1948 *Present :* **Nagalingam J.**

KUDOOS BHAI, Appellant, *and* VISVALINGAM, Respondent.

S. C. 84—C. R. Colombo, 4,941.

Landlord and tenant—Action for ejectment—Joinder of sub-tenant as defendant—Improper—Sub-tenant bound by decree—Liable to be ejected—Civil Procedure Code, Section 325.

In an action by a landlord against his tenant for ejectment the joinder of a sub-tenant as defendant is improper. A sub-tenant is, however, bound by a decree for ejectment entered against the tenant and is liable to be ejected. Should the sub-tenant refuse to quit, it would be open to the landlord to take proceedings under section 325 of the Civil Procedure Code.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

G. P. J. Kurukulasuriya, for 2nd defendant, appellant.

H. W. Tambiah, for plaintiff, respondent.

Cur. adv. vult.

December 6, 1948. NAGALINGAM J.—

A point of some importance in the law of landlord and tenant comes up for adjudication on this appeal. The plaintiff let to the 1st defendant on the terms of a monthly tenancy certain premises referred to in the plaint. The 1st defendant admittedly fell into arrears with his rent, and after due notice terminating his tenancy this action was instituted against him by the plaintiff claiming arrears of rent, ejectment and damages for overholding.

It would appear that the 1st defendant had sublet the premises to the 2nd defendant. The action as originally instituted was against the 1st defendant alone who was named the sole defendant. After service of summons which was effected on him by way of substituted service five months after action, an attempt appears to have been made to compromise the suit. The 1st defendant offered to give over possession of the premises with the sub-tenant but the plaintiff insisted upon vacant possession ; the first defendant apparently undertaking to file action against the sub-tenant and have him ejected the action was by consent of parties put off for a period of four months. There is no evidence in the case as to what steps if any were taken by the 1st defendant to implement his part of the terms of settlement. But, the record shows that three months later the plaintiff moved to amend the plaint with the 1st defendant's consent by bringing on the record the 2nd defendant as a party " so that he may have notice of this action and that he may be bound by the decree for ejectment to be entered in this case." The amendment was

allowed and summons was served on the 2nd defendant who filed answer disputing, *inter alia*, the right of the plaintiff to add him as a party. The 1st defendant filed no answer and pending the trial of the action against the 2nd defendant, decree for ejectment was entered against the 1st defendant.

At the trial between the plaintiff and the 2nd defendant the learned Commissioner disposed of the plea raised by the 2nd defendant in the following words :—

> " The 2nd defendant is only sought to be bound by the decree for ejectment . . . . there is no privity of contract between the plaintiff and the 2nd defendant, but the 2nd defendant, the sub-tenant should have notice of the action to be made bound by the decree for ejectment."

It has been contended on appeal that the amended plaint discloses no cause of action against the 2nd defendant and that no relief in point of fact was claimed against him in the prayer to the plaint. On behalf of the plaintiff, however, an argument was advanced seeking to justify the addition of the 2nd defendant as a party defendant on the analogy of the addition of puisne encumbrancers to a mortgage action as parties defendant. I may say at once that there is no parallel between an action upon a mortgage bond and an action by a landlord against his tenant. An action by a mortgagee is one to enforce a real right of property, while an action by a landlord is entirely one involving personal rights. The distinction will be better appreciated if the full significance of the term " real right " is borne in mind. " A real right is a right in a thing which entitles the holder to vindicate his right, that is, to enforce his right in the thing for his own benefit as against the world ; that is *against all persons whatsoever*." Wille, Principles of South African Law, 2nd edition, 153. A slight acquaintance with the history of hypothecary actions in our courts will reveal the considerations that led to the formulation of the rule that every person who claims an interest in the mortgaged property acquired by him subsequent to the date of the hypothec should be added a party defendant to the hypothecary action. But, these considerations are totally inapplicable to an action by a landlord who sues his tenant on the basis of a monthly tenancy. It is needless to say that different considerations would apply under our law to leases and sub-leases entered into notarially.

