APPUHAMY

v.

SENEVIRATNE

COURT OF APPEAL.
RATWATTE, P. AND ATUKORALE, J.
C.A. 98/80—D.C. AVISSAWELLA 15294/RE.
DECEMBER 16, 1980.

Landlord and tenant—Action for ejectment on ground of arrears of rent and reasonable requirement—Rent (Amendment) Law, No. 10 of 1977—Consent decree—Application in revision—Whether writ can issue till alternate accommodation provided by Commissioner of National Housing—Arrears—Claim by tenant to set off sums expended on repairs—Failure to obtain prior authorisation of Rent Board—Validity of decree—Issue of writ of ejectment—Rent Act, No. 7 of 1972, section 13 (3).

The respondent to this application sued the petitioner, his tenant, for ejectment on the ground of arrears of rent and also under the provisions of Rent (Amendment) Law, No. 10 of 1977, on the ground that the premises wer required for her own occupation. At the date of institution of the action, on the averments in the plaint, the petitioner was three months in arrears of rent. The petitioner in his answer pleaded, inter alia, that he was entitled to set off certain monies expended by him on repairs against the rents payable; and he also asked that, in the event of decree being entered for ejectment on the ground of reasonable requirement the Court order execution to be stayed until the Commissioner of National Housing provided him with alternate accommodation in terms of Law No. 10 of 1977. At the trial the case was settled and judgment was entered, of consent, against the petitioner in terms of which he was bound to hand over the premises on or before 31st December, 1981.

The petitioner thereafter filed this application to revise the judgment entered in the case and to have the case sent back for re-trial or in the alternative to have it amended to read that no writ of execution shall issue until after the Commissioner of National Housing has notified to Court that he is able to provide alternate accommodation. It was contended on behalf of the petitioner that the action must be regarded as one where the ejectment of the petitioner was sought solely on the ground of reasonable requirement and not one for the recovery of possession on the ground of arrears of rent. Accordingly it was submitted there being no material before court that the premises were so required for occupation by the respondent the Court had no jurisdiction to enter a decree for ejectment even of consent; and that, in any event, such a decree could not be entered depriving the petitioner of the protection afforded by Law No. 10 of 1977, whereby he could not be evicted until alternate accommodation was found by the Commissioner of National Housing.

Held

It was clear on the pleadings that the respondent had sought to eject the petitioner on the ground of arrears of rent as well as on the ground of reasonable requirement. The

petitioner not having obtained the prior authorisation of the Rent Board had no right to a set off in respect of the sums expended by him on repairs and accordingly was in three months' arrears of rent and continued to be so until the institution of the action. The application must therefore fail.

Per Atukorale, J.
"... it appears to me that the ground on which an action is filed need not necessarily be the one set out in the notice terminating the tenancy."

Cases referred to
(1) *Abdul Rahuman v. Marimuttu, (1951) 52 N.L.R. 503.*
(2) *Lorensz v. Abdul Cader, (1962) 66 N.L.R. 523; 63 C.L.W. III.*
(3) *Ratnam v. Dheen, (1967) 70 N.L.R. 21.*
(4) *Appuhamy v. Perera Hamine and another, (1962) 63 C.L.W. 84.*
(5) *Mohideen v. Mohideen, (1976) 78 N.L.R. 108.*

APPLICATION in revision from the District Court, Avissawella.

W. P. Gunatillake, with *A. B. Tennekoon*, for the petitioner.
P. A. D. Samarasekera, with *Upali de Almeida*, for the respondent.

Cur. adv. vult.

February 19, 1981.
ATUKORALE, J.

The present petitioner was the defendant in case No. 15294/RE of the District Court of Avissawella which was filed against him by the present respondent seeking to have him ejected from certain premises the tenancy of which had commenced prior to the coming into operation of the Rent Act, No. 7 of 1972. Admittedly the premises were governed by the provisions of the Rent Act as amended by the Rent (Amendment) Law, No. 10 of 1977. The standard rent of the premises did not exceed Rs. 100 per month, the actual rent being Rs. 60 per month payable, according to the plaint, on or before the end of each month. It is also not is dispute that a notice dated 28.5.1978 was sent to the petitioner by the respondent's attorney-at-law requesting the petitioner to quit and vacate the premises on or before 1.12.1978. The plaint which was filed on 10.1.1979 stated in paragraph 5 that all rents up to 30.9. 1978 had been paid but not the rents and damages that fell due thereafter. Paragraph 6 of the plaint set out the various facts which had to be proved by the respondent to enable him to obtain a decree for ejectment against the petitioner on the ground that the premises were reasonably required for occupation as a residence for herself or a member of her family. In the prayer to the plaint she asked for an order of ejectment of the petitioner, for arrears

of rent and for damages from 1.12.1978 until restoration, of possession. It will thus be seen that on the averments of the plaint the petitioner was, on the date of institution of the action, over 3 months in arrears of rent after it became due.

