KURUKULASURIYA
v.
RANMENIKA

SUPREME COURT.
BANDARANAYAKE, J., MARK FERNANDO, J. AND AMERASINGHE, J.,
S. C. APPEAL No. 12/87,
MAY 23 AND 25, 1990.

Landlord and tenant - Payment of rent for specific months - Appropriation of such rent against arrears of previous months - Deposit of arrears before summons returnable date.

(1) Where the defendant tenant has failed to aver that the agreed rent was in excess of the authorised rent to support his plea that he was not in arrears, there is no burden on the plaintiff- landlord to plead the standard or the authorised rent. This objection was not taken at the trial or in the Court of Appeal or in the written submissions and therefore it was too late to agitate the question in the Supreme Court.

(2) Section 31 of the Rent Act, No. 7 of 1972 as amended provides for a continuance of the tenancy and keeps in force retrospectively the original contract of tenancy despite termination by notice. Once the contractual tenancy is ended by notice, the landlord loses no rights by accepting rent from the statutory tenant. The mere acceptance of rent is insufficient to create a new tenancy. Acceptance of rent for a period subsequent to the notice revives the tenancy only if from the facts established an intention to waive can reasonably be inferred. Every such payment does not *ipso facto* amount to a revival. Parties must be shown to have been *ad idem* as to the terms. A waiver of notice cannot be presumed.

(3) It was established that deposits of rent had been made with the local authority by the defendant, mentioning the specific months for which rent was being paid. These were drawn by the plaintiff without reservation. According to the principles governing appropriation of payments in the Roman Dutch Law the first general rule is that when there are several debts owing to the creditor and the payment made is insufficient to discharge the entire sum due the debtor has the right to declare at the time he makes payment which of his debts he wishes to reduce.

Since the debtor had elected to appropriate payment he made to specified months, the Court must consider whether the debtor has been unreasonable in so appropriating the payments. The debtor continued to occupy the premises and failure to pay rent would expose him to an action for ejectment. The facts also disclose a course of dealing between the parties, a pattern of making payments for specified months from the very inception of the tenancy. The creditor was therefore entitled reasonably to believe that the debtor intended appropriation to be made for those designated months and no other. Considering all the circumstances it cannot fairly be said that the debtor was unreasonable in what he did. The creditor was obliged to consent to the appropriation of payments made by the debtor. The Court should give effect to that decision.

Appropriation of payments by the operation of the Roman Dutch Law principle that unspecified debts should be carried to that account which it is most beneficial to the debtor to reduce and that when accounts are of the same nature so as to make no difference to the debtor the payment must be carried to the oldest account is applicable only in the absence of a decision by the parties. This is not the case in the instant litigation.

Appropriation of payments is done at the time of making the payment. The statute does not prohibit the parties from exercising such an option either expressly or by way of inference. There is no conflict in this area between the common law and the statute. If the payments are appropriated by the parties in a certain way then the principles of the common law apply to those payments and they will be applied in the designated manner. The two streams of law will operate in all areas where there is no conflict.

Thus if payments so appropriated are sufficient to meet all the debts specified in the notice of termination of tenancy, then the plaintiff will fail in his action. If not there will remain unpaid arrears of rent. Here there was a period of five months anterior to the months for

which payments had been assigned in respect of arrears of rent for which rent was not paid. Hence the tenant is in arrears and the plaintiff is entitled to judgment.

Cases referred to:

(1) *Ansar v. Hussain S. C. Appeal No. 71/80 – S. C. Minutes of 18.02.86.*
(2) *Wellington v. Amerasinghe [1987] 1 Sri LR 45.*
(3) *Ephraims v. Jansz 3 NLR 142.*
(4) *Fernando v. Fernando 55 NLR 465.*
(5) *Eastern Hardware Stores v. Fernando 58 NLR 568, 569.*
(6) *Fonseka v. Naiyar Ali 22 NLR 447.*
(7) *Vincent v. Sumanasena 55 NLR 478.*
(8) *Fernando v. Samaraweera 52 NLR 278, 283, 284, 285.*
(9) *Attorney-General v. Ediriwickramasuriya 41 NLR 499.*
(10) *Virasinghe v. Peiris 46 NLR 139.*
(11) *Dias v. Gomes 55 NLR 357.*
(12) *Perera v. Maggie Nona Hamine 76 NLR 547*
(13) *Bardeen v. de Silva 66 NLR 547*
(14) *Ramzan v. Sardar 73 NLR 380.*

APPEAL from judgment of the Court of Appeal.

