RATNAYAKE
v.
MUSHIN

SUPREME COURT.
WANASUNDERA, J., H. A. G. DE SILVA, J. AND G. P. S. DE SILVA, J.
S.C. 34/86; C.A. 439/78 (F); D.C. COL. 1534/RE.
FEBRUARY 09 AND 18, 1988.

Landlord and tenant–Arrears of rent–Advance–Set-off–Authorized rent fixed by Rent Board–Does it have a retroactive operation?

The defendant moved into occupation of the premises let in November 1973 and from this month to 30th June 1974 the defendant paid Rs. 480 per month. The Rent Board by its order dated 5th June 1971 fixed the authorized rent as Rs. 234 per month and again by its order dated 2nd June 1975 at Rs. 279 per month. On 1st May 1973 prior to moving in the tenant paid the plaintiff Rs. 1,440 being "3 months advance".

Held–

(1) As the tenant's position at the trial was not that the whole of the advance should be set off against arrears but only so much of the Rs. 1,440 as was in excess of three months authorized rent and no issue was raised on the point of setting-off the whole of the advance, the whole of the Rs. 1,440 was not available for set-off against arrears and the tenant was hence in arrears.

(2) There is a distinction between fixation of the authorised rent and determination of the authorized rent. When the Rent Board determines the authorized rent it ascertains what according to law is the authorised rent of the premises and variable factors like annual value and permitted increases are involved.

The content of the Orders of the Rent Board has nothing to indicate that the Rent Board intended its decisions to apply to a period prior to the date on which the decisions were made. The orders do not have a retroactive operation.

Cases referred to:

1. *William v. Somasunderam (1970) 71 NLR 459.*
2. *Ranasinghe v. Jayatilake (1971) 72 NLR 126.*

APPEAL from judgment of Court of Appeal.

H. L. de Silva, P. C. with *Gomin Dayasiri* and *Miss L. N. A. de Silva* for defendant-appellant.

A. A. M. Marleen with *N. Jaufer A. Hassen* and *A. R. M. Azard* for plaintiff-respondent.

Cur. adv. vult.

MARCH 11, 1988.

G. P. S. DE. SILVA, J.

The plaintiff as landlord instituted this action on 15th December, 1975, against the defendant, the tenant of business premises No. 98, Deans Road, Colombo 10, for ejectment on the ground of arrears of rent. The plaintiff pleaded in his amended plaint that the agreed rental was Rs. 480 per mensem and that the defendant paid rent up to 30th June 1974 but failed to pay any rent thereafter. The defendant in his answer denied that he was in arrears of rent and said that he had duly paid the authorized rent. After trial, the District Judge entered decree for ejectment and the defendant preferred an appeal. The Court of Appeal affirmed the decree for ejectment and the defendant has now appealed to this court, having obtained leave from the Court of Appeal.

The defendant came into occupation of the premises in November, 1973. It is common ground that from November 1973 to 30th June 1974 the defendant had paid by way of rent Rs. 480 per month. It was also admitted that cash payments by way of rent were made only up to 30th June 1974. It was in evidence that the Rent Board by its order dated 5th June, 1974, marked D1 had fixed the authorized rent at Rs. 234 per month. Again, by its order D2 dated 2nd June, 1975, the Rent Board fixed the authorized rent at Rs. 279 per month. Although the defendant came into occupation of the premises only in November 1973, yet on 1st May 1973 he had paid the plaintiff a sum of Rs. 1,440 being "3 months advance" as evidenced by D16.

The first submission of Mr. H. L. de Silva, Counsel for the defendant-appellant, was that the Court of Appeal was in error in holding that the advance of Rs. 1,440 (vide the receipt D16) could not be set-off against the unpaid rent in order to determine whether the tenant was in arrears. Mr. de Silva stressed that the receipt D16 ex facie described the sum of Rs. 1,440 received by the plaintiff from the defendant on 1st May 1973 as "3 months advance" and that the plaintiff too had so stated in the course of his evidence. Mr. de Silva further submitted that the defendant's position that this sum of Rs. 1,440 was not an "advance" but a deposit which could be returned only upon the termination of the tenancy was untenable in law in view of section 9 of the Rent Act which prohibits the payment or receipt of a "deposit" for the grant of a tenancy.

