NAJIMDEEN AND OTHERS
v.
NAGESHWARI AND OTHERS

COURT OF APPEAL.
GUNAWARDANA, J.,
JAYAWICKRAMA, J.
C.A. NO. 512/98 (F).
D.C. KANDY NO. 2448/RE.
AUGUST 17, 1999.

Civil Procedure Code – S. 18 – Subletting – Application by subtenant to add a party as a necessary party – Rent Act, S. 10 (2) – Nemo potest plus juris ad alium transferee quam ipse Habet – Evidence Ordinance, S.116.

Held:

1. The 4th defendant-respondent was placed in possession by the 3rd defendant-respondent.

2. It is not open to the 4th defendant-respondent to show that he is as at present in possession under the title of any other than that of the 3rd defendant-respondent.

3. Even if the party is added since, the 4th defendant-respondent even at present is in occupation in unbroken continuation of the property which he had derived from or under the title of the 3rd defendant-respondent, the 4th defendant-respondent would be effectively precluded in law from showing that the party proposed to be added or anyone else than the 3rd defendant-respondent has title or that he is holding or in possession under anyone else than the 3rd defendant-respondent.

"Law does nothing in vain and commands nothing in vain."

APPLICATION in Revision from the order of the District Court of Kandy.

Cases referred to:

1. *Rubera and Another v. Wijesuriya* – [1998] – 1 Sri. L.R. 58.
2. *V. Visvalingam v. Gajaweera* – 56 NLR 111.

Reza Muzni for the plaintiff-petitioner.

A. A. de Silva, PC for the 4th defendant-respondent.

Cur. adv. vult.

September 30, 1999.

GUNAWARDANA, J.

The plaintiff-petitioner had filed this action, framed as it is, on a contract of tenancy as between himself and the 1st defendant-respondent to eject the latter and the 2nd to 4th defendants-respondents – the position averred in the plaint being that the 1st had sublet to the 2nd defendant-respondent and that the 3rd defendant-respondent who is the husband of the 2nd defendant-respondent, in turn, had sublet to the 4th. The plaintiff-petitioner has made this application in revision in respect of an order dated 04. 05. 1998 whereby the learned District Judge had allowed an application made by the 4th defendant-respondent in terms of section 18 of the Civil Procedure Code, to add Natha Devale as a necessary party.

It is also worth pointing out, in this context, that the 2nd and 3rd defendants-respondents, in their answer, had admitted that they sublet to the 4th, which is slightly different from the position enunciated in the plaint, ie that it was the 3rd defendant-respondent who sublet to the 4th.

Thus, it is clear that the only issue that would demand consideration at the trial is as to whether the 1st defendant-respondent had, in fact, sublet to the 2nd and 3rd for if, in fact, she, ie the 1st defendant-respondent had done so, without having obtained the prior written consent of the landlord, all the defendants are liable to be ejected – subleases or subtenancies being a nullity as far as the landlord,

ie the plaintiff-petitioner is concerned. By virtue of the operation of section 10 (2) of the Rent Act, a subletting or sublease made by the tenant in breach of the law confers no rights on the alleged subtenant, both of whom render themselves liable to ejectment, because the tenant, ie the 1st defendant had no right to sublet, forbidden as he was by the law to sublet without the prior consent of the landlord in writing. The principal tenant, ie the 1st defendant-respondent cannot evade this consequence by reason of a fictitious partnership agreement which gives the 2nd defendant-respondent all the benefits of a subtenancy while describing her as a partner in business (with the 1st defendant-respondent) if, in fact, the agreement with respect to a partnership is fictitious. If, in truth, the first defendant had sublet to the 2nd and 3rd defendants-respondents, the latter two defendants derive no righs because the subletting without consent of the landlord was forbidden by law and the 4th defendant too would not derive any right from the 2nd or the 3rd for they too had none or no rights to transmit to the 4th defendant-respondent, who, it is to be remarked, had admittedly been let into possession by the 3rd defendant-respondent who is the husband of the 2nd defendant-respondent or by both of them. *Nemo potest plus juris ad alium transferre quam ipse habet* – which means that no one can transfer a greater right to another than he himself has, and when one has no right one cannot transfer any right.

It is worth pausing to note that the fact that the 4th defendant-respondent was let into occupation by the 3rd defendant-respondent is an admitted fact in the answer that had been filed by him, ie the 4th defendant-respondent, whereas 2nd and 3rd defendants-respondents in their joint answer had stated that both of them jointly sublet to the 4th. On these pleadings, a situation which may embarass the plaintiff-petitioner, at the trial, is perhaps, in the offing, and I do not wish to aggravate it by dilating on it.

Subletting, if, in fact, the 1st defendant-respondent had done so, is a nullity as far as the plaintiff-petitioner is concerned. And, as section

116 of the Evidence Ordinance provides that neither the tenant nor anyone claiming through him shall be heard to deny that, that particular landlord had title to the property, it is open to the plaintiff-petitioner to eject all of them, that is, the tenant and subtenants, without proving his (plaintiff-petitioner's) title. It is well to remember that after the forfeiture of the main tenancy, that is, that of the 1st defendant, he being the principal tenant, the subtenants have no right to be in occupation. As explained above, if the 1st defendant-respondent had sublet the premises, such subletting works a forfeiture of the tenancy and the tenant and all those holding under him are liable to be ejected as trespressers. It is to avoid that consequence, that the 4th defendant-respondent sought to prove, by means of adding the Natha Devale, that –

(*a*) 3rd defendant-respondent had no title to the relevant premises in question to give the 4th defendant-respondent a valid tenancy in respect of the same;

(*b*) the 4th defendant-respondent, now, that is, as at present, is in occupation of the premises in suit, not under the title of the 3rd defendant-respondent but under that of Natha Devale.

