

1970. *Present*: H. N. G. Fernando, C.J., Alles, J., and Weeramantry, J.

Mrs. A. E. ALWIS, Petitioner, and D. S. KULATUNGE
and another, Respondents

S. C. 612/69—C. R. Colombo, 97922

Rent-controlled premises—Deserted wife of tenant—Her right to continue in occupation after desertion—Doctrine of protection for the deserted wife—Right of the wife to tender the monthly rental to the landlord—Debt—Right of a third party to pay it—Consent decree entered without jurisdiction—Its liability to be set aside on the ground of nullity.

Under both English law and Roman-Dutch law a husband has the duty to provide his wife with accommodation and cannot eject her from the matrimonial home without offering her alternative accommodation or maintenance. Furthermore, in the particular sphere of Rent Control legislation, the wife, in view of her special status as such, has the benefit, even against the landlord, of the tenant's statutory protection. She consequently cannot be deprived by the landlord of her right of occupation unless and until the husband is duly deprived of his protection in accordance with law. Till such time she has the status, both in relation to the tenant and in relation to the landlord, of a protected person.

Moreover, inasmuch as in Roman-Dutch law a third party may make payment to the creditor on behalf of the debtor unless the obligation of the debtor is of a personal nature, the wife is entitled to tender the rent on behalf of the husband so as to keep the tenancy alive. When the rent is so tendered the landlord has an obligation to receive it.

If parties admit that one of the events which give the court jurisdiction to order ejectment has happened and if there is no reason to doubt the *bona fides* of the admission, the court is under no obligation to make inquiry as to the question of fact admitted. Where however the admission is the result of the fraud of one or more of the parties, and is aimed at obtaining a decree of ejectment which would not but for the fraud have been available, and where the result of the decree thus fraudulently obtained is to deprive the wife of her special protection referred to above, the decree of ejectment entered upon the basis of such a fraudulent consent is one entered without jurisdiction.

APPEAL from a judgment of the Court of Requests, Colombo. The facts are set out in the judgment of Weeramantry, J.

In April 1968 the 1st respondent, who was the landlord of certain rent-controlled premises, brought the present action against the 2nd respondent (the tenant) seeking his ejectment on the ground that rent was in arrear from 1st June 1967 up to 31st March 1968. On the date of trial, 19th May 1969, judgment was entered of consent in favour of the plaintiff as prayed for, writ of possession to issue forthwith. Thereafter, at the stage of execution, the present petitioner, the wife of the tenant, sought to intervene and obtain a stay of execution of the writ. She averred that her husband had deserted her in February 1967 and that her husband was aware that since that day she had been depositing each month's rental of

Rs. 33/14 with the Rent Department of the Municipality in accordance with the practice that had been followed by her husband prior to the date of desertion. However, the rents paid by the petitioner had been returned to the Municipal Council by the landlord on the ground that he was not prepared at any time to accept the petitioner as his tenant and that he had not at any time accepted rents from her.

The trial Judge refused to grant the petitioner's application for stay of execution of the writ. The petitioner thereupon filed the present appeal.

K. W. D. Perera, with *M. Moussof Deen*, for the intervenient-petitioner.

W. D. Gunasekera, with *W. S. Weerasooria*, for the plaintiff-1st respondent.

Cur. adv. vult.

August 7, 1970. H. N. G. FERNANDO, C.J.—

I have had the advantage of reading the judgments prepared by my brothers.

I agree that for the reasons stated by them the consent decree entered on 19th May 1969 must be set aside, and the case remitted to the lower Court for trial.

ALLES, J.—

The facts are fully set out in the judgment of my brother Weeramantny J. and I agree with his conclusion that the petitioner is entitled to relief. In view, however, of the importance of the question of law that has been argued in this case, I would like to state my reasons shortly.

This application raises vital questions relating to the rights of a deserted wife to continue to remain in occupation of rent controlled premises. There is an absence of judicial authority in regard to this question in Ceylon and consequently we have to look elsewhere for guidance.

The rights of the deserted wife in such circumstances have been very succinctly stated by Lord Denning in *Middleton v. Baldock*¹. Said he at p. 688—

“ In a case of the present kind, where the husband has deserted his wife and she has nowhere else to go, no court would order her out. She is therefore lawfully there, and, so long as she remains lawfully there, he remains in occupation by her. If he desires to cease to be in occupation—and to cease to be responsible for her occupation—then

¹ (1950) 1 K. B. 657.

he must go to the court and persuade it, if he can, to order her out. But until that time arrives she is lawfully there, and she can claim in his right, even against his will, to be there. The landlord can only get possession if the rent is unpaid or some other condition of the Acts is satisfied entitling him to possession."

In *Middleton v. Baldock* reference has been made to two earlier decisions of the Court of Appeal—*Brown v. Draper*¹ and *Old Gates Estates Ltd. v. Alexander and Another*². The facts of these two cases have been set out in the judgment of my brother Weeramantry J. In the latter case Bucknill L.J. took the view that so long as the husband's furniture was on the premises he retained possession to that extent, but doubted whether the revocation of permission to the innocent wife to leave the matrimonial home, in the absence of circumstances showing that the wife was in the wrong and had forced him to leave her, had any legal effect. In the same case Denning L.J. held that the husband does not lose the protection of the Rent Restriction Act if he goes out leaving his furniture and wife there.

