1954 *Present :* **Sansoni J.**

V. VISVALINGAM, Appellant, *and* D. DE S. GAJAWEERA, Respondent

*S. C. 180—C. R. Colombo, 41,956*

*Landlord and tenant—Merger of titles—Effect—Right of tenant to dispute landlord's title—Meaning of "landlord" in rent restriction law— Rent Restriction Act, No. 29 of 1948; ss. 13 (1) (a), 26, 27.*

Plaintiff-appellant had let certain premises to the defendant-respondent on a non-notarial document. Admittedly he was not the owner of the premises. He brought the present action to have the defendant ejected on the ground that rent was in arrears. Defendant pleaded that he had purchased from the owners a portion of the premises and taken on lease the remainder and that, consequently, the capacities of landlord and tenant had become merged in him.

*Held*, that even assuming that the defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession to his landlord. He must first give up possession, and then it would be open to him to litigate about the ownership.

Meaning of expression "landlord" in sections 26 and 27 of the Rent Restriction Act considered.

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

*H. W. Tambiah*, with *H. L. de Silva*, for the plaintiff-appellant.

*H. W. Jayewardene, Q.C.*, with *D. R. P. Goonetilleke*, for the defendant-respondent.

*Cur. adv. vult.*

October 13, 1954. SANSONI J.—

The plaintiff-appellant brought this action against the defendant-respondent claiming that rent was in arrears for four months. He claimed the amount due on this account and also asked for ejectment and damages. The defendant-respondent pleaded—

(1) that the plaintiff-appellant was not his landlord but only a rent collector for the owners ;

(2) that he had purchased from the owners through their attorney an undivided 1/3rd share of the rented premises prior to the filing of this action, and a further 5/18th share since the filing of the action ; and that he had taken on lease from the owners the remaining 7/18th share ;

(3) that the effect of such purchase was to extinguish the contract of lease because the capacities of landlord and tenant merged in the defendant.

On the question whether the respondent was the tenant of the appellant the learned Commissioner held, in my opinion correctly, that he was. The tenancy agreement entered into between them concludes the matter. The appellant was not the owner of the premises ; he only claimed to have taken them on rent himself on an oral agreement entered into with the owner. Though section 26 of the Rent Restriction Act, No. 29 of 1948, on which the respondent's counsel relies seems to enable the owner in such a case to claim that he is the landlord of the sub-tenant, section 27 of the Act clothes the appellant also with the character of a landlord. The purpose of section 26 seems to be to create a class of statutory landlords consisting of persons who would not normally bear that character; they come into existence independently of any contracts made by them, and their tenants are also created for them by the same section.

I have heard interesting arguments urged on the second and third questions by counsel for the appellant and the respondent respectively, but I think this appeal should be decided on the law as laid down many years ago by Bonser C.J. and Withers J. in *Alvar Pillai v. Karuppen* [1]. In that case which is very similar to the present one the defendant was let into possession of the whole land in dispute by the plaintiff on a non-notarial document. When the terms of the letting expired the defendant refused to give up possession on the ground that he had acquired title to half the land from a third party. Bonser C.J. said, " Even though the ownership of one half of this land were in the defendant himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease. He must first give up possession, and then it will be open to him to litigate about the ownership (Voet 19.2.32.) ". The same rule based on the same passage in Voet is set out in Maasdorp, Institutes of Cape Law (4th Edition) Vol. 3, page 248—" A lessee, as already stated, is not entitled to dispute his landlord 's title, and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of the same. His duty in such a case is first to restore the property to the lessor and then to litigate with him as to the ownership ". I am not aware of any authority upsetting the rule enunciated in these passages. The earlier statement referred to in Maasdorp is at page 245 and reads :—" A lessee is not entitled, when sued, to dispute his landlord's title to the leased property, even though that title is invalid unless he has been evicted or been legally compelled to pay the rent to some one else ". This obviously relates to the defence of eviction by title paramount which is open to a tenant under our law too, for which " actual physical dispossession is not necessary, but the eviction may be constructive or symbolic ", as Jayawardene A.J. said in *Tillekeratne v. Coomarasingham* [2]. But there is no question of eviction by title paramount in this case, since the respondent's position is not that he has been

[1] *(1899) 4 N. L. R. 321.* [2] *(1926) 28 N. L. R. 186.*

asked to pay rent to a third person under threat of eviction. The respondent is bluntly disputing hi landlord's title and he has refused to pay rent on the ground that he has acquired title to a share of the premises which he took on rent. He cannot be permitted to do this so long as he remains in possession, and if he ill-advisedly failed to pay the rent he is none the less in arrears of rent. This appeal therefore succeeds.

It would, on this finding, be illogical for me to examine the claim of the respondent to have acquired title to certain shares of the premises in question. That dispute—for the respondent's claim to those shares is challenged by the appellant—can be gone into if and when an action is filed by the respondent to vindicate his title. I am, however, unable to uphold the defence of merger or *confusio* put forward by the respondent even assuming, without deciding, that he has purchased the shares he claims. It does seem correct to say that a contract of lease becomes extinguished " by merger of titles, as where the lessee becomes owner of the leased property " and Maasdorp (page 269) cites Voet 19.2.4 as authority for this statement. But I do not think that such a result follows when a lessee purchases only a share, and it may be only an infinitesimal share, of the leased property. He would still, I think, remain a lessee and there would still be a landlord, for in such a case there is not that " concurrence of two qualities or capacities in the same person, which mutually destroy one another ", which is the reason of the rule as given by Innes, C. J., in *Grootchwaing Salt Works v. Van Tonder* [1].

But even if there had been merger in this case, I do not think it will assist the respondent because he will still be bound to restore the rented premises to the appellant for whether the contract of tenancy is extinguished by expiration of the term or by notice to quit or by merger of titles makes no difference to the tenant's obligation to surrender possession before he litigates about the ownership. Voet's views on this obligation are unmistakable in the passage I have referred to. " Nor can the restitution of the thing hired be delayed by the conductor pleading the *exceptio dominii*, although he might be able easily to prove his own ownership, but he must by all means first surrender the possession and then litigate as to the proprietorship, especially when the lessor sues not by the ordinary *actio locati*, but under the interdict for recovery of possession, " (Berwick's translation, page 228). The learned translator's note draws attention to the English formula that a tenant cannot dispute his landlord's title.

For the reasons given by me earlier in this judgment I allow this appeal. The appellant is entitled to judgment against the respondent as prayed for in his plaint, with costs in this Court and the lower Court.

*Appeal allowed.*

[1] *(1920) A. D. 492.*