1948 *Present :* **Nagalingam J.**

GEORGE, Appellant, *and* RICHARD, Respondent

S. C. 154—C. R. Panadure, 11,903

Rent Restriction Ordinance—Rent in arrears—Tendered before action filed—Landlord cannot sue—Ordinance No. 60 of 1942, Section 8 (a).

An action for ejectment is not maintainable under proviso (*a*) to section 8 of the Rent Restriction Ordinance unless the rent has been in arrear at the date of the institution of the action for one month after it has become due. Where, therefore, such arrears are tendered before the commencement of proceedings the landlord is not entitled to maintain an action.

APPEAL from a judgment of the Commissioner of Requests, Panadure.

H. W. Jayewardene, for defendant, appellant.

G. P. J. Kurukulasuriya, for plaintiff, respondent.

Cur. adv. vult.

December 9, 1948. NAGALINGAM J.—

This is a landlord's action against the tenant primarily for ejectment of the latter from the premises let. The plaintiff let the premises described in the plaint to the defendant on the terms of a monthly tenancy at a rental of Rs. 10. The defendant according to the plaintiff made default in the payment of the rents for the months of January to June, 1947, although neither the pleadings nor the proceedings in the lower Court disclose the agreement between the parties as to when the rent was payable. On June 19, 1947, the plaintiff instituted this action alleging, *inter alia*, that the rent for the month of June as well had fallen into arrears. The defendant did not dispute this allegation, but pleaded that he had tendered the rent for the month of June on June 10, 1947. Under the Roman-Dutch law the rent of any one month would be payable only at the expiry of the month in the case of a monthly tenancy; but in view of the plea of the defendant himself I assume that there was an agreement between the parties that the rent should be paid at the beginning of each month.

When the defendant was in arrears with his rent for the months of January to April, 1947, the plaintiff caused his Proctor to send a letter of demand dated April 24, 1947, claiming the arrears and also giving notice to the defendant terminating his tenancy at the end of May, 1947. On receipt of this demand the defendant remitted to the plaintiff's proctor by money order the sum claimed, but the plaintiff's proctor on instructions from his client declined to accept it. Notwithstanding this refusal, the defendant on June 10, 1947, remitted by another money order the rents for the months of May and June as well but this money order too was returned to him by the plaintiff's proctor.

Thereafter the plaintiff commenced this action for arrears of rent, ejectment and damages for overholding. The defendant resists the claim for ejectment by calling to his aid the provisions of section 8 of the Rent Restriction Ordinance, No. 60 of 1942. The Rent Restriction Ordinance does not purport to interfere with the ordinary contractual rights as between landlord and tenant. The Ordinance does not prevent a landlord from giving notice terminating the tenancy and a notice due and proper in form in fact terminates the tenancy of the tenant. It cannot be said that after such termination the ordinary relationship of landlord and tenant continues to subsist between them. The occupation of a tenant thereafter is without the consent of the landlord. The effect of the Rent Restriction Ordinance, however, is to bar a landlord from

instituting an action for ejectment on the footing of an overholding by the tenant unless the landlord can make out a case falling within the provisions of section 8 of the Ordinance. If the landlord is unable to make out such a case the tenant acquires a right to continue in occupation paying the statutory rent and in law his position may best be described as a statutory tenant, if one may adopt the English nomenclature adopted in similar circumstances.

