

**JAYASUNDERA**  
**v.**  
**DANTANARAYANA AND ANOTHER**

SUPREME COURT.

SAMERAWICKRAME, J., ISMAIL, J., AND WANASUNDERA, J.

S. C. No. 33/79—C.A. (S.C.) No. 26/77 (I)—D. C. KANDY MR/11766/A.

OCTOBER 28, 1980.

*Civil Procedure Code, section 328—Claim by person dispossessed of property in execution of decree—Objection under sub-section (3)—Transfer of property after institution of action—Meaning of expression—Does it include transfer of possession—Claimant restored to possession.*

*D*, the petitioner-respondent, who was lessee for a long period, of certain premises, on a notarial lease, had himself let them on a monthly tenancy to *E*, the 2nd respondent. The latter on 28th March, 1974 surrendered possession to him and *D* then placed one *N* thereon as his tenant and agent. The appellant *J* had filed action against *E* for the breach of two agreements entered into with him on which *E* had undertaken to transfer to *J* the business owned and carried on by *E* at these premises and to hand over possession. On a decree and writ of possession issued in this action *D* and *N* were ejected, despite their protests, on 29th October, 1974. Thereafter *D* instituted these proceedings stating that he was not a party to that action and not bound by that decree. He prayed that he be placed in possession of the premises.

In answer to this *J* took up the position, inter alia, that by virtue of section 328 (3) of the Civil Procedure Code *D* could not succeed in his application as *E* who was the judgment-debtor in the action filed by *J* has transferred the property to *D* after the institution of the action, within the meaning of that sub-section. After trial, the learned District Judge directed that *D* be restored to possession holding that he was in possession on his own account on the relevant date and also—despite such a plea by *J*—that there was no proof of collusion between *D* and *E*. He also held that the relevant provisions of the law applicable were those of the Administration of Justice Law. On an appeal by *J*, the Court of Appeal held that the Civil Procedure Code applied as its provisions had been re-enacted with retrospective effect. It held however that there had been no transfer of property within the meaning of section 328 (3) and dismissed the appeal. *J* appealed to the Supreme Court.

**Held**

A landlord and tenant may both be considered to be in possession of the leased property and, subject to the tenancy, the landlord has the full and complete right to possession. If the tenancy is terminated by surrender of possession by the tenant and acceptance thereof by the landlord, then the landlord's possession is enlarged to full and complete possession. Although the words "transferred the property" in section 328 (3) of the Civil Procedure Code have been correctly interpreted to include *transfer of possession* of property, such a surrender of possession by a tenant does not amount to a transfer within the meaning of this section unless in a particular case there are facts or circumstances tending to show the contrary. Accordingly, *D* the petitioner-respondent was not disentitled to the remedy he sought under section 328 by reason of the operation of the provisions of Sub-section 3 of that Section.

**Cases referred to**

- (1) *Kanagasabhai Pather v. Poornathammal*, A.I.R. (1947) Madras 458.  
(2) *Umahirayo v. Ramsaran*, A.I.R. (1954) Madhya B. 46.

APPEAL from a judgment of the Court of Appeal.

*H. L. de Silva*, with *S. Sivarasa*, for the appellant.

*Nimal Senanayake*, with *L. A. T. Williams*, *K. Gunaratne*, *Miss S. M. Senaratne* and *Mrs. A. B. Dissanayake*, for the respondent.

*Cur. adv. vult.*

March 6, 1981.

