

THEIVANDRAN
v.
RAMANATHAN CHETTIAR

SUPREME COURT.

SHARVANANDA, C.J., COLIN-THOME, J. AND ATUKORALE, J.

S.C. No. 40/83.

C.A. No. 485/74 (F).

D.C. COLOMBO 13560/L.

MARCH 17, 18 AND 21, 1986.

Landlord and Tenant – Vindictory suit – Title not disputed by defendant – Sub-tenant or licensee – Claim for ejectment resisted by defendant claiming possession as partner of tenant – Tenancy not terminated – Burden of proof.

The occupation by a sub-tenant or licensee of the tenant is not, in law, unlawful occupation. The statutory protection afforded to a tenant can always be availed of by his sub-tenant or licensee except of course where such protection had ceased to exist by the tenant surrendering possession to the landlord or by eviction of the tenant by decree of a competent court.

When the legal title to the premises is admitted or proved to be in the plaintiff the burden of proof is on the defendant to show he is in lawful possession. But where the premises have been let out if the landlord qua owner of the premises chooses to sue for ejectment a third party in occupation, the burden will then be on the plaintiff to show that the right of the tenant to be in possession had come to an end and that the right of possession had reverted to him and that he is thus entitled to sue for recovery of possession from such third party. As here the tenancy was admitted the burden was on the plaintiff to show that the defendant had got into possession and was remaining in unlawful possession of the premises without the consent, acquiescence or licence of the tenant and was questioning his title to the premises in suit. Until the tenancy is terminated and decree of ejectment obtained against the tenant the plaintiff cannot reach the defendant. The defendant was carrying on business in partnership with the tenant in the premises and the partnership had not ceased. Hence it cannot be said the defendant was in unlawful occupation.

Cases referred to:

(1) *Ibrahim Saibo v. Mansoor* – (1953) 54 N.L.R. 217, 224.

(2) *Zubair v. Sultan Kannu* – Sri Kantha's Law Reports Vol. 11 – p. 87.

APPEAL from judgment of Court of Appeal.

K. N. Choksy, P.C. with S. Mahenthiran, V. Thevasenathipathy, Britto Muthunayagam and Miss J. Rodrigo for defendant-appellant.

Dr. H. W. Jayewardene, Q.C. with N. R. M. Daluwatte, P.C. and Miss T. Keenawinne for plaintiff-respondent.

Cur. adv. vult.

May 7, 1986.

SHARVANANDA, C.J.

The plaintiff-respondent an Indian citizen instituted by his attorney, this action, for a declaration of title to, and, for ejection of the defendant from premises No. 142, Sea Street, Colombo 11. In his plaint he stated that the defendant is estopped from denying and disputing the title of the plaintiff to the said premises, as the defendant was falsely claiming to be the tenant thereof. The defendant filed answer denying that he had at any time claimed to be a tenant under the plaintiff in respect of the premises in suit. The defendant further stated that one Sri Renganathan "had been for several years and still is a tenant of the premises in suit under the plaintiff and the said tenancy is still in force and no grounds exist for its termination." The defendant stated that he was in occupation of the premises in suit under an agreement entered into with the said Sri Renganathan by Deed No. 67 dated 21.1.1972 and attested by C. Sri Kanthan, Notary Public. The defendant specifically pleaded that the plaintiff had chosen to file this rei vindicatio action to evade the provisions of the Rent Act.

The case proceeded to trial on the following issues:—

1. Is the plaintiff the owner of the premises described in the schedule to the plaint?
2. Is the defendant in wrongful and unlawful occupation of the said premises from 1.4.1972?
(both parties agree that the damages per month is Rs. 150).
3. If issues 1 and 2 are answered in favour of the plaintiff, is the plaintiff entitled for judgment as prayed for in the plaint?

After trial the District Judge dismissed the plaintiff's action. The plaintiff appealed to the Court of Appeal against the said judgment. The Court of Appeal allowed the appeal preferred by the plaintiff. The defendant has appealed to this Court from the judgment of the Court of Appeal.

The case of the plaintiff that he was the owner of the premises was never disputed by the defendant. The defendant resisted only the prayer for ejection.

