1975 *Present* **:Tennekoon, C.J, Samerawickrame, J., Udalagama, J., Tittawella, J., and Sharvananda, J**

M. A. MOHIDEEN, Plaintiff-Appellant-Petitioner, *and* M. S. MOHIDEEN, Defendant-Respondent-Respondent

S. C. 23/1972, Court of Appeal 19/1973—C. R. Colombo 1980/R. E.

Rent Restriction Act as amended by Act No. 12 of 1966—Section 12A(1)(a)—Termination of Contract of Tenancy—Validity of notice to quit—Arrear of rent at the time of notice to quit not required.

Where a landlord institutes action for ejectment of his tenant from premises to which the Rent Restriction Act as amended by Act No. 12 of 1966 applies, Section 12A(1)(a) does not require the landlord to satisfy the Court that at the time notice to quit was given to the tenant, the latter was three months or more in arrear of rent after it had become due. Section 12A(1)(a) neither alters the common law rule that a monthly tenancy may be terminated by a month's notice, nor does it require that in order to terminate the tenancy, the tenant should be three months in arrear of rent.

"It seems to me that the combined effect of the general law relating to contracts of tenancy and the provisions of Section 12A(1) (a) is that a right to sue a tenant in ejectment will accrue to the landlord when two conditions are satisfied, namely, that the contract is terminated by due notice, that is, by a month's notice, and secondly, that the tenant had fallen into arrear of rent in respect of a period of 3 months or more" per Tennekoon, C. J.

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

A. M. M. Marleen for the plaintiff-appellant.

A. Sivagurunathan for the defendant-respondent.

Cur. adv. vult.

March 10, 1975. TENNEKOON, C.J.

The landlord of a certain premises filed action in the Court of Requests of Colombo against his tenant, the defendant-respondent for ejectment and for recovery of arrears of rent and damages. It was an admitted fact that the standard rent did not exceed Rs. 100 per mensem. The actual rent under the contract of tenancy was Rs. 85 per mensem payable before the end of each month. The action was instituted on the 19th of October, 1970. The landlord alleged that the tenancy had been duly terminated by notice to quit dated 27th of July, 1970. He alleged that the defendant had been in arrear of rent for three months and more after it became due within the meaning of section 12A (1) (*a*) of the Rent Restriction Act (as amended by Act No. 12 of 1966). The Commissioner of Requests held that rents had been paid up to the end of April, 1970, and dismissed the plaintiff's action, holding that the notice to quit was invalid, because at the date it was given, that is, 29th July, 1970, the tenant was not three months in arrear of rent. On appeal to the Supreme Court Wimalaratne, J. dismissed the appeal holding that at the date of the notice, the tenant was only two months in arrear of rent, and that therefore, the landlord had not satisfied the requirements of section 12A (1) (*a*) of the Rent Restriction Act. The appellant obtained leave to appeal to the Court of Appeal, and this appeal being one pending before the Court of Appeal on the 31st of December, 1973, was transferred to this Court under the provisions of section 53 (1) of the Administration of Justice Law 44 of 1973.

The question that arises for our consideration in this case is whether the landlord who instituted action for the ejectment of his tenant living in a premises to which the Rent Restriction Act applied, and the standard rent of which for a month did not exceed Rs. 100 must satisfy the court that *at the time notice to quit was given to the tenant,* the latter was three months or more in arrear of rent after it had become due ; it is contended that this is the implication contained in section 12A (1) (*a*) of the Act. For the appellant it is contended that a valid notice may be given even when there are no arrears of rent, and that action for ejectment can be instituted at any time thereafter, if the tenant falls into arrears of rent for three months or more. Section 12A (1) (*a*) reads as follows :—

> "12A (1) Notwithstanding anything in any other law, no action or proceedings for ejectment of the tenant of any premises to which this Act applies and the standard rent of

which for a month does not exceed one hundred rupees shall be instituted or entertained by any court unless where—

(*a*) the rent of such premises has been in arrear for three months or more after it has become due."

