

1967

Present : Siva Supramaniam, J.

H. MARGARET NONA, Appellant, and A. H. M. BAZEER,
Respondent

S. C. 18/1966—C. R. Colombo, 89558/RE

*Landlord and tenant—Eviction of landlord by title paramount—Quantum of evidence—
Estoppel of tenant—Scope—Evidence Ordinance, s. 116—Protection of Rent
Restriction Act—Burden of proof.*

A lessee sublet the leased premises to a person who was already a tenant under the owner at the time of the commencement of the lease. After his rights under the lease bond had come to an end and the sub-tenant had been asked by the owner to pay rent to a third person, the lessee instituted the present action for recovery of arrears of rent and for the ejection of the subtenant.

Held, that the lessee was entitled to judgment for arrears of rent till the date of the termination of the lease but not to an order of ejection of the sub-tenant. In such a case, the lessee has been evicted by title paramount, and the provisions

of section 116 of the Evidence Ordinance are not applicable. If he relies on the protection of the Rent Restriction Act, the burden is on him to prove that the leasehold rights are still available to him despite the expiration of the period specified in the lease bond.

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

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, for the plaintiff-appellant.

V. Thillainathan, for the defendant-respondent.

Cur. adv. vult.

August 22, 1967. SIVA SUPRAMANIAM, J.—

The facts which give rise to this appeal may be shortly stated as follows :—

Certain Ghouse Mohammed who has been adjudged a lunatic was the owner of premises No. 75, Maligakande Road, which consisted of a large number of tenements which had been consolidated for purposes of assessment by the Colombo Municipality in terms of s. 233 (1) of the Municipal Councils Ordinance. One Marikkar who had been appointed manager of the lunatic's estate by the District Court leased the said premises to the plaintiff Margaret Nona for a period of three years by a notarially attested indenture of lease D6. In terms of D6 the period of lease commenced on 1.12.1961 and ended on 30.11.1964. The plaintiff was however placed in possession on 1.9.1961—three months before the date of commencement of the lease set out in D6. Prior to 1961, the premises had been leased out by Marikkar to other persons, for a period of three years at a time.

Since 1955, the defendant had been in occupation as a tenant of tenement No. 49, which formed part of the consolidated premises, paying rent to the lessee for the time being. On 30.8.1961, the defendant was instructed by Marikkar by letter D7 to pay the rent from 1.9.1961 to the plaintiff Margaret Nona. Thereafter the defendant entered into an informal tenancy agreement P1 with the plaintiff, thereby attorning tenancy to the plaintiff. On 29.6.1964 by letter D8 Marikkar informed the defendant that the plaintiff's lease would expire on 31.8.1964 and instructed him to pay the rent thereafter to one Gamini who had been granted a lease for 3 years commencing from 1.9.1964. This instruction was again confirmed by letter D9 dated 17.8.1964. In accordance with those instructions the defendant paid the rent to Gamini after 1.9.1964. The view that the plaintiff's lease would expire on 31.8.1964 was erroneous since under D6, the lease was valid till 30.11.1964.

The defendant ceased to pay rent to the plaintiff after May 1964. The plaintiff, by letter dated 20.8.1964, terminated the tenancy and noticed the defendant to quit the premises and deliver vacant possession thereof to her on 1.11.1964. On 15.12.1964, the plaintiff instituted this action

for recovery of arrears of rent and damages and for the ejection of the defendant. On the footing that the tenement in question was subject to the Rent Restriction Act, the prayer for ejection was based on the ground that the defendant was in arrears of rent for a period of over three months after it became due.

The learned Commissioner of Requests gave judgment in favour of the plaintiff for arrears of rent till 30.11.1964 but dismissed the prayer for ejection on the ground that the plaintiff's rights as a landlord came to an end on 30.11.1964 and she could not thereafter seek to eject the defendant. The defendant stated in evidence that in view of the letters D8 and D9 received by him from Marikkar he feared eviction if he did not comply with the instructions contained therein and consequently paid the rent to Gamini with effect from 1.9.1964. Nevertheless, as was rightly held by the learned Commissioner, he was liable to pay rent to the plaintiff till 30.11.1964.