In his answer the petitioner stated that the lavatory appurtenant to the premises fell into a state of disrepair but that the respondent in spite of being requested to do so failed to repair the same. He further stated that he spent a sum of Rs. 166.35 cts. for the repair which was effected in about 1976 and that after setting off this sum from the rents payable by him he remitted a sum of Rs. 14 to the respondent by a money order which the respondent refused to accept and returned to him. Apparently this sum of Rs. 14 was the balance due, after deducting the cost of the repair, out of 3 months rent amounting to Rs. 180. In paragraph 13 of the answer the petitioner stated that although he has remitted rents to the respondent every month without fail, the respondent has informed him that 3 months' rent was in arrears. He further stated that the 3 months' rent referred to by the respondent was the amount that should be set off against the cost of the repair and, if done so, there was no arrears of rent due from him. He also stated that, in any event, without prejudice to his rights, a sum of Rs. 240 being 4 months rent was being deposited by him in court together with the filing of his answer. He denied that the premises were reasonably required for occupation as a residence by the respondent or any member of her family. He averred that the premises in suit were not the only residential premises owned by the respondent. He also asked that in the event of the court entering a decree for his ejectment on the ground of reasonable requirement the court do order the execution of the decree be stayed until the Commissioner of National Housing provides him with alternate accommodation in terms of the Rent (Amendment) Law, No. 10 of 1977.

In his replication the respondent, whilst denying the lavatory required repairs, maintained that the petitioner had no right to incur any sum by way of expenditure on that account. He also stated that the sum of Rs. 240 had been deposited after the summons returnable date, i.e., the date fixed in the summons as the date on which the petitioner had to appear in court and that as such the petitioner was in arrears of rent for a period of 3 months or more after it became due and that accordingly he was entitled to an order of ejectment of the petitioner and for the recovery of arrears of rent.

The case was taken up for hearing on 16.1.1980 on which date both parties were represented by their respective lawyers. Both parties then informed court that the case had been settled. The petitioner agreed to hand over possession of the premises to the respondent on 31.12.1981. He stated that he would occupy the premises until then without payment of rent. The respondent agreed to this. The petitioner also agreed not to sublet or cause any damage to the premises. On the terms of settlement being recorded by court, judgment was entered ordering the petitioner to hand over the premises to the respondent on or before 31.12.1981 as agreed. If he failed to do so, the respondent was declared entitled to take out writ of ejectment against the petitioner without notice. It was further ordered that if the petitioner failed to hand over possession as agreed, the respondent will be entitled to recover all sums as prayed for in the plaint. Decree was ordered to be entered accordingly. Both parties signed the record after the terms of settlement were read out and explained to them.

About two weeks later, on 29.1.1980, the petitioner filed the the present application in this court to revise the said judgment and to have it set aside and the case sent back for a retrial or, in the alternative, to have it amended to read that no writ in execution of the decree shall issue until after the Commissioner of National Housing has notified to court that he is able to provide alternate accommodation for him, in terms of Section 22 (1C) of the Rent Act, No. 7 of 1972, as amended by the Rent (Amendment) Law, No. 10 of 1977. Learned Counsel for the petitioner appearing before us contended that this action was and must be regarded as one where the respondent asked for ejectment of the petitioner solely and purely on the ground that the premises were reasonably required for occupation as a residence of the respondent or a member of her family, and that it was not and cannot be regarded as one for the recovery of possession on the ground of arrears of rent. He therefore maintained that, firstly, the court had no jurisdiction to enter a decree for ejectment even of consent, unless there was material to satisfy Court that the premises were, in the opinion of the Court, reasonably required for occupation of the respondent or a member of her family; and, secondly, that the Court had no jurisdiction to enter decree in the manner in which it was entered in this case as it has taken away the statutory protection enjoyed by a tenant against eviction until such time as the Commissioner of National Housing notifies Court of his ability to provide alternate accommodation in terms of the above law.

In support of his submission he cited the following authorities: (1), (2), (3), and (4).

Learned Counsel for the respondent, on the other hand, submitted to us that the action was one in which ejectment of the petitioner was sought for on both grounds, namely, on the ground that the premises were reasonably required for the occupation of the respondent as well as on the ground of arrears of rent. He maintained that the settlement entered into by the parties was a lawful compromise of the action under section 408 of the Civil Procedure Code. He also urged that even if the action is considered to be one based solely on the ground of reasonable requirement, the petitioner must, in the circumstances of this case, be deemed to have waived the statutory bar against ejectment until the provision of alternate accommodation by the Commissioner of National Housing.

