UVAIS
v.
PUNYAWATHIE

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
DHEERARATNE, J.
SC APPEAL NO. 14/88
CA NO. 331/77 (F)
DC COLOMBO 1961/RE
JUNE 10 AND 11, 1991.

Landlord and tenant – Increase of rent after notice of termination – Does it create a new tenancy? – Civil Procedure Code, Sections 75, 146, 148 and 150 (Explanation 2).

Held :

(1) The variation of one term of the contract by an increase of rent does not create a new contract of tenancy. The landlord can demand the increased rent without withdrawing the notice of termination.

(2) It is sometimes permissible to withdraw admissions on questions of law but admissions on questions of fact cannot be withdrawn. Quite apart from any question of estoppel or prejudice, to permit admissions to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleadings and issues. Section 75 not only requires a defendant to admit or deny the several averments of the plaint, but

also to set out in detail, plainly and concisely the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence ; sections 46 (2) and 148 oblige the Court upon the pleadings or upon the contents of the documents produced, and after examination of the parties if necessary, to ascertain the material propositions of fact or of law upon which the parties are at variance, and thereupon to record issues on which the right decision of the case depends ; section 150 explanation (2), prohibits a party from making at the trial, a case materially different from that which he has placed on record and which his opponent is prepared to meet ; the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

Per Fernando, J. : "The alleged absence of an agreement to pay an increased rent was not a fact or circumstance on which the defendant relied for his defence ; nor a proposition on which the trial Court found the parties at variance ; evidence on that matter was prohibited to the defendant, and superfluous for the plaintiff ".

Cases referred to :

1. *Gunaratne v. Thelenis* (1946) 47 NLR 433.
2. *Siddick v. Natchiya* (1954) 55 NLR 367.
3. *Vincent v. Sumanasena* (1954) 55 NLR 478.
4. *Samaraweera v. Ranasinghe* (1958) 59 NLR 395.
5. *Theivandarajah v. Sanoor* (1967) 71 NLR 12.
6. *De Silva v. Perera* (1928) 29 NLR 206.
7. *Sellahewa v. Ranaweera* (1956) 59 NLR 66.
8. *Abdul Rahaman v. Justin* (1973) 79 NLR 97.
9. *Nadarajah v. Naidu* (1965) 68 NLR 230.

APPEAL from order of District Court of Colombo.

Eric S. Amerasinghe, P.C. with P. A. D. *Samarasekera, P.C., Gamini Jayasinghe* and *Miss Rajepakse* for substituted plaintiff-appellant.

H. L. de Silva, P.C. with *Laksman Perera* and *N. M. Musafer* for defendant-respondent.

Cur. adv. vult.

September 05, 1991.

FERNANDO, J.

The plaintiff-appellant (the " plaintiff ") purchased the premises in suit in 1968, and the tenant, the defendant-respondent (the " defendant "), attorned to the plaintiff ; the authorised rent was Rs. 529.28. On 17.12.69 the plaintiff gave the defendant notice to quit, to enable the plaintiff to demolish the building and construct

a new building ; the plaintiff then applied to the Rent Control Board for written permission under section 13 (1) of the Rent Restriction Act, No. 29 of 1948, as amended, to institute action for the ejectment of the defendant, the defendant however continued in occupation paying rent at the rate of Rs. 529.28 per month. In March, 1970 the Municipal Council increased the assessment of the annual value of the premises and in consequence the authorised rent became Rs. 552.41 per month. The defendant objected to this assessment. While the inquiry into those objections was pending, the plaintiff by letter dated 8.5.70 informed the defendant :

> "....the assessment for taxes..... has been revised and you are liable to pay damages from 1.4.70 at the rate of Rs. 552.41. This notice is given to you without prejudice to the notice to quit served on you and the application pending before the Rent Control Board."

