

THALWATTE
v.
SOMASUNDARAM

SUPREME COURT.

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

KULATUNGA, J. AND

RAMANATHAN, J.

S.C. APPEAL 57/93.

C.A. NO. 845/85 (F).

D.C. MT. LAVINIA NO. 1156/RE.

MARCH 31, JULY 14, NOVEMBER 2, 1995.

JANUARY 23 AND 30 AND FEBRUARY 1, 1996.

Rent Act – Action for ejectment – Arrears of Rent – Payment of arrears before summons returnable date – Rent Act, section 22(3)(c) – Appropriation of payments – Civil Procedure Code, section 150(2).

Held:

1. The appropriation of payments of rent as against arrears turns upon the intention of the debtor, either express or implied. Applying this principle, the defendant was not in arrears of rent as at the summons returnable date, having regard to the terms of section 22(3) (c) of the Rent Act.
2. The question of appropriation of payments by way of rent did not arise for the reason that the case was not presented before the District Court on that basis. A party cannot be permitted to present in appeal a case materially different from the case presented before the trial court.

Cases referred to:

1. *Kurukulasuriya v. Ranmenike* – [1990] 1 Sri L.R. 331.
2. *Setha v. Weerakoon* 49 N.L.R. 225, 228, 229.

APPEAL from judgment of the Court of Appeal.

A. K. Premadasa, P.C. with *T. B. Dillimuni* for plaintiff-appellant.

P. A. D. Samarasekera, P.C. with *S. Mahenthiran* for defendant-respondent.

February 12, 1996.

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

The plaintiff, as landlord, instituted these proceedings on 5.6.80 seeking, *inter alia*, the ejection of his tenant (the defendant) from the premises in suit. The ground of ejection was arrears of rent (section 22(2) (a) of the Rent Act). The premises were residential premises.

The monthly rental was Rs. 290/64. By letter dated 24.4.79 the plaintiff gave the defendant three months notice of termination of tenancy. The tenancy terminated on 31.7.79. The summons returnable date was 8.12.80.

At the hearing before us, it was common ground that the period for which rent was due from the defendant to the plaintiff was from 1.12.76 to 31.3.79. It was for a period of 28 months and the arrears of rent amounted to Rs. 8137/92. Furthermore, it was not disputed that the defendant had paid the plaintiff as rent a sum of **Rs. 10,744/50** before the summons returnable date (8.12.80). The defendant was therefore not in arrears of rent having regard to the terms of section 22(3) (c) of the Rent Act and the Court of Appeal reversed the judgment of the District Court and dismissed the plaintiff's action. The plaintiff has appealed against the judgment of the Court of Appeal.

At the hearing before us the principal submission of Mr. Premadasa, counsel for the plaintiff-appellant, was founded on the decision of this court in *Kurukulasuriya v. Ranmenika*⁽¹⁾. Mr. Premadasa pointed out that admittedly the defendant had paid no rent during the relevant period, namely, 1.12.76 to 31.3.79. It was after 31.3.79 that the defendant commenced to pay the arrears of rent, and what is more in each of the documents P4, P5, P6, P7 and P8 the defendant had specifically stated the month or months for which payment was being made. Mr. Premadasa repeatedly stressed the fact that in each of the aforesaid documents the defendant had specified the month or months for which payment was being made. And relying on the judgment in *Kurukulasuriya's* case (*supra*)

Mr. Premadasa argued that those payments cannot be reckoned for any period other than the period specified in the documents. If this submission is accepted, the result would be that the defendant is in arrears of rent and the plaintiff must succeed in this appeal.

However, on a consideration of the relevant facts, this submission does not commend itself to me. The facts in the appeal before us do not show that the defendant **actually intended** to make payments for specified periods. The period specified in the documents P4, P5, P6, P7 and P8 (referred to above) was by reason of a **mistake** initially made by the defendant when he made the first payment of P3 dated 24.7.79. What happened was that by P3 the defendant sent the plaintiff a sum of Rs. 5510/- as arrears of rent stating that it was for a period of **19 months**, the period set out being 1.12.76 to 30.6.79. This was obviously a mistake for in truth the period 1.12.76 to 30.6.79 covered **29 months** (and not 19 months as stated in P3). The subsequent payments on P4, P5, P6, P7, and P8 were on the wrong assumption that he had by P3 paid rent up to the end of June 1979. It was by reason of that mistake that the very next payment P4 mentions the months of July, August and September 1979. A scrutiny of the documents therefore clearly establishes that the months specified in the documents were by reason of a mistake.

Citing a passage from Nathan, Common Law of South Africa, 2nd Edn. Vol. II, page 659. Bandaranayake, J. states in Kurukulasuriya's case (*supra*) at pages 338 and 339:- "the whole doctrine of the Roman Dutch Law as to appropriation of payments turns upon the intention of the debtor, either expressed, implied or presumed." Since the facts in the appeal before us clearly show that there was no such intention on the part of the defendant, Kurukulasuriya's case has no application.

Besides, the question of appropriation of payments by way of rent does not arise in the present case for the reason that the case was not presented before the District Court on that basis. Neither the pleadings nor the issues nor even the written submissions reflect the question of appropriation of payments. A new contention of this kind

cannot be raised for the first time in appeal since it involves questions of mixed fact and law – *vide* the judgment of Dias J. in *Setha v. Weerakoon*⁽²⁾. In this connection, it is well to bear in mind the provisions contained in Explanation 2 to section 150 of the Civil Procedure Code. *A fortiori*, a party cannot be permitted to present in appeal a case materially different from the case presented before the trial court.

Finally, in regard to Mr. Premadasa's reliance on *Kurukulasuriya's case (supra)* (which was decided five years after the judgment of the District Court) the Court of Appeal correctly and relevantly stated thus:- "It was not the respondent's case (i.e. the plaintiff's case) that the ruling regarding appropriation should apply and the **trial in the District Court was on the basis of overall arrears and the overall picture is that the appellant was not in arrears of rent.**" (The emphasis is mine).

For these reasons the appeal fails and is dismissed with costs fixed at Rs. 750/-.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.