

1986

*Present* : Sirimane, J., and Alles, J.

W. L. P. DASSANAYAKE, Appellant, and J. B. KUMARA-  
KULASINGHE, Respondent

*S. C. 533/63—D. C. Colombo, 50,356/M*

*Set-off—Conditions which must be satisfied before a claim for set-off can be allowed—  
Meaning of term “debt”—Landlord and tenant—Action for recovery of arrears  
of rent.*

Before a claim for set-off can be entertained, there must be an ascertained sum clearly due from the plaintiff to the defendant at the time of the institution of the action.

Accordingly, in an action for recovery of arrears of rent due in respect of premises A, the tenant is not entitled to set off a sum overpaid by him as rent to the plaintiff in respect of certain other premises B, if such overpayment can be ascertained only by virtue of the terms of a Supreme Court decree obtained subsequently by the tenant upon an appeal preferred by him earlier from a judgment according to which there was no overpayment of rent in respect of premises B at the time when the action for rent due on premises A was instituted.

**A**PPEAL from a judgment of the District Court, Colombo.

*N. E. Weerasooria, Q.C.*, with *M. M. K. Subramaniam*, for the plaintiff-appellant.

*C. Ranganathan, Q.C.*, with *J. V. C. Nathaniel*, for the defendant-respondent.

*Cur. adv. vult.*

January 16, 1966. ALLES, J.—

The facts of this case are not in dispute and may be briefly stated :

The plaintiff, who was the owner of premises No. 22, Nimal Road, Bambalapitiya, instituted this action against his tenant, the defendant, for arrears of rent, ejectment from the premises in question and for damages at Rs. 62/78 per mensem from 1.7.60 until he is quieted in possession. The notice to quit was given on 31.5.60 requesting the defendant to quit the premises on or before 30.6.60. According to the plaint no rent was paid from 1.10.59 till 30.6.60 and the arrears of rent claimed by the plaintiff in his plaint amounted to Rs. 565/02.

The defendant filed amended answer over two years later and, while admitting the tenancy, claimed that he was not in arrears of rent. According to the defendant he was also the tenant of the plaintiff in respect of premises No. 204, Galle Road, Bambalapitiya. In respect of these premises plaintiff had sued the defendant for ejectment in C. R. Colombo Case No. 67881. The learned Commissioner in that case gave judgment for the plaintiff on 4.11.59 for a sum of Rs. 111, ejectment and damages at the rate of Rs. 58/50 as from 1.11.57. From this judgment and decree the defendant appealed and on 9.12.60 in appeal the judgment and decree of the Court of Requests was varied and the damages were reduced from 58/50 to 29/25 per mensem from 1.11.57 and to Rs. 10 from 1.6.58 to 21.5.59. The answer in the present case was filed only after these variations made in favour of the defendant were made known. It was submitted by the defendant that in view of this variation, there was an overpayment of Rs. 592/75 by him, which sum was in the hands of the plaintiff and it was successfully argued on behalf of the defendant in the Court below, that when this sum and the additional sum of Rs. 168/89 claimed as repairs is set off against the damages claimed in the present case, the defendant is not in arrears of rent. The learned District Judge held that the defendant was entitled to set off the sum decreed as over paid in respect of premises No. 204, Galle Road, against the arrears of rent due for premises No. 22, Nimal Road.

The plaintiff has appealed from this finding and the only question that now arises in appeal is whether the learned Judge was right in arriving at this conclusion in dismissing the plaintiff's action.

In deciding this case in favour of the defendant, the learned Judge has followed the dictum of Soertsz, S.P.J. in *Wijemanne & Co., Ltd. v. Fernando*<sup>1</sup> that where a tenant is in arrears with his rent for one month, any sum in the hands of the landlord overpaid as rent extinguishes *pro tanto* the rent due. That was a case in respect of a contract of tenancy for premises No. 26, Bagatelle Road, and there was clear evidence that in respect of the rent of those premises the learned Judge had miscalculated the amount due as rent and consequently there was an amount to the credit of the tenant as rent in the hands of the landlord. This decision would be authority, if at all, for the proposition that where there is money in the hands of the landlord as rent for any particular premises, such a sum can be set off in respect of any arrears of rent due from the tenant, for those premises. In the present case the contract of tenancy was in respect of premises No. 22, Nimal Road and the overpayment in respect of rent paid for premises No. 204, Galle Road on another contract of tenancy. Counsel for the defendant-respondent submitted that if there was any sum of money in the hands of the landlord belonging to the tenant from any source whatsoever, the tenant is entitled to set off such sum against arrears of rent, without any intimation to the landlord. I am unable to agree with such a general proposition nor do I think that the dictum in *Wijemanne & Co. Ltd. v. Fernando* supports this view.

