1955 *Present :* **Gratiaen J. and Sansoni J.**

D. H. S. AMARASEKARA, Appellant, *and* D. S. ABEYGUNAWARDENE, Respondent

S. C. 198—D. C. Colombo, 23,654/M

Prescription—Action instituted in Court of Requests—Claim in reconvention beyond jurisdiction—Transfer to District Court—Date of action in respect of the claim in reconvention—Courts Ordinance (Cap. 6), s. 79—Prescription Ordinance, s. 10.

Rent Restriction Ordinance, No. 60 of 1942—Sections 7 and 14—Premium illegally received by landlord—His right to retain it—Illegal contract.

When the Supreme Court authorises under section 79 of the Courts Ordinance a transfer of proceedings from the Court of Requests to the District Court by reason of the claim in reconvention being beyond the jurisdiction of the Court of Requests, the action for the recovery of the claim in reconvention in excess of the sum which the Court of Requests has jurisdiction to award does not "commence" within the meaning of the Prescription Ordinance until the transfer of the proceedings to the District Court has been authorised by the Supreme Court ; in regard to the issue of prescription, the action must be regarded as having *commenced* in the Court of Requests and *continued* in the *District Court* in respect only of those claims over which the former Court had jurisdiction to grant relief.

Quaere, whether a premium paid by a tenant to his landlord in contravention of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is recoverable in every case ? Scope of the applicability of the maxim *in pari delicto potior est conditio defendentis* considered.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiff appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant respondent.

Cur. adv. vult.

March 18, 1955. GRATIAEN J.—

The appellant was the landlord, and the respondent the tenant, of a bungalow in Colombo to which the Rent Restriction Ordinance, No. 60 of 1942, applied. The landlord sued the tenant in the Court of Requests on 15th May, 1950, for the ejectment of the tenant who claimed in reconvention the return of certain sums paid by him (*a*) as rent in excess of the authorised amount, and (*b*) by way of "premium" as a condition of the grant of the tenancy.

The total amount counter-claimed by the tenant far exceeded the monetary jurisdiction of the Court of Requests. Accordingly, he applied

2——J. N. B 44786-1,592 (5/55)

for and obtained from this Court on 6th October, 1950, an order under section 79 of the Courts Ordinance transferring the entire proceedings to the District Court of Colombo.

Before the trial commenced in the District Court, the tenant had vacated the premises, so that only his claims in reconvention called for adjudication. The landlord admitted liability to refund a sum of Rs. 551·88 received by him in excess of the authorised rent. With regard to the outstanding claim for the return of the premium, the learned Judge held that the landlord had exacted a premium of Rs. 1,800 in breach of section 7 of the Rent Restriction Ordinance, No. 60 of 1942, and entered judgment in favour of the tenant for this amount in addition to the sum of Rs. 551·88 admitted to be due.

The landlord has appealed against that part of the decree which orders the repayment of the premium on two grounds :—

(1) that the claim was prescribed ;

(2) that in any event, the principle *in pari delicto potior est conditio defendentis* precluded the tenant from asking the Court's aid to recover an illegal payment.

As to the former plea, it is common ground that section 10 of the Prescription Ordinance applies, and the learned Judge accepted the evidence that the premium sought to be recovered had been paid on 3rd September, 1947. If, therefore, the action on the claim in reconvention can properly be regarded as having " commenced " when the tenant filed his answer in the Court of Requests—i.e., on 10th July, 1950, the plea of prescription admittedly fails. On the other hand, Mr. Jayawardene concedes that the claim was prescribed if 6th October, 1950, is taken as the operative date—that is to say, if the action for the recovery of the premium did not " commence " within the meaning of section 10 until the transfer of the proceedings to the District Court was authorised by the Supreme Court.