W. P. Gunatillake with *J. A. J. Udawatte, U. S. Sooriyarachchi* and *C. Gamage* for plaintiff-Appellant.

W. Rajapakse with *C. Viknarajah and C. de Silva* for defendant- Appellant.

Cur. adv . vult.

June 18, 1990.

BANDARANAYAKE, J.

This appeal raises a question of law whether if payment of rent is made specifying particular months for which it is being paid could the rent be appropriated towards arrears due for a period prior to that month. Leave to appeal on this question of law was granted by the Court of Appeal.

The plaintiff-appellant instituted action in the District Court as the landlord of the premises in suit for ejectment of the defendant-respondent-tenant for arrears of rent in a sum of Rs. 900 and for damages at the rate of Rs. 125/- a month until final disposal. The plaint was filed under the provisions of the Administration of Justice Law, No. 44 of 1973. It was stated as a material fact that the defendant had failed to pay rent from October 1975. Notice to quit was given on 23.7.76 requiring the defendant to quit the premises on or before 10.11.76. Whilst admitting tenancy

the defendant-respondent denied being in arrears of rent and prayed for dismissal of the action.

The case proceeded to trial on the following issues :-

Plaintiff's Issues :-

(1) Was the defendant in arrears of rent in terms of s. 22 (2) of the Rent Act, No. 7 of 1972 ;
(2) If so, is the plaintiff entitled to the relief prayed for ?

Defendant's Issues :-

(3) Was the notice to quit sent by the plaintiff to the defendant valid in law as the arrears of rent demanded had been paid by the defendant before he received the notice to quit ;

(4) Was the defendant in arrears of rent on date of institution of the action ?

The trial Judge held that the defendant had before 19.10.77 the summons returnable date, deposited the entirety of the arrears payable and was therefore entitled to relief in terms of s. 22 (3) (*c*) of the Rent Act.

It was the plaintiff's case that he rented the premises to the defendant on 10th July 1971 on a monthly rental of Rs. 125/- on tenancy agreement- "P 1". Plaintiff admitted taking an advance of three months rent at the commencement of the tenancy "P 2". The plaintiff also admitted that the defendant paid rent directly to the plaintiff until June 1975 -"P3" to "P48" - being counterfoils of rent receipts of the payments made. This last payment for the month of June 1975 had been made only on 18.3.76. No settlement was possible before the Conciliation Board on the complaint of the plaintiff. Notice to quit was sent on 23.7.76 terminating the tenancy with effect from 10.10.76. The action was instituted as aforesaid on 31.5.77. It was in evidence that from the month of May 1976 the defendant had deposited monies in the plaintiff's favour with the local authority the Kotte-Galkissa Gam Sabha as rent. Each such deposit made to the local authority mentioned a specific month in respect of which the payment was being made. Sometimes an amount more than the monthly rental was deposited. The overpayments also were appropriated by the defendant-

debtor for specific debts (months). This was the defendant"s evidence given at the trial. The plaintiff withdrew these monies from the local authority up to October 1977 all amounting to a sum of of Rs. 2,125/- although all arrears due to him as at October 1977 was, according to the plaintiff a sum of Rs. 3000/-. This was computed on the basis that the period specified in the notice of termination of tenancy as being the period in which the tenant was in arrears was two years (i.e.) from October 1975 to the date on which the tenant was required to appear in Court in answer to the summons which was 19.10.77. Thus two years rent at the rate of Rs. 125/- per month amounted to Rs. 3,000/-. The deficit of Rs. 875/- represented 5 months rent. According to the plaintiff's computation the arrears of rent amounting to Rs. 875 - should be assigned for the months of October 1975 to February 1976 for the following reasons:-

(*a*) The defendant stopped paying rent directly to the plaintiff after June 1975 ;

(*b*) As the plaintiff has taken three (3) months advance rent at the commencement of the tenancy the defendant has been given credit for same which covers the period July to September 1975. Thus arrears are being claimed from October, 1975 as set out in the plaint ;

(*c*) The defendant has made deposits of monies as rent with the local authority mentioning specific months for which rent was being paid reflected in counterfoils of receipts "P 3" to "P 48" and by the defendant's own documents. The first payment has been assigned by the defendant for the month of May, 1976 and other payments assigned in respect of March and April 1976 and months succeeding May 1976 - (i.e.) June 1976 onwards to the summons returnable date.