"The reason is" says Lord Denning "because the wife, so long as she is behaving herself properly, has a very special position in the matrimonial home. . . . Even if she stays there against his will, she is lawfully there; and so long as she is lawfully there the house remains within the Rent Restriction Acts after he leaves, just as it does after he is dead. She can pay the rent and perform the obligations of the tenancy on his behalf, and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied."

Implicit in the observations of Bucknill and Denning L.J.J. is a suggestion that if the wife did not behave properly she was likely to forfeit the benefits under the Acts. This point arose for determination in 1952 in *Wabe v. Taylor*³ where the wife, after desertion, committed adultery with a man whom she took as a lodger but the husband took no steps to revoke the permission he had given her to reside therein. It was held by the Court of Appeal that, even assuming that the commission of adultery by the wife gave the husband the right to revoke her authority to reside in the house, it was irrelevant on the question between her and the landlord, and, therefore, in the absence of such revocation by the husband, the landlord was not entitled to possession.

The principles enunciated in the above cases have been approved by the House of Lords in *National Provincial Bank Ltd. v. Ainsworth*⁴. The question that arose for decision in that case was whether a deserted wife's interest was not an "overriding interest" within the meaning of Section 70 (1) (g) of the Land Registration Act of 1925. In the course of the judgment, however, the learned Law Lords had occasion to consider the rights of the deserted wife under the Rent Restriction Acts. Lord

¹ (1944) 1 K. B. 309.

² (1950) 1 K. B. 311.

³ (1952) 2 A. E. R. 420.

⁴ (1965) A. C. 1175.

Hodson in dealing with the argument of Counsel that the husband and not the wife must be the person in actual occupation stated at p. 1227—

“ He relied on the cases decided under the Rent Restriction Acts where a husband even when he has deserted his wife has been treated as still in occupation of the premises since he remained in possession of them through his wife. I cast no doubt on the authority of these cases (*Brown v. Draper*, *Old Gate v. Alexander* and *Middleton v. Baldock*) but I do not think they are conclusive on the construction of the words ‘in actual occupation’ contained in Section 70 (1) (g) of the Land Registration Act, 1925.”

and Lord Wilberforce at p. 1252 stated—

“ Since, at any rate 1944 (*Brown v. Draper*) and possibly before that date, the courts in a number of instances have given protection to deserted wives of tenants of rent controlled premises. They have done this by the device of holding that the husband-tenant cannot put an end to the tenancy, even by such acts as delivering the keys to the landlord, so long as his wife remains on the premises ; he remains there by her, and so long as he does so, whatever else he does or says, the tenancy remains. This doctrine now seems to be firmly established. I do not find it necessary to examine these cases : they relate to the special and intricate world of rent control in which the courts have had in many directions to work out empirical solutions to prevent injustice being done. For in the rent cases, the wife’s occupation has been treated as the husband’s so as to give her the benefit, against the landlord, of the tenant’s statutory protection.”

There is therefore high authority of the House of Lords which has recognised the right of deserted wives of tenants of rent controlled premises to continue to remain in occupation of premises constituting the matrimonial home.

Arising from these decided cases the following propositions would appear to emerge in respect of the English law :—

- (a) The wife is entitled to be provided with a matrimonial home until the dissolution of the marriage by a Court of competent jurisdiction ;
- (b) The husband, therefore, cannot give up possession of the premises rented out for that purpose and cannot consent to judgment if sued by the landlord so long as the wife continues to be in occupation of the premises in suit ;
- (c) The wife is entitled to pay the rent and perform the obligations of the tenancy on her husband’s behalf and the landlord can only obtain possession if the conditions laid down under the Rent Restriction Acts are satisfied ; and

- (d) The commission of a matrimonial offence on the part of the wife does not entitle the landlord to eject her from the premises until the marriage between the parties is dissolved and the status of husband and wife ceases to exist.

In order to give practical effect to these principles it should be possible for the wife to intervene in the tenancy action between the landlord and the husband and the question whether the landlord is entitled to obtain possession of the rented premises would be a matter that must be adjudicated upon by the Court after a consideration of the rights of the deserted wife as well. In *Middleton v. Baldock* (supra) the landlord brought two actions, one against the husband claiming possession of the house on a contractual tenancy and the other against the wife as a trespasser. The Court of Appeal permitted the wife to be joined as a defendant in the action against her husband.

