

1959

Present : Sansoni, J., and Sinnetamby, J.

NOORBHOY, Petitioner, and HUSAIR, Respondent

S. C. 105—Application for the transfer of Case No. 71,322 from C. R. Colombo to D. C. Colombo.

Courts Ordinance (Cap. 6)—Section 79—Transfer of case from Court of Requests to District Court—Factors for consideration.

An application made under section 79 of the Courts Ordinance for the transfer of a case from the Court of Requests to the District Court will not be granted if, although the plaintiff's claim and the defendant's claim in reconvention are intimately connected, a right to possession of immovable property is involved only in the plaintiff's claim. Accordingly, a landlord's action against his tenant for rent and ejection will not be transferred to the District Court solely on the ground that the tenant's claim in reconvention of a sum of money overpaid as rent exceeds the monetary jurisdiction of the Court of Requests.

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

V. Thillainathan, for the defendant-petitioner.

K. Shinya, for the plaintiff-respondent.

April 20, 1959. SINNETAMBY, J.—

The plaintiff instituted the present action in the Court of Requests Colombo, against the defendant-petitioner claiming arrears of rent and seeking to eject the defendant from premises No. 79, New Moor Street. The premises are situated within an area to which the Rent Restriction Act applies. The defendant petitioner in his answer alleged that he had regularly paid the plaintiff rents in excess of the authorised rent and claimed in reconvention the amounts so overpaid aggregating to Rs. 2,767.

In these proceedings the defendant petitioner invokes the provisions of section 79 of the Courts Ordinance and seeks to obtain from this Court an order transferring the whole case to the District Court on the ground that the claim in reconvention exceeds the monetary jurisdiction of the Court of Requests and is so intimately connected with the claim that it is convenient and desirable that both should be tried together.

Section 79 of the Courts Ordinance is in the following terms :—

“ 79. Where in any proceeding before any Court of Requests any defence or claim in reconvention of the defendant involves matter beyond the jurisdiction of the court, such defence or claim in reconvention shall not effect the competence or duty of the court to dispose of the matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such claim in reconvention :

Provided always that in such case it shall be lawful for the Supreme Court, or any Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from the court in which it shall have been instituted to some court having jurisdiction over the whole matter in controversy ; and in such case the record in such proceeding shall be transmitted by the clerk of the court to the court to which by such order the proceeding shall be so transferred ; and the same shall thenceforth be continued and prosecuted in such court as if it had been originally commenced therein ”. (Cap. 6 of Legislative Enactments—Vol. 1 p. 56.)

The terms in which this section is drafted rather suggest that the ordinary rule is for the Court to adjudicate upon the claim of the plaintiff and the competence of the Court to so adjudicate is not to be affected by the fact that the claim in reconvention exceeds the jurisdiction of the Court of Requests. The proviso enables an order of transfer being made by the Supreme Court “ if it shall be thought fit ” to a Court having jurisdiction over the whole matter in controversy. The burden, therefore, is upon a defendant to satisfy the Supreme Court that a case is a fit one for a transfer order to be made.

Learned counsel for the petitioner submitted that the mere fact that the claim in reconvention is intimately connected with the claim of the plaintiff is sufficient ground for an order of transfer. In view of this

submission, I think it desirable to consider the cases bearing on this question cited to us in the course of the arguments and to deduce the principle on which the Supreme Court has acted in exercising its discretion in favour of a transfer.

In *Veeravaku v. Suppramaniam*¹ the plaintiff sued the defendant in ejectment. It was a tenancy case and the defendant interposed a claim in reconvention in which he claimed a sum of Rs. 2584 for goods sold and money advanced by him to the plaintiff. The Court refused to grant a transfer on the ground that the plaintiff's claim was for possession and therefore urgent and on the ground that the granting of the application for a transfer would prejudice the plaintiff and delay his claim.

*Jinasena v. Moosajee*² was a case in which the plaintiff sought to eject a defendant from premises alleging a tenancy and in which the defendant interposed a claim for compensation for improvements amounting to Rs. 6500 and also claimed a *jus retentionis*. It would appear that certain buildings had been put up by the tenant's father under an agreement with the then owner of the land, according to the terms of which the tenant was entitled to possess the land on payment of a sum of Rs. 540 per mensem. Defendant claimed the right to possess under the agreement or in the alternative to a *jus retentionis* till compensation for improvements was paid to him. Hearne, J., allowed a transfer differentiating the case he was considering from the case of *Veeravaku v. Suppramaniam*. He did not consider it appropriate to express an opinion on a tenant's right at common law to claim a *jus retentionis* till compensation was paid but expressed the view that in the circumstances of that case the disadvantage to the plaintiff of a transfer was far outweighed by the advantage to the defendant of having the questions of the alleged tenancy, and compensation and the *jus retentionis* decided at one and the same time. It is to be noted that apart from the claim based on common law the tenant claimed the right to possess under an agreement, and that question arose for decision. It must, I think, be conceded that apart from agreement under our law a tenant has no right to a *jus retentionis* till compensation for improvements has been paid. In that particular case, apparently, the question of tenancy was also disputed and that was one of the facts which, no doubt, weighed with the learned Judge in ordering a transfer.

