1967 *Present :* **Sirimane J., and Samerawickrame, J.**

M. DAVID SILVA, Appellant, *and* S. K. MADANAYAKE, Respondent

S. C. 545/64—D. C. Colombo, 54048/M

Landlord and tenant—Sale, by landlord, of premises let—Resulting relationship between purchaser and tenant.

When a landlord sells premises which have been rented by him, the tenant has the option of cancelling or surrendering his tenancy and pursuing his remedy upon the contract against his landlord or of retaining occupation of the premises. If the tenant elects to retain occupation of the premises, he is bound to pay rent to the purchaser if the purchaser calls upon him to do so. In such a case, if the tenant, or his licensee, refuses to recognise the purchaser as his landlord and continues to remain in possession of the premises without paying rent, the purchaser is entitled to maintain an action for ejectment of the tenant.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *C. Ranganathan, Q.C.*, *Eric Amerasinghe*, *G. D. C. Weerasinghe* and *B. J. Fernando*, for defendant-appellant.

H. W. Jayewardene, Q.C., with *M. D. K. Kulatunga* and *D. S. Wijewardene*, for plaintiff-respondent.

Cur. adv. vult.

March 7, 1967. SAMERAWICKRAME, J.—

The plaintiff-respondent instituted this action against the defendant for his ejectment from premises in Ward Place, stating that the defendant, who had been his tenant, continued in unlawful occupation of the property after the tenancy had been terminated. The defendant-appellant filed answer in which he stated that the tenant of the premises was a Company called Lanka Chemists Ltd. and he denied that he was at anytime a tenant of the plaintiff-respondent.

It would appear that David Silva, the defendant, became the tenant of these premises in 1947 having taken them from Mudaliyar Madanayake, who was the father of the plaintiff-respondent. The defendant carried on the business of a dispensing chemist under the name "Lanka Chemists" on the ground floor of the premises and he resided on the top floor. On the 24th March, 1955, the defendant's business was incorporated into a Limited Liability Company known as Lanka Chemists Ltd. and the defendant was Managing Director of the Company. The defendant continued to reside on the top floor of the premises till the year 1959.

After the Company was formed, rent had been paid by cheques of the Company but the rent appears to have been forwarded by and receipts given in favour of the defendant, David Silva. The defendant has produced two receipts D1 and D2, D1 in favour of Lanka Chemists and D2 in favour of Lanka Chemists Ltd. The translation of D2 states that Lanka Chemists Ltd. was the tenant of the premises but on an examination of the original, which is a printed form in Sinhala, it shows that the words which had been translated as "tenant" have been scored off in the original. The receipt D1 is in favour of Mr. M. David Silva (Lanka Chemists Ltd.). The plaintiff-respondent has produced the counterfoils of all the other receipts issued before and after D2 and shown that they have been issued in favour of David Silva personally. Mudaliyar Madanayake, the father of the plaintiff, who was the original landlord died in the year 1963 before the trial of this action. The defendant has given evidence but he has not spoken to any agreement between the parties whereby the Company was accepted as tenant in place of himself. The learned District Judge has held that the Company did not become the tenant of these premises and that the defendant David Silva continued to be the tenant even after the incorporation of the Company.

Mr. H. V. Perera, Q.C., who appeared for the defendant-appellant, did not seriously ask us to reverse this finding of fact by the learned District Judge. He submitted, however, that the evidence in regard to the transaction between the parties was relevant to the next point, namely, that the defendant had not elected to become the tenant of the present plaintiff.

By deed No. 1334 of 10th September, 1957, Mudaliyar Madanayake transferred the premises in suit to the plaintiff-respondent. It appears that at that time the plaintiff-respondent was pursuing his studies in England and the defendant continued to be the tenant of and paid rent to Mudaliyar Madanayake. On the 15th March, 1961, Proctors acting for the plaintiff wrote letter (P 26) to both the defendant and Lanka Chemists Ltd. stating that the premises had been transferred by Mudaliyar Madanayake to the plaintiff and that the plaintiff would recognise and accept rent from David Silva, the defendant. On the 28th March, 1961, Proctors for the defendant-appellant sent a letter in which they acknowledged receipt of the information regarding the change of ownership of the premises and forwarded a cheque for the rent for the months of February and March. On the 3rd April, 1961, letter was written on behalf of the plaintiff requesting the Proctors for the defendant to confirm that the cheque was forwarded on account of Mr. David Silva. No reply appears to have been received and a further letter had been written on the 29th April calling attention to the earlier letter. On the 11th May, 1961, Proctors for the plaintiff wrote to the defendant stating that he and not Lanka Chemists was the tenant of Mudaliyar Madanayake and that he and not Lanka Chemists was the tenant of the plaintiff. The letter further stated that the cheque forwarded by the Proctors for the defendant-appellant and a further cheque sent by Lanka

Chemists Ltd. was returned as they purported to be payment by Lanka Chemists Ltd. On the 24th May, 1961, Proctors for the defendant-appellant sent a letter forwarding a cheque for Rs. 612/45 in settlement of the rent for the premises for the months of February, March and April 1961. Proctors for the defendant-appellant also sent a letter on the 13th May, 1961 forwarding a cheque in respect of the rent for May 1961. On the 2nd June, 1961 letter was sent on behalf of the plaintiff-respondent to the Proctors for the defendant-appellant asking them to confirm that the tenant is Mr. M. David Silva and that the payments are from him. To this letter, the Proctors for the defendant-appellant replied by their letter dated 7th June, 1961 stating that they were surprised at the contents of the letter and that the plaintiff-respondent was aware that the tenant of the premises was Messrs Lanka Chemists Ltd.