A landlord cannot seek to enforce his right of recovery of possession of the property let " against all the world ", but only against his tenant. Hence no person other than the tenant can properly be sued by a landlord for ejectment. There is the high authority of *Voet* for this proposition who lays down, 19–2–21, " *non tarmen locatori primo contra secundum conductorem ull ex locato actio est, cum nihil inter eos conveniri sit,* " that is to say in the words of Nathan in his Common Law of South Africa, Vol. 2, Edt. 1904, p. 807, " a lessor will not have an action on the lease against a sub-lessee since there is no contract between the parties and a person cannot sue or proceed upon the contract of a third party."

It is therefore obvious that the contention put forward by the plaintiff for adding the 2nd defendant as a party defendant cannot be sustained.

No other argument has been adduced for adding the 2nd defendant as a party defendant to this action. But, it has been urged on behalf of the plaintiff that unless the 2nd defendant is brought on the record he would be left with no remedy to recover possession of the property. I do not think so. The answer to the difficulty propounded is to be sought in section 324 of the Civil Procedure Code. A decree for ejectment entered in favour of the landlord against the tenant is a decree for recovery of possession of immovable property within the meaning of section 323 and in terms of section 324 on receipt of the writ it is the duty of the Fiscal to deliver over possession of the property described in the writ to the judgment creditor, if need be, by removing any person bound by the decree who refuses to vacate the property. To this provision there is a proviso which directs that "as to so much of the property as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor and not bound by the decree to relinquish such occupancy," the Fiscal shall give, what may be termed for the sake of brevity, constructive possession.

The first point to decide is whether a sub-tenant is a person who can be said to be bound by the decree entered in favour of the landlord against the tenant so as to subject him to removal by the Fiscal under the main provision of this section. It is not gainsaid that members of the family of the tenant such as the wife, child or servant are persons falling within the category of persons bound by the decree and who need not therefore be named defendants in the action or against whom a separate action need be brought to have them removed from the premises in order to deliver possession to the judgment-creditor. But, it is said that the case of a tenant is specifically dealt with in the proviso and that in regard to a tenant only constructive possession is possible in accordance with it. The phrase, "and not bound by the decree to relinquish such occupancy" qualifies also the word "tenant" in the proviso. The proviso therefore deals with tenants not bound by the decree thereby implying recognition of a class of tenants who would be bound by the decree. A common instance of a tenant who would not be bound by the decree entered against his landlord is the case of a tenant in occupation of property sold in execution against his landlord at the instance of a judgment-creditor of the landlord. No argument is necessary in such a case to demonstrate that the tenant is not bound by the decree and cannot be removed from the premises. Delivery of possession to the purchaser in such a case can only be a constructive one. In the case of a sub-tenant where judgment has been entered against the tenant himself the position is different. Such a sub-tenant is one who is bound by the decree. The right of the sub-tenant to continue in occupation is entirely dependent on the title of his landlord, the tenant, and on the tenancy of the tenant being determined, the sub-tenant's right too comes to an end and with reference to execution proceedings had by the landlord against the tenant, the sub-tenant is in no better position than a member of the family of the tenant.

This view is given expression to by de Kretser J. in the case of *Siripina v. Ekanayake* [1].

> " One can conceive of a tenancy where the lessee of a house or a set of rooms lets in some person into one room—such a person will be more or less his dependant."

This case has however been relied upon to support the contention that a sub-tenant is not bound by the decree entered against the tenant. The facts of the case show that the sub-tenant was one who had been let into possession *with the consent of the lessor* or his representative and that he had besides the rights of an improver. The learned Judge held that the sub-tenant in those circumstances was not liable to be evicted under the decree obtained by the lessor against his lessee. The case is therefore really no more than an authority for the proposition that where the *sub-tenancy is created with the consent of the landlord* a decree entered against the tenant cannot be enforced against the sub-tenant.

