HUSSENIYA

v.

JAYAWARDENA AND ANOTHER

SUPREME COURT.
WEERARATNE, J., SHARVANANDA, J. AND WANASUNDERA, J.
S. C. No. 61/79 – C.A. 493/78 (F) – D.C. GALLE 8307/L.
MARCH 6, 1981.

Landlord and tenant – Action for ejectment – Tenant in arrears of rent – Payment by sub-tenant – Need for such payments to be in name of tenant or on his behalf if arrears to be discharged – Failure of sub-tenant to establish this – Plaintiff entitled to judgment.

Rent Act, No. 7 of 1972, section 21 – Payment of rents to authorised person – Payments must be in name of or on behalf of tenant.

Held

(1) Under our law a stranger to a contract acting without authority may validly discharge the debtor's obligation provided the payment is made in the name of the debtor and for his benefit. In the present case, however, the 2nd defendant who was a sub-tenant of the 1st defendant had failed to establish that he deposited rents in the name of the 1st defendant or on his behalf and the evidence in fact pointed to the deposit having been made by the 2nd defendant in his own name. Such a deposit was not effective to discharge the 1st defendant's liability for arrears of rent to the landlord.

(2) Further, the provisions of section 21 of Rent Act, No. 7 of 1972, having been invoked on behalf of the 2nd defendant, inasmuch as the payments were made to the Municipality, the 2nd defendant had to establish that he had so paid the rents in the name of or on behalf of the tenant (1st defendant) to the Municipality, which in terms of the section was a statutory agent of the landlord. The section only contemplates the deposit of rent being made by the tenant and the deposit made by the 2nd defendant did not attract the benefit of the provisions of section 21.

(3) Accordingly, the finding that the 1st defendant was in arrears of rent must be upheld and judgment be entered for the plaintiff.

Per Sharvananda, J.

"On the facts it would appear the allegation of collusion between the plaintiff and the 1st defendant made by the 2nd defendant is not without substance. There was no good reason for the 1st defendant's failure to pay rent from February, 1972. But such allegation has no relevance to the question of ejectment of the sub-tenant if the tenant, in fact, had fallen into arrears of rent as prescribed by the Rent Act. . . . . If the tenant in collusion with the landlord or otherwise fails to pay rent and, in fact, falls into arrears of rent, the sub-tenant's right of occupation is jeopardised. His right to occupation is dependent on the tenant's right to occupation and he is liable to eviction if the statutory protection given by the Rent Act to a tenant and of which a sub-tenant may avail himself ceases to be available to him by reason of fraud or collusion on the part of the tenant."

Cases referred to

(1) Bousfield v. Divisional Council of Stutterheim. (1920) 19 S.C. 74.

(2) Commissioner for Inland Revenue v. Vesser, (1959) 1 S.A.L.R. 452.
(3) Ibrahim Saibo v. Mansoor, (1953) 54 N.L.R. 217; 48 C.L.W. 35.

A. Mampitiya, with *N. R. M. Daluwatte*, for the plaintiff-respondent-appellant.
M. S. A. Hassan, with *Miss Sheila Jayatillake*, for the 2nd defendant-appellant-respondent.

Cur. adv. vult.

March 27, 1981.

SHARVANANDA, J.

This is an appeal from the judgment of the Court of Appeal allowing the appeal of the 2nd defendant-respondent and dismissing the plaintiff-appellant's action with costs.

The plaintiff-appellant sued the 1st and 2nd defendant-respondents for ejectment from premises Nos. 5, 7 and 9, Ward Street, Galle, on the ground that the 1st defendant, being the tenant of the plaintiff, was in arrears of rent from 1.2.72 up to the date of the plaint, viz., 21.5.74, and also on the ground that the 1st defendant had without her consent sub-let the premises to the 2nd defendant.

The 1st defendant denied that he was in arrears of rent and prayed for the dismissal of the plaintiff's action.