The defendant continued to pay Rs. 529.28 per month as rent. The plaintiff accepted these payments on account of damages due and without prejudice to his right to file action. By letter dated 19.9.70 the defendant informed the plaintiff that she had remitted the usual rent because the appeal against the assessment had not yet been decided, and that thereafter the correct amount with all arrears, if any, would be paid. On 19.5.71 the defendant's appeal against the assessment was dismissed, and accordingly the authorised rent as from 1.4.70 was Rs. 552.41. By letter dated 30.6.71 the defendant requested information as to the total amount which she had to pay by way of increased rent, and by letter dated 13.7.71 the plaintiff furnished particulars as to the increased amount payable as damages. The defendant however continued to pay Rs. 529.28 per month. The plaintiff thereupon gave a second notice to quit dated 27.9.71, calling upon the defendant to vacate the premises on 31.12.71 on the ground of arrears of rent. Action for ejectment was instituted on 18.1.72 ; in the plaint the first notice to quit was not even mentioned ; it was pleaded that as a result of an increase in taxes, the authorised rent had been raised to Rs. 552.41 per month, and that the defendant had been given notice to pay rent at that rate from 1.4.70. It was further pleaded that the defendant had agreed to pay the authorised rent upon the determination of her appeal against the increased assessment of the annual value, but, despite the dismissal of that appeal, had failed and neglected to pay such authorised rent. In

her answer the defendant expressly admitted that she had agreed to pay the increased rent but had not done so, and the entire proceedings at the trial related to defences based on her inability to pay the sums due because of illness and financial difficulties. Those defences were rejected and judgment was given for the plaintiff.

In the Court of Appeal it was contended on behalf of the defendant that the main issue arising upon the plaint was whether there had been arrears of rent ; that the plaintiff had demanded damages and that the defendant had offered to pay an increased amount as rent ; there was thus no demand for payment of an increased rent, and therefore no agreement to pay the higher amount. This was admittedly a new point not raised at the trial, and it was contended that it was a question of law arising upon the evidence. It was further submitted that the admissions in the answer were in the teeth of the correspondence and arose from a reconstruction of the documents by the defendant's lawyers ; such admissions were not binding and could be withdrawn unless there is an estoppel ; the plaintiff had not acted to his prejudice and hence the defendant was entitled to raise that matter. These submissions were upheld ; the Court of Appeal held that the plaintiff had failed to prove that the defendant was in arrears of rent and allowed the appeal. Leave to appeal was granted by the Court of Appeal. The plaintiff died while the appeal was pending in the Court of Appeal, and the substituted plaintiff-appellant was substituted in his place.

Three questions arise. Did the parties agree, after notice of termination, that the respondent would pay an increased rent of Rs. 552.41 per month? If so, did the acceptance of such rent by the appellant create a new tenancy? Was the respondent entitled at the stage of appeal, to withdraw the admissions that she had agreed to pay the increased rent, but had failed to do so?

Learned President's Counsel for the defendant contended that while the plaintiff demanded damages, the defendant tendered rent, and hence there was no agreement as to the character of the sums paid. While it is correct that a sum offered by the debtor in satisfaction of a particular liability cannot be appropriated by the creditor in satisfaction of a different liability, that is not the position here. Quite apart from the admissions in the answer, analysis of the correspondence reveals that there was no uncertainty as to the

liability which both parties had in mind–namely the payment due in respect of the occupation of the premises. Although one described it as " rent ", and the other as " damages ", no mistake or misunderstanding resulted ; and the notice to quit dated 27.9.71 referred to arrears of rent : thus there was agreement that an increased rent would be paid ; but despite this, the defendant failed to pay the increase in rent, and was in arrears when notice to quit was given.

It is well established that the acceptance of rent by the landlord after notice of termination does not create a new tenancy, unless there is a clear intention to create a new tenancy. It was contended, however, that the landlord was entitled to accept rent, after notice of termination, without giving rise to a new tenancy only where the amount of such rent did not exceed the rent paid prior to the notice of termination, and that this was the position in all the decided cases *(Gunaratne v. Thelenis* [1]; *Siddick v. Natchiya* [2]; *Vincent v. Sumanasena* [3]; *Samaraweera v. Ranasinghe* [4]). Learned President's Counsel sought to distinguish *Theivendrarajah v. Sanoon* [5], as being a lease expiring by affluxion of time, and not a tenancy terminated by notice. In that case Sirimane, J., held that the lessor was entitled to demand and to receive the authorised rent, even though that was more than the rent paid under the lease. The underlying principle is that in order to secure the protection of the Rent Restriction Act, the " statutory tenant " must pay, if demanded, what the landlord is statutorily entitled to receive, namely that authorised rent, including the increases premitted from time to time. If for instance a drastically revised assessment results in an increase in rates which exceeds the rent previously paid, the landlord will be out of pocket unless he is entitled to recover the increased amount from the statutory tenant. Learned President's Counsel for the defendant submitted that in such a situation the landlord should withdraw the notice of termination (and any pending action), demand the permitted increase, give a fresh notice of termination, and thereafter institute another action. In the absence of plain words compelling the conclusion that the legislature intended such a protracted procedure and an inequitable result, I must decline to accept that contention. It is not disputed that prior to notice of termination, the landlord is entitled to demand and to receive an increase in rent equivalent to the increase in rates. Although a tenant is not normally obliged to pay