There are no earlier decisions precisely in point, but we do receive some guidance from *Mudiyanse v. Siriya* [1] and more particularly from *Kuluth v. Mohamadu* [2]. Each of these cases was concerned with a " 247 action " in which the plaint (originally filed in a Court lacking jurisdiction in the matter) was subsequently filed in the proper Court (the transfer in one instance having been authorised by the Supreme Court). It was held in both cases that, for purposes of prescription, the action " commenced " only on the date when the proceedings were initiated in the Court which did have jurisdiction to entertain the plaint. The *ratio decidendi* of Abrahams C.J.'s judgment in *Kuluth's case* (supra) is that an action cannot be regarded as having effectively *commenced* in the first Court (and *continued* in the other) unless the former Court had jurisdiction to give relief upon the cause of action relied on ; and that an order of this Court authorising a transfer of the proceedings does not affect the issue in the absence of special statutory provision to that effect.

The learned Judge rejected the plea of prescription in view of the interpretation which he placed on the concluding words of the proviso to section 79 of the Courts Ordinance—namely, that when the Supreme Court has

[1] *(1921) 23 N. L. R. 285.*

[2] *(1936) 38 N. L. R. 48.*

authorised a transfer of proceedings from a Court of Requests (which lacks jurisdiction to enter judgment upon a claim in reconvention) to a District Court (which has such jurisdiction) the proceedings "*shall thereafter be continued and proceeded in (the District Court) as if it had originally commenced there*". I find myself unable to accept this view. In my opinion, these words are not equivalent to a statutory provision that, upon a transfer, an action shall *for all purposes* (including an issue of prescription) be deemed to have commenced in the District Court on the date on which it had in fact commenced in the Court of Requests. On the contrary, the words relied on by the learned Judge seem to me to be only procedural in their nature : no fresh pleadings need be filed as a preliminary to the trial in the new Court but the proceedings "continue" (in that sense) from the stage at which they had been interrupted in the Court of Requests.

In his original answer filed in the Court of Requests, the tenant pleaded certain facts relating to payments made by him to the landlord—in so far as those facts had a bearing on his defence to the landlord's claim, the Court of Requests certainly had jurisdiction to adjudicate upon them ; but in so far as he further asked for a decree in his favour for a sum exceeding Rs. 300 upon his claim in reconvention based on these facts, the Court had no jurisdiction to grant him that additional relief. It is for this reason that the tenant obtained the sanction of this Court to have the whole proceeding (comprising the claims on which the Court of Requests had power to grant relief as well as those on which it had no such power) transferred to a Court "having jurisdiction over the whole matter in controversy". This analysis seems to me to lead to the following conclusions as far as the issue of prescription is concerned :—

(1) The action must be regarded as having *commenced* in the Court of Requests and *continued* in the District Court in respect only of those claims over which the former Court had jurisdiction to grant relief ; these "matters in controversy" were confined only to the landlord's claim for ejectment and damages until ejectment, and the tenant's claim to recover excess rent (on his first cause of action) limited however to a judgment in his favour for a maximum sum of Rs. 300 ;

(2) With regard to the outstanding matters in controversy, which included the entirety of the defendant's cause of action for the recovery of the premium, the action cannot be regarded as having "commenced" (within the meaning of the Prescription Ordinance) in the Court of Requests which had no jurisdiction to grant him substantive relief in the form of a money decree. Therefore, the action for the recovery of the premium effectually "commenced" only in the District Court which alone had jurisdiction to grant him the relief asked for ; it was in a different sense that the action "continued" for procedural purposes from an earlier procedural stage.

The word "commenced" appearing in "unless the same shall be *commenced* within three years from the time when such cause of action

accrued" mean "initiated in a Court possessing jurisdiction to grant *relief in the form of a decree* upon the cause of action". I would accordingly hold that the tenant's claim in recovention for the recovery of Rs. 1,800 paid as premium was prescribed. The decree in his favour must therefore be confined to a sum of Rs. 551·88 in respect of which no plea of prescription has been raised, together with costs in that class. The appellant is however entitled to the costs of this appeal.

It is no longer necessary to give a definite finding on the landlord's alternative plea that the Court should not in any event lend its aid to a party seeking to recover money paid by him in pursuance of an illegal transaction. In deference to the interesting arguments addressed to us, however, I propose to make some observations on this issue.

