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Present : Akbar J.

SUNDRAM PILLAI *v.* AMBALAM *et al.*

229—C. R. Colombo, 41,673.

Small tenements—Rule nisi *on tenant—Writ of possession against occupier not served with rule—Ordinance No. 11 of 1882, ss. 3, 5, 6.*

Where in proceedings under the Small Tenements Ordinance a rule *nisi*, which had been served on an alleged tenant is made absolute, a writ of possession issued in pursuance of the rule is not operative against an occupier, who was no party to it.

APPEAL from an order of the Commissioner of Requests, Colombo.

H. V. Perera (with *N. E. Weerasooria*) for landlord-appellant.

A. E. Keuneman, for second respondent.

February 13, 1929. AKBAR J.—

This appeal raised several questions of law on the construction of the Small Tenements Ordinance, No. 11 of 1882. I have had the benefit of a full and able argument by Counsel on both sides and now proceed to give my opinion in the case.

The appellant, as landlord of No. 120, Sea street, proceeded, under section 3 of the Ordinance, against his alleged tenant, Muthu Alague Ambalam. Rule *nisi* was issued, and it was made absolute on March 17, 1928. Thereupon the Court issued writ of possession to the Fiscal to deliver possession of the premises to the appellant, but as the second respondent refused to vacate the premises, the matter was reported to Court and was inquired into on July 17, 1928. The second respondent filed an affidavit alleging that the premises in question formed a temple and that he was the officiating priest and had been in possession for upwards of twelve years. He denied that he had paid any rent, and claimed title in his own right. The Commissioner heard evidence and held that the room was a Hindu temple, and that the second respondent had been in possession. He therefore refused to let the writ operate against the second respondent as there was no rule issued against him.

It is contended by Mr. Perera, and he quoted a case reported in *2 Brown's Reports 76* as a case in point, that the only remedy open to a person in the position of the second respondent is to proceed under section 6 of the Ordinance, that is to say, he is bound to give up possession under the writ although he was no party to the rule, and that the only way in which he can stop the operation of

the writ was to give a bond with two securities, in such sum as the Court may order, for the due payment of the rent already due and which may become due, and the probable cost of an action which he was bound to sue out, within two months of the date of the bond.

If the argument of the appellant is given effect to, it will mean this, namely, that in the case of a house which may be rented out at Rs. 20 or less per month, two persons, acting in collusion to defraud the owner and occupier of the house, can start proceedings under the Ordinance. On a Re. 1 stamp proceedings can be started by the bogus landlord against the alleged tenant, there will be a rule *nisi* and, of course, the rule will be made absolute on the non-appearance of the tenant. According to the appellant's Counsel's contention, a writ of possession will empower the Fiscal to eject the owner or occupier even though he was not a party to these proceedings, and the only manner in which he can stay ejectment is to give a bond with two securities, upon the terms mentioned in section 6 of the Ordinance, and to bring an action as plaintiff in which the whole question of title will have to be proved by him. It is clear, therefore, that it will not be just to give effect to such a contention, unless the plain words of the Ordinance direct me to do so. It is true from certain words in section 3 of the Ordinance and from certain remarks of Mr. Justice Lawrie in the case I have referred to, that the writ of possession given to the Fiscal will appear to empower him " to enter upon the tenement with such assistance as he may deem necessary, and to give possession accordingly." But the opening words of section 3 are significant. They are as follows :—" Whenever the term or interest in any tenement shall have ended or shall have been duly determined by legal notice to quit, and such tenant, or (if such tenant do not actually occupy the premises or occupy only part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the tenement, or of such part thereof, it shall be lawful for the landlord to file, &c." From these words it is clear that if there is a person in the position of the second respondent in this case who claims to be the owner of the premises and who denies the tenancy, these proceedings are not operative against him unless he has been served with a rule *nisi* and has had the opportunity of contesting the plaintiff's claim to the tenancy as against himself. Even here only the word " tenant " occurs in section 5 and there is no reference to the occupier, but section 3 makes it clear that the rule *nisi* is not to be made absolute unless it has been served on the tenant or occupier and the tenant or occupier fails to appear, on the due date, or appearing does not show good and valid cause to the contrary. Therefore, on a reading of the whole Ordinance, it seems to me that when the Fiscal reported

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that the respondent refused to quit, all the proceedings by the landlord against his alleged tenant became inoperative against the occupier so claiming. If the landlord's case is that the second respondent is not acting *bona fide* but is a nominee of the tenant, he should have started proceedings against this occupier *de novo* under section 3 by issuing the rule *nisi* against such person.

If I were to hold that the writ empowered the Fiscal to clear out every person from the premises in the position of the second respondent in this case, it would lead to the very great abuse which I have indicated above. In my opinion section 6 refers only to a person who has been served with a rule *nisi* and who has failed to appear on the returnable date, or has appeared but failed to satisfy the Court that the rule *nisi* should not be made absolute. It is significant that section 6 refers, not only to the occupier, but even to the tenant. It is also clear from the form of the bond No. 5 in the schedule to the Ordinance which is to be followed (see section 9) that section 6 appears to give a double remedy to the tenant in the case, or the occupier to contest the right of the landlord to eject him.

The proceedings on the returnable date cannot but be summary, and more or less akin to a claim inquiry under the Civil Procedure Code. Section 6 gives a further right to the defeated tenant or occupier in the summary proceedings to assert his right in the fullest possible manner if he gives proper security.

As regards the remarks of Mr. Justice Lawrie in *2 Brown's Reports 76*, they were *obiter*, because the main finding of the Supreme Court in that case was that proceedings taken by a petitioner under section 325 *et seq.* of the Civil Procedure Code were misconceived in a case under Ordinance No. 11 of 1882.

I would therefore, for the reasons given by me, dismiss the appeal, but I would make no order as to the costs of this appeal, owing to the uncertainty of the law on the point and the absence of definite authorities.

Appeal dismissed.