1953 *Present :* **Gratiaen J. and K. D. de Silva J.**

SWAMI SIVAGNANANDA, Appellant, *and* THE BISHOP OF KANDY, Respondent

S. C. 51, with Application 95—D. C. Kandy, L 3,444

Rent Restriction Act—Distinction between tenancy and licence—Test of exclusive possession.

When a prospective purchaser of certain premises is permitted, pending his purchase, to occupy the premises on payment of a stipulated sum of money, his occupation is, at best, that of a licensee and not that of a contractual tenant entitled to claim the protection of the Rent Restriction Act. If the contemplated sale does not take place, the duration of the licence expires and the licensee becomes a trespasser liable to be ejected at the instance of the owner of the property.

" Although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. "

APPEAL from a judgment of the District Court, Kandy.

S. J. V. Chelvanayakam, Q.C., with *K. C. Kamalanadan* and *G. Candappa*, for the defendant appellant.

H. V. Perera, Q.C., with *Cyril E. S. Perera, Q.C.*, and *P. Somatilakam*, for the plaintiff respondent.

Cur. adv. vult.

July 22, 1953. GRATIAEN J.—

This is a *rei vindicatio* action. The plaintiff purchased certain premises, which are situated within the Municipal limits of Kandy, from their previous owners in June, 1951. Shortly afterwards he sued the defendant, who is the Manager of a school, for, *inter alia*, declaration of title and for ejectment on the footing that he was a trespasser on the premises. After trial, the learned District Judge entered judgment in the plaintiff's favour as prayed for with costs.

The basis on which the defendant contested the plaintiff's claim in the lower Court had not been very clearly defined in his pleadings, but the relevant facts which form the background of his defence are not in dispute. The previous owners of the premises had for some time been anxious to sell them in the open market, and on 29th November, 1950, they entered into an informal agreement (P 6) with the defendant whereby he undertook *inter alia* to purchase the premises for a sum of Rs. 80,000 within a period of 90 days, or in the alternative to deposit within that period a sum of Rs. 50,000 in part payment of the purchase price, in which latter event he would enter into a formal notarial agreement binding himself to complete the purchase not later than 30th April, 1951. A contemporaneous, ancillary agreement was entered into whereby he was to be permitted by the owners to occupy the premises immediately in anticipation of his purchase " during the time preceding the first instalment ", paying a sum calculated at the rate of Rs. 200 per mensem as consideration " for the usage of the property " during the interim period. The defendant entered into occupation in pursuance of this ancillary agreement, which made no express provision, however, for the eventuality of his defaulting in his principal obligation to complete the purchase within the stipulated period.

As events turned out, the defendant had been over-optimistic as to his prospects of collecting sufficient funds to implement his promise to purchase the property. He was granted one or two short postponements of the date for completion, but ultimately the owners informed him that, unless the sale was concluded on or before 2nd March, 1951, they would sell the premises to some one else. He failed to make payment within that time, and it was in these circumstances that the plaintiff became the purchaser.

The defendant refused to vacate the premises. In his correspondence with the previous owners before the action commenced, he took up the untenable position that the non-notarial agreement of sale in his favour (which was of no force or avail in law quite apart from the expiry of the stipulated time for completion) took priority over the plaintiff's purchase, and that the plaintiff's only remedy was to recover from him a sum of Rs. 80,000 representing the amount which he had promised to pay for the premises. In this Court, Mr. Chelvanayakam contrived to present the defence upon a more respectable basis, and he argued that the defendant's occupation was from its inception that of a contractual tenant under the previous owners and that the premises, by reason of their situation, were protected by the provisions of the Rent Restriction Act. In the result, he contends, the plaintiff's action was misconceived, because he has neither pleaded nor proved that any of the circumstances enumerated in the Act have arisen to justify a decree for ejectment

Although this new defence was not raised specifically at the trial, all the facts necessary for a determination of the precise nature of the defendant's occupation are before us. Upon those facts, I am satisfied, as a matter of law, that the defendant was at no time a contractual tenant of the premises, but that he was at best a licensee (in the sense in which that term is now understood) enjoying a " permissive occupation which falls short of a tenancy "—*per* Denning L.J. in *Marcroft Wagons Ltd. v. Smith* [1]. The duration of the licence granted in the original agreement (and later extended until 2nd March, 1951) had expired long before the action commenced. In consequence, he became a trespasser liable to be ejected at the instance of the present owner of the property.

