1951 *Present:* **Gratiaen J. and Gunasekara J.**

JUSTIN FERNANDO *et al.*, Appellant, *and* ABDUL RAHAMAN *et al.*, Respondents

S. C. 167—D. C. Colombo, 16,361/M

Landlord and tenant—Action for ejectment—Decree entered against tenant—Binding effect on sub-tenant—Civil Procedure Code, ss. 324, 325—Rent Restriction Ordinance No. 60 of 1942, s. 8 (c)—Meaning of term " obiter dictum ".

A sub-tenant in occupation of premises under a contract of sub-tenancy entered into before an action for ejectment has commenced against the tenant is not bound by the decree in such an action unless he was joined as a party to the proceedings.

Such a sub-tenant cannot be judicially evicted from the premises except in terms of a decree for ejectment entered against him in an action to which he was made a party.

Siripina v. Ekanayake (1944) 45 N. L. R. 403 followed.

Kudoos Bhai v. Visvalingam (1948) 50 N. L. R. 59 not followed.

Where two separate and distinct reasons are given by a Judge for his decision, each is part of the *ratio decidendi*, and there is no justification for regarding one of them as *obiter dictum*.

[1] *(1950) 34 Ct. of Crim. App. Rep. at p. 197.*

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, for the appellants.

E. B. Wikramanayake, K.C., with *C. Renganathan*, for the plaintiff respondent.

G. L. L. de Silva, for the defendant respondent.

Cur. adv. vult.

July 16, 1951. GRATIAEN J.—

This appeal relates to premises No. 97, Chatham Street, Colombo, in which the 1st appellant has for over 20 years run a barber's saloon. The premises form part of a valuable property which had belonged for many years to a gentleman named Brodie. A previous tenant of Brodie had carried on a hotel business in the other portion of the premises, but he later sold the hotel business and assigned the tenancy rights under Brodie in respect of the entire property including No. 97 to the defendant Robert de Silva who attorned to Brodie. At the same time the 1st appellant, who had been the sub-tenant under the previous tenant in respect of No. 97, attorned to the defendant as his sub-tenant. The monthly rental for the barber's saloon—i.e., premises No. 97—was Rs. 115. The 2nd appellant is employed as a servant by the 1st appellant.

In 1944 the plaintiff purchased the entire premises, including No. 97, from Mr. Brodie, and the defendant having now attorned to the plaintiff as his tenant, continued to carry on the hotel business in the main portion of the building while the 1st appellant, as his sub-tenant, continued to run the barber's saloon at premises No. 97 as the 1st defendant's sub-tenant. Admittedly, no privity of contract was at any time established between the 1st appellant and the plaintiff.

At the end of June, 1945, the plaintiff gave the defendant one month's notice to vacate the entire premises. It has not been proved that the 1st appellant was informed of this fact at the time. The defendant in the first instance refused to quit, and on 2nd August, 1945, the plaintiff sued him in this action for ejectment pleading, *inter alia*, that the entire premises were " reasonably required by him for use and occupation as a place of business " within the meaning of Section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942. The 1st appellant was not joined as a party in the action, and remained in occupation of premises No. 97, continuing regularly to pay rent to the defendant on the footing that the sub-tenancy was still in force.

The action for ejectment was settled on 13th May, 1946, as between the plaintiff and the defendant. The consent decree provided that the defendant should be forthwith ejected from the premises No. 97—that is, the barber's saloon occupied by the 1st appellant—but that he should, subject to certain conditions which do not affect the present issue, remain in occupation as the plaintiff's tenant of that part of the premises in which

the hotel business was carried on. But for this settlement, the Court would not have had jurisdiction to grant a decree for ejectment except on proof that the case fell within Section 8 (*c*) of the Rent Restriction Ordinance of 1942. The 1st appellant was not a party to this compromise.

In the state of the law as it was understood by practitioners and litigants at that time, the order for ejectment in respect of premises No. 97, Chatham Street, was assumed to be ineffectual against the 1st appellant. *Vide* the judgment of de Kretser J., with whom Soertsz J. agreed, in *Siripina v. Ekanayake* [1]. In this view of the legal position the plaintiff called upon the defendant to institute separate proceedings, independently of the decree in the present action, to eject the 1st appellant so that the plaintiff would have vacant possession of the premises. Accordingly the defendant made an application to the Board of Assessment constituted under the Rent Restriction Ordinance of 1942 (which was then in force) for authority to sue the 1st appellant for ejectment. After due inquiry the Board refused this application on 9th September, 1946.

