

1961

Present : Sinnnetamby, J.

D. GUNARATNE, Appellant, and U. L. P. PERERA, Respondent

*S. C. 188/59—C. R. Colombo, 72154**Rent Restriction Act, No. 29 of 1948—Section 13 (1) (a)—Late payments of rent by tenant—Effect on right of landlord to eject tenant.*

A tenant would be liable to be ejected under section 13 (1) (a) of the Rent Restriction Act if the rent is in arrear for one month after the due date, even when the landlord has usually accepted without protest late payments of rent but not, except rarely (two occasions in the present case), later than one month after the due date specified in the contract of tenancy.

Suppiah v. Kandiah (1957) 58 N. L. R. 479 and *Jayakody v. Pedris* (1959) 60 N. L. R. 422, distinguished.

Adamjee Lukmanjee & Sons Ltd. v. Ponniah Pillai (1959) 61 N. L. R. 181, followed.

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

H. V. Perera, Q.C., with *D. R. P. Goonetilleke*, for the Defendant-Appellant.

C. Ranganathan, with *M. L. de Silva*, for the Plaintiff-Respondent.

Cur. adv. vult.

September 13, 1961. SINNETAMBY, J.—

The plaintiff instituted this action for ejectment against the defendant alleging that the authorisation of the Rent Restriction Board was not necessary as the defendant was in arrears of rent in respect of the month of August, 1958, for more than one month after it had become due. The terms of the contract of the tenancy were embodied in the document P 1 which expressly provided that the rent for any month had to be paid before the 10th of the succeeding month. The rent for August, 1958, therefore, had become payable on the 10th of September, 1958, but was in fact paid on the 17th October, 1958. On this basis the plaintiff would ordinarily have been entitled to institute the action. The defendant, however, alleged that in as much as rents had not been regularly paid on the due dates, but in each case had been paid towards the end of the following month, the date of payment had been altered from the 10th of the month following the month for which it was due to the end of that month. The learned Commissioner of Requests declined to accept this proposition and held that the plaintiff was entitled to an order for ejectment. Against the learned Commissioner's finding the defendant has appealed.

The question argued before me was purely one of law. The contention of the appellant was that plaintiff, by his conduct in persistently accepting rents without protest towards the end of the month though under the terms of the agreement it had to be paid on the 10th, had varied the terms of the contract to that extent. Hence, when payment was made on the 17th October, 1958, the defendant was not in default of the August rent for a period of one month after it had become due.

I should like, first of all, to refer to certain findings of the learned Commissioner on the facts. He held that after the institution of the present action, the defendant had continued to pay rents on the 10th of every following month. P 4 was a reply sent by the defendant to P 3 which was a notice to quit dated 16th October, 1958. In that letter there is not the faintest suggestion that the date of payment had by conduct been altered. The only suggestion made is that the relevant rent which had been tendered on the due date, had been rejected. Documents D 1 to D 52 are rent receipts. These receipts show that only 2 of them relate to payments made more than one month after the rent had in terms of the tenancy agreement become due. They are D 1 which is in respect of January and February 1949 and is late only in respect of January, and D 50 which is rent for May paid on 14th July, 4 days late; the rent for May would have been payable on the 10th of June and 14th July would be more than one month after it had become due by 4 days. Apart from these two payments all other payments have been made after the due date but within a month of the due date. The learned Commissioner also held that the tenant was in actual fact in no way misled by the landlord's conduct into thinking that he could pay the rent towards the end of each succeeding month instead of on the 10th.

In support of his argument the learned counsel for the appellant relied upon two cases both of which were decided by my brother Fernando. In the first of these two cases *Suppiah v. Kandiah*¹ the head note is liable to be misleading. What the learned Judge held in that case was that the plaintiff had failed to establish that under the tenancy agreement rent had to be paid monthly in advance, as averred, on the 15th of each month: on the contrary the documents produced suggested that it was not so payable. The learned Judge states:—

“ before the plaintiff can establish that rent was in arrears he had to establish when it became due and in the face of the documentary evidence it was, in my view, impossible for the plaintiff to contend that there had been an agreement to pay the rent from month to month.”

And then went on to observe:—

“ It seems to me, that the real question is whether the practice does not show that there was an implied agreement to pay and accept rents about once in 2 or 3 months.”

¹ (1957) 58 N. L. R. 479.