It seems to me that the combined effect of the general law relating to contracts of tenancy and the provisions of section 12A (1) (*a*) is that the right to sue a tenant in ejectment will accrue to the landlord when two conditions are satisfied, namely, that the contract is termniated by due notice, that is, by a month's notice, and secondly, that the tenant had fallen into arrears of rent in respect of a period of three months or more. There is nothing in section 12A (1) (*a*) which alters the common law rule that a monthly tenancy may be terminated by a month's notice. The section does not require that in order *to terminate the tenancy* the tenant should be three months in arrear of rent. This Section deals with the right of instituting and maintaining an action for ejectment, and it seems to me, that section 12A (1) (*a*) only makes it incumbent on a landlord to establish one fact more than would ordinarily be necessary to succeed against an overholding tenant, viz., that the tenant has been in arrear of rent for three months or more after it became due. All that a landlord has to satisfy to court is that he has brought the contract of tenancy to an end, and that the tenant has fallen into arrears of rent for three months or more. A tenant whose contract of tenancy has been terminated by a month's notice, and still enjoys the protection of the Act in the sense that the landlord cannot sue in ejectment would lose that protection by failing to pay rent for three months or more : by so failing to pay rent he places himself outside the limits of the protection given to him by the Act provided of course that the notice to quit has not in the meantime been waived or a new contract of tenancy constituted so as to make a fresh termination of the tenancy necessary. In the present case notice to quit was given on the 29th of July, 1970, and the notice was to expire on the 31st of August, 1970 ; on the date notice was given to the tenant, he was only two months in arrear of rent. By the beginning of October, 1970, he was clearly in arrear of rent for more than three months, and the right to sue the tenant accrued to the landlord, when both conditions were satisfied, namely, that the contract had been terminated, and the tenant was in arrear of rent for three months. The action was

instituted on 19.10.70, and there is nothing in the Rent Restriction Act which prevents the court in these circumstances from giving a decree in ejectment to the landlord.

Two previous decisions of the Supreme Court have been referred to by Wimalaratne, J. in his judgment. First case is *Samaraweera vs. Ranasinghe,* (59 N.L.R. 395) and the second case is *Abdul Hassan vs. Calideen* (74 N.L.R. 21) He appears to take both these cases as supporting the proposition that a landlord of premises to which the Rent Restriction Act applies and the standard rent of which for a month does not exceed Rs. 100 will be entitled to institute and maintain an action for ejectment of the tenant only if notice of termination of tenancy is given at a time when the tenant was in arrear of rent for three months or more. In *Samaraweera's case* the Court was dealing with the Rent Restriction Act prior to its amendment in 1961 and in 1966. It is true that in this case the tenant was more than one month in arrear of rent at the time notice to quit was given, but the court was not even called upon to examine the question whether notice of termination of tenancy given at a time when there were no arrears of rent was invalid. In fact the tenor of the judgment is to the contrary. Basnayake, C. J. stated as follows in the course of his judgment :—

> " In fact the section (13 (1) of the Rent Restriction Act No. 29 of 1948) affords protection to the tenant against the landlord's exercise of his common law remedies. Once a tenant loses this protection the landlord is free to institute legal proceedings in ejectment. One of the ways in which this protection can be lost is by allowing the rent to be in arrear for one month after it has become due. While protecting the tenant against ejectment except in certain circumstances the statute has by implication imposed on him the obligation of paying rent even after the contract of tenancy is determined if he is to continue to receive the protection. The obligation is that he must pay the rent on the due date. Now what is the due date once the contract has been terminated ? At common law rent becomes due on the date agreed on as the date on which it should be paid. As the statute does not prescribe a date as the due date it must be presumed that the Legislature had the contractual date in contemplation. "