There is no evidence as to what negotiations took place between the plaintiff and the defendant after this order of 9th September, 1946, was made. All that is clear is that the 1st appellant continued from month to month to pay his rent to the defendant for the occupation of the barber's saloon. Whether this rent was passed on to the plaintiff is not clear. At any rate, no attempt was made in the present action for over two years to execute the decree for ejectment in respect of premises No. 97. Nor was a regular action instituted against the 1st appellant either by the plaintiff or by the defendant in order to test his right to remain in occupation.

Matters stood in this way until February, 1949. Shortly before this date a judgment of special interest to landlords, tenants, and sub-tenants had been pronounced by Nagalingam J., sitting alone, in *Kudoos Bhai v. Visvalingam* [2]. That judgment was immediately concerned with the question whether a sub-tenant could properly be joined in a landlord's action for ejectment against the tenant, and the question was answered in the negative. The judgment proceeded, however, upon a consideration of several decisions of the Indian Courts and of certain passages in Voet and Nathan's " Common Law of South Africa ", to dissent from the earlier ruling which was considered on this particular point to be an *obiter dictum* in *Siripina's case*. In the result my brother Nagalingam pronounced that although a sub-tenant could not be joined in an action for ejectment instituted by the landlord against the tenant, he was nevertheless bound by the decree for ejectment entered in such an action, and was accordingly liable to be ejected summarily from the premises in execution proceedings taken against the judgment-debtor under Section 324 of the Civil Procedure Code.

The plaintiff, encouraged no doubt by the terms of this decision, made an application for execution of his decree in respect of premises No. 97, Chatham Street. To this application the defendant consented in due course. The appellants refused, however, to vacate the premises and

[1] *(1944) 45 N. L. R. 403.* [2] *(1948) 50 N. L. R. 59.*

resisted the attempt of the Fiscal's Officer to turn them out. Their position was that the decree did not bind the 1st appellant, and that it therefore could not bind his servant the 2nd defendant either. The plaintiff then made a further application to have the appellants removed from the premises in terms of the decree under which, it was argued, they were bound on the authority of *Kudoos Bhai's case*.

The learned District Judge, in dealing with this application, was faced with the invidious choice of deciding whether he should follow what had been ruled by Nagalingam J. to be an *obiter dictum* of de Kretser J. in *Siripina's case* or the later *obiter dictum* of Nagalingam J. himself in *Kudoos Bhai's case*. He selected the latter alternative, and allowed the plaintiffs application. The appellants have now invited this Court to hold that *Siripina's case* was correctly decided. The only other local decision to which we have been referred was *Mohamed Haniffa v. Dissanayake* [1], where Porter J., sitting alone, took the view, in connection with a criminal prosecution, that a writ of possession issued under a decree for ejectment did not bind a sub-tenant who was not a party to the action. Unfortunately, this last decision makes no specific reference to the Roman Dutch law or to the provisions of the Civil Procedure Code which are applicable.

I desire to state at the outset that I am unable to agree that the view expressed by de Kretser J. and endorsed by Soertsz J. in *Siripina's case* regarding the position of a sub-tenant in relation to a decree for ejectment against the tenant only can properly be described as an *obiter dictum*. It is true that this judgment decided that the landlord's application under the relevant provisions of the Civil Procedure Code had not been made in proper form. Nevertheless, the learned Judges *also* decided that the sub-tenant was in any event not " bound by the decree " entered against the tenant who was his immediate landlord in proceedings to which he, i.e., the sub-tenant, was not a party. " Certain subordinates ", said de Kretser J., " may be bound by the decree, but a tenant's position is different. Ordinarily, he would not be bound by the decree unless he was a party to the case ". In another passage of the judgment, he expressly states " *If it is sought to bind him (the sub-tenant) by a decree, he ought to be made a party to the action* ".

