PINONA
v
DEWANARAYANA AND OTHERS

COURT OF APPEAL
SOMAWANSA, J. AND
EKANAYAKE, J.
C.A. 189/83(F)
D.C. MATARA 5376/L
JUNE 7, 2004
JULY 30, 2004

Rei Vindicatio Action – Attornement – Applicability of Rent Act, No. 7 of 1972 sections 21 and 22 – Payment of rent to authorised person, not the landlord – Vindicatory action available? – Owner not bound by tenancy created by third party – Who is a landlord?

The original plaintiff instituted action seeking a declaration of title to the premises and the ejectment of the 1st, 2nd, and 3rd defendants-respondents.

The original plaintiff contended that, he purchased the property from one N and before he purchased the property the father of N acting for and on behalf as agent of N permitted the 1st defendant-respondent to occupy the premises free of rent on the undertaking (P2) that he would vacate the premises on or before a specified date. The 2nd and 3rd defendants-respondents, it was alleged, were in occupation with the leave and license of H and that, after the plaintiff purchased the property, 1st, 2nd and 3rd defendants were disputing his title.

The defendants-respondents denied, that the 1st defendant-respondent was in occupation of the premises with the leave and license of H and took up the position that before N became the owner, one I was the owner and the 3rd defendant - respondent took on rent the said premises from I and after N purchased the property, the 3rd defendant-respondent paid rent to H who was the agent of N and after the original plaintiff became the owner he never informed the 3rd defendant - respondent to attorn to the original plaintiff and sought the dismissal of the action.

The trial court held with the defendants-respondents.

On Appeal-

Held :

(i) There is no evidence that the 3rd defendant-respondent who claims to be the tenant had anything to do with the undertaking (P2) given by the 1st defendant-respondent.

(ii) There is no evidence that the 1-3rd defendants-respondents were in occupation of the premises in suit with the leave and licence of H or N. Taken at its best P2 only contains an undertaking given by the 1st defendant-respondent, who is not the tenant and does not contain any undertaking given by the 3rd defendant-respondent who is the tenant.

(iii) A letter given by a tenant that he would vacate the premises would be irrelevant. Section 22 does not set out as a ground for ejectment the giving of a notice to quit by the tenant to his landlord.

(iv) A tenant cannot contract out of the protection afforded by the Rent Act.

(v) A tenant who pays rent to an authorised person in the name of a person who is not the landlord can be ejected in a vindicatory action and the owner is not bound by a tenancy created by a third party.

(vi) The term "landlord" is defined as the person for the time being entitled to receive rent under the contract of tenancy ; such person need not be the true owner.

Per Somawansa, J.

"There was no evidence adduced to establish that after the original plaintiff became the owner the 3rd defendant-respondent was informed to attorn to the original plaintiff and pay the rent to him either by H or his daughter N who was the landlord or by the original plaintiff himself. The 3rd defendant-respondent cannot be faulted for the deposit of rent with the authorised person in the name of N who was to her knowledge her landlord."

APPEAL from the judgment of the District Court of Matara.

Cases referred to:

1. *Jayasingham* v *Arumugam* – (1992) – 1 SRI LR 350
2. *Hussain* v *Jiffry* – (2002) –1 SRI LR 185
3. *Violet Perera* v *Asilin Nona* – (1996) – 1 SRI LR
4. *Gunasekera* v *Jinadasa* – (1996) 2 SRI LR 11 (DB) (SC)
5. *S.M.F. Fernando* v *W.R.S. Perera* – 77 NLR 220
6. *David Silva* v *Madanayake* – 69 NLR 396
7. *Imbuldeniya* v *De Silva* – (1987) 1 SRI LR 367 (DB) SC

Nihal Senaratne for the plaintiff-appellant

C.E. de Silva for defendant-respondent.

Cur.adv.vult

September, 3, 2004

ANDREW SOMAWANSA, J.

The original plaintiff instituted the instant action seeking a declaration of title to premises No. 39/1, Anagarika Dharmapala Mawatha, Matara, morefully described in paragraph 02 of the plaint, ejectment of 1st, 2nd and 3rd defendants-respondents therefrom, restoration to possession thereof and damages. 01

The original plaintiff's pleaded case was that by virtue of deed No. 1516 dated 20.03.1970 he purchased the aforesaid property from Nirmala Harischandra, that before he purchased the said property C.A. Harischandra acting for and on behalf of or as agent of his daughter the said Nirmala Harischandra had permitted the 10 1st defendant-respondent to occupy the said premises free of rent on the undertaking given in writing by the 1st defendant-respondent to vacate the said premises on or before 30.11.1969, that the 1st defendant-respondent along with his brother the 2nd defendant-respondent and his sister the 3rd defendant-respondent were in occupation of the said premises with the leave and licence of the said C.A. Harischandra, that after the original plaintiff became the owner of the said premises on 20.03.1970 the 1st to 3rd defendants-respondents acting in concert are disputing the title of the plaintiff-appellant and are refusing to hand over vacant possession 20 of the said premises in suit thereby causing damages to the plaintiff.

