1970 *Present :* Pandita-Gunawardene, J

K. B. SAMARAKOON, Appellant, *and* P. V. G. GUNADASA, Respondent

S. C. 52/68—C. R. Kandy, 19744

Rent-controlled premises—Notice to quit on ground of arrears of rent—Payment of arrears before expiry of date of termination of tenancy or before date of institution of action—Effect—Action in ejectment—Dismissal with costs—Computation of rent due thereafter—Whether, in a subsequent action, the costs can be set off against rent due—Rent Restriction Act, (Cap. 274), as amended by Acts No. 10 of 1961 and No. 12 of 1966, ss. 12, 12A (1) (a), 12A (2), 13 (1) (a), 13 (1A), 13 (1B), 14.

[1] *(1961) 65 N. L. R. 184.*

Where, in a case governed by section 12 A (1) (*a*) of the Rent Restriction Act, a tenant of premises the standard monthly rent of which does not exceed Rs. 100 has been in arrears of rent for three months or more after it has become due, and has been given notice of termination of his tenancy by the landlord, he cannot save himself from eviction by payment of arrears either (i) before the expiry date of the termination of the tenancy, or (ii) before the date of institution of the action. Once he falls into arrears for the specified period, he forfeits the protection of the Rent Restriction Act and is liable to eviction, unless he is able to plead section 12 A (2) of the Act.

Dias v. Gomes (55 N. L. R. 337) applied.

Mohamed v. Wahab (72 N. L. R. 333) not followed.

It is the duty of a tenant of rent-controlled premises to continue to pay rents regularly even during the pendency of an action in ejectment relating to the premises. And if the action is dismissed with costs, the costs cannot be set off against the rent due in a subsequent action if the tenant has not had his costs taxed and in the absence of a specific issue.

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

L. D. Guruswamy, with *Patrick de Alwis*, for the defendant-appellant.

C. Ranganathan, Q.C., with *Miss Nirmala Sandrasagara*, for the plaintiff-respondent.

Cur. adv. vult.

December 15, 1970. PANDITA-GUNAWARDENE, J.—

This is an action by the plaintiff landlord for ejectment of the defendant, his tenant, on the ground of arrears of rent.

Before I discuss the particular facts of this case, it may be useful to give a brief resume of that aspect of the Rent Laws which purport to deal with arrears of payment of rent as a ground to sustain a landlord's action for ejectment of the tenant.

The original Act No. 60 of 1942 provided that no action for the ejectment of a tenant shall be instituted unless the rent has been in arrear for one month after it has become due. This Act was superseded by two amending Acts Nos. 29 of 1948 and 6 of 1953 consolidated in Chapter 274 Volume 10 L. E. C. titled the Rent Restriction Act, and thereinafter referred to as the principal Act. This principal Act took over the same provision restricting the landlord's right to institute proceedings for ejectment unless the rent has been in arrear for one month after it has become due (Section 13 (1) (*a*)).

By the Rent Restriction (Amendment) Act No. 10 of 1961, Section 13 of the principal Act was amended by the insertion of the following new sub-sections (vide section 6 of the Amendment Act)—

(1A) " The landlord of any premises to which this Act applies shall not be entitled to institute 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 one month after it has become due—

(*a*) if the landlord has not given the tenant three months' notice of the termination of tenancy, or

(*b*) if the tenant has, before such date of termination of tenancy as is specified in the landlord's notice of such termination, tendered to the landlord all arrears of rent.

(1B) Where any action or proceedings for the ejectment of the tenant of any premises to which this Act applies is or are instituted on the ground that rent has been in arrear for one month after it has become due, the Court may, on being satisfied that the rent has been in arrear on account of the tenant's illness or unemployment or other sufficient cause, make order that a writ for ejectment of the tenant from those premises shall not issue if the tenant pays to the Court the arrears of rent either in a lump sum on such date, or in instalment on such dates, as may be specified in the Order ; and if the tenant pays to the Court the arrears of rent on such date ordates, his tenancy of those premises shall, notwithstanding its termination by the landlord of those premises, be deemed not to have been terminated."

