1953 *Present :* **Rose C.J., Gratiaen J., Pulle J., Swan J. and L. M. D. de Silva J.**

A. M. M. IBRAHIM SAIBO, Appellant, *and* S. D. M. MANSOOR *et al.*, Respondents

S. C. 36—C. R. Colombo, 15,508

Landlord and tenant—Action for ejectment—Decree entered against tenant—Binding effect on sub-tenant—Joinder of sub-tenant as party—Civil Procedure Code, ss. 18, 324 (1), 325, 327—Rent Restriction Act, No. 29 of 1948, s. 13—Right of sub-tenant to claim statutory protection.

A sub-tenant of premises let under a non-notarial contract of monthly tenancy is not liable to be removed by a Fiscal's Officer under a writ of ejectment directed against the tenant alone in execution of a decree entered in proceedings in which the sub-tenant was not made a party although he had commenced his occupation of the premises before the action commenced.

Kudoos Bhai v. Visvalingam (1948) 50 N. L. R. 59, overruled.

In an action for rent and ejectment instituted by a landlord against his tenant, a sub-tenant may be added by Court as a party under the provisions of section 18 of the Civil Procedure Code. But where he was not so added as a party and the landlord, who has obtained a decree for ejectment against the tenant alone, applies to be placed in possession of the premises, the proper procedure for the Court to adopt is in the first instance to direct that " constructive delivery " of the premises be given by the Fiscal to the landlord under the proviso to section 324 (1) of the Civil Procedure Code, and thereafter to investigate the landlord's claim to complete and effectual possession in accordance with the procedure laid down in section 327 of the Civil Procedure Code.

The statutory protection given by the Rent Restriction Act to a tenant can always be relied on by a sub-tenant.

APPEAL from a judgment of the Court of Requests, Colombo. It was reserved under the provisions of section 51 of the Courts Ordinance for the decision of a Bench of Five Judges.

H. V. Perera, Q.C., with *M. Somasunderam* and *S. Sharvananda*, for the petitioner appellant.—The question is whether a sub-tenant is liable to be ejected under a writ of ejectment obtained by a landlord against a tenant in execution of a decree entered in proceedings to which the sub-tenant was not made a party. In this connection sections 323 and 324 of the Civil Procedure Code are relevant. The question is, who is bound by a decree for possession of immovable property. Clearly the parties to the action are bound, and so are persons occupying the property by virtue of some relationship subordinate to the judgment-debtor, e.g., his wife, children and servants. With regard to the position of privies by subordination see *Bigelow on Estoppel, 6th ed., pp. 158, 159.* Persons in occupation—e.g., lessees, mortgagees—who have rights of property acquired from the judgment-debtor will be bound by the decree only if they acquired their interests either pending the action or after decree. See section 11 of the Registration of Documents Ordinance

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(Chap. 101). A distinction must be drawn between a person occupying the property under a notarial lease and a person who is in occupation as a monthly tenant. The former has a right of property, the latter has only a personal right. With regard to the juridical nature of a tenant's rights, see *Wille : Landlord and Tenant, 4th ed., p. 133.* See also section 2 of the Prevention of Frauds Ordinance (Chap. 57), and *Carron v. Fernando*[1] It has been held that a sub-lessee of a monthly tenant and a tenant at will cannot claim to occupy the property when the tenancy is extinguished. See *Sailendra Nath Bhattacharjee v. Bijan Lal Chakravarty*[2] and *Berton v. Alliance Economic Investments*[3].

