**1974** *Present :* **Alles, A.C.J., Vythialingam, J. and Walpita, J.**

S. M. J. FERNANDES, Appellant, *and* W. R. S. PERERA and another, Respondents

*S. C. 57/67 (F)—D. C. Colombo, 10113/L*

*Rent Restriction Act—Sale of the rented premises—Refusal by the tenant to attorn to the new owner—Remedy of the new owner—Evidence Ordinance, s. 116.*

When a person purchases premises which are subject to the provisions of the Rent Restriction Act, and the tenant who is in occupation of the premises refuses to accept the purchaser as his new landlord on the alleged ground that the rents are payable to a third party, the remedy of the purchaser is to sue the tenant on the contract of tenancy and not by way of a vindicatory action.

The 1st defendant was the tenant of certain "excepted" premises and had been paying the rents to the 2nd defendant at the request of the landlord. After the death of the landlord, the plaintiff purchased the premises, with the sanction of the Court, from the administrator of the deceased landlord. When the plaintiff's proctor wrote to the 1st defendant requesting him to attorn to the plaintiff and pay rents to him, the 1st defendant replied that he had been the tenant of the 2nd defendant for the previous 18 years and wanted the plaintiff to obtain a letter from the 2nd defendant to pay rents to the plaintiff and that, unless this was done, he could not attorn to the plaintiff. At no stage did the 1st defendant seek to terminate the tenancy. He was in occupation of the premises and was willing to fulfil his obligations as a tenant to whomsoever was legally his landlord.

In the present action the plaintiff sought a declaration of title to the premises and the ejectment of the two defendants from the premises. The trial Court gave judgment in favour of the plaintiff, holding that the 2nd defendant who claimed the property on a verbal gift from the deceased landlord was a trespasser and that the 1st defendant, by denying the title of the plaintiff, forfeited the protection of the Rent Restriction Act.

*Held,* applying the *ratio decidendi* in *David Silva v. Mudanayake* (69 N. L. R. 396), that the 1st defendant had attorned to the plaintiff and could only be ejected if there was a breach of any of the conditions laid down in the Rent Restriction Act. The plaintiff's action in the present case was therefore misconceived and he could not eject the 1st defendant in a vindicatory action.

APPEAL from a judgment of the District Court, Colombo.

*C. Ranganathan,* with *A. Sivagurunathan,* for the 1st defendant-appellant.

*J. W. Subasinghe,* for the respondents.

*Cur. adv. vult.*

June 17, 1974. ALLES, A.C.J.—

The plaintiff instituted this action against the two defendants in 1963 for a declaration of title to premises No. 107, Parakrama Road, Peliyagoda, for ejectment of the two defendants from the said premises, and for recovery of damages. The plaintiff

became the purchaser of these premises in April 1961 when Samarabandu Perera, the Administrator of the Estate of Baron Perera, whose estate was being administered in Testamentary proceedings D.C. Colombo 15330/T obtained permission of Court to sell the property. The sale was confirmed on 7th September, 1962, and Deed of Transfer No. 1279, whereby he became the owner, was executed on 20th September, 1962.

The 1st defendant, who is the appellant in this case had been the tenant of Baron Perera since 1945. It is not in dispute that since 1947 the 1st defendant, at the request of Baron Perera, paid the rents to the 2nd defendant, who was an illegitimate son of Baron Perera and the learned District Judge has held that the 2nd defendant was the agent of Baron Perera until the date of the latter's death on 3rd November, 1952. After 1952 the 1st defendant continued to make payments to the 2nd defendant and in 1959 the 2nd defendant had sued the 1st defendant in D.C. Colombo 46795/M for arrears of rent from February 1958 (P7). The case was settled on 20th May 1960 and decree entered in favour of the 2nd defendant, whereby the 1st defendant agreed to payment of rent from 1st May 1960 to the 2nd defendant. The decree however added that " in the event of the defendant being sued by the legal heirs of Baron Perera, the plaintiff agrees to indemnify the defendant " (1D15). Prior to the date of decree on 18th May, 1959, the 1st defendant deposited to the credit of the Testamentary Case a sum of Rs. 305/94, being the balance rent due from him after deducting the cost of essential repairs. According to 1D4 of 25th April 1960 the 1st defendant looked upon the 2nd defendant as the Administrator of Baron Perera's estate and continued to pay his rent to the credit of the Testamentary Case. In March, 1962, the 1st defendant became aware that the plaintiff had bought the property and wrote to him whether he was to forward the rent to him (1D16). He followed up this query with a second letter (1D17) dated 9th April, 1962. By 1D19 of 21st May 1962 the plaintiff's proctor wrote to the 1st defendant requesting him to remit the rents from January 1962 to the plaintiff, since the latter had purchased the property in December, 1961. Thereafter until the end of 1962 the plaintiff's proctor wrote to the 1st defendant requesting him to attorn to the plaintiff and pay rents to him.

