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

S. M. M. SIRIWARDENA, Appellant, *and* H. MUDIYANSELAGE APPUHAMY *et al.*, Respondents

S. C. 262/67 (F)—D. C. Kandy, 7264/L

Landlord and tenant—Monthly tenancy—Practice of paying rent in advance for one year at a time—Whether landlord can terminate the tenancy on a month's notice—Informal "lease" in writing—Position of "lessee" as against a person who subsequently obtains a notarial lease from owner.

Where, in a case of monthly tenancy, the practice has been that rent should be paid in advance for one year at a time, such practice does not convert the tenancy into a yearly tenancy or disentitle the landlord from terminating the tenancy on a month's notice; the consequence of such a termination would be that the landlord will become liable to refund the excess rent which he had taken in advance.

Quaere, whether a person in possession of a land under a non-notarial writing purporting to be a lease of the land for a period exceeding one month is a trespasser or a monthly tenant as against a person who subsequently obtains a valid notarial lease from the owner of the land.

APPEAL from a judgment of the District Court, Kandy.

P. Somatilakam, for the defendant-appellant.

C. R. Gunaratne, for the plaintiffs-respondents.

Cur. adv. vult.

November 9, 1970. H. N. G. FERNANDO, C.J.—

This appeal was heard by a Bench of three Judges for two reasons : *firstly*, the two Judges before whom the appeal was first argued were unable to agree upon the decision of the appeal ; and *secondly* they were doubtful of the correctness of the decision in *Hinniappuhamy v. Kumarasinghe*[1].

In the case just mentioned, it was held that a person in possession of a land under a non-notarial writing purporting to be a lease of the land for a period of 4 years was a trespasser ; hence he could not, as against a person holding a valid notarial lease from the owners of the land, claim to be a monthly tenant of the land and to be therefore entitled to notice of termination of his tenancy as a condition precedent to the institution against him of an action for ejectment.

We are satisfied that the decision is not applicable on the facts of the instant case. No document was here produced which purported to lease to the defendant or his predecessor the premises from which the plaintiffs

[1] *(1957) 59 N. L. R. 565.*

1*——K 8133—2,225 (10/71)

seek to eject him. There was evidence that the father of the defendant had been in possession of the premises from 1947 until the time of his death in May 1963 and that he had sometimes paid Rs. 60 to the plaintiffs' predecessor Kalu Banda as rent in advance for a period of 12 months. Even if such payments can, without more, properly give rise to an inference that the parties had entered into some informal agreement for a lease for a long period, that inference is fully rebutted by other evidence.

In 1953, Kalu Banda instituted an action against the defendant's father for ejectment and for arrears of rent. The plaint in that action averred that the defendant's father had taken these premises on a monthly rent of Rs. 7·50, and sought his ejectment on the footing of the rent having been in arrears. The averment that the defendant's father was a monthly tenant was admitted in the answer. The defence pleaded was that the rent had not been in arrear, because rent had been tendered but not accepted by Kalu Banda. In appeal from the decree entered for ejectment, Gratiaen J. held that " the practice between the parties was that rent should be paid in advance for one year at a time ", and also that the appellant had tendered a sum of Rs. 60 on 19th February 1953 as rent from 1st July 1953 to 30th June 1954. In view of the refusal to accept this payment in advance, the appellant was held not to be in arrear.

It will thus be seen that there was firstly an admission by Kalu Banda of a monthly tenancy, and secondly a finding by this Court that the practice in regard to that tenancy was that rent should be paid in advance for one year at a time. Such a practice does not convert the tenancy into a yearly tenancy or disentitle the landlord from terminating the tenancy on a month's notice ; the consequence of such a termination would be that the landlord will become liable to refund the excess rent which he had taken in advance.