H. W. Tambiah, with *V. Ratnasabapathy* and *R. R. Nalliah*, for the 2nd defendant respondent.—The Rent Restriction Act would be set at nought if a sub-tenant who is not a party to an action for ejectment by a landlord can be ejected from the premises. Sub-letting was permitted before 1st January 1949. The inclusion of section 9 in Act No. 29 of 1948 is significant in this connection. Sub-tenants have vested interests in the property. See section 26 of Act No. 29 of 1948. The Roman-Dutch Law permitted sub-letting. See *Wille : Landlord and Tenant, 4th ed., p. 112.* On the question whether a sub-tenant should be made a party to an action for ejectment brought by a landlord against his tenant, see *Mohamed Haniffa v. Dissanayake*[4] and *Siripina v. Ekanayake*[5]. A different view was taken by a single Judge in *Kudoos Bhai v. Viswalingam*[6] but that view was not followed by two Judges in *Justin Fernando v. Abdul Rahiman*[7]. In this connection see also *Mussan Haji v. Thavara Koran*[8] ; *Nallamuthu Padayachi v. Sriniwasa Aiyar*[9] ; and *Geen v. Herring*[10]. The view of *Bigelow* (*supra*) which states the American law cannot be accepted in Ceylon. In India itself there is a conflict of views. *Minet v. Johnson*[11] is based on English procedural law different from our law of procedure. Our law of *res judicata* is contained in section 207 of the Civil Procedure Code. The corresponding sections of the Indian Code are not the same and Indian decisions are not always applicable. See *Palaniappa Chetty v. Gomes*[12] and *Samichi v. Pieris*[13]. For the law in South Africa, see *Wille : South African Law, 2nd ed., p. 252 ; Doorgapershad v. Oliver*[14] ; *Katz v. Reading*[15]. With regard to the joinder of tenant and sub-tenant see *Juhar v. Ramanathan*[16]. The cause of action is the same against tenant as well as sub-tenant. The test laid down in *Dingiri Menika v. Punchi Mahatmaya*[17] should be applied. With regard to the legal position of a monthly tenant see *Wille : Landlord and tenant, 4th ed., p. 41 ; Thassim v. Cabeen*[18] ; *The Imperial Tea Co. Ltd. v. Aramody*[19] ; *Fonseka v. Jayawickrema*[20]. With regard to section 2 of Ordinance No. 7 of 1840, an informal lease of over one month is regarded as a monthly tenancy—

[1] *(1933) 35 N. L. R. 352.*
[2] *(1945) A. I. R. Calcutta 283.*
[3] *(1922) 1 K. B. 742.*
[4] *(1922) 4 Times 94.*
[5] *(1944) 45 N. L. R. 403 at p. 404.*
[6] *(1948) 50 N. L. R. 59.*
[7] *(1951) 52 N. L. R. 462.*
[8] *(1921) A. I. R. Madras 708.*
[9] *(1924) A. I. R. Madras 576.*
[10] *(1905) 1 K. B. 152 at p. 158.*
[11] *(1890) 63 L. T. 507.*
[12] *(1908) 4 Bal. Reps. 21 at p. 23.*
[13] *(1913) 16 N. L. R. 257 at p. 260.*
[14] *(1948) 2 S. A. L. R. 787.*
[15] *(1944) C. P. D. 197.*
[16] *(1952) 53 N. L. R. 454.*
[17] *(1910) 13 N. L. R. 59 at p. 63.*
[18] *(1946) 47 N. L. R. 440.*
[19] *(1923) 25 N. L. R. 327.*
[20] *(1892) 2 C. L. Rep. 134 at p. 135.*

Buultjens v. Carolis Appu [1] ; *Bandara v. Appuhamy* [2] ; *H. Kira Fernando v. V. D. Ukkuwa* [3]. No authority has been cited by appellant for the distinction drawn between real and personal rights in the interpretation of section 324 of the Civil Procedure Code. It is submitted that the correct view is stated in *Justin Fernando v. Abdul Rahman* (*supra*).

