SAHEED

v.

WICKRAMANAYAKE

COURT OF APPEAL.
RANASINGHE, J. AND RODRIGO, J.
C.A. 615/73 (F) D.C. GALLE 7822/L.
JUNE 3, 1981.

Landlord and tenant—Arrears of rent—Action for ejectment—Claim by tenant that he had overpaid rents—Schedule of payments set out in answer—Burden of proving payment in this manner to be on defendant—Validity of notice to quit—Rent Restriction Act (Cap. 274) as amended by Act No. 12 of 1966, section 12 (A) (1) (a).

The plaintiff filed this action against his tenant, the defendant seeking ejectment, inter alia, on the ground of arrears of rent. He claimed that the rent was Rs. 50 per month and that the defendant paid no rent from 1st June, 1966. Notice of termination of tenancy was sent on 30th March, 1969, to take effect at the end of April, 1969. The defendant while denying the allegations in the plaint admitted the receipt of notice terminating the tenancy, but did not admit its validity. He, however, averred that he took the premises at a monthly rental of Rs. 200 and had paid all rents until the end of April, 1969, setting out the manner of payment in a schedule to his answer. He alleged that the authorised rent was Rs. 62.61 per month and that he had overpaid a sum of Rs. 3,495.56, claiming the same in reconvention.

The learned trial Judge found that the agreed rent was Rs. 200 per month and the authorised rent was Rs. 62.61, but held that the defendant had not proved payment as set out in the schedule to his answer. He also held that the plaintiff has not proved that the defendant was in arrears of rent for over three months until after it had become due and that the notice terminating the tenancy was invalid.

Held

(1) The defendant had chosen a specific method of disproving the plaintiff's assertion that the rent was Rs. 50 per month and that he was in arrears and sought to prove the schedule of payments he relied on. He had, however, failed in this attempt. All that the plaintiff could have done was to state on oath that the defendant had not paid him the rent and subject himself to cross-examination on this matter; but the defendant who makes a positive assertion as in this case is required to produce evidence of payment and this the defendant had failed to do. The learned trial Judge was wrong in holding that the rent was Rs. 200 per month and that the plaintiff had failed to prove that the defendant was in arrears as claimed by him.

(2) The learned trial Judge was wrong in holding that the notice terminating the tenancy was invalid as all that was required by the Rent Restriction Act (Cap. 274) as amended by Act No. 12 of 1966 (section 12 (A) (1) (a)) was that the rent should be in arrear for three months or more. Once the tenant forfeited the protection of the Act on this ground a calendar month's notice of termination of the tenancy was sufficient.

Cases referred to

(1) *Sirisena v. Pieris, (1970) 74 N.L.R. 174.*
(2) *Nilamdeen v. Nanayakkara, (1973) 76 N.L.R. 169.*

APPEAL from the District Court, Galle.

H. W. Jayewardene, Q.C., with *M. I. M. Sally* and *Lukshman Perera,* for the plaintiff-petitioner.

T. B. Weerakoon, for the defendant-respondent.

Cur. adv. vult.

June 26, 1981.

RODRIGO, J.

The plaintiff-appellant died pending this appeal. The defendant-respondent too died after that. Their respective widows have now been substituted in their place. To assist clarity I shall in this judgment refer to the plaintiff-appellant as 'plaintiff' and the defendant-respondent as 'defendant'.

The plaintiff has instituted this action to eject the defendant from premises No. 45, Pedlars Street, Galle. He was also claiming arrears of rent and damages. He was seeking the ejectment of the defendant on three grounds. He alleged in his plaint that the defendant was in arrear with his rent for over three months after it fell due. He has said that the defendant had not paid rent from 1st June, 1966. Notice terminating the tenancy had been sent on March 30, 1969, to vacate the premises at the end of April 1969. The plaintiff has also alleged that the defendant has partitioned the rooms in the premises with planks and sub-let the said rooms. He alleged further by the said partitioning of the rooms with planks, the defendant has caused wanton and wilful damage to the premises. These are the three grounds relied on by him for ejectment of the defendant.

The 1st defendant in his answer denied all these allegations. He admitted the receipt of the notice terminating the tenancy but denied its validity. He said that he came into the premises as a tenant on January 1, 1964. He said he took the premises at a rental of Rs. 200 per mensem and paid the plaintiff three months' advance of rent in a sum of Rs. 600. He had paid rents till the end of April 1969 according to his answer in the manner set out in his schedule thereto. It is said in his answer that when he tendered

the rent for May 1969 the plaintiff refused to accept it. He alleged that the authorised rent of the premises is Rs. 62.61 per month and he had over-paid the plaintiff a sum of Rs. 3,495.56 as at the end of January 1971 and claimed in reconvention a refund of this sum of money.