Mr. Chelvanayakam referred us to certain earlier decisions of the English Courts in support of his submission that a prospective purchaser who is permitted, pending his purchase, to occupy the premises on payment of an agreed consideration may legitimately be regarded as enjoying the rights of a tenant during that period. In *Howard v. Shaw* [2], however, Lord Abinger C.B. ruled that " while the defendant occupied under (even a valid) contract for the sale of the property to him, he could not be considered as a tenant ". Discussing these conflicting authorities, the Court of Appeal in England recently pointed out that " after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive ". *Errington v. Errington and Woods* [3].

The question whether or not the parties to an agreement intend to create as between themselves the relationship of landlord and tenant must in the last resort be a question of intention—*per* Lord Greene M.R. in *Booker v. Palmer* [4]. Similarly, Denning L.J. said in *Errington's case* (*supra*) " Although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted *a personal privilege, with no interest in the land*, he will be held to be a licensee only."

Let us examine the terms of the informal agreement P 6 in the light of these principles. Can it be reasonably supposed that the prospective purchaser who was permitted, on payment of a stipulated sum of money, to occupy the premises for a period not exceeding 90 days in anticipation of his implementing his previous undertaking to become the owner by purchase within that time, was intended, if he defaulted in the principal obligation, to continue nevertheless to occupy the premises as a contractual tenant enjoying, in addition to all the common law rights attaching to that status, the statutory protection of the Rent Restriction Act ? The agreement does not say so, and to imply such term would, in my opinion, be wholly artificial in the background of the negotiations which preceded it. Had the defendant and the owners originally discussed what should happen if the contemplated sale fell through owing to the defendant's default, I do not doubt that they would both have

[1] *(1951) 2 K.B. 496 at 506.*
[2] *8 M. & W. 118 (=151 E.R. 973).*
[3] *(1952) 1 K. B. 290.*
[4] *(1942) 2 A. E. R. 676.*

declared, " it goes without saying that the concession of occupying the premises must automatically cease ". To my mind, it borders on the fantastic to suppose that the previous owner who was so anxious to dispose of his premises could have intended to saddle the premises with a tenant enjoying substantial protection from eviction under the Rent Restriction Act. Evershed M.R. points out in *Marcroft Wagons Ltd. v. Smith* [1] that " Every owner of a property today appreciates that the effect of the Rent Restriction Acts is such that in all human probability, should he claim or desire possession of the property, he will have to go to the (County) Court for an order . . . . In judging from the inference to be drawn from such events as those which took place here, it seems to me vital to bear in mind that this is the background against which people must now discuss and regulate their affairs. " I quote these observations because they apply so aptly to the present context.

For the reasons which I have given, I would hold that the defendant's occupation falls far short of that of a tenant entitled to claim the protection of the Rent Restriction Act. Indeed, he has refused to recognise the plaintiff as his " landlord " by attornment. The judgment and decree under appeal must therefore be affirmed, subject to the deletion of that part of the decree which orders the defendant to pay to the plaintiff a sum of Rs. 3,000 as damages upon the fourth cause of action pleaded in paragraph 12 of the plaint. Although there is little doubt that the defendant has caused certain damage to the property since he commenced to occupy it, the evidence does not establish that the wrongful acts complained of were committed *after* the plaintiff became the owner. Subject to the amendment of the decree in this respect, I would dismiss the appeal with costs. I would however direct that writ of ejectment should not issue until 31st October, 1953. This concession will mitigate the hardship which might otherwise be caused to the pupils of the defendant's school.

K. D. DE SILVA J.—I agree.

Appeal mainly dismissed.