

WAHAB  
v.  
JAYAH

SUPREME COURT.

SHARVANANDA, C.J., RANASINGHE, J. AND TAMBIAH, J.

S.C. No. 34/85.

C.A. No. 30/76

M.C. (CIVIL) KANDY No. 152/RE.

DECEMBER 9, 1987.

*Landlord and Tenant—Tenant of excess house of landlord vested in the Commissioner of National Housing—Can property vested be disposed by agreement to sell?—Estoppel—Eviction by title paramount—S. 10 and 11(1) of Ceiling on Housing Property Law No. 1 of 1973—Evidence Ordinance, s. 116.*

The premises occupied by the tenant (defendant) being an excess house of the owner were vested in the Commissioner of National Housing on 13.01.74. The landlord's wife entered into an agreement to sell the house by deed purporting to take advantage of s. 10 of the Ceiling on Housing Property Law which permits the owner of an excess house to dispose of it within 12 months from the date of the commencement of the law unless the tenant had made an application with contemporaneous notice to the present owner for the purchase of that house. The Commissioner by a mistake did not include the house in the list of excess houses of the plaintiff vested in him and the evidence of his representative was that the house had not vested in the Commissioner.

**Held—**

- (1) An agreement to sell is not a disposal of the house within the meaning of s. 10 of the Ceiling of Housing Property Law. Since the plaintiff had not disposed of the house before 13th January 1974, the premises vested in the Commissioner of National Housing under s. 11(1) of the Law. No vesting order is necessary. The vesting is by operation of law.
- (2) A tenant who has been let into possession is estopped from denying his landlord's title or from asserting that another person has a better title than his landlord (s. 116 of the Evidence Ordinance). But this doctrine has no application, where the tenant has been evicted by title paramount.
- (3) To constitute an eviction by a person claiming under title paramount, it is not necessary that the tenant should be put out of possession or that ejection should be brought. A threat of eviction is sufficient.
- (4) If the tenant under threat of eviction by the holder of title paramount attorns to such holder he can set this up as an 'eviction' by way of defence to an action for rent subject to his proving his evictor's title. Actual physical eviction is not always necessary to constitute eviction. It can be constructive or symbolic.
- (5) The burden was on the defendant to establish that he was evicted by title paramount. He however did not advance any evidence of eviction actual or constructive by the holder of title paramount. He has only established that the plaintiff's title has been superseded by title paramount. This is not sufficient to resist plaintiff's claim for ejection. There was no threat of eviction as the Commissioner, erroneously thinking the house was not vested in him, had not sought to evict the defendant.

**Cases referred to:**

- (1) *Cader v. Hamidu* (1922) 23 NLR 91, 92.
- (2) *Annie Tillekeratne v. Coomarasingham* (1927) 26 NLR 186, 188.

APPEAL from judgment of the Court of Appeal reported in [1985] 1 Sri LR 121.

*Dr. H. W. Jayewardene Q.C.* with *M. A. Q. M. Ghazzali, Miss T. Keenawinne and H. Amerasekera* for the plaintiff-appellant.

*S. C. B. Walgampaya* for defendant-respondent.

*Cur. adv. vult.*

January 13, 1988.

**SHARVANANDA, C.J.**

The plaintiff-appellant instituted this action on 6th June 1974 in the Magistrate's Court (Civil) Kandy for the ejection of the defendant, his tenant, from the premises in suit on the ground that the defendant was in arrears of rent. The defendant filed answer denying that he was in arrears of rent and further pleaded that the premises in suit had

vested in the Commissioner of National Housing on 13.01.1974, in terms of the provisions of the Ceiling on Housing Property Law No. 1/73 and that hence the plaintiff could not maintain this action for ejection of the defendant from the premises.

After trial the trial Judge held—

- (a) That the defendant was in arrears of rent and gave judgment in a sum of Rs. 1,000 and that the plaintiff was entitled to recover the said sum as arrears.
- (b) In regard to the plaintiff's claim for ejection, the court held that the premises in suit had vested in the Commissioner of National Housing and that plaintiff cannot maintain this action for the ejection of the defendant, and dismissed plaintiff's action for ejection.

At the hearing of the appeal preferred by the plaintiff before the Court of Appeal the defendant did not challenge the finding of the trial Judge that he was in arrears of rent. The main matter in contest was whether the premises in suit had vested in the Commissioner of National Housing. The Court of Appeal agreed with the trial Judge that the premises had so vested and held that the appellant was not entitled to maintain this action for the ejection of the defendant.

The plaintiff has preferred this appeal to this court. He has urged that the lower court erred in holding that the premises in question has vested by operation of law in the Commissioner of National Housing. Queen's Counsel appearing for the plaintiff-appellant further submitted that even on the finding that the plaintiff's title has been superseded by title paramount, defendant has not been evicted; that plaintiff has neither averred nor led any evidence to show that he had been evicted by title paramount.

The Ceiling on Housing Property Law No. 1 of 1973, came into operation on 13.1.73. Under section 8 of the said law the plaintiff made statutory declaration (P1 dated 4.4.73) which included the premises in suit, as a house owned by the appellant in excess of the permitted number of houses which the plaintiff did not propose to retain. Section 10 of the said law provides that any person who owns any house in excess of the permitted number may, within a period of 12 months from the date of the commencement of the Law, dispose of such house with notice to the Commissioner unless the tenant of such house had made an application with simultaneous notice to the present owner for the purchase of that house.

