1955 *Present :* **Gunasekara J., Pulle J. and Weerasooriya J.**

K. L. S. SUBBIAHPILLAI, Appellant, *and* M. A. SHERIFF & CO., LTD., Respondent

S. C. 218—D. C. Colombo, 23,718 M

Rent Restriction Act, No. 29 of 1948—Cheques given in payment of rent—Landlord's failure to present them at the Bank—Demand for fresh cheque—Refusal by tenant—Effect on question of rent being "in arrear"—Section 13 (1), proviso.

When a landlord takes cheques from his tenant as conditional payment of rents due, the cheques operate as payment, and the tenant is not in arrear within the meaning of the proviso to section 13 (1) of the Rent Restriction Act unless the cheques are dishonoured on presentment. Nor is the tenant in default where the reason why his cheques have not been realized is that the landlord elected not to present them for payment. If then the landlord returns the cheques and asks for "a fresh cheque to cover the entire rent due" the tenant's liability would be a liability on the cheques and not a liability to pay rent.

Per GUNASEKARA J.—"Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment."

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *C. Manohara* and *P. Navaratnarajah*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *N. C. J. Rustomjee* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

May 13, 1955. GUNASEKARA J.—

This appeal from a judgment of the District Court of Colombo was heard originally by a bench composed of Nagalingam J. and Fernando A. J. and as they were unable to agree as to the decree which should be passed it was reheard by the present bench in terms of section 775 (1) of the Civil Procedure Code.

The action out of which the appeal arises was instituted by the respondent, a limited company, on the 26th October, 1950. The company sought to recover from the appellant a sum of Rs. 3,625 as rent for the period 1st October, 1947, to 28th February, 1950, at the rate of Rs. 125

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a month, for certain premises to which the Rent Restriction Act applied, and for ejectment of the appellant and damages for overholding from the 1st March, 1950. They alleged that damages in respect of the period 1st March to 31st August, 1950, had been paid by the appellant and asked for a decree for damages only in respect of the appellant's occupation after that. The district court gave judgment for the respondent company as prayed for in the plaint. The only ground on which the appeal was pressed was that the learned trial judge had erred in finding for the respondent on an issue as to whether the rent had been in arrear for one month after it had become due and the case was thus brought within the proviso to section 13 (1) of the Rent Restriction Act, No. 29 of 1948

The tenancy began on the 1st April, 1946, and the agreement regarding the time for the payment of rent was that each month's rent should be paid on or before the 10th of the next month. The appellant regularly sent the respondent each month a cheque for the amount of the previous month's rent, and the respondent realized all the cheques except those that represented the rents for the period 1st October, 1947, to 31st January, 1950, which he refrained from presenting for payment. It appears from the evidence of the managing director of the respondent company that it was at the company's own request that the appellant sent them cheques for the rent. The 26 cheques in respect of the period 1st October, 1947, to 30th November, 1949, were returned to the appellant by the respondent's proctor with a letter dated the 24th January, 1950, in which he asked for " a fresh cheque to cover the entire rent due ". He says in this letter that the respondent company did not cash these cheques because " their application before the Rent Board was pending " and that " most of the cheques have grown stale ". (The earliest of the cheques was dated the 7th November, 1947, and the latest the 10th December, 1949.) The application referred to was one made on the 6th October, 1947, for the sanction of the assessment board, which was the predecessor of the rent control board established under the Act, to sue for the ejectment of the appellant. The application was refused on the 7th November, 1947, and the order made by the assessment board was affirmed by the Board of Review on the 29th October, 1948. The letter of the 24th January, 1950, from the company's proctor to the appellant was followed by another of the 30th January, 1950, giving the appellant notice to quit on the 28th February and demanding payment of " all arrears of rent " up to that day. The appellant's proctor replied by a letter dated the 3rd February, 1950, with which he returned the cheques. He said : " The stale cheques sent by your clients are herewith returned. It is the duty of your client to realise the amount due on the cheques as and when cheques are sent ". The company's proctor sent the cheques back with a letter dated the 6th March, 1950, in which he said that the appellant had been aware that the cheques had not been cashed " on account of the application pending before the Rent Control Board " and he repeated his request for a fresh cheque. He also said " If your client still refuses to issue a fresh cheque my client will have no other alternative but to sue your client for ejectment on the ground they are in arrears of rent ". The appellant's proctor replied by a letter dated the

16th September, 1950, returning the 26 cheques once more. After the institution of the action the appellant brought into court the sum of Rs. 3,625, though he denied in his answer the respondent's averment that it was due as arrears of rent.

