SEELAWATHIE
v.
EDIRIWEERA

SUPREME COURT
FERNANDO, J.
DHEERARATNE, J. AND RAMANATHAN, J.
S.C. APPEAL No. 65/87
C.A. No. 16/78(F),
D.C. MOUNT LAVINIA 302/RE
SEPTEMBER 19, 1989.

Landlord and tenant – Tenant notified of change of ownership and of transferee's election to recognise him as tenant – Statement under Section 37 of the Rent Act, No. 7 of 1972 – Tenant's express refusal to attorn – Tenant continuing in occupation – Has privity of contract been established between the transferee (appellant) and tenant (respondent) ?

The tenanted premises were transferred and the tenant apprised of the change of ownership and of the transferee's option to take possession of the premises with the tenant in occupation, by letter and by a statement under Section 37 of the Rent Act No. 7 of 1972 signed by the appellant as landlord. The tenant expressly refused to attorn to the appellant and continued to occupy the premises.

Held –

(1) Continuance in occupation by the tenant (with notice of the transferee's election to recognise the tenant) constitutes an exercise of the tenant's option to acknowledge the transferee as landlord, establishing privity of contract between the parties. No other act or conduct is necessary.

(2) The respondent became the tenant of the appellant, upon the expiration of the monthly tenancy that was in force at the time she received the letter and the statement under Section 37 signed by the appellant as landlord indicative of her election to recognise the respondent as tenant, and the appellant was entitled to maintain this action against the respondent for rent, damages and ejectment, upon her failure to pay rent.

(3) Distinguished (a) *Naidu* V *Mudalige* (1), where there was a fresh agreement between the new owners and the former tenant, which transformed the character of the latter's occupation; there was no occupation *qua* tenant and no tenancy, and an action for rent and ejectment could not be maintained; (b) *Fernando* V *Wijesekera* (18), where the purchaser and the tenant had negotiated a new agreement.

Zackariya V *Benedict* (7) not followed.

Cases Referred to :

1. *Naidu vs. Mudalige* 76 NLR 385
2. *David Silva vs. Madanayake* 69 N.L.R 396, 398
3. *Silva vs. Silva* 16 N.L.R 315, 316
4. *Perera vs. de Costa* 57 N.L.R 293
5. *Morris vs. Mortimer* 2 S.C.C. 46
6. *Silva vs. Muniamma* 56 N.L.R. 357
7. *Zackariya vs. Benedict* 53 N.L.R. 311
8. *Perera vs. Padmakanthi* 1987 2 Sri L.R.1
9. *Wijesinghe vs. Charles* 18 N.L.R. 168, 170
10. *Fernando vs. Appuhamy* 23 N.L.R. 476, 477
11. *de Alwis vs. Perera* 52 N.L.R. 433, 445
12. *De Silva vs. Abeyaratne* 56 N.L.R. 574, 575
13. *Mohomed vs. Singer Sewing Machine Co.* 64 N.L.R. 407
14. *Subramanium vs. Pathmanathan* [1984] 1 Sri. L.R. 252, 257.
15. *Sabapathipillai vs. Ramupillai* 58 N.L.R. 367
16. *Fernandes vs. Perera* 77 N.L.R. 220
17. *Mensina vs. Joslin* 1 Srikantha's L.R. 76

18. *Fernando vs. Wijesekera* 73 N.L.R. 110

A.K. Premadasa. P.C. with *T.B. Dillimuni* for the Plaintiff-Appellant-Appellant.

N.R.M. Daluwatte, P.C., with *K. Balapatabendi* for the Defendant – Respondent – Respondent.

Cur. adv. vult.

November 3, 1989.

FERNANDO, J.

This appeal involves an important question of law, as to the circumstances in which a tenant who continues in occupation after receiving notice of the transfer of the rented premises becomes the tenant of the transferee.

The rented premises were gifted to the Appellant by her sister and brother-in-law, the original owners, on 18.5.74. By letter dated 9.11.74 the brother-in-law informed the tenant, the Respondent, of the transfer, and forwarded a statement in terms of section 37 of the Rent Act, which described the Appellant as the landlord, and which was signned by her as landlord. In the column headed "name and address of the person to whom the rent is payable", the name and address of the brother-in-law was set out: but, as the Court of Appeal held, this did not have the effect of designating the brother-in-law as the landlord. There was no reply to that letter, and the Respondent continued in occupation of the premises. By letter dated 30.12.74, the Appellant's Attorney-at-law informed the Respondent that she had become the owner of the premises by virtue of the aforesaid gift, and called upon the Respondent to attorn, and to pay the rent, to her. That letter also stated that "this state of affairs, I understand, had been intimated to you by the previous owner .... by registered post on or about 9th [November] 1974", an obvious reference to the letter and statement of particulars sent on 9.11.74. There is an apparent inconsistency, in that the former required the rent to be paid to the brother-in-law whereas the latter required payment to the Appellant, but this was in no way the cause of the Respondent's failure to pay rent. A payment to the brother-in-law would have been a valid discharge of the obligation to pay the Appellant; and a simple inquiry would have settled any real doubt on that score. To this the Respondent's reply was "without prejudice to my rights under the provisions of the Rent Act No 7 of 1972 and the Ceiling on Housing

Law, I acknowledge the receipt of your letter."

