

NANAYAKKARA

v.

NAVARATNE

SUPREME COURT.

WIMALARATNE, J., COLIN-THOMÉ, J. AND RODRIGO, J.

S. C. APPEAL No. 55/81 – C. A. APPEAL No. 382/74 (F) – C. R. MATALE
No. 16152.

OCTOBER 1, 1984.

Landlord and Tenant – Tenant evicted under partition decree from premises to which Rent Restriction Act applied – Right of Tenant to sue for restoration to possession – Actio Conducti – Civil Procedure Code, section 328.

The plaintiff, the tenant of one Davith Appuhamy occupied premises situated on a land in respect of which a partition suit was filed. Davith Appuhamy who was the 22nd defendant died during the pendency of the action and in his room Agnes (the present

appellant), her sister and the sister's husband were substituted as 25th, 24th and 23rd defendants respectively. The plaintiff treated Agnes as his landlady. By the final decree, a lot in which was situated the house occupied by the plaintiff was allotted to Agnes, her sister and the sister's husband. Although the Rent Restriction Act applied to the premises occupied by the plaintiff, Agnes, her sister and sister's husband took out writ under section 62 of the Partition Act and had the plaintiff evicted. Thereafter they sold the premises to a third party who installed his own tenant in the premises. The plaintiff filed this suit naming Agnes as defendant, to be restored to possession. The District Judge dismissed the action as Agnes had parted with possession but the Court of Appeal reversed this finding.

Held –

- (1) Privity of contract had been established between the tenant (plaintiff) and the new owner (Agnes).
- (2) Although the plaintiff failed to seek redress in the partition suit yet the plaintiff was not debarred from invoking the provisions of s. 328 of the Civil Procedure Code.
- (3) One of the duties of a landlord is to guarantee to the tenant quiet possession of the premises let and a personal bona fide action the *actio conducti* (not possessory action) is available to the tenant to claim the use and occupation of the property let and the performance of the duties imposed on the landlord. The action may be brought by the tenant or by any person who succeeds him in his capacity of tenant and it lies against the landlord or any person who succeeds him in his capacity of landlord.

APPEAL from the judgment of the Court of Appeal.

J. W. Subasinghe, P. C. with Miss E. S. M. Edirisinghe for defendant-appellant.

A. P. Niles with Lalith Gamlath for plaintiff-respondent.

Cur. adv. vult.

October 22, 1984.

WIMALARATNE, J.

The plaintiff-respondent was the monthly tenant of premises No. 12, Matala Road, Rattota from about the year 1954. The premises were subject to the Rent Restriction Act. The original landlord was one W. P. Davith Appuhamy, the father of the defendant-appellant. An action (D. C. Matala case No. P263) was instituted for the partition of the land in which the premises are situated, and Davith Appuhamy was the 22nd defendant in that action; the plaintiff-respondent was however not a party. Davith Appuhamy died in 1965, during the pendency of the partition action, and the defendant-appellant Agnes, her sister and sister's husband were substituted as the 25th, 24th and 23rd defendants respectively in the room of the 22nd defendant. It is common ground that after the death of Davith Appuhamy, Agnes was

recognised as the landlady. Agnes had once sought to have the plaintiff ejected, but without success ; that was after Davith Appuhamy's death, but before final decree.

Final decree in the partition action was entered on 13.05.1969, and lot 11 in partition plan No. 903C, in which lot the premises in question are situated, was allotted to the 23rd, 24th and 25th defendants. On 09.03.1971 they made an application under section 62 of the Partition Act (Cap. 69) for delivery of possession of lot 11 to them. The fiscal effected delivery on 16.03.1971 by ejecting the plaintiff and his family, and placing the defendants in possession. Four days later, on 21.03.1971, the defendants sold and transferred the premises to one Peiris on deed D9 and Peiris's tenant one Samarasinghe went into occupation. The plaintiff instituted the present action against Agnes on 22.03.1971 seeking that he be put, placed and quieted in possession as tenant under her, and that an order for ejectment be entered against her and her agents. He reserved the right to claim damages in a separate action.

Although the learned trial Judge correctly held that the plaintiff's tenancy rights were not wiped out by the final decree entered in the partition action, he dismissed the plaintiff's action for the reason that the defendant had divested herself of title the day before this action was instituted, and hence no relief could be granted against her.

The Court of Appeal reversed this finding of the trial judge holding that the defendant did not cease to be the landlord of the plaintiff on the mere sale of the property, until privity of contract was established between the tenant and the new owner. Answering another contention made on behalf of the defendant, the Court of Appeal took the view that notwithstanding the failure of the plaintiff to seek redress in the partition action itself by invoking the provisions of section 328 of the Civil Procedure Code, yet the plaintiff was not debarred from asking for a decree in a separate action for the restoration of possession on the basis of the tenancy. Answering yet another contention, that of the futility of a decree for possession against the defendant who was out of possession and because such a decree can never be enforced against the defendant as long as the tenant of the vendee is in possession, the Court of Appeal took the view that that question does not arise at this stage, and could only arise when the plaintiff seeks to enforce the decree.

It seems to me that the Court of Appeal was correct in its conclusion on all the above findings. Learned Counsel for the defendant-appellant contended before us that there is no basis for the present action either on any principle of the common law or on any statutory provision. Learned Counsel for the plaintiff-respondent argued that this is a possessory action instituted by a tenant in possession who had been ousted. I do not think so, because a possessory action can be instituted only if a person in possession has been dispossessed of immovable property otherwise than by process of law. Here the plaintiff had been dispossessed as a result of an order for delivery of possession entered under the Partition Act. The fact that the plaintiff's rights were not wiped out by the partition decree is a different matter altogether.

What then, is the basis for the present action? Admittedly the defendant was the plaintiff's landlord on the date of ejectment. One of the duties of a landlord is to guarantee to the tenant quiet enjoyment of the premises let. The landlord is under a duty not to interfere with the tenant's occupation. He commits a breach of that duty if he either dispossessed the tenant or if he disturbs him in his beneficial enjoyment. Dispossession may take the form of actual ejectment of the tenant from the leased premises, or on any conduct by the landlord having the same effect – *Wille, Landlord & Tenant in South Africa*. (4th Edition) page 139.

The 'actio conducti' is the action available to the tenant in claiming from the landlord the use and occupation of the property let, and the performance of the duties imposed on the landlord. *Wille, page 123; Voet 19.2.14*. The action may be brought by the tenant or by any person who succeeds him in his capacity of tenant and it lies against the landlord or any person who succeeds him in his capacity of landlord. The action is a personal bona fide action which is granted to the lessee and to his heirs against the lessor and against his heirs – *Voet 19.2.14* Gane's translation Vol. 3 page 418).

The conduct of the landlord had the effect of dispossessing the tenant. The landlord was a party to the application for an order for delivery of possession. She proceeded with the fiscal to execute that order. The fiscal ejected the plaintiff and his family on that order. The fiscal thereupon placed the landlord in possession. This was conduct amounting to dispossession by the landlord himself, by abuse of the

process of Court. A cause of action therefore arose to the plaintiff to sue the defendant to have himself restored to the possession of the premises as well as for damages.

This Appeal is accordingly dismissed with costs.

COLIN THOMÉ, J. – I agree.

RODRIGO, J. – I agree.

Appeal dismissed with costs.
