JAYAKODY
v.
LILIAN PERERA

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. 57/92
C.A. NO. 574/83 F
D.C. MOUNT LAVINIA CASE NO. 635/RE
MARCH 29, JUNE 01 AND 09, 1993.

Landlord and Tenant – Rent Act – Ejectment for arrears of rent – Tenant's claim for repairs set off against rent – Payment to court – Sections 13 (1) and 22 (3) (c) of the Rent Act – Section 409 of the Civil Procedure Code – Section 91 of the Evidence Ordinance.

Plaintiff sued the defendant for ejectment from the premises in dispute on the ground of arrears of rent. The defendant claimed that he was not in arrears in that firstly he had effected repairs to the house on an order of the Rent Board under Section 13 (1) of the Rent Act and secondly, in any event, the defendant had deposited a sum of Rs. 1500 to the credit of the case on the summons returnable date and hence the action could not be proceeded with in view of Section 22 (3) (c) of the Act.

Held :

(1) The existence of a valid order under Section 13 (1) of the Act is the foundation of the right to set off against rent in respect of the premises, the expenditure actually incurred for repairs.

(2) On the day of the action there was no valid order for repairs, the order relied upon having been set aside by the Board of Review and the Supreme Court. The cost of repairs effected before the order of the Rent Board was set aside, were effected by the defendant at his peril.

(3) The defendant should produce the order of the Rent Board of which oral evidence cannot be led in view of Section 91 of the Evidence Ordinance.

(4) The tender of money under Section 22 (3) (c) of the Act should be to the landlord. The deposit of money to the credit of the case does not constitute a valid tender to the landlord within the meaning of that section.

Cases referred to :

1. *Razik v. Esufally* 58 NLR 469.
2. *Medonza v. De Silva* [1985] 1 Sri LR. 44.

APPEAL from a judgment of the Court of Appeal.

A. K. Premadasa, P.C. with *L. V. P. Wettasinghe* for Defendant Appellant.

N. R. M. Daluwatte, P.C. with *S. Sinnetamby* and *E. K. Shanmugalingam* for Plaintiff-Respondent.

Cur. adv. vult.

June 21, 1993.

G. P. S. DE SILVA, C.J.

The plaintiff instituted this action on 18th September, 1978, in the District Court for the ejectment of the defendant from the premises in suit, inter alia, on the ground of rent being in arrear for three months or more after it has become due as provided for in section 22 (1) (a) of the Rent Act No. 7 of 1972. It was the case for the plaintiff that no rent was paid from 1st May, 1976. The plaintiff so stated in her evidence and this was not challenged.

The defendant resisted the claim of the plaintiff for ejectment on a two-fold basis. Firstly, he pleaded in his answer that on 18th May, 1976, the Rent Board of Dehiwala–Mt. Lavinia made order in case No. 352/73 authorizing him to effect repairs in a sum of Rs. 1500 in the event of the plaintiff failing to effect the repairs ; that he did effect repairs which cost Rs. 1500 and that thereafter he did not pay rent, as he lawfully might, until the said sum of Rs. 1500 'was liquidated'. Secondly, he pleaded that he deposited to the credit of the present case a sum of Rs. 1500 on 17th November, 1978, which was the summons returnable date and thus relied on the provisions of section 22 (3) (c) of the Rent Act as a defence.

After trial, the District Judge entered judgment for the plaintiff; the defendant unsuccessfully appealed to the Court of Appeal. He has now preferred an appeal against the judgment of the Court of Appeal to this court.

The first submission of Mr. Premadasa for the defendant-appellant was that a tenant is in arrear of rent within the meaning of section 22 (1) (a) only when rent is due. In other words, it was Counsel's contention that the landlord can succeed only upon proof of the tenant's *default* in the payment of rent; there can be no such default in view of the order of the Rent Board dated 18.05.76 in his favour.

