1949 *Present :* **Gratiaen J.**

KOCH, Appellant, *and* ABEYASEKERE, Respondent

S. C. 97—C. R. Colombo, 17,119

Rent Restriction Ordinance—Action for ejectment—Relative claims of both parties.

The claims of a tenant who has failed, in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord whose family does at least possess a home in which they can continue to live.

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

S. J. Kadirgamar, for defendant appellant.

M. M. Kumarakulasingham, with *J. M. Jayamanne*, for plaintiff respondent.

Cur. adv. vult.

December 13, 1949. GRATIAEN J.—

The plaintiff, who is a school-teacher employed at Weligama, rented his bungalow in Nugegoda in March, 1946, to the defendant, who is a clerk. The house has been occupied since that date by the defendant, his wife and child.

On July 25, 1948, the plaintiff gave the defendant three calendar months' notice to quit the house, explaining that he required it for his wife and child " who frequently fall ill here, the climate disagreeing with them ". There is no evidence, however, that the climate in Nugegoda was any more salubrious than that in Weligama. The truth appears to be that although the plaintiff's duties required him to remain in Weligama, he was anxious to make arrangements for the education in Colombo of his daughter who was now of school-going age.

The defendant protested on September 10 that he could not vacate the house as he had not succeeded in finding suitable alternative accommodation. The plaintiff replied that he doubted the genuineness of the defendant's attempts to look for another house but, as far as I can judge, the defendant's *bona fides* in this respect was neither challenged nor disproved at the trial. Indeed, the plaintiff's proctor suggested the names of certain other landlords who might possibly accept the defendant as a tenant, but the defendant has established that this was not correct.

In November, 1948, the plaintiff instituted the present action for ejectment. The provisions of the Rent Restriction Ordinances admittedly apply to the premises in question, and the burden therefore lay on the plaintiff to prove that he reasonably required the house for the occupation of his wife and child. In deciding this issue, it is of course necessary to consider the relative claims of both parties to the contract of tenancy.

The learned Commissioner of Requests decided the case in favour of the plaintiff, and the present appeal is from his judgment. I propose to adopt as substantially correct the learned Commissioner's findings of

fact; as to the inferences to be drawn from these facts, an appellate tribunal is placed in no less advantageous a position than the Court below to arrive at a correct conclusion.

In my opinion there is one circumstance which tips the balance in favour of the defendant, and to which insufficient weight has been given by the learned Commissioner. Whereas on the one hand the tenant had signally failed in his endeavours to find alternative accommodation for himself and his family, the landlord has been more fortunate. Shortly after giving notice to quit, the landlord has succeeded in taking on rent a house in Talangama for his wife and daughter, and from there the child, who is a Roman Catholic, has attended St. Bridget's Convent as a student. Arrangements have been made for taking the child to and from school each day, and although these are not ideal they seem to me to be not inadequate having regard to the difficulties of the present time. Certain minor inconveniences which the plaintiff complains of are surely insignificant when they are compared with the hardships to which the defendant and his family would be subjected if they were ejected from their house with nowhere else to go. In my opinion the claims of a tenant who has failed, in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord whose family does at least possess a home in which they can continue to live. It was suggested at the trial that the defendant could take up residence in the house at Talangama which the plaintiff's wife and daughter now occupy. If that could have been definitely arranged, the defendant would have been unreasonable in refusing to vacate the house in Nugegoda. No such proposal was however made to the defendant before the trial commenced, and at the trial the owner of the Talangama house was extremely non-committal on the point.

In my opinion the plaintiff has failed to establish his claim to be restored to possession of the house in Nugegoda. I therefore allow the appeal and enter decree dismissing the plaintiff's action. The defendant is entitled to his costs of appeal, but as he failed in the lower Court to establish his claim in reconvention in regard to alleged "excess" rent, each party will bear his own costs of trial.

Appeal allowed.

1950 *Present:* Jayetileke C.J. and Pulle J.

ANNAMMAH, Appellant, *and* SUBRAMANIAM, Respondent

S. C. 436—D. C. Jaffna, 462

Divorce action—Non-appearance of defendant—Decree nisi—Requirement of personal service of notice—Civil Procedure Code, ss. 85, 596, 604.

Where owing to the non-appearance of defendant a decree *nisi* is entered in favour of the plaintiff in a matrimonial action the procedure laid down in section 85 of the Civil Procedure Code must be followed and notice of the decree *nisi* must be served personally on the defendant, unless the Court directs some other mode of service.