

ABDUL CADER
v.
NAGARATNAM

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND SIVA SELLIAH, J.

S.C. 248/72 (F) – D. C. JAFFNA L 3362.

FEBRUARY 11 AND 13, 1985.

Landlord and tenant – Tenant's manager continuing in occupation after tenant has left the premises, on contract of tenancy with co-owner of landlord – Can such person be evicted on decree obtained against former tenant? Civil Procedure Code, s. 328.

Abdul Cader had rented the premises in suit to one Mrs. Sinniahpillai. Her Manager one Nagaratnam was carrying on her business in the premises but from 1964 Nagaratnam registered the business in his own name and in 1967 he obtained the tenancy of the premises from one Careem Hadjjar a co-owner of the premises and brother of Abdul Cader. By then Mrs. Sinniahpillai had left the premises. Abdul Cader sued Mrs. Sinniahpillai in ejectment and, having obtained decree against her of consent, had Nagaratnam evicted in execution of this decree. Nagaratnam in the present proceedings under section 328 of the Civil Procedure Code sought restoration to possession.

The main questions were whether Nagaratnam's possession was bona fide and whether he was in possession in his own right as tenant at the material time. Abdul Cader contended that Nagaratnam was Mrs. Sinniahpillai's agent and having come into occupation in that capacity cannot now claim to be in possession in a different capacity. Further as Careem Hadjjar had acquiesced in the letting of the premises by Abdul Cader he could not in law have created a tenancy with Nagaratnam.

Held –

(1) Mrs. Sinniahpillai had abandoned the premises and in the changed circumstances Nagaratnam was entitled to obtain the tenancy for himself.

(2) A co-owner has the right to lease out his share and this gives the lessee the right to possess and his possession is therefore a bona fide possession.

(3) The question of estoppel by acquiescence was not raised in the District Court proceedings and cannot be raised now.

(4) Under s. 328 of the Civil Procedure Code all that had to be established was that the possession of the disputant was bona fide on his own account or on account of some person other than the judgment-debtor and that he was not a party to the action in which the decree was passed.

(N.B. Section 328 referred to in this decision was as it stood before the passage of Law No. 20 of 1977.)

Cases referred to :

- (1) *Vaz v. Haniffa* (1948), 49 NLR 286.
- (2) *Vanderlan v. Vanderlan* (1940) 41 NLR 547, 550.
- (3) *Thamboo v. Annammah* (1934) 36 NLR 330, 333.
- (4) *Kalpage v. Gunawardane* (1964) 66 NLR 302.
- (5) *Ranasinghe v. Marikar* (1970) 73 NLR 361, 371.
- (6) *Ranasinghe v. Premadharma & Eminona* [1985] 1 SLR 63.
- (7) *Kandasamy v. Gnanasekaram S.C.* 60/82 S.C. Min. of 16.6.1983.
- (8) *Rosahamy v. Diago* (1898) 3 NLR 203.
- (9) *Ratnayake v. Rodrigo* (1915) 3 Bal. N.C. 68.

APPEAL from the District Court of Jaffna.

Faiz Mustapha with *N. M. Saheed*, for defendant-appellant

H. L. de Silva, P.C. with *K. Kanag-Iswaran* and *S. Mahenthiran* for plaintiff-respondent.

Cur. adv. vult

March 29, 1985.

SIVA SELLIAH, J.

This is an appeal by the defendant-appellant from the judgment of the learned District Judge of Jaffna dated 13.12.71 in case No. D.C. Jaffna L:3362 ordering that the plaintiff be restored to the possession of the premises from which he was ejected on 28.7.68 in execution of the decree in case No. 3268 L and awarding costs to the plaintiff.

