

COURT OF APPEAL

Pathirana
Vs.
Ahangama

C.A. 783/75 (F) – D.C. Kandy No. 10513/L.

Section – 328 Civil Procedure Code – Investigation into right to possession – vendor in occupation after sale – licensee.

One W.S. Perera, by Deed No. 10458 of 10.8.67 transferred his 2/3rd share of premises bearing assessment No. 24 Brownrigg St., Kandy to the Appellant reserving to himself the right to repurchase it within three years.

On 2.3.69 W.S. Perera entered into a tenancy agreement with the Respondent and on the basis of this agreement carried on a stationery business at 24 Brownrigg Street.

When the three years stipulated in Deed No. 10458 of 10.8.67 expired the Appellant filed action for declaration of title and eviction of W.S. Perera.

A consent decree was entered whereby W.S. Perera was given time till 30.9.73 to pay and on failure to pay writ was to issue.

W.S. Perera failed to pay and Appellant obtained Writ of Possession. Acting on this Fiscal evicted Respondent and handed over vacant possession to Appellant. The District Judge found that the Respondent was a tenant of W.S. Perera - the judgment debtor. He was in bona fide possession on his own account and he had not been made a party to the action for declaration of title. The District Judge ordered that Respondent be restored to possession.

Appellant appealed against this Order.

- Held*
1. In an action under Section 328 of Civil Procedure Code the only question that arises is that of possession and not title.
 2. that W.S. Perera the judgment debtor was only a licensee after he transferred his 2/3rd share to the Appellant.
 3. that the Respondent was a licensee of W.S. Perera who was himself a licensee and that he had no right to possession on his own account and therefore he was liable to be ejected.

APPEAL from judgment of the District Court of Kandy.

Before: L. H. de Alwis, J. & Abeywardena, J.,

Counsel: H. W. Jayewardene, O.C., with N. Devendra & R. Perera for Defendant - Appellant.
Shanmugalingam, for the Plaintiff - Respondent.

Argued on: 1st & 2nd March 1982.

Decided on: 12.5.82

Cur. adv. vult

L. H. DE ALWIS, J.,

This is an appeal from the judgment of the learned District Judge of Kandy in proceedings instituted under section 328 of the old Civil Procedure Code, ordering the plaintiff-respondent to be restored to possession of the premises in suit after he had been evicted by the Fiscal in execution of a Writ issued by the District Court, Kandy, in case No. L 9519, to which he was not a party. Case No. L 9519, was instituted by the appellant, against one W.S. Perera seeking a declaration of title to the premises in suit and his ejection therefrom.

The position taken up by the respondent was that he was the tenant of W.S. Perera, of these premises, having contractual rights of his own even against W.S. Perera, the judgment debtor, and as such was in bona fide possession on his own account of the premises in suit. He was therefore not liable to be ejected under the decree passed in that case and the judgment-creditor was only entitled to obtain constructive possession of the premises in execution of the Writ. Besides he was not a party to the action in which decree had been entered and was not bound by it. He applied to Court under section 328(1) of the Civil Procedure Code stating his grounds of dispute and sought to be restored to possession of the premises. The application was numbered and registered as a plaint in an action between him as the plaintiff and the decree-holder the appellant, as the defendant. He gave evidence that he entered into a tenancy agreement with W.S. Perera on 2.3.69 (P1) by which the premises in suit were let to him on a monthly rental of Rs. 100/-. He carried on a stationery business in the premises under the name of "Ahangama & Sons" and was a stockist for the Eastern Paper Mills Corporation.

On 14.9.73 W.S. Perera unlawfully evicted him but he was restored to possession the next day, on a complaint made by him to the Police and on his giving W.S. Perera a cheque for Rs. 500/- (P6). Thereafter on 30.11.73 he applied to the Rent Control Board to have the rent determined and to deposit it with the Board. He then filed an action for damages against W.S. Perera claiming a sum of Rs. 25,000/- for wrongful ejection, and stating in the Plaint (P4) that he was the tenant of W.S. Perera. He also made an application to the Assistant Commissioner of National Housing on 31.1.74 (P5) through his lawyer for relief under the Protection of Tenants (Special Provisions) Act No. 28 of 1970.

The case of the appellant was that W.S. Perera transferred to her by deed No. 10458 dated 10.8.1967 (R1) his 2/3 share of premises No. 24 Brownrigg Street, Kandy, reserving to himself the right to re-purchase it within three years of the date of the execution of the deed. These premises are now re-numbered as No. 50, Brownrigg Street and are the premises in suit.