In *Joseph v. Kasupathy*³ the claim in convention did not concern possession of land though counsel in the course of his argument said it did, and this fact influenced Nagalingam, J., in ordering a transfer. The tenancy had, according to the plaint, in no way been terminated and plaintiff was not entitled to possession: the claim was for rent, the reconvention was for compensation. The learned Judge allowed a transfer.

*Waidyachandra v. Nanayakkara*⁴ is a case in which the facts are very similar to the facts under consideration in the present case. There,

¹ (1902) 6 N. L. R. 59.

³ (1946) 48 N. L. R. 326.

² (1938) 47 N. L. R. 142.

⁴ (1953) 49 C. L. W. 63.

as here, the claim was for ejection, rent, and damages, and the claim in reconvention was for excess rent paid over and above the authorised rent payable under the Restriction Acts. The learned Appeal Judge allowed a transfer and in doing so referred to certain observations made by Hearne, J., in *Jinasena v. Moosajee* and by Nagalingam, J., in *Joseph v. Kasupathy*. It is to be noted, however, that in the former case the claim in reconvention also involved in addition to the other factors a claim to possession of the same land while in *Joseph v. Kasupathy* the claim of plaintiff did not involve a claim to possession of land. These facts were, if I may say so with great respect, not given sufficient consideration by the learned Judge in *Waidyachandra v. Nanayakkara* when he referred to certain observations made by the Judges who decided the two cases in question.

Observations of a general character made in the context of a particular case having reference to the facts established therein are apt to be misleading when applied to a case in which the facts are quite dissimilar.

It is to be noted that the observations of Hearne, J., in regard to the relative advantage to defendant and disadvantage to plaintiff made in *Jinasena v. Moosajee* would not justify an order for transfer on the facts of the present case. The disadvantage to plaintiff is great if a transfer is allowed. He would be kept out of possession for a long period. That is not disputed. What precisely is the advantage gained by the defendant if a transfer order is made. The defendant is entitled under our law if he has made overpayments to set off the overpayments against rents that have become due and would not for the purposes of the Rent Restriction Act be in arrears; the plaintiff's action must accordingly fail and the defendant would continue to be in occupation. If, however, he fails to establish overpayment he would get an undue advantage and that was not the kind of advantage Hearne, J., contemplated. In these circumstances the refusal to transfer would cause the defendant no hardship whatever whereas a transfer would cause the plaintiff hardship in the event of a false claim being interposed in reconvention. In *Joseph v. Kasupathy* the claim did not include a claim for ejection and in that respect it differs from the present case.

The cases in which applications for transfer are generally made may be categorised as follows:—

- (1) When claim and claim in reconvention are independent of and unconnected with each other and there is no right to possession of land involved;
- (2) When they are so unconnected and independent but a claim to possession is involved in the plaintiff's claim (*Veeravaku v. Suppramaniam*);
- (3) When claim and claim in reconvention are intimately connected and right to possession is involved in both claims (*Jinasena v. Moosajee*);

- (4) When claim and claim in reconvention are intimately connected but no right to possession is involved in either (*Joseph v. Kasupathy*);
- (5) When the claim and the claim in reconvention are intimately connected but a right to possession of immovable property is involved only in the plaintiff's claim (*Waidyachandra v. Nanayakkara*).

In classes 1 and 2 the Court would, it seems to me, refuse to grant a transfer; the ordinary rule would apply as no justifiable grounds exist for the intervention of the Supreme Court in the exercise of its discretion.

In cases falling under classes 3 and 4 the Court would order a transfer. In both cases no prejudice would be caused to a plaintiff: indeed, a refusal to do so in cases coming under class 3 would considerably prejudice a defendant and, it seems to me, it is the one case in which the Supreme Court has consistently exercised its discretion under section 79. In regard to class 4, the ground on which the Court would exercise its discretion in favour of a transfer is convenience.

The present case would fall under class 5. In my opinion, on the facts averred, in this case too an order of transfer should not be made. As I stated earlier when considering the case of *Waidyachandra v. Nanayakkara*¹ the defendant in this case would suffer no hardship whatever if his application is not granted. If the averments in his answer are at the trial found to be correct he is entitled to set off the overpayments against current and future rents and to continue to remain in possession till the full amount of the overpayments has been so liquidated: the plaintiff's action would then be dismissed. The Court would, in terms of section 79, "dispose of the matter in controversy so far as it relates to the demand of the plaintiff and the defence thereto", but it would not give any relief to the defendant in excess of its jurisdiction. On the other hand, if a transfer is made and it is established that no overpayments have, in fact, been made the plaintiff would suffer considerable hardship by being deprived for a considerable length of time of his common law right to be restored to possession. On a consideration of these facts I do not think this is a case in which a transfer order should be made.

I would accordingly dismiss the application with costs.

SANSONI, J.—I agree.

Application dismissed.

¹ (1953) 49 C. L. W. 63.