

1948

Present : Basnayake J.

DIAS BANDARANAYAKE, Appellant, *and* PERERA,
Respondent.

S. C.160—C. R. Colombo 3,784.

*Landlord and tenant—Notice to quit—Waiver—What constitutes it—Action under
Small Tenements Ordinance—Withdrawal—Excess of jurisdiction—Res judicata.*

Waiver of a notice to quit by a landlord requires some positive act. Failure of proceedings to evict a tenant does not amount to waiver of a notice already given.

The withdrawal of proceedings under the Small Tenements Ordinance for the reason that the monthly rental of the premises was in excess of its jurisdiction does not operate as *res judicata*.

APPPEAL from a judgment of the Commissioner of Requests, Colombo.

H. W. Jayewardene for plaintiff, appellant.

N. Kumarasingham for defendant, respondent.

Cur. adv. vult.

March 11, 1948. BASNAYAKE J.—

The plaintiff appellant let to the defendant respondent part of premises bearing assessment No. 66, Modera Street, Mutwal in Colombo, at a monthly rental of Rs. 25. The present action is for ejection of the defendant respondent from the said premises, for arrears of rent and for damages at Rs. 25 per mensem from July 1, 1946.

Of the ten issues framed at the trial the following three were tried as preliminary issued :—

- (a) Was the notice to quit referred, to in the plaint the subject matter of the case No. 2,602 of this court ?
- (b) Was the said case withdrawn unconditionally by plaintiff ?
- (c) If so can plaintiff maintain that action on that said notice to quit ?

The learned Commissioner of Requests answered issues (a) and (b) in the affirmative and issue (c) in the negative. The present appeal is from the decision of the learned Commissioner of Requests that there has been a waiver of the notice given by the plaintiff appellant to the defendant respondent on May 30, 1946.

The action referred to in issue (a) is an action under the small Tenements Ordinance which provides for a special procedure for ejecting overholding tenants of premises to which the Ordinance applies. Although I have examined the proceedings of that action as appearing in the exhibit D1 produced by the defendant respondent I find nothing therein to indicate that that action was withdrawn. There appears an affidavit by the tenant stating that the action is not in conformity with the Small Tenements and the Rent Restriction Ordinances and asking that the rule *nisi* be discharged. The only order one finds in D1 thereafter is a decree which reads .—

“ It is ordered and decreed that the Rule *Nisi* be and the same is hereby discharged with costs fixed at Rs. 10.50 and costs of summoning witnesses, if any ”.

If the averment in the plaint in the present action, which is not denied by the defendant respondent, that the monthly rent of the premises in question is Rs. 25 is correct it is clear that the proceedings under the Small Tenements Ordinance were misconceived, for that Ordinance does not apply to premises rented at a sum exceeding twenty Rupees a month exclusive of rates. I have not been referred to, nor am I aware of any principle of law to the effect that the failure of proceedings to evict a tenant operates as a waiver of the notice given by the landlord.

Waiver is the passing by an occasion to enforce a legal right whereby the right to enforce the same is lost. (tomlins Law Dictionary Vol. II.). In the case of a contract of tenancy mere lying by is no waiver, there must be some positive act on the part of the landlord, which act, however, if done, is a waiver in law. A common instance of such an act is receiving rent after the forfeiture of a lease for a period subsequent to the forfeiture. It is settled law that a valid notice to quit cannot be waived by the party giving it, so as to restore the tenancy determined by it, except by acts or conduct of both parties which amount to the creation of a new tenancy.

The most recent restatement of this principle is to be found in the case of *Loewenthal v. Van houten and another*¹. There is no evidence of such waiver in this case. Waiver is never presumed. It must be clearly proved (*United Biocope Cafes, Ltd., v Mosely Buildings, Ltd.*)² and the onus of proof rests on the person who alleges it (Voet Bk. 16.2 para. 3). He must show that the landlord with full knowledge of its right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. (*Laws v. Rutherford*)³.

It is clear from the principles I have stated above that even if the proceedings under the Small Tenements Ordinance had been withdrawn by the landlord's agent who brought it the withdrawal cannot be regarded in the present case as a waiver of the landlord's rights. The fact that this action was instituted before the expiration of the month in which the order in the case under the Small Tenements Ordinance was made is a clear indication of the landlord's intention to enforce his rights. Counsel for the defendant respondent maintained that the plaintiff appellant was precluded by sections 34 and 406 of the Civil Procedure Code from maintaining the present action. As I have already pointed out the earlier proceedings were not withdrawn and it is therefore unnecessary to deal with this argument. Section 34 of the Civil Procedure Code does not in my opinion apply to proceedings instituted under enactments such as the Small Tenements Ordinance which provide for special remedies. A person taking advantage of such an enactment is required when proceeding thereunder to conform to the procedure and adopt the forms therein prescribed. He is not free to do what section 34 of the Civil Procedure Code enjoins in regard to actions in general. He is confined by the terms of the Statute whose aid he is invoking and is not entitled to bring in matters which do not fall within the scope of the enactment. As I have indicated above proceedings in ejectment cannot be brought under the Small Tenements Ordinance in respect of a house whose rent is over Rs. 20 a month exclusive of rates.

The appeal is allowed with costs and the case is remitted to the learned Commissioner in order that the remaining issues may be tried.

Appeal allowed.