The reasons which prompted the English Courts to take this charitable view in regard to the rights of the deserted wife or to use the words of Lord Wilberforce "the deserted wife's equity" have been very aptly stated by the learned Law Lord in *National and Provincial Bank Ltd. v. Ainsworth* (supra). After dealing with the housing shortage that existed in England after the 1939-45 war he has stated at p. 1241—

"To a woman, whose husband has left her, especially if she has children it is of little use to receive periodical payments for her maintenance if she is left without a home. Once possession of a house has been lost, the process of acquiring another place to live in may be painful and prolonged. So, even though, as is normally the case, the home is in law the property of the husband, the courts have intervened to prevent him from using his right of property to remove his deserted wife from it and they have correspondingly recognised that she has a right, or 'equity' as it has come to be called, which the law will protect, to remain there."

These observations are applicable with equal force to the conditions presently existing in Ceylon. The Roman Dutch law has recognised the right of the wife to be supported by her husband and thereby to provide his wife with accommodation, food, clothing, medical attention and whatever else she reasonably requires.

"On the principle that no one can escape his legal obligations by his wrong doing, the husband's duty of support continues if the separation was due to his fault—he deserted his wife without just cause or drove her away by his misconduct."

(Vide the South African Law of Husband and Wife by Hahlo, 2nd Edition 1963 at p. 101.)

This view has been adopted in Ceylon in *Canekeratne v. Canekeratne*¹ where it was held that a wife who has been deserted by her husband was

¹ (1968) 71 N. L. R. 522.

not liable to be ejected by her husband from the matrimonial home. In support T. S. Fernando J. quotes the observations made by Lord Upjohn in *National Provincial Bank Ltd. v. Ainsworth*¹.

The principles laid down in the English cases, supported as it is by reason and being in consonance with modern conditions, may well be adopted to the conditions existing in Ceylon, and indeed appear to have been recognised as such in *Canekratne v. Canckeratne*. An acceptance of these salutary principles would prevent the deserted wife from being thrown on the streets without a roof over her head by the husband maliciously consenting to judgment in the tenancy action brought against him by the landlord. She would then be entitled to the protection of the Rent Acts.

Once the "deserted wife's equity" is recognised in a case of this kind, it is relevant to consider the validity of the consent decree entered into between the landlord and the tenant. If the decree has been validly entered there would be a termination of the tenancy and the wife would be unable to obtain relief in the tenancy action. The jurisdiction of the Courts can only be invoked when there is a contravention of the provisions of the Rent Restriction Act. In the present case it was agreed between the parties that there was such a contravention when the rent was in arrears, but the evidence would seem to indicate that the rent for the premises in suit had been regularly paid by the petitioner and that therefore the rent was not in arrear. If the wife had the right to pay the rent and the rent was paid regularly, the landlord was bound to accept such rent. Therefore, the basis of the consent decree in this case was factually incorrect and did not entitle the Court to exercise jurisdiction.

In a consent decree of this nature there may be—

- (a) collusion between the husband and the wife to defeat the rights of the landlord;
- (b) collusion between the husband and the landlord to eject the wife from the rent controlled premises;
- (c) fraud or lack of *bona fides* on the part of the husband (not necessarily with the connivance of the landlord) to have the wife evicted from the premises.

In regard to (a) above it is possible to conceive of a case where a husband leaves the matrimonial home on the pretext of deserting his wife, consenting to judgment in the tenancy action and thereafter the wife taking up the position that as a deserted wife she could not be evicted from the premises. In the English cases of *Brown v. Draper* and *Old Gates Ltd. v. Alexander* (supra) the husband left the matrimonial home after a quarrel leaving behind some of his furniture. In the latter case, after the institution of proceedings for eviction, he was reconciled to his wife

¹ (1965) A. C. 1175 at 1232.

and it was held, in spite of two written documents giving up possession, that he was entitled to the protection of the Rent Acts. It is therefore necessary for a Court to examine the facts in each case closely and arrive at a decision whether there has been a desertion as recognised under the law or whether the departure of the husband from the matrimonial home was due to a temporary estrangement. In the present case, however, it has not been disputed that the husband had deserted his wife.

With regard to the attitude of the landlord, the Court has not found as a fact that there was collusion between the husband and the landlord. Although the landlord was aware that the husband had deserted the petitioner and sympathised with her in her plight, he appears to have been indifferent to the relations existing between the husband and the wife. He had other tenements in the same locality and had instituted proceedings against the husband previously—an action which failed owing to the amendment to the Rent Restriction Act. Therefore the evidence suggesting collusion on the part of the landlord is meagre and the learned Commissioner was, in my view, justified in coming to the conclusion that it only amounted to strong suspicion. One has therefore to proceed on the basis that it has not been established that the landlord was a party to having the wife ejected from the premises without just cause.

The same, however, cannot be said of the husband. The learned Commissioner has not addressed his mind to the issue as to whether he has been guilty of fraud or lack of *bona fides*, although an examination of the evidence seems to suggest that this was the case. He was aware that the petitioner had been paying the rent even after he left the premises; he had summoned his wife to give evidence at the trial and to produce the rent receipts, but did not choose to call her as a witness and the terms of the consent decree strongly suggest that, without prejudice to himself, he was agreeable to the landlord obtaining immediate possession of the premises forthwith, the only outcome of which would be to deprive the wife of the occupation of the premises. It would therefore appear that there was, if not fraud, certainly lack of *bona fides* on his part. The dictum of Lord Atkin in *Barton v. Eincham*¹ cited by Gratian J. in *Nugera v. Richardson*² would in the circumstances be applicable to the facts of this case. Said Lord Atkin in regard to lawful compromises entered into between the parties to a tenancy action—

“ If the parties admit that one of the events had happened which gave the Court jurisdiction, and if there was no reason to doubt the *bona fides* of the admission, the Court was under no obligation to make further inquiry as to the question of fact.”