The only witness for the plaintiff was one Letchuman Chettiar who was plaintiff's attorney for over thirteen years. Though, in the plaint, the plaintiff had stated that the defendant was claiming to be the tenant of the premises and this allegation was denied by the

defendant, the plaintiff's attorney did not seek to substantiate the allegation that the defendant was claiming to be the tenant of the premises. The evidence does not support the allegation that the defendant was claiming to be the tenant of the premises in suit. The allegation that the defendant was claiming to be a tenant of the premises is a false allegation, falsely made for the purpose of founding the action for ejection on the ground that the defendant was claiming to be the tenant to the exclusion of the actual tenant, in competition with him. The attorney's evidence in examination-in-chief was that Sri Renganathan was the tenant of the premises from 1958, and that he was running a hotel called "Komathi Vilas" in the premises. There is no evidence to suggest that Sri Renganathan's tenancy has been terminated by surrender of possession or that the defendant was claiming adversely to Sri Renganathan. The attorney stated that the rents were paid by the defendant in the name of Sri Renganathan. He further stated that "Komathi Vilas", was still being run in the premises in suit. The attorney had in the declaration 'D1' dated 28.7.1972, made under the provisions of the Rent Act, declared that Sri Renganathan was the tenant of the premises. He further stated that before Renganathan left for good in April 1972, for India, he had sent a notice asking Sri Renganathan to quit, but the notice was not complied with. This notice has not been marked in evidence and has not been relied on by the plaintiff. The plaintiff's attorney further testified that the defendant had, after April 1972, remitted to him in the name of Sri Renganathan the rents through the Rent Control Board. The defendant in evidence testified that prior to his departure to India, Sri Renganathan had appointed him as his attorney, by power of attorney marked D7 dated 21.1.1972. This power of attorney authorises the defendant to act "for me and on my behalf and in the name of me in respect of my firms "Komathi Vilas" and "Kalyani Corporation" and tenancy of premises No. 142, Sea Street, Colombo 11, and to act for me in connection with the tenancy of No. 142, Sea Street, Colombo, remit rent to the landlord and doing all things connected therewith."

The premises in question are business premises governed by the Rent Act No. 7 of 1972.

It is not the case of the plaintiff that the tenancy of Sri Renganathan had been terminated and a decree for eviction entered against him in terms of the provisions of the Rent Act. Sri Renganathan continues to enjoy the statutory protection of the Rent Act, even if his tenancy had

been terminated, by notice to quit as alleged by the plaintiff's attorney. As stated by the Divisional Court in *Ibrahim Saibo v. Mansoor* (1):

"The only two ways in which the statutory protection comes to an end are

1. By the handing back of the premises to the landlord.
2. By the order of a competent court that is to say a court acting with jurisdiction."

It is in the backdrop of Sri Renganathan's continued tenancy of the premises in suit that one has to examine the plaintiff's complaint that the defendant is in unlawful occupation of the premises from 1st April 1972.

The occupation by a sub-tenant or licensee of the tenant is not, in law, unlawful occupation. The statutory protection afforded to a tenant can always be availed of by his sub-tenant or licensee except of course where such protection has ceased to exist. An owner of a land has the right to possession of it and hence is entitled to sue for the ejectment of a trespasser. In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession. But, where the evidence shows that the plaintiff has let out the property to a tenant and that it is the tenant who is entitled to the possession of the premises, it is the tenant who may institute action to recover possession of the premises from persons who are in unlawful possession as against him. Vide *Zubair v. Sultan Kannu* (2). A contractual or statutory tenant, has the locus standi to sue for the ejectment of any person who disturbs his possession. A landlord who has parted with the possession of the property to the tenant, cannot therefore sue for the ejectment of a third party in occupation if such third party entered into possession of the premises with the consent or licence of the tenant. A tenant may be in occupation of the premises by himself, his agent, his licensee or his sub-tenant. Hence in the case of premises which have been let out if the landlord qua owner of the premises, chooses to sue for ejectment a third party in occupation, the burden will then be on him to

show that the right of the tenant to be in possession had come to an end and that the right of possession has reverted in him and that he is thus entitled to sue for recovery of possession from such third party. Had Sri Renganathan, the tenant, abandoned or surrendered possession of the premises when he left for India, the plaintiff might then have treated the tenancy of Sri Renganathan as determined and thus having become entitled to possession sued for the ejectment of the defendant; the defendant cannot remain in occupation after the expiration of the main tenancy. The plaintiff had appeared to have had such a situation in mind when he falsely alleged that the defendant was claiming to be the tenant of the premises. Though the plaintiff had not disclosed the fact in his plaint that the premises in suit had been let by him to Sri Renganathan and that the tenancy was still in subsistence at the time of the suit, yet on the evidence in examination-in-chief of the plaintiff's attorney itself it transpired that the premises had, at the time the present action was filed, been let to Sri Renganathan and the statutory protection given to the tenant had not come to an end and that Sri Renganathan had not surrendered possession of the premises to the plaintiff. In that state of facts the burden of proof is, in my view, on the plaintiff to show that the defendant had got into possession and was remaining in unlawful possession of the premises without the consent, acquiescence or licence of the tenant, Sri Renganathan and was questioning his title to the premises in suit. In such a context the ordinary rule applicable in a *rei vindicatio* action that once title is proved or admitted the defendant has to justify his possession to resist ejectment does not apply. In the instant case it is not contested by the plaintiff that the defendant got into occupation of the premises with the consent, acquiescence or licence of Sri Renganathan, the tenant. The plaintiff does not dispute that the defendant got into possession of the premises as partner of Sri Renganathan of the business of "Komathi Vilas" with the consent of Sri Renganathan but he states that as the partnership had terminated on 1.4.1972, the defendant has no more any right to remain in possession of the premises after that date. But even assuming, as opposed to the finding of fact (*infra*) that the partnership had on that date been terminated, it does not follow that the plaintiff will be able to sue the defendant over the head of the tenant who let the defendant into the premises. The only person who could have sued the defendant in ejectment on the expiration of the partnership was Sri Renganathan, who as tenant, was entitled to be in possession of the premises at that relevant time. It is only after the plaintiff had successfully sued Sri

