

GUNASEKERA
V.
JINADASA

SUPREME COURT.
FERNANDO, J.
AMERASINGHE, J.
DHEERARATNE, J.
WADUGODAPITIYA J.
WIJETUNGA, J.
S.C. 25/95.
C.A. 490/84.
D.C. MATARA 5579/L.
11 MARCH, 1996.

Rent Act 7 of 1972- Attornment - Deposit of Rent in favour of original landlord-Authorised Person? - Ejectment - Tenancy Action or Vindictory Action.

The premises were let in 1960 by the Plaintiff Respondent Appellants' 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 authorised 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 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.

The Plaintiff instituted vindictory 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 judgment 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; on Appeal.

Held:

Per Fernando, J.

"I do not agree that simply because the Rent Act now gives tenants more extensive privileges, the common law should now be interpreted differently, either to assist the transferee or the occupier, the question before us must be approached without any predisposition towards an interpretation which would favour either Plaintiffs or owners, on the one hand or Defendants or tenants on the other.

(i) While it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of law of contract comes into play in such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract the transferee has the option either to treat the tenancy as subsisting and to sue for arrears of rent and ejection or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser.

Per Fernando, J.

"The court must not apply the presumption of attornment as a trap for the transferee, allowing the occupier who fails to fulfil the obligation of a tenant, if used on the tenancy, to disclaim tenancy and assert that he can only be sued for ejection and damages in a vindicatory action, but if faced with an action based on title to claim that notwithstanding his conduct he is a tenant and can only be sued in a tenancy action, since it is the occupiers conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives to the transferee.

(ii) Payment to the authorised person in the name of the person who is not the landlord does not discharge the tenants obligation to the landlord.

AN APPEAL from the judgment of the Court of Appeal.

Cases referred to:

1. *Seelawathie v Ediriweera* - 1989-2SLR 170
2. *De Alwis v Perera* - 1951-52 NLR 433,445
3. *Silva v Muniamma* - 1955, 56 NLR 357,358
4. *De Silva v Abeyratne* - 1955, 56 NLR 574
5. *Perera v Costa* - 1955- 57 NLR 283, 284

6. *Sabapathipillai v Ramupillai* - 1956, 58 NLR 367,369
7. *David Silva v Madanayake* - 1967, 69 NLR 396, 400
8. *Perera v Padmakanthi* - 1987 2SLR 1,7
9. *Subramaniam v Pathmanathan* 1984 1 SLR 252, 257
10. *Violet Perera v Asilin Nona* SC 63/94 SCM 7.7.95. (1996 1 SLR 1)
11. *Mensina v Joslin* 1981 1 SRISK LR 76
12. *Fernandes v Perera* 1974, 77 NLR 220
13. *Fernando v Wijesekare* 1969, 73 NLR 110
14. *Naidu v Mudalige* 1973, 76 NLR 385

R.K.W. Goonasekera with Ms Shiranthi Jayatilleke for Plaintiff-Respondent-Appellant.

Rohan Sahabandu with Athula Perera for Defendant- Appellant-Respondent.

Cur.adv.vult.

September 13, 1996.

FERNANDO, J.

The Plaintiff-Respondent-Appellant ("the Plaintiff") was granted special leave to appeal to this Court on the **question** whether tenant who is notified by his landlord and the landlord's successor in title that the rented premises had been transferred and that the rent should be paid to the **transferee**, but who **ignores** that request and continues to deposit rent to the credit of the **landlord** (with the "**authorised person**") is in law the tenant of the transferee, and is liable to be ejected **only** upon a properly constituted tenancy action.

When this appeal first came up for hearing, Mr. Goonasekera for the Plaintiff submitted that it was necessary to **reconsider** the series of decisions (referred to in *Seelawathie v Ediriweera*,⁽¹⁾) in which it had been held that continuance in occupation by the tenant, with notice of the transferee's election to recognize him as the tenant, constitutes an exercise of the tenant's option to acknowledge the transferee as landlord; and also that there now arose for decision the question left open in *Seelawathie v Ediriweera* (*supra*) whether such a transferee was entitled, either in addition or in the alternative, to claim relief based on title.