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the 1st defendant respondent.—With regard to appellant's argument based on the meaning of the words " bound by decree " it is submitted that a sub-tenant is not a privy by subordination of the judgment-debtor. The principle stated in *Bigelow* (*supra*) is based on English land tenure and is therefore not applicable in Ceylon. The position in Ceylon is governed by the Roman-Dutch Law. See *Berwick's Voet, p. 219*, and *Wille : Landlord and Tenant, 3rd ed., pp. 103, 108.*

A. W. W. Goonewardene, with *T. Velupillai*, for the 3rd, 4th and 6th defendants respondents.

H. V. Perera, Q.C., in reply.—On the question of misjoinder, see section 18 of the Civil Procedure Code. Any person whose presence may be necessary for a complete adjudication can be made a party. If a sub-tenant has no real right then he is bound according to the rules of " res judicata ". *Bigelow* (*supra*) was cited only to show that there exists a class of persons, privies by subordination, who are bound by decrees. See also *Spencer Bower : Res Judicata, 1924 ed., p. 130.* Under section 324 of the Civil Procedure Code the Fiscal has the power to remove persons " bound by the decree ", that is, bound by the law of " res judicata ". In any event a sub-tenant would come within the proviso to section 324, and in relation to him the Fiscal would give constructive possession of the premises to the landlord. See *Abubaker Lebbe v. Ismail Lebbe* [4] and *Adyanath Ghatak v. Krishna Prasad Singh* [5]. The legal possession of the sub-tenant having once come to an end, if he resists further the landlord may make an application under section 325 before obtaining a subsequent order of ejectment under section 327, which gives a sub-tenant a right to be heard. For the scope of sections 325 and 327 see *Chinnathamby v. Somasundera Aiyer* [6] and *Vanderpoorten v. Ameresekera* [7].

Cur. adv. vult.

[The following judgment was written by the Bench of Five Judges collectively :—]

January 5, 1953.

This appeal was reserved under the provisions of section 51 of the Courts Ordinance for the decision of a Bench of Five Judges. The question to be determined is whether a sub-tenant is liable to be removed

[1] *(1919) 21 N. L. R. 156.*
[2] *(1923) 25 N. L. R. 176.*
[3] *(1936) 1 C. L. J. Reps. 96.*
[4] *(1908) 11 N. L. R. 309.*
[5] *(1949) A. I. R. (P. C.) 124.*
[6] *(1947) 48 N. L. R. 515.*
[7] *(1927) 28 N. L. R. 452 at p. 455.*

by a Fiscal's Officer under a writ of ejectment directed against the tenant alone in execution of a decree entered in proceedings to which the sub-tenant was not made a party although he had commenced his occupation of the premises before the action commenced. For the purpose of judgment which we are about to pronounce, the term " sub-tenant " is confined to monthly sub-tenants under non-notarial contracts. The position of a sub-lessee under a notarial contract for a term exceeding one month does not arise for consideration.

The question under consideration had been answered in the negative by a single Judge of this Court in *Mohamed Haniffa v. Dissanayake* [1], and later by a Bench of two Judges in *Siripina v. Ekanayaka* [2]. In *Kudoos Bhai v. Visvalingam* [3], however, a single Judge of this Court, under the impression that the ruling in *Siripina's case* was an *obiter dictum* and therefore not binding on him, considered himself free to take a contrary view, but in *Justin Fernando v. Abdul Rahiman* [4], a Bench of two Judges held that *Siripina's case* had been correctly decided. In consequence of this conflict of authority, much uncertainty has prevailed as to what is the correct legal position in regard to a problem of considerable practical importance at the present time, and it is desirable that the conflict should be resolved by an authoritative pronouncement of this Court.

The effect of a concluded contract of sub-tenancy is that the tenant, while remaining liable to the original landlord for the fulfilment of his own contractual obligations, has for the time being transferred to the sub-tenant the right to occupy the rented premises. If, during the subsistence of the main tenancy, the intermediate tenant defaults in the payment of rent, the *actio locati* is available to his landlord to sue him (but not the sub-tenant) for recovery of rent. " An original lessor has no right to the *actio ex locato* against a sub-tenant, for there was no contract between them, and one cannot sue or be sued on the contract of another ".—*Voet 19.2.21.* Similarly, an action lies against the tenant at the end of the hiring for " the restoration of the thing in the same state in which it was given ".—*Voet 19.2.32.* This latter remedy is not destroyed by the mere fact that the premises happen to be in the occupancy of a sub-tenant at the relevant date. In that eventuality the Roman-Dutch law recognises that a landlord has one distinct cause of action against the tenant (based on contract) for the recovery of the property, and another (based on delict) for the ejectment of the sub-tenant who remains in occupation after the main tenancy has expired. In the South African case *Katz v. Reading et al.* [5] Sutton J. said ," A sub-tenant cannot remain in occupation after the expiration of the main lease " (meaning thereby the main tenancy) " and the landlord is therefore entitled to an order of ejectment against the sub-tenant ". There is nothing in the development of the Roman-Dutch law in Ceylon which leads to a different conclusion.

