1957 *Present :* Sinnetamby, J.

MRS. A. C. PIGERA, Appellant, *and* M. I. M. MACKEEN, Respondent

S. C. 148—C. R. Colombo, 57,573

Rent Restriction Act, No. 29 of 1948—Section 9—Sub-letting—Condonation by landlord —Waiver of landlord's right by acceptance of rent.

Although a landlord must elect forthwith to terminate a tenancy when he becomes aware of a sub-letting in contravention of section 9 of the Rent Restriction Act, he may delay institution of action against the tenant if he has

reasonable explanation for doing so, e.g., if the tenant genuinely undertakes to eject the sub-tenant and deliver possession of the premises in question.

Acceptance of rent for a period subsequent to the sub-letting does not necessarily prove waiver by the landlord of his right to eject the tenant.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, Q.C., with *H. Rodrigo*, for the defendant-appellant.

V. Wijetunge, with *D. R. P. Goonetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

January 7, 1957. SINNETAMBY, J.—

This is an action for ejectment instituted by the landlord against his tenant without the authorisation of the Rent Restriction Board. The landlord claims the right to so institute this action by virtue of the fact that the tenant had sub-let the premises within the meaning of section 9 of the Rent Restriction Act of 1948. The learned Commissioner has allowed the plaintiff's claim for ejectment and the appeal is against that judgment.

The facts are as follows. The defendant was a lessee of the premises in question under a lease P3 according to the terms of which the lease expired on 31.12.1954. The tenant had sub-let the premises during the subsistence of the lease and the landlord, according to the evidence, became aware of this shortly after the 24th April, 1952, when he received letter P1 in regard to assessment of the premises by the Municipality and consequent upon a visit to the premises in connection therewith. The lease does not permit sub-letting : on the contrary there is a covenant in the lease which expressly prohibits it. The landlord did not immediately file action but accepted an assurance from the tenant's husband that he would eject the sub-tenant and deliver possession of the premises to the landlord. On 31.3.53 the landlord sent notice to quit P2 but did not proceed to action. The tenant thereafter had taken steps before the Rent Restriction Board to eject the sub-tenant and the landlord says he actively co-operated with the tenant in the course he was pursuing. This is the explanation for the delay in filing action and the learned judge has accepted that explanation as the reason for the delay in instituting action. After the expiry of the lease, in January 1955 he sent a further notice to quit P6 and instituted the present action in June 1955. It is to be noted that when the lease was due to expire the landlord sent the tenant letter P5 asking for delivery of possession at the termination of the lease. It was presumably because the tenant failed to deliver possession of the premises that the landlord sent the notice to quit P6 dated 21.1.55. In neither P5 nor P6 does the landlord claim that he is entitled to possession by reason of the sub-letting.

The only matter pressed at the argument in appeal related to the question of condonation. The learned Commissioner has held that there was no condonation and has accepted the landlord's explanation for the delay. It was urged that he had misdirected himself on this question both in regard to the law and on the facts.

It was contended that a landlord must on becoming aware of a sub-letting elect immediately whether he should regard the tenancy as at an end or whether he should permit the tenancy to continue. Reliance was placed on the case of *Robert v. Rashad* [1] for this proposition. Gratiaen J. therein observed:

> "The correct view is that, when the landlord becomes aware of the contravention, he must forthwith elect whether or not to treat the contract as terminated. If he elects to enforce this statutory remedy, the tenant's statutory protection under section 13 is automatically forfeited. But if he does not so elect the contravention is condoned, and the contractual tenancy continues."

I do not take the view that by these words the learned Judge intended to state that the landlord should immediately file action. He may elect forthwith to terminate the tenancy and nevertheless give the tenant time. All that is required is that the election should be made forthwith and not so long afterwards as to suggest condonation. In the present case if the delay in instituting action had stood by itself without any other relevant fact the inference of condonation would be so overwhelming as to be almost irrebuttable. But in this case there are other facts also to be considered.

Plaintiff's evidence is that he withheld his hand because the defendant undertook to eject the sub-tenant and deliver possession. One can understand a landlord not filing action in those circumstances if he believed in the sincerity of his tenant in view of the fact that recourse to the law courts involves not only delay but also expense. Finding that the tenant was somewhat remiss the landlord sent notice P2 which had the effect of immediately inducing the tenant to take steps to obtain the authorisation of the Rent Restriction Board to eject his sub-tenant. These proceedings were long drawn out due mainly to mistakes made by the tenant and the landlord then proceeded to give the notice on which the present action is based. In fact no notice would have been necessary as a breach of section 9 of the Act gives the landlord a statutory right to sue the tenant immediately in ejectment.

In support of the plea of condonation the following facts were urged. First there was an acceptance of rent right up to May, 1955. Secondly in the notice to quit P6 no reference is made to the sub-letting and finally no mention was made in accepting rent that it was being done so without prejudice to the landlord's rights to sue. On these facts it would no doubt have been open to a judge to reject the landlord's evidence and to

[1] *(1954) 55 N. L. R. 517.*

hold that there was no condonation. The question of condonation is, however, a question of fact. The learned trial judge has come to one conclusion and I cannot say that he is wrong.

On the question of whether there has been a waiver by acceptance of rent for a period subsequent to the sub-letting one has to take into account the facts of the case. There is no presumption in favour of waiver: the presumption is just the opposite. (Vide *Fernando v. Samaraweera* [1])

Although it is possible that another judge might well have taken another view on the question of waiver I am not justified, sitting in appeal, to hold that the judge erred on the question of fact involved in the plea of condonation. I accordingly dismiss the appeal with costs both here and in the Court below.

Appeal dismissed.

[1] *(1951) 52 N. L. R. 278.*