

**GUNAPALA**

v.

**BABYNONA**

SUPREME COURT.

SHARVANANDA, C.J., WANASUNDERA, J. AND ATUKORALE, J.

S.C. 28/85, C.A. 418/78 (F), D.C. MT. LAVINIA 409/RE.

MAY 6, 1986.

*Rei Vindicatio action—Suit for ejectment—Landlord gifting premises reserving life interest and thereafter renting them—Death of landlord—Suit filed by donor on basis of tenancy—Issues framed on basis of rei vindicatory suit—Does contract of tenancy end by death of life interest holder?*

One Simon gifted the premises in suit to G and S reserving his life interest. Thereafter Simon rented the premises to B. Subsequently Simon died and G called upon B to

attorn to him (G) but B did not pay any rents to G who then instituted a suit for ejectment on the basis of a tenancy. Issues however were framed without objection on the basis that the suit was by a co-owner suing in a rei vindicatio action.

#### Held—

(1) Where the lessor granting a lease has only a usufructuary interest the lease is dissolved by the death of the usufructuary although the new co-owner requested the tenant B to attorn to him but B failed to do so. The case must be decided on the issues—i.e. as a rei vindicatory suit. B was in wrongful possession against the co-owner G and liable to be ejected.

#### Cases referred to:

- (1) *Fernando v. Silva*—(1966) 69 NLR 164.
- (2) *Mohamed v. Public Trustee*—(1978-79) 1 Sri L.R. 1.

APPEAL from judgment of the Court of Appeal.

F. C. Perera for plaintiff-appellant.

N. J. de Seneviratne with *Rushan D' Alwis* for defendant-respondent.

I. A. N. J. de Seneviratne with *Rushan D' Alwis* for defendant-respondent.

July 8, 1986.

#### SHARVANANDA, C.J.

By this action filed on the 29. 4. 1977 the plaintiff sued for the ejectment of the defendant from the premises in suit. The defendant was the tenant of the premises from March 1969, under one Simon. Prior to the defendant becoming the tenant, Simon had by Deed No. 4958 dated 3.10.1967, donated these premises to his grand nephews, the plaintiff and his brother Siripala, after reserving to himself his life interest, Simon died on 26. 10. 1975. It is admitted that all rents in respect of the premises had been paid and/or settled upto 30th November 1974 and that no rents were paid thereafter. The plaintiff pleaded in his plaint that after the death of Simon, the defendant attorned to him and that by letter dated 9. 8. 1976 he had asked the defendant to pay him all arrears of rent failing which he terminated the defendant's tenancy as from 31. 12. 1976. The defendant in her answer denied that there was a tenancy between herself and the plaintiff and pleaded that plaintiff had never called on her to attorn to him.

The case proceeded to trial on the following issues:

1. By Deed No. 4938 dated 3.10.1967 is the plaintiff the owner of the premises in suit?

2. From 1. 1. 1977 is the defendant in wrongful possession causing loss to the plaintiff at Rs. 59.72 per mensem?
3. As the dispute could not be settled has the Conciliation Board Certificate been filed of record?
4. If issues 1, 2 and 3 are answered in favour of the plaintiff is he entitled to relief as prayed for?
5. Is the defendant a tenant of the plaintiff?
6. If not can the plaintiff maintain the action?

The trial judge answered the issues as follows and dismissed the plaintiff's action with costs:

1. Not sole owner.
2. No.
3. Yes.
4. No.
5. No and
6. No.

The plaintiff's appeal to the Court of Appeal was dismissed with costs. The plaintiff has now preferred this appeal to this court.

The plaintiff's brother Siripala has stated in his evidence that he had no objection to the entire rent/damages being paid to the plaintiff. Both the District Court and the Court of Appeal have dismissed the plaintiff's action on the ground that the defendant was not made aware of the existence of the deed on which the plaintiff claims the premises and hence she was not bound to attorn to the plaintiff.

It is true that the plaintiff had framed this action on the basis that the defendant attorned to him and had thereby become his tenant. But significantly the issues framed by him in this case departed from his pleadings and converted the action into a *rei vindicatio* action. The issues were raised by the plaintiff on the basis that he claimed to be a co-owner of the premises and on the cessation of Simon's life-interest, the defendant's possession was wrongful possession of the premises. The defendant did not object to the issues framed by the plaintiff. The case must be decided on the issues raised in the action.

Counsel for the plaintiff contended as a matter of law, that the death of the landlord Simon operated to terminate the defendant's tenancy and that the plaintiff being a co-owner entitled on the death of the usufructuary, to possess the property and maintain this action for the ejectment of the defendant. He submitted that Simon who was the landlord of the defendant had, when he took the defendant as his tenant, only a life interest in the premises in suit and that in law a tenancy is dissolved by the death of the landlord who had only life interest over the premises. He conceded that position might have been different if Simon had been the owner of the premises. He cited in support of his proposition *Fernando v. Silva* (1). In that case it was held that as a general rule a contract of tenancy is not terminated by the death of the landlord; but that this rule will not apply where the lessor's title was one for life only, such as fiduciary interest or life interest, in which case the death of the lessor terminated the lease.

He also referred to the judgment of the Divisional Bench of this Court in *Mohamed v. Public Trustee* (2) where Samarakoon, C.J., referred to the general rule applicable to all leases—

“a lease is not dissolved by the death of one of the parties; but, in accordance with a rule common to all contracts, the rights and obligations arising from the lease pass to the person of his heirs, or to that of his vacua successio” and added that “This rule is subjected to an exception where the lessor made the lease in his capacity as usufructuary, for in that case the lease is dissolved by the lessor's death.”

I agree with the legal submissions of Counsel for plaintiff and hold that as defendant's landlord Simon had only a usufructuary interest in the property when he granted the tenancy to the defendant, the tenancy stood dissolved by the death of the landlord Simon and that the defendant was, after the death of Simon in wrongful possession of the premises in suit as against the co-owners. Though by letter dated 9.8.1976, the plaintiff had requested the defendant to attorn to him, yet the defendant had failed to attorn to the plaintiff. The defendant's possession of the premises is therefore wrongful. Both the lower courts had erred in dismissing the plaintiff's action. In fairness to those courts, it must be said that the legal submission set out above, was not addressed to them.

I set aside the judgment of the Court of Appeal and of the District Court and enter judgment for plaintiff as prayed for. The plaintiff will however be entitled to the costs of this court only.

WANASUNDERA, J. – I agree.

ATUKORALE, J. – I agree.

*Appeal allowed.*

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