1954 *Present :* **Nagalingam S.P.J. and de Silva J.**

K. KANAGALETCHUMY *et al.*, Appellants, *and* A. M. M. MARIKAIR, Respondent

S. C. 256—D. C. Batticaloa 798L

Lease—Non-payment of rent and taxes—Forfeiture.

In the absence of a forfeiture clause or an express condition a lease is not liable to be cancelled for breach of a covenant to pay rent unless (1) the non-payment of rent is deliberate and persistent or contumacious, (2) the lessee is in arrear of rent for two years and (3) the lessor gives the lessee notice of terminating the lease if the arrears are not paid.

An undertaking by a lessee to pay taxes in respect of the leased premises is a condition for the breach of which the lessor is entitled to a cancellation of the lease.

APPEAL from a judgment of the District Court, Batticaloa.

C. Renganathan, for the 1st and 2nd defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *E. Jayaweerasingham*, for the plaintiff respondent.

Cur. adv. vult.

December 21, 1954. DE SILVA J.—

The two questions which come up for decision in this appeal are (1) In what circumstances is a lessor entitled to a cancellation of a lease for non-payment of rent which the lessee has undertaken to pay and (2) Is a lease liable to be cancelled for a breach of an undertaking to pay taxes, when the indenture of lease itself is silent as to what is to happen in the event of a breach of these covenants ?

The plaintiff-respondent who is the owner of the premises described in the amended plaint leased the same to one Kanapathipillai by bond P 1 dated 26th March, 1948, for a period of 10 years at a rental of Rs. 3,000. That part of this deed which is material to this case reads :—

> " I do hereby declare that the sum of Rs. 1,000 paid by the lessee as advance on this date should always remain with me as deposit, that at the end of every month he should pay me a sum of Rs. 25 as monthly rent and obtain receipt, that he should pay the taxes due to the U. C., effect necessary repairs and put up the buildings required according to his convenience and render proper accounts to me, that at the expiration of the said term of lease I shall repay this money together with the sum of Rs. 1,000 received as advance, that in default thereof he can sue for and recover the same, that I shall settle all disputes and objections that may arise as regards lessee's possession and that the lessee and his substitutes, heirs, executors, administrators and assigns can possess the leased property until the expiration of the said term of lease. Thus declaring and binding myself and my substitutes, heirs, executors, administrators and assigns and giving over lease possession of the said property I have executed this deed of lease.
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> I the said Murugappar Kanapathipillai the lessee consenting to the above said conditions have accepted this lease."

The lessee died on or about 31st October, 1949, having devised by his last will all his property to his daughter, the 1st defendant, a minor, whose guardian ad litem is the 2nd defendant, her mother. The 3rd

and 4th defendants are sub-tenants of the 1st defendants, but they have since the institution of this action vacated the premises. No rent or taxes whatsoever has been paid on this lease by the original lessee, or by anyone else. Taxes were paid by the plaintiff during the pendency of the lease.

The plaintiff instituted this action on 2nd February, 1952, for a cancellation of the lease and the ejectment of the defendants to recover arrears of rent and damages. Although the 1st and 2nd defendants in their answer denied the averment in the plaint that the lessee had failed to pay rent or taxes, the learned District Judge held that neither rent nor taxes was paid by the lessee and that therefore there was a breach of covenant which entitled the plaintiff to claim a cancellation of the lease and to recover arrears of rent and taxes paid by him. Against this judgment the 1st and 2nd defendants have appealed. Mr. Renganathan who appears for the appellants contends that the lease cannot be cancelled for the non-payment of rent or taxes in the circumstances of this case.

The finding of the learned District Judge that no rent or taxes was paid by the lessee is not canvassed. The deed P 1 does not contain a forfeiture clause for non-payment of rent or taxes. The undertakings to pay rent and taxes are referred to in P 1 as " conditions ". A " condition " is a stipulation the breach of which gives rise to a right to treat the contract as repudiated. Morice in his treatise " English and Roman Dutch Law " (2nd Edition page 177) states, " If it appears from the terms of the lease that the fulfilment of certain stipulations are conditions of the lease the Courts will enforce forfeiture". He bases this observation on a passage appearing in Kersteman's *Woorderboek under Huur* which reads :—" A lease for a period of successive years contracted on condition that the rent shall be paid without any delay on certain fixed dates, on the lessee proving in default to do so is immediately cancelled and extinguished with all its results and consequences". The words " without any delay " appearing in this passage indicates that time is of the essence of the contract. The language of P 1 does not permit a similar construction being placed on it. If it was understood between two parties to this document that a failure to pay rent was to result in the cancellation of the lease that intention could have been expressed by using such language from which this intention could have been inferred. It is not clear whether the Tamil word in P 1 which has been translated as " conditions " bear the same connotation as the latter word does when used in the strict legal sense. The whole document has to be considered to ascertain the real intention of the parties in regard to the payment of rent. When forfeiture is involved the document has to be construed strictly. If two interpretations can be placed on it the one more favourable to the lessee must be adopted. On proper examination of it, I do not think it is possible to say that the relevant Tamil word even if it has been correctly translated to mean " conditions " was used in respect of rent, in the sense of a stipulation the breach of which gives a right to treat the contract in P 1 as at an end. In my view these words with reference to rent do not signify anything more than a covenant.