The plaintiff claims that under the Roman Dutch Law of Contract once the debtor appropriates a debt by assigning a particular payment to a particular debt that payment extinguishes the debt so specified. Counsel cited "Law of Contract" - Weeramantry, Vol. 2. p. 676 paras 701 onwards ; and Walter Pereira's "Laws of Ceylon" 2nd Ed. p. 772 ; Wessels "Law of Contract in South Africa", 2nd Ed. Vol. II, para 2294.

Learned Counsel for the plaintiff-appellant contended that the trial Judge and the Court of Appeal were in error in treating the deposits made

to the local authority as rent tendered to the landlord in respect of **all arrears of rent claimed** by applying the provisions of s. 22(3)(*c*) of the Rent Act and ignoring the assignment of those payments by the defendant to particular debts. It was Counsel's submission that the said provisions of the Rent Act cannot be applied willi-nilli to a situation where there are a series of debts, and payments made in liquidation of those debts are directed to apply to specific debts by the debtor. In such a situation the Roman Dutch Law has to be applied to the payments so assigned at the time of payment. If a balance of unpaid debts is left the plaintiff was entitled to recover such balance as arrears of rent by means of a properly instituted action. Had the defendant not assigned payments be made in the manner he did, then it would have been different. Learned Counsel for the plaintiff-appellant submitted that although this point of law was raised and argued before the Court of Appeal that Court had failed to deal with it in the course of its judgment.

Turning to the position taken by the defendant-respondent before this Court on the question of law raised in the reference, the only submission made in the written submissions filed by the defendant-respondent was that as the plaintiff has admitted that before the summons retunable date the defendant-respondent had tendered Rs. 2,125/- to the local authority which sum had been withdrawn by the plaintiff-landlord, the action must fail in view of the supervening conditions of s. 22 (3) (*b*) of the Rent Act and that the decision of the Supreme Court in *Ansar v. Hussain* (1) was authority for this proposition. Also cited was the case of *Wellington v. Amerasinghe* (2) which held that where there is excess rent in the hands of the landlord there will be an automatic set off (i.e.) that the provisions of the Rent Act determined the matter. In the course of oral submissions however respondents's Counsel also submitted that the Roman Dutch Law principle that was applicable was not that relied upon by the appellant (supra) but that unspecified debts should be carried to that account which it is most beneficial to the debtor to reduce and that when accounts are of the same nature so as to make no difference to the debtor the payment must be carried to the oldest account - vide "Laws of Ceylon" Walter Pereira, 2nd Ed. p. 772, items (3) (4) in the second paragraph thereof and *Ephraims v. Jansz* (3) and *Fernando v. Fernando* (4) It was submitted that in the instant case the debts were of the same nature.

In the course of the oral hearing before us learned Counsel for the respondent also sought to raise several other arguments for the first time which were objected to by the appellant. They were :

(i) that the standard rent has not been pleaded in the plaint and therefore there was no mode of calculating arrears of rent ; you cannot demand more than the authorised rent ; that even the authorised rent was not pleaded ; that when a landlord comes into Court there must be certainty as to whether the proceeding was in respect of premises the standard rent of which for a month does not exceed Rs. 100/- or which exceeded Rs. 100/- as different provisions of law applied to each such situation ; thus a mandatory provision had been ignored ; this was therefore a fatal irregularity which voided the proceedings.

(ii) that the admitted acceptance of rent by the plaintiff-appellant for a period subsequent to the notice to quit amounted to a waiver of the said notice; that in the instant case there was no evidence that the withdrawal of monies deposited with the local authority by the plaintiff **was made without prejudice** to his rights in the action and therefore acceptance of rent was without condition and amounted to a waiver of the notice of termination of tenancy dated 26.7.76 - *Eastern Hardware Stores v. Fernando (5)* - and *Fonseka v. Naiver Ali (6).*

It would be convenient to first dispose of the matters not mentioned in the written submissions and raised for the first time at this hearing; in regard to (i) above viz; that the standard rent was not pleaded; the case proceeded to trial on the basis of an **agreed** rent of Rs. 125/- per month. That being common ground and the defendant pleaded that he was not in arrears of rent, then there is a burden on the defendant to show at least by way of an averment to that effect that the agreed rent was in excess of the authorised rent. There was no such averment. There was no burden on the plaintiff therefore to plead the standard or the authorised rent. This objection was not taken at the trial and not raised in the Court of Appeal or in the written submissions. It is too late now to agitate such a question. In any event, the defendant was given three months notice of termination of tenancy which is the upper limit and this would not have caused him prejudice.

