1960 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

SILVA, Appellant, *and* SILVA, Respondent

*S. C. 148—D. C. Kurunegala, 14400/M*

*Lessor and lessee—Liability of lessee for damages caused by his negligence—Assignment of lease without lessor's permission—Validity.*

The defendant, who was a lessee, assigned his lease without the lessor's consent but, a few days later, while he was still in occupation, the leased premises were damaged by fire caused by the negligence of members of the defendant's family. In the action instituted by the lessor against the defendant for the recovery of damages, the liability of the defendant on the contract of lease as well as in tort was clearly pleaded by the lessor.

*Held*, that, even assuming that the lease had been validly assigned despite the absence of the lessor's consent, the defendant was nevertheless liable in tort.

*Quaere*, whether the rights of a lessee under a lease can be assigned without the permission of the lessor where there is no express provision in the lease.

APPEAL from a judgment of the District Court, Kurunegala.

*D. R. P. Goonetilleke*, with *F. R. Dias*, for plaintiff-appellant.

*M. L. S. Jayasekera*, with *Hannan Ismail*, for defendant-respondent.

*Cur. adv. vult.*

December 14, 1960. WEERASOORIYA, J.—

By indenture of lease P2 dated the 25th April, 1956, the plaintiff-appellant granted on lease to the defendant-respondent for a period of two years commencing from the date thereof certain premises consisting of three boutique rooms with a cadjan roof. On the 21st January, 1957, the defendant by deed D1A assigned the lease in favour of one Paulu Appuhamy. At the same time the assignee gave the defendant the notice D2A requesting him to vacate the leased premises within fifteen days. But on the 29th January, 1957, while the defendant and his family were still there, a fire originating in the hearth in the kitchen and spreading to the roof destroyed the entire building. The plaintiff seeks in this action to recover as damages from the defendant a sum of Rs. 1,500 being the value of the building.

According to paragraph 8 of the plaint the liability of the defendant to pay this sum arose from his position as the lessee of the premises, and in the alternative on the basis that the fire was due to his negligence and carelessness. The issues framed on these averments were as follows :

" (3) On 29.1.57 was the defendant in occupation of the said boutique and premises as lessee of the plaintiff ?

(5) Did the fire arise out of any act of negligence or carelessness for which the defendant is liable ?

(6) If so, to what damages is the plaintiff entitled ?"

Issue No. 5 was objected to by counsel for the defendant on the ground that particulars of negligence were not pleaded. The District Judge allowed the issue but only on certain conditions, one of them being that issue No. 3 is answered in the affirmative. This ruling, for which I can find no sanction at all in the provisions of the Civil Procedure Code relating to the framing of issues, necessarily meant that the question whether issue No. 5 should be treated as an issue or not was left undetermined till judgment was delivered. Eventually, having answered issue No. 3 in the negative, the learned Judge held that issue No. 5 did not arise for consideration. But in the meantime evidence relevant to the issue was adduced by the plaintiff as well as by the defendant. That evidence, in my opinion, is decisive of this case as it leaves no room for doubt that the fire was due to the negligence of members of the defendant's family, for which he must take responsibility, It is, therefore, quite immaterial whether at the time when the fire occurred the defendant's occupation of the leased premises was in the capacity of a lessee under the plaintiff, for, even if the defendant was (as he alleged) in occupation of the premises at the material time with the leave and licence of Paulu Appuhamy, in view of the negligence disclosed in the evidence he is liable in damages to the plaintiff in tort.

In my opinion issue No. 5 should have been admitted without any conditions as it arose on the averments in the plaint, in paragraph 8 of which the liability of the defendant on the contract of lease as well as in tort was clearly pleaded. The erroneous treatment of issue No. 5 by the trial Judge seems to have proceeded from a misconception that the action was based on the contract of tenancy only.

If the action was so based, the decision of the case may well have turned on the answer to the question whether at the date of the fire the defendant was still a lessee or not under the plaintiff. The lease P2 is silent on the right of the lessee to assign the lease. It was part of the defendant's case that he obtained the prior consent of the plaintiff to the assignment D1A. No consent appears in D1A, and the Judge held that no consent had, in fact, been given. His finding on the point was not convassed by counsel for the defendant at the hearing of the appeal. Despite this finding the Judge held that in the absence of any provision to the contrary in the lease, there can be a valid assignment by the lessee without the consent of the lessor, and he dismissed the action as he considered that by virtue of the assignment, D1A, the defendant was no longer the lessee under the plaintiff at the date of the fire and was, therefore, not liable under the contract. In holding that D1A operated as a valid assignment the learned Judge followed the case of *Goonesekere*

*et al. v. John Sinno* [1] which he regarded as binding on him. That case is undoubtedly an authority for the proposition that the rights of a lessee under a lease can be assigned without the permission of the lessor where there is no express provision in the lease. The question whether the assignment also results in a transfer of the lessee's obligations under the lease does not appear to have been expressly considered in that case. But the correctness of that decision, as far as it goes, was doubted in *Goonesekere v. Ramanpillai* [2], and may have to be examined afresh when a suitable case arises. In the present case, although arguments were addressed to us in regard to the validity and effect of the purported assignment, D1A, I prefer to rest my decision on the ground that the defendant is liable in damages to the plaintiff in tort in view of the negligence that has been established.

As regards the quantum of damages, although the plaintiff claimed Rs. 1,500, it was elicited in examination-in-chief from one of his own witnesses that the reconstruction of the building that was destroyed would not cost more than Rs. 800. The judgment and decree appealed from are set aside and judgment will be entered in favour of the plaintiff in a sum of Rs. 800 with costs here and below.

H. N. G. FERNANDO, J.—I agree.

*Appeal allowed.*