

Shanmugasunderam v. Mohamed and another

COURT OF APPEAL.

WIMALARATNE, P. AND TAMBIAH, J.

C. A. (S. C.) 64/76—M. C. COLOMBO 4377/ED.

OCTOBER 19, 1979.

Landlord and tenant—Partnership—Whether admission of new partner makes him also tenant—Payment of rents by third party—Effect.

Held

(1) Where persons carry on business in partnership in premises let to them, a third party who becomes a partner subsequent to the commencement of the tenancy does not thereby become a tenant of the premises and, unless the landlord has agreed to accept such new partner as his tenant, this is so even if the landlord is aware of the position.

(2) Payment of rents by a third party on behalf of a tenant though permissible in law, did not create privity of contract between him and the landlord unless the landlord in addition recognized such third party as a tenant in place of the original tenant.

Per TAMBIAH, J.

“..... a tenant in occupation of the leased premises which has changed hands becomes the tenant of the new purchaser by operation of law if he chooses to continue with the lease.”

Cases referred to

- (1) *Perera v. Liyanagama*, (1956) 58 N.L.R. 454.
- (2) *David Silva v. Madanayake*, (1967) 69 N.L.R. 396.
- (3) *Quyn v. Ibrahim*, (1968) 72 N.L.R. 103.

APPEAL from the Magistrate's Court, Colombo.

C. de S. Wijeratne, for the petitioner-appellant.
N. R. M. Daluwatte, for the respondents-respondents.

Cur. adv. vult.

November 19, 1979.

TAMBIAH, J.

The appellant instituted an action in the Magistrate's Court of Colombo, by way of summary procedure, against the respondents and sought a declaration that he is the lawful tenant of premises No. 25, Gabos Lane, Colombo 11, under the 1st respondent. He also asked for restoration to possession of the premises and damages.

The appellant stated in his petition that one Jacob Nadar and Y. Ponniah were the tenants of the premises and that they carried on business in partnership under the name of “Ponniah & Jacob and Co.” in the said premises. He became a partner in the said business in 1955 and in 1961 he purchased the shares of Ponniah in the firm and continued with Jacob Nadar as a partner in the firm. Jacob Nadar left for India and he continued in the business, paying rent to the 1st respondent. The 1st respondent collected rents from him up to February 1973. Some time later, he learnt that the 2nd respondent had become the tenant of the premises under the 1st respondent. As the 1st respondent had refused to accept rent from him, since March 1973, he has been making the payments to the authorised officer. He alleged that the 1st and 2nd respondents have and are acting fraudulently and in collusion to deprive him of his tenancy rights and to establish the 2nd respondent as tenant of the said premises.

The appellant did not give evidence. However, whilst the respondents were giving evidence, certain documents were produced and marked in evidence—the certificate of registration of the business dated 10.9.55 (P1) showing the appellant as partner along with Jacob Nadar and Ponniah; Deed of Transfer

No. 612 of 21.12.61 (P2) by which Ponniah transferred to the appellant 1/3 share in the business ; Certificate of Registration of the business (P3) dated 30.6.62 showing the present partners of the firm as Jacob Nadar and the appellant ; rent receipts issued by the 1st respondent in the names of Jacob Nadar and Ponniah (P4 of 10.3.73, P6 of 10.5.65, P7 of 10.7.65, P8 of 10.11.72) ; letter dated 10.8.76 (P5) from the Electricity Board to the appellant certifying that the appellant has been registered as a consumer for the supply of electricity to the said premises from 19.12.63 to 2.5.73.

The 1st and 2nd respondents gave evidence at the trial. The position taken by the 2nd respondent in his evidence is that in 1957, he occupied a portion of the premises with the permission of Jacob Nadar ; at that time, the latter was doing business with the appellant in the balance portion of the premises. Jacob Nadar when he left for India, rented out the premises to the appellant at Rs. 100 per month. In 1965, one Arumugam took the premises on rent from the appellant and when Arumugam left the premises, he took over the entirety of the premises. On 22.3.73, the appellant attempted to take over the premises by force over which he complained to the Police (D1) ; he discussed the question of tenancy with the 1st respondent who accepted him as a tenant, in proof of which he produced rent receipts for April and May 1973 (D2 and D3). On 19.5.73 the appellant again attempted to forcibly take possession of the premises ; he complained to the Police (D4) and since then, the Police have locked up the premises. He also tendered in evidence letter dated 17.7.69 (D6) from the Telecommunication Department acknowledging his application for a telephone to be installed in the premises and telephone bills for May and December 1972 (D7 and D8).

The 1st respondent in his evidence stated that up to 1973, the contract of tenancy was between him and Jacob Nadar and Ponniah and that he issued the rent receipts P6 to P8 in the names of Jacob Nadar and Ponniah. He did not know at any time that there was a partnership business carried on in the said premises. In April 1973 he gave the premises on rent to the 2nd respondent and rent receipts D2 and D3 were issued by him. He has seen the appellant at the premises. He had a rent collector to collect rents and at times he personally went to the premises to collect rent ; he was uncertain as to whether the appellant paid rents to him on the occasions he went to collect rents.

The learned Magistrate came to the finding that the appellant was not tenant of the 1st respondent at any time and therefore the appellant was not entitled to a declaration that he is the tenant of the premises and to an order for restoration to possession of the premises.