In this case the court also rejected the submission that what is payable by a tenant who is protected under the Act after his common law contract of tenancy has been terminated was " damages" and not " rent " and went on to hold that there can be arrears of

rent even after the common law contract of tenancy has been terminated. In *Abdul Hassan's case* the tenant was three months in arrears when notice was given ; he thereafter paid up those arrears, but when action was instituted he was again 3 months in arrears on that day. It was held that the notice to quit was a valid notice and that the plaintiff had satisfied the requirements of law as contained in section 12A (1) (*a*) of the Rent Restriction Act as amended by No. 12 of 1966, namely, that rent was in arrears for three months or more after it had become due and that the contract had been duly terminated. This case, again, does not hold that for the purpose of section 12A (1) (*a*) a notice to quit is invalid unless a tenant is in arrears for three months or more on the date of giving the notice.

Indeed the trend of judicial authority has been in the opposite direction. *Samaraweera's case* is one such instance. Again in the case of *Cassim Hadjiar vs. Umanlevve* (67 N.L.R. 22), it was held that where, at the time when notice to quit rent-controlled premises is given to the tenant, the tenant is not in arrear of rent, the landlord may nevertheless avail himself of the notice to quit if, at the time of institution of action subsequently, the tenant is in arrear of rent for one month after it had become due. This case was decided prior to the amendments in the Rent Restriction Act, L. B. de Silva, J delivering the judgement stated—

> "The learned District Judge held that at the time the notice to quit was given the defendants were not in arrears of rent as it had been issued a few days after the plaintiff became the owner of the premises, and therefore held that the plaintiff was not entitled to give notice to quit as the defendants were not in arrears of rent at that stage. There is no provision under the common law that a landlord cannot terminate a monthly tenancy by notice if the tenants were not in arrears of rent, nor is there any provision in the Rent Restriction Act which prevents a landlord from terminating a tenancy by notice on that ground. The only provision in the Rent Restriction Act applicable to the case was that a landlord is not entitled to sue the defendants in ejectment unless the defendants were in arrears of rent for a period of one month after the rent became due before the action was filed. In this case the defendants have paid no rent at all to the plaintiff and they were in arrears of rent for a period of over one month after the rent became due when the plaintiff filed this action. The defendants were thus not entitled to the protection of the Rent Restriction Act, even if they are considered to be statutory tenants of the plaintiff."

The *case of Abdul Hassan* referred to earlier can also be regarded as one following this same trend of decision.

I would accordingly hold that the Supreme Court was wrong in holding that the notice of termination of tenancy given by the appellant on the 29th of July, 1970, was invalid, because the tenant was not, on that day, in arrear of rent for three months after rent became due. It is clear that all that the law requires is firstly, that there had been a valid termination of the common law contract of tenancy, and secondly, that at the time of the institution of the action the tenant had been in arrears of rent for three months or more. These two facts have been established in this case and the appellant was entitled to succeed in his action for ejectment.

Justice Wimalaratne in the course of his judgment which is under appeal makes a passing reference to the position under the Rent Act, No. 7 of 1972 and says : " In terms of section 22 (3) of this Act (i.e. the Rent Act of 1972) notice of termination of tenancy, in order to be valid can be given only after the tenant has been in arrear for the requisite period. " While this appears to be undoubtedly so, it is sufficient to state that this case does not fall to be decided under the Rent Act of 1972, but under section 12A (1) of the repealed Rent Restriction Act ; and no argument has been advanced before us to the contrary.

I would accordingly allow the appeal ; the judgment of the learned Commissioner and the judgment of the Supreme Court affirming it are set aside, and judgment is entered for the plaintiff for the ejectment of the defendant, for arrears of rent and damages from 1st May, 1970, at the rate of Rs. 85 per mensem till the plaintiff is restored to possession of the premises in suit ; the defendant will be entitled to credit for any payment made on account of rent and/or damages as from May, 1970.

In view of the fact that the plaintiff has failed in his claim for arrears of rent as from September, 1968, I would order that he be not entitled to the costs of the trial in the Court of Requests, but he will be entitled to the costs of appeal in the Supreme Court, in appeal No. 23 of 1972 and for costs of the present appeal which started as an appeal to the Court of Appeal and was later transferred to this court.