Mr. Marleen for the plaintiff-respondent while conceding that the sum of Rs. 1,440 was available for set-off against unpaid rent if this sum was paid by the tenant by way of "an advance" (and in that event the defendant would not be in arrears of rent) contended that the case for the defendant as presented before the District Court was quite different from the case sought to be made out on his behalf in appeal. It seems to me that if the position of the defendant at the trial was that the sum of Rs. 1,440 paid on 1st May 1973 was an "advance" of 3 months rent that has to be set-off against arrears of rent, then that fact would have been placed in the forefront of his case. But strangely enough, this plea was not set out in the answer, nor was it put in issue at the trial. What is more, the defendant in his evidence took up an entirely different position, namely that out of the sum of Rs. 1,440 the plaintiff could retain a sum of Rs. 702 but that the balance sum of Rs. 738 must be set-off against accruing arrears of rent. The Court of Appeal in the course of its judgment makes pointed reference to this factual position: "It was not the appellant's position that all the money he had paid as an advance could and should be set-off against accruing arrears. What was contended for was, that only so much of the Rs. 1,440 as was in excess of three months authorized rent should be set-off and was therefore deductible". Having regard, therefore, to the manner in which the case for the defendant was presented before the District Court and, in particular, in the absence of a specific issue on this point, it seems to me that Mr. de Silva's submission that the entire sum of Rs. 1,440 is available for set-off against arrears of rent is not well-founded.

Mr. de Silva's next submission was that the decisions of the Rent Board, D1 and D2, had retroactive effect and that the finding of the Court of Appeal that D1 and D2 were operative only from the date of the decisions was erroneous. Counsel maintained that the determinations (D1 an D2) of the Rent Board were declaratory of the authorized rent and had retroactive effect from the commencement of the year in which the determinations were made. He emphasized that the decisions of the Rent Board did not constitute "a fixing of the authorized rent" but rather a legal conclusion arrived at on a consideration of the matters set out in sections 4 and 5 of the Rent Act No. 7 of 1972.

In support of this contention Mr. de Silva relied on two authorities, viz. *William vs. Somasunderam,* (1) and *Ranasinghe vs. Jayatilake,* (2)

As rightly submitted by Mr. de Silva, H. N. G. Fernando, C.J. in these two decisions drew a distinction between the "fixation" of the authorized rent and its "determination". Mr. de Silva urged that in terms of the Rent Act the Board "determines" the authorized rent, that is to say, the Board "ascertains what according to law is the authorized rent" of the premises.

In *Ranasinghe vs. Jayatillake* (supra) the order of the Rent Control Board was made on 5th November 1964, but the plaintiff's claim for rent overpaid to the landlord was for the period from 1962 to September 1964. Fernando, C.J. took the view that the order of the Rent Control Board was applicable for 1962, 1963 and up to September 1964. In the course of his judgment the learned Chief Justice expressed himself thus:

> "It must be assumed therefore that the Board's determination was reached upon due consideration of s. 5(1) (a) of the Act and other provisions relevant to the ascertainment of the authorized rent.
>
> It thus appears that the objection that the Board's determination of November 1964 is not evidence of the amount of the authorized rent for a past period, is at best purely technical. The provisions of the Act relating to the standard rent of assessed premises and to permitted increase of the standard rent are such that there is little possibility that the authorised rent of any premises at any time can be higher than the amount which was the authorized rent at any earlier period.* On the contrary, the only apparent possibility is one quite unfavourable to a landlord, namely that the authorised rent of premises say in 1962 or 1963 may be lower than the amount which a Rent Control Board may determine under s. 16A in 1964 at page 129."

In the appeal before us the authorized rent as determined on 5.6.74 was Rs. 274 (D1) but after an interval of one year (2nd June 1975) the authorized rent had gone up to Rs. 279. It is to be noted that the "annual value" of the premises is only one of the factors to be taken into account in determining the authorized rent. The "permitted

* Editor's Note: Fernando C.J. has pointed out that this sentence of his judgment erroneously states the opposite of what he intended; the next sentence indicates the actual intention.

increase" which is another relevant factor, could well vary from time to time, even within a period of one year. If I understood Mr. De Silva aright, he conceded that this was a variable factor. In the instant case, there is no evidence in regard to the date of the applications made to the Rent Board for determining the authorized rent. On a perusal of D1 and D2 there is nothing to indicate that the Rent Board intended the decisions to apply to a period prior to the date on which the decisions were made. Therefore, having regard to the facts and circumstances of the present case, I find myself unable to accept the contention that D1 and D2 have a retroactive operation.

The appeal, accordingly, fails and is dismissed with costs.

WANASUNDERA, J.—I agree.

H. A. G. DE SILVA, J.—I agree.

Appeal dismissed.