Counsel for the plaintiff-appellant argued with considerable force that the learned District Judge had misdirected himself in law in coming to the conclusion that the defendant was entitled to claim a set-off on the facts of this case. The plaint in the present case was filed on 4.7.60. The judgment in C.R. Colombo Case No. 67881 in favour of the present plaintiff was delivered on 4.11.59 and according to that decree there was no money in the hands of the plaintiff belonging to the defendant at the time of the institution of these proceedings. The rights of the plaintiff must be considered at the time of the filing of the action (*Silva v. Nona Hamine*<sup>2</sup>) and on 4.7.60 there was no debt due from the plaintiff to the defendant. Mr. Weerasooria relied on the decision of Basnayake, C.J. in *Mukthar v. Ismail*<sup>3</sup> where the learned Chief Justice quotes from Sweet's Law Dictionary that

“ . . . a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor).”

and that

“ A ‘debt’ denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.”

In the present case on 4.7.60 the defendant had no right to receive and enforce any alleged overpayment.

<sup>1</sup> (1946) 47 N. L. R. 62 at 64.

<sup>2</sup> (1906) 10 N. L. R. 44 (F. B.).

<sup>3</sup> (1962) 64 N. L. R. 293 at 299.

According to Wessels Law of Contract in South Africa (2nd Edn. Vol. II, p. 695) in the case of compensation of liquid debts (the only type of debt to which compensation applies) there are two conditions, both of which must be satisfied, before a claim for set-off can be entertained—

- (a) The amount of the debt must be determined ; and
- (b) the fact that the debt is actually due must be clear.

With regard to (a) above, Wessels says quoting De Villiers C.J. in *Kruger v. Van Vuuren's Executors* 1886 5 S. C. 162, 168 that

“ Until every element of uncertainty is removed as to the amount opposed in compensation, set-off is not allowed.”

In *Arie Kgosi v. Kgosi, Aron Moshete and Others*<sup>1</sup>, the Court held that if the actual amount has to be determined or approved by a third party, the debt cannot be compensated. Thus, although when costs are awarded it is known upon what principles they will be taxed, and although when taxed they are regarded as being due from the moment of the award, yet until the amount of the costs actually due is *ascertained* by the taxing master, they cannot be opposed in compensation.

With regard to (b) above, Wessels citing Voet (16.2.17) says that if a debt is subject to a suspensive condition or at a future date, there is no debt until the condition is fulfilled or the time arrives, and therefore such a conditional debt cannot be pleaded in compensation. Finally, Wessels says that the defendant who wishes to oppose in compensation a debt due to him by the plaintiff must be in a position to demand payment of the debt.

Applying these principles to the relation between the parties on the date the present action was instituted (4.7.60) the following facts emerge :

- (a) There was *no ascertained sum* due from the plaintiff to the defendant. On the contrary on that date the plaintiff had a valid decree for an ascertained sum against the defendant.
- (b) It was not clear whether any debt was actually *due* from the plaintiff to the defendant. At most there was only a possibility that a debt might become due if the defendant succeeded in his appeal.
- (c) The defendant was *not entitled to claim payment* from the plaintiff at the time compensation was supposed to operate.

We are therefore of the view that the learned District Judge was in error in holding that the defendant was entitled to set-off the amounts overpaid by him in C.R. Colombo Case No. 67881 against the arrears of rent in the present case. Consequently, the plaintiff was entitled to succeed in his action. In his prayer the plaintiff claimed damages in a sum of Rs. 565/02 being rent due from 1. 10. 59 to 30. 6. 60 at the rate of Rs. 62/78

<sup>1</sup> (1921) T. P. D. 524.

per mensem but in his evidence he said that at the time of the filing of the action the rent due was from January, 1960 to June, 1960. This would amount to Rs. 376/68 being damages from January, 1960 to June, 1960 at Rs. 62/78 per mensem. The defendant is also entitled to credit in a sum of Rs. 168/89 being the plaintiff's share of the cost of repairs effected to these premises.

The amount due to the plaintiff at the time of filing action was therefore Rs. 207/79, and the action should have been filed in the Court of Requests. We set aside the judgment and decree dismissing the plaintiff's action, and enter judgment for the plaintiff in a sum of Rs. 207/79, ejection and damages at Rs. 62/78 per month from 1.7.60 till the defendant is ejected. The evidence shows that the defendant has made certain payments after action was filed. He will, of course, be entitled to credit for those payments when damages are computed.

In regard to costs, it was the plaintiff's exaggerated claim for arrears of rent which necessitated the filing of the action in the District Court. We are not disposed to grant him costs in the lower Court, but he will be entitled to costs of appeal, to be taxed as in the case of an appeal from the Court of Requests.

SIRIMANE, J.—I agree.

*Decree set aside.*

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