The 2nd defendant filed answer denying that he was a sub-tenant of the 1st defendant and claimed that he was in fact the tenant of the premises under the plaintiff, that he had offered the rent to the plaintiff in February, 1972, but as she refused to accept the rent, all the rent from February, 1972 had been deposited by him in the Municipality of Galle. He further pleaded that this was an action instituted by the plaintiff in collusion with the 1st defendant in order to eject him. According to him, the 1st defendant was permitted by his predecessors to use a portion of the premises in suit and was a licensee under him.

The position taken up by the 2nd defendant in the pleadings and in his evidence was that his predecessors, Wilmot Jayawardena and after him Hinni Nona, were tenants of the plaintiff and that on the death of Hinni Nona, his mother, on 8th February, 1972, he succeeded her as tenant of the plaintiff and in such capacity offered the rent for February,

1972 to the plaintiff, but she wrongfully refused to accept the rent from him.

The main issues on which the case proceeded to trial were:

(a) Who was the tenant of the premises—the 1st defendant or the 2nd defendant?

(b) If the 1st defendant was the tenant, whether he was in arrears of rent from February, 1972; and

(c) Whether the 1st defendant had sub-let the premises to the 2nd defendant without the written consent of the plaintiff.

After trial, the trial Judge entered judgment for the plaintiff, holding that the 1st defendant was, in fact, the tenant and that he had wrongfully sub-let the premises to the 2nd defendant, and further that the 1st defendant was in arrears of rent as pleaded in the plaint.

The 2nd defendant thereupon appealed to the Court of Appeal, and the Court of Appeal by its judgment dated 26.11.79 while affirming the finding of the District Judge that the 2nd defendant's predecessor Hinni Nona was in occupation of the premises as sub-tenant thereof and that on her death on 8th February, 1972, the 2nd defendant succeeded her as sub-tenant under the 1st defendant, proceeded to hold that the sub-letting had taken place prior to the date of commencement of the Rent Act, No. 7 of 1972 (i.e., prior to 1.3.72) and hence section 10(7) of the Rent Act protected such sub-letting, so long as the 2nd defendant continued to be the sub-tenant of the premises or part thereof. The Court further held that since the 2nd defendant had deposited the rent from 1.3.72 to 31.8.72 and further rents up to 31.3.75 in the Municipality, such deposit was a valid payment of rent and that hence the 1st defendant was not in arrears of rent when the plaintiff filed this action and consequently both the 1st and 2nd defendants were entitled to the protection of the Rent Act. It allowed the appeal of the 2nd defendant and dismissed the plaintiff's action with costs.

On the appeal before us, the concurrent finding that the 1st defendant was the tenant of the premises and the 2nd defendant was his sub-tenant was not canvassed and was accepted by counsel

for the 2nd defendant-respondent. It was also common ground that the 2nd defendant had, in fact, deposited on 29th September, 1972, the rents for these premises for the period 1.3.72 to 31.8.72 and thereafter for the subsequent period up to 31.3.75 in the Municipality in favour of the plaintiff. The sole question canvassed before us was whether such payment by the 2nd defendant constituted valid payment of rent to the plaintiff so as to wipe out the 1st defendant's arrears of rent. The finding of the trial Judge that the 1st defendant had himself failed to pay any rent for the month of February, 1972 and thereafter was not questioned and was accepted by all parties.