That case, it seems to me, does not suggest that a term of the contract of tenancy which expressly stipulates that rents shall be payable by a certain date can be varied by a subsequent practice. All that that case decided is that the plaintiff had failed to establish the date on which rent was payable and the practice suggested an implied agreement for payment to be made once in 2 or 3 months. In *Adamjee Lukmanjee & Co. v. Ponniah Pillai*¹, after referring to the case of *Suppiah v. Kandiah* (supra), the present Chief Justice refused to follow it. If *Suppiah v. Kandiah* did really decide that where there has been a date of payment fixed in the contract of tenancy the question of whether the tenant is in arrears must be considered not with reference to the stipulated date but with reference to the practice which existed, I would prefer to follow the views expressed in *Adamjee Lukmanjee & Co. v. Ponniah Pillai* (supra).

In the 2nd case decided by H. N. G. Fernando, J. namely *Jayakody v. Pedris*², he followed certain observations made by Chief Justice Watermeyer in the case of *Garlick v. Phillips*³. The facts in *Jayakody v. Pedris* (supra) are entirely different to the facts of the present case. In that case the defendant had consistently made late payments of rent more than one month after each had become due; that is, after the right to sue in ejectment had accrued to the landlord. The learned Judge did not suggest that thereby the terms of the tenancy agreement were altered. All he said was, following the South African case, that the plaintiff having frequently accepted late payments, if he intended to exercise his right to sue for ejectment it was his duty to inform the defendant explicitly that no further late payments will be accepted. In that case the plaintiff had by his conduct led the tenant to believe that such late payments were excused. In those circumstances the court held that there was a duty imposed upon the landlord to inform the tenant of the change in his attitude.

In the present case the late payments were not so long delayed as to give the plaintiff a right to sue. He did not by his conduct lead the tenant to think that he would not exercise the right to sue which in practically all those instances had not accrued to him: the only right the plaintiff had was, perhaps, to institute action for the recovery of the rent which had not been paid on the due date, but he certainly was not entitled in all those cases bar two, to institute an action for ejectment. The tenant could not, therefore, legitimately complain that the landlord by his conduct led him (the tenant) to believe that he would not render himself liable to be sued in ejectment; he did not in fact say so when notice to quit was served on him. All he could have been led to believe was that rents need not be paid on the due date and that no action would be taken for the recovery of those rents if they were paid before the end of that month on the 10th of which, under the terms of the contract, the rent was payable.

¹ (1959) 61 N. L. R. 181.

² (1959) 60 N. L. R. 422.

³ 1949 South African Law Reports 121.

In *Garlick v. Phillips* (supra) the Appellate Division of the Supreme Court of South Africa considered a case where the rent was payable on the 1st day of the month under the terms of the contract and the court was construing an enactment which provided that if the rent was paid on the date on which it was due, an order of ejectment will not be available till November, 1948, to a landlord who had given due notice to quit. The Statute was a war measure which prohibited the courts from granting ejectment against tenants of business premises until November, 1948, in spite of the fact that the lease had been terminated by notice provided, however, that the rents were duly paid. In that case, the landlord had accepted late payment of rents for a considerable period of time and it was contended that the condition of the lease requiring payments "in advance on the 1st day of each month" had been modified by the conduct of the parties. The Appellate Court while not holding that there was a modification to the terms of the contract held that the landlord by his conduct either gave revocable permission to the tenant to pay rents late or had led the tenant to believe that such permission had been given. If the first was the true legal position, the court held that the tenant's obligation was temporarily modified but if the latter was the true legal position then something in the nature of an estoppel arose which precluded the landlord from denying that he had given such permission. It is to be noted that in *Garlick v. Phillips* (supra) the late payment under the terms of the contract gave the landlord an immediate right to sue in ejectment. By not doing so over a long period of time he had led the tenant to believe that he, the tenant, could, without rendering himself liable in ejectment, make the late payments. The landlord's conduct operated to the tenant's detriment in that the tenant thought that no adverse consequence would follow from late payments.

In the present case, the only way in which the landlord's conduct would have prejudiced the tenant was, as I have already stated, to lead him to believe that he would not be sued for the recovery of rents which were not paid on the 10th provided they were paid within that month. The tenant was certainly not led to believe that he would not be sued in ejectment because the right to sue in ejectment had not accrued in any one of these cases except two, to the landlord. The landlord's conduct, therefore, did not and could not have led the tenant to think that if he was more than one month in arrear after the 10th of the month on which the rent was payable under the terms of the contract, the landlord would not exercise his right. On this basis the present case is entirely different to the case of *Jayakody v. Pedris*.

I would, therefore, hold that there has been a default on the part of the tenant which resulted in the rent being in arrears for more than one month after it had become due and that the plaintiff was entitled to maintain his action in ejectment. The appeal is accordingly dismissed with costs.

Appeal dismissed