This appeal was thereupon referred to this bench of five Judges in terms of Article 132 (3) of the Constitution, as an important question

of law was involved- whether in those circumstances a transferee is entitled to institute a vindicatory action, instead of a tenancy action.

The facts are not in dispute. The premises were let in 1960 by the **Plaintiff's father** to the **father** of the **Defendant Appellant-Respondent** ("the Defendant") ; in 1970 the Plaintiff's father **gifted** the premises to him, but they **neither** informed the Defendant's father **nor** called upon him to attorn; the latter died in 1973, and the **Defendant** then **attorned** to the **Plaintiff's father** ; the **Defendant** continued to pay rent to the **Plaintiff's father** ; attempts were then made to get the Defendant to leave the premises, and the Plaintiff's father refused to accept the rent, whereupon, from 1980, the Defendant deposited the rent with the "authorised person" to the **credit** of the **Plaintiff's father**. **Thereafter**, by their letter dated 23.10.81, father and son informed the Defendant of the transfer and 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. At that time he had paid the rent only up to April 1981. Thereafter too he deposited the rent (of Rs. 30/- per month) in the **father's name** : on 12.1.82, the rent for May, June, and July 1981, and on 3.5.82 the rent for the next ten months, August 1981 to May 1982. Thus, despite remaining in occupation for six months after being asked to attorn, he not only failed to pay rent to the Plaintiff, but deposited the rent for December 1981 to May 1982 - which was clearly due to the Plaintiff, if he was accepted as the landlord - **in favour of the original landlord**. This he continued to do **after** this action was instituted, and even after his answer was filed in October 1982. The Plaintiff made no effort to recover these sums from the "authorised" person".

On 11.5.82 the Plaintiff instituted a **vindicatory** action for the ejection of the Defendant, averring that the Defendant had failed to accept him as landlord and to pay him rent; and that the Defendant was in unlawful possession from 16.11.81. In his answer filed in October 1982 the Defendant averred that he had not possessed the premises otherwise than as tenant, and that he had never denied the Plaintiff's title.

The principle issue at the trial was whether the Defendant was in unlawful possession of the premises from about 16.11.81 by reason

of his refusal to accept the Plaintiff's title. The trial Judge held that both the Plaintiff and his father had called upon the Defendant to attorn to the Plaintiff; that there was no uncertainty as to the real landlord; and that the defendant having failed to attorn to the Plaintiff, was a **trespasser**. He gave judgement for the Plaintiff.

On appeal, the Court of Appeal reversed that judgment, holding that the Defendant had become aware of the Plaintiff's title in 1973; that thereafter the father continued to collect the rent, acting as the Plaintiff's agent; that the defendant had not challenged the title of the Plaintiff, had not deliberately refused to accept him as landlord, and had not refused to pay him rent (which he had continued to deposit with the "authorised person"); and that therefore the Defendant had not been transformed from a tenant into a trespasser.

On appeal to this Court, Mr. Goonasekera contended that upon a tenant's failure expressly to attorn, a vindicatory action was the proper remedy, and not an action for ejection based on the tenancy and arrears of rent. He questioned the series of decisions which have, expressly or impliedly, upheld the presumption of attornment arising from continued occupation: that "a tenant who remains in occupation, with notice of the (transferee's) election to recognise him as a tenant, may legitimately be regarded as having attorned to the (transferee) so as to establish privity of contract between them" *de Alwis v Perera*,⁽²⁾ *Silva v Muniamma*,⁽³⁾ *de Silva v Abeyratne*,⁽⁴⁾ *Perera v de Costa*,⁽⁵⁾ *Sabapathipillai v Ramupillai*,⁽⁶⁾ *David Silva v Madanayake*,⁽⁷⁾ *Perera v Padmakanthi*,⁽⁸⁾ *Subramaniam v Pathmanathan*,⁽⁹⁾ *Seelawathie v Ediriweera (supra)* and *Violet Perera v Asilin Nona*.⁽¹⁰⁾ It was his submission that in those cases the transferee had sued on the basis of tenancy, whereupon the Defendant had denied attornment, and the Courts had then drawn the presumption of attornment in favour of the Plaintiff; now, however, the Rent Act gives tenants extensive privileges in regard to paying up arrears of rent so that it was more advantageous to a transferee to bring a vindicatory action; and in those circumstances, he urged, the Courts should not presume attornment from continued occupation.