In this case there was every reason to doubt the *bona fides* of the husband that the rent was in arrear and consequently the consent decree being made without jurisdiction amounted to a nullity.

¹ (1921) 2 K. B. 291.

² (1949) 51 N. L. R. 116.

I am therefore of the opinion that the petitioner was entitled to intervene in this action and have her rights safeguarded. Acting in revision I would therefore remit the case to the learned Commissioner for an adjudication as to whether the petitioner is entitled to claim relief under the Rent Restriction Act. The petitioner would be entitled to the costs of this application and the costs of the inquiry in the Court below.

WEERAMANTRY, J.—

The petitioner is the wife of the tenant of premises which had been let prior to the dates material to this action. The letting was on a monthly tenancy at a rental of Rs. 35.14 a month.

On 16th April 1968 the 1st respondent (the landlord) had instituted action in the Court of Requests against the 2nd respondent (the tenant) seeking his ejection on the ground that rent was in arrear from 1st June 1967 up to 31st March 1968.

Although the tenant filed answer denying the averment of arrears of rent, on the date of trial the case was settled on the basis of an admission by the tenant of the averment regarding arrears of rent. Judgment was entered of consent in favour of the plaintiff as prayed for, writ of possession to *issue forthwith*. It was further agreed that the writ for the recovery of rent, damages and continuing damages was not to issue for two years but that in the event of the plaintiff obtaining vacant possession of the premises satisfaction of decree was to be entered in respect of the money claimed. Decree was entered accordingly. These proceedings took place on 19th May 1969.

Thereafter, at the stage of execution, the present petitioner, the wife of the tenant, sought to intervene and obtain a stay of execution of writ. She averred in her petition that she was the legal wife of the defendant and that she had five children, all living with her at the premises in suit since 1955. She averred further that the tenant (her husband) had deserted her and the children in February 1967 and that since that day she had been depositing rent at the rate of Rs. 35.14 with the Rent Department of the Municipality.

The petitioner averred that although she had been summoned to give evidence and to produce the rent receipts she had received, and although she was present in court in obedience to the summons, she was not called up to give evidence or produce these receipts and that it was only later that she came to understand that an order of ejection had been entered of consent. It was her position that her husband had joined hands with the landlord to secure the ejection of herself and her children from the premises, and she contended that, being the legal wife of the tenant, she had a right to pay the rent in respect of the premises in suit and to continue in occupation thereof.

It was the petitioner's position that if she and her children, of whom three were grown up daughters, were ejected from her premises, she would have to face irreparable loss and damage and "would be thrown on to the streets".

The learned Commissioner after inquiring into this application has found upon the facts that the petitioner has deposited the rent at the Rent Department of the Municipality and has done so up to date. He has also expressed his sympathies for the petitioner in the strongest terms and indicated a grave suspicion that the tenant had connived with the landlord in the matter of consenting to judgment as prayed for. However the learned Commissioner, observing that the application was one presumably made under the provisions of section 344 of the Civil Procedure Code, expressed the view that however tragic the petitioner's situation may be, it was not open to her to make an application under that section in view of the fact that that section was apparently available only to parties and their privies.

He has also stated that in view of the tragedy revealed by the evidence he had addressed his mind to the provisions of section 18 of the Rent Act to see whether by analogy with the situation contemplated by that section, some relief could be granted to the petitioner. He did not however find it possible to extend the scope of the principle underlying that section to a case such as that of the petitioner. In the circumstances he dismissed the application but awarded no costs against the petitioner.

It is from this order that the petitioner seeks relief.

It is relevant also to state that up to the date of desertion the tenant had been paying his rent at the Rent Department of the Municipality and that the petitioner in depositing the rent at the Rent Department was only continuing the practice that had been followed up to that time. Although the petitioner had deposited rents without a break so as to leave no arrears, these rents had been returned to the Municipal Council by the plaintiff. The plaintiff's position was that he was not prepared at any time to accept the petitioner as his tenant and that he had not at any time accepted rents from her.

These facts raise the question whether any legal principle can be invoked which entitles the court to take into account the plight of the deserted wife of a tenant, who is threatened with ejection. This involves also the question whether the wife has any right to tender rent to the landlord when the husband fails or neglects to do so. Connected with this question is the question whether the landlord is obliged in law to accept the rent so tendered by the tenant's wife. It becomes necessary also to examine whether, if the answer to these questions be in the affirmative and the rent was therefore not in arrears at the date of the consent decree, there exists, upon the facts of this case, any basis on which the consent decree may be set aside.