The facts material for the determination of this appeal are as follows :

The defendant (Abdul Cader) sued one Mrs. Sinniahpillai for arrears of rent, damages and ejectment in case No. 3268 L on 5.5.68. On consent motion P14C in which defendant (hereinafter referred to as Abdul Cader) waived arrears of rent and damages and Mrs. Sinniahpillai consented to judgment in ejectment, decree was entered accordingly. Thereafter Abdul Cader took out writ and the plaintiff (hereinafter referred to as Nagaratnam) was ejected on 28.7.68. Nagaratnam thereafter filed the necessary papers for restoration of possession and the matter was duly inquired into, culminating in the judgment dated 13.12.71 ordering that Nagaratnam be restored to possession. Nagaratnam has contended that although prior to 1967

he was carrying on business in the premises as Manager, and the business was registered in his own name from 1964 (P1) the tenant of the premises was Mrs. Sinniahpillai. Nevertheless after May 1961 Mrs. Sinniahpillai ceased to be interested in the business and was resident in Colombo and as from 1967 by P2-P5 and P13 he (Nagaratnam) paid all arrears and rents to Abdul Cader's brother Careem Hadjar who was a co-owner of the property and obtained tenancy from him (Careem Hadjar) ; and that P13, and P2-P5 show that as from October 1967 Nagaratnam in fact possessed the premises in his own right at the relevant time at which he was ejected as tenant of Careem Hadjar and could thus not be evicted from the premises as he came within the ambit of section 328 of the Civil Procedure Code. Abdul Cader on the other hand contended that Nagaratnam was an agent of Mrs. Sinniahpillai and did not come within the scope of section 328 of the Civil Procedure Code and therefore was properly ejected. The learned District Judge has very carefully considered the rival contentions, the facts and the law applicable and concluded that the plaintiff came within the scope of section 328 and has held that Abdul Cader has chosen a short cut to eject Nagaratnam from the premises, that at the time the action against Abdul Cader's tenant was filed Nagaratnam was already in occupation as tenant of another co-owner and that Nagaratnam was forcibly ejected in spite of his protests and ordered restoration of possession.

It now becomes necessary to examine the provisions of section 328 of the Civil Procedure Code (Chapter 101) which states as follows :

"328. (1) If any person other than the judgment-debtor is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was bona fide in his possession on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the action in which the decree was passed, he may apply to the court by petition stating his grounds of dispute.

(2) If after examining the applicant.....the court shall proceed to investigate the matter in dispute....."

In hearing an application under the section the court shall confine itself to the grounds of dispute above specified.

It is manifest from a consideration of these provisions, that Nagaratnam had to establish that the property was bona fide in his possession on his own account or on account of some person other than the judgment-debtor and that he was not a party to the action in which the decree was passed. The defendant-appellant has alleged in his petition of appeal that the plaintiff-respondent was the agent of his tenant Mrs. Sinniahpillai, that he was a trespasser and that he thus could be ejected on the decree.

It is relevant at this stage to mention that Abdul Cader had filed action in D.C. Jaffna L/1602 in 1962 against the tenant Mrs. Sinniahpillai on the ground of arrears of rent and got judgment which was however set aside in appeal by the Supreme Court by P10 on 4.6.67. Thereafter Abdul Cader filed action against the tenant Mrs. Sinniahpillai and Nagaratnam in case No. L 3255 on 27.4.68 for ejection on the ground of arrears and subletting but chose not to pursue the said action which was abated only on 11.1.69. He also filed action L 3268 a few days after the institution of action L 3255 on 5.5.68 against the tenant Mrs. Sinniahpillai only and obtained a consent decree on 14.7.68 which the plaintiff-respondent alleged was a collusive decree by virtue of which Nagaratnam was ejected. It has also transpired that from 1961-1967 the tenant was not in occupation and it was Nagaratnam who carried on the business in the said premises and indeed conducted the appeal in L 1602. During this period no rents were paid and Abdul Cader was fully aware of the fact that Nagaratnam was in occupation and carried on business there. Nagaratnam has also admitted that prior to 1967 the tenant was Mrs. Sinniahpillai. Nagaratnam sensing danger had offered to become the tenant of Abdul Cader who however wanted key money in Rs. 7,500 and was prosecuted but acquitted in the Magistrate's Court; negotiations by Nagaratnam to secure tenancy from Abdul Cader failed. It is evident that the tenant Mrs. Sinniahpillai had not paid rent from May 1961 nor been in occupation as she was resident in Colombo. Nagaratnam thereafter offered the rents due for the premises to Abdul Cader's brother Careem Hadjar who was a co-owner of the premises and paid him arrears and monthly rents and became a tenant under him as documents P13 & P2-P5 establish. It is thus evident from all this that it has been a battle of strategies with the landlord Abdul Cader seeking to evict Nagaratnam on the consent decree entered in L 3268 with Mrs. Sinniahpillai to which the plaintiff-respondent was not a party and not by prosecuting action No.

