1947 *Present : Dias J.*

KULAWANSE, Appellant, and JAYARATNE, Respondent.

S. C. 64—C. R. Colombo, 337.

Landlord and tenant—Rent Restriction Ordinance—Acceptance of rent after action—Waiver of notice—Question of fact.

The question whether the receipt of rent by a landlord after notice to quit and after the filing of an action amounts to a waiver of the notice to quit is a question of fact which depends on the circumstances of each case.

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

H. W. Jayewardene, for the defendant, appellant.

J. Fernandopulle, for the plaintiff, respondent.

Cur. adv. vult.

July 2, 1947. DIAS J.—

The plaintiff respondent sought to recover possession of premises bearing assessment No. 121A, Galle Road, Mount Lavinia, of which the defendant is the tenant. The plaintiff claimed possession on two grounds :— (*a*) Under section 8, proviso (b), of the Rent Restriction Ordinance, No. 60 of 1942, on the ground that he had given the defendant notice to quit on July 30, 1946, but that in spite of this, the defendant was in wrongful occupation ; and (*b*) under section 8, proviso (c), on the ground that the premises are reasonably required for occupation as a residence for himself. The learned Commissioner of Requests has found against the defendant on both points.

In regard to the first point, under the notice quit, the defendant should have vacated the premises by the end of August, 1946. The plaintiff filed this action on September 3, 1946. Therefore, as the Commissioner of Requests holds, the plaintiff was not waiving the notice to quit by accepting the rent for August, 1946. The plaintiff, however, admits that the defendant paid him rent until the end of January, 1947. Therefore, by accepting that rent even after he had filed action, I am of opinion the plaintiff must be deemed to have waived the notice to quit. The Commissioner deals with this part of the case as follows. He says : " As notice to quit was given at the end of August, plaintiff's acceptance of rent for August is quite in order. It is not known when the defendant paid the September rent. Defendant should have produced the receipt. The plaintiff filed action on September 3, 1946. Receiving rent after action filed is not waiver of rent ". The evidence shows that notice to quit was not given at the end of August but at the end of July. There was no need for the defendant to produce any rent receipts when the plaintiff definitely stated in his evidence : " Defendant has paid me rent to the end of January 1947. Each month's rent was payable by the tenth of the month, but sometimes he paid it towards the end of the month also which I accepted. I am not producing my counterfoil book of receipts ". I do not follow the Commissioner of Requests when he says

that the receipt of rent after action filed is not waiver of rent. In *Fonseka v. Naiyan Ali*[1] it was held that the receipt by the landlord of rent after notice to quit, and after filing an action against the tenant, would amount to a waiver of the notice to quit unless, of course, there is some specific agreement not to waive the notice. It is a question of fact in each case whether there has been a waiver of the notice to quit—*Virasinghe v. Peris*[2]. In my opinion, in the circumstances of this case, there has been a clear waiver by the plaintiff of the notice to quit.

The burden of proof is on the plaintiff to satisfy the Court after a consideration of all the surrounding circumstances and of the relative position of both the landlord and the tenant, that the need of the plaintiff is greater than that of the defendant. This matter has been considered in a series of judgments of this Court including a decision of a bench of two Judges in *Wijemanne v. Fernando*[3]. The Court before coming to a conclusion must consider and discuss various matters, such as the alternative accommodation available for the landlord and tenant; whether injury to the health of either party may result from an order for possession being made or refused; or whether some pecuniary loss might directly flow from one being turned out. These are questions of major importance which the learned Commissioner of Requests has failed to refer to or discuss in his judgment.

The defendant is carrying on a school known as the Duke's Correspondence College in these premises and he employs a staff of clerks. There is also a printing press in the premises. Defendant says, and there is no reason to disbelieve him, that he would shift if he was able to obtain another suitable house. To turn him out from the premises would involve him in severe financial loss. The Commissioner of Requests appreciates this for he has not ordered the immediate ejectment of the defendant. I can attach no importance to the fact that after this action was filed, the plaintiff informed the defendant that a client of his, one Jayetilleke, had a house available. The defendant says he saw Jayetilleke who demanded an exorbitant rent and also demanded an advance of two years' rent. The Commissioner of Requests dismisses this evidence with the observation that it is unlikely that Jayetilleke would demand "black market rent". The rights of the parties to an action are to be determined as at the date the action was filed. In this case that date is September 3, 1946. The plaintiff told the defendant about Jayetilleke on September 9, 1946—see P 1. Therefore, at the date the action was filed the defendant had no suitable alternative accommodation available to him. There is no proof that he had such accommodation even at the date of trial.

On the other hand, the plaintiff owns two houses—No. 120A of which the defendant is in possession, and No. 120 which is vacant although let to an Excise Inspector who is said to be still paying him rent. It is to be noted that the plaintiff refrained from calling this Excise Inspector and did not produce his counterfoil book of rent receipts from which it might have been ascertained whether the Excise Inspector was still paying rent to the plaintiff. Furthermore, the plaintiff is living in premises

[1] *(1920) 22 N. L. R. 447.* [2] *(1943) 46 N. L. R. 139.*
[3] *(1946) 47 N. L. R. 62.*

No. 313, Galle Road. He says that his landlord, one Abeyratne, has given him notice to quit, but the plaintiff who is a proctor and knows the value of evidence, failed to produce the notice to quit.

Had the Commissioner of Requests considered the position of the two parties in the light of the principles laid down for his guidance, he would have come to the conclusion that the defendant's need was far greater than that of the plaintiff.

I set aside the decree appealed against and dismiss the plaintiff's action with costs both here and below.

Appeal allowed.