When the stipulated period of three years for the re-conveyance had expired, the appellant filed action No. L 9519 for a declaration of title to the premises in suit and the ejection of W.S. Perera therefrom. The case was settled on the terms that W.S. Perera was to pay the appellant a sum of Rs. 2,100/- on or before 30.6.1973 in addition to the sum of Rs. 2,400/- which was admitted to have been paid by him, and was given time till 30.9.73 to pay the full balance and interest. In default of payment, both Writs were to issue without notice to him. If he made payment on the due dates, the appellant was to execute a deed of transfer in respect of the said premises in his favour and on her failure to do so, the Secretary of the Court was to execute the deed of transfer (vide R2). A decree by consent was entered in accordance with these terms (vide R3). The respondent alleges that this was a collusive settlement entered into between the appellant and W.S. Perera with a view to evicting him from the premises. Be that as it may, W.S. Perera failed to satisfy the terms of the consent decree and the appellant obtained a Writ of possession and an order to break open the padlocks of the doors of the premises which were closed, and to place her in possession. The Fiscal's Officer in execution of the writ issued to him proceeded to the premises on 10.12.73 and after breaking open the padlocks of the doors and removing the property that was inside, handed over vacant possession of the premises to the appellant. The property consisted

of a big iron safe, a table, two show cases and some items of stationery which the Fiscal stacked on the pavement outside. The respondent was not present at the time but one Milton who was there claimed a share of the property.

The learned District Judge has come to the finding that the respondent was the tenant of the premises under W.S. Perera from 2.3.69 and was carrying on a stationery business there. He held that the respondent was in possession of the premises bona fide on his own account and was not a party to the action in which the decree had been entered. He was of the view that the appellant had no right to dispossess the respondent from the premises in suit and ordered that the respondent be restored to possession. It is from this Judgment that the appellant now appeals.

Counsel for the respondent contends that the respondent is protected from eviction by section 324 of the Civil Procedure Code since he was the tenant of the premises under W.S. Perera and was not bound by the decree entered in case L 9519.

Section 324 provides as follows :-

“Upon receiving the Writ the Fiscal or his officer shall as soon as reasonably may be repair to the ground, and there deliver over possession of the property described in the Writ to the judgment - creditor or to some person appointed by him to receive delivery on his behalf, and if need be by removing any person bound by the decree who refuses to vacate the property:

Provided that as to so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against judgment-debtor, and not bound by the decree to relinquish such occupancy, the Fiscal or his officer shall give delivery by affixing a copy of the Writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property:

It is the contention of the learned counsel for the respondent that under section 324, only constructive possession of the premises could have been given by the Fiscal to the appellant in execution of the Writ of possession.

This section came up for consideration by a Bench of five Judges in *Ibrahim Saibo Vs. Mansoor*, 54 N.L.R. 217, and the Court took the view that this section recognised a tenant as belonging to the category of persons "entitled to occupy the same as against the judgment-debtor and not bound by the decree to relinquish such occupancy." The Court further said -

"It follows that the proviso enjoining constructive delivery applies to all tenants.. Where the decree for ejection is against a tenant a sub-tenant would be covered by the word 'tenant' in the section. Upon the view we have formed no sub-tenant who is not a party to the decree is bound by the decree to relinquish occupancy but is a person to whom the proviso applies. He is a person who cannot be ejected upon a Writ of ejection against the tenant, but in relation to whom constructive delivery under the proviso should be given to the decree-holder."

Learned Counsel for the respondent submitted that the respondent was at least a sub-tenant of W.S. Perera and in that capacity too, was not liable to be evicted under section 324 of the Civil Procedure Code. But it had never been his position that W.S. Perera was the tenant of the premises so that he could not have been his sub-tenant. His case all along was that W.S.Perera was the owner and the landlord of the premises and that he took the premises direct from him as his tenant.

Counsel for the respondent next contended that what the Court has to investigate in proceedings under section 328 of the Civil Procedure Code is whether the appellant had bona fide possession of the premises on his own account and not his title to the property. In the present case the premises were in the possession of W.S. Perera at the time the respondent entered into the tenancy agreement with him (P1). The respondent was therefore under the bona fide belief that W.S. Perera was the owner of the premises although he had in fact transferred his 2/3 share of it to the appellant on R1 prior to the agreement P1.

In *Rosahamy Vs. Diago*, 3 N.L.R. 203, it was held that the investigation on an application numbered and registered as a plaint under section 328 of the Civil Procedure Code should be limited to the question as to whether the applicant is entitled to be restored

to possession of the property claimed by him. The question of title to the property should not be gone into. Bonser, C.J., in that case followed the decision in *Ratnaike Vs. Rodrigo*, Bal. Notes of cases 68.

