1952 *Present :* **Nagalingam S.P.J. and Pulle J.**

JAINUDEEN, Appellant, *and* MOHIDEEN THAMBY, Respondent

S. C. 79—D. C. Badulla, 9,595

Landlord and tenant—Payment of rent to wrong party—Liability of tenant to be held in arrears of rent—Tender or payment of arrears of rent after institution of action—Effect on rights of plaintiff—Rent Restriction Act, No. 29 of 1948, s. 13 (1) (a).

A tenant will be held to be in arrears of rent if he takes upon himself to deny the landlord's right to recover rents from him and pays the rents to a third party wrongly.

It is well settled law since the Rent Restriction Ordinance came into operation that where after the tenancy has been terminated arrear of rent is tendered or paid after the institution of action, such tender or payment has no effect at all on the rights of the plaintiff who had instituted the action prior to the tender to him or receipt by him of the arrear.

APPEAL from a judgment of the District Court, Badulla.

H. W. Tambiah, with *E. R. S. R. Coomaraswamy,* for the plaintiff appellant.

H. W. Jayewardene, for the defendant respondent.

Cur. adv. vult.

August 5, 1952. NAGALINGAM S.P.J.—

This is an appeal by an unsuccessful landlord who claimed as against his tenant ejectment from the premises and arrears of rent. The facts as ascertained by the learned District Judge may be accepted as correct, for Counsel for the appellant has not sought to challenge those findings.

The defendant had not paid rent from June, 1949, to the plaintiff but the rent from June, 1949, to the end of February, 1950, had been deposited by the defendant either in special case D. C. Badulla, 120, to which I shall make more detailed reference presently, or with the defendant's Proctor, Mr. Abeyesekera. On 4th April, 1950, the defendant sent by money order a sum of Rs. 35 as rent for the month of March, 1950, and another money order for a similar sum on 4th May, 1950, as rent for April, 1950, and in between these two dates, namely on the 22nd April, 1950, the defendant sent a money order for Rs. 315 on account of rent for the period from 1st June, 1949, to 28th February, 1950. The tenancy was determined by the plaintiff by notice given on 27th February, 1950, terminating the tenancy by the end of March, 1950, and the action was filed on 19th April, 1950. It would be apparent from a consideration of the dates and the amounts remitted that when on the 4th April, 1950, the defendant purported to send the money order for Rs. 35 in respect of rent for the month of March, 1950, that was on the assumption that he had duly paid and accounted for the rent for the period ending February, 1950. But of course the defendant's own conduct clearly indicates that the rent for the period ending 28th February, 1950, far from having been paid to the plaintiff was yet at that date in the hands of other persons and certainly not in the hands of the plaintiff, for it was only on 22nd April, 1950, that he sent the money order in respect of the rent for the period of June, 1949, to February, 1950, to the plaintiff. The plaintiff was therefore justified in disregarding the payment of the sum of Rs. 35 on 4th April, 1950, as a payment of rent for the month of March, 1950, and in treating the defendant as being in arrears with his rent and filing action against him, as already stated, on the 19th April, 1950.

I think it is well settled law since the Rent Restriction Ordinance came into operation that where, after the tenancy has been terminated, arrears of rent is tendered or paid after the institution of action, such tender or payment has no effect at all on the rights of the plaintiff who had instituted the action prior to the tender to him or receipt by him of the arrears. In this case, therefore, the plaintiff was fully entitled to the benefit of the action instituted by him on 19th April, 1950, and any subsequent payment made by the defendant could not have tended to detract from the rights that had accrued and vested in him.

The simple question, therefore, is whether the defendant was in arrears of rent for more than a month at the date the plaintiff instituted the action, and in regard to this there cannot be the slightest doubt, for the defendant admittedly was in arrears of rent at least for the period from July, 1949, to February, 1950, at the date of institution of action if defendant be given credit for the payment of Rs. 35 made on 4th April, 1950. Learned Counsel for the respondent was unable to surmount this obstacle but the learned District Judge has, no doubt, sympathising with the defendant and referring to the circumstance that the defendant was not in such impecunious circumstances as not to have been able to pay the rent, stretched a point in his favour and held that the payment or deposit of money either in the special case 120 D. C. Badulla or with the defendant's Proctor, who was then not in fact the defendant's Proctor but Proctor for a party who was litigating with the plaintiff, was a

sufficient payment to the plaintiff, and therefore a payment which would have operated to prevent the defendant from being in arrears of rent. It is, however, a trite saying that hard cases make bad law and I do think that however much one may be willing to extend one's sympathy to a party, nevertheless, unless the law is properly and correctly administered without reference to extraneous circumstances such as sympathetic considerations the tendency would be to bring about chaos and disaster.

It is now necessary to advert to the circumstances by stress of which the defendant made payment to parties other than the plaintiff of the rent due for the period from June, 1949, to February, 1950. It would appear that the plaintiff was trustee of the property in question appointed under a will of his father, whereby the income of the property was to be expended in the maintenance of a school. It would also appear that in the special case 120 D. C. Badulla the plaintiff's brother challenged the plaintiff's rights to administer the trust and it would be seen that for some reason or other which is not clear from the record the defendant had chosen to throw in his lot with the plaintiff's brother in that piece of litigation and sought to proffer assistance to the plaintiff's brother by withholding the payment of rent to the plaintiff though the plaintiff demanded the payment of the rents as they fell due ; it must be noted in this connection that Mr. Abeyesekera who is the defendant's Proctor was at the relevant date of the proceedings of special case 120 D. C. Badulla the Proctor for the plaintiff's brother. In other words the defendant took upon himself to deny the plaintiff's right to recover rents from him although admittedly he was the plaintiff's tenant, and if he did defy the plaintiff he has only himself to thank for the consequences of his conduct, and sympathy should not be permitted to outweigh the plain legal considerations that are applicable to the case.

I would therefore hold that the defendant was in arrears of rent and that the plaintiff is entitled to an order for ejectment.

The defendant claimed by way of reconvention a sum of Rs. 135 as constituting the aggregate of over-payments made by him at the rate of Rs. 5 a month in excess of the authorised rent, but at the trial it was conceded that the excess was only Rs. 2 a month. On this basis the defendant will be entitled to claim a sum of only Rs. 54 for the period ending April, 1950.

I would therefore set aside the judgment of the learned District Judge and enter judgment for the plaintiff for the sum of Rs. 385 less Rs. 54 and for damages at the rate of Rs. 33 a month from 1st May, 1950, until restoration of possession of the premises to the plaintiff and for ejectment of the defendant from the premises and order the plaintiff to be placed in possession thereof. The plaintiff will also be entitled to his costs of the action and of the appeal.

PULLE J.—I agree.

Judgment set aside.

2**—J. N. B 19618 (8/52)