In holding that the deposit of the rent to the credit of the plaintiff for the relevant period by the 2nd defendant was a valid payment which accrued to the benefit of the 1st defendant the Court of Appeal fell into the fundamental error of assuming that the Rent Clerk of the Galle Municipal Council had stated in his evidence that the rents for these premises for the period 1.3.72 to 31.8.72 had been paid by the 2nd defendant "in the name of the 1st defendant". This assumption is not borne out by the evidence of that witness. According to the record, the Clerk had only stated: "A Sum of Rs. 540 being rent from March, 1972 to August, 1972, has been paid on 29.9.72 by Nissanka Jayawardena (the 2nd defendant). This money has been paid in the name of Mohamed Ismail Asma Husseniya (plaintiff). Money has been paid up to March, 1975 at the rate of Rs. 90 a month". Not even the 2nd defendant in his evidence has stated that he deposited the rent in the Municipality in the name of the 1st defendant. It is not conceivable that the 2nd defendant would have made the deposit of rent in the Municipality in the name of the 1st defendant, as, according to him, during the relevant period he was the tenant of the premises and the 1st defendant was his licensee and hence, in the circumstances, it was not at all likely that he would have paid the rents in the name of the 1st defendant. In fact, in re-examination he stated: "On 8.2.72 I paid the money direct to the plaintiff. When I paid the money for the month of March, the same was refused. Thereafter I deposited the money in the Municipal Council". The conclusion is irresistible that the 2nd defendant did not make the deposit in the Municipality in the name of the 1st defendant, but made it in his own name in the purported discharge of his obligation qua tenant. The burden was on the 2nd defendant to establish that the deposit made by him served to wipe out the 1st defendant's arrears of rent. To succeed

in that defence, he had to prove that the deposit made by him was made in the name of the 1st defendant or on his behalf. He has failed to do so.

In view of its unwarranted assumption that the deposit of rent was made by the 2nd defendant in the name of the 1st defendant, the Court of Appeal came to the wrong conclusion that such payment went to discharge the obligations of the 1st defendant and that hence the 1st defendant was not in arrears of rent.

The person who ought ordinarily to render performance is a debtor. He may also render performance through an agent acting on his behalf. Under the Roman Dutch Law, although the debtor or the agent is the proper person to perform the contract, he is not the only person entitled to do so. Any person interested in the payment of the debt can discharge the obligation. A sub-tenant could make payment of the rent due from a tenant to a landlord if such payment was for the purpose of preventing his own goods from being seized under the landlord's tacit hypothec.

"A sub-tenant is entitled to pay the landlord the rent due to him by the tenant either in order to free his (the sub-tenant's) goods from the landlord's tacit hypothec, or acting as negotiorum gestor for the tenant." (Voet 19.2.21 *Wille* Landlord and Tenant, 3rd Edition at 169).

"The Civil Law, differing in that respect from the English Law, allows a stranger to a contract to carry out his terms and to extinguish the obligation of the debtor irrespective of whether the debtor is ignorant of the payment or unwilling that it should be made by a third party." *(Wessels* Law of Contracts, 1937 Edition, Vol. I, paragraph 2130 at p. 658). However, in paragraph 2134, Wessels states:

> "For such payment to be effective, it must however be quite clear that the third party makes the payment for the benefit of the debtor."
>
> (Van Leeuwen, Cens. For., 1.4.32.3)

In book 46.3.7 Voet states the law:

> "Although payment to my creditor's creditor will not be valid without my creditor's consent except in so far as my actions on

his behalf have been for his benefit though unknown to him."

Thus, according to Voet, the payment to operate as a discharge of the debt due to the landlord must be for the benefit of the landlord and must purport to be on his behalf.

Pothier, in his Law of Obligations, states:

> "Section 463: It is not essential to the validity of the payment that it be made by the debtor or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name and in his discharge and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation and the debtor is discharged even against his will . . . . . But if the payment was not made in the name of the real debtor, it will not be valid: if a man paid in his own name a sum of money, believing that he was the debtor when in fact it was not due from him but from some other person, this payment would not extinguish the obligation of the real debtor."

In *Bousfield v. Divisional Council of Stutterheim* (1) at 71, De Villiers, C.J. accepted the law as laid down by Voet and Pothier that payments made by a stranger to a contract are valid and discharge the obligation, but he added: "It is necessary however that the tender made by a perfect stranger should be made in the name of the debtor", and held that if a tender is made by a stranger in his own name, the creditor may refuse to accept payment.