Renganathan in ejection under the provisions of the Rent Act and brought to an end the statutory protection of the tenant that he could have proceeded against this defendant on the ground of his being in unlawful possession of the premises as against him. The present action against the defendant by the plaintiff is therefore misconceived. The plaintiff cannot reach the defendant without first getting a decree of ejection against Sri Renganathan.

The Court of Appeal has not addressed its mind to this preliminary legal question which arises in the case. In view of the admitted fact that the premises in question had been let to Sri Renganathan and that his tenancy has not been terminated by decree of a competent court, I hold that the plaintiff cannot in law maintain the action for the ejection of the defendant. In the circumstances disclosed, there is no legal basis for a decree for the ejection of the defendant.

The defendant in his answer stated that on and after 21.1.1972, he has been in occupation of the premises in suit under Deed No. 67 dated 21.1.1972, marked D2 entered into with Sri Renganathan. The District Judge has held that the defendant is in lawful occupation of the premises by virtue of the partnership agreement D2 with Sri Renganathan, who, although he has left this country and gone back to India, still continues to remain the tenant of the plaintiff and carry on hotel business in partnership with the defendant.

Sri Renganathan is an Indian citizen, who was in the island on a visa which expired on 2.2.1972. He was arrested and deported on 13.4.1972.

It would appear from the Certificate of Registration of the firm of "Komathi Vilas" dated 18.1.1956 (P3) issued under the Business Names Ordinance, Sri Renganathan had been carrying on the business of an eating house (hotel) called "Komathi Vilas" and of "Kalyani Corporation" in the premises in suit from 5.7.1943 in partnership with one Kandasamy Pillai. According to the Certificate of Business Registration dated 24.1.1972 a change was effected in the partners in the business as from 1.1.1972. S. Kandasamy Pillai retired from the partnership and a new partner S. Thevendran (the defendant) was admitted to the firm. The Certificate of Business Registration Name dated 17.3.1972 (P4A) discloses the name of the partners of the firm as M. Sri Renganathan and S. Thevendran. The change referred to in P2 is consequent to the Partnership Agreement No. 67 dated 21.1.1972, marked D5. This agreement was entered into by Sri

Renganathan and Theivendran (defendant) and one Vythialingam to carry on the two businesses of "Komathi Vilas" and "Kalyani Corporation" in partnership in the premises in suit. Clause 5 of the Agreement provides as follows:

"Hereinafter the business shall be registered with the Registrar of Business Names in the name of the party of the first part (defendant) only who shall hold the said business in trust for himself and the parties of the 2nd and 3rd part,"

Clause 16 of the Agreement provides:

"that the tenancy of premises No. 142, Sea Street, Pettah, in Colombo, shall continue in the name of the party of the third part (Sri Renganathan) during the continuance of the partnership, but such tenancy shall be the property of all three partners."

Thereafter on 1.4.1972, the defendant and Sri Renganathan, jointly informed the Registrar of Business Names, of a change viz: that Sri Renganathan had ceased to be a partner and S. Theivendran (the defendant) was the sole proprietor of the Business of "Komathi Vilas" and "Kalyani Corporation" as from 1.4.1972. The Certificate of Registration, P5A dated 14.4.1972, issued pursuant to the statement of change dated 1.4.1972 (P5) shows that the sole proprietor of the business of "Komathi Vilas" was S. Theivendran (the defendant). The evidence on record shows that Sri Renganathan had left the island on 13.4.1972. Counsel for the plaintiff submitted that the documents P5 and P5A unequivocally show that the earlier partnership between Sri Renganathan and the defendant had ceased to exist by 1.4.1972 and that the partnership agreement evidenced by Deed No. 67 (D5) had come to an end and hence the defendant was from 1.4.1972 in occupation of the premises not as a partner of "Komathi Vilas" along with Sri Renganathan but as sole proprietor of "Komathi Vilas" and "Kalyani Corporation" and that the ground on which the defendant sought to justify his occupation of the premises in suit namely, partner with Sri Renganathan of the business of "Komathi Vilas" run in the premises in suit has ceased to be valid.