However, Mr. Sahabandu for the Defendant strongly relied on those decisions as establishing that the Defendant did become the

tenant of the Plaintiff. He argued that payment of rent to the Plaintiff's father did not militate against that presumption or affect the Defendant's status as tenant. Firstly, he claimed that the Defendant's father became the Plaintiff's tenant in 1970 when the premises were transferred to the Plaintiff; that the payments made after 23.10.81 were on the same basis. Secondly, he submitted that, in any event, payment to the "authorised person" discharged the tenant's obligation to the landlord. Thirdly, he contended that continued occupation after 23.10.81 constituted attornment, and that even if the Defendant had thereafter failed to pay rent to the Plaintiff, yet he was still a tenant, albeit a tenant in arrears of rent, who could only be ejected in a tenancy action. Finally, he urged that rent legislation over a long period of time manifested the special care and concern which the Legislature had for tenants, and that the Courts should not prefer an interpretation which would permit a vindicatory action, which would deprive tenants of their benefits under the Rent Act - such as the privilege of paying up arrears of rent even after action was filed.

Mr. Sahabandu's submission that the Defendant's father became the Plaintiff's tenant when the premises were transferred to the Plaintiff in 1970 is unacceptable. 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. Hence there is no doubt that the Plaintiff's father continued to be the landlord even after the 1970 transfer, and that the payments made to him (first by the Defendant's father, and after 1973 by the Defendant) were in the same capacity, and not as the agent of the Plaintiff *qua* landlord. The Plaintiff could not have stepped into his father's shoes unless and until there was an attornment.

As for the submission that payment to the "authorised person" was sufficient, *Violet Perera v Asilin Nona (supra)* is authority that payment to the "authorised person" in the name of a person who is not the landlord does not discharge the tenant's obligation to the landlord.

Turning to the question of attornment, while Mr. Goonasekera urged that the presumption had been drawn by the Courts to assist a Plaintiff to rebut the Defendant's denial of a tenancy, Mr. Sahabandu asked the Court to interpret the law so as to assist a Defendant who

asserts a tenancy. The decisions which Mr. Goonasekera questioned explained and applied the common law; they did not seek to "assist" a transfer faced with a tenant who denied attornment, and I do not agree that simply because the Rent Act now gives tenants more extensive privileges, the common law should now be interpreted differently - either to assist the transferee or the occupier. The question before us must be approached without any predisposition towards an interpretation which would favour either Plaintiffs or owners, on the one hand, or Defendants or tenants, on the other.

Mr. Goonasekera has not suggested any other reason why those decisions should be varied or overruled, and I am of the view that **they are correct**. Upon a transfer of the rented premises, one option which the transferee has is to take the premises with the tenant; there upon the tenant has two alternative courses of action - either to attorn to the transferee (and to continue in occupation of the premises under the transferee, but in terms of the original tenancy) or to refuse to attorn (and to leave the premises and to pursue his contractual remedy against the original landlord). The only way in which the tenant could validly exercise the second option is by quitting the premises "If he refuses to continue as tenant, his first duty is to quit the premises. If he chooses to stay in occupation, he remains there as tenant" *de Silva v Abeyratne*, (*supra*). If he does not do that, and instead continues in occupation, it is a legitimate inference that he is exercising his first option to remain as tenant. This is the position even if he states, unequivocally, that he refuses to accept the transferee as his landlord (as in *David Silva v Madhayake*, (*supra*)) and *Mensina v Joslin*,⁽¹¹⁾ or requests some clarification (as in *Fernandes v Perera* ⁽¹²⁾ *Subramaniam v Pathmanathan*, (*supra*)) and *Seelawathie v Dirirweera*. (*supra*)).

But that presumption may be displaced by the terms of an agreement between the transferee and the tenant as in *Fernando v Wijesekera*,⁽¹³⁾ and *Naidu v Mudalige*⁽¹⁴⁾ under which the latter is permitted to continue in occupation otherwise than as a tenant. The presumption of attornment is therefore not irrebuttable.