Ordinarily the termination of a monthly tenancy by the landlord is by the giving of a month's notice. By this amendment, the landlord was required to give a period of three months' notice ; and it was provided further that if before the date of the termination of the tenancy the tenant paid all arrears of rent, the landlord was precluded from instituting proceedings.

The new sub-section 1(B), already quoted, was an added advantage to the tenant.

The Rent Restriction (Amendment) Act, No. 10 of 1961, was again amended by Act No. 12 of 1966. This (Amendment) Act, No. 12 of 1966, made separate provisions for premises the standard monthly rent of which did not exceed one hundred rupees, and for premises where the standard monthly rent exceeded one hundred rupees. In respect of premises of the former category, it was enacted that no action shall be instituted unless the rent has been in arrear for three months' or more after it has become due. This was a new section inserted immediately after Section 12 of the principal Act and to have effect as section 12A (1) (*a*). The concession granted to all tenants by amending section 13 (1B) of the principal Act, namely, where the Court on being satisfied that the rent has been in arrear on account of the tenant's illness or unemployment or other sufficient cause if the tenant pays the arrears of rent either in a lump sum or in instalments on a date or dates specified,

the tenant was to be permitted to continue in occupation and the tenancy is deemed not to have been terminated, was retained in the new sub-section 12A (2).

In the case of tenants whose monthly rental exceeded one hundred rupees, the Amending Act 12 of 1966 resolved that the arrears of rent entitling the landlord to institute action be as in the Act No. 10 of 1961, namely, where the rent has been in arrear for a month after it has become due and the notice terminating the tenancy be a three months' notice. The tenant of such premises also retained the advantage of not being liable to be sued in ejectment if before the date of termination of his tenancy as specified in the landlord's notice, he tendered to the landlord all arrears of rent ; also the benefit provided by section 13 (1B).

The situation as at present in cases of a tenancy where the standard monthly rental does not exceed one hundred rupees, is—

(i) The tenant cannot be sued in ejectment unless his rent has been in arrear for three months or more after it has become due.

(ii) The termination of his tenancy may be effected by a month's notice.

(iii) Where an action in ejectment has been instituted if he satisfies the Court that the arrears of rent has been due to his illness or unemployment or other sufficient cause and undertakes to pay the arrears either in a lump sum or in instalments on specified dates, he is permitted to continue as if his tenancy was not terminated.

The primary object of the Rent Restriction Act is —

(1) To control rents.

(2) To ensure to the tenant security of tenure.

In interpreting the rent law, it would be correct to approach a tenancy case on the basis that the Rent Act is to protect the tenant who fulfils his obligations. But that does not mean that the Rent Act is to be interpreted in such a way as to penalise the landlord. That is not the Law.

There is a statutory obligation on the tenant who is governed by the Rent Act to see that his rent is not in arrear for the period specified in the Act. In the event of the tenant violating his obligation, he loses the protection under the Act and is liable to eviction. He can only save himself from eviction if he can establish to the satisfaction of Court that arrears were occasioned by his illness, unemployment or other sufficient cause and on his undertaking to make payment of all arrears in a lump sum or in instalments (*vide* Section 12A (2) ; Section 2 Rent Restriction (Amendment) Act 12 of 1966).

In *M. M. Dias v. P. Vincent Gomes,*[1] Pulle J. (Nagalingam, A.C.J. and Swan J., agreeing) said :

[1] *(1954) 55 N. L. R. 337 at 342.*

" It seems to me that being in arrears is a condition or state in which the tenant finds himself by his own lapse and upon that condition or state supervening the tenant places himself outside the limits of the protection and it is for him to show how thereafter he regained that protection. . . The Rent Restriction Act has made heavy inroads into the common law rights of the landlord and I do not see anything oppressive in interpreting proviso (*a*) to mean that, having regard to the new and extensive rights conferred on a tenant, it is a condition precedent to the continued protection of the Act against eviction that the tenant shall pay the rent not necessarily as it falls due, but at least within a month thereafter."