It became clear in the course of the trial (and the Court of Appeal so held) that the premises were not vested under the Ceiling on Housing Property Law; the owners were thus free to sell or otherwise alienate the premises. An application by the Respondent for the purchase of the premises under that Law was pending, but it was not contended before us that those proceedings in any way restricted the right of the owners to alienate the premises.

The Appellant's Attorney-at-law, by letter dated 29.3.75, gave notice to quit on the ground of arrears of rent (for a period in excess of three months), requiring the Respondent to deliver vacant possession on 15.7.75. The Respondent's reply was, firstly, that "the house . . . . . was vested with the Commissioner of Housing, and therefore I have no dealings with your client", and secondly, that "as the previous owners had charged excess rent", I am not obliged to pay rent till that sum is covered in full". There was no unequivocal refusal to have dealings with the Appellant, or to recognise her as landlord; such refusal was based on the premise that the Commissioner had become the owner. Further, the refusal to pay rent (presumably, to the new owner) was for the reason that excess rent had been charged, thereby implying that rent would have been paid had no excess rent been charged, or after such excess had been set off in full.

The issue which arises for decision in this appeal was framed thus at the trial –

> "Did the [Respondent] become a tenant of the [Appellant] as pleaded in para C of column 1 of the plaint ?"

In paragraph C it was averred that the Respondent was given due notice of the transfer and therefore by operation of law the Respondent became the tenant of the Appellant on the terms of a monthly rental. The learned trial Judge answered this issue in the negative, and held also that the original landlord had not lawfully terminated the tenancy, and that the Appellant had not succeeded to the rights and obligations of the original landlord. The reasons given by him were not considered to be acceptable by the Court of Appeal:

(a) that the statement under section 37 of the Rent Act referred to the brother-in-law as the person entitled to receive rent: as the Court

of Appeal observes, this "does not make [him] the landlord . . . only the agent of the landlord to collect the rents due to the landlord";

(b) that there were discrepancies in regard to the quantum of rent claimed by the Appellant: the Court of Appeal points out that the Respondent could have discharged her obligation by paying the authorised rent;

(c) that there were discrepancies in regard to the commencement of the tenancy, and the date from which the Respondent was in arrears: the original tenancy commenced on 15.3.64, and the Court of Appeal was of the view that the new tenancy, if any, commenced on 15.6.74 (upon the expiry of the monthly tenancy which was in operation when the transfer took place on 18.5.74). However, I incline to the view that a new tenancy could have commenced only on 15.11.74, **after** the tenant had notice of the transfer, and as at 15.3.75 rent had not been paid for four months;

(d) that the Respondent had not been duly informed of the change of ownership with relevant particulars, and that the transfer to the Appellant amounted to "an eye-wash": the Court of Appeal held that a donee from the landlord is in the same position as a transferee, and that the Rspondent had adequate notice of the transfer.

The Court of Appeal held that the existence of privity of contract between the Appellant and the Respondent is a pre-requisite to the Appellant's cause of action; that the Respondent, though she remained in occupation of the premises with adequate notice of the transfer, cannot be presumed or regarded as having attorned to the Appellant, since she refused to attorn; that in *Naidu v Mudalige* (1) the (former) Court of Appeal held that "mere continuing of occupation on the part of a tenant after notice of transfer by his landlord without more does not suffice to constitute an attornment"; that no privity of contract has been established between the Appellant and the Respondent, and accordingly the Appellant's action was misconceived.

Learned President's Counsel appearing for the Respondent contended that the Respondent had expressly refused to accept the Appellant as the landlord, and had not agreed to pay rent to her; that privity of contract had not been established between the parties; and accordingly, there being no relationship of landlord and tenant between them, the Appellant was not entitled to maintain an action for rent and ejectment, although possibly – but this he did not

concede – the Appellant may have been entitled to maintain an action based on title.

We were not referred to any provision of the Rent Act which dealt with the rights *inter se* of a tenant vis-a-vis a transferee from the landlord, and the arguments proceeded on the basis of the common law principles.

Different aspects of the question of law that arises here have been discussed in numerous decisions of this Court, and apart from three decisions which are referred to later in this judgment, these decisions appear to be self-consistent and consistent in principle, and establish the following principles.

