1959 *Present :* **Basnayake, C.J.**

KURUNERU, Appellant, *and* ALIM HADJIAR, Respondent.

S. C. 194—C. R. Batticaloa, 4962

Contract—Right of contracting party to bind heirs and executors—Rent Restriction Act, No. 29 of 1948, s. 13 (c)—Notarial lease—Death of lessee—Right of executor to benefit of Act on expiry of lease.

Although the general rule is that a contract cannot bind a person who is not a party to it, a person may by contract not only bind himself but may also bind his heirs, executors and administrators.

Accordingly, where a lessee who enters into a notarial contract of lease not only for himself but also for his heirs, executors and administrators dies during the pendency of the lease, the executor is entitled to the benefit of the Rent Restriction Act, No. 29 of 1948, on the expiry of the term of the lease.

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

H. W. Jayewardene, Q.C., with *E. Gooneratne* and *L. C. Seneviratne*, for Defendant-Appellant.

C. Renganathan, with *S. C. Crossette-Thambiah* and *S. Sivarasa*, for Plaintiff-Respondent.

Cur. adv. vult.

[1] *(1953) N. Z. L. R. 366 at 383.*

May 29, 1959. BASNAYAKE, C.J.—

By an instrument of lease No. 458 executed on 6th July 1946 and attested by K. V. M. Subramaniam, Notary Public, the plaintiff Ahamadulevvai Mohamadu Cassim Alim Haji leased to Caesar Kuruneru, his heirs, executors, and administrators, the land described in the schedule thereto for a period of ten years from 1st January 1947 at a yearly rental of Rs. 720 to be paid quarterly in advance. It was a condition of the lease that the lessee should pay the rates on the premises. Caesar Kuruneru died on 19th December 1953 while the lease was still current and the defendant, his brother, Dharmadasa Kuruneru, executor and sole devisee of his business, continued to occupy the premises and carry on the business which the deceased was carrying on at the time of his death and pay the rent and discharge the other conditions of the lease.

When the term of the lease came to an end on 31st December 1956 the defendant did not quit the premises, but continued to carry on business therein notwithstanding the fact that the plaintiff had asked him to quit and deliver possession thereof to him. On 16th February 1957 the plaintiff instituted these proceedings for the ejectment of the defendant who was no longer the contractual tenant and for damages for wrongful occupation after 1st January 1957. The plaintiff seeks to bring himself within the ambit of section 13 (1) (*c*) of the Rent Restriction Act, No. 29 of 1948, by alleging that the premises are reasonably required by the members of his family to carry on business.

The main question that arises for decision in the instant case is whether the plaintiff is barred by section 13 of that Act from instituting this action for the ejectment of the defendant.

The deceased Kuruneru entered into the contract of lease not only for himself but also for his heirs, executors, and administrators. The instrument which is carelessly drafted and is full of mistakes and does no credit to the notary who attested it reads—

> " The lessor doth hereby demise and let unto the lessee his heirs executors and administrators all that land and premises more fully described in the schedule hereto. To have and to hold the said premises unto the lessee his heirs executors and administrators for the term of ten years from 1st January 1947.
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> . . . . . .
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> And the lessee doth hereby for himself and his heirs executors and administrators covenant with the lessor that the lessee his heirs executors and administrators during the said term will pay the yearly rent hereinbefore reserved on the days and in manner aforesaid.
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> . . . . . .
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> And the lessee for himself and his executors and administrators covenant and agree with the lessor that the premises shall not be sub-let mortgage assign the said lease to a third party with the consent and approval of the lessee (lessor ?).

The lessee or his aforesaid shall give six months' notice if at any time before the expiry of the said term of ten years desire to quit the premises to the lessor failure to do so and in the event of the lessee or his aforesaid leaves and quits the premises without such notice the lessee for himself and his aforewritten for the payment of the rent for the said period of six months to the lessee. And the lessee and his aforewritten further covenant and agree that at the expiration of the said term or sooner so yield up the same unto the lessor his heirs executors and administrators.

.....

And the lessor doth hereby covenant with the lessee that the lessee his heirs executors and administrators performing and observing all the covenants by the lessee herein contained may quietly hold and enjoy the said premises during the said term without any interruption by the lessor or any person claiming through him."

