power so conferred until or unless Parliament otherwise provides.”

The Government Gazette (Publication) Ordinance of November 15, 1930 recognizes the Minister's power to issue gazettes on any matter or item with which he is charged.

“Section 2(1) –

It shall be lawful for the Minister, after consulting the Minister of Justice, by Order published in the Gazette, to declare that any provision of written

law with the administration of which he is charged and which requires that any matter or thing, or any order, notification, list, statement, abstract, notice, or other document, shall be published or proclaimed, or published by Proclamation, in the Gazette, shall cease to be in force as from a date to be specified in such Order.”

Based on the statutory facts cited above, it is evident that the Minister, in exercising his statutory authority, issued Extraordinary Gazette Notification No. 1305/17 of 2003.09.09, deleting the Rent Act's application to a certain premise.

Another concern that has been put forward for determination by this Court is "whether that the rights of the parties are decided as at the date of the action?" In this regard, the date of the tenancy's commencement is significant. The date of the aforementioned Regulation and the date on which the plaint in this case was filed are pertinent. The parties acknowledge that the defendant leased the premises in question in January 2003, before the said Regulation was enacted. On 09.09.2003 the Gazette was published. On 20th May 2005, the Plaintiff filed this ejectment and damages action against the Respondent. The parties' rights are determined at the time the action is filed, according to established law. Therefore, by operation of law since 9th September 2003, the premises concerned becomes an Excepted Premises and the tenancy is no longer no longer governed by the Rent act.

“Cries statutes law 7th Edie page 387

“.... a statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws or creates new obligations, or imposes new duty, or attaches a new disability in respect to transaction or considerations already past. But a statute is not properly

called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing.

The Rent Act contains no provision stating that the regulations promulgated by Gazette Extraordinary No. 1305/17 dated 2003.09.09 will apply retrospectively. As a result, it is apparent that the regulations have no retrospective effect, and the abovementioned regulations will take effect on 9th September 2003.

As a result, it is a widely acknowledged principle that parties' rights should be determined according to the law in effect at the time of the action. It is also determined in the case of *Eastern Hardware Stores vs. J.S.Fernando* 58 NLR 568. Since the plaint was filed on 20.05.2005, the parties' rights in this dispute must be determined based on the facts and law that existed at the time the action was filed.

According to the existing law, if the landlord and the tenant are companies registered under the Companies Act No. 17 of 1982, the premises shall be an excepted premises.

In the case of *K.Mary Margret Fernando vs. Beeta De Silva (SC Appeal No. 193 of 2011)*, the issue is whether business premises located in the local authority's territory are exempt. Which are referred to as "excepted premises" under the Rent Act No. 7 of 1972, as amended. The Saleem Marsoof PC J held that,

“It is common ground that the time of institution of action the property in suit was situated with in the local authority area of the Anuradhapura Urban Council, and the relevant annual value for the property to be regarded in law as excepted premises..”

The Gazette Notification amending the list of excepted premises was published on 09th September 2003 and it becomes a law from that date. This action was

filled after the publication of the said Gazette Notification therefore that amendment applies to the present case.

I answer the questions of law in the following way,

- 1) The regulations published by gazette notification No. 1305/17 of 09.09.2003 is not retrospective and the plaintiff is entitle to invoke the regulations.
- 2) No
- 3) No

The appeal dismissed.

Judge of the Supreme Court

B.P. Aluwihare , PC, J.

Judge of the Supreme Court

P. Padman Surasena J,

Judge of the Supreme Court