The practical question arises at once how, in order to avoid a multiplicity of suits, a sub-tenant can be joined in an action for rent and ejectment against a tenant. Although it is extremely desirable and convenient

[1] *(1922) 4 T. C. L. R. 94.*
[2] *(1944) 45 N. L. R. 403.*
[3] *(1948) 50 N. L. R. 59.*
[4] *(1951) 52 N. L. R. 462.*
[5] *(1944) C. P. D. 197.*

that a landlord should do so it could be said that there was a misjoinder. This difficulty is completely overcome if a plaintiff after filing an action for rent and ejectment against his tenant, moves the court under section 18 of the Civil Procedure Code to join the sub-tenant. Such an application should normally be allowed. Section 18 provides for the joinder of persons " whose presence may be necessary in order to enable the court effectively and completely to adjudicate and settle all the questions involved in the action ". In our view the Code after making provision restricting the joinder of parties and causes of action by a plaintiff as of right enables the court under section 18 on the consideration of the merits of an individual application to relax the rigours imposed by other sections. It is proper that a court should have this power because, as in the circumstances under consideration, delay and inconvenience would be caused if power was not vested in some authority to relax the rules laid down to prevent in the generality of cases the indiscriminate joinder of parties and causes of action.

In the present action the plaintiff-appellant obtained a decree for ejectment against his tenant alone in proceedings from which a number of sub-tenants, though originally joined as defendants, had been discharged at an early stage of the trial in deference to the current ruling of a single Judge of this Court in *Kudoos Bhai v. Visvalingam* (*supra*). The question is whether the decree exposes all these sub-tenants to liability to peremptory removal under the provisions of section 324 (1) of the Civil Procedure Code which reads as follows :—

> " Upon receiving the writ the Fiscal or his officer shall as soon as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment creditor or to some person appointed by him to receive delivery on his behalf, and if need be by removing any person bound by the decree who refuses to vacate the property ;
>
> Provided that as to so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment debtor, and not bound by the decree to relinquish such occupancy, the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property ; and
>
> Provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served on him, and in such case no proclamation need be made ".

In an action for ejectment instituted against a tenant by his landlord the foundation of the decree is the judicial decision that events had occurred which gave rise to the termination of the main tenancy under the common law and also, should the question arise, that circumstances have arisen which deprive the tenant of the protection of such Rent Restriction legislation as was applicable to the premises at the relevant date. On the basis of this adjudication, the tenant is required under a mandatory decree to fulfil his contractual obligation to restore the

property to his landlord. On his failure to obey that direction, the decree authorises the issue of a writ for his removal by the Fiscal from the premises under section 324 (1) with a view to their restoration to the decree holder. This writ would also catch up persons who, though not specifically included in its terms, are present on the property by virtue of some relationship subordinate to the judgment debtor, e.g. his servants and the members of his household. Persons in that category cannot claim the protection of the proviso to section 324 (1) and are without question liable to forcible removal on a writ of ejectment directed against the judgment debtor.