The 1st to 3rd defendants-respondents while admitting the title of the original plaintiff to the premises in suit denied that the 1st defendant-respondent was in occupation of the premises in suit with the leave and licence of the said C.A. Harischandra and took up the position that before Nirmala Harischandra became the owner of the premises in suit one N.A. Ismail was the owner of the said premises and that the 3rd defendant-respondent took on rent the said premises from the said N.A. Ismail, that after the said 30 Nirmala Harischandra became the owner of the said premises the 3rd defendant-respondent paid rent in respect of the said premises to C.A. Harischandra who was acting as the agent of Nirmala Harischandra, that after the original plaintiff became the owner of the said premises the original owner never informed the 3rd defendant-respondent to attorn to the original plaintiff or to pay rent to

him, that the 3rd defendant-respondent is ready and willing to attorn to the original plaintiff and pay the rent of the said premises to the original plaintiff and that provisions of the Rent Act, No. 7 of 1972 apply to the said premises in suit. In the premises, they prayed for a dismissal of the action of the original plaintiff. 40

At the commencement of the trial, parties admitted the original plaintiff's title to the premises, that the said, C.A. Harischandra was acting as the agent of his daughter Nirmala Harischandra and that provisions of the Rent Act, No. 7 of 1972 apply to the premises in suit. 10 issues were settled between the parties and at the conclusion of the trial the learned District Judge by his judgment dated 22.01.93 and pronounced on 28.01.93 held with the defendants-respondents and dismissed the action of the original plaintiff. It is from the said judgment that the plaintiff-appellant has lodged this appeal. 50

It is contended by the counsel for the plaintiff-appellant that as evidence of the 3rd defendant-respondent would reveal the contract of tenancy ends at the point the 3rd defendant-respondent opted to pay rents to C.A. Harischandra and failed to attorn to Nirmala Harischandra. Thus by her own conduct she has repudiated the contract of tenancy which cannot be revived by making payment to authorized person after the change of ownership from Nirmala Harischandra to the original plaintiff. Therefore he submits that the original plaintiff is entitled to institute action against the defendants-respondents as tresspassers. Furthermore, by signing a letter to vacate the premises in suit by 30.11.69 the defendants-respondents became licensees and were liable to be ejected on the basis of over holding licensees. 60

At this point it would be relevant to examine the evidence led in this case. Evidence of the 3rd defendant-respondent reveals that she came into occupation of the premises in suit in 1962 as the tenant of Ismail and that she was using the premises as her residence, that she paid Rs.62/- per month as rent to the said Ismail and marked the rent receipts issued to her by Ismail as V4 to V16. V3 is dated 19.08.1962 while V16 is dated 31.07.1968, that after she was informed by the said Ismail of the sale of the premises in suit to Nirmala Harischandra she paid the rent to C.A. Harischandra the father of Nirmala Harischandra for one year but no receipts were 70

issued, that as no receipts were issued to her she commenced depositing the rents in the Urban Council of Matara from January 1970. The certified extract from the Rent Register in respect of premises in suit issued by the Urban Council of Matara, was marked V2 which shows Nirmala Harischandra as the landlord and 3rd defendant-respondent as the tenant. This evidence has gone in uncontradicted. It is to be noted that the original plaintiff admits in his pleadings that C.A. Harischandra was acting for and on behalf of and or as agent of his daughter Nirmala Harischandra. Unfortunately C.A. Harischandra was not called to give evidence.

On the other hand, the evidence of the Grama Sevaka called by the plaintiff reveals that as from 1966 the 3rd defendant-respondent as well as the 1st defendant-respondent were in occupation of the premises in suit. Again the evidence of the other witness called by the plaintiff also reveals that when Nirmala Harischandra purchased the property in suit in 1968 the 1st and 3rd defendants-respondents were in occupation.