The decision in *Siripina's case* is in my opinion based squarely upon two separate and distinct grounds, and each ground is part of the *ratio decidendi*. " We are not entitled to pick out the first reason as the *ratio decidendi* of the case and neglect the second or to pick out the second reason as the *ratio decidendi* and neglect the first; we must take both as forming the grounds of the judgment "—*per* Greer J. in *London Jewellers Ltd. v. Attenborough* [2]. This point of view was recently emphasised by Lord Simonds in *Jacobs v. London County Council* [3]. " There is no justification ", he said, " for regarding as *obiter dictum* a reason given by a Judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decides two things would decide nothing ". Applying

[1] *(1922) 4 T. C. L. 94.*

[2] *(1934) 1 K. B. 206 at 222.*

[3] *(1950) A. C. 367.*

these principles, I think that the decision in *Siripina's case*, unless overruled by a Divisional Bench, is an authority which must be followed by all Judges of first instance and by any Judge of this Court who sits alone to dispose of appeals from a decision of a minor Court.

Section 324 (1) of the Civil Procedure Code appears in the Chapter dealing with the execution of decrees for possession of immovable property. Its provisions are in the following terms:—

" (1) Upon receiving the writ the Fiscal or his officer shall as soon as possible as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf, *and if need be by removing any person bound by the decree who refuses to vacate the property:*

Provided that as to so much of the property, if any, as is in *the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy*, the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property; and

Provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served upon him, and in such case no proclamation need be made."

It is significant that the language of the first proviso recognises that, at least in certain cases, a tenant in occupation may, notwithstanding a decree for possession, be entitled under the common law " to occupy the (premises) as against the judgment-debtor " whose rights have been defeated by the successful party. Section 287 (2) makes Section 324 (1) also applicable to orders made under Section 287 (1) for delivery of possession to execution-purchasers under money decrees. Such an order, it should be noted, is only permissible if the property sold is " in the occupancy of the judgment-debtor *or* of some person on his behalf *or* of some person claiming under a title created by the judgment-debtor *subsequent to the seizure of the property* ". A person in the position of the 1st appellant would not fall within any of these categories, and such a case must be dealt with under the special provisions of Section 288. Section 324 has therefore no application if the property purchased in execution proceedings is in the occupation of a tenant who does not answer to one of the descriptions specified in Section 287 (1).

The question whether in Ceylon a person in occupation of premises as a sub-tenant of the judgment-debtor is " bound by " the decree in favour of the latter's landlord, *qua* judgment-creditor, must necessarily be determined by reference to the principles of the Roman Dutch Law which regulates the rights and obligations of landlords, tenants and sub-tenants *inter se*—subject, of course, to any local enactments which may be applicable. No useful purpose can therefore be served by examining the position of sub-tenants under the English Law or the Law of India.

If those systems be identical in any respect with the Roman Dutch Law on this subject, the coincidence, however interesting to students of comparative law, is nevertheless irrelevant.

Under the common law the tenant of an *urban tenement* is free, in the absence of any express agreement to the contrary, to sub-let the premises to a third party without his landlord's permission. There are apparently certain exceptions to this general rule, but they do not touch the present issue. *Voet 19—2—5 (Berwick's translation). Wille's Landlord and Tenant (4th Edition) page 112.* The contract of sub-tenancy between the 1st appellant and the defendant was therefore at its inception a perfectly legitimate transaction. When the plaintiff purchased the premises, and the defendant attorned to him, a new contract of tenancy came into operation between the plaintiff and the defendant, but it did not affect and was not affected by the existing contract of sub-tenancy between the defendant and the 1st appellant. The rent under the main lease was payable by the defendant to the plaintiff, and the rent under the sub-tenancy continued to be payable by the 1st appellant to the defendant. No privity of contract existed between the plaintiff and the 1st appellant. *Voet 19—2—21; Wille's Landlord and Tenant (4th Edition) page 108.* As I see it, each of these co-existing contracts would remain in force until it is terminated by due notice or in some other manner recognised by law. Upon its termination the overholding tenant (or sub-tenant as the case may be) became liable to be ejected by due process of law under a decree entered against him by a Court of competent jurisdiction. If the tenant retained the right to occupy the premises as against his overholding sub-tenant, only the tenant could sue the latter for ejectment on a cause of action founded on contract. If, on the other hand, the tenant had himself lost his tenancy rights other considerations would arise.