SAMERAWICKRAME, J. I agree.

UDALAGAMA, J. I agree.

TITTAWELLA, J. I agree.

SHARVANANDA, J.

The relevant facts relating to the question of law involved in this appeal fall within a small compass and are not in dispute, but the point involved in the appeal is one of some importance in the law relating to the right of a landlord to eject his tenant under the provisions of the Rent Restriction Act of 1948 as amended by Act No. 12 of 1966.

The plaintiff instituted this action on 19.10.1970 for the ejectment of the defendant, on the ground of arrears of rent from 1.10.1968. It is agreed that the premises are governed by the Rent Restriction Act and that the authorised rent was Rs. 85 per month. The learned Commissioner of Requests disbelieved the plaintiff's evidence that the defendant had paid rent only up to the end of September 1966. The Commissioner has held that rent had been paid by the defendant up to the end of April 1970 and that the defendant was in arrears of rent for more than three months on the date of the institution of action viz. 19.10.1970 within the meaning of section 12A (1) (*a*) of the Rent Restriction Act as amended by Act No. 12 of 1966. The Commissioner has however dismissed the plaintiff's action for ejectment, since he was of the view that as the defendant was not three months in arrears of rent on the date 29.7.70 when the notice to quit P 1 was sent, the plaintiff's action must fail. The view was upheld by the Supreme Court.

In this Court, counsel for the plaintiff did not seriously canvass the findings of the Commissioner but was content to argue on the basis of the Commissioner's findings that the defendant was not in arrears of rent for three months after it had become due on the date of the plaintiff's notice of termination of tenancy P1, but that on the date of the institution of this action the defendant was in arrears of rent for more than three months. He submitted that neither the Common Law nor the provisions of the Rent Restriction Act require that the tenant should be in arrears of rent at the time the tenancy is sought to be terminated by a valid notice to quit. He argued that the relevant time when the tenant should be in arrears for the specified period is the time of institution of action and not the date of the notice to quit. He relied in support of his submission on the judgment of L. B. de Sliva, J., in *Cassim Hadjiar 'v. Umamlevve* 67 N.L.R. 22. In that case too the lower court held that the plaintiff landlord was not entitled to give notice to quit as the defendant-tenants were not in arrears of rent at that stage. On appeal, in setting aside the judgment of the lower court, this court relevantly observed : " there is no provision under the common law that a landlord cannot terminate a monthly tenancy by notice if the tenants were not in arrears of rent, nor is there any provision in the Rent Restriction Act which

prevents a landlord from terminating the tenancy by notice on that ground The only provision in the Rent Restriction Act applicable to this case was that a landlord is not entitled to sue the defendants in ejectment unless the defendants were in arrears of rent for a period of one month after the rent became due before the action was filed. " In that judgment this Court was considering the application of section 13 (1) (a) of the Rent Restriction Act of 1948 (Chap. 274) but the principle enunciated therein applies equally well when the amending Rest Restriction Act No. 12 of 1966 is considered. The position is clarified when the true nature of a monthly tenancy in common law and the impact of the Rent Restriction Act on it are appreciated.

Common Law :

As was held in *Fernando v. de Silva* 69 N.L.R. 164 at 165 " a monthly tenancy is a periodic tenancy. It is a tenancy which by agreement between the contracting parties runs from month to month and is terminated by a month's notice." Wille in his classic—Landlord and Tenant (4th ed.) at page 42 sums up the position thus—" The essence of a periodic tenancy is, under the common law, that it continues for successive periods until it is terminated by notice given by either party." The notice must be given ' a reasonable time ' before the date on which it is desired that the tenancy or lease should terminate. A reasonable time in the case of a monthly tenancy is a month, and the notice of termination must be given so as to expire at the end of a monthly period, for a monthly lease runs from month to month, and not for broken periods. The notice need not refer to any reason for the termination of the tenancy.