The facts of this case under consideration are as follows. The defendant was the tenant of the plaintiff from 1964, paying a monthly rental of six rupees. In December 1964 the plaintiff filed plaint seeking to eject the defendant on the ground that he required these premises for his own use and occupation (*vide* P1, plaint in C.R. Kandy 18689). After trial, the Commissioner of Requests dismissed the plaintiff's action on 11.1.66. It has been conceded that the defendant did not make payments after December 1964 during the pendency of that case. On 11.1.66 when the plaintiff's action was dismissed, Section 14 of the Rent Restriction Act came into operation. Section 14 reads as follows :—

" Where an action for the ejectment of any person from any premises occupied by him as a tenant is dismissed by a Court by reason of the provisions of this Act, his occupation of those premises for any period prior or subsequent to the dismissal of such action shall, without prejudice to the provisions of this Act, be deemed to have been or to be under the original contract of tenancy."

The effect of the dismissal was to confer retrospectively on the tenant, his rights and status under the original contract of tenancy :

" but equally so there would be imposed on him also the obligations of the tenant. When a tenant defends an ejectment action, he should be aware that either he would be liable in damages for his occupation during the pendency of the action, if the plaintiff is ultimately successful, or he would by virtue of S. 14 retrospectively continue to be tenant, if the plaintiff fails. If therefore he wishes to secure to himself the full benefit which S. 14 is intended to confer, he must regard himself as a tenant during the pendency of the action and pay the rent as it falls due, or else deposit it in Court to the credit of the action. If he does not do so, he runs the risk, as in the present case, that the plaintiff can immediately serve him with fresh notice forthwith after the determination of the first action."

per Fernando, A.J. (now C.J.) in *L. W. A. Vincent v. K. G. Sumanasena.*[1] This is an authoritative answer to the argument of learned counsel for the defendant that during the pendency of the earlier action, the

[1] (1954) 55 *N. L. R.* 478 at 480.

defendant was under no obligation to pay. An argument on the same lines appears to have been advanced in the case of *Samaraweera v. Ranasinghe.*[1] Sinnetamby, J. (with whom were associated Basnayake, C.J. and de Silva, J.) in the course of his judgment, disposed of the argument in these words :—

> "This places a tenant in a position of undue advantage. On notice being given he need not pay rent but is entitled to occupy the premises till the action which is instituted is disposed of. The final decision may take several years particularly if there is an appeal, and if the landlord fails, he still has a reasonable time in which to pay the arrears. This was clearly not the intention of the legislature. The one cardinal principle which forms the basis of the entire Act is that the tenant's possession must be preserved so long, and only so long, as he pays *rent* regularly."

It was also contended, but not with much enthusiasm I thought, that once a contractual tenancy is terminated by notice, the tenant is a trespasser from whom not rental but only damages could be claimed. And that the term "statutory tenant" is a "mere curiosity" not recognised under our law. I think it is far too late in the day for counsel to make such an assertion. I need only refer to the case of *Fernando v. Samaraweera*[2] where Basnayake J. (as he was then) expressed himself in this way :—

> "It appears from the foregoing that a landlord who has terminated the contract of tenancy through a desire to get back his premises but is unable to satisfy the above requirements has to submit to the continued occupation of his premises by a person whom he does not want there but whom the statute will not permit him to eject therefrom by process of law. Such a person cannot be described as a trespasser for his occupation of the premises is not lawful. He is, since the termination of the tenancy, under no contractual relationship with the landlord.
>
> This creature of the statute whose counterpart is to be found in England, has been called the 'statutory tenant' by Lord Justice Scrutton who also describes him as that anomalous legal entity who would not ordinarily be described as a tenant. Lord Coleridge describes the resulting legal relationship as a 'statutory tenancy'. What are the rights and obligations of this 'anomalous legal entity' ? For the answer we have to turn to the Rent Restriction Act."