In regard to the question raised in (ii) above, viz: that the acceptance of rent for a period subsequent to the notice to quit amounted to a waiver of notice, it was held by H.N.G. Fernando, A.J. (as he then was) in the case of *Vincent v. Sumanasena (7)* that during the pendancy of an action

for ejectment under the Rent Restriction Act the tenant must continue to pay rent as it falls due. Failure to do so may, by virtue of s. 14 of that Act render him liable to be sued again for ejectment in a subsequent action on the ground of non-payment of rent. Held, that during the pendency of an action for ejectment the tenant must continue to pay rent as it falls due. The Rent Act, No. 7 of 1972 as amended contains in s. 31 a provision similar to s. 14 of the Rent Restriction Act. It provides for a continuance of the original contract of tenancy. This provision thus keeps in force retrospectively the original contract of tenancy. This being so the *ratio decidendi* in the case of *Vincent v. Sumanasena* (supra) would apply. The acceptance of rent in the present circumstances does not amount to a waiver of the notice. Once the contractual tenancy is ended by notice, the landlord loses no rights by accepting rent from the statutory tenant. The mere acceptance of rent is insufficient to create a new tenancy. The agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms. A waiver of a notice to quit cannot be presumed. *Fernando v. Samaraweera (8); Attorney-General v. Ediriwickramasuriya (9); Virasinghe v. Peiris (10); Dias v. Gomes (11); Perera v. Maggie (12)*. .Acceptance of rent for a period subsequent to the notice revives the tenancy only if from the facts established an intention to waive can reasonably be inferred. Every such payment does not *ipso facto* amount to a revival. *Eastern Hardware Stores v. Fernando (5)*.

Turning to the question of law raised in this appeal it is common ground that the defendant-respondent deposited monies with the local authority as payment of rent for specific months. The trial Judge has accepted the evidence of the plaintiff in regard to these payments. A perusal of the documents produced - deposits of payment - show clearly that payment of rent was being appropriated by the debtor towards payment of specified debts at the time of payment. According to the principles governing appropriation of payments in Roman Dutch Law the first general rule when there are several debts owing to the creditor and the payment made is insufficient to discharge the entire sum due recognises the debtor's right to declare at the time he makes payment which of his debts he wishes to reduce. The debtor has the liberty to do so. This rule is based on the principle that, all things being equal, the interests of the debtor prevails over those of the creditor. It has been stated that "the whole doctrine of the Roman Dutch Law as to appropriation of payments turns upon the intention of the debtor either express, implied or presumed"

- vide - Weeramantry "Law of Contracts", Vol 11, paras 701-705, pp. 676-680; Nathan "Common Law of South Africa", 2nd Ed. Vol 11, p. 659.

The facts of this case manifestly show the debtor's intention to appropriate against specified debts. Since the debtor (the defendant-respondent) has elected to appropriate payments he made in the manner reflected by the facts the Court must consider whether the debtor has been unreasonable in so appropriating the payments. The debtor continued to occupy the premises. If he fails to pay rent he exposes himself to an action for ejectment. The facts also disclose a course of dealing between the parties, a pattern of making payments for specified months from the very inception of the tenancy. The creditor was therefore entitled reasonably to believe that the debtor intended appropriation to be made for those designated months and no other. Considering all the circumstances it cannot fairly be said that the debtor was unreasonable in what he did. The creditor is obliged to consent to the appropriation of payments made by the debtor. The Court should give effect to that decision.

On the background of the law as stated above, it will be seen that on the facts of this case, appropriation of the payments by operation of law as contemplated by the Roman Dutch Law does not arise. The contention of Respondent's Counsel (supra) that the rules by which payments are appropriated by operation of law should be followed in this case is unacceptable. Those rules which contain principles by which appropriation is decided by operation of law are applicable only in the absence of a decision by the parties. This is not the case we have before us.