3255 filed against Mrs. Sinniahpillai and Nagaratnam (her agent) for arrears and subletting of the premises, which has led the learned District Judge to observe in his judgment that "clearly the defendant had chosen a short cut to eject the plaintiff-respondent from the premises." On the other hand the plaintiff-respondent had obtained a tenancy from a co-owner of the premises the brother of the defendant by paying all arrears of rent and the monthly rent prior to institution of action L 3268 and certainly before judgment for ejectment and execution of writ in the said case. P13 and P2-P5 establish that all arrears up to end of September 1967 and rents for November, December and January were thus paid. The plaintiff-respondent Nagaratnam was thus able to establish that he was in bona fide possession of the premises on his own account and could not have been ejected and the learned District Judge accordingly ordered that he be restored to possession.

The learned counsel for the defendant-appellant Abdul Cader in this case, has strenuously contended that the learned District Judge has erred in holding that there was a letting of the premises by Careem Hadjjar to the plaintiff-respondent of the premises, that as a matter of law he was not so entitled to let the premises to the plaintiff-respondent, that although the defendant-appellant could have sued the plaintiff-respondent as a trespasser he had not done so but chosen a short cut by ejecting him under a decree obtained against Mrs. Sinniahpillai to which he was not a party, and that the learned District Judge had misdirected himself by the fact that Mrs. Sinniahpillai was not occupying the premises.

These contentions must be viewed in the light of the scope and ambit of section 328 of the Civil Procedure Code set out above. What the plaintiff-respondent Nagaratnam had to show was that the property was bona fide in his possession on his own account and that he did not possess it as an agent of the tenant Mrs. Sinniahpillai. In his petition dated 5.8.68 seeking restoration after ejectment in para 5(d) the plaintiff has stated "that the said land and premises were bona fide in the petitioner's possession on his own account as a tenant under the said Careem Hadjjar and that the petitioner was not a party to the above action in which the decree was passed and therefore that he could not be dispossessed." The learned District Judge after inquiry by his order has held on the facts that the fact the plaintiff had obtained tenancy from Careem Hadjjar in October 1967 is supported by P13 and P2-P5 and is further supported by the evidence of

advocate Thuraiyappa's evidence which he had no hesitation in accepting. I see no reason to disturb his findings on the question of fact. The learned District Judge has also found that although defendant Abdul Cader had filed case No. L 3255 against Mrs. Sinniahpillai and the plaintiff-respondent for arrears and sub-letting, that he had abandoned that action and a few days later had filed the instant action and obtained decree against Mrs. Sinniahpillai and ejected the plaintiff-respondent who was not a party. As far as the counsel's submission that Careem Hadjar had no right in law to so let the premises as a co-owner is concerned the District Judge has held "at the worst therefore Careem Hadjar had the right to lease his one third share of the premises to the plaintiff" and has relied on the case of *Vaz v. Haniffa* (1). This receives further support from the cases of *Vanderlan v. Vanderlan* (2) and *Thamboo v. Annammah* (3). Thus if a co-owner had the right to lease out his share of the premises the tenant certainly must have the right to possess and his possession is therefore a bona fide possession. The contentions therefore of defendant-appellant that the co-owner could not let the premises or even his own share and that plaintiff's possession was not bona fide or that he had no right to possession accordingly must fail.