Section 7 of the Ordinance of 1942 prohibited a landlord from demanding or receiving a premium "as a condition of the grant, renewal or continuance" of a tenancy of controlled premises, and section 14 prescribes the penalty for this offence. The Ordinance did not directly penalise payments of premium *by tenants* (such as is now done in the later Act of 1948), but no doubt a tenant making a payment which his landlord was prohibited from receiving under the earlier enactment would generally be found to have committed the offence of abetment within the meaning of the Penal Code. I therefore agree with Mr. Perera that the judgment of Pulle J. (Swan J. concurring) in *Vitharane v. de Zylva*[1], which dealt with a case under the Act of 1948, cannot be distinguished on this narrow ground. Whichever enactment applies, the question whether the maxim *in pari delicto potior est conditio defendentis* should operate or not must be decided with due regard to the facts of the particular case.

Mr. Jayawardene relied strongly on a recent judgment of Devlin J. in *Gray and others v. Southouse and another*[2] in which, under the English law, a premium paid to a tenant by his sub-tenant was held to be recoverable. It is safer, however, to examine the question solely by reference to the provisions of our local enactments in the light of the principles of the Roman-Dutch law.

I am not convinced that a landlord can automatically claim that the *in pari delicto* principle affords a complete answer to any claim for the recovery of a premium illegally received by him in contravention of the Ordinance of 1942 or of the Act of 1948. The law is not so rigid, and it is quite wrong to assume that, under existing conditions, a tenant making an illegal payment is necessarily *in pari delicto* with his landlord who illegally receives it.

The true principle to be applied in a case of this kind has been explained by the Appellate Division of the Supreme Court of South Africa in *Jajbhay v. Cassim*[3]. The maxim *ex turpi causa non oritur actio* will, of course, always preclude a litigant from seeking the assistance of a Court of law to enforce an illegal contract; but the ancillary maxim *in pari delicto potior est conditio defendentis* "has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two

[1] *(1954) 56 N. L. R. 57.*

[2] *(1949) 2 A. E. R. 1019.*

[3] *(1939) S. A. A. D. 537.*

delinquents to recover what he has delivered under such a contract ". The proper test is whether public policy would best be served by granting or refusing the plaintiff's case, and, in applying that test, " a Court should not disregard *the various degrees of turpitude* in delictual contracts ". Watermeyer J. said :

> " The principle underlying the general rule is that the Courts will disregard illegal transactions but, the exceptions show that where it is necessary to prevent injustice or to promote public policy, it will not rigidly enforce the general rule."

The underlying policy of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is to prevent certain abuses in a " seller's market " induced by the serious shortage of housing accommodation in certain localities. Both enactments make express provision for the recovery of payments illegally received (or illegally paid) by way of *excess rent*, but they are silent as to the right of a landlord to retain a premium illegally received by him. This omission does not convey to my mind that Parliament necessarily intended a landlord to retain the illegal premium in every case if he was willing to run the risk of paying a fine or serving a term of imprisonment prescribed for his offence. On the contrary, Parliament was content to leave issues arising on a tenant's claim to recover the money to be decided in accordance with the principles of the general law.

I can well conceive of cases where, in the context of rent restriction legislation, public policy would require a landlord to refund the illegal premium. Similarly, I can conceive of cases where the tenant ought not to be allowed to claim the money back. An illustration of the former case is when a rapacious landlord exacts an illegal payment from a person who is desperately in need of a house, and who cannot find shelter for himself and his family unless he submits to the illegal terms exacted by the landlord. An illustration of the converse case is where a wealthy person in search of a house puts temptation in the way of a landlord by offering him a " bribe " in order to obtain preference over other prospective tenants. The proper way to promote public policy and to administer justice between man and man is to give careful consideration to the circumstances of the particular case instead of applying an inflexible rule of law.

In the present case, the learned Judge took the view that the money ought to be refunded because " the landlord had taken undue advantage of the tenant's need for a house and exacted from him a sum of Rs. 1,800 notwithstanding the statutory prohibition ". If the evidence on record justifies that inference, I would be disposed to say that public policy would be better served by compelling the landlord to return his ill-gotten gains. However, as the claim is prescribed, this question need not be pursued further for the purposes of the present appeal. But landlords would be unwise to assume that *Vitharane v. de Zilva* (supra) has finally settled the law in their favour on the other issue.

SANSONI J.—I agree.

Appeal allowed.