It is left to consider whether the principles of the Roman Dutch common law are applicable in an action brought under the statute - the Rent Act, No. 7 of 1972 as amended. Appropriation of payments is done at the time of making the payment. The statute does not prohibit the parties from exercising such an option either expressly or by way of inference. This being so, the provisions of s. 22 (3) *(b)* & *(c)* cannot be read as rendering nugatory the principles of the common law. In my opinion there appears to be no conflict in this area between the common law and the statute. If the payments are appropriated by the parties in a certain way, then the principles of the common law apply to those payments and they will be applied in the designated manner. The two streams of law will operate in all areas where there is no conflict. Thus if payments so appropriated are

sufficient to meet all the debts specified in the notice of termination of tenancy, then the plaintiff will fail in his action. But if not, there will remain unpaid arrears of rent.

To recapitulate the evidence accepted by the trial Judge, the notice of termination of tenancy was dated 26.7.76. It declared that the tenant was in arrears of rent from October 1975 onwards. The tenant was required to vacate the premises on or before 10.11.76. Thus three months notice to quit the premises was given. The tenant had not paid rent after June 1975. Then on 11.5.76 a deposit was made by the tenant to the local authority at the same time appropriating that payment as rent for the month of May 1976. Deposits made thereafter were also appropriated for specified months. Over-payments were also made by the tenant on certain occasions amounting to Rs.250/- In her evidence the defendant-tenant appropriated those overpayments specifically to the months of March and April 1976 and that evidence was not contested. Action was instituted on 30.5.77. It was the plaintiff's case that he had by October 1977 withdrawn the total sum deposited by the defendant with the local authority amounting to Rs. 2,125/- lying to his credit. The plaintiff's evidence that was accepted by the trial Judge was that there still was a balance of Rs. 875/- due and owing to him as unpaid rent by the defendant as at the date on which the defendant should appear in Court in respect of the action as stated in the summons served on him. It was the plaintiff-appellant's contention that the unpaid balance represents five months rent in arrears. Taking into account the obligation of the Court to uphold the right of the debtor under the common law to appropriate payments to specific debts, then it must be accepted that by such appropriation of the sum deposited (Rs.2,125/-) there was still a sum of Rs. 875/- owing up to the date on which he had to appear in Court. Thus the unpaid dues within the period specified in the notice must relate to the five months in respect of which no appropriation has been made. viz. October, 1975 to February 1976. It is no doubt a period anterior to the months for which payments have been assigned in respect of arrears of rent but they remain unpaid and the plaintiff is entitled to judgment.

I am of the opinion that all payments made by the tenant as at the summons returnable date have been lawfully appropriated as rent for the specified months leaving unpaid arrears of five months rent. This being so the provisions of s. 22(3) *(b)* and *(c)* have no application as the tenant

has failed to tender sufficient money to the landlord to meet all arrears of rent specified in the notice to quit. In other words there was nothing left in the Kitty for s. 22 (3) *(c)* of the Rent Act of 1972 to become operative. The authorities relied upon by the Court of Appeal, viz. *Ansar v. Hussain* (supra) which approved of *Bardeen v. de Silva (13)* and *Ramzan v. Sardar (14)* for holding that all arrears of rent have been terdered by applying the provisions of s. 22(3) (c) are inapplicable and are irrelevant. Those cases have been decided upon different facts.

In this view of the law issues 1 and 2 should have been answered in the plaintiff's favour. The plaintiff-appellant is entitled to succeed in this action. I do not have the benefit of any views or findings by the Court of Appeal on the question whether the principles of the Roman Dutch Law are applicable to the facts of this case.

Since the tenant was in arrears of rent for several months and he appropriated payments he made to specific months, the tenant must be regarded as having tendered arrears of rent for those months to the landlord. If all the arrears so tendered were insufficient to discharge the entire sum due as arrears then the tenant remains in arrears of rent whether or not they were due for a period prior to the arrears paid up. I set aside the judgments of the District Court and the Court of Appeal and allow this appeal. As Counsel for both parties have intimated to Court that the premises in suit have since been sold and purchased by the defendant - respondent who is in occupation the prayer for ejectment is redundant. The plaintiff- appellant is entitled to judgment, arrears of rent from October 1975 to February 1976 both inclusive and damages as prayed for, subject to the defendant-respondent's right to prove payment of the whole or part of rents due. The defendant- respondent shall pay costs in all three Courts.

FERNANDO, J. - I agree.

AMERASINGHE,J. - I agree.

Appeal allowed.