Admittedly no privity of contract exists between a landlord and a sub-tenant, but I am aware of no principle of the common law which precludes a landlord from recovering possession of the premises in an action for ejectment against the overholding sub-tenant *after the rights of the tenant have been extinguished.* In *Kudoos Bhai's case* Nagalingam J. took the view that "no person other than the tenant can properly be sued by the landlord for ejectment". In arriving at this conclusion he relied on the authority of *Voet 19—2—21* and *Nathan's Common Law of South Africa, Vol. 2 (1904 Edition) page 807* (which seems to correspond to *page 904, para. 911* of the 1913 Edition). With great respect, I think that these passages refer to actions *for the recovery of rent* and not specifically to proceedings *for ejectment.* No doubt a landlord's claim to eject his immediate tenant is also founded on contract, but this does not mean that he is not entitled, *qua* owner, to claim a decree for ejectment against an overholding sub-tenant whose continued occupation of the premises has in law been reduced to that of a mere trespasser.

The South African Courts have assumed that there are circumstances in which the joinder of the tenant and his sub-tenant as co-defendants in an action instituted for a cancellation of the main lease *and for ejectment* is quite appropriate. In *Abdulla and Co. v. Kramer Bros.*[1], a lessee,

[1] *(1928) C. P. D. 423.*

contrary to an express term in the contract of lease, had sub-let the premises to a third party. The landlord relying on this breach, claimed a cancellation of the lease and an order for ejectment in an action to which the lessee and his sub-tenant were made defendants. Benjamin A.J.P., in a considered judgment entered a decree (1) declaring as against the lessee that the lease was cancelled, (2) issuing as against both defendants an order for ejectment. In Ceylon, I find that in *Udayappa v. Goonetilleke* [1] a decree for rent and ejectment against a sub-lessee (who was a co-defendant with the lessee) was set aside by Sampayo J. and Maartensz A.J. in respect of the decree for rent but *not in respect of the decree for ejectment.* This authority is admittedly of little assistance because the question of the propriety of the decree for ejectment had been raised but was later abandoned by counsel.

Section 9 of the Rent Restriction Act, No. 29 of 1948, now prohibits a tenant of any premises to which the Act applies from sub-letting the premises *without the prior written consent of his landlord.* Upon a breach of this statutory provision, the landlord is entitled to a decree ejecting both the tenant and the sub-tenant in occupation, and the Act in this way gives to the landlord the same right of action against both parties which, under the common law, would apparently have been available to him for the breach of an express *contractual* prohibition against subletting.

I have been handicapped by my inability to have direct access to some of the South African Reports cited in the text-books, but the following reference appears in *Bisset and Smith's Digest of South African Case Law, Vol. 2, page 810:*—

> " In an action by plaintiff against defendant for cancellation of a lease in consequence of default, and for ejectment of the defendant ' *or any other person* ' from the property, and for damages, *Held* that plaintiff was entitled to cancellation of the lease and damages, but that *as to the claim for ejectment*, as persons other than the defendant were in occupation and had not been joined as defendants, *the claim must fail. Landers v. Vogel* [2]."

Nathan (1913 edition) 11,901, also refers to the ruling in *Poulter v. Davis* [3] which held that an order of Court " directing a tenant to vacate leased premises has *no application to sub-tenants,* holding under him with the landlord's knowledge, *who have not had notice of the proceedings in ejectment* ". (This report is unfortunately not available to me.)

Mr. Wikremanayake has relied on *Wille on Landlord and Tenant (4th edition) page 249,* where it is stated, on the authority of *Voet 19—2—16,* that " the extinction of the landlord's title to the leased property must necessarily extinguish the title of the tenant, because the latter's claim is founded entirely on that of the landlord ". He therefore contended that, the defendant's rights having been extinguished by the consent decree in favour of the plaintiff, the 1st appellant's right to remain in occupation of the premises was automatically wiped out. Does it

[1] *(1925) 27 N. L. R. 59.*
[2] *(1906) 27 Natal L. R. 458.*
[3] *(1908) T. H. 36.*

necessarily follow that a person who has lost his legal rights of occupation by virtue of the termination or the forfeiture of his landlord's title is necessarily *bound by* a decree to which he was not a party and which in terms orders not him, but someone else, to be ejected from the premises? It is important to note that Wille, in the passage which I have quoted—indeed, in the same sentence—proceeds to state that the extinction of the title of the landlord (i.e., in this case, of the defendant) " does not *ipso facto terminate the contract of tenancy.*" Wille relies on *Voet 19—2—17* and on *Glathar v. Hussan* [1] and *Colonial Government v. Aunalinda Village Management Board* [2] for the proposition that " the true owner of the property is not bound by a lease of it made without his consent or authority, and may, *by virtue of his ownership*, claim the ejectment *of the tenant* at any time ". I have been able to trace this latter report, and find that the owner successfully sued the lessor and the unauthorised lessee in the same proceedings (*a*) for a declaration that the purported lease was invalid and of no legal force or effect, (*b*) for the immediate ejectment of the lessee, his agents and servants.