The Rent Restriction Act has introduced to us this "anomalous legal entity", the statutory tenant, and so he will remain with us until the Rent Act ceases to be operative.

After the dismissal of plaintiff's earlier action on 11.1.66 the defendant took no step to make any payment of rent. And on 27.5.66 the plaintiff through his proctor, sent a notice (P2) to the defendant demanding the arrears of rent due from 11.1.65 ; with notice to quit and vacate the

[1] *(1958) 59 N. L. R. 395 at 399.* [2] *(1951) 52 N. L. R. 278 at 281-282.*

premises on or before 30.6.66 "as you are in arrears of rent" adding "allow us however to recommend an amicable settlement". This indeed was a generous gesture which the defendant has failed to apprec ate.

It was suggested that the notice (P2) terminating the tenancy was invalid in tha, three months' notice had not been given. In the case of tenants whose monthly rental does not exceed one hundred rupees, three months' notice is not required. The period of three months' notice would be applicable only to tenants whose monthly rental exceeds one hundred rupees. The learned Commissioner of Requests has correctly answered this issue in favour of the plaintiff.

In response to the notice (P2), the defendant on 16.6.66, i.e., fourteen days prior to the terminal date of the tenancy, by letter P4 sent to the plaintiff rupees seventy-two "being rent for twelve months". It is significant that this payment by the defendant by way of rent, strikes at the root of counsel's contention that since the dismissal of the plaintiff's earlier action, he is not bound to make any payment due up to 11.1.66 which is the date of the judgment in that action.

Issue (2) raised by the defendant reads :—

> "Does the decree in C. R. Kandy Case No. 18689 operate as res judicata and estop the plaintiff from claiming any arrears of rent up to 11.1.66".

I am at a loss to understand why this issue was permitted. It does not arise for the obvious reason that the plaintiff made no claim to this payment; for the defendant at time of action brought, had paid all rents up to the end of April, 1966. On 29.7.66 the defendant remitted a further amount of twenty-four rupees being "four months' rent from 1st January, 1966 to 30th April, 1966" (vide P5). On 22.9.66 the plaintiff instituted the present action against the defendant on the ground of arrears of rent, giving credit to the payments totalling rupees ninety-six.

The position at the time of the institution of this action on 22.9.66 was that the defendant was still 4 months in arrears of rent, and since the last payment of Rs. 24 on 29.7.66, the defendant in fact has made no further payment. In the course of his evidence at the trial, the defendant stated "I have not paid any money after I paid the sum of Rs. 24. I have not paid as the plaintiff has not paid me my costs due to me in the earlier case. There is no other reason for my not paying rents after that".

Learned Counsel endeavoured to base an argument on this statement of the defendant. His argument was that the costs due to the defendant in the earlier case should be considered as a set-off against the rent due. This argument cannot be entertained; firstly for the reason that this was not the position taken up in the defendant's answer and no such issue was raised; secondly, the defendant has not had his costs taxed. "I do not know the amount of costs due to me" said the defendant.

There can be no set-off for legal costs where the bill has not been taxed (*Aril Kyosi v. Kyosi Aaron Moshette and others, South African Law Reports T. P. D. 1921, page 524*).

It is abundantly clear on the evidence in this case that at the time of the plaintiff's notice terminating the tenancy, namely, 27.5.66, the defendant was in arrears of rent for a period well over three months. He had violated the obligation imposed on him under Section 12A 1 (*a*) of the Rent Act and therefore forfeited the protection afforded him against eviction. Any payment thereafter cannot avail the defendant. For said Basnayake, J. in *Fernando v. Samaraweera*[1],

> " The consequences of the failure to observe the obligations imposed by the statute cannot be avoided by doing late what should have been done in time. "

This dictum was quoted with approval in *Dias v. Gomes*[2], by Pulle, J. who made his own contribution in these words :—

> " I cannot assent to the proposition that any disability to maintain an action for rent by reason of a valid tender before action has necessarily the effect of restoring the tenant to the status of irremovability—which is the protection afforded by the Act—if in fact he lost that protection the moment he was in arrears of rent beyond one month after it became due."