Turning now to the first of these questions, learned counsel for the petitioner has referred us to a series of decisions under the English Rent Acts. This line of cases would appear to have commenced with the principle that a surrender of premises by the tenant (one of the limited ways in which a tenant may deprive himself of the protection of the English Acts) cannot be effectively made so long as the wife of the tenant remains in occupation. Commencing from this principle the English Courts would appear to have built up, in the context of Rent Restriction legislation, a doctrine of protection for the deserted wife.

In *Brown v. Draper*¹, one of the earliest cases on this subject, it was held that unless and until the tenant yields up possession (which he cannot do while his wife is still in occupation) or has an order for possession made against him, the protection of the Acts extends to protect the wife as a licensee of the tenant, not because the licensee can claim the protection of the Acts personally but because the possession of the licensee must be taken to be the possession of the tenant.

This principle was carried further in *Old Gate v. Alexander and another*² where a statutory tenant living with his wife in a flat left the premises following a quarrel and purported to surrender them to the landlord by agreement. His wife remained in occupation, and, on her refusal to quit, the husband gave her written notice revoking any authority which she might have had from him to occupy the flat. It was held that the statutory tenancy had not been terminated as the tenant had not given up possession so long as he remained in occupation through his wife. Lord Denning there observed that the wife has a very special position in the matrimonial home. "She is not the sub-tenant or the licensee of the husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go without seeing that she has a proper place to go to. He is not entitled to turn her out without an order of the court even if she stays there against his will. She is lawfully there and so long as she is lawfully there the house remains within the Rent Acts and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied." Indeed Lord Denning went even further and said in this case³ that the wife can "pay the rent and perform the obligations of the tenancy" on the tenant's behalf. This case is cited in the latest edition of Megarry⁴ as authority for the proposition that the wife can continue in occupation paying the rent and performing the obligations of the tenancy.

Again in *Middleton v. Baldock*⁵ the Court, applying *Brown v. Draper* and *Old Gate v. Alexander and another*, held that a tenant could not by agreement waive the statutory protection afforded by the Act and that a deserted wife remaining in the matrimonial home despite such waiver was lawfully there and that the husband remained in

¹ (1944) 1 All E.R. 246.

² (1949) 2 All E.R. 822.

³ As reported in (1950) 1 K.B. 311 at 320.

⁴ Rent Acts 10th Ed. p. 188.

⁵ (1950) 1 All E.R. 708.

occupation through her. Indeed the English courts have gone so far as to apply this principle even to the case of a wife who remains in occupation in adulterous association with another man¹.

Learned counsel for the respondent has cited to us the decision of the House of Lords in *National Provincial Bank Limited v. Ainsworth*², as an authority nullifying the effect of the earlier English cases specially protecting the deserted wife. It is true that in *National Provincial Bank Limited v. Ainsworth* it was stressed that in matters between husband and wife there cannot be a right *in rem* conferred on the wife in respect of property such as would travel beyond the ambit of the purely personal husband and wife relationship. For this reason it was held that there would not be any interest in the wife amounting to "an over-riding interest" such as would confer on her a real right which attaches to property and operate as a clog upon the ownership thereof. This principle does not however interfere in any way with the cases to which I have referred. In fact Lord Hodson has expressly stated³, after referring to these decisions, that he casts no doubt on their authority, and Lord Wilberforce has said that the decision in that appeal leaves unaffected the large number of instances in which the house in question is leasehold property held on a tenancy protected by the Rent Restriction legislation, which he described as a special category of its own⁴. I do not think therefore that learned counsel's contention that all these decisions have now lost their force in view of this decision of the House of Lords, is entitled to succeed. Indeed as I have already pointed out, the leading authority on the Rent Acts has in an edition subsequent to this decision (the 10th edition was in 1967) referred to these decisions as still being good law. It is of interest to note that this same submission, that the earlier line of cases no longer carried authority in view of the decision in *National Provincial Bank Limited v. Ainsworth*, was made to T. S. Fernando, J. in *Canekeratne c. Canekeratne*⁵, to which I shall shortly refer, but the court found it unnecessary to make any pronouncement upon the question.

The English cases thus all serve to show that in what has been described as the "special and intricate world of rent control"⁶ the English courts "have had in many directions to work out empirical solutions to prevent injustice being done"⁷ and have thus built up a principle of protection for the deserted wife and of a recognition of her right to be upon the premises, so long as the husband remains entitled to the protection of the Acts. To summarise this principle, in the words of Lord Wilberforce "the wife's occupation has been treated as the husband's so as to give her the benefit, against the landlord, of the tenant's statutory protection"⁸.

¹ *Wabe v Taylor* (1952) 2 All E.R. 420.

² (1968) 71 N.L.R. 522 at 523.

³ (1965) A.C. 1175.

⁴ Per Lord Wilberforce in *National Provincial Bank Ltd. v. Ainsworth* (1965) A.C. 1175 at 1252.

⁵ (1965) A.C. 1175 at 1227.

⁷ *Ibid.*

⁸ *Ibid* at p. 1241.

⁹ (1965) A.C. 1175 at 1252.

