

1946

Present : Soertsz A.C.J. and Rose J.

MARTHELIS APPUHAMY, Appellant, and PEIRIS, et al.,
Respondents.

64—D. C. Chilaw, 11,947.

Contract—For benefit of third party—The third party can enforce it—Roman-Dutch Law.

Where a covenant was entered into between a lessee and a sub-lessee for the benefit of the original lessors,—

Held, that the lessors could, under the Roman-Dutch law, claim the benefit of, and sue on, the stipulation made in their favour, although they themselves were no parties to the contract of sub-lease.

A PPEAL from a judgment of the District Judge of Chilaw.

H. V. Perera, K.C. (with him *H. A. Koattegoda*), for the defendant, appellant.

N. E. Weerasooria, K.C. (with him *Austin Jayasuriya*), for the plaintiffs, respondents.

Cur. adv. vult.

January 16, 1946. SOERTSZ A.C.J.—

The facts that are material for the consideration of the question that arises in this case are as follows:—The first plaintiff and her deceased husband, being in urgent need of a sum of sixty thousand rupees obtained it from the first plaintiff's father, giving him in return a lease of certain lands belonging to them, for a period of 20 years from March 6, 1926, at an annual rental of Rs. 3,000. A covenant in the indenture of lease provided "that if the said lessee possessed the property hereby leased within the first seventeen years in full absolutely without any interruption from the said lessors or from any one of their heirs and *so forth* (sic), he shall assign back the lease of the remaining three years without recovering any money from the lessors or their heirs and *so forth* (sic) after such possession, that the said lessors shall cause to possess the property hereby leased within the said leasehold period uninterruptedly and that if any damage of or loss sustained in failure thereof the lessors shall pay all such damage and loss unto the said lessee. That the lessee shall at the termination of the said lease deliver back the said property unto the said lessors without causing any damage thereto and shall vacate same peacefully. And the said two parties the lessors and lessee for themselves and their heirs, executors, administrators and assigns have hereby further promised and bound to and with the other party for the true performance of the aforesaid conditions".

By an indenture of lease dated June 4, 1927, the lessee sub-leased these lands to his son Walter for a period of eighteen years and eight months subject to a condition similar to that undertaken by him. Walter sub-leased the premises at the end of fourteen years and six months to one K. A. S. Fernando for a period of four years and three months providing for an earlier termination of the lease. K. A. S. Fernando, himself, by indenture dated October 6, 1942, sub-leased these lands to the defendant-appellant for a period of forty-one months, an earlier termination being again provided for.

The plaintiffs now complain that although the period of seventeen years has elapsed without let or hindrance on their part to the persons entitled to the possession of these lands, the defendant has continued to possess them wrongfully and unlawfully. The first plaintiff is one of the lessors, and the second, third and fourth plaintiffs are the children born to her and the deceased lessor. The defendant is the last sub-lessee, his lease having commenced when the seventeen-year period referred to in the first indenture of lease had five months more to go to attain completion. They therefore pray for a declaration:—

- (a) that the defendant holds the leasehold rights in respect of the said lands and premises for the benefit of the plaintiffs as regards the period commencing from March 6, 1943, to March 6, 1946.
- (b) that the defendant be ordered to execute a valid assignment of the said leasehold rights for the said period in favour of the plaintiffs.
- (c) Alternatively, that the Court may be pleased to declare that the rights of the defendant to hold the said lands and premises became extinguished on March 6, 1943, and that the plaintiffs became entitled to the said lands and premises.

(d) that the COURT may declare that the plaintiffs became entitled to the possession of the said lands and premises on March 6, 1943, and that the defendant is in the possession of the same unlawfully since the said date and is liable to pay damages from March 6, 1943, till the plaintiffs are restored to peaceful possession of the said lands and premises at a rate to be ascertained by Court.

The trial Judge found that the lessee and the sub-lessees "had undisputed possession of the leased lands for a full period of seventeen years". I agree with him for, on the evidence in the case, any other conclusion is hardly possible. On that finding, there can be no doubt whatever that if the question raised in this case had arisen between the plaintiffs and the original lessee, it would have had to be answered in favour of the plaintiffs.

The question, then, is whether the position in law is different so far as the defendant the ultimate sub-lessee is concerned. The original lessee bound himself, and his executors, administrators, *and assigns* for the due performance of the covenants in the indenture of lease. It is clear, therefore, that there was, impliedly, an agreement between the lessors and the lessee, permitting the lessee to assign that is to say to cede both his rights and liabilities. In the event of such an agreement, it is well established that the lessee may either sub-let or assign. If he assigns the lease to a third party there is a complete delegation or novation of the contract and the lessee goes out of the picture and the cedent takes his place. But if the lessee only sub-lets, "there are two separate *vincula juris*, one between the landlord and the lessee and the other between the lessee and the sub-lessee" (*Wessels' Law of Contract, Vol. 1, page 551.*) There is in that event, *prima facie*, no privity of contract between the original lessor and the sub-lessee. But this general rule may be departed from by agreement between the parties concerned. In this case, when the lessee sub-let the premises to his son the first sub-lessee, it was expressly agreed between the two parties that if the latter had possession of the premises leased for fifteen years and eight months he should surrender the remaining three years to the lessor or to his heirs and so forth. But when this sub-lessee had had possession of the premises for fourteen years and six months, he sub-leased them to K. A. S. Fernando who agreed "that he will at the expiration or sooner determination of the said term peaceably and quietly surrender and yield up the said premises unto the said lessor or his aforewritten in good and proper condition."

Similarly, when K. A. S. Fernando sub-leased the premises to the defendant-appellant, the latter covenanted and agreed "that he will at the expiration or sooner determination of the said term peaceably and quietly surrender and yield up the said premises unto the said lessor or his aforewritten in good and proper condition". There was, thus, an undertaking by the defendant-appellant of the obligation to surrender the lease to his lessor or to his lessor's aforewritten on the expiration or sooner determination of the term of the lease. In the context afforded by all the indentures read together, the word "aforewritten" must be construed as including the original lessors. The question then arises whether the

original lessors can claim the benefit of, and sue on the stipulation made in their favour, they themselves being no parties to the contract of sub-lease. The answer to that question is, in my opinion, that they can under the Roman-Dutch law which is the law applicable in this case. In the case of *Tradesmen's Benefit Society v. Du Preez*¹, Lord de Villiers said "where there is in existence a binding agreement for valuable consideration between the promisor and promisee, there can be no possible injustice in allowing a third person for whose benefit the promise was made, and was intended to be made to recover upon the same", particularly, where one of the contracting parties bears a certain legal relationship to the third party as is the case here.

But quite apart from the plaintiffs' claim upon the contract, the defendant was, on the finding of the trial Judge, liable in tort as a trespasser on these lands from the date of the termination of the seventeen-year period, and the alternative remedy sought in paragraph (c) of the prayer is substantially based on that ground.

I am inclined to agree with the trial Judge that the last two leases were collusive transactions resorted to in an attempt to defeat the condition of an earlier termination of the lease.

In regard to the amount of damages, I see no reason to interfere with the award of the trial Judge.

I would dismiss the appeal with costs.

ROSE J.—I agree.

Appeal dismissed.