Speaking for myself, I am respectfully in complete agreement with the views expressed by Basnayake, C.J., and Pulle, J., and there is nothing I can usefully add, except to say that as the law is at present, where a tenant of rent controlled premises, the monthly rent of which does not exceed Rs. 100, has been in arrears of rent for three months or more after it has become due, upon notice of termination of his tenancy by the landlord, he cannot save himself from eviction by payment of arrears either

(i) before the expiry date of the termination of the tenancy, or

(ii) before the date of institution of the action.

In the context of this case, the question of " late " payment does not arise for the reason that on the terminal date of the notice terminating the contractual tenancy, there were arrears of six months' rental ; and on the date of institution of the action, there were arrears of four months' rent not remitted. The defendant can only rescue himself by seeking the indulgence of Court as provided for in Section 12A (2) of the Act, namely, satisfying the Court that he " has been in arrears on account of illness or unemployment or other sufficient cause". The circumstances of this case cannot permit the defendant to seek this indulgence. He had not sought it in the Trial Court and he cannot seek it in Appeal. In fact the defendant's conduct, as is evident from the proceedings, militates against my showing, even were it possible now, a compliant concern towards him.

[1] *(1951) 52 N. L. R. 278 at 283.* [2] *(1954) 55 N. L. R. 337 at 342.*

In reality there is nothing more I need say to dispose of this appeal. But in view of the fact that in the course of the argument learned Counsel for the defendant endeavoured to seek in aid the judgment of Samerawickrame, J. in *V. A. Mohamed v. M. L. A. Wahab* [1] it has become necessary for me to make reference to it; the more so for the reason that learned Queen's Counsel for the plaintiff made a strong submission that it has been wrongly decided. It was emphasized that the judgment "cut across the view" expressed in the Divisional Bench case of *Dias v. Gomes*.[2]

In the case of *Mohamed v. Wahab* (supra) the payment of the arrears of rent, unlike in this case, had been made before the action was filed. That judgment would therefore have no application to the facts of this case. However, in view of the criticism directed at that judgment and moreover, because of the firm opinion I have expressed that in a case to which Section 12A (1) (*a*) of the Rent Restriction Act is applicable, no subsequent tender of payment can protect the tenant, unless he can invoke the provisions of Section 12A (2) of the Act, I feel compelled, albeit with some reluctance, to consider it.

In the course of his judgment in *Mohamed v. Wahab* (supra) Samerawickrame, J. in referring to the Divisional Bench case said :—

> "The Court held that once a tenant has been in arrears of rent for one month after it has become due, he forfeits the protection given to him by the Act against being rejected and that he cannot regain the protection by the mere act of tendering the arrears before the institution of action. The provision which was considered by the Divisional Court sets out the circumstances where authorization of the board was not necessary. It also provides that in those circumstances, no application for authorization may be entertained by the board. It would thus appear that the circumstances were considered to be such as have arisen at the stage of an application to the board made prior to the filing of an action. There was, therefore, if I may say so with respect, good ground for the Divisional Court to hold that the provision contemplated rent being in arrear at a time prior to the institution of the action."

I would with respect say that in the case of arrears of rent, authorization of the Board is not necessary and no application for authorization can be entertained by the Board. The Board has nothing whatever to do in such a case. The Divisional Court in *Dias v. Gomes* (supra) in clear and unambiguous terms, laid it down that once a tenant has been in arrear of rent for one month after it has become due, he forfeits the protection given to him by the Act against being ejected. He cannot regain the protection by the mere act of tendering the arrear before the institution of the action.