I shall deal first with the defence based on the order of the Rent Board. By relying on the order of the Rent Board the defendant is in truth claiming the benefit of section 13 of the Rent Act. The material provisions of section 13 read as follows :

"13 (1) Where the board is satisfied, on application made by the tenant of any premises, or on an inspection of such premises carried out by it or under its authority, that the landlord –

(a) has without reasonable cause discontinued or withheld any amenities previously provided for the benefit of the tenant ; or

(b) has failed to carry out any repairs or redecoration necessary in the opinion of the Board to maintain the premises in proper condition,

the Board may make order directing the landlord to provide such amenities or to carry out such repairs or redecoration as may be specified in the order ; and it shall be the duty of the landlord to comply with the provisions of such order before such date as may be specified in that behalf in the order, or within such extended period as may be allowed by the Board on application made by the landlord.

(2) Where the Board is satisfied that any delay in the provision of the amenities alleged to have been discontinued or withheld in an application made under sub-section (1) or that any delay in the carrying out of the repairs or redecoration which the landlord is alleged in any such application to have failed to carry out, will cause injury to the occupants of the premises or hazard to their health or permanent damage to the premises, or seriously inconvenience the occupants, the Board shall, before making the

final order on such application, make an interim order directing the landlord to provide such amenities or to carry out such repairs or redecoration without delay, notwithstanding that there may be pending in any court, at the time of such application, any other action or proceedings relating to such premises.

(3) The Board shall in any order under sub-section (1) or sub-section (2) directing the landlord to effect any repairs or redecoration authorize the tenant, in the event of the landlord failing to comply with the order, to carry out such repairs or redecoration and to incur for the purpose, expenditure not exceeding such amount as may be specified in that behalf in the order; and where any repairs or redecoration are carried out by the tenant in pursuance of the authority so conferred, the tenant shall be entitled to set off against the rent payable in respect of the premises the expenditure actually incurred by him for the purpose, or the amount specified in that behalf in the order, whichever is less."

On a reading of the above provisions of law, it is clear that the foundation of the right to set off against the rent payable in respect of the premises that expenditure actually incurred for repairs is the existence of a valid order of the Rent Board made in terms of section 13 of the Rent Act. But in the present case it is not disputed that the order of the Rent Board was set aside by the order of the Board of Review ; an appeal against the order of the Rent Board has to be filed "before the expiry of a period of 21 days after the date of the receipt of a copy of the order" (s. 40 (4) of the Rent Act). It is also common ground that an application for a writ of certiorari was made to the Supreme Court on 28th June, 1978, which set aside both the order of the Rent Board and the order of the Board of Review and directed that a fresh inquiry be held. The resulting position was that as on the date of action there was *no valid* order of the Rent Board. Mr. Premadasa, however, contended that the fact that the order of the Rent Board was quashed is not material for the reason that the defendant had already spent Rs. 1500 for repairs on the strength of the order of the Rent Board. It seems to me that it is not an answer to contend that prior to 28th June, 1978, the tenant had already spent Rs. 1500 as cost of repairs, for if in fact he has done so prior to the final determination of the validity of the order of the Rent Board, he has acted at his peril. What is more, there is no evidence as to the date on which the repairs were carried out

by the defendant. Moreover, the order of the Rent Board was not produced, despite the provisions of section 39 (13) of the Rent Act which enacts that " Every order made by the Board.....shall be reduced to writing and signed by the Chairman ". No oral evidence of the order could have been led in view of section 91 of the Evidence Ordinance. I accordingly hold that there was no basis upon which the defendant could have relied on the *purported* order of the Rent Board.

Mr. Premadasa's next contention was that in as much as the defendant has deposited a sum of Rs. 1500 to the credit of the instant case on the summons returnable date, he was entitled to rely on section 22 (3) (c) of the Rent Act as a bar to the action for ejectment being proceeded with. The material part of section 22 (3) (c) reads thus :

" The landlord of any premises referred to in sub-section (1)..... shall not be entitled to proceed with any action or proceedings for the ejectment of the tenant of such premises on the ground that the rent of such premises has been in arrear for three months or more.....after it has become due,

(a) .....
(b) .....
(c) if the tenant has, on or before the date fixed in such summons that is served on him, as the date on which he shall appear in court in respect of such action or proceedings, tendered to the landlord all arrears of rent."