**SAMERAWICKRAME, J.**

Dantanarayana, the petitioner-respondent, alleged that he had been lessee of the premises on notarial leases for a period of over 40 years. At the time relevant to the proceedings, Eliyas, the 2nd respondent, had been his monthly tenant. On 28.3.74 the 2nd respondent surrendered possession of the premises to him and he had placed one Nadesapillai in possession as his tenant and agent. On 29th October, 1974, the petitioner and Nadesapillai, despite their protests, were ejected from the premises on a writ of possession issued in an action filed by Jayasundera, the 1st respondent-appellant, against Eliyas, the 2nd respondent. The petitioner-respondent stated that he was not a party to that action and was not bound by the decree. He prayed that he be placed in possession of the premises. The 1st respondent-appellant in answer stated that persons unlawfully in occupation were lawfully ejected by the Fiscal. He alleged collusion between Eliyas, the 2nd respondent, and Dantanarayana, the petitioner-respondent. He also submitted that the application was badly constituted, misconceived and not tenable in law. He relied on section 328 (3) of the Civil Procedure Code alleging that the 2nd respondent Eliyas who was the judgment-debtor had transferred the property after the institution of the action to the petitioner-respondent, Dantanarayana.

Learned Counsel who appeared in that action for the petitioner-respondent raised the following issues:

- “(1) Was the plaintiff in possession of premises No. 94, D. S. Senanayake Veediya, Kandy, through one Nadesapillai, who was a tenant and agent on 29.10.1974?  
(It is admitted that the plaintiff was not a party to Action No. D. C. Kandy MR 11766).

(2) Was the plaintiff and the said Nadesapillai dispossessed upon a writ issued in the District Court of Kandy in case No. MR 11766 on 29.10.1974?

(3) Was the plaintiff bound by the Decree entered in D. C. Kandy Case No. MR 11766?

(4) If issues 1, 2 and 3 are answered in the affirmative, is the plaintiff entitled to an Order restoring him to possession of the aforesaid premises?

(The plaintiff and the 2nd defendant admit that the plaintiff had rented out the said premises in suit to the 2nd defendant Eliyas and the 2nd defendant surrendered possession of the said premises to the plaintiff on 28.3.1974).

Learned Counsel who appeared in that action for the 1st respondent raised the following issue :

“(5) Is the plaint of the plaintiff badly constituted misconceived and not maintainable in law in view of sub-section (iii) of section 328 of the Civil Procedure Code?”

The learned District Judge accepted the evidence of the petitioner-respondent and a witness called by him to the effect that the petitioner-respondent was in possession on his own account at the relevant date. He held that there was no proof of collusion between the petitioner-respondent and the 2nd respondent and held that the provisions of law which were applicable were the relevant provisions of the Administration of Justice Law which had no provision corresponding to section 328 (3) of the Civil Procedure Code. He directed the petitioner-respondent to be restored to possession.

On an appeal filed by Jayasundera, the 1st respondent-appellant, the Court of Appeal held that as section 328 (3) of the Civil Procedure Code had been re-enacted with retrospective effect, the matter had to be decided upon that provision. The Court of Appeal further held that the tenant Eliyas was in immediate possession and the landlord Dantanarayana in mediate possession, of the premises, and that the surrender of possession by Eliyas to Dantanarayana was not a transfer of the property within the meaning of section 328 (3) of the Civil Procedure Code. The

Court of Appeal accordingly dismissed the appeal. The respondent-appellant has filed an appeal to this Court with leave granted by the Court of Appeal.

It must be noted that at the commencement of proceedings in the action filed by the 1st respondent-appellant against Eliyas, the 2nd respondent, an admission was recorded that Eliyas was the owner of the premises and that the action proceeded without any admission by the 1st respondent-appellant of any right in Dantanarayana and the claim made by the 1st respondent-appellant in the action, appeared to be adverse to Dantanarayana.

Section 328 (3) of the Civil Procedure Code reads:

“Nothing in this section or section 327 applies to a person to whom the judgment-debtor has transferred the property after the institution of the action in which the decree is made.”

It has been held on an interpretation of the corresponding provision in the Indian Code of Civil Procedure that ‘transfer of property’ referred to in the provision would include transfer of possession of property. Vide *Kanagasabhai Pather v. Poornathammal* (1) and *Umahirayo v. Ramsaran* (2). Learned Counsel for 1st respondent-appellant challenged the finding of the Court of Appeal that there was no transfer of property within the meaning of the provision because the transfer was by a person in immediate possession of the premises to one who had mediate possession of it. Learned counsel for the 1st respondent-appellant stressed that a tenant for the period of his tenancy has the sole right to occupy the premises and that he may exclude even his landlord. He further pointed out that Salmond alone of the text writers referred to a landlord having mediate possession and a tenant immediate possession and stated that even that writer was dealing only with a case of an occupation or holding by a tenant at will. He pointed out that Keeton has taken the view that a bailor, pledgor and a landlord whom Salmond regarded as having mediate possession had no possession at all, but a right to recover possession at a future date.

