[IN THE COURT OF APPEAL OF SRI LANKA]

1973 ***Present:*** **Fernando, P., Sirimane, J., Samerawickrame, J., and Siva Supramaniam, J.**

A. S. NAIDU, Appellant, *and* P. O. MUDALIGE and 4 others, Respondents

APPEAL No. 2 OF 1973

S. C. 158/70 (R. E.)—C. R. Colombo, 99154

Landlord and tenant—Sale of rented premises to a third party—Action in ejectment instituted by the purchaser against the tenant—Plaintiff's claim based solely on an attornment—Duty of the Court to consider the defendant's version—Court of Appeal Act, No. 44 of 1971—Section 8 (2)—Jurisdiction of the Court thereunder.

Plaintiffs purchased a house of which the defendant was at that time the tenant of the vendor. Nearly three years after the purchase the plaintiffs instituted the present action in ejectment against the tenant. The only substantial issue at the trial was whether the defendant had attorned to the plaintiffs. The version of the defendant was that his occupation of the premises after the transfer to the plaintiffs was not in the capacity of a tenant who had attorned to new owners but in the capacity of a person who had been told both by his landlord and the landlord's successors-in-title that he could purchase the premises for a stated sum and who had before the expiry of the last date for payment of the purchase money completed payment of the full sum involved. The trial Judge, however, without considering the contention of the defendant, gave judgment in favour of the plaintiffs solely on the ground that, after the existence of the new owners (the plaintiffs) was made known to the defendant, the defendant was bound to attorn as tenant to the plaintiffs if without vacating the premises he chose to continue in occupation.

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. It was the duty of the trial Court to have considered the defendant's contention, for without such consideration no proper finding on the substantial issue in the case could have been reached.

Held further, that, in the circumstances of the present case, the Court of Appeal had jurisdiction under section 8 (2) of the Court of Appeal Act to enter judgment for the defendant on the basis that a finding of attornment on the part of the defendant would not have been justified.

APPEAL from a judgment of the Supreme Court.

Nimal Senanayake, with *Miss S. M. Senaratne, Melvin Silva* and *Rohan Perera,* for the defendant-appellant.

L. V. R. Fernando, for the plaintiffs-respondents.

Cur. adv. vult.

A—02496-2,808 (10/73)

July 23, 1973. FERNANDO, P.—

The plaintiffs purchased on deed of transfer P1 of 16th November 1965 certain premises including a small house (hereinafter referred to as house No. 75/6) of which the defendant had for long years been the tenant of the vendor to the plaintiffs. Nearly three years after that purchase, the plaintiffs claiming that " they had been accepting rent from the defendant and that the defendant by operation of law had attorned to the plaintiffs " instituted this action in the Court of Requests alleging that the defendant was in arrear in payment of rent and praying for such arrears of rent, damages and ejectment of the defendant.

The defendant denied that he was the tenant of the plaintiffs and alleged that the action was not properly constituted. The only substantial issue upon which the parties agreed to proceed to trial was whether the defendant had attorned to the plaintiffs as their tenant. The learned Commissioner of Requests answered this issue in the affirmative and entered judgment as claimed. The defendant appealed to the Supreme Court against that judgment, and that Court dismissed his appeal without reasons stated. In this situation it would be in order for us to assume that the Supreme Court adopted in substance the reasons given by the Commissioner of Requests.

It could be contended that there is now here a concurrent finding on a question of fact by the two Courts below, and that the Court of Appeal should not in ordinary circumstances interfere with such a finding. While we do not under-estimate the strength of that contention, it does appear to us that the Court of Requests, in reaching a conclusion that there was an attornment by the defendant (which is in truth a mixed question of fact and law), has omitted to consider the version of the defendant. That version was that his occupation of the premises after the transfer to the plaintiffs was not in the capacity of a tenant who had attorned to new owners whose very existence was first made known to him only by a letter dated 27th May 1966, more than six months after the transfer, but in the capacity of a person who had been told both by his landlord and that landlord's successors-in-title that he could purchase the premises for a stated sum and who had before the expiry of the last date for payment of the purchase money completed payment of the full sum involved.

Regarding the substantial issue above referred to, in spite of a formal answer thereto in favour of the plaintiffs, certain statements in the learned Commissioner's judgment appear to indicate that he entertained some doubts in respect of attornment.

Says he "it may be argued that, in the absence of any evidence to show that the defendant complied with the request (i.e. that rent be paid) or did anything whereby he recognized the plaintiffs as his landlord, he could not be said to have attorned to them as would give the plaintiffs a right to sue". In spite of this statement, he did not go on to examine that argument any further for the reason, as it seems to us, that, purporting to apply the decision of the Supreme Court in *David Silva v. Madanayake*[1] (69 N. L. R. 396), he held that the defendant had only one of two courses open to him, to wit:—(*a*) vacate the premises if he did not wish to continue as a (become ?) tenant under the plaintiffs or (b) attorn as tenant to them and continue in occupation. To reproduce his own words, "here he had chosen the latter course", i. e. he had continued in occupation. "He has therefore attorned to the plaintiffs". The statement of the law contained in *David Silva's* case, as indeed all statements of law to be found in court decisions, must be understood in the light of the particular facts of the case under decision. 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. We are not called upon to say here what the position might have been if the plaintiffs had claimed that the defendant had failed to attorn to them in spite of notice to do so, had remained in occupation thereafter without payment of rent and was therefore liable to be ejected. Such a question did not arise from the action actually instituted. From first to last the plaintiffs' claim was based on an attornment, and they had to fail or succeed on the correct answer to that claim on the evidence.