Thus it would appear that under our law a stranger to a contract acting without authority, may validly discharge the debtor's obligation, provided the payment is made in the name of the debtor and for his benefit, in which event the debtor is discharged even against his will. (*Commissioner for Inland Revenue v. Vesser* (2) at 458 (A.D.)) The payment must however be made to the landlord or his agent.

In this case the 2nd defendant has failed to establish that he deposited the money in the name of the 1st defendant or on his behalf. On the other hand, the evidence points to the deposit having been made by the 2nd defendant in his own name. Hence such deposit is not effective to discharge the 1st defendant's

liability for arrears of rent. Further, the payment was not made to the plaintiff or to any agent appointed by him; the payment was to the Municipality.

Counsel for the 2nd defendant referred to section 21 of the Rent Act, No. 7 of 1972, and claimed that payment in terms of section 21 had been made to the Municipality, which has been made the statutory agent of the landlord and that such payment is deemed to be payment to the plaintiff, which redounded to the benefit of the 1st defendant-tenant. Section 21 reads as follows:

"21(1) The tenant of any premises may pay the rent of the premises to the authorised person instead of the landlord.

(2) Where any payment of rent of any premises is made on any day in accordance with the provisions of sub-section (1), it shall be deemed to be a payment received on that day by the landlord of the premises from the tenant thereof.

(4) In this section 'authorized person' with reference to any premises means the Mayor or a Chairman of the Local Authority within whose administrative limits the premises are situated."

The principle of the Roman Dutch Law set out above applies only if the rent has been paid by the sub-tenant in the name or on behalf of the tenant to the landlord or his agent. In this case the rent has not been paid by the 2nd defendant to the plaintiff-landlord in terms of the Roman Dutch Law. Section 21 of the Rent Act has appointed the Local Authority to be the statutory agent of the landlord for the due payment of rent. For the 2nd defendant to avail himself of the benefit of that section, he should satisfy all the conditions prescribed for the deeming-section (21 (2)) to come into operation. Section 21 contemplates the deposit of rent to be made by the tenant. Admittedly, the deposit of rent has not been made to the 'authorised person' by the 1st defendant or anyone authorised by him. In the circumstances, the deposit made by the 2nd defendant in the Municipality without the authority of the 1st defendant does not attract the benefit of the provisions of section 21 and the 2nd defendant cannot claim the salvation of section 21.

For the above reasons, I cannot agree with the judgment of the Court of Appeal that the deposit made by the 2nd defendant complies with the requirement of the Roman Dutch Law or of section 21 of the Rent Act.

In view of my above conclusion, it is not necessary to go into the question whether the sub-letting of the premises by the 1st defendant to the 2nd defendant took place prior to the commencement of the Rent Act, No. 7 of 1972, or not.

On the facts it would appear that the allegation of collusion between the plaintiff and the 1st defendant made by the 2nd defendant is not without substance. There was no good reason for the 1st defendant's failure to pay rent from February 1972. But such allegation has no relevance to the question of ejectment of the sub-tenant if the tenant, in fact, had fallen into arrears of rent as prescribed by the Rent Act. As was said in *Ibrahim Saibo v. Mansoor* (3) at 223 D.B., "the position of a monthly sub-tenant whose immediate landlord is a monthly tenant is precarious. . . . . . .His right to occupation is fragile." If the tenant in collusion with the landlord or otherwise fails to pay rent and, in fact, falls into arrears of rent, the sub-tenant's right of occupation is jeopardised. His right to occupation is dependent on the tenant's right to occupation and he is liable to eviction if the statutory protection given by the Rent Act to a tenant and of which a sub-tenant may avail himself ceases to be available to him by reason of fraud or collusion on the part of the tenant.

I allow the appeal of the plaintiff-appellant and set aside the judgment of the Court of Appeal and restore the judgment of the trial Judge entering judgment for the plaintiff as prayed for. The 2nd defendant will pay the plaintiff-appellant his costs in the Court of Appeal and in this Court.

WEERARATNE, J.—I agree.

WANASUNDERA, J.—I agree.

Appeal allowed.