Therefore it is necessary to consider whether according to the common law (Roman Dutch Law) a breach of a covenant to pay rent entitles the landlord to claim a cancellation of the lease.

It is well settled law that it is not in every case of failure to pay rent the landlord is entitled to ask for a cancellation of the lease. To claim such a right the non-payment must be deliberate and persistent or contumacious. That is not all. The lessee must be in arrear of rent for 2 years. For, Voet says that a landlord is entitled to " expel " a tenant when he is " for 2 whole years in arrear of rent " (Commentary on The Pandects 19.2.16). The same view is expressed by Grotius (3.9.11). Mr. Renganathan contends that the tenant should not only be in arrear of rent for a period of 2 years but that the landlord should also give him notice of terminating the lease if the arrears are not paid. Neither Voet nor Grotius expressly refers to the necessity of such a notice, but Huber in his work entitled "The Jurisprudence of My Time", states, " It should, however, be understood that a landlord who wishes to avail himself of this 2 years right, must observe the due order of law, and is therefore obliged to give notice ". It is true that here Huber is referring to the law applicable in Friesland, a province of Holland. It is necessary to consider whether this law prevailed in the other provinces of Holland, as well. In South Africa the Courts have constantly followed that this notice on the defaulting tenant was strictly necessary. *Jones v. Colonial Government* [1]. The question whether this notice was required in the other provinces of Holland was considered by de Villiers C.J. and answered in the affirmative in the case *Estate Thomas v. Kerr and another* [2]. In that case, while referring to the decision in *James v. Colonial Government*, he observed : " The Court, however, went further, and finding that no notice of cancellation had been given to the lessee expressed the opinion on the authority of Huber (Hed Recttsc 3 : 9 : 1 and 2) that in the absence of such a notice the Court would not have ordered cancellation if an action for the purpose had been instituted by the Government. Huber's observations apply to the law of Friesland where the departure from the practice and principles of Roman Law was less marked than in the other provinces of the Netherlands, and if, according to him, a notification putting an end to the lease was necessary, it would *a fortiori* have been necessary in the other provinces ". Although Voet does not refer to the necessity of this notice when he states that the landlord is entitled to cancel a lease when the tenant is in arrear of 2 years rent, yet later he makes this significant observation : " In those cases in which expulsion of tenants before the expiry of the lease is allowed by the lease or by the laws or by the usages, it has to be observed, that the tenants of rural and urban tenements must not be disturbed without the public authority of a judge, *when they have refused to quit after private warning* " (19 : 2 : 18). The words " when they have refused to quit after private warning ", clearly contemplate that notice had to be given to the defaulting tenant before judicial proceedings were instituted. Therefore the requirement of this notice should be considered to be a part of the Roman Dutch Law which governs us. In the instant case the plaintiff did not give notice to the original lessee or the 1st defendant of his intention to

[1] *15 S. C. 245 at 249.*

[2] *20 S. C. 354.*

terminate the lease when 2 years rent was in arrear. It is true that the plaintiff on 15.9.48 gave the notice P 3 to the original lessee informing him that he was in arrear of rent and that he should consider the lease as having been cancelled. But, at that time the lessee was not in arrear of rent for 2 years. That being so, the notice is ineffectual for the purposes of this action. It would appear, however, that it is sufficient to give the notice before the expiry of the 2 years, provided it is stated in it that the lease would stand cancelled in the event of the rent being in arrear for 2 years. Such a notice has to be given within 12 months immediately preceding the expiry of the 2 years. Accordingly the plaintiff is not entitled to a cancellation of the lease on the ground of non-payment of rent.

His remedy should be a claim to recover arrears of rent. In this case the plaintiff set up a claim for rent also. In any event he is entitled to that relief.

In regard to taxes, Mr. Renganathan argued that the lease cannot be cancelled for non-payment of taxes. The lessee gave a solemn undertaking to pay the taxes to be levied by the Urban Council. The non-payment of these taxes would result in drastic consequences to the plaintiff. This agreement to pay the taxes is binding on the lessee although the plaintiff continued to be liable to pay them as far as the Urban Council was concerned. The lessee however failed to fulfil the agreement to pay the taxes. If the plaintiff had not been vigilant enough to pay these taxes himself there was a grave and imminent risk of the leased premises being sold up at the instance of the Urban Council. The taxes had to be paid quarterly. I have not been able to discover the views of Voet or Grotius on this matter, but according to Huber a landlord is entitled to give notice terminating the lease for non-payment of taxes. He states, " We also said above that similarly to the case of quitrent tenure, notice may be given terminating the lease, if the lessee does not pay the land-tax or floreen-schatting, as we call it " (3 : 9 : 14). There is no time limit fixed within which this notice has to be given. In the notice P 3 there is a reference to the failure to observe the conditions of the lease. Although that notice does not expressly refer to the failure to pay taxes it is sufficient, in my view, to notify the lessee of the fact that he had committed a breach of the agreement to pay taxes. This lessee is not entitled to claim equitable relief for his default in the payment of taxes in view of the fact that he had repeatedly and deliberately refrained from paying the taxes. In these circumstances it is not unfair to hold that the undertaking to pay taxes is a condition for the breach of which the plaintiff is entitled to a cancellation of the lease.

The appeal must therefore fail. Accordingly I dismiss the appeal with costs.

NAGALINGAM S.P.J.—I agree.

Appeal dismissed.