We can now turn to a consideration of the argument on behalf of the defendent that there has been a failure on the part of the learned Commissioner to examine the true nature of the defendant's answer to the claim of attornment.

The vendor to the plaintiffs had agreed informally to sell house No. 75/6 to the defendant for a sum of Rs. 5,500. The defendant, an old man, had for long years been a chauffeur of the vendor and, before that, of the vendor's father. The transfer was admittedly to be made out in the name of the defendant's wife. In pursuance of this agreement the defendant paid on 17th February 1965 to the proctors for the vendor an advance of Rs. 2,000. On the same day the proctors by their letter (D5) requested the defendant's wife (i) to remit a sum of Rs. 203.50 in payment of their notarial fees and for stamps and (ii) to deposit with them the balance Rs. 3,500. Five days later she paid the sum of Rs. 203.50, and followed this up a few days thereafter with the payment of another sum, Rs. 1,500 which was accepted (D7) as

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

" being part purchase price of house No. 75/6, Pickering's Road ". After five months had passed, the proctors on 16th November 1965 wrote (P8) to the defendant's wife in the following terms:—

> " We write to inform you that the deed of transfer in your favour could now be executed.
>
> Kindly deposit with us the balance purchase price of Rs. 2,000 to enable us to have the transaction completed. "

It was unfortunate that the same proctors purported to look after the interests of the vendor, of the purchasers and of the defendant .On the very day they wrote this letter (P8) they attested deed of transfer P1 already referred to above. Not only did they fail to mention in P8 anything about a proposed transfer that day of house No. 75/6 to any other party; they failed altogether to inform the defendant or his wife of the actual transfer for a period of over six months after it had been effected. And, when they did eventually inform the wife of the defendant by letter (D3) of 27th May 1966, they omitted to let her know either the date of that transfer or the number of the deed. They requested her to attorn to the new owners. They made reference in this letter also to her failure to deposit the full purchase price in the following terms:—

> " Mr. Naidu saw us on your behalf and promised to complete the purchase by end of April this year. As you have again failed to deposit the full purchase price we have now been instructed by the present owners to refund immediately all monies deposited by you in this connection and to cancel the sale.
>
> On our own responsibility we have managed to extend the time for completion up to end of this month. In the event of your failing to do so we will have no other alternative but to cancel the sale and to refund all the monies deposited by you."

Although the 1st plaintiff (who was acting on behalf of all the plaintiffs) denied knowledge of this letter D3, the proctors' admitted that it was written on the instructions of the 1st plaintiff. D3 not only shows that the sum of Rs. 3,500 paid as deposit towards purchase price was being treated by the plaintiffs as money under their control, but also that the extension

of time to pay till the end of May was also consented to by them. It is idle to speculate whether resourceful proctors, as the proctors in question have shown themselves to be, would have employed a word like "managed" in a letter of this nature if any further conditions were intended. "Managed" must imply that they managed to get the plaintiffs to agree to the transfer being made if the balance money was paid before the end of May.

The defendant's wife (perhaps to the surprise of the plaintiffs) was able to pay the balance sum required. The contention for the defendant is that after the full purchase price had been paid he considered that his wife was virtually owner of the house and that in these circumstances nothing was further from his mind than attorning thereafter as tenant of the plaintiffs. It is true that the defendant a fortnight later, on 12th June 1966, sent to the proctors a sum of Rs. 77.68 representing rent for the four months November 1965 to February 1966. The payment was in respect of a period prior to 30th May 1966 on which date payment of the full purchase price demanded was completed. Even if the defendant considered himself liable to pay rent in respect of that period to the plaintiffs, it would not affect his position after the 30th May 1966 having regard to the entire absence of any acknowledgment of the plaintiffs as his landlords after that date.

The defendant's contention we have outlined above should have received the attention of the trial judge for without such attention it would not have been possible for him to have reached a proper finding on the substantial issue in the case. Having regard to the interval of time that has elapsed and the long litigation already undergone by the parties, we have ourselves, in the exercise of our jurisdiction under section 8 (2) of the Court of Appeal Act, undertaken the examination of the relevant evidence without making a direction that the case be remitted for that purpose to the court of trial which course would have there entailed a fresh trial altogether. Our examination has brought us to the conclusion that a finding of attornment on the part of the defendant would not have been justified. For that reason we set aside the decrees of both the Supreme Court and the Court of Requests and make order that the action of the plaintiffs be dismissed with costs to the defendant in all three courts.

Appeal allowed.