The plaintiff's position that the defendants-respondents occupation of the premises is based on a license granted by C.A. Harischandra to the 1st defendant-respondent rests solely on the document marked P2 whereby the 1st defendant-respondent had given an undertaking to vacate the premises in suit by 30.11.1969. However the said document marked P2 does not speak of any licence granted to the 1st defendant-respondent. In any event, there is no evidence that the 3rd defendant-respondent who claims to be the tenant of the premises had anything to do with the undertaking given by the 1st defendant-respondent in document marked P2. In fact there is no evidence that the 1st to 3rd defendants-respondents were in occupation of the premises in suit with the leave and licence of the said C.A. Harischandra or Nirmala Harischandra. Taken at its best the said document marked P2 only contains an undertaking given by the 1st defendant-respondent who is not the tenant of the premises in suit and it does not contain any undertaking given by the 3rd defendant-respondent who is the tenant of the premises.

In the case of *Jayasingham* v *Arumugam* [1] the Supreme Court held:

"As the issue was whether in terms of the Rent Act, No. 7 of 1972, a letter given by the tenant that he would vacate the premises, the Roman Dutch law would be irrelevant. Section 22 does not set out as a ground for ejectment the giving of a notice to quit by the tenant to his landlord. Hence the letter given by the tenant will not terminate the tenancy in terms of the Rent Act."

At page 357 *per* Wadugodapitiya, J:

"In considering issue No.4 in the context and within the framework of the Rent Act, No.7 of 1972, it may be mentioned that section 22 of the said Act, as its marginal note indicates, deals with "Proceedings for ejectment", and sets out the grounds for ejectment. However, nowhere does section 22 mention, as a ground, for ejectment, the giving of a notice to quit by the tenant to his landlord. It is therefore clear that the giving of such a notice to quit the premises, or, in the context of this case, the giving of the letter P5 by the appellant to the respondent, stating that he (the appellant) will vacate the premises, will in no way give rise to a cause of action to the respondent, under the Rent Act, No. 7 of 1972, to eject the appellant from the premises in suit." 120 130

Again in the case of *Hussain* v *Jiffry* (2) the facts were:

"The appellant was the landlord and the respondent was the tenant of premises No. 297, Main Street, Colombo 11. On 31.03.1980, the respondent informed the appellant in writing that he (the respondent) was relinquishing his tenancy with effect from that date and requested the appellant to give the premises to one R. There was no evidence of a new tenancy, nor did the respondent give vacant possession of the premises to the appellant.

However, the respondent sent a letter dated 05.07.1980 to the appellant informing her "I continued and still remain the lawful monthly tenant of the premises" with a cheque for rent for the months of April, May and June, 1980, which established that the respondent had not handed over the premises to the appellant. 140

The appellant instituted action for the ejectment of the respondent from the premises, alleging that by this letter dated 31.03.1980 the respondent voluntarily terminated the tenancy and that he was in unlawful occupation from 01.04.1980." It was held:

"In the circumstances, there was no termination of the tenancy and the rule that a tenant cannot contract out of the protection afforded by the Rent Act applies." 150

At 189 *per* Shirani Bandaranayake, J:

> "It is conceded that although the respondent wrote the letter P1 dated 31.03.1980, the premises in question was not handed over to the appellant. Even if the respondent had wanted to relinquish the tenancy at the time he wrote the letter P1, and if the owner has accepted it, still it would be necessary for the premises to be physically handed over by the respondent to the appellant, for the statutory protection to come to an end. Under a contract of tenancy, the owner and the tenant agree and accept the terms of tenancy. Therefore, although the respondent may have contem- 160 plated relinquishing the premises as revealed in P1, he could, nevertheless, unilaterally change his mind and reverse his decision, if he had not handed over the premises to the landlord. In such circumstances the document marked P1 by itself does not serve to terminate the tenancy."

It is to be noted that the document marked VI also indicates that the original plaintiff was well aware that the defendants-respondents were not occupying the premises in suit as licensees but as tenants. VI is a copy of the declaration sent by the plaintiff to the Rent Control Board after he became owner of the premises in suit 170 stating that the 1st defendant-respondent was his monthly tenant.

The plaintiff also seeks to draw support for his position that the 3rd defendant-respondent was not the monthly tenant of the premises from an averment in the answer of the 1st defendant-respondent filed in an earlier unsuccessful action instituted by the original plaintiff for the ejectment of the defendants-respondents from the premises in suit. Answer of the 1st defendant-respondent filed in the said case No. 3248/L was marked P4. It is to be noted that nothing is mentioned of his sister or her residence but the 1st defendant-respondent merely denies that he is the tenant of the 180 premises and goes on to say that he is residing there with his brother. Though the correct factual position of the 1st defendant-respondent's occupation of the premises has not been set out therein the averment in the said answer does not contradict the correct posi-

tion that the 3rd defendant-respondent was the monthly tenant of the premises. In any event, the 1st defendant-respondent in his evidence explained that on discovery of this defect in the answer he instructed his attorney-at-law to rectify the defect and accordingly filed amended answer which was marked P5.