In the face of the admission by Kalu Banda that the defendant's father was a monthly tenant, and of the findings to which I have referred, the plaintiffs in the present action could have established the existence of an informal long-term lease only by the production of some writing or of definite evidence to that effect. This they did not even attempt to do, for they called no evidence. The ground on which they sought ejectment was the quite different ground that the tenancy terminated, either on the death of Kalu Banda or on the death of the defendant's father. On this ground the plaintiffs succeeded in the lower Court.

Kalu Banda died in February 1963, having accepted rent in advance for the period ending December 1963, and the defendant's father continued in possession of the premises. The defendant's father himself died in May 1963, and the defendant thereupon gave notice under s. 18 of the Rent Restriction Act to the 3rd plaintiff (the son of Kalu Banda) that the defendant would be paying the rent of the premises previously tenanted by his father.

Kalu Banda had in September 1959 conveyed these premises to the 1st and 2nd plaintiffs, but he had as already stated continued to take the rent until the time of his death. Reliance was not placed at the trial on this conveyance to set up the position that the plaintiffs were not the landlords of the premises whether before or after the death of Kalu Banda. The only question agitated in the address of the plaintiff's Proctor was that the defendants had failed to prove that the premises were subject to the Rent Restriction Act, and that the notice under s. 18 of the Act was therefore ineffective.

The defendant produced a Proclamation of June 10, 1947 declaring that the Rent Restriction Ordinance of 1942 shall be in force in the following area :—

> "That part of the Palegampaha Korale Village area in the Divisional Revenue Officer's Division of Uda Hewaheta in the Nuwara Eliya District, which was the former Sanitary Board town of Padiyapelella."

The learned trial Judge held that there was no evidence to show that the premises in this case are situated in the area described above. The premises, as described in the plaint, are stated to be situated at Padiyapelella, and in the absence of any evidence to the contrary, the Judge in my opinion would have been justified in assuming that the Padiyapelella referred to in the schedule to the plaint is the same place as is referred to by that name in the proclamation.

There are other reasons why the findings of the learned Judge cannot be sustained. In the earlier action for ejectment already mentioned, Kalu Banda did not rely merely on the fact that he had terminated the tenancy of the defendant's father. Instead he relied also on the ground of arrears of rent, and on the ground that the premises were required for his own occupation. Both these latter grounds were rejected in the judgment in appeal in that action ; but the very fact that Kalu Banda had relied on these two grounds establishes that to his knowledge the Rent Restriction Act applied to the premises. That being so, there was an admission by the plaintiffs' predecessor in title of the matter which has been disputed by the plaintiff's Proctor in the present action. In the absence of any evidence to contradict the defendant's statement that these premises are situated in the proclaimed area, the defendant is quite entitled to rely on Kalu Banda's former admission. I hold that in this way there was sufficient proof that the premises are within the Act.

In view of the circumstance that the defendant's appeal must succeed on the grounds which I have stated, Counsel for the appellant did not present any argument as to the correctness of the judgment in *Hinniappuhamy v. Kumarasinghe.* That being so, a considered opinion expressed in the present case on the correctness of that judgment would be obiter. Nevertheless, since I share the doubt which two judges have already

entertained as to the correctness of that judgment, I trust that there will be an early opportunity to re-consider it.

The appeal is allowed, and the plaintiff's action is dismissed with costs in both courts.

ALLES, J.—

My Lord the Chief Justice has dealt with the facts fully and I am in agreement that, on the facts established, the appeal is entitled to succeed and that the plaintiff's action should be dismissed with costs.

Since no argument was presented by Counsel at the appeal in regard to the correctness of the decision in *Hinniappuhamy v. Kumarasinghe*, I prefer not to express any opinion in regard to that decision.

WEERAMANTRY, J.—

I agree with His Lordship the Chief Justice that the appeal is entitled to succeed and that the plaintiff's action should be dismissed with costs.

I do not express any views regarding the decision in *Hinniappuhamy v. Kumarasinghe*, that question not having been fully argued before us.

Appeal allowed.