A landlord who, being the owner of premises, has duly terminated a contract of tenancy by proper notice or in any other manner recognised by law, is clearly entitled under the common law to sue a sub-tenant for ejectment if he remains, *qua* trespasser, in occupation with knowledge that the tenant's rights have been extinguished. *Wille's Landlord and Tenent (4th edition) page 118* mentions a number of South African decisions on this point. As at present advised, I am not satisfied that the landlord cannot properly obtain a decree for ejectment against the overholding sub-tenant in an action in which the tenant is also joined as defendant in order to achieve finality in the litigation. The judgment of De Villiers C.J. in *Macdonald v. Hume* [3] is interesting in this connection. A lessee had sub-let the premises in contravention of the terms of the lease. The landlord sued the sub-lessee alone for ejectment. De Villiers C.J. expressed some surprise that the lessee " whose words, acts and conduct constituted so material a portion of the evidence and who had so serious an interest in the issue of the case " had not been summoned as a co-defendant. Nevertheless, as the lessor admittedly had notice of and could if he so desired have intervened in the action, a decree for ejectment *as against the sub-lessee alone* was affirmed. This judgment seems to indicate that in South Africa the joinder of both lessor and lessee in such cases is considered desirable and, as a rule, necessary. It is by no means clear that our Code of Civil Procedure regarding the joinder of defendants and causes of action prohibits an action so constituted, provided that a cause of action against only a single defendant is not combined with a cause of action against both. I refrain, however, from expressing any *obiter dictum* on this point which might cause embarrassment when the question is raised specifically.

In the present action there is an additional ground for holding that the 1st appellant is not " bound by the decree " against the defendant. The order made by the Board of Assessment on 9th September, 1946, refusing

[1] *(1912) T. P. D. 327.*

[2] *(1907) 24 S. C. 276.*

[3] *(1875) Buch. 8.*

the defendant authority to sue the 1st appellant for ejectment, had not been superseded by a decree of any Court in terms of Section 8 (*c*) of the Ordinance of 1942. By virtue of this order, which was made by a tribunal of competent jurisdiction, the 1st appellant was at the date of the present application " entitled to occupy the premises as against the judgment-debtor " within the meaning of the first proviso to Section 324 (2).

The general conclusions at which I have arrived for the purpose of deciding this appeal before us may be summarised as follows:—

(*a*) that a sub-tenant in occupation of premises under a contract of sub-tenancy entered into before an action for ejectment has commenced against the tenant is not bound by the decree in such an action unless he was joined as a party to the proceedings;

(*b*) that such a sub-tenant cannot be judicially evicted from the premises except in terms of a decree for ejectment entered against him in an action to which he was made a party;

(*c*) that the ruling of de Kretser J. and Soertsz J. in *Siripina v. Ekanayake* [1] on the above points is correct, and must be regarded as a binding authority unless and until it is either expressly over-ruled by a Divisional Bench of this Court or set at nought by the Legislature.

(*d*) that after the tenant's rights have been extinguished to the knowledge of the sub-tenant, the landlord, *qua* owner, is entitled to sue the overholding sub-tenant, *qua* trespasser, for ejectment; (it is not necessary to decide in this case whether in such an action the overholding sub-tenant and the tenant whose rights have been extinguished can properly be joined as co-defendants in the same proceedings).

(*e*) that a sub-tenant would be bound by a decree for ejectment against the tenant if the contract of sub-tenancy was entered into *after* the date of the decree; (if, on the other hand, the contract of sub-tenancy was entered into after institution of action but before the date of the decree, the question whether the sub-tenant was bound by such a decree must presumably be considered with reference to the doctrine of *lis pendens*).

In the present case, for the reasons which I have given, I would hold that the 1st appellant and his servant, the 2nd appellant, are not bound by the decree for ejectment against the defendant. I would therefore set aside the judgment appealed from and refuse the plaintiff's application as against the appellants with costs both here and in the Court below. The defendant should bear his own costs in both Courts.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *(1944) 45 N. L. R. 403.*