Learned counsel for the defendant-appellant submitted that his client had not become the tenant of the plaintiff-respondent upon the transfer by Mudaliyar Madanayake of the premises to the latter, 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 his landlord. In order to examine this contention, it is necessary to consider the rights of parties upon the sale or transfer of premises that have been let. Under the Roman Law, the purchaser of property which had been let was not bound by the lease unless it had been stipulated in the contract of sale that the lease should remain in force. Consequently, the purchaser could, as soon as he became owner, eject the tenant and the latter's only remedy was an action on the contract against his landlord. The rule of the Roman Law was, however, modified by the customary law of Holland to this extent that the purchaser had to allow the lessee to remain in occupation till the end of his term. Grotius, 3-19-16 states, " it is also a rule with us that a purchaser must allow a lease or hiring which has been granted by the seller ". Voet, 19-2-7 states, " it has been decided that purchase gives place to lease (*dat Huur Voor Koop gaat*) unless something different has been expressly arranged between lessor and lessee. This is so whether the sale takes place privately or publicly or by the order of the Magistrate on a petition of a creditor with employment of the formalities of the auction-sphere and the lessor enjoys the right of retention if he prefers to continue with the hire ". Later, at 19-2-19, Voet states, " on the other hand also whenever by Statute or consent sale gives place to a lease, a particular successor is only bound to bear up to the end with a resident in occupation or a tenant in enjoyment if the lessee is ready to pay the rent to him for the ensuing period. "

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.

In some cases, reference has been made to the privilege of the tenant to decide whether he would continue under the purchaser on the basis of a dictum in Bayne on 'Landlord and Tenant'. I have examined the passage in Bayne and I find that it does not in anyway run counter to the conclusion which I have arrived at. It is to the following effect, "'Hire goes before sale', or *'dat Huur voor Koop gaat'*, is an axiom of our law, and purchasers of, and persons succeeding to the possession of landed property, are bound by the leases previously made by the vendors. From this arises the privilege of the tenant, either to remain the tenant of the new landlord, the purchaser, or to cancel the lease. But the new landlord, the purchaser, cannot, according to this rule, eject the tenant, but must await the expiration of the lease, or the occurrence of some circumstance which will operate as giving a right of re-entry".—vide Bayne : Landlord and Tenant, page 37.

Referring to the maxim "*dat Huur voor Koop gaat*", Greenberg J.P. in the case of *Boshoff v. Theron*[1] states—

> "The maxim had no place in the Roman law, under which a purchaser of property was not bound to recognise a lease on the property unless it was a condition of the sale that he should. Without such a condition, a sale was regarded as a termination of the lease, leaving the lessee with no claim to remain in occupation of the property, but giving him a right to damages against the seller. But in Roman-Dutch law, in terms of several of the codes in the Netherlands, it was provided that 'the purchaser must acknowledge the lease entered into by his predecessor in title, viz. the vendor, according to the maxim *huur gaat voor koop*'. (Wessels, History of the Roman-Dutch Law, page 622).
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> This has been adopted in South Africa and it is a recognised principle that the purchaser steps into the shoes of the seller as regards the enforcement of the lease and the latter's obligation under a lease entered into with the seller (*de Wet v. Union Government* 1934 A. D. 59 at page 63)."

[1] *1940 T. P. D. 299 at page 302.*

Later in his judgment, the learned Judge states, "In *de Jager v. Sisana* (1930 A. D. 71) Wessels, J. A. (at page 82) after referring to the Roman law principle which I have already mentioned, said 'this principle however was modified by the Roman-Dutch Law and that system adopted the rule that the sale does not break the lease but that the purchaser becomes the landlord of the tenant under the same conditions as his lease with the seller'. The words 'becomes the landlord of the tenant, etc.' may be used loosely, but in their ordinary significance they mean that the relationship of landlord and tenant which existed between seller and tenant before the sale has given place to a relationship of this kind between purchaser and tenant."

In 52 N. L. R. page 445 Gratiaen J. considered the position and came to the following conclusion. "Finally, there is the position arising where the purchaser elects to recognise the tenant but the tenant does not specifically attorn to him. Sampayo J. took the view 'but not without some hesitation' 16 N. L. R. at page 317, that in such a case the purchaser would enjoy the right not only to claim rent but also to sue for damages and ejectment. In 18 N. L. R. page 168 the earlier ruling was re-affirmed. It would, therefore, 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*[1], Sansoni J. stated, "He has, however, held that because the defendant refused to comply with the plaintiffs' request to pay rent to them, the plaintiffs cannot bring an action to recover rent as the defendant has not attorned to the plaintiffs. He cites a judgment of this Court in *Zackariya v. Benedict*, but the point decided there was different. Mr. Justice Swan was dealing with the case where a tenant refused to pay rent to the vendee of the landlord and all he held was that the vendee could give the tenant notice to quit and sue the tenant for ejectment, but there are numerous authorities in support of the proposition 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. Of course, 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".

In the present case, the position is that before and after the transfer by Mudaliyar Madanayake to the present plaintiff, the defendant was in possession of the premises in question through his licencee the Lanka Chemists Ltd. After he was informed of the transfer to the plaintiff and was called upon to pay rent to him, he continued to be in possession in the same manner. As stated in the authorities referred to above, it was not open to him to remain in possession of the premises and refuse to recognise the plaintiff as his landlord and pay rent to him.

[1] *(1955) 56 N. L. R. 357.*

I am, therefore, of the view that plaintiff was entitled to maintain the present action for ejectment of the defendant. I think the learned Judge has come to a correct conclusion, and I dismiss the appeal with costs.

SIRIMANE, J.—I agree.

Appeal dismissed.