The same principle would be valid in respect of our rent control legislation unless there is any variance between the principles of English common law that have been used to build up this doctrine and the corresponding principles of the Roman-Dutch law; and as I shall presently show, an examination of the relevant principles of Roman-Dutch law affords even stronger support for such a doctrine than the principles of the English common law.

Moreover, the broad reason underlying the general doctrine of protection for the deserted wife as set out by the House of Lords in *National Provincial Bank Ltd. v. Ainsworth* is as applicable in every detail to the circumstances of this country as it is in England. The reason there adduced was as follows: "the doctrine of the 'deserted wife's equity' has been evolved by the courts during the past 13 years in an attempt to mitigate some effects of the housing shortage which has persisted since the 1939-45 war. To a woman, whose husband has left her, especially if she has children, it is of little use to receive periodical payments for her maintenance (even if these are in fact punctually made) if she is left without a home. Once possession of a house has been lost, the process of acquiring another place to live in may be painful and prolonged. So, . . . the courts have intervened . . . and they have . . . recognised that she has a right, or 'equity' as it has come to be called, which the law will protect, to remain there." No part of the reasoning leading to the resulting doctrine can be dismissed as inapplicable here.

Passing now to a comparison of the relevant principles of English common law and of Roman-Dutch law we see first of all that the right is rooted in the duty of maintenance and support which, according to the English law is owed by the husband to the wife.

Now, on this matter, the Roman-Dutch law is no less stringent, and places upon the husband the duty to provide his wife with accommodation and other reasonable requisites for her support.² The husband's duty to support his wife does not come to an end with the break up of the joint household, where the husband is the deserting spouse³. Following this principle it was held in *Canekeratne v. Canekeratne*⁴ that a deserted wife is not liable to be ejected by her husband from the matrimonial home unless alternative accommodation or substantial maintenance to live elsewhere was offered to her.

In so far, then, as the English cases are based upon the principle of support, the same considerations obtain under our law.

In so far as the English law recognises a right in the wife to tender payment of rent, a right to which Lord Denning refers, the position would appear to be even stronger in our law, having regard to the principle of

¹ *Ibid* at p. 1241.

² *Hahlo* *ibid*, p. 102.

³ *Hahlo, South African Law of Husband and Wife*, 2nd Ed. p. 101.

⁴ (1968) 71 N. L. R. 522 at 523.

the Roman-Dutch law that a third party may make payment on behalf of a debtor. It will be necessary to examine this principle in some detail because it would appear to afford a firm additional basis for considering the principle evolved in England to be available under our legal system as well.

According to the authorities, performance of a debt may be rendered by an independent third party in the name of the debtor even without his knowledge and against his will, unless the performance is of such a personal character that it cannot be effectually made except by the debtor in person.¹ Pothier illustrates the inapplicability of this principle to personal obligations by stating that if a contract is with a husbandman to plough one's land, another husbandman may discharge the obligation, but if I agree with a painter to take a likeness, he cannot discharge his obligation by causing it to be taken by any other painter without my consent.² The payment of rent is not performance of such a personal character that it must necessarily be made by the debtor in person, and therefore the exception referred to has no applicability in the present instance.

Grotius states that "performance consists in the render of the thing which is due, made by the debtor or someone on his behalf being qualified to make it, to the creditor, being qualified to receive it"³ and he explains the phrase "by the debtor or someone on his behalf" as being applicable even though the debtor had no knowledge of the payment.⁴ The phrase "being qualified to make it" is explained as meaning that those who are not capable such as minors cannot make any true performance.

On the same matter Pothier observes that any tender made to the creditor by any person whatever in the name of the debtor will be valid when the debtor has an interest in the payment. But if the payment offered would not procure any advantage to the debtor the offer ought not to be regarded.⁵ Instances mentioned by Pothier of acts in which the debtor has an interest are such acts as putting an end to any action which the creditor may have commenced or stopping the accumulation of interest or extinguishing a right of hypothecation. With reference to the facts of the present case it will be seen that the debtor, namely the husband, had an interest in this payment in that so long as he was in occupation through his wife and children, whom he had a duty to support, he was incurring liability to pay rent to the landlord, and the payments made were to his benefit in that they relieved him of this liability. Till complete and effectual vacation of the premises by the tenant and his family the landlord would have been entitled to a decree for rent, and indeed in the present case decree was so entered as prayed for.

¹ *Lee, Roman Dutch Law, 5th ed., p. 251.*

² *Pothier, Obligations, s. 461.*

⁵ *Pothier, Obligations, s. 461.*

³ 3.39.7, *Lee's Translation.*

⁴ 3.39.10.

Voet observes that "even if a person has paid on behalf of an unaware or unwilling debtor, the payment will hold good at least to the extent that release will befall the debtor thereby."¹ Mr. Justice Gane has in his translation of Voet noted a series of South African decisions approving and following this particular passage, and there is no indication of any dissent therefrom.