The learned district judge holds that the payments in question were conditional payments and that the appellant "cannot plead either that the cheques were received by the plaintiff company as absolute payment or that he is discharged merely by reason of the failure to present the cheques for payment before they became stale". He appears to have accepted an argument "that those cheques, although they were conditional payments, had failed to satisfy the condition, and the debt revived when the cheques became stale"; and it is apparently on this ground that he bases his finding that at the time of the institution of the action the rent had been in arrear for one month after it had become due.

In the argument before this court the case for the respondent was put higher than at the trial and it was contended that the giving of the cheques did not amount to even a conditional payment of the rents in question.

The basis of this contention is that while there is ordinarily a strong presumption that the giving of a bill or note on account of a debt is a conditional payment, there is no such presumption in a case where the creditor already possesses a higher remedy: see *Chalmers' Bills of Exchange, 11th edition, pp. 310, 312.* Thus, it was held in *Davis v. Gyde* [1] that a promissory note given and received for rent could not of itself extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note, or operate in suspension of such claim. The question that arose for decision in that case was the sufficiency of a plea to a avowry of rent, that the landlord had received from the tenant on account of the rent a promissory note and the note was not yet due for payment. It was held that the plea was insufficient as it made no averment that the note was received by way of satisfaction or upon an agreement with the landlord that it should suspend his claim of rent. Again, in *Re J. Defries and Sons, Limited* [2], it was held that the mere giving of a cheque is not conditional payment of a secured debt so as to release the security. The reason for the presumption of conditional payment and the qualification of the rule was explained by Maule J. in *Belshaw v. Bush* [3]. He said :—

> "If an agreement were expressly made, that the bill should operate as payment, unless defeated by dishonour, etc., there is no reason why a suit brought while the payment remained undefeated, should not be barred by such agreement; and the cases in which a bill given on account of the debt has been held to operate as such payment, are to

[1] *(1835) 2 Ad. & E. 623; 111 E. R. 240.*
[2] *(1909) 2 Ch. 423.*
[3] *(1851) 11 C. B. 191, at 206; 138 E. R. 444, at 450.*

be supported by considering that such an agreement is to be implied by law from giving and receiving such security on account of a debt on simple contract : and the cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment, does not arise, when, if it did, the plaintiff would be deprived of a better remedy, than an action on a bill as in *Davis v. Gyde* [1] in which, the debt being for rent, the plaintiff would part with a remedy by distress : and in *Worthington v. Wigley* [2], where, the demand being on bond, the plaintiff might, in certain events, have recourse to other funds than he could in an action on a simple contract. "

The fact of a landlord taking a bill of exchange from his tenant for rent due is, however, some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill (*Palmer v. Bramley* [3]); although it does not raise a legal implication of such agreement. As was pointed out by Kay L.J. in *Palmer v. Bramley* [3] what was decided in *Davis v. Gyde* [1] was that the plea was insufficient and not that the giving of the bill was no evidence of an agreement to suspend the landlord's right of distress.

In the present case the learned district judge's finding is not based on a view that the mere giving and receiving of a cheque raises a legal implication of an assent by the landlord that the cheque shall operate as a conditional payment. Besides, there is here more than the mere giving of a cheque, for the rent was always paid by cheque and was so paid because, in the words of the company's managing director, the company " wanted cheques to be sent ". Moreover, even when the 26 cheques were returned what the company asked for in their place was a fresh cheque for the total amount. In my opinion there is sufficient evidence to support the finding that the cheques were taken by way of conditional payment, and there is no reason to disturb that finding. (I may observe in passing that the view is expressed in Chitty's *Treatise on the Law of Contracts* [4] that there appears now to be no difference between specialties and simple contract debts, and that if nothing is said as to terms the original debt remains but the remedy is suspended till the maturity of the bill.)

The condition upon which these cheques were received as payment of the rents due must be understood to be that the debt would revive if they were not realized (*Currie v. Misa* [5]) and they would operate as payment unless they were presented and dishonoured (*Marreco v. Richardson* [6]). There is no evidence of presentment or dishonour, and it is contended for the appellant that the learned district judge's finding

[1] *(1835) 2 Ad. & E. 623 ; 111 E. R. 240.*
[2] *(1837) 3 Bing. N. C. 454.*
[3] *(1895) 2 Q. B. 405.*
[4] *20th Edition, p. 291.*
[5] *(1875) L. R. 10 Eq. 153.*
[6] *(1908) 2 K. B. 584.*

that the debt had revived is therefore erroneous and the rent was not in arrear at the material time. It is also contended that even if the learned judge is right in this finding all that follows is that the appellant's liability to pay the debt is not discharged, but not that the rent is in arrear within the meaning of the proviso to section 13 subsection (1) of the Rent Restriction Act.