It is beyond all controversy that, in law, the 4th defendant – is estopped from proving or showing either of the two facts designated (*a*) and (*b*) above, because the 4th defendant-respondent having admittedly come into possession of the relevant premises or having obtained the benefit of possession thereof from the 3rd defendant-respondent is just as much precluded or shut out from denying the 3rd defendant's title as he (the 4th defendant-respondent) is from denying that he is in possession, as at present, under the title of the 3rd defendant. For example, if the tenant had been placed in possession by X and now seeks to prove that he (the tenant) is now in occupation or possession under Y or under Y's – title that is also a way of challenging X's title – which a tenant is not entitled in law

to do without first surrendering possession of the premises to X under whose title he entered into possession.

As explained in my own judgment in *Ruberu and Another v. Wijesooriya*[1] the fact that the tenant received the benefit of possession from the landlord is, perforce, an admission by tenant of the fact that landlord had title to the premises. In any event, it is wholly unnecessary for the landlord to have title to the premises to give the same on rent and if authority for that proposition be needed it is found in *Visvalingam v. Gajaweera*[2] where Sansoni, J. held that the owner himself need not be the landlord. As explained in Ruberu's case (*supra*), if the tenant desires to deny the title of landlord or that he is not now in possession under the title of the person who let him into possession, that being exactly what the 4th defendant-respondent is now seeking to do, the tenant must first vacate and surrender possession of the premises to the person or persons who originally placed him in occupation – the person who placed the 4th defendant-respondent in possession of the premises in suit, as explained above, being admittedly the 2nd and 3rd or the 3rd defendant-respondent alone. But, on the pleadings and on the admissions made by the learned President's Counsel for the 4th defendant-respondent at the hearing before us, the 4th defendant-respondent had been continuously in possession as from the date, that is, from the date that he, ie the 4th defendant-respondent, was let into possession by the 3rd defendant-respondent, and had never surrendered possession to the latter, since then.

So that even if Natha Devale is added as a party, since, admittedly, the 4th defendant-respondent, **even as at present, is in occupation in unbroken continuation of the possession which he had initially derived from or under the title of the 3rd defendant-respondent – he (the 4th defendant-respondent) would be effectively precluded in law from showing that Natha Devala or anyone else than 3rd defendant-respondent has title or that he is holding or**

in possession under anyone else than 3rd defendant-respondent. That being so, it would be futile to add Natha Devale as a party to the action because, so far as I know, law requires nothing to be done that is to no purpose. Law does nothing in vain; and commands nothing in vain. And, still less would law permit anything to be proved which if proved would be irrelevant as expressed in the maxim *"Non potest probari quod probatum non relevant"*. The facts that Natha Devale is the owner of the premises in question, and that the 4th defendant-respondent is presently paying rent to the Natha Devale, assuming that those facts are established, and are true, are wholly irrelevant if not for any other reason than that they, ie those facts, cannot in law, be made use of by the Court, as explained above, to hold that it is open to the 4th defendant-respondent to challenge the title of the 3rd defendant-respondent or to show that the 4th defendant-respondent is not in possession under the title of the 3rd defendant-respondent.

To sum up, so far as I can see, the central point, being also the solitary point, that arises for consideration is as to whether the 1st defendant had, in fact, sublet to the 2nd as averred in the plaint. A little confusion can arise on the pleadings in consequence of the averment in the plaint that the 1st sublet only to 2nd defendant-respondent whereas the 2nd and 3rd defendants-respondents in their joint answer had stated that they both sublet to the 4th defendant-respondent who, in his answer, had stated that it was from the 3rd defendant-respondent that he obtained possession. It is probable that the 3rd defendant-respondent, being the husband of the 2nd defendant-respondent, was also holding under or by virtue of the right of the 2nd defendant and that he (the 3rd defendant) had sublet, if in fact, he had done so, to the 4th – not in his own right or in defiance of the right of the 2nd defendant-respondent but as someone acting on behalf of the 2nd defendant-respondent who was his wife. The situation has to be realistically appreciated.

IN ANY EVENT, HAVING ADMITTEDLY COME INTO POSSESSION, WHICH POSSESSION THE 4TH DEFENDANT-RESPONDENT

IS STILL HOLDING OR RETAINS, IT IS NOT OPEN TO THE 4TH DEFENDANT-RESPONDENT TO SHOW THAT HE IS, AS AT PRESENT, IN POSSESSION UNDER THE TITLE OF ANYONE OTHER THAN THAT OF THE 3RD DEFENDANT-RESPONDENT. IT IS WELL TO REMEMBER THAT IN HIS OWN ANSWER, AS POINTED OUT ABOVE, THE 4TH DEFENDANT-RESPONDENT HAS ADMITTED THAT – HE WAS PLACED IN POSSESSION BY THE 3RD DEFENDANT-RESPONDENT – ALTHOUGH THE 2ND AND 3RD DEFENDANTS-RESPONDENTS HAD, IN THEIR JOINT ANSWER, DIVERGED A LITTLE, AND HAD STATED THAT IT WAS BOTH OF THEM WHO SUBLET TO THE 4TH DEFENDANT-RESPONDENT.

Any how, one must not forget that the point that arises on this application before us, as at this stage, is not whether the 1st – 4th defendants-respondents are liable to be ejected on the facts set out in the plaint at the instance of the plaintiff-petitioner, but as to whether Natha Devale can be added as a necessary party under section 18 of the Civil Procedure Code at the instance of the 4th defendant-respondent. I have no choice but to answer that question in the negative, that is to say, that Natha Devale cannot be so added. The order of the learned District Judge dated 04. 05. 1998 directing the addition of Natha Devale is as wrong as wrong can be and is hereby vacated.

JAYAWICKRAMA, J. – I agree.

Application allowed.