As Wessels points out,² the Civil law differs from the English in allowing a stranger to the contract to carry out its terms and to extinguish the obligation of the debtor irrespective of whether the debtor is ignorant of the payment or unwilling that it should be made by the third party.³

By way of corollary to this principle a creditor is not as a rule entitled under the Civil law to refuse payment from a third party where it makes no difference to him by whom the contract is performed provided the performance is effective and in terms of the contract.⁴

The principles referred to have been accepted as settled law in South Africa. Of the many South African cases on this principle it will suffice to refer to *Rolfes, Nebel & Co. v. Zweigenhaft*⁵, where Wessels J. said "it is a principle of our law that a stranger can validly pay any debt even though the debtor is unwilling (Vote 46.3.1). This is the main principle of the decision in *Eckhardt v. Nolte* (2 Kotze 48 ; 3 C. L. J. 43)".

It is necessary to make a brief reference to the case of *Cassim v. Kaliappa Pillai and another*,⁶ where it was held that a landlord is under no obligation to accept payment by cheque unless there is an agreement express or implied to do so. The cheque in that case was drawn by a third party and Basnayake, C.J., observing that payment in a contract of letting and hiring must be in cash, said that even an implied agreement that rent would be accepted by cheque does not cast an obligation on the landlord to accept a cheque drawn by a person other than the tenant in his favour in payment of rent. He went on to observe "Nor has a third person the right to force the landlord of another to accept a cheque drawn by him in payment of that other's rent. Such a payment by a third person not being a payment in terms of the contract of letting and hiring would not amount to payment thereunder." It would appear that Basnayake, C.J., was there directing his attention in particular to the fact that rent was paid by cheque and the principle he sought to underline was that unless there is an agreement that rent be paid and accepted by cheque there is no obligation upon the landlord to accept payment by cheque. *A fortiori*, therefore, the landlord would be under no obligation to accept

¹ Voet 46.3.1 Gane's Translation.

² S. 2129.

³ Wessels, S. 2130.

⁴ Wessels S. 2133, Pothier S. 464.

⁵ 1903 T. S. 185 at 195.

⁶ (1960), 58 C. L. W. 64, 62 N. L. R. 409.

the cheque of a third party. It is in this context that the observations in that case are to be understood, and the learned Chief Justice was not there considering the question whether a third party could under the Roman-Dutch law make payment due from one of the contracting parties. Indeed had the learned Chief Justice been considering this matter from the point of view of such a principle, there is no doubt that due reference would have been made to the Roman-Dutch authorities on payment by a third party, and there is no citation of any authority on this question. I would therefore interpret the statements in that case in the limited sense which I have explained earlier and not in the sense that there is any principle of law denying a third person the right to make payment of the debtor's obligation under the contract.

In the result, it seems clear that under our law the abandoned wife who remains in the premises can tender the rent on behalf of the husband so as to keep the tenancy alive and that the landlord when the rent is tendered has an obligation to receive it. Hence, when the petitioner continued her husband's practice of depositing the rent with the Municipality she was tendering the rent on her husband's contract as she was entitled in law to do, and when the rent was so tendered the landlord was under an obligation to receive it in payment. The rent in consequence was not in arrear when plaint was filed or when judgment was entered.

Summarising, then, the result of the foregoing discussion, we see that the principles of Rent Control legislation, despite the lack of express provision in that behalf, afford recognition to the deserted wife to the extent of giving her a right to be upon the premises so long as the husband is entitled to the protection of the Acts. In association with this principle we see also a right in the wife, both by the principles of Rent Control legislation and by the principles of the Roman-Dutch law, even to pay the rent and perform the obligations of tenancy, so that rent was not in fact in arrears at any time. She cannot be deprived by the land lord of her right of occupation unless and until the tenant is duly deprived of his protection in accordance with law. Till such time she has the status, both in relation to the tenant and in relation to the landlord, of a protected person.

The next question, then, is whether there has been such due termination of the tenant's protection in accordance with law.

The consent decree, if valid, would of course constitute such a due termination and we must therefore examine the effect upon that consent decree of the finding that rent was not in fact in arrears at the time.

Now, under the Rent Control Act the Court has no jurisdiction, unless permission of the Rent Control Board has been first obtained, to entertain an action in ejectment unless one or other of the circumstances specified by the Act exist, such as that rent has been in arrear. As a Divisional

Bench of this Court held in *Ibrahim Saibo v. Munsoor*¹, with reference to actions instituted without the permission of the Board where such permission was necessary, "any decree entered in an action in which such authority, being necessary, has not been obtained, would be a nullity because a court acting without such authority would be acting without jurisdiction. It has to be noted that it is not competent for a defendant to contract out of such a requirement or by waiver tacit or express to obviate the necessity for compliance with it."² In *Dep v. Nagorathnam*³ His Lordship the Chief Justice having referred with approval to this passage expressed his entire agreement with these observations concerning the nature and scope of the protection afforded to tenants by the Rent Restriction Act. As Halsbury puts it "The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect."⁴

Parties may however admit the existence of such circumstances which vest the court with jurisdiction, in which event the courts often, as they are entitled to do, enter decrees in ejectment by consent. As Atkin L.J., said in *Barton v. Fincham*,⁵ cited with approval in *Nugara v. Richardson*,⁶ "If the parties admit that one of the events had happened which gave the court jurisdiction and if there was no reason to doubt the bona fides of the admission, the court was under no obligation to make inquiry as to the question of fact." Gratiaen, J. citing this principle in *Nugara v. Richardson* observed that the provisions of the Rent Restriction Ordinance did not in any way fetter the right or the duty of the court to give effect to lawful compromises willingly entered into in a pending action between a landlord and his tenant.