To what extent does a decree for ejectment, if passed against the tenant alone, affect a sub-tenant who is in occupation of the premises ? A number of arguments have been addressed to us and a number of reasons appear in the decided cases as to how this question should be answered. Some point in one direction and some in another. We think that a decisive argument is to be found in the section itself. In the words " tenant or other person entitled to occupy the same as against the judgment debtor and not bound by the decree to relinquish such occupancy " the two phrases (1) " entitled to occupy the same as against the judgment debtor " (2) " not bound by the decree to relinpuish such occupancy " were not intended to and do not qualify the word tenant. The section recognises a tenant as belonging to the category of persons " entitled to occupy the same as against the judgment debtor and not bound by the decree to relinquish such occupancy " and proceeds to extend the application of the proviso to " other " persons who are in the same category. It follows that the proviso enjoining constructive delivery applies to all tenants. Where the decree for ejectment is against a tenant a sub-tenant would be covered by the word " tenant " in the section. Upon the view we have formed no sub-tenant who is not a party to the decree is bound by the decree to relinquish occupancy but is a person to whom the proviso applies. He is a person who cannot be ejected upon a writ of ejectment against the tenant but in relation to whom constructive delivery under the proviso should be given to the decree-holder.

The constructive delivery or possession under the proviso to section 324 when made on the orders of a court of competent jurisdiction effectively terminates the right to possession not only of the tenant but also of the sub-tenant. *Adyanath Ghatak v. Krishna Prasad Singh and another* [1]. After constructive possession has been given the decree-holder can avail himself of the remedies provided by sections 325 and 327 for the purpose of obtaining a subsequent order for the ejectment of the sub-tenant. At an inquiry under section 327 the sub-tenant will have an opportunity of being heard before an order for ejectment is made against him. As the constructive delivery under section 324 has effectively determined his rights to possession he would not be able to resist the application to eject him except on the grounds hereinafter mentioned.

What, it may be asked, is the purpose in this scheme, which we think has been laid down in the Code, for an inquiry under section 327 ? I ensures that a person such as a tenant who is not a party to the decree

[1] *A. I. R. (1949) 124 P. C.*

is heard before he is ejected. He is given an opportunity to justify his resistance. The investigation serves to ascertain the precise position of the person resisting and this is important where he is not a party to the decree. If it is verified at the inquiry that the person resisting is a tenant to whom notice of constructive delivery has been given then, subject to such defences as he may raise (these are dealt with later), an order for ejectment will be made. This procedure recognises the wholesome rule that no person not named in the decree (except those in the subordinate relationship previously referred to) can be ejected unless and until it is established after he is heard that he is liable to be ejected.

We have now dealt with two courses which a landlord can adopt for the purpose of obtaining possession. First to join the sub-tenant in an action against the tenant and thereby obtain a decree for the ejectment of both. Secondly if he has sued the tenant without joining the sub-tenant he can obtain a subsequent order for ejectment against him under section 327. A third course is open to him. Where the landlord has sued the tenant without joining the sub-tenant he may sue the latter for ejectment in a separate action.

A few further observations on the position of a sub-tenant under the common law are material to the questions we have discussed. The position of a monthly sub-tenant whose immediate landlord is a monthly tenant is precarious. The tenant can determine the sub-tenancy by giving notice to quit. But the tenant can also by agreement with the landlord terminate the tenancy between himself and the landlord in which event the sole foundation for the sub-tenant's right to occupation crumbles at once and he is liable to eviction by the landlord. In an action against him, if the circumstances in which he is sought to be evicted are harsh, a court would no doubt give him relief by staying writ under the decree for a reasonable period. A sub-tenant cannot complain that the law gives him no further rights of protection because he must be taken to know full well that in entering into a contract of tenancy with a person who is himself a tenant, his right to occupation is fragile.

In an inquiry under section 327 the termination of the tenancy which is the foundation of the decree against the tenant can be assumed. It is not necessary to resort to any principle of *res judicata* to arrive at this conclusion. As already stated a landlord and tenant by the simple process of agreeing to the determination of the tenancy can deprive a sub-tenant of his right to occupation. Such a determination may work to the detriment of a sub-tenant but there is no room for any complaint of fraud or collusion because however harsh the determination may be it is nevertheless lawful, and results simply from agreement which cannot be characterised as fraudulent or collusive. The declaration implicit in a decree for eviction that the original tenancy has ceased to exist works no more hardship on the sub-tenant, the security of whose tenure is so essentially dependent on the lawful continuation of the main tenancy. The decree of a court of competent jurisdiction must therefore be regarded as marking formally the cessation of the original tenancy.