It would appear that the English Law places greater stress on the aspect of the custody of property rather than the mental element. The Roman Dutch Law appears to be different. Morice, “English and Roman Dutch Law”, p.70, states:

“Although in English Law possession is said to consist of two elements—physical contact and intention to possess—the latter element does not assume the same prominence as in the shape of the *animus domini* (intention of an owner) it has assumed in Roman and Roman Dutch Law. In English Law the intention to possess is implied from the act which evidences physical control; and even in circumstances where the intention to possess does not in fact exist, as in the case of concealed treasure, legal possession is still acquired. In general, it may be said in English Law physical control gives legal possession, unless the apparent possessor holds only as agent or servant of another.”

In Roman Dutch Law much more importance is given to the mental element. Voet *XLI-2-3* states:

“Possession is divided according to the ruling given by me above into natural and civil; and this in a twofold manner. In the first place indeed that form of it is called “natural” which is composed of an act, as when a person possesses with his body. . . .

But that form is called “civil” which is made up of law, as when a person possesses with his mind, and thus is feigned by law to possess what in actual fact he does not hold. In this way, both an owner and a possessor in good or in bad faith, and even a thief and a robber are understood to hold possession through the body of a tenant, lodger, borrower for use, repository and the like. . . .”

He further states that there are dicta that more persons than one cannot at the same time possess the same thing in whole but states that this refers to “such possession as is held with the body” i.e., physical control. It would appear that two persons can be considered to be in possession of the same thing in whole at the same time for different purposes and with different legal effects, vide Voet *41-2-5*.

Even assuming that in modern law a tenant is regarded as having possession, there is no reason why a landlord and tenant may not be regarded as both possessing though with different rights and with different effects. In a short terse dictum in a judgment which was not approved by the Privy Council on another point, Lawrie, J.

has set out the facts which render a person who lets out premises a possessor. He said :

“he leased it and took the rents; he repaired it and paid the taxes.”

Further, a person who lets premises may in certain circumstances be entitled to claim compensation for improvements effected by his lessee or tenant on the basis that he is in bona fide possession of the premises. The fact that a person who lets property is entitled to rent shows that he has in a sense enjoyment or possession of property. This is not so clear when the rent is paid in the form of money but where it takes the form of part of the produce of the property it is more apparent. Dealing with a provision in the Indian Code of Civil Procedure, corresponding to section 328, Venkatarama Iyer, J. said :

“The decisions in which the landlord was held entitled to file an application under Order 21 Rule 100 when the person actually dispossessed is the tenant did not form an exception to this rule. There the receipt of rent by the landlord is tantamount to actual possession by him. The position might be thus stated : when lands are leased, both the landlord and tenant together share the produce in such proportion as they agree: both of them are thus equally in possession and both of them are entitled to take action under Order 21 Rule 100” — Vide A.I.R. 1954 Madhya B. 46 at 48.

I am, therefore, of the view that both the landlord and tenant may be considered to be in possession of property.

Where a tenant hands over possession of the premises to a third party, possession passes from one who has it to one who does not have it, and there is a transfer of possession. This appears to have been the position in the case of *Kanagasabhai Pathar v. Poornathammal*(1). The judgment-debtor who was sued in that case appears to have handed over possession not to the landlord from whom he held the property on payment of rent but to a third party. In the present case, Dantanarayana the petitioner-respondent was the landlord and was in possession through his tenant Eliyas. He was a notarial lessee and had the rights of owner for the period of his lease. Subject to the tenancy he had given to Eliyas he had full and complete right of possession. If the tenancy