If therefore the admission is a bona fide admission, any judgment entered upon the basis of that admission is one entered with jurisdiction and would be unimpeachable even if the facts admitted are proved to be incorrect.

If however the admission is not made bona fide, the matter would not fall within the principle set out in *Barton v. Fincham* and indeed if it were made with an improper motive which would amount to fraud, the judgment based thereon would in accordance with the oft repeated principle that "fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice"⁷ be liable to annulment⁸. This result would ensue whether the fraud be that of one or more of the parties to the case⁹.

¹ (1953) 54 N. L. R. 217.

² *Ibid.*, at p. 224.

³ (1954) 56 N. L. R. 262 at 264.

⁴ Halsbury, 3rd vol. 15, p. 205, S. 384.

⁵ (1921) 2 K. B. 291.

⁶ (1949) 51 N. L. R. 116.

⁷ *Duchess of Kingston's case* 1776, 2 Smith L. O., 13th ed., 664 at 651.

⁸ Halsbury, 3rd ed., vol. 15, p. 203, S. 383.

⁹ Halsbury, 3rd ed., vol. 22, p. 790, S. 1669.

Having already reached the result in the present case that rent was not in arrears, it remains for us to examine further whether the making of that admission was so tainted as to bring it within the principles I have now mentioned.

There would appear to exist in the present case the strongest circumstances establishing fraud on the part of the tenant in consenting to this decree and also circumstances suggestive indeed of collusion on the part of the landlord in this act of the tenant. The tenant had denied in his answer that rent was in arrears and he quite clearly knew that his wife had tendered payment of the rents, as was evidenced by his summoning her to give evidence on his behalf. She was present in court but was nevertheless not called but the tenant on the contrary consented to judgment. Moreover, while apparently, for the purpose of satisfying the court of its jurisdiction, he admitted nominally that rent was in arrears and therefore consented to a liability in damages, he has taken care so to arrange the settlement as to save himself from any financial liability whatever in the event of ejection. He was of course aware that his wife and children were upon the premises but he has permitted the specific insertion into the terms of settlement of the harsh if not cruel provision that writ of possession is to issue *forthwith*—a term we rarely if ever find any tenant consenting to in any court of trial, and least so when it means the ejection of a member of his own family. Whatever the feelings of the tenant were towards his wife, he must surely have been aware of his duty of providing shelter, if not to his wife at least to his children. By that provision he secures the dual result of the immediate ejection of a wife and family whom he was powerless in law to eject so long as his protection lasted, as well as of a total immunity as far as he was concerned, to damages. The suggestion of fraud on his part which the petitioner makes and which the learned judge was strongly inclined to believe, stands amply proved by these circumstances. Moreover the court order which was obtained as a result was aimed not only at a person whose right to remain in occupation was protected by law but at one who by laying out her own money, though in payment of her husband's debt, would have had a very special ground of complaint over and above the average deserted wife, if despite her care and sacrifice to keep the tenancy alive she was to be ejected on the false basis that rent was in arrears.

Passing now to the conduct of the landlord, his refusal to accept the rent although it was tendered in the tenant's name and the subsequent filing of action on the basis that the tenant was in arrears, despite this fact; the way in which he agreed to save the tenant from any financial liability in the event of immediate ejection despite the knowledge which he is shown on the evidence to have had that the deserted wife and children of the tenant were upon the premises— all this is suggestive that the landlord had joined hands with the tenant as the petitioner alleges, in order to secure her eviction. Moreover he was thereby obtaining an ejection order to which he would not have been entitled had the facts been correctly represented to court.

I think therefore that there was good ground for the petitioner's allegation of collusion on the part of the landlord and for the judge's suspicions in this regard, though I would hold that on this matter, unlike in respect of the tenant's conduct, the element of fraud, though strongly probable, has not been conclusively proved to exist.

For the reasons set out I conclude therefore that the consent judgment was obtained by fraud on the part of the tenant (and indeed probably of the landlord as well) with a view to depriving of her right of occupation, a person specially protected by law. The admission of arrears which gave the court jurisdiction to enter decree was not made bona fide. The admission was incorrect in fact. The consent judgment is in the circumstances a nullity.

Acting in the exercise of this Court's powers in revision I would set aside the Commissioner's order refusing stay of execution and also the consent decree entered on 19th May 1969 and remit the case to the learned Commissioner for trial on the basis of the legal principles I have indicated. The petitioner will have the costs of this application and of the inquiry in the court below.

Order set aside and case set back for further proceedings.
