

1962

Present : H. N. G. Fernando, J.

M. B. HENDRICK, Petitioner, *and* B. M. A. PERERA,
Respondent

S.C. 294 of 1962—Application for the stay of proceedings in C. R. Colombo Case No. 81411, and for the transfer of the said case to the District Court of Colombo

Court of Requests—Transfer of case brought therein to District Court—Permissibility.

Where, in an action instituted in a Court of Requests, the claim and counter-claim are intimately connected and right to possession of immovable property is involved in both the claims, the defendant would be entitled to have the case transferred to the District Court if the Court of Requests has no jurisdiction to entertain the claim in reconvention.

APPPLICATION for the transfer of a case from the Court of Requests, Colombo, to the District Court.

N. S. A. Goonetilleke, for Defendant-Petitioner.

S. Sharvananda, with *M. T. M. Sivardeen*, for Plaintiff-Respondent.

Cur. adv. vult.

September 24, 1962. H. N. G. FERNANDO, J.—

This is an application for the transfer to the District Court of an action instituted against the petitioner as Defendant in the Court of Requests of Colombo.

The plaintiff in the action averred that the Defendant had become the tenant of the Plaintiff on a monthly tenancy of certain premises at Maharagama at a rent of Rs. 70 per month. Plaintiff then stated that he had given notice to the Defendant to quit the premises on 30th November 1961, but that the Defendant still continues in wrongful and unlawful occupation, and therefore sues for ejection. In the answer the Defendant pleaded, inter alia, that the parties had in November 1952 entered into a notarial agreement under which the Defendant had paid a total sum of Rs. 4,150 to the Plaintiff, and that he spent that amount in constructing a bakery and boutique on the Plaintiff's land, which premises were let to him at Rs. 70 per month. He further states that he had spent a further sum of Rs. 7,000 on repairs and improvements and claimed to be entitled to a *jus retentionis* for this aggregate amount of Rs. 11,150. The present application for a transfer of the proceedings is made on the ground that the Commissioner of Requests would have no jurisdiction to entertain the petitioner's claim in reconvention.

One of the matters urged by counsel for the respondent is that the claim in reconvention is not made in good faith. It is argued that since the Defendant originally provided money and entered into occupation on a notarial lease, it is unlikely that he would subsequently have spent further moneys without again entering into a notarial transaction. But it would seem that in fact the Defendant did make an advance additional to that covered by the agreement of 1952: that agreement only provided for an advance of Rs. 3,600 whereas the Plaintiff in his affidavit filed in this Court refers to a further loan of Rs. 550/- and admits that in consideration of that further loan the Defendant occupied the premises for a period of six months after the expiration of the term of five years agreed to in the agreement. The circumstances do not therefore conclusively exclude the possibility that there were further transactions which might justify the Defendant's claim to a *jus retentionis*. Counsel has also argued that neither in the answer nor in the affidavit in this Court did the Defendant specifically state that the additional sum of

Rs. 7,000 was spent in pursuance of an agreement between the parties. If, it is said, there is no such agreement, there would in law be no *jus retentionis*. Indeed the fact that there had been some agreement additional to that provided for by the transaction of 1952 is indicated by the fact that the Defendant had actually been in possession of the premises for something over seven years. In these circumstances, I am unable to say upon the material before me that the Defendant's claim is not made in good faith, and that he would not be able to satisfy a Court that he had in fact made improvements with the consent of the Plaintiff.

It seems to me that the circumstances of this case fall within the third category of cases referred to in the judgment of Sinnetamby, J., in *Noorbhoy v. Husair*¹:

“(3) When claim and claim in reconvention are intimately connected and right to possession is involved in both claims (*Jinasena v. Moosajee*);”

The two claims in this case are intimately connected in that each party claims a right to possession of the land. If the Plaintiff's were to be investigated without reference to the counter-claim, the Defendant would have to surrender possession even though he may well be in a position to satisfy a Court of facts which would entitle him to the *jus retentionis*. I would therefore allow the application for the transfer with costs fixed at Rs. 157.50.

Application allowed.