The main provision of section 8 of the Ordinance prevents the institution of an action for the ejectment of the tenant unless the assessment board has authorized such institution. In the present case no such authorization is relied upon by the landlord, but proviso (*a*) to the section is said to provide the foundation for the action. The question for decision, therefore, is whether the present case is one where "rent has been in arrear for one month after it has become due." The rents for the months of January to May may be said to have remained unpaid for over a month after they had fallen due on the basis of course, that the rent of any one month was payable at the commencement of that month. But the point is whether the rent "has been in arrear" within the meaning of the term as used in the proviso. The words "has been" denote a continuous fact that is to say a fact continuing to subsist up to the occurrence of a certain event or the performance of some act. Those words have received judicial interpretation in this sense. *Ex parte Kinning*, 16, L.J., Q.B., 257 and *Re Storie*, 2 D.G.F. and J. 529. Now, what is the event or act in relation to which the rent should continue to be in arrears? In the context it seems to me that the event or act contemplated is the institution of the action and the proviso should be construed as meaning that rent should have been in arrear *at the date of institution of action* for one month after it has become due. This construction would become manifest if the proviso is re-drafted making use of the phraseology of the main provision; it would then run so far as is material to the present discussion as follows:—"No action for the ejectment of the tenant shall be instituted unless rent has been in arrear for one month after it has become due;" that is to say the arrears must exist at the date of institution of action.

The contention on behalf of the appellant is that if at any time the tenant was in arrear with his rent for over one month, then the right vests in him under this proviso to institute action and if this argument is sound the subsequent payment of rent by the tenant cannot take away from the landlord his right to institute an action for ejectment. One would have expected in those circumstances the plaintiff to have accepted payment and instituted the action. But the plaintiff on the other hand deliberately declined to receive the payments tendered; I have little doubt that he did so because whatever position he may have taken later at the trial, he or rather his legal advisers were of opinion at the date of institution of action that it would be essential to aver in the plaint at least that the defendant was in arrear with his rent. As a matter of fact, the plaint alleges that the defendant has failed and neglected to pay to the plaintiff (the arrears of rent) though thereto often demanded,—an allegation, to put it mildly, not quite true to facts. Why then did the

plaintiff make a mis-statement of fact in the plaint ? No explanation has been given, but the answer is obvious and reveals clearly the view held by the plaintiff's lawyers themselves.

The construction I have placed on this proviso is supported by the view taken in the English Courts in regard to a similar provision in the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (23 and 24) George the Fifth, Chapter 32, Schedule 1 Clause (*a*) which empowers the Court to direct delivery of possession to the landlord, " if any rent lawfully due from the tenant has not been paid." Though the language of our enactment is not identical with that of the English provision a striking correspondence can be noticed if the term " has been in arrear " is paraphrased as " has not been paid."

In the case of *Bird v. Hildage* [1], the facts were that the landlord commenced his action in ejectment against the tenant after refusing to accept the arrears of rent tendered to him before commencement of suit ; the Court of Appeal held that as the tender of rent had been made before the commencement of proceedings such tender prevented rent being lawfully due and that the landlord was not therefore entitled to maintain the action. Although the words " lawfully due " do not find a place in our enactment, yet the notion underlying these words is implicit under our law as well. With regard to the meaning to be attached to these words Cohen J. said,

> " In our view, rent is not lawfully due unless it can be recovered by process at law."

Now a landlord under our law too cannot institute an action for recovery of rent unless it remains unpaid at date of institution of action. If rent is in arrear, a cause of action accrues to the landlord to sue for it but if before he files or can file action, rent is tendered or paid to him, the cause of action is extinguished, and with it the right to sue. Hence at the date of institution of action the plaintiff must be in a position to show that not only had a cause of action accrued to him prior to institution of action but that the cause of action continued to subsist even at the date of institution. In the present case therefore, it is essential for the plaintiff to show that not only had the defendant allowed the rents to remain unpaid for over a month as they fell due, but that in fact the rents remained so unpaid even at date of institution of action. The plaintiff is clearly unable to establish the second requirement. The rents that were in arrears were tendered to him before institution of action and he wrongfully refused to accept them. The plaintiff must in those circumstances be deemed to have been paid the rents on the dates they were tendered and therefore it must follow that the tenant was not in arrear with his rent. The plaintiff cannot therefore avail himself of proviso (*a*). In this view of the matter the plaintiff's action fails. The appeal is therefore allowed and the plaintiff's action dismissed with costs in both Courts.

Appeal allowed.

[1] *(1947) 2 All E.R. 7.*