It was held by my brother Weerasooriya in *Vadivel Chetty v. Abdu* [1] that the meaning of the expression " in arrear " in that proviso is that " the payment of the rent has been in default " and that " a tenant who has tendered to the landlord the rent as it fell due and has taken all reasonable steps towards the landlord's acceptance of it cannot be regarded as in default in paying the rent ". The effect of the proviso is to take away from a tenant, in the circumstances there set out, the protection given to him against being sued for ejectment without the sanction of the rent control board. It seems clear that in the context the expression must imply not merely that the debt remains undischarged but that it is undischarged in consequence of some default on the part of the tenant and not that of the landlord. Otherwise the protection given to the tenant is rendered nugatory, for the landlord can prevent the debt from being discharged by merely refusing to accept the rent when it is tendered. In such a case there would be no default on the part of the tenant and therefore the rent, though unpaid, would not be in arrear within the meaning of the proviso. Nor is the tenant in default where the reason why his cheque has not been realized is that the landlord elected not to present it for payment. As was observed by my brother Gratiaen in the case of *Thangadorai Nadar and Brothers v. Esmailjee* [2], " it would indeed be a remarkable result if a landlord by resorting to the simple device of postponing presentation of his tenant's cheque until the bank refused to honour it (for no other reason than that it had become stale) could deprive the tenant of his statutory protection ".

Mr. Jayawardene argued that though the appellant was not in default while the cheques were in the hands of the respondent, he became liable to pay the amount of the cheques within a reasonable time after they were returned to him and was therefore in default when he failed to discharge this liability. But any such liability would be a liability on the cheques and not a liability to pay rent. Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment.

In my opinion there is no evidence that the rent was in arrear for one month after it became due, and the order for the ejectment of the appellant and for damages must therefore be set aside. The order for the payment

[1] *(1953) 55 N. L. R. 67 at 71.*

[2] *(1954) 56 N. L. R. 343.*

to the respondent of the sum of Rs. 3,625, which the appellant deposited in court in satisfaction of the respondent's claim, must be affirmed.

It was urged on behalf of the respondent company that in any event no order for costs should be made in favour of the appellant, for the reason that he had raised an issue as to whether his contract of tenancy was a contract with the company and had failed on that issue. It appears from the evidence of the respondent company's managing director, Sheriff, that he was the owner of the demised premises and that the company (which was a private company in which he held the majority of the shares) managed on his behalf this property and certain others of which he was the owner. It also appears both from his own admissions and the relevant documents, that the application made to the assessment board for sanction to sue the appellant for ejectment and the appeal from the order of this board purported to be made by him personally and not by the respondent company. Sheriff explained that this was the result of a mistake made by his proctor, and the explanation was accepted by the learned judge. Having regard to the state of facts in which the issue was raised I do not think that there is sufficient reason why the appellant, who has substantially succeeded in both courts, should not be given his costs. The order made by the learned judge in respect of costs must be set aside and the respondent company must be ordered to pay the appellant's costs in both courts.

PULLE J.—I agree.

WEERASOORIYA J.—

I agree.

Although as a general rule the tendering of a cheque is not equivalent to payment, the Court will not require very strong evidence to show that the parties contemplated that payment might be made by cheque. This appears to be the view not only of the English Courts but also of the South African and American Courts. In this connection see the case of *Scheider and London v. Chapman* [1] which is a decision of the South African Courts. The evidence in that case was that the vendor had accepted from the purchaser a cheque in part payment of the purchase price. The purchaser sent by post on the day before the balance of the purchase price had to be paid another cheque in settlement of the amount due. The cheque was, however, received by the vendor only on the day after payment had to be made. He refused to accept it on the ground that payment had been made too late and he sued the purchaser for breach of contract and damages. The argument of counsel for the purchaser