On the termination of the tenancy, it is the duty of the tenant to vacate the property let ; if he remains in occupation of the property, he is said to ' hold over ' and is liable in damages to the landlord, in addition to ejectment under order of Court. Such a tenant can however lawfully be ejected only on an order of Court. The landlord has no right to take the law into his own hands and eject such a tenant either forcibly or illicitly. As it is the duty of the tenant to restore the property let on the termination of the tenancy, the tenant cannot resist an order of ejectment being granted against him by Court on proof of the termination of the tenancy by a proper notice to quit. The landlord has thus an unfettered right under the common law to eject his tenant on the termination of the tenancy. The ejectment of such a tenant is based solely on the fact of the expiry of the tenancy. But if the contractual tenancy still exists, the landlord cannot obtain an order for ejectment of the tenant.

Under the Rent Restriction Act :

Since the enactment of legislation relating to rent restriction,

the tenant whose tenancy has been terminated has ceased to be in such helpless position of being completely at the mercy of the landlord. Without curtailing the landlord's right to terminate the contract of tenancy by proper notice, the Rent Restriction legislation prohibited the landlord from instituting an action for ejectment of a tenant except on the grounds stipulated therein. The Rent Restriction Act operates as a fetter on the action of the Court in granting a remedy. The effect of the Act is not to destroy the right to possession but to bar the enforcement of that right by erecting a " barrier in the way of the plaintiff's right of action for possession "—per Romer L. J. in *Moses v. Lovegrave* (1952) 1. A.E.R. 1279 at 1285. When a tenancy expires because of effluxion of time or notice, the contractual relationship between the parties comes to an end ; but, by virtue of the provisions of the Rent Restriction Act, the tenant may remain in possession of the premises let to him, provided he does not render himself guilty of any of the acts or omissions set out in section 12A or 13 of the Rent Restriction Act as amended by Act No. 12 of 1966. A landlord who has terminated the contract of tenancy but is unable to establish any of the grounds set out in the aforesaid sections 12A and 13 will be denied the remedy of an order for possession from the Court and in the circumstances the tenant, from being a contractual tenant, becomes what is conveniently described as a " statutory tenant ". Statutory tenancy supervenes on the determination of the contractual tenancy and such a tenancy is determined on the tenant giving up possession or when the Court makes an order for possession on any of the grounds set out in the Rent Restriction Act. The Rent Restriction Act gives the statutory tenant the right to resist ejectment. He acquires a statutory right of irremovability except on the grounds postulated by the Rent Restriction Act. The Act thus gives statutory tenants security of tenure by preventing landlords from getting an order for ejectment from the Court except on the grounds provided for by the Act. Thus notwithstanding the termination of the contractual tenancy, the tenant is afforded a statutory right of occupation so long as he does not come within the pale of sections 9, 12A and 13 of the Rent Restriction Act as amended by Act No. 12 of 1966 and continues to perform his statutory obligation of regular payment of the monthly rent. The relevant provisions of the Rent Restriction Act protects the tenant against the landlord's exercise of his common law remedy of ejectment. This protection is enjoyed only so long as the statutory tenant performs his obligations. This protection is lost if he defaults in those obligations and thereby enables the landlord who has terminated the contractual tenancy to institute proceedings in ejectment. Under the Rent Restriction Act a tenant who is in default of rent for the stipulated period deprives himself of the statutory protection which he may ordinarily claim after the contract of

tenancy has been duly terminated. " But this does not relieve the landlord of establishing the termination of the contract of tenancy either by due notice or by effluxion of time before claiming a decree for ejectment "—per Gratiaen, J., in *Chettinad Corporation v. Zaneek* 55 N.L.R. at 153.