The learned Judge however proceeded to discuss the question generally as to the extent a sub-lessee was bound by a decree against the lessee and expressed the view, " the ruling principle is that no person is bound by the decree unless he is a party to the action. Certain subordinates may be bound by the decree but a tenant's position is different. Ordinarily he would not be bound by the decree unless he were a party to the case. Section 324 seems to recognise such a situation for it says, that if the Fiscal finds the property in the occupancy of a tenant or other person entitled to occupy the same as against a judgment-debtor and not bound by the decree to relinquish such occupancy he shall give possession in the manner indicated, that is constructive possession ". The learned Judge appears to have been influenced in arriving at this view by the case of *Ezra v. Gubbay* [2]. That was a case where a sub-tenant resisted the landlord in obtaining possession of the premises under a decree entered against the tenant and Rankin J. after considering the provisions of Order 21, Rules 97 and 99 of the Indian Civil Procedure Code corresponding to sections 327 and 328 of our Code held that the remedy of the landlord was by way of a separate action against the sub-tenant. But this case was not followed subsequently. Page J. sought to distinguish it in the case of *Ramkissendas and another v. Binjraj Chowdhury and another* [3]. That was a case where certain sub-tenants instituted an action against their landlords who had obtained a decree for ejectment against the latter's tenant for a declaration that the landlords are not entitled to have them ejected under that decree. It was held that that action was wholly unjustifiable and further that the sub-tenants were bound by the decree entered against the tenant and that the sub-tenants were not necessary parties to the action instituted against the tenant by the landlord. An excerpt from the judgment of Page J. will bear reproduction as it reflects effectively certain aspects of the argument at the Bar :

> The effect of that decree (in favour of the landlords against the tenants) was that the present defendants who were the head landlords of the

[1] *(1944) 45 N. L. R. 403.*
[2] *A. I. R. (1920) Calcutta 706.*
[3] *A. I. R. (1923) Calcutta 691.*

plaintiffs were entitled to possession of those premises as against the plaintiffs and against the plaintiffs' landlords and that the plaintiffs have not and have never suggested that they had a shadow of a right to remain in possession after the decree had been passed against their immediate landlords. What they say is this. That although it is perfectly true that they have no legal ground for resisting the execution of that decree yet as they have not been made parties to the action they were not bound by the decree.

Or in other words unless a landlord chooses to make all the sub-lessees and everybody who may have acquired an interest through those under-tenants parties to this action he could only execute against those persons against whom decrees have been obtained with the result that he may have to bring any number of suits ultimately against other persons who remained in possession.

If that were so it would, I think, tend unduly to multiply the number of suits.

It would be seen that the view taken was that a sub-tenant is bound by the decree entered against the tenant. In the case of *Jfferji Ibrahimji v. Yadin Mangal* [1] where again Order 21, Rules 97 and 99 came up for consideration on a resistance by a sub-tenant to execution of a decree entered against the tenant in favour of the landlord, Macleod C.J. said,

"In this case the tenants do not say they are in possession of the suit property on their own account or on account of some person other than the judgment debtor. They admit that they are *tenants of the judgment debtor.* The question whether they are servants or agents of the judgment debtor and not tenants is not really relevant to the question at issue, because in either case they are not entitled to obstruct the decree holder."

It will be realised that the effect of this holding is that had the learned Chief Justice been called upon to construe Order 21, Rule 35 (our section 324), he would have had no hesitation in holding that a sub-tenant was bound by the decree against the tenant and the only reason why he did not consider that provision was because the case came up for adjudication after the stage had been reached of obstruction by the sub-tenant. The learned Chief Justice expressed himself more fully in the later case of *Jivam Jadowj and others v. Nowraj Jamshedji Plumber* [2], where too the sections corresponding to our sections 325, 327 and 328 came up for consideration and particularly the words, "person other than the judgment debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor;" in regard to a proceeding taken with reference to an obstruction by a sub-tenant in delivering possession of the property to the landlord on a decree against the tenant :—

"It seems to me clear that a sub-tenant cannot claim to be in possession of property on his own account and if admittedly his immediate landlord is the tenant and judgment debtor he cannot be in

[1] *A. I. R. (1922) Bombay 273.* [2] *A. I. R. (1922) Bombay 449.*

possession on account of some person other than the judgment debtor. It is obvious therefore that the execution plaintiff is entitled to get possession of the premises from the sub-tenant; and if any other construction were placed on rules 97 and 99 obstruction could be caused to an execution plaintiff in a suit for possession in a manner which was never contemplated by the Code.