On an examination of the evidence led in this case, I am of the view that on a balance of probability the learned District Judge has come to a correct finding that the 3rd defendant-respondent who was the tenant of the premises in suit from 1962, became the tenant of Nirmala Harischandra with the purchase of the said premises by Nirmala Harischandra and the payment of rent to C.A. Harischandra as agent of Nirmala Harischandra in no way alter the 3rd defendant-respondent's position of a tenant and the privity of contract of tenancy does not end. 190

Counsel for the plaintiff-appellant has in his submissions referred to 3 decisions in support of his contention that a tenant who pays rent to a authorized person in the name of a person who is not the landlord can be ejected in a vindicatory action and that the owner is not bound by a tenancy created by a third party. First being the decision in *Violet Perera* v *Asilin Nona*[3] the facts were as follows. 200

> "The plaintiff's mother after an unsuccessful attempt to evict the defendant gifted the tenanted premises to her daughter the plaintiff. The defendant was duly informed of this by the plaintiff's lawyer and the lawyers who attested the deed, but the defendant called for a copy of the deed from the plaintiff's mother and receiving no response continued to deposit the rent in the Municipality in favour of the plaintiff's mother. The plaintiff filed suit in August 1984 and summons was ordered on 13.11.84. On 14.11.84 the defendant delivered to the Muncipality rent for September and October 1984." 210

It was held:

> "The defendant was not justified in not paying rent to the plaintiff. A request for the documents may have been justified if conflicting claims were being made as for instance by persons claiming under a Last Will, intestacy, and donation. This was not one of those instances. 220

The purpose of section 21 is not to substitute the authorized person for the postal services, or other means of delivery or tender of rent payments (whether made by cheque, money order or otherwise). The purpose is to prevent a tenant who wishes to pay rent to the landlord being placed in real difficulty or dilemma - as where the landlord refuses or evades the acceptance of rent, or there is uncertainty as to who the real landlord is. In those situations, a payment by the tenant which augments the funds of the authorized person is equivalent to a payment to the landlord." 230

In the instant action the evidence reveals that after the 3rd defendant-respondent was informed by Ismail of the sale of the premises in suit to Nirmala Harischandra, the 3rd defendant-respondent paid rent to C.A. Harischandra the father of Nirmala Harischandra who was admitted to be acting for and on behalf of and or as agent of Nirmala Harischandra. In the circumstances one could presume that the landlord Nirmala Harischandra accepted the rent paid to her father as a due and proper payment made to her. It is settled law that tenancy is a contractual relation which may subsist even where the landlord is not the owner of the rented premises. However as receipts for payment of rent were not issued the 3rd defendant-respondent had started depositing rents in the Urban Council, Matara. In the circumstances non issue of receipts would be a sufficient ground for the 3rd defendant-respondent to deposit the rent with the authorised person. 240

The second being the decision in *Gunasekera* v *Jinadasa* [4] the facts were as follows:

"The premises were let in 1960 by the plaintiff-respondent appellant's father to the father of the defendant-appellant respondent. Later in 1970, the plaintiff's father gifted the premises to him, but they neither informed the defendant's father nor called him to attorn, the latter died in 1973, the defendant then attorned to the plaintiff's father, the defendant continued to pay rent to the plaintiff's father, when the plaintiff's father refused to accept rent from 1980, the defendant deposited the rent with the authorized person, to the credit of the plaintiff's father. The father and son by their letter of 23.10.81, informed the defendant of the transfer and 250

called upon him to pay rent to the plaintiff with effect from 16.11.81. The defendant did not reply but continued to occupy the premises, he deposited the rent in the father's name and continued to do so even after his answer was filed. 260

The plaintiff instituted vindicatory action, the trial Judge held that both the plaintiff and his father had called upon the defendant to attorn, to the plaintiff and that the defendant having failed to attorn to the plaintiff was a *trespasser*, and gave judgement for the plaintiff.

On appeal the Court of Appeal reversed the judgment, holding that the defendant had become aware of the plaintiff's title in 1973, and that the father continued to collect rent as the plaintiffs agent, and that the defendant had not deliberately refused to accept him as landlord and had not refused to pay him rent; and that therefore the defendant had not been transformed from a tenant into a trespasser; 270

On appeal".