Thus it is to be noticed that the condition precedent for the invocation of the jurisdiction of Court to order ejectment of the tenant under the Common Law and the Rent Restriction Act is the determination of the contractual tenancy by due notice to quit. This notice to quit, in the nature of the relationship, depends on the arbitrary whims of the landlord. The exercise of this whim remains, unfettered. But that is not the end of the story. To claim ejectment of the tenant the landlord has however to establish certain other facts besides the determination of the tenancy. The effectual determination of the tenancy need not be ascribed to those facts, but is a necessary step to achieve the object of ejecting the tenant. To claim ejectment under the Rent Restriction Acts, those facts have to be established, in addition to the fact of termination of the contractual tenancy. Sections 12A and 13 of the Rent Restriction Act postulate the circumstances which in law entitle the landlord for the ejectment of the statutory tenant. But these additional facts or circumstances are independent of and not relevant to the fact of termination of the tenancy. The law does not require that the ground for statutory ejectment as set out in the Rent Restriction Act should be urged as the reason for the termination of the tenancy. The termination of the tenancy is attributable to the fact that the landlord does not desire the tenancy to continue—he is exercising a right vested in him by the contract of tenancy. He need not justify his termination of the tenancy on any ground apart from that of his contractual right. It is only when he applies to Court for the relief of ejectment that he is required by the Rent Restriction Act to establish any of the statutory circumstances to entitle him to his remedy of ejectment of the tenant. The Rent Restriction Act has denied the process of law in aid of the landlord who has, without more, terminated the tenancy in the exercise of his contractual right. But that does not mean that the reason for the termination of the tenancy should be referable to any of the grounds which the Rent Restriction Act postulates for the entitlement to an order for ejectment. To sustain the prayer for ejectment it is sufficient if besides the termination of the tenancy any such ground exist at the time of the institution of action.

The grounds for possession set out in the Rent Restriction Act are however subject to the common law doctrine relating to waiver. In the instant case that doctrine is not invoked by the

defendant and hence it is not necessary to explore the scope of it. But it is to be borne in mind that once a statutory tenancy has been created the subsequent acceptance of rent by the landlord does not by itself affect the existence of the statutory tenancy. The payment and acceptance of the rent as such will not give rise to inference of a new contractual tenancy ; for, the landlord has no option but to permit the tenant to remain in occupation.

In the course of the argument the correctness of the judgment of Tambiah, J., reported in *Bardeen v. de Silva* 66 N.L.R. 547 and of Samerawickrame, J. reported in *Ramzan v. Sardar* 73, N.L.R. 380 with regard to section 13 (1A) of the Rent Rescrition Act was canvassed. Though lot remains to be said for the reconsideration of the view expressed in those cases it is not necessary for the purpose of this appeal to go into that question. In an appropriate case the correctness of the view expressed therein will have to be gone into.

Counsel for the defendant-respondent made a feeble attempt to resist the order for ejectment by invoking section 22 (3) of the Rent Act No. 7 of 1972 which came into operation on 1.3.1972. He argued that the provisions of section 22 of the Rent Act 1972 are retrospective in their scope and nature and that on an application of section 22 the plaintiff's action failed in limine. It is not necessary to go into the question of the applicability of section 22 to the facts of the present case, for as has been rightly held in the case of *Gunasekera v. Somapala* 77 N.L.R. 141 subsections (1) (2), and (3) of section 22 are prospective and not retrospective in operation.

The defendant has not applied for the indulgence of Court as provided by section 12 (a) (2) of Act No. 12 of 1966, namely satisfying the Court that he " has been in arrears on account of illness or unemployment or other sufficient cause ". He has not sought it.

In the instant case, on the findings of the learned Commissioner that the defendant was in arrears of rent for more than three months at the time of the institution of this action, the plaintiff is entitled to an order for ejectment of the defendant. The learned Commissioner was in error in holding that as the defendant was not in arrears of rent for three months at the time notice to quit was given by the plaintiff, the plaintiff was not entitled to an order for ejectment of the defendant. It was sufficient in law that at the time of institution of action the defendant was in arrears of rent for three monhs or more after it had become due.

I would accordingly allow the appeal and agree with the order proposed by the Honourable the Chief Justice in this appeal.

Appeal allowed