At the trial counsel for plaintiff raised an issue to cover the plaintiff's allegation that the defendant partitioned the premises and sub-let them and that by so partitioning the premises the defendant caused wanton and wilful damage. The issue was objected to by counsel for the defendant as the averments in the answer in regard to this issue are not in conformity with section 40 (*d*) of the Civil Procedure Code, read with section 44 thereof. He argued that section 40 (*d*) requires that the circumstances constituting the cause of action should be averred and that the plaint in respect of this matter does not give the circumstances. He said that the particulars and more particularly the dates relating to the partitioning of the premises and the causing of damages are important for him but that they had not been pleaded. The Judge of first instance upheld the objection and the plaintiff had not pursued it any further. The trial therefore proceeded to determine whether the monthly rental of the premises was Rs. 50 as averred by the plaintiff or Rs. 200 as averred by the defendant; whether the defendant was in arrear with the rent for over three months after it had become due; whether the notice terminating the tenancy was valid; whether the authorised rent of the premises was Rs. 62.61; whether the defendant had paid rent at Rs. 200 per month in the manner set out in the schedule to his answer and what amount, if any, were the parties entitled to recover from each other by way of arrears and damages or by way of excess payments of rent.

The trial Judge has reached a finding that the agreed rent was Rs. 200 a month as averred by the defendant but that he had not proved that he had paid Rs. 200 a month as set out in the schedule to his answer; that the defendant therefore is not entitled to his claim in reconvention; that the plaintiff has not proved that the defendant was in arrear with his rent for over three months after it had become due; that the notice terminating the tenancy is not valid and that the authorised rent of the premises is Rs. 62.61.

These findings are attacked on behalf of the appellant as some

being inconsistent with one another and all being inconsistent with the evidence led in the case. It is argued that when the trial Judge reached a finding that the defendant had not proved his payments according to the schedule to his answer and the burden of proving which he took upon himself by a specific issue in that regard, it is not open to him in the same breath, to say that the plaintiff has not proved that the defendant was in arrear with his rent for over three months. This appears to me to be an exercise in logic. The trial Judge has found that he could place no reliance at all on any item in the schedule of payments put forward by the defendant. The defendant had been cross-examined item by item in the schedule. The defendant at one stage, so the trial Judge finds, was constrained to admit that his schedule of payments was completely wrong. The plaintiff said that he gave receipts to the defendant whenever rent was paid to him. The defendant did not challenge this. Neither did he produce the receipts. Nor has the plaintiff noticed the defendant to produce the receipts. One can well understand why the plaintiff did not so notice the defendant. The defendant had denied that the rent was Rs. 50 per mensem. In the circumstances it would have been futile for the plaintiff to require the defendant produce the receipts. The receipts, if in fact, they had been given, would have given the lie direct to the defendant's contention. Even so, the Judge had viewed the plaintiff's evidence with disfavour. He could not bring himself to believe that the plaintiff would have given these premises to the defendant for a sum as low as Rs. 50 per mensem. The plaintiff had bought these premises for his own occupation. He found that it was difficult for him to continue where he was as his bedrooms were upstairs and he could not climb the stairs as he was too ill for that. He, therefore, had slept in the dining room. In that situation he would have ordinarily moved into the house he had purchased without delay. Still, he had rented it out to the defendant. The reason advanced was that the defendant was pleading with him and his wife. The defendant had promised to vacate the premises in a very short time. The defendant, however, had continued without trouble for as long as March 1969. The plaintiff, however, had said that he had repeatedly requested the defendant to hand over the premises. This had been done verbally. From the very first month of occupation of the premises by the defendant it was the defendant that had paid the rates. When rates are deducted from the rent of Rs. 50 per month what was left to the plaintiff out of the rent was less than Rs. 25. The trial Judge therefore thought that it was more probable that the rent would have

