1964

Present : **Basnayake, C.J., Abeyesundere, J., and Sirimane, J.**

V. C. MAMMOO and 2 others, Appellants, *and* M. P. K. MENON, Respondent

S. C. 65/61—C. R. Colombo, 76475

Landlord and tenant—Monthly tenancy—Action for recovery of arrears of rent only—Subsequent action for ejectment—Maintainability—Notice to quit—Effect of subsequent waiver, tacit or otherwise—Res judicata—*Civil Procedure Code, ss. 33, 34, 207.*

(i) A landlord who, before the notice to quit sent by him to his monthly tenant has taken effect, sues the tenant for recovery of arrears of rent only, but not for ejectment, is entitled to bring a separate action in ejectment after the same notice to quit has taken effect.

Plaintiffs had let certain premises to the defendant on a monthly tenancy. On 2nd April 1960 notice of termination of the tenancy was given requiring the defendant to deliver possession of the house by 31st May 1960. Before the expiry of the notice, however, namely on 26th May 1960, action No. 50064 was instituted in the District Court for recovery of all arrears of rent due up to that date. Consent decree was entered in that action on 2nd February 1961. After the notice to quit of 2nd April 1960 had taken effect, the present action was instituted on 2nd June 1960 for the ejectment of the defendant and for damages per mensem commencing from 1st June 1960.

Held, that the decree in action No. 50064 could not operate as *res judicata* in the present action.

Ebhramjee v. Simon Singho (62 N. L. R. 261) considered.

(ii) After notice of termination of a monthly tenancy, an unqualified acceptance of rent amounts, in the absence of other facts which indicate the contrary, to a tacit renewal of the contract of tenancy. After such a tacit renewal, the landlord is not entitled to go back on it and sue for ejectment as if the notice of termination is in force. But the renewal, tacit or otherwise, does not deprive the landlord of the right to sue for the recovery of arrears of rent.

APPEAL from a judgment of the Court of Requests, Colombo. This appeal was referred under section 48A of the Courts Ordinance to a Bench of three Judges.

C. Ranganathan, with *M. T. M. Sivardeen,* for Plaintiffs-Appellants.

H. W. Jayewardene, Q.C., with *D. S. Wijewardene, M. S. M. Nazeem* and *M. Sivanathan,* for Defendant-Respondent.

June 3, 1964. BASNAYAKE, C.J.—

This is an action by the plaintiffs carrying on business under the business name of P. B. Umbichy against the defendant who was employed as a technician at their Mills for his ejectment from premises No. 221

2—R 824—1,855 (9/64)

Baseline Road, Colombo, and for damages at the rate of Rs. 58·12 per mensem commencing from 1st June 1960 till the defendant and all persons holding under him are ejected from those premises and peaceful possession thereof is restored to the plaintiffs. The defendant while admitting that he took the premises in question from the plaintiffs on a monthly tenancy denied that the rental was payable on the 10th day of each month. He denied that he had failed and neglected to pay the rents due after 31st March 1958 and stated that the question of rental had been settled in D.C. Colombo Cases Nos. 47445 and 50064. When issues were framed at the trial, the following issue was suggested by counsel for the defendant, although there was no plea of *res judicata* in the answer :—

> "5. Do the judgments and decree in D.C. Colombo Nos. 47445 and 50064/M operate as *res judicata* ?"

The issue was not in regard to a matter that arose on the pleadings and should not have been adopted by the Commissioner. At the trial the plaintiffs took up the position that the defendant paid monthly rentals up to 31st March 1958 and thereafter defaulted, and that on 16th June 1959 notice of termination of tenancy on 31st July 1959 was given to the defendant by the plaintiffs. On 8th July 1959, however, before the tenancy terminated, action No. 47445/M was instituted by the plaintiffs for the recovery of a sum of Rs. 819·30 being arrears of rent due for the months of April to December 1958 and for January to June 1959. In that action too, the defendant admitted that he had become a monthly tenant of the plaintiffs, but denied that he was in arrears of rent. He asserted—

(*a*) that the plaintiffs bought from him four soap frames at a cost of Rs. 3,000,

(*b*) that it was agreed that the rental was to be deducted from the said sum of Rs. 3,000,

(*c*) that he had paid all rents which fell due,

(*d*) that there was yet a sum of Rs. 1,321·46 due and owing from the plaintiffs to him, and

(*e*) that in accordance with the agreement the said sum of Rs. 1,321·46 should be set off against future rents.

In the course of those proceedings the parties appear to have settled the matter, because the decree that was entered on 23rd May 1960 is a consent decree which reads—

> ". . . , it is ordered and decreed by consent that the defendant do pay to the plaintiff the sum of Rs. 819·30 together with legal interest thereon from 8.7.59 to date and thereafter on the aggregate amount of the decree till payment in full and costs of suit, payable by instalments of Rs. 75 a month commencing from 30.6.60."

While the earlier action was still pending, on 2nd April 1960 a second notice of termination of defendant's tenancy was given requiring him to deliver possession of the house he occupied by 31st May 1960. Before the expiry of that notice, however, namely on 26th May 1960, a second action No. 50064/M was instituted by the plaintiffs for the recovery of a sum of Rs. 600·82 being the rents due for the months July 1959 to May 1960. In that action also the defendant admitted that he had become a monthly tenant of the plaintiffs, but once more denied that the rent was payable on the 10th of each month. He also denied that he was in default of rent for the months for which the claim had been preferred. This action too appears to have been settled because the decree that was entered, dated 2nd February 1961, is a consent decree. It reads—

> ". . .,it is ordered and decreed by consent that the defendant do pay to the plaintiff the sum of Rs. 600·82 together with legal interest thereon from 27.5.60 to date and hereafter on the aggregate amount of the decree till payment in full and costs of suit payable by monthly instalments of Rs. 25 commencing from 15.2.61."