A consideration of the facts set out in the pleadings filed in the lower Court irresistibly leads one to the conclusion that the respondent sought to eject the petitioner both on the ground that the premises were reasonably required for her occupation as well as on the ground that the petitioner had fallen into arrears of rent. As stated above the plaint was filed on 10.1.1979. Paragraph 5 of it states that no rent was paid after 30.9.1978. Hence in terms of section 22 (1) (*a*) of the Rent Act the petitioner, at the time of the institution of the action, had fallen into arrears for 3 months or more after the rent became due. This position is further clarified in paragraphs 3 and 4 of the respondent's replication, wherein she specifically pleads that she is entitled to eject the petitioner on this ground. A perusal of the answer reveals that whilst the petitioner was claiming to set off the cost of the repair, the respondent was consistently refusing to acknowledge any such right in the petitioner. There was thus no doubt that if the petitioner did have a right to a set-off, then he was not in arrears of rent. It was also equally clear that if the petitioner did not have such a right, then he was in fact in arrears of rent for a period of 3 months. This situation emerges from the state of the pleadings in the lower Court. At the hearing before us it was not disputed that the petitioner had not obtained the prior authorisation of the Rent Board to carry out the repair. Hence the true legal position would be that the petitioner had no right to a set-off as claimed by him—vide section 13 (3) of the Rent Act. It would therefore appear that the petitioner in 1976 commenced to fall into 3

months' arrears of rent and that subsequently he continued to be in such arrears of 3 months rent at any given point of time until the filing of the plaint on 10.1.1979 when he was in arrears of rent for the months of October, November and December, 1978. Thus on the basis that the rent for a particular month was payable on or before the end of that month as pleaded in the plaint, the petitioner was, at the time of the institution of the action, in arrears for 3 months or more after the rent became due.

The sole ground on which learned Counsel for the petitioner relied for his contention that the action was not one for ejectment on the ground of arrears of rent was the fact that whilst the notice to quit was dated 28.5.1978 the plaint averred that all rents up to 30.9.1978 had been paid. He thus maintained that on the face of the plaint the rent was not in arrears at the time the notice to quit was sent. His contention was that according to section 22 (3) of the Rent Act a notice terminating the tenancy to be valid must be given only after the tenant has in fact fallen into arrears for the requisite period, namely, for a period of 3 months or more or for a month as the case may be. In support of this legal contention he cited the case of *Mohideen v. Mohideen* (5). A perusal of this case, however, shows that this point urged by learned Counsel for the petitioner before us did not arise for adjudication in that case although Tennekoon, C. J. seemed to think that that was the correct position under the Rent Act, No. 7 of 1972. What was decided in that case was that under section 12 (A) (1) (*a*) of the Rent Restriction Act, No. 29 of 1948, as amended by Act No. 12 of 1966, there was no requirement that at the time the notice to quit is given to a tenant in occupation of premises the standard rent of which does not exceed Rs. 100 a month the tenant should have been 3 months or more in arrears of rent after it has become due. The corresponding position under Section 22 (3) of the Rent Act as amended by Law No. 10 of 1977 did not arise for determination in that case.

In the instant case the notice to quit which was sent to the petitioner and which under normal circumstances should have been in his custody was not produced on the date of hearing. Nor is there any material before us to indicate whether it contained any reference to the rents being in arrears or not at the time it was sent, although it appears to me that the ground on which an action is filed need not necessarily be the one set out in the notice terminating the tenancy. But considering the manner in which the

petitioner fell into arrears of rent in this case entailing, as it were, a recurring back-log of 3 months' rent in arrears at any given point of time, it seems to me fairly certain that the petitioner had in fact fallen into 3 months' arrears at the time the notice was sent. No doubt the plaint does state that all rents up to 30.9.1978 have been paid by the petitioner. But in my view it cannot, in the context of the pleadings and facts in this case, be inferred therefrom that there was no arrears due at the time the notice was despatched. To place such a construction would in effect be contrary to the position taken up by the petitioner himself in his own answer. To my mind what the plaint states is simply this and no more namely, that as at the time of filing of the plaint rents up to 30.9.1978 had been paid by the petitioner. From this I cannot reasonably conclude that there were no arrears of rent due at the time the notice to quit was sent. For the above reasons I am of the opinion that the submissions of learned Counsel for the petitioner cannot succeed. The application is therefore dismissed with costs fixed at Rs. 210.

RATWATTE, P.—I agree.

Application dismissed.