Mr. Jinnah, for the fruit-seller (the sub-tenant), relies upon the decision in *Ezra v. Gubbay* (*supra*). No doubt the learned Judge in dismissing the execution plaintiff's application held on the construction of Rule 99 that the under-tenant can be said to claim to be in possession on his own account. With all due respect it appears to me to require explanation, for, I cannot see how it can be said that an under-tenant is in possession of the premises on his own account. And in my opinion those words can only refer to a person who claims to be in possession on his own title. Otherwise it would not be necessary to add the words, ' on account of some person other than the judgment debtor ' the person in possession may either claim to be in possession on his own title or as *tenant of some person other than the judgment debtor*. But, if he claims to be in possession as a tenant of the judgment debtor, then it seems to me that the Court is bound to make the order in favour of the execution plaintiff, otherwise a landlord may get a decree for ejectment against his tenant, but may find that decree an absolute nullity if the tenant had sublet the premises as he may have again to file a suit against the sub-tenant."

The main provision of section 324 of our Code corresponding to Order 21, Rule 35 and section 325 corresponding to Order 21, Rule 97 came up for consideration in the Calcutta High Court in the case of *Sheikh Yusuf v. Jyotish Chandra Banerjee and others*[1] before a Bench of two judges. In that case the question whether a sub-tenant is a person who comes within the class of persons bound by the decree under the first part of section 324 (Order 21, Rule 35 Indian Civil Procedure Code) was specifically discussed as well as the legal position of a sub-tenant who obstructs delivery of possession of property to the landlord in execution of a decree against the tenant. In that case the landlord in execution of a decree for ejectment against his tenant who had sublet portions of the premises to various sub-tenants recovered possession of all the buildings barring one of which the petitioner the sub-tenant was in possession and which he refused to vacate. The landlord applied to the Court for Police help to obtain possession by ejecting the petitioner. The petitioner then made an application to Court under section 151 of the Indian Civil Procedure Code corresponding to our section 839 urging that he should not be evicted in execution of the decree against his lessor but that the proper procedure to be followed by the landlord was that under Order 21, Rule 97 (our section 325). Suhrawardy J. in delivering judgment said :—

" The decree under execution is a decree for delivery of possession of immovable property and was being executed under Order 21, Rule 35 under which possession of the property shall be delivered, if necessary

[1] *A. I. R. (1932) Calcutta 241.*

by removing any person bound by the decree who refuses to vacate the property. The question therefore that falls for determination is whether the petitioner is a person bound by the decree. If he is not so, the only remedy open to the decree-holder is to proceed under Order 21, Rule 97. If he is so, he is liable to be evicted in execution of the decree under Rule 35. The learned advocate for the petitioner argues that the words 'any person bound by the decree' are synonymous with 'judgment-debtor'. In my judgment the words include judgment-debtor as well as any person who may be held under the law as bound by the decree. The word 'judgment-debtor' is defined in S. 2 (10) Civil Procedure Code, as meaning any person against whom a decree has been passed or an order capable of execution has been made. If the scope of Rule 35 is limited only in respect of the person against whom a decree has been passed or an order capable of execution has been made then it would have been much easier to use the expression 'judgment-debtor' in the rule instead of the descriptive clause 'any person bound by the decree'.

Now it has to be seen whether the petitioner is a person who is bound by the decree. Under Section 115, T. P. Act, he being a sublessee his interest ceased with the forfeiture of the lease and he ceased to have any tangible right to the property. It seems to me that it would be unreasonable to force a landlord to make in a suit for ejectment against his lessee all the under lessees or even persons under such under lessees who may be in actual possession, parties to the suit the nature of which may change from a simple suit for ejectment on forfeiture or determination of the lease. So far as the landlord is concerned the possession is with his lessee. The possession of the lessee may be by his occupying the premises himself or by his allowing other persons to occupy the premises on his behalf either as sublessees or licensees or as servants. It would be most oppressive to insist upon the landlord to make all such persons parties to a suit. For instance in the case of a house in Calcutta which is popularly called 'mansion' or 'Court' there may be some 150 sub-tenants in occupation of different portions of it. The owner, if the view urged by the petitioner is accepted, will have to make all these persons parties in a suit for ejectment against his lessee. Take another common instance of a market or bazaar held under lease. If the owner seeks possession of it by ejecting the lessee, it will be absurd to hold that he must make every squatter or stall-holder party to the suit."

