1954 *Present :* **Pulle J. and Swan J.**

C. N. FERNANDO, Appellant, and M. J. C. FERNANDO, Respondent

S. C. 104—D. C. Colombo, 26,306

Rent Restriction Act—Appropriation of payments—Onerous nature of debt due as rent.

When a tenant who is protected by the Rent Restriction Act owes his landlord not only rent but also money due on certain money lending transactions, any payment made by him must, if its purpose is unspecified, be first appropriated to pay off the arrears of rent. The payment "must be carried to that account which it is most beneficial to the debtor to reduce".

APPEAL from a judgment of the District Court, Colombo.

S. J. Kadirgamar, for the plaintiff appellant.

No appearance for the defendant respondent.

Cur. adv. vult.

May 10, 1954. PULLE J.—

The landlord who is the appellant in this case sought to eject his tenant on the ground that he was in arrears of rent from October, 1950. The action was instituted on the 1st April, 1952. It is not necessary to go into detailed figures as to how the tenant set up the plea that he was not in arrears. He did not give evidence at the trial and the learned District Judge disposed of the case on the basis of the landlord's evidence, except on one material point to which I shall later advert.

Admittedly there was a payment by the tenant of Rs. 554 on the 29th October, 1951. Giving the tenant credit for this sum and two other sums, namely, Rs. 89·76 being the excess rent recovered during the first sixteen months of the tenancy and Rs. 106 being the amount spent by the tenant in effecting repairs, the learned District Judge held that the tenant was not in arrears and dismissed the action.

It is plain on the evidence, and the Judge so finds, that there were monetary transactions between the parties. In regard to the payment of Rs. 544 the landlord stated,

> "Thereafter he paid me Rs. 544. He told me that was all he had and gave me the money and he said it was on account of the loan."

If this was true then clearly the tenant was in arrears but the finding on this point is specific that the Judge did not believe that the tenant requested the landlord to take this amount in payment of the loans. If Rs. 544 was not paid in payment of the loans, then the inference is reasonable that it was on account of rent. The matter, however, does not rest at this point. The letter P15 of 9th June, 1951, written by the tenant to the landlord and the letter P16 of 24th September, 1951,

written to the tenant by the landlord's wife and the reply thereto amply support the finding that Rs. 544 was paid on account of rent and accepted by the landlord on that basis.

An argument was addressed to us that the learned Judge wrongly stated the law to the following effect :

> " Arrears of rent was the more onerous debt and this payment of Rs. 544 should have been appropriated to pay off the arrears due at that time. "

I do not think that the Judge intended to convey that he had any doubts as to the accuracy of the finding based on circumstantial evidence that the payment must have been on account of rent. It was argued that if the tenant did not indicate the purpose for which the payment of Rs. 544 was made the landlord had the choice of applying it in reduction either of the rent or the loan. Reliance was placed on the case of *Leeson v. Leeson* [1] and *Wessels on the Law of Contract in South Africa, Vol. I–p. 692.* The English case no doubt lays down that there must be something more than an intention of the *debtor* uncommunicated to the creditor to amount to an appropriation by the *debtor* but it also says that that intention may be inferred from circumstances known to both parties. Wessels says at paragraph 2295, " If the debtor, when he makes the payment, does not apply the money to a particular debt, the creditor is entitled to appropriate the money, within certain limits, to whatever debt he pleases ". Paragraph 2297, however, states that it is not enough to make the appropriation *in praesenti*, he must also communicate it to the debtor so as to give the latter an opportunity of refusing to pay under such circumstances.

In view of the finding by the Judge which was supported by the evidence the authorities relied on do not support the landlord's contention. He took his stand on the positive allegation that the tenant requested him to apply the money to the loan and his evidence has not been accepted owing to the circumstances which surrounded the payment.

Travelling outside the citations at the argument I would refer to *Walter Pereira's Laws of Ceylon at pp. 772 and 773* which refer to two local cases *Ephraims v. Jansz* [2], *Schokman v. Felsinger* [3], in which it was held that where the purpose for which a payment is made is unspecified " it must be carried to that account which it is most beneficial to the debtor to reduce ". There can be no doubt that as between a debt arising from a money lending transaction and one arising out of a contract of tenancy subject to the Rent Restriction Act the latter is the more burdensome.

Whether the debtor was silent as to how the payment should be appropriated or whether the parties well understood that the payment was made on account of rent, I reach the same result that the appeal fails and should be dismissed.

SWAN J.—I agree.

Appeal dismissed.

[1] *(1936) 2 K.B. 156.*

[2] *(1895) 3 N.L.R. 142.*

[3] *(1872-76) Ramanathan's Reports 317.*