The only question that arises for determination on this appeal is whether the plaintiff was entitled to a decree for ejection against the defendant in view of the finding that the defendant was in arrears of rent for a period of more than three months after it became due. It is argued on behalf of the appellant that the defendant, being a tenant, is estopped from denying the plaintiff's title and the plaintiff is entitled to a decree for ejection, although her rights under the lease bond D6 may have come to an end. There was no issue raised in the case in regard to whether the plaintiff's rights as a lessee subsisted, despite the expiration of the period specified in the bond, by reason of the operation of the Rent Restriction Act or for any other reason. Since the annual value of the consolidated premises which formed the subject of the lease was more than Rs. 8,000 (as evidenced by documents P4, P5 and P6), the Rent Restriction Act would have had no application to the said consolidated premises. In any event, the onus was on the plaintiff to prove that the leasehold rights were still available to her after 30.11.1964, in view of the following express stipulations contained in the lease bond D6 :—

- (a) "The said lessor does hereby, let, lease and demise unto the said lessee the premises fully described in the schedule To hold the said premises for and during the term or period of three years commencing from 1st December 1961"
- (b) "The said lessee shall and will at the termination of this lease peaceably quit and surrender the said premises unto the said lessor"

On the evidence led, the plaintiff failed to discharge that burden. *Ex facie* therefore, on the date on which this action was instituted, the plaintiff had no rights under the lease bond in respect of the premises in question.

The question, then, is whether the defendant is precluded by s. 116 of the Evidence Ordinance or by any other provision of law from denying the plaintiff's right to eject him from the premises. The relevant portion of s. 116 of the Evidence Ordinance is as follows :—

“ No tenant of immovable property,
shall during the continuance of the
tenancy, be permitted to deny that the
landlord of such tenant had, at the
beginning of the tenancy, a title to such
immovable property ; ”

There is nothing in this section which precludes a tenant from showing that the landlord has lost his title subsequent to the commencement of the tenancy. In *Cader v. Hamidu* ¹, Garvin A.J. (as he then was) said :

“ It is sound law that a lessee cannot refuse to pay rent on the ground that the lessor had no title to the premises leased at the date of lease. It is equally good law, however, that he may prove that since the tenancy commenced the landlord's title has expired and that he has been evicted by title paramount.”

This passage was cited with approval by Jayewardene A.J. in *Tillekaratne v. Coomarasingham* ². At page 189 the learned Judge proceeded to state :

“ Actual physical dispossession is not necessary, but the eviction may be constructive or symbolic. A threat of eviction is sufficient, and if the tenant in consequence of such threat attorns to the claimant, he can set this up as or by way of defence to an action for rent, subject to his proving his evictor's title. ”

Learned Counsel for the appellant, however, argued, relying on the case of *Visvalingam v. Gajaweera* ³, that the defendant should first give up possession and then it would be open to him to litigate about the plaintiff's right to the premises. In that case, the plaintiff who was not the owner of the premises, let the same to the defendant on a non-notarial document. He instituted an action to eject the defendant on the ground that rent was in arrears. The 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. Sansoni J. (as he then was) held that even assuming that the defendant had become the owner of the entire premises it was not open to him to refuse to surrender possession to his landlord. The learned Judge, after citing with approval the following passage from the judgment of Bonser C.J. in a similar case (*Alvar Pillai v. Karuppan* ⁴) :—“ 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.

¹ (1921) 23 N. L. R. 91 at p. 92.

² (1926) 28 N. L. R. 186 at p. 188.

³ (1954) 56 N. L. R. 111.

⁴ (1899) 4 N. L. R. 321.

He must first give up possession, and then it will be open to him to litigate about the ownership ”, proceeded to state that the defence of eviction by title paramount is however available to a tenant under our law, and that the eviction may be constructive or symbolic. On the facts of the case before him he said: “ But there is no question of eviction by title paramount in this case, since the respondent’s position is not that he has been asked to pay rent to a third person under threat of eviction. The respondent is bluntly disputing his 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 ”. That decision cannot assist the appellant as the facts in the instant case disclosed a threat of eviction of the defendant by a paramount title holder. It has also to be borne in mind that the plaintiff at no stage let the defendant into possession of the premises but the defendant was already in possession for many years before he attorned tenancy to the plaintiff at the instance of Marikkar, the plaintiff’s lessor. The plaintiff would have been entitled to institute an action for ejectment of the defendant during the pendency of the lease, but not thereafter. This action was instituted on 15th December 1964, after the expiry of the lease. The learned Commissioner was therefore right in refusing to grant the plaintiff’s prayer for ejectment of the defendant from the premises in question.

I dismiss the appeal with costs.

Appeal dismissed.