The two questions that arise for our determination are: (1) Where premises are let to 2 persons who carry on business in partnership in the premises, does a 3rd party by virtue of his becoming a partner in the business subsequent to the commencement of the tenancy, become a tenant of the premises under the landlord? (2) Do payments of rents by a 3rd party on behalf of the tenant, make such 3rd party a tenant of the premises?

The position that emerges from the pleadings filed by the appellant is, that the tenancy of the premises was in the names of Jacob Nadar and Ponniah who carried on a partnership business in the premises. He became a partner in the said business in 1955, and that by virtue of the fact that he is a partner in the business, he became a tenant of the premises. It is not his position that he had a contractual tenancy with the landlord, the 1st respondent.

In *Perera v. Liyanagama* (1) after the death of the tenant who carried on a bakery business on the premises, the defendants claiming to be partners of the business carried on by the deceased brother, remained in occupation of the premises. Their offer to attorn was rejected by the plaintiff landlord. The latter brought an action to eject the defendants on the ground that they were trespassers. De Silva, J. in the course of his judgment stated (p. 455) :—

“ The tenancy arises from a contractual relationship existing between the landlord and tenant. Even if the landlord is aware before he let his premises to the tenant that a partnership business was to be carried on in the premises by the person taking on the premises on rent and others, no contract of tenancy arises between the landlord and the partners that the latter were to be the tenants. The 1st defendant stated that even during the lifetime of Charles Liyanagama he (1st defendant) paid the rent to the plaintiff and asked for receipts in the name of Charles Liyanagama. This is clear proof that the plaintiff was unwilling to accept any persons other than Charles Liyanagama as his tenant. The learned Commissioner was wrong in holding that the partnership was a tenant because a partnership is not a “legal persona.” Although the partners in their individual capacity can enter into a contract yet a partnership as such cannot do so. Therefore, on the death of Charles Liyanagama the contract of tenancy ceased to exist and the plaintiff is entitled to treat the other partners who remained in occupation of the premises as trespassers.”

It seems to me that this decision is authority for the view that since a tenancy can only arise from a contractual agreement between the landlord and the tenant even if the landlord is aware that the tenant is carrying on a partnership business on the premises with others, the latter do not become tenants of the premises unless the landlord has agreed to accept the other partners as tenants. It is the 1st respondent's position that the contract of tenancy was between Jacob Nadar and Ponniah on the one hand and himself on the other; he was unaware that a partnership business was being carried on in the premises. Even on the assumption that it was the appellant who paid rents for which rent receipts P6 to P8 were given, the receipts were issued in the names of Jacob Nadar and Ponniah, a clear circumstance showing that the 1st respondent was unwilling to accept the appellant as a tenant. I might however add that apart from the case of a contractual tenancy, the Rent Act No. 7 of 1972 in s. 36 sets out instances of persons being deemed to be tenants of the premises, in respect of both residential and business premises. Of particular relevance to this case is s. 36 (2) (c) (ii) which enacts that with regard to business premises a partner in the business carried on by the deceased tenant is entitled to continue the tenancy upon the death of the tenant. But it is not on this basis that the appellant is seeking a declaration that he is a tenant of the premises. Moreover, the evidence in the case is that Jacob Nadar has left for India. It would also seem that in the light of the decision in *David Silva v. Mudannayake* (2) a tenant in occupation of the leased premises, which has changed hands, becomes the tenant of the new purchaser by operation of law, if he chooses to continue with the lease.

In *Quyn v. Ibrahim* (3) the tenant of the premises entered into a partnership with the defendant and certain others to carry on business in the premises. He permitted the partner to occupy or use the premises during the continuance of the partnership. The tenant thereafter terminated the partnership and requested the partner to quit the premises. Sirimane, J. said (p. 131), "In my view, the defendant was in occupation of the premises only as the licensee of the plaintiff so long as the partnership subsisted. On its termination he was no longer entitled to remain there after the plaintiff had given him due notice to quit." It seems to me, at the highest, the appellant was in occupation of the premises only as a licensee of Jacob Nadar. However, in the instant case, the appellant is seeking a declaration that he is the lawful tenant of the premises, as a monthly tenant, under the 1st respondent, a relief which he is not entitled to be granted.

It is the appellant's position that after Jacob Nadar left for India, he continued with the business in the premises, paying rent to the 1st respondent. The rent receipts P6 to P8 are in the names of Jacob Nadar and Ponniah. There is no impediment in law for a 3rd party to make payment of rent on behalf of the tenant. "In Roman Dutch Law performance may be rendered even by a 3rd party, not an agent of the debtor, so as to discharge the debtor from liability, except in cases where performance is so personal in its nature that it can properly be rendered only by the debtor.....Indeed under Roman Dutch Law performance may be rendered by such a 3rd party, even without the knowledge or against the will of the debtor; and the creditor is not as a rule entitled to refuse performance from such a 3rd party, where it makes no difference to him by whom performance is rendered." (Weeramantny's Law of Contracts, Vol. 2, s. 691, at p. 668). But it seems to me that privity of contract is not created by the landlord, accepting rent from a 3rd party. This would be so only if, in addition to accepting the rent, the landlord recognises the 3rd party as tenant in place of the original tenant. The rent receipts P6 to P8 clearly show that the 1st respondent refused to recognise the appellant as his tenant.

For reasons stated, I hold that the appellant is not entitled to the reliefs he has sought. The learned Magistrate has correctly dismissed the appellant's action. The appeal is dismissed with costs.

WIMALARATNE, P.—I agree.

Appeal dismissed.

J. P. de Almeida,
Attorney-at-Law.