The second notice appears to have been given on the basis that the contract of tenancy which had been terminated by the earlier notice had been tacitly renewed. The second action that was filed was also brought on the basis of a subsisting tenancy, for what was claimed was rent and not damages for over-holding despite the notice terminating the tenancy in July 1959. The defendant acquiesced in that position and admitted a subsisting tenancy. He cannot therefore now be heard to say that the June 1959 notice was in force in May 1960 when the second action for arrears of rent was brought, and that the plaintiff should have then prayed or was entitled to pray ejectment.

The plaint in the present action was filed on 2nd June 1960 after the April 1960 notice had taken effect. The learned Commissioner held that the two previous judgments operate as *res judicata* and dismissed the plaintiff's action, and the present appeal is from that order.

This appeal came up before my brother Sri Skanda Rajah who reserved for the consideration of more than one Judge the question of *res judicata* arising hereon.

In *Ebhramjee v. Simon Singho* [1] Pulle J. held that a landlord who had sued for arrears of rent only, but not for ejectment, was not entitled to bring a separate action in ejectment based on the same notice to quit. He says—

> "Having intentionally relinquished his claim to ejectment the landlord should not be allowed to pursue that in separate proceedings."

In this case two separate actions were brought for the recovery of rent that had accrued but had not been paid. In the first action the plaintiffs were not entitled, even if they wished to do so, to add a prayer

[1] *(1960) 62 N. L. R. 261.*

for ejectment because the tenancy had not terminated on the date on which the action was brought. The second action was brought after the second notice had been served, but before the date fixed therein for the determination of the tenancy. It was common ground in the second action that there was a subsisting contract of tenancy tacitly created and their conduct indicated that both parties regarded the June 1959 notice as not in force.

It was not open to the plaintiffs in either of those actions to ask for ejectment of the detendant; so that the present action does not seek any relief which had been claimed or could have been claimed in the previous actions. The plea of *res judicata* does not therefore lie.

The basic principles of the law of *Res Judicata* have been written into our Civil Procedure Code. Its provisions are designed as far as may be to prevent a multiplicity of actions. With this end in view—

(*a*) section 33 enacts that, as far as practicable, every regular action shall be so framed as to afford ground for a final decision upon the subjects in dispute, and to prevent further litigation concerning them,

(*b*) section 34 enacts—

(i) that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action,

(ii) that if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished, and

(iii) that a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; and that if he omits except with the leave of the court obtained before the hearing to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted,

(*c*) section 207 enacts that all decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties and goes on to explain what is the extent of the finality in these words—

"Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties."

Now the expression " cause of action " is defined in the Civil Procedure Code as "the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil

an obligation, the neglect to perform a duty, and the infliction of an affirmative injury." Subject to the context in which it occurs, the expression " cause of action " has to be understood in the sense in which it is defined. In the instant case the expression occurs in the context " or put in issue between the parties to an action upon the cause of action for which the action is brought ". The material words are " upon the cause of action for which the action is brought". What is the cause of action for which the two earlier actions were brought ? It is the non-payment of rent, and not the failure to quit the premises upon termination of the tenancy. What was claimed in the July 1959 action was arrears of rent (D.C. Colombo 47445/M), the cause of action being non-payment of rent. It was not open to the plaintiff to pray ejectment in that action. Similarly in the May 1960 action (D.C. Colombo 50064/M) it was again arrears of rent alone that was claimed, although notice of termination of tenancy had been given in June 1959. The cause of action being non-payment of rent, was it open to the plaintiff in that action to pray ejectment ? We think not, because the pleadings show that there had been after the June 1959 notice and before the May 1960 action a tacit renewal of the contract of tenancy which was terminated by the second notice in April 1960 upon which the third action was brought. It is only in the instant action that damages and ejectment are prayed. The cause of action in the instant case is the failure to quit and deliver possession of the premises on the termination of the tenancy. We find ourselves unable to agree with the view taken by Justice Pulle in regard to the meaning of " cause of action ".

Where there has been a breach in the case of a contractual relationship like that between landlord and tenant, it is open to the parties by agreement or conduct to renew the contractual relationship either expressly or tacitly. Where there has been such a renewal, it is not open to the landlord to go back on it and proceed as if there had been no renewal. The acceptance of rent without more, after notice of termination of a monthly tenancy, has been held, in the absence of other facts which indicate the contrary, to amount to a tacit renewal of the contract of tenancy. After such a tacit renewal, it has been held that the landlord is not entitled to go back on it and sue for ejectment as if the notice of termination was in force. In such a case a fresh notice of termination is necessary before an action in ejectment can be instituted. But the renewal tacit or otherwise does not deprive the landlord of the right to sue for arrears of rent though he cannot pray ejectment. We are therefore of the opinion that the learned Commissioner is wrong in his conclusion.

We accordingly allow the appeal with costs both here and in the court below, set aside the order of the Commissioner and send the case back for trial *de novo*.

ABEYESUNDERE, J.—I agree.

SIRIMANE, J.— I agree.

Appeal allowed.