Thus if the only question for decision had been "was the Defendant's occupation on or about 16.11.81 unlawful?", it would have been legitimate to infer that his occupation was as tenant, and was

therefore not unlawful. But that does not dispose of the matter, because the issue before us is whether the Defendant's occupation was unlawful **In May 1982**. Is the presumption compelling and irrebuttable? If the occupier by his words denied the tenancy, and by his acts repudiated it accepting another as the owner and landlord, or by dealing with the premises as if he were himself the owner - is he entitled to continue to be regarded as a tenant? Or, rather, is the transferee **bound** to treat him as a tenant?

It seems to me that while it is legitimate initially to **infer attornment** from **continued occupation**, thus establishing **privity of contract** between the parties, another principle of the law of contract comes into play in such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract, the transferee has the option **either** to treat the tenancy as subsisting, and to sue for arrears of rent and ejectment (as in *David Silva v Madanayake (supra)*) **or** to "accept" the occupier's repudiation of the tenancy, and to proceed against him as a trespasser.

When the Defendant, having **failed** expressly to accept the **plaintiff** as landlord, thereafter **failed to pay** him the rent for several months **after 16.11.81**, and instead deposited that rent to the credit of the **former landlord**, he repudiated the fundamental obligation of a tenancy - he denied the Plaintiff's status as landlord, and did not pay the rent due to him - a paltry sum of Rs. 30/- per month. While it would still have been legitimate to regard him as a tenant, if the Plaintiff wished to do so notwithstanding his repudiation of the presumed tenancy, yet if the Plaintiff too no longer desired continuation of any such tenancy, the principle laid down by Gratiaen, J., in *de Alwis v Perera (supra)* does not suggest that the Courts should nevertheless impose on the parties a contractual relationship which they had disclaimed or denied, or are estopped from asserting.

Hence as at May 1982 when the plaint was filed, it was not obligatory to infer a tenancy. Any lingering uncertainty in that respect is removed by the Defendant's conduct in depositing rent to the credit of the **former landlord** even after he filed his answer in which he asserted that he did not dispute the **Plaintiff's title**.

This interpretation commends itself to me as being consistent also with **equity and fairness**. The Court must not apply the presumption of attornment as a trap for the transferee: allowing the occupier who fails to fulfil the obligations of a tenant, **if sued on the tenancy**, to disclaim tenancy and assert that he can only be sued for ejectment and damages in a vindicatory action; but **if faced with an action based on title**, to claim that notwithstanding his conduct he is a tenant and can only be sued in a tenancy action. Since it is the occupier's conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives to the transferee.

The position might have been **Different** if the defendant had duly discharged his tenancy obligations for a period - as for instance by paying rent to the Plaintiff - and had defaulted only thereafter. But we are not called upon to decide that point.

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.

In *Seelawathie v Ediriweera (supra)* I refrained from commenting on the conclusion in *Fernandes v Perera (supra)* and *Mensina v Joslin (supra)* that a vindicatory action did not lie. The former is distinguishable. There the tenant became aware of the transfer, and wrote to the transferee in March, and again in April 1962, inquiring whether he was to send the rent to him; the transferee's Proctor told him, in May 1962, to remit the rent to the transferee, and wrote to him again to attorn, and pay rent, to the transferee. In December 1962, the tenant's Proctor wrote to the transferee's Proctor saying that he had been the tenant of a third party for 18 years and that he could not attorn unless the transferee obtained that third party's consent to the payment of rent to the transferee. The Court took the view that the tenant never sought to terminate the tenancy, and was always willing to pay the rent, but was under a genuine difficulty as to the person entitled to receive the rent; and held that he could not be ejected in a vindicatory

action, but only in a tenancy action. The judgement does not show that the tenant in that case either paid rent to the third party after March 1962, or asserted that the third party was the landlord. There was thus no repudiation of the tenancy under the transferee. *Mensina v Joslin (supra)* decided that the transferee could only file a tenancy action, even though the Defendant had disputed her title. With respect, that decision failed to recognise that the presumption is one which "may" be drawn, and is neither compelling nor irrebuttable.

I allow the appeal, set aside the judgment and decree of the Court of Appeal, and affirm the decree of the District Court for the reasons set out. The Plaintiff will be entitled to costs in this Court and in the Court of Appeal in a sum of Rs. 7,500/-.

AMERASINGHE, J. – I agree.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.