The defendant stated in evidence that P5 and P5A do not represent the true facts and that his partnership with Sri Renganathan continued to subsist even after the declarations in P5 and P5A. He gave a tenable explanation for the declaration in P5 and P5A by him and Sri Renganathan viz: that he had become the sole proprietor of the partnership business from 1.4.1972. He said that he was a Jaffna

Tamil, while Sri Renganathan and Vythialingam were Indians and that for the sake of obtaining quotas of rice and flour from the Government they agreed to register the business in his name only. This was embodied in clause 5 of Agreement D5 which also provides that he should hold the business in trust for all the three partners.

The Court of Appeal has come to the conclusion that the partnership referred to in D5 has ceased to exist by 1.4.1972 on the basis of P5 and P5A. On the other hand the trial judge has addressed his mind to the question whether the business registered under D5 by the defendant and Sri Renganathan was a genuine business or a fraudulent business and has after examining the oral and documentary evidence led in the case come to the conclusion that the partnership business was a genuine one and that the defendant was carrying on the business along with Sri Renganathan even after 1.4.1972. Counsel for the plaintiff sought to demonstrate that the statement of change P5 was not consequential to clause 5 of the partnership Agreement P5. The trial judge had on the evidence come to the conclusion that Sri Renganathan continued after 1st April 1972 to have interest over the business of "Komathi Vilas" and had accepted the defendant's explanation as to how the declarations in P5 and P5A came to be made. Though I appreciate the force of counsel's argument it cannot be stated that the trial judge erred in accepting the defendant's evidence and holding that the defendant is in fact continuing to carry on business in partnership with Sri Renganathan even after 1st April 1972. Apart from the aforesaid declarations in P5 and P5A, the plaintiff led no evidence to show that Sri Renganathan and the defendant had ceased to be partners. In terms of section 109 of the Evidence Ordinance, the burden of proof was on the plaintiff to establish that Sri Renganathan and the defendant had from 1.4.1972 ceased to stand in the relationship of partners. It is to be noted that by letter D2, dated 14.4.1972, the plaintiff's attorney returned the cheque for Rs. 149.50 representing rent of the premises on the ground that "the cheque had been drawn by a partner of Komathi Vilas". This supports the defendant's evidence that the firm of "Komathi Vilas" continued to function, to plaintiff's knowledge, even after the departure of Sri Renganathan to India and that the plaintiff's attorney was aware of that fact.

In the statement of particulars required to be furnished under section 37 of the Rent Act No. 7 of 1972 (D1), dated 28th July 1972, the plaintiff through his attorney has stated that the tenant of

the premises was Sri Renganathan. This is significant, as Sri Renganathan had admittedly been deported or left the country on or about 13.4.1972, and the plaintiff's attorney who was residing a few yards away from the premises in suit, must have been fully aware of that fact. This declaration militates against the suggestion that Sri Renganathan had surrendered possession of the premises before he left for India.

Since the information given in P5 and P5A that the defendant has become the sole proprietor of the business of "Komathi Vilas" and "Kalyani Corporation" is not factually correct, it does not affect the continuance of the partnership. Counsel submitted that clause 5 of D5 should not be given effect to, as it is illegal. Even assuming that the clause is illegal, it is severable and does not vitiate the partnership.

The trial judge has answered issue 2 in the negative. Sufficient reason did not exist to justify the Court of Appeal to reverse the finding of fact by the trial judge that the defendant continued to carry on the business of "Komathi Vilas" and "Kalyani Corporation" in the premises in suit with the tenant Sri Renganathan even after the latter's departure to India and that the partnership had not come to an end on 1st April 1972. In view of this finding of fact, it cannot be said that the defendant is in unlawful occupation of the premises from 1st April 1972, as contended by plaintiff.

I allow the appeal of the defendant-appellant and set aside the judgment of the Court of Appeal and restore the judgment of the District Judge. Subject to the declaration that the plaintiff is the owner of the premises in suit, the plaintiff's action is dismissed with costs. The defendant-appellant is entitled to costs in all three courts.

COLIN-THOMÉ, J. – I agree.

ATUKORALE, J. – I agree.

Appeal allowed.