It was the case of the plaintiff that he did dispose of the said house on 10.1.74 by Deed No. 5861 (P2) dated 10.1.74 executed by his wife as owner prior to the material date 13.1.74. An examination of P2 shows that it is an agreement between the plaintiff as vendor and one Velliah Ramu as purchaser, to sell and transfer the premises in suit No. 197/6, Heerassagala Road, Kandy, along with premises No. 197/5 for the price of Rs. 30,000 to be paid by the said purchaser to the said vendor in instalments—Rupees Two thousand to be paid at the execution of the agreement and thereafter an annual payment of Rs. 2000 per year for a period of fourteen years, the vendor agreeing to execute a valid deed of transfer in favour of the purchaser on completion of the said annual instalments without making any default. The plaintiff has stated that he had only informed the Commissioner by letter P3 dated 14.2.74 that he had disposed of the said house and that the defendant had at no time made application to purchase the said house, even though he had by letter dated 4.4.73 (P6) given the defendant the option to purchase the premises.

I agree with the finding of the courts below that the Deed No. 5861 (P2) does not operate to dispose of the house in suit. It constitutes only an agreement to transfer and convey and is not effectual to pass any legal title in the property to the other party to the Agreement. The deed does not make any effectual disposition of the property; the plaintiff has not parted with the property. Section 10 contemplates, by the use of the word 'dispose', the transfer of the excess house — an agreement to convey at a later date is not sufficient to dispose of the property. Since the plaintiff had not disposed of the house before 13th January 1974, the premises in question vested in the Commissioner of National Housing by virtue of Section 11. (1) of the Ceiling on Housing Property Law. Section 11 (1) of the Law provides thus:—

"Any house owned by any person in excess of the permitted number of houses which has not been disposed of within the period within which such person may dispose of such house in accordance with the provisions of section 10 shall on the termination of such period vest in the Commissioner."

No vesting order is necessary, if the vesting is by operation of law.

The Commissioner had, after the receipt of plaintiff's letter dated 14.2.74 (P3) issued a Vesting Order dated 29.5.74 (P4) setting out the houses of the plaintiff which, according to him, has vested in him.

This vesting order P4 does not, due to some mistake include the premises in suit. In fact, acting on this misconception, the officer from the Department of National Housing stated in evidence that the premises in suit had not vested in the Commissioner. Though the view of the Commissioner regarding the vesting of the property is irrelevant, where the property has, by operation of law, vested in the Commissioner, yet it is relevant on the question whether the tenant had, in fact been ejected. The Commissioner would not have sought to eject the tenant since he was of the view that these premises had not vested in him.

Section 15 (2) of the Ceiling on Housing Property Law provides:

"Where any house is vested in the Commissioner under this law, the Commissioner shall have absolute title to such house and free from all encumbrances, and such vesting shall be final and conclusive for all purposes against all persons whomsoever, whatever right or interest, they have or claim to have to, or in, such house."

Section 116 of the Evidence Ordinance provides:-

"No tenant of immovable property or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property."

Section 116 is one of three sections which compose Chapter 'X' of the Evidence Ordinance which is headed Estoppel. The section embodies the principle of estoppel arising from the contract of tenancy. A tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. This section accords statutory recognition to the well-known doctrine that during the existence of the relationship of landlord and tenant, the tenant is estopped from denying the landlord's title or from asserting that another person has a better title than the landlord. This doctrine has no application, where the tenant has been evicted by title paramount. In order to constitute an eviction by a person claiming under title paramount, it is not necessary that the tenant should be put out of possession, or that ejection should be brought. A threat of eviction is sufficient, and if the tenant, in consequence of such threat, attorns to the claimant, he can set this up as an eviction by way of defence to an

action for rent, subject to his proving the evictor's title. Actual physical dispossession or expulsion is the most obvious and ordinary form of eviction; but evictions may be proved by less than this, and it is sufficient to prove acts and proceedings on the part of the third person, and reasonably and properly submitted to by the tenant, which are tantamount to actual dispossession by force. Such constructive or symbolic eviction is established by proof that there exists a third person claiming title paramount to the demised premises, that the third person has threatened to evict the tenant unless he attorns or pays rent to, or makes a new arrangement with himself; and that such attornment, payment or arrangement is thereupon made by the tenant in reasonable apprehension that the threats and demands of the tertius are warranted by a title paramount, and are not made gratuitously, or in collusion with the landlord. (Spencer Bower and Turner – Estoppel by Representation – 2nd Ed at page 178).

"It is sound law that a lessee cannot refuse to pay rent on the ground that the lessor had no title to the premises leased at the date of the lease. It is equally good law, however that he may prove that since the tenancy commenced the landlord's title has expired and that he has been evicted by title paramount."

Per Garvin J., in *Cader v. Hamidu*, (1).

It is not enough that a third party has a paramount title; but to excuse the payment of rent the tenant must have been evicted or ousted under that title. Bigelow on Estoppel page 563, quoted with approval by Jayawardena, A. J., in *Annie Tillekeratne v. Coomarasingham* (2).

The burden was on the defendant to establish that he was evicted by title paramount. He has not advanced any evidence of eviction actual or constructive. He has not even raised an issue respecting any such eviction. He has only established that the plaintiff's title has been superseded by title paramount; that is not sufficient to resist the plaintiff's claim for ejectment. Since the Commissioner was under the misconception that the property has not vested in him, he would not have taken any steps to eject the defendant or to have the defendant attorn to him. In the circumstances, the courts below have erred in holding that the plaintiff is not entitled to maintain his action for ejectment of the defendant.

I allow the appeal and set aside the judgment of the courts below and enter judgment for the plaintiff as prayed for by him, except that he will be entitled to a sum of Rs. 100 only on account of arrears of rent, due up to end of March 1974. I direct the defendant to pay the plaintiff the costs of this Court, and of the Court of Appeal which I fix at the aggregate sum of Rs. 3000. Parties will bear their own costs of the trial court.

**RANASINGHE, J.**—I agree.

**THAMBIAH, J.**—I agree.

*Appeal allowed*

---