Fernando, J., held:

"I hold that although the plaintiff had failed to establish his plea that the defendant was in unlawful possession from 16.11.81, yet the evidence showed that the defendant was in *unlawful possession* at the time *the action was* instituted. That was sufficient to entitle the plaintiff to succeed in the vindicatory action brought by him upon the issues framed at the trial." 280

In that case as aforesaid the father and son by their letter dated 23.10.81 informed the defendant of the transfer and called upon him to pay rent to the plaintiff with effect from 16.11.81. However the defendant did not reply but continued to occupy the premises and deposited rent in the father's name and continued to do so even after his answer was filed. In the instant case evidence revealed that by deed No. 1516 dated 20.03.1970 marked P1 the original plaintiff purchased the premises in suit from Nirmala Harischandra. However there was no evidence adduced whatsoever to establish that after the original plaintiff became the owner of the said premises the 3rd defendant-respondent was informed to attorn to the original plaintiff and pay the rent to him either by C.A. Harischandra or his daughter Nirmala who was the landlord or by 290

the original plaintiff himself. In the circumstances the 3rd defendant-respondent cannot be faulted for the deposit of rent with the authorised person in the name of Nirmala Harischandra who was to her knowledge her landlord. However in the pleadings in paragraph 7 of the amended answer of the defendants-respondents the 3rd defendant-respondent has pleaded her willingness to attorn to the original plaintiff and to pay the rent to him in respect of the premises in suit. 300

In the case of *S.M.J. Fernandes* v *W.R.S. Perera*[5] facts were:

> "When a person purchases premises which are subject to the provisions of the Rent Restriction Act, and the tenant who is in occupation of the premises refuses to accept the purchaser as his new landlord on the alleged ground that the rents are payable to a third party, the remedy of the purchaser is to sue the tenant on the contract of tenancy and not by way of a vindicatory action. 310
>
> The 1st defendant was the tenant of certain "excepted" premises and had been paying the rents to the 2nd defendant at the request of the landlord. After the death of the landlord, the plaintiff purchased the premises, with the sanction of the Court, from the administrator of the deceased landlord. When the plaintiff's proctor wrote to the 1st defendant requesting him to attorn to the plaintiff and pay rents to him, the 1st defendant replied that he had been the tenant of the 2nd defendant for the previous 18 years and wanted the plaintiff to obtain a letter from the 2nd defendant to pay rents to the plaintiff and that, unless this was done, he could not attorn to the plaintiff. At no stage did the 1st defendant seek to terminate the tenancy. He was in occupation of the premises and was willing to fulfil his obligations as a tenant to whomsoever was legally his landlord. 320
>
> In the present action the plaintiff sought a declaration of title to the premises and the ejectment of the two defendants from the premises. The trial Court gave judgment in favour of the plaintiff, holding that the 2nd defendant who claimed the property on a verbal gift from the deceased landlord was trespasser and that the 1st defendant, by denying the title of the plaintiff, forfeited the protection of the Rent Restriction Act." 330

It was held:

"Applying the *ratio decidendi in David Silva* v *Madanayake*(6) that the 1st defendant had attorned to the plaintiff and could only be ejected if there was a breach of any of the conditions laid down in the Rent Restriction Act. The plaintiff's action in the present case was therefore misconceived and he could not eject the 1st defendant in a vindicatory action". 340

As contended by counsel for the plaintiff-appellant in the case of *Imbuldeniya* v *De Silva* (7) it was decided:

"It would be quite wrong to include within the definition of "landlord" any person other than the original lessor or someone who derives the title from the original lessor. However the Court went on to hold that the term "landlord" is defined as the person for the time being entitled to receive the rent under the contract of tenancy (s.48 of the Rent Act). Such person need not necessarily be the true owner." 350

In that case the facts were:

"Where the father of the plaintiff let out the premises to the defendant for his own benefit at a time when the plaintiff was not aware she was the owner and without her authority and not as her agent and the plaintiff neither acquiesced in or adopted the letting."

In the instant action the facts were quite different in that C.A. Harischandra the father of Nirmala Harischandra the predecessor in title of the original plaintiff was acting for and on behalf of and or as agent of his daughter Nirmala Harischandra. 360

For the foregoing reasons, I am of the view that on a balance of probability the learned District Judge has come to a correct finding and I see no reason to disturb his judgment. Accordingly the appeal of the plaintiff-appellant is dismissed with costs fixed at Rs.5000/-.

EKANAYAKE, J. - I agree.

Appeal dismissed.