was terminated full possession of the premises accrued to him. One mode of termination of tenancy was the surrender of possession by the tenant and acceptance of such surrender of possession by the landlord in which event the tenant could be free of liability for payment of rent and the landlord's possession would be enlarged to full and complete possession. In respect of such surrender of possession by a tenant, it appears to me that all that the tenant requires to do, and does, is no more than to relinquish possession: whereupon full possession accrues to the landlord. Section 328(3) refers to transfer of the property and though these words have correctly been interpreted to include transfer of possession of property, nevertheless it is important to bear in mind that what the section actually refers to is transfer of the property. It appears to me that surrender of possession by the tenant does not amount to transfer of property within the meaning of section 328 (3) unless in a particular case there are facts or circumstances tending to show the contrary. A surrender of possession by the tenant may in certain circumstances cloak or, amount to, transfer of property. In the instant case, the learned trial Judge gave his mind to the question whether there had been collusion between the tenant and the landlord but he held that no collusion had been proved.

Jayasundera, the 1st respondent-appellant, filed the action against Eliyas the 2nd respondent in which the writ of possession ultimately issued for breach of two agreements by which Eliyas undertook to transfer to him the business owned and carried on by him at the premises and to hand over possession of the premises. In the prayer to the plaint, he asked that the defendant be ordered to hand over possession of the business carried on by him in the premises and the said premises to the plaintiff or in the alternative, for the return of the sum of Rs. 11,000 and for damages in a sum of Rs. 40,000. These were the reliefs that were claimed in the action even on the 28th March, 1974, when Eliyas surrendered possession to Dantanarayana.

In August 1974, there were proceedings in the action. Before the framing of issues, an admission was recorded that Eliyas was the owner of the premises. Thereafter Jayasundera gave evidence and his counsel applied for a date before the conclusion of his evidence on an objection being taken to a document being produced on the ground that it was not listed. On the 16th September, 1974, the plaint was amended and a prayer was added

asking that the defendant, his sub-tenants, agents, servants and those who are claiming through or under him be ejected from the premises and the plaintiff be quieted in possession thereof. Thereafter, on a consent motion filed without any further proceedings, decree was entered on the 13th October, 1974, under which writ of possession was issued.

Jayasundera's position was that Eliyas had told him that the landlord was the owner of the premises, viz., one Emil Perera. Jayasundera said in evidence that he contacted Emil Perera and attempted to purchase the premises from him but that before the matter was finalised, Emil Perera died. He also said that he had purchased the undivided share of Carl Perera, who was the son of Emil Perera. In cross-examination, he admitted that Dantanarayana came to the premises and obtained the rent from Eliyas but that Eliyas told him that Dantanarayana was taking the rent to be handed over to the owner, Emil Perera. Dantanarayana, however, had a notarial lease of the premises from Emil Perera, which has been produced. In these proceedings, we are not concerned with the respective rights of the parties but only with such matters as are relevant to the applicability of the remedy under section 328 of the Civil Procedure Code. The mere entry upon the premises under writ of possession of a person who does not acknowledge any rights in him and whose claim is apparently adverse to him derogates from the possession of the owner who has let the premises as it precludes such owner from possessing the premises through a tenant and obtaining rent in respect of his occupation; but the displacement of a person placed in occupation by the owner amounts, in my view, to dispossession of the owner.

The learned District Judge held that the petitioner-respondent was in possession of the premises on his own account and was not bound by decree in the action in which writ of possession issued. He accordingly made order for the restoration of the petitioner-respondent in possession. Upon appeal, the only matter that appears to have been raised was the question whether the petitioner-respondent was disentitled to the remedy under section 328 in view of the provision in section 328(3). The Court of Appeal held that he was not disentitled on the ground that surrender of possession by the tenant in the circumstances of this case did not amount to a transfer of the property.

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For the reasons given above, I am in agreement with the view of the Court of Appeal. The appeal is, accordingly, dismissed with costs.

ISMAIL, J.—I agree.

WANASUNDERA, J.—I agree.

*Appeal dismissed.*