Under the Roman Law, the sale of the leased premises by the landlord terminated the lease (unless it had been stipulated in the contract of sale that the lease should remain in force); the purchaser could eject the tenant, whose only remedy was an action on the contract against his landlord. The Roman-Dutch law adopted a different principle, that "hire goes before sale": *David Silva v Madanayake* (2) and *Silva v Silva* (3). A passage from Wille, Landlord and Tenant in South Africa, has been cited in the latter case –

> "A purchaser from the landlord of the property leased steps into the shoes of the landlord, and receives all his rights and becomes subject to all his obligations, so that he is bound to the tenant, and the tenant is bound to him, in the relation of landlord and tenant."

However, this is not an automatic consequence of the transfer. Both the transferee and the tenant have options: whether to permit the relationship of landlord and tenant to exist between them.

The same principles apply, whether it is a sale or a sale in execution: *Perera v de Costa* (4) and *Morris v Mortimer* (5), or, as in this case, a donation: *Silva v Muniamma* (6), *Zackariya v Benedict* (7) and *Perera v Padmakanthi* (8).

Thus the purchaser has the option, as against his vendor, to insist on vacant possession (or in the alternative to claim rescission of the sale) or to take possession, with the tenant in occupation – subject to the tenant's option. Where the purchaser opts for the former course, the occasion for the exercise of the tenant's option does not arise: the relationship of landlord and tenant as between vendor and tenant

continues, and the vendor alone can take steps to terminate the tenancy and eject the tenant in terms of the contract: *Wijesinghe v Charles* (9); *Fernando v Appuhamy* (10); *de Alwis v Perera* (11); *de Silva v Abeyaratne* (12); *Mohamed v Singer Sewing Machine Co* (13). Where the purchaser opts to take possession with the tenant in occupation, then –

> "The lessee had the option of cancelling and surrendering the lease and pursuing his remedy upon his contract against his landlord, or of retaining occupation of the property in terms of his lease against the purchaser. But in the event of his pursuing the latter course, he was under an obligation to pay rent to the purchaser and ..... also to perform all the other obligations due by him as a tenant to his landlord. The option [or] privilege that the tenant had to decide whether he would become a tenant of the purchaser consisted in this, that it was open to him to cancel or surrender the lease if he did not desire to become a tenant of the purchaser. Where he chose to continue in possession as tenant of the premises, it does not appear to me that he had any right to refuse to pay rent or to fulfil the other obligations of a tenant to the purchaser." *(David Silva v Madanayake,*(2)) per Samerawickrame, J. at 399."

The crucial matter for decision in this appeal is whether a tenant who remains in occupation of the rented premises, after receiving notice of the transfer and of the purchaser's election, has thereby exercised the option to become the tenant of the purchaser; or whether a tenant is entitled, while continuing to remain in occupation, to refuse to accept the purchaser as his landlord. Gratiaen, J., in *de Alwis v Perera* (11), Sansoni, J., (as he then was) in *Silva v Muniamma* (6), and *de Silva v Abeyaratne* (12), K.D. de Silva, J., in *Perera v de Costa* (4), and Samerawickrame, J., in *David Silva v Madanayake* (2) all appear to be of the view that "a tenant who remains in occupation with notice of the purchaser's election to recognise him as a tenant" may legitimately be regarded as having exercised his option to acknowledge the purchaser as his landlord, and thus to establish privity of contract between them. (These decisions have been cited with approval, more recently, in *Perera v Padmakanthi* (8), and *Subramaniam v Pathmanathan* (14). If the tenant does not wish to acknowledge the purchaser as his landlord, he must give up the tenancy and quit the premises, for –

> "If he refuses to continue as tenant, his first duty is to quit the

premises. If he chooses to stay in occupation he remains there as tenant ...." ((12) at 575).

In *Sabapathipillai v Ramupillai* (15), Weerasooriya, J., held that a tenant who received notice of the purchaser's election to recognise him as tenant cannot be heard to say that he did not attorn to the purchaser if he continued to be in occupation without informing the purchaser that he did not elect to attorn to him. However, he did not discuss the case of a tenant who, without remaining silent, expressly refuses to recognise the purchaser – which was the position in *David Silva v Madanayake* (2). There the tenant had claimed that his company, and not he, was the tenant; it was held that an action on the tenancy, for the ejectment of the tenant, was maintainable. In *Fernandes v Perera* (16), the purchaser called upon the tenant to attorn and pay rent to him: the tenant, claiming that he had been the tenant of another person for many years, refused to attorn unless the purchaser obtained that person's consent to the payment of rent to the purchaser. Following *David Silva v Madanayake* (2) it was held that, despite this refusal to pay rent to the purchaser, the tenant had become the tenant of the purchaser by operation of law. *Mensina v Joslin* (17) is similar.