The 1st defendant appears to have been in a difficulty not knowing to whom he had to pay his rent. He was apparently not interested in the Testamentary proceedings and was only anxious to continue to be in occupation of the premises and pay rents to whomsoever was legally entitled to it. Finally by ID23

of 14th December, 1962, his proctor wrote to the plaintiff's proctor that he had been the tenant of the 2nd defendant for the last 18 years and wanted the plaintiff to obtain a letter from the 2nd defendant to pay rent to the plaintiff and that unless this was done he could not attorn to the plaintiff. It will be noted that at no stage did the 1st defendant seek to terminate the tenancy. He was in occupation of the premises and was willing to fulfil his obligations as a tenant to whomsoever was legally his landlord.

In giving judgment in favour of the plaintiff, the learned Judge has held that the 1st defendant as tenant has supported the case of the trespasser, the 2nd defendant, who claimed the property on a verbal gift from Baron Perera, and that by denying the title of the plaintiff he has forfeited the protection of the Rent Restriction Act, the premises in question being excepted premises under the provisions of the Act.

Learned Counsel for the appellant submitted, that when a landlord sells a property, even if the tenant refuses to attorn to the purchaser, but continues in occupation, the contract of tenancy is not terminated. The only relief to which the new landlord is entitled in such a case is not to bring a vindicatory action but an action on the contract of tenancy and he can only succeed in such an action if the tenant contravenes any of the provisions of the Rent Restriction Act. In support Mr. Ranganathan relied on the judgment of Samerawickrame, J. in *David Silva v. Mudanayake*[1] 69 N.L.R. 396. This judgment was delivered in 1967 subsequent to the order of the learned District Judge in this case.

In *David Silva v. Mudanayake* the premises in question had been let to David Silva by Mudaliyar Mudanayaka in 1947. In 1957 Mudaliyar Mudanayaka transferred the premises in suit to his son, the plaintiff, and it was the submission of Counsel for David Silva that his client had not become the tenant of the plaintiff upon the transfer by Mudaliyar Mudanayaka, because it was the tenant who had the option of continuing the tenancy and if the tenant was unwilling to be the tenant of the purchaser, the latter did not become the landlord. Samerawickrame, J. considered the rights of parties upon the sale or transfer of premises that have been let. After considering the Roman Law on the subject and its extension under the Roman Dutch Law Samerawickrame, J. summarised the legal position in the following passage at pp. 398 and 399.

[1] *(1967) 69 N. L. R. 396.*

"It would appear, therefore, that a purchaser of property that had been let was bound by the lease and had to permit the lessee to continue in occupation till the end of the term of the lease. The purchaser may of course, as against his vendor, insist on vacant possession or, in the alternative, claim rescission of the sale, but if he desires to abide by the sale, he can only *take possession along with the lessee in occupation if the latter chooses to continue with the lease.* The lessee had the option of cancelling or 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 it appears to me also to perform all the other obligations due by him as tenant to his landlord. The option of 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."

The learned Judge also cited two previous decisions of this Court in support of the above proposition. In *De Alwis v. Perera* [1] 52 N.L.R. 433 at 445 Gratiaen, J. stated that "it would seem 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 attorned to the purchaser so as to establish privity of contract between them". In *Silva v. Muniamma* [2] 56 N.L.R. 357 Sansoni, J. stated "that when a landlord sells premises which have been rented the purchaser steps into the landlord's shoes and is entitled to claim the rent from the tenant. It is not incumbent on the tenant to remain in possession if he does not wish to acknowledge the vendee as his landlord. He is quite entitled to give up the tenancy and quit the premises *but so long as he remains in possession he must pay the rent* to his new landlord, that is the vendee".

Mr. Ranganathan submits that in the light of these authorities, if the tenant is in occupation of the leased premises he becomes the tenant of the new purchaser by operation of law. The tenant in such a case is not a trespasser and even if he seeks to deny the title of his landlord—which he is estopped from denying under the provisions of section 116 of the Evidence Act—it does

[1] *(1951) 52 N. L. R. 433 at 445.*  [2] *(1955) 56 N. L. R. 357.*

not affect the contract of tenancy so long as he continues to be in occupation and is willing to pay his rent. I have detailed the evidence in this case in regard to the relation between the plaintiff and the 1st defendant to indicate that the 1st defendant was in occupation of the premises, that he never sought to terminate the tenancy and was always willing to pay his rent. His difficulty arose in regard to the payment of rent to the correct person in view of the conflicting claims of the 2nd defendant and the plaintiff who both claimed to be the landlord of the premises. Counsel for the plaintiff cited a passage from Voet 19.2.19 (Berwick's translation) in support of the issue that the 1st defendant was a trespasser. This passage does not however support his submission. This same passage has been cited by Samerawickrame, J. in *David Silva v. Mudanayake* when he dealt with the Roman Dutch Law on the subject. Therefore applying the *ratio decidendi* in *David Silva v. Mudanayake* the defendant had attorned to the plaintiff and could only be ejected under a properly constituted tenancy action if there was a breach of any of the conditions laid down in the Rent Restriction Act.

The plaintiff's action in this case is therefore misconceived and he could not eject the 1st defendant in a vindicatory action. Issue No. 5 should have been answered in favour of the 1st defendant and the plaintiff's action dismissed. We therefore allow the 1st defendant's appeal with costs payable to him by the plaintiff-respondent.

VYTHIALINGAM, J.—I agree.

WALPITA, J.—I agree.

*Appeal allowed.*