been much higher than Rs. 50 per month. The plaintiff has also not impressed the trial Judge as a witness. Too often he had said from the witness box that he could not remember when questions were put to him. The trial Judge thought that he was exploiting his apparent illness to give false answers. The question still remains as to whether the Judge was right in concluding that the rent per month was Rs. 200 as said by the defendant. The quantum of rent was not important to the central issue in the case: it is whether the defendant has been in arrear with his rent for three months or more. It did not really matter what the amount of the rent was. This had, however, a bearing on the credibility of the parties. How did the Judge reach this finding that the rent was Rs. 200 per mensem as testified to by the defendant? One cannot ignore the fact that the defendant joined issue with the plaintiff on the amount of rent and that he was in arrear. The defendant drew the plaintiff into a pitched battle of falling or standing with the defendant's assertion that the rent was Rs. 200 and that there was no arrears. He positively asserted that he had made the payments according to the schedule which he produced. He claimed a large sum of money in reconvention. The plaintiff had to meet this. It is not as if the defendant had put the plaintiff to proof that the rent was Rs. 50 and that he was in arrears. The defendant deliberately chose a specific method of disproving the plaintiff's assertions. He sought to prove his schedule of payments. He failed in that. Is it then open to him to say 'It is true I have failed in my attempt to prove my assertions. But still you have not proved your assertions?' Is it not the position that when the defendant has made a positive assertion and sought to prove it with a view to disproving the plaintiff's assertion that he cannot fall back on the right which he had to ask the plaintiff to prove his case independently of the defendant's version? While the assertion of the plaintiff and that of the defendant cannot both be true, they can both be false. The plaintiff after all was seeking to prove a negative. In the nature of things the best evidence of the negative assertion is negativeness. What evidence can a plaintiff give or put forward before a court when the plaintiff says that the defendant had not paid him rent from a particular month. The best evidence rule will not enable him to do anything more than to say on oath that the defendant had not paid him rent and stand cross-examination on that denial. But a defendant who makes a positive assertion is required by the best evidence rule to produce evidence of payment. This he attempted to do and failed.

There is this case: *H. D. Sirisena v. Pieris* (1). Here the plaintiff asserted that he rented out his premises to the defendant for Rs. 7.50 per month. The defendant said that the plaintiff had taken Rs. 15 per month. He said the plaintiff did not issue him receipts, ever. The Chief Justice (H. N. G. Fernando) observed that "the proved conduct of the parties afforded the best test as to the truth of their conflicting evidence on this question." That is, what the rent was, and for what period the defendant was in arrears. I think in this case too that test would be appropriate. Let me run over the evidence of their conduct. The defendant denied the plaintiff's allegations. He chose to prove positively what the true position was. He did not succeed. As against that it is rather strange that the plaintiff should have been content with a small amount of rent after the payment of taxes and that he should have continued for long to let the defendant occupy the premises when his needs of occupation were urgent. This must remain a mystery. It will not detract from the effect and repercussions of the attempt and failure of the defendant to prove what he said was the true position. In my view, therefore, the Judge was wrong in holding that the rent was Rs. 200 per month and that the plaintiff had not proved that the defendant was in arrear with his rent for three months or more.

There are two more points that need mention. The Judge had held that the notice of termination is invalid. What he means by that is not clear. The notice validly terminated the common law tenancy. What the section, that is, section 12 (A) (1) (*a*) of the Rent Act, No. 29 of 48, as amended by Act No. 12 of 66 requires was that a tenant could not be ejected from premises the rent of which for a month does not exceed Rs. 100 except, inter alia, on the ground that the rent of such premises had been in arrear for three months or more. In the instant case the plaintiff fell into arrears within the meaning of this section in June 1966. He forfeited the protection of the Act on this ground in June 1966. The notice terminating the tenancy did not require for its validity anything other than that that it should be a calendar month's notice. The plaintiff's cause of action arose when defendant fell into arrears, within the meaning of section 12 (A) (1) (*a*) of the Rent Restriction Act, No. 29 of 48. See *Nilamdeen v. Nanayakkara* (2). (A judgment of the then Court of Appeal). I, therefore, hold that the Judge was wrong in his finding that the notice terminating the tenancy was invalid.

A point was sought to be raised for the first time in appeal by counsel for the defendant that the action could not have been maintained in any event in the Court below as the plaintiff's cause of action to recover his arrears of rent was prescribed. What the counsel meant by that was not clear. In any case since no such plea had been raised in the court below either in his pleadings or in the form of a issue we indicated to him that such an issue, even if it had any merit on the face of it, and we thought there was none, could not be raised for the first time in appeal as it is a mixed question of fact and law. What little enthusiasm counsel displayed in raising this point thereafter quickly evaporated and he did not press it any further.

We finally take the view that the plaintiff has proved that he rented these premises to the defendant at Rs. 50 per month and that the defendant was in arrear with his rent within the meaning of the section of the Rent Act referred to, for three months or more and thus has forfeited the protection given to him by the Rent Act. The plaintiff must therefore succeed in this appeal. We accordingly allow his appeal with costs here and in the Court below. We set aside the judgment of the learned trial Judge and enter judgment as prayed for by the plaintiff. The defendant's widow has been substituted in his place and she and her servants and agents are accordingly liable to be ejected in terms of this judgment from the premises in suit.

RANASINGHE, J.—I agree.

Appeal allowed.