GOONEWARDANA *v.* RAJAPAKSE *et al.*

D. C., Colombo, letter C.

1895.
October 8.

Right of lessee to the action rei vindicatio *or to a possessory action as against lessor—Civil Procedure—Motion for summons—Motion to forward case in appeal.*

A notarial lease is a *pro tanto* alienation, and gives the lessee during his term the legal remedies of an owner and possessor.

When a plaint is accepted by the court, there is no necessity for a separate motion for summons, nor is a motion to forward the case in appeal necessary after the filing of the petition of appeal.

THE facts of the case are sufficiently stated in the judgment of the Supreme Court.

Sampayo, for appellant.

8th October, 1895. BONSER, C.J.—

This is an action by a lessee of immovable property against his two co-lessors, and another, who, he complains, have wrongfully ousted him. It appears from the plaint that the lease was made

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by a notarial instrument duly registered; that the plaintiff paid in advance the rent for the whole term of five years and entered into the occupation of the property, and that having been in such occupation for more than a year, he was unlawfully ejected by the lessor and the other defendant, who has a lease of the same property from the lessors subsequent in date to the plaintiff's lease. He claims restoration to possession and damages.

The Acting District Judge of Colombo, Mr. Templer, rejected the plaint, on the ground that "the statement in the plaint is "barred by a positive rule of law, that a tenant cannot sue his "landlord in ejectment; and that his remedy is for a breach of "covenant for quiet enjoyment," in other words, that his only remedy is an action for damages. It is not stated where this positive rule of law is to be found, and I do not believe that any such exists.

It appears that, according to the Roman Law, where a land or house was let, the "conductor," who in the case of land was termed *colonus*, and in the case of a house *inquilinus*, was not regarded as possessing the demised premises, for he did not claim to hold them *ut dominus*, which was of the essence of possession, so that the lessor was still the possessor, notwithstanding the letting.

If, therefore, the tenant were ejected by a third person, he was not entitled to the action *rei vindicatio*, nor to the ordinary possessory interdicts. But by the Roman-Dutch Law, where a lease was for a substantial period, the tenant had the right to sue his lessor to compel him to give up the use of the premises during the term, and was not restricted to an action for damages for breach of contract. *Neque dubitandum videtur, quin, locatione in decennium, vicennium, longiusve tempus contracta, locator ac heredes ejus personali actione conducti compellendi sint ad usum conductori relinquendum integro longo aut longissimo tempore in contractu definito* (*Voet, XIX., 2, section 1*).

Further, such lessees were, by Roman-Dutch Law, allowed to assert their right to the use of the land during the term, even against the purchaser, to whom their landlord had sold the property after granting the lease, although by the Roman Law the purchaser was not bound by the lease, provided, however, that the leases were by deed (*Voet, XIX., sections 1 and 2*).

The Legislature of this Island has still further recognized the rights of lessees. Ordinance No. 7 of 1840 makes every lease of immovable property (other than a lease at will or for a period not exceeding one month) void, unless made by a notarial instrument. Ordinance No. 8 of 1863 makes it compulsory to register all

such leases, and punishes non-registration with loss of priority. Both Ordinances placed leases in the same class as conveyances and other alienations, and it is now impossible to treat a lessee under a notarial instrument, however short be the term, as a Roman *colonus* or *inquilinus*.

In my opinion we ought to regard a notarial lease as a *pro tanto* alienation, and we ought to give the lessee, under such a lease, during his term, the legal remedies of an owner and possessor (see *D. C., Colombo, 55,552, Vanderstraaten, p. 283;* and *Perera v. Sobana, 6, S. C. C. 61*, where the distinction between a modern lease and a Roman *colonus* or *inquilinus* is recognized).

For these reasons I am of opinion that the plaint discloses a good cause of action.

I wish to add that the record shows that, even at this early stage of the action, at least two unnecessary motions have been made. At page 11 there is a motion paper containing a motion by the plaintiff's proctor, that summons should issue to the defendants. This is unnecessary, for section 55 of the Civil Procedure Code makes it the duty of the Court to issue summons if it accepts the plaint. Again, at page 12½ there is another motion paper containing a motion, that the petition of appeal be forwarded to the Supreme Court, but it was the duty of the District Court to forward it without any special motion for that purpose. These motions serve no object. They only mean expense to the parties, and encumber the record with unnecessary matter. The costs of these motions should not be allowed in taxation either between party and party, or between proctor and client.

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I readily subscribe to My Lord's judgment. Lessees for terms of years under instruments duly executed and signed should have their tenure assured to them as if they had the *civilis possessio* of the civil law.

The possessory action should be open to them against whosoever ejects them by force, be he stranger or landlord, or one claiming under the landlord. Such leases may be regarded as sales for the term of the *jus possidendi*, which the nature of the contract requires.

Motions for the issue of summonses on the presentment of a plaint are mere waste of time and paper, and even the Code does not say they are necessary.

The Code enacts that motions are to be made only in matters incidental to an action in the course of it, and not when step is being taken in the regular procedure (see *section 91*).

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The issue of a summons is a step in the regular procedure which the Court has to take.

There was again no occasion to move that the petition of appeal should be forwarded without security. It was an *ex parte* order not requiring security.

The costs of these motions should not be allowed in taxation.