[1] *(1917) T. P. D. 497.*

that sending the cheque did not amount to payment (and not that it was sent too late) was rejected by the eminent Judges (de Villiers, J.P., Wessels and Bristowe, JJ.) who heard the appeal in that case. Having regard to the course of business between the parties de Villiers, J.P., stated in his judgment " It seems to me the Court would be encouraging the veriest technicality—seeing that the money to meet the cheque was in the bank—if we were to hold that payment was not made as it should have been ". The judgment of de Villiers, J.P., also contains the following citation from a judgment of the American Courts in the case of *Gunby v. Ingram* [1] : " It may be conceded, we think, under universal authority, that a strictly good tender cannot be made by the offer of a cheque for the amount due. But it is well established that the creditor may waive the character of the money which is tendered by raising no objection to the payment, for the reason that it is not the character of money or specie that is called for in the obligation, or by raising some other objection which would exclude the idea of objecting on that ground. Considering the fact, which is a matter of common knowledge, that probably ninety per cent. of the business of the mercantile world is now done through the medium of cheques, drafts, &c., instead of by the transfer of gold and silver coins, or even of any other species of legal tender, it would be a dangerous rule to announce, and one which could easily be turned into an engine of oppression, if the tender of a paymont . . . . could not be made by cheque, where no question was raised as to the value of the chequo tendered, and especially, as in this case, where it was shown that the former payments involved in this transaction had been made by cheques, which were not objected to by the creditor.".

There is nothing in law which precludes a creditor, who already possesses a higher remedy than mere recourse to the debtor for payment of the amount due, from accepting a cheque in settlement of the debt. The authorities cited by Mr. Jayewardene, who appeared for the respondent, in support of his contention that, since in the present case the respondent had the higher remedy of the landlord's lien, the giving of the cheques did not amount to even a conditional payment of the rents in question have been fully discussed by my brother Gunasekara in his judgment, and it is clear that those authorities do not help Mr. Jayewardene in that contention as the evidence is that previous payments of rent had throughout been made by cheque and accepted by the respondent without demur. As pointed out by my brother Gunasekara, the evidence goes further, because the managing director of the respondent company stated that the company " wanted cheques to be sent ". In the letter P31 dated the 24th January, 1950, the respondent's proctor requested the appellant to send a fresh cheque covering not only the amount of the twenty-six cheques returned with that letter and representing the rents for the months of October, 1947, to November, 1949, but also the rent for December, 1949, which apparently had not then been paid by the appellant.

[1] *36 Law Rep. Annot. N. S. p. 232 at 234.*

It is not in dispute that had those cheques been duly presented at the Bank on which they were drawn they would have been paid. Even if, as a result of the respondent having chosen to withhold their presentment and their having become stale in the meantime, the appellant's obligation to pay the rents represented by the cheques was not discharged, there was, in my opinion, a valid tender of payment of the rents by the appellant when he sent the cheques from time to time to the respondent. "The effect of a tender, though it will not release a debtor from the necessity of making payment or fulfilment in terms of his tender if subsequently called upon to do so, is to release the debtor from all the consequences which would otherwise have arisen from his omission to make such payment or fulfilment"—*Maasdorp's Institutes of South African Law* [1].

I next turn to the argument of Mr. Jayewardene that even if the appellant was not in default while the cheques were in the respondent's hands, the failure of the appellant to pay the rents represented by them within a reasonable time after they were returned to him rendered him in default in regard to those rents for a period of one month (and more) since he had not paid them even at the date of the institution of this action. Mr. Jayewardene conceded that the date on which the rent becomes due has to be determined with reference to the contract of tenancy, but he contended that if at any time after that date the tenant is, for a period of one month, in default in payment of the rent, he would lose the statutory protection conferred on him under the Rent Restriction Act, No. 29 of 1948, against a suit for ejectment. According to Mr. Jayewardene the period of "one month" referred to in S. 13 (1) of that Act should, in a case like the present one, be computed from the expiry of the reasonable time (which would be a varying period depending on the circumstances of each case) within which the payment must be made. A similar argument seems to have been advanced in the case of *Vadivel Chetty v. Abdu* [2] but, as stated in my judgment in that case, it was not necessary to decide the point since the action was filed long before the expiry of one month even so computed. Although the point arises for decision in the present case, in my opinion the words "the rent has been in arrear for one month after it has become due" in paragraph (*a*) of the proviso to S. 13 (1) mean that the rent has been in arrear for one month reckoned from the date on which it became due, and the argument, therefore, fails. Moreover, the appellant's liability to pay the rents in question always existed notwithstanding the giving of the cheques. That liability was not enhanced in any way, nor did a fresh liability arise, on the return of the cheques.

I also agree with the order proposed by my brother Gunasekara as regards costs.

Appeal allowed.

[1] *Vol. IV (The Law of Delicts and the Dissolution of Obligations), 5th. ed., p. 160.*
[2] *(1953) 55 N. L. R. 67.*