The District Judge reached the finding that there was no proof that the defendant had deposited the sum of Rs. 1500 as arrears of rent to the credit of the case. This finding is clearly contrary to the evidence. The defendant in the course of his evidence produced the relevant receipt as V3. This was not challenged. The Journal Entry No. 11 shows that the Manager of the Bank had sent a letter to Court confirming the deposit of the money. Thus the finding of the District Judge cannot be sustained.

The true question that arises for decision is whether the deposit of the arrears of rent to the credit of the instant case is a " tender " of such arrears to the " landlord " within the meaning of

section 22 (3) (c). In *Rasak v. Esufally* [1], *Basnayake C.J.* had occasion to consider the meaning of tender of rent in the context of section 13 of the Rent Restriction Act. Said the learned Judge, " Mere willingness to pay the rent does not discharge the obligation to pay the rent..... Tender does not mean mere expression of readiness to pay. To constitute tender the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt. (Harris on Law of Tender, p. 11)..... The rent must be actually paid ".

Mr. Daluwatte for the plaintiff-respondent placed strong reliance on the judgment of the Court of Appeal in *Medonza v. de Silva* [2], where the provisions of section 22 (3) (c) of the Rent Act directly arose for consideration. Tambiah J. (as he then was) having cited the case of *Rasik vs. Esufally* (supra) and a passage from Law of Contract by Cheshire and Fifoot, 4th Edn., P. 445 concluded :– " So, it seems to me to constitute a valid tender of all arrears to the landlord under section 22 (3) (c), there must be actual production of the money..... The tender of the money..... must be made to the landlord ". This, in my view, is the correct interpretation to be placed on the words " tendered to the landlord all arrears of rent " in section 22 (3) (c). It is to be noted that the same phrase occurs in section 22 (3) (b) which contemplates a situation prior to the institution of action. In such a situation the tender of the money must of necessity be to the landlord, which is a term defined in section 48 of the Rent Act. There is no compelling reason for giving the same expression occurring in section 22 (3) (c) a different meaning.

Mr. Premadasa, on the other hand, submitted that the interpretation placed on section 22 (3) (c) of the Rent Act in *Medonza v. de Silva* (supra) was incorrect as the Court of Appeal has failed to consider section 409 of the Civil Procedure Code. Section 409 of the Civil Procedure Code reads thus:– " The defendant in any action brought to recover a debt or damage may, at any stage of the action, deposit in court such sum of money as he considers a satisfaction in full of the plaintiff's claim ". In my view the provisions contained in section 409 of the Civil Procedure Code which speaks of an action " to recover a debt or damage " have no application to the provisions in section 22 (3) (c) of the Rent Act. As rightly submitted by Mr. Daluwatte, where a tenant is in arrears of rent for three months or more within the meaning of section 22 (3) (a) of the Rent Act, two distinct legal

consequences flow. Firstly, the tenant loses the protection of the Rent Act and the bar against proceedings for ejectment by the landlord is removed. Secondly, the landlord has a claim against the tenant for arrears of rent. It is to be noted that section 409 of the Civil Procedure Code speaks of a " debt " and of " satisfaction in full of the plaintiff's claim ". The deposit of money in court in full of the plaintiff's claim ". The deposit of money in court in terms of section 409 of the Civil Procedure Code has relevance to the money claim, namely the arrears of rent. However, section 409 of the Civil Procedure Code has no bearing whatever on the claim for ejectment. The defendant who was in arrears of rent within the meaning of section 22 (1) (a) and has thus lost the protection of the Rent Act, cannot regain the protection which he has lost except by complying with the statutory requirements set out in section 22 (3) (c) of the Rent Act.

I accordingly hold that the deposit of money to the credit of the case, does not constitute a tender of arrears of rent *to the landlord* within the meaning of section 22 (3) (c) of the Rent Act.

In the result, the appeal fails and is dismissed with costs. Since the immediate ejectment of the defendant from the premises in suit may cause grave hardship, I direct writ of ejectment not to issue till 31st December, 1993.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.