The learned Judge after expressing his disapproval of the judgment in *Ezra v. Gubbay* (*supra*) continued,

"A decree in ejectment passed against a lessee at the instance of a lessor is not only binding upon the lessee but also upon his subtenants provided they have no right independent of the right of their lessor in the demised premises."

The learned Chief Justice obviously did not consider it necessary to refer to Order 21, Rule 36 corresponding to the proviso of our section 324 for the reason that the view had been taken in the Indian Courts that

that rule did not apply to sub-tenants but to tenants under a judgment-debtor who was not sued in his capacity as a tenant by a landlord. See the cases of *Shama Soonderee v. Jardine Skinner & Company*, [1] and *Uppala Raghava v. Uppala Ramanuja* [2].

Following the principles underlying these judgments, I would hold that a sub-tenant is bound by the decree for ejectment entered against the tenant and that it is the duty of the Fiscal to remove the sub-tenant as he is a person bound by the decree and deliver possession to the landlord. But, if for any reason the Fiscal is unable to deliver over possession by removal of the sub-tenant from the premises the landlord would have to take proceedings under section 325 of the Code and if the Court finds that the person obstructing was a sub-tenant under the tenant the Court would then direct the ejectment of the sub-tenant, for as was said by Macleod C.J. in the case of *Jairam Jalowji and other v. Nowreji Jamshedji Plumber* (*supra*),

> "Now, the only justification for the fruitseller (the sub-tenant) being in occupation of the premises is the agreement of tenancy which originally existed between himself and the judgment debtor. He does not claim to be in possession on his own account or to be holding on account of some person other than the judgment debtor."

I should however add that in some of the earlier Indian cases it has been suggested that although a sub-tenant may not be a necessary party to an action by a landlord against his tenant for ejectment, nevertheless it may be advantageous to add the sub-tenants as parties. But this view has not prevailed later and in the case of *Sheik Yusuf v. Jyotish Chandra Banerjee* (*supra*) Suhrawardy J. observed in regard to it as follows :—

> "A question similar to this came for consideration incidentally in England in *Geen v. Herring* where the plaintiff had made all sub-tenants parties to an action for recovery of a house. The Court disallowed the costs of serving all the sub-tenants with writs or notices on the ground that it was not necessary to make all the sub-tenants parties to the action. In delivering the judgment of the Court of appeal Stirling L.J. observed—
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> 'It was not disputed, and I think rightly so, by the counsel fo the plaintiff that the action for recovery of these houses would have been well brought against Herring (the lessee) alone, without joining his weekly tenants.'
>
> The position will be more intolerable if a person in the position of the decree-holder in this case is compelled on resistance being offered by each of the sub-tenants to bring a suit for possession of this property against each of them. A valid notice to quit not only determines the original demise, but any under-lease which the tenant might have made. Fox on the Law of Landlords and Tenants, Edn : 6, p. 683. The petitioner therefore is a person who has no right to remain on the land and whose right, if any, came to an end along with that of his lessor."

[1] *7 W. R. 376.*

[2] *I. L. R. 26 Madras 78.*

Having regard to the principles of Roman-Dutch Law there is all the more reason to adopt the later Indian view.

In view of the foregoing reasons the conclusion I reach is that the 2nd defendant was improperly added and that the action against him should be dismissed with costs, both in this court and in the court below. But, I think, I have said enough to indicate my view that the 2nd defendant is one who is bound by the decree entered against the 1st defendant and is liable to be ejected under it.

Appeal allowed.