an increased rent unless he agrees (*de Silva v. Perera* [6]; *Sellahewa v. Ranaweera* [7]), the position is different in regard to an authorised increase of rent, of which the tenant is only entitled to notice (*Abdul Rahaman v. Justin* [8], *Nadarajah v. Naidu* [9]). While the Rent Acts are intended to protect a tenant even after the contractual relationship has come to an end, I find nothing to suggest a legislative intention to enlarge the rights of a tenant after termination. In regard to the landlord's right to receive the rent, or the increased rent, payable under the Rent Acts, there is thus no basis whereby the position of a statutory tenant, after the termination of a lease by affluxion of time, can be distinguished from that of a statutory tenant after the termination of a monthly tenancy by notice of termination. Both claim the same statutory protection, and both must pay the same price ; the rent or other payment which the landlord is statutorily entitled to demand. It was also contended that when an increased rent is agreed upon, necessarily a new contract comes into existence. Where there is a subsisting contract of tenancy, the variation of one term of that contract does not usually result in a new contract ; negotiating an increased rent does not give rise to a new contract, but merely results in the variation of one term of the contract. The plaintiff was therefore entitled to demand and to receive the increased authorised rent of Rs. 552.41 per month, without being obliged to withdraw the notice of termination, and without thereby creating a new tenancy.

In the present case by the time the matter came up for decision in the trial Court, difficulties as to whether parties meant rent or damages, and the need for the tenant's consent to an increased rent, had been completely removed by reason of the defendant's express and unambiguous admissions that she had agreed to pay the increased rent of Rs. 552.41 per month, but had not done so. On that basis, she pleaded inability to pay that rent, for reasons which the learned trial Judge properly rejected. Those admissions were not withdrawn during the trial, and the judgment of the trial Judge was therefore perfectly correct. Even if those admissions are disregarded, the documents establish that the parties had agreed upon an increased rent, and that the defendant had failed to pay the increase, and was in arrears of rent. However, it is necessary to state my view that the Court of Appeal was in error in holding that the defendant could withdraw those admissions at the stage of appeal, and take up a completely different position not pleaded,

not suggested to the plaintiff in cross-examination and not supported by the defendant or her witnesses ; and in giving judgment in favour of the defendant on a basis which the plaintiff never had an opportunity to explain. While it is sometimes permissible to withdraw admissions on questions of law, the admissions now under consideration are primarily questions of fact ; what the parties intended and understood by their letters, and their conduct in relation thereto, hardly involve questions of law. In any event, in the absence of evidence as to the circumstances in which those admissions were made, it would be speculative to regard them as resulting from the misconstruction of documents by the defendant's lawyers : they may equally well have been the result of express instructions given by the client. An additional circumstance is that, had these admissions not been made, the plaintiff would have had an opportunity of reconsidering this position, and may then have decided to withdraw his action and to institute another action on a different basis ; the denial of that opportunity was a potential source of prejudice, and the Court of Appeal was in error in assuming that the plaintiff had suffered no prejudice, or had not acted to his detriment, where he had no chance of explaining how he would have acted. Quite apart from any question of estoppel or prejudice, to permit admissions to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleadings and issues. Section 75 not only requires a defendant to admit or deny the several averments of the plaint, but also to set out in detail, plainly and concisely, the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence ; sections 146 (2) and 148 oblige the Court upon the pleadings, or upon the contents of documents produced, and after examination of the parties if necessary, to ascertain the material propositions of fact or of law upon which the parties are at variance, and thereupon to record issues on which the right decision of the case depends ; section 150, explanation (2), prohibits a party from making at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet ; the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings. The alleged absence of an agreement to pay an increased rent was not a fact or a circumstance on which the defendant relied for his defence ; nor a proposition on which the trial Court found the parties to be

at variance ; evidence on that matter was prohibited to the defendant, and superfluous for the plaintiff.

I allow the appeal, and set aside the judgment of the Court of Appeal. The judgment and decree of the District Court is affirmed. The substituted plaintiff-appellant will be entitled to costs in a sum of Rs. 5,000 in this Court, as well as costs in both Courts below.

AMERASINGHE, J. – I agree.

DHEERARATNE, J. – I agree.

Appeal allowed.