Referring to Section 12A (1) (*a*). Samerawickrame. J. further stated in *Mohamed v. Wahab*[1] :—

" I think, this provision indicates the nature of an action brought under Section 12A (1) (*a*), namely, that it is brought on the ground that rent has been in arrear for three months or more. One would normally expect a ground of an action to subsist at the date of its institution. The words " has been " may be used to denote a fact continuing to subsist up to the occurrence of a certain event or the performance of some act—vide *Ex parte Kinning*. It appears to me, therefore, that in Section 12A (1) (*a*), the requirement that rent has been in arrear for three months or more after it has become due, is not satisfied unless rent is in arrear up to and at the date of the institution of the action."

The case of *V. M. Abdul Samad v. H. D. Sirinayake*,[2] has been mentioned in support of this proposition. There Alles, J. said :—

" For the plaintiff to succeed in appeal, he must satisfy the Court in this case, that the defendant was in arrears of rent for three months at the time of the institution of the action."

No reason has been given for this view and Alles. J. does not appear to have considered the line of decisions. namely, *Fernando v. Samaraweera*,[3] *Suyambulingam Chettiar v. Pechchi Muttu Chettiar*,[4] *Dias v. Gomes* (supra), *Samaraweera v. Ranasinghe*[5], which are in direct conflict with the view he formed. Apparently these decisions were not cited to him.

Samerawickrame, J. whilst interpreting the words "*has been*" in the phrase "*Has been in arrear for three months or more*" to denote a fact continuing to subsist up to the occurrence of a certain *event*, has implied that the event up to the occurrence of which the state of arrears must subsist, is the institution of the action. I should think that the *event* here must be taken to be the accrual of the landlord's right to institute action and *not* the date of the institution of the action. Had the legislature meant otherwise, it would have, I expect, expressed itself in appropriate terms.

One may also look at the matter from another angle. If the claim of the landlord is merely a claim for the recovery of arrears of rent, i.e., *a money claim*, it may be said that if prior to action filed the arrears are paid, the cause of action does not subsist. But where the landlord claims *recovery of property* based on the ground of arrears of rent the position is, indeed, different.

[1] *(1969) 72 N. L. R. 333 at 336.*
[2] *(1967) 70 N. L. R. 47 at 48.*
[3] *(1951) 52 N. L. R. 278.*
[4] *(1951) 53 N. L. R. 382.*
[5] *(1958) 59 N. L. R. 395.*

Much as I respect the opinions of Samerawickrame, J., I find myself unable to agree with him when he also says, ibid at page 335 [1] :—

" It appears to me unlikely that the legislature intended that tenants of premises whose standard rent is below Rs. 100, should be liable to be ejected by reason of arrears of rent, even though there had been a tender of rent before the actual institution of the action. It is not probable that the legislature intended that tenants of such premises should be placed in a worse position in this regard than the tenants of premises whose standard rent is in excess of Rs. 100. Nor is it probable that the legislature intended to place tenants of such premises in a position of so much greater disadvantage compared to that which they enjoyed under the law before it was amended by Act 12 of 1966. It is also relevant that the provision in sub-section (2) which empowers the Court to permit a tenant to pay into Court the arrears of rent and in such a case, not to issue a writ of ejectment is some indication that the legislature contemplated arrears due at the date of institution of action."

The language of the Rent Restriction (Amendment) Act 12 of 1966 is clear and there is no room for thinking that the legislature " slipped up ", if I may be permitted to use such an expression, in inadvertently omitting what should have been there included.

" It is not the function of any Judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature " observed Lord Morton of Henryton in the case of *Magor and St. Mellons Rural District Council v. Newport Corporation.* [2] "

I would, accordingly, affirm the judgment of the Commissioner of Requests and dismiss the appeal. The plaintiff is entitled to his costs in appeal as well as costs in the lower Court.

Appeal dismissed.

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[1] *(1969) 72 N. L. R. 333 at 335.*

[2] *(1951) 2 A. E. R. 839 at 847.*