There is thus a long and authoritative series of decisions to the effect that continuance in occupation by the tenant (with notice of the transferee's election to recognise the tenant) constitutes an exercise of the tenant's option to acknowledge the purchaser as landlord, establishing privity of contract between the parties. No other act or conduct is necessary. I hold that the Respondent became the tenant of the Appellant on 15.11.74, upon the expiration of the monthly tenancy that was in force at the time she received a letter dated 9.11.74 and the statement under section 37 signed by the Appellant as landlord, indicative of her election to recognise the Respondent as tenant; and the Appellant was entitled to maintain this action against the Respondent, for rent, damages and ejectment, upon her failure to pay rent.

It is necessary to refer to three decisions, which are to some extent inconsistent with the decisions referred to above. In *Zackariya v Benedict* (7) the tenant refused to pay rent to the transferee, and even questioned the validity of the transfer; an action for rent and ejectment was held not to be maintainable. This decision was not followed in *Perera v de Costa* (4) and was doubted in *Silva v*

Muniamma (6); *Fernandes v Perera* (16) is totally inconsistent with it.

Observations in *Naidu v Mudalige* (1) that "mere continuing of occupation .... without more" does not constitute an acknowledgement of the transferee as landlord, cannot be regarded as part of the **ratio** of that case. The landlord had informally agreed to sell the rented premises to the tenant, who then paid an advance; some months later, a firm of proctors wrote to the tenant that the deed of transfer in his favour could be executed, and requested payment of the balance purchase price. The same day, the premises were sold to the plaintiffs. The aforesaid firm was purporting to look after the interests of both the landlord and the plaintiffs, but made no mention of any sale or proposed sale. Six months later, the firm informed the tenant of the transfer, and that the new owners had consented to an extension of time for the payment of the balance purchase price; the tenant paid within the stipulated time. In these circumstances, no question of attornment arose: the tenant's occupation of the premises, after notice of the transfer, was not as tenant under the new owners, but as a prospective purchaser. There was a fresh agreement between the new owners and the former tenant, which transformed the character of the latter's occupation; and the latter duly complied with the stipulated condition as to the payment of the balance purchase price. There was thus no occupation *qua* tenant, and no tenancy, and an action for rent and ejectment could not be maintained.

Weeramantry, J., in *Fernando v Wijesekera* (18) defined the precise meaning of "attornment" and went on to consider whether the continued existence of the original contract of tenancy is a necessary consequence of attornment (at page 115); however, he refrained from deciding any question as to the manner in which the tenant's option is to be exercised, or the creation of privity of contract, and rested his decision on the finding that the purchaser and the tenant had negotiated a new agreement.

In *Fernandes v Perera* (16) and in *Mensina v Joslin* (17), it was held that in these circumstances the transferee is not entitled to bring a vindicatory action or an action for declaration of title, although in the latter case the tenant had disputed the transferee's title; however, it is not necessary for me to express any opinion on the question whether the transferee is entitled, either in addition or alternatively, to claim relief based on title.

I allow the appeal, and set aside the judgments and decrees of both Courts below, with costs throughout.

The learned District Judge, having held that the Respondent did not become a tenant of the Appellant, considered it unnecessary to answer other issues which related to the period in respect of which the Respondent had failed to pay rent, and the amount payable as rent. Since all the relevant evidence was available, findings of fact should have been reached on these issues, obviating the need for a fresh trial if an Appellate Court came to a different conclusion on the legal issues. In the circumstances of this case, I do not propose to remit this case to the District Court for the determination of those issues, as it is quite clear that the Respondent did not pay rent, either to the Appellant or her predecessors in title, after 9.11.74. Although there was some dispute as to the quantum of the rent, according to the plaint the authorised rent was Rs 96/58 per mensem (in 1974), and Rs 100/27 per mensem (in 1975), and the Court of Appeal has held that the authorised rent was Rs.96/58 according to the extracts from the Assessment Register. The Respondent did not contend for a lower figure, and it was not contended before us that the Respondent had the right to claim a set-off of the amount, if any, which she had overpaid to the Appellant's predecessors in title. The Court of Appeal also held that the original tenancy commenced on the 15th of the month, and that the new tenancy, had there been one, would have run from the 15th of each month. On that basis, the Appellant will be entitled to a decree for –

(a) ejectment of the Respondent as prayed for in her amended plaint;

(b) a sum of Rs 1,296/13, on account of arrears of rent from 15.11.74 and damages upto date of plaint (15.12.75), and damages at the rate of Rs 100/27 per mensem thereafter until vacant possession of the premises is delivered to her; and

(c) costs.

DHEERARATNE, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.