The nature of the protection afforded by the Rent Restriction Act to a sub-tenant must now be considered. This Act contains provisions regulating the rights and liabilities of a landlord and his tenant *inter se* and has no direct application to a sub-tenant *vis-a-vis* the head-landlord. It was held by Lord Greene M. R. in delivering the judgment of the Court of Appeal in the case of *Brown v. Draper* [1] which dealt with the case of a licensee of a tenant that the licensee " cannot in her own right claim the protection of the Acts ". That proposition is equally true of our Rent Restriction Act and what is stated about a licensee is applicable equally to a sub-tenant. But a sub-tenant can shelter behind the protection afforded to the tenant (his immediate landlord) if that protection has not ceased to exist. Now where a decree for eviction has been entered against the tenant that protection would normally have ceased to exist. A sub-tenant can plead its continued existence only on the basis that the decree was entered by a Court which had no jurisdiction to enter it, for instance, in a case where the authority of the Board was necessary under section 13 of the Rent Restriction Act of 1948 but had not been obtained.

Section 13 says " no action or proceedings for ejectment of the tenant of any premises which this Act applies shall be instituted in or entertained by any court unless the Board, on the application of the landlord, has in writing authorised the institution of such action or proceedings " except in certain specified cases. Any decree entered in an action in which such authority, being necessary, has not been obtained would be a nullity because a court acting without such authority would be acting without jurisdiction. It has to be noted that it is not competent for a defendant to contract out of such a requirement or by waiver tacit or express to obviate the necessity for compliance with it. There may be other cases where there is a failure of jurisdiction. Such pleas would be open to a sub-tenant in an inquiry under section 327 or in a separate action brought against him.

Something more has to be said about the statutory protection given by the Act to a tenant and of which a sub-tenant may avail himself. A tenant can never contract out of the protection afforded. It follows from this that he can at any moment recall a promise to surrender possession. The only two ways in which the statutory protection comes to an end are :—

1. By the handing back of the premises to the landlord.
2. By the order of a competent court that is to say a court acting with jurisdiction.

This was held to be the position in England in the case mentioned above and the position is the same in Ceylon. The statutory protection afforded to a tenant can always be relied on by a sub-tenant except of course where it has ceased to exist.

There remains the application of those general principles to the facts of the present case. On 18th October, 1950, the plaintiff-appellant, who had previously obtained a decree for the ejectment of his tenant

[1] *(1944) 1 K. B. 309.*

(the 1st defendant), complained to the Court that the 2nd to the 6th defendants respectively had wrongfully resisted and obstructed the execution of the writ by asserting claims which were allegedly " frivolous and vexatious ". After a careful investigation of the facts the learned Commissioner of Requests decided that the 2nd to the 6th defendants were in truth monthly sub-tenants of the 1st defendant, each occupying a portion of the leased premises under a contract which had commenced many years before the action against the 1st defendant was instituted. This finding has not been canvassed before us, and we accordingly hold that the sub-tenants concerned were not bound by the decreee " to relinquish their occupancy of the premises ". On the facts of the present case the application that they be committed to jail under the provisions of section 327A of the Civil Procedure Code was rightly refused by the learned Commissioner.

With regard to the appellant's further application to be placed in possession of the premises, the proper procedure for the Court to have adopted in the circumstances of the case was in the first instance to direct that " constructive delivery " of the premises be given by the Fiscal to the appellant under the proviso to section 324 (1) of the Code, and thereafter to investigate the appellant's claim to complete and effectual possession in accordance with the procedure laid down in section 327 of the Code. Neither of these steps was in fact taken. The true legal position has now been authoritatively clarified, and we make order that, if the appellant so desires, the correct procedure indicated by us should now be followed. Subject to this, the learned Commissioner's order dated 25th July, 1951, is affirmed and the appeal is dismissed with costs as between the appellant and the 2nd to 6th respondents. The 1st respondent will bear his own costs of appeal.

Decree varied.