It would appear from the portions of the lease I have quoted above that the lessee contracted not only for himself but also for his heirs, executors, and administrators. Although the general rule is that a contract cannot bind a person who is not a party to it, under our law a person may by contract not only bind himself but may also bind his heirs, executors, and administrators. The basis for this rule is the Code, Bk. 8 Ch. 38 s. 13, wherein it is stated—

" In order to settle the disputes arising out of ancient law, we decree, in general terms, that every stipulation, whether it consists in giving anything, doing anything, or both giving something or performing some act, shall be transmitted both to and against heirs, whether any special mention has been made of them or not, for why should what is just, so far as the principal parties are concerned, not be transmitted both in favour of and against their successors ?

And, as it is held that stipulations of this description, having reference to something which should be given, can still be performed by heirs, the subtle and superfluous opinion, by which it is decided that what is imposed on one person cannot possibly be executed by another, is hereby abolished." (Scott's translation, Vol. 14 p. 293).

This view gains further support from the following passage in the Digest (22.3.9)—

" Where an agreement is made in which there is no mention of an heir, the question arises whether this has been done in order that only the person of the party himself may be considered. But although it may be true that he who makes use of an exception must establish good ground for doing so ; still, the plaintiff, and not he who pleaded the exception, must prove that the agreement merely had reference to himself, and did not include his heir, because in such cases, we generally provide for our heirs as well as for ourselves. (Scott's translation, Vol. 5 p. 225).

Van Leeuwen adopts the views of the Roman writers when he says—

> " We covenant for ourselves and for our heirs; not for others, unless either it is to the interest of the covenantor ; or it is a contract with regard to restoring to a third party his rightful property, or with regard to giving up his own property to another ; or unless the covenantor is under the *patria potestas* of the man for whom he covenants." (Censura Forensis, Pt. I Bk. IV Ch. III s. 3—Barber's translation, p. 12).

Even where there is no express stipulation in a contract of letting and hiring—

> " At the death of either of the parties the contract of letting or hiring is not terminated, but passes to the heirs both of the lessor and of the lessee until the time fixed arrives and this is so everywhere. The same is the case according to the customs of Saxony, as we are told by Georg Schultz and Carpzov. There is an exception in the case of some performance, in which regard is had to the industry of a particular person, and which cannot be done with equal satisfaction by anybody else, and so, as it were, adheres to that particular person." (Van Leeuwen—Censura Forensis, Pt. I Bk. IV Ch. XXII s. 18—Barber's translation, p. 191).

This is also the view expressed by Domat in s. 465 (Vol. 1 p. 259—Strahan's translation) wherein he says—

> " The engagements which are formed by the contract of letting and hiring pass to the heirs or executors of the lessor, and to those of the lessee."

In the instant case the defendant both as executor and heir was under the terms of the instrument of lease entitled to continue and did continue as the contractual tenant of the premises in question. When the term of the lease expired the defendant became what is now familiarly known as a statutory tenant. The defendant's position is no different from that in which Caesar Kuruneru would have been had he lived beyond the term of the lease and not quitted the premises on 31st December 1956.

The defendant is therefore in the position of an over-holding tenant and is entitled to the benefit of the Rent Restriction Act. It has been held in the case of *Gunaratne v. Thelenis* [1] by three Judges of this Court that the terms of the Rent Restriction Ordinance, No. 60 of 1942, were wide enough to apply to premises leased as well as to premises held on a tenancy from month to month and that an action for the ejectment of a lessee who overholds cannot be instituted except in any one of the cases permitted by the Ordinance. Although the Ordinance in respect of which that decision was given has since been replaced by the Rent Restriction Act, No. 29 of 1948, that decision is equally applicable to the Act and I hold that the plaintiff was not entitled to institute or maintain

[1] *(1946) 47 N. L. R. 433.*

this action as he has failed to establish the allegations in paragraph 6 of his plaint that the premises are reasonably required by the members of his family to carry on their business.

Many other questions have been raised by the parties in the course of these proceedings, but it is unnecessary to decide them for the purpose of this action which is an action in ejectment.

I allow the appeal and dismiss the plaintiff's action with costs here as well as in the Court below.

Appeal allowed.