In *Suppar Rettiar Vs. Mohammodu*, 32 N.L.R. 189, it was held that in an application under section 328 of the Civil Procedure Code, the test of jurisdiction is the value of the applicant's interest in the premises, that is, a month's rental.

Learned Queen's Counsel for the appellant on the other hand contended that an investigation in an action under section 328(2) of the Civil Procedure Code involves questions of title and since the phraseology of the sub-section is similar to that of section 327 in regard to the investigation he relied on the case of *Vanderpoorten Vs. Amerasekera*, 28 N.L.R. 452. That case was an action under the provisions of section 327 of the Civil Procedure Code and it was held that the investigation there is not limited to the determination of the right to possession but that questions of title arising between the parties in connection with their right of possession may be determined in such an investigation. That case admittedly dealt with section 327 of the Civil Procedure Code and Drieberg A.J., thought it was not necessary to consider the cases of *Rosahamy* and of *Ratnaike* which held that the only question to be decided under section 328 is the "right to possession", since "the right of a claimant in an investigation under section 327 to retain possession and right of a claimant in an investigation under section 328 to be restored to possession may well be determined on different grounds."

In this state of the law the decisions in the cases of *Rosahamy* and of *Ratnaike* which are in respect of section 328 of the Civil Procedure Code are binding on this Court and the only question that arises for determination is the respondent's right to the possession of the premises.

Learned Queen's Counsel for the appellant, contended that the respondent had neither a right to possession of the premises nor legal title to it, since on the execution of the conditional transfer of the 2/3 share of the premises in suit to the appellant on deed R1, W.S. Perera lost his title to the premises and continued to remain in occupation only as the licensee of the appellant. The deed R1 has been filed in case No. L 9519 and was not produced in this

case. But it is not in dispute that the appellant was entitled to the premises in suit and learned Counsel even at the hearing of the appeal proceeded on this basis. Indeed the decree entered by consent in case No. L 9519 is on the footing that the appellant was entitled to the premises.

In *Sithy Marhooma Vs. Weerasingham*, 68 N.L.R. 304 it was held that where A continues to remain in possession of a house after he has sold it on condition that B should reconvey it to A, if the consideration for the transfer is repaid within a fixed period, A's possession is that of a licensee, H.N.G. Fernando, S.P.J., as he then was, observed that

"according to his own (the defendant's) position the only right he had was to demand a re-conveyance of the property upon fulfilment of the alleged condition for the reconveyance. It does not even appear that the defendant claimed to have satisfied this condition."

In the present case too W.S. Perera has failed to comply with the terms of settlement entered in case No. L 9519 and to obtain a re-transfer of the premises in his favour. After the execution of deed R1 on 10.8.67, he remained in occupation of the premises in suit, only as a licensee of the appellant.

He was entitled to a re-transfer of the premises within three years of the date of the execution of the deed R1 but before the three years had expired, he let the premises to the respondent on the tenancy agreement P1 dated 2.3.69, when he was still a licensee of the appellant. As a licensee in occupation of the premises he could not have given a better right to the premises to the respondent than he himself had. The words used in P1 alone will not suffice to turn a licence to occupy into a tenancy.

In *Swami Sivagananda Vs. Bishop of Kandy*, 55 N.L.R. 130 it was held that when a prospective purchaser of certain premises is permitted, pending his purchase to occupy the premises on payment of a stipulated sum of money, his occupation is, at best, that of a licensee and not that of a contractual tenant entitled to claim the protection of the Rent Restriction Act. If the contemplated sale does not take place, the duration of the licence expires and the licensee becomes

a trespasser liable to be ejected at the instance of the owner of the property.

It follows therefore that the respondent as a licensee cannot claim to be in possession of the property on his own account under section 328 of the Civil Procedure Code, even if his possession was bona fide under the purported tenancy agreement P1.

In my view the learned District Judge was therefore wrong when he held on the evidence that the respondent was the tenant of the premises under W.S. Perera and could not be ejected as he was not bound by the decree entered against W.S. Perera in action No. L 9519. His finding that the respondent's possession of the premises in suit was bona fide on his own account is also not sustainable because he was only a licensee of the premises under W.S. Perera who was himself a licensee of the appellant and therefore liable to be ejected by the Fiscal in execution of the Writ against W.S. Perera.

I accordingly allow the appeal. The judgment of the learned District Judge is set aside and the action filed by the respondent under section 328 of the Civil Procedure Code is dismissed.

In the circumstances of this case I make no order for costs in favour of the appellant both here and in the Court below.

ABEYWARDENA, J., — I agree.

Appeal allowed.