It was contended by learned counsel for plaintiff that the co-owner Careem Hadjar had acquiesced in the contract of tenancy of Abdul Cader with Mrs. Sinniahpillai and therefore Nagaratnam could not create a tenancy with Careem Hadjar. It must be borne in mind that the evidence established that no rents were collected by Abdul Cader between 1961 - 1967 and that Mrs. Sinniahpillai was not in occupation of the premises during this time but was resident in Colombo. Nor was any evidence led regarding acquiescence by Careem Hadjar of the tenancy between Abdul Cader and Mrs. Sinniahpillai. Indeed no issue was raised on this point before the District Judge and although Careem Hadjar was cross-examined not a single question was put to him in cross-examination regarding such acquiescence on his part. This Court will accordingly not interfere on a question which was never before the District Judge but is trotted out for the first time in the Court of Appeal. In *Gunawardene v. Kalpage* (4) Tambiah, J. stated that in the absence of pleadings on acquiescence the District Judge had misdirected himself in holding that the co-owner had acquiesced in one of the co-owners leasing the whole of the premises. Further if indeed in the circumstances Nagaratnam

created a tenancy with only Careem Hadjiar without the consent of the other co-owners he did so at his own peril (*Ranasinghe v. Marikar* (5) per H. N. G. Fernando, J.)

The learned counsel further contended that Nagaratnam having been an agent of Mrs. Sinniahpillai prior to 1967 could not thereafter take up a different position of being a tenant. He quoted the cases of *Ranasinghe v. Premadharma & Eminona* (6) and the case of *Kandasamy v. Gnanasekeram* (7) for the proposition that a party cannot approbate and reprobate at the same time. What was held in these cases is easily distinguishable for Sharvananda CJ has in the former case stated "Hence a defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides." And that he cannot blow hot and cold. Thus in a duly constituted action a party cannot take up two positions. In the instant case however, once Mrs. Sinniahpillai had abandoned her tenancy taking up residence in Colombo and not paying rents, Nagaratnam sensed danger to himself and found in another co-owner a ready solution to his problem and accordingly paid all arrears and rents to him and thus at any rate for the time being solved his problem. Thus there was a change of circumstances and it was not a case of approbating and reprobating at the same time or blowing hot and cold as contended by learned counsel; it was Nagaratnam's consistent position even then that he at the relevant time was a tenant under another co-owner Careem Hadjiar. The District Judge has considered this position when he has stated that "equally it was open to the defendant to have sued the plaintiff for ejectment as a trespasser (*Kalpage v. Gunawardane (supra)*). But he has not chosen to do so. It is certainly not open to the defendant to sue the tenant whom he had put in possession and who to defendant's own knowledge had long since ceased to occupy the premises and under colour of the decree in that case eject a tenant to whom another co-owner had rented the co-owned property. It makes no difference that such tenant was earlier in occupation of the premises as sub-tenant or agent of the defendant's own tenant. What matters is that at the time the action against the defendant's tenant was filed the plaintiff was already in occupation as the tenant of another co-owner and the defendant's tenant was no longer in occupation of it.

Thus as was held in the case of *Rosahamy v. Diago* (8) by Bonser, C.J. the investigation in an application under section 328 should be limited to the question as to whether the plaintiff is entitled to restoration to possession of the property claimed by him. The only question is the right to possession. This decision was followed by Wood Renton ACJ in *Ratnayake v. Rodrigo* (9). In the instant case thus the bona fide possession of the plaintiff Nagaratnam is clearly established and no estoppel operates as contended by counsel. It is also established that he was holding under Careem Hadjar and not under Mrs. Sinniahpillai. The plaintiff Nagaratnam thus clearly comes within the ambit of section 328 of the Civil Procedure Code and the learned District Judge was right in making order that plaintiff be restored to possession. For these reasons the several contentions of the learned counsel for defendant-appellant must fail and the appeal is accordingly dismissed with costs.

H. A. G. DE SILVA, J.— I agree.

Appeal dismissed.
