

1976 *Present: Wijesundera, J. and Wanasundera, J.*

B. HAPWOOD, Petitioner *and* A. DIAS, Respondent.

*S.C. 401/76 (F) – M. C. COLOMBO 127/RE*

*Consent decree – Wrongful refusal to accept payment – No liability to tender subsequent payments – Court order not complied with – Grant of relief by Court – Abuse of process of Court.*

When a plaintiff landlord wrongfully refuses to accept payment tendered by a defendant-tenant in terms of consent decree, there is no liability on the defendant-tenant to tender subsequent payments and the plaintiff-landlord cannot take advantage of the subsequent defaults and apply for writ.

Where a party fails to comply with a Court Order made of consent or otherwise, it is always open to Court to take action and grant relief to prevent process of Court being abused.

**A**PPPLICATION in Revision.

*K. M. Rajaratna* for defendant-petitioner.

*R. Rasaratnam*, for plaintiff-respondent.

*Cur. adv. vult.*

August 24, 1976, WANASUNDERA, J.–

The defendant-petitioner was the tenant of premises No. 11, Prince's Gate, Colombo 12 and was sued by her landlord, the plaintiff-respondent, for ejection on the ground that she was in arrears of rent for over a period of three months. The rent of the premises was Rs. 18/88 and it was alleged that she was in arrears in a sum amounting to Rs. 902/88.

At the trial the defendant-petitioner admitted that she was in arrears of rent and the parties consented to judgment on the following terms:–

“Of consent, judgment for plaintiff in a sum of Rs. 816/10 being rent and damages up to the end of June 1975 together with further damages at Rs. 18/81 from the 1st of July 1975 and for ejection, with costs fixed at Rs. 52/50.

If the defendant pays every month on or before the last date of each month from 31st July 1975 a sum of Rs. 56/43 out of the arrears and costs, together with the current damages at 18/81 without defaults, writs not to issue till the 31st of December 1976. In default of any payment,

both writs to issue without notice. Even if writs are to issue after one year, writs to issue without notice. All payments to be made by money orders to Mr. K. A. Rasanathan, No. 200, Hulfsdorp, Colombo 12, Attorney-at-Law for the plaintiff. The defendant further states that she has no sub-tenants under her and undertakes not to sublet the premises.

If the defendant makes the payments aforesaid without any fault, the defendant will be entitled to continue in occupation of the premises on a fresh contract of tenancy as from the 1st of January 1977. If the rates and taxes are not paid by the plaintiff, the defendant will be entitled to make such payment and set them off against the payment due. The defendant will be entitled to withdraw the money order No. 111453 paid to the Authorised Officer Colombo Municipal Council. All other payments made to the Authorised Officer, Colombo Municipal Council, to be recovered by the plaintiff.”

Thereafter, the defendant-petitioner made payments regularly in terms of the consent order until November 1975. The defendant-petitioner states that she sent, by a Money Order dated 28th November 1975, the sum of Rs. 75/24, being the amount payable for November 1975, to the plaintiff-respondent's attorney Mr. Rasaratnam. Mr. Rasaratnam had refused to accept it and had returned the Money Order stating that the payment was out of time.

Consequent to this, the plaintiff-respondent applied to court for a writ of possession, alleging that the defendant-petitioner was in default of the consent order. The defendant-petitioner filed objection to the application for writ and alleged that she had been regularly paying the amounts decreed in the consent order. After inquiry, the learned trial Judge held that the payment in issue had been made in time, and dismissed the plaintiff-respondent's application for writ.

While that inquiry was pending, the defendant-petitioner had not made the monthly payments contemplated by the consent order for the succeeding months. The last payment was the one for November 1975, which the court held by its order 16th March 1976 to have been paid within the prescribed time. The defendant-petitioner had taken the position that, as the plaintiff-respondent had wrongly refused to accept a payment, she was under no obligation to tender further payments, and she was therefore withholding payments pending the inquiry into that matter by court.

The inquiry concluded on the 16th March 1976 in the defendant-petitioner's favour but four days later, on the 20th March 1976, the plaintiff-

respondent applied once again for writ of possession for the defaults in respect of the months subsequent to November 1975. Although the defendant-petitioner objected to the issue of the writ, the court, after inquiry, granted the plaintiff-respondent's application. The defendant-petitioner has now been ejected from the premises, but she seeks relief from this court to have the Magistrate's order revised.

Mr. Rajaratna for the petitioner has urged earnestly that, having regard to the circumstances of this case, the petitioner should be given some relief. The question is whether the grounds urged by him are sufficient for us to intervene on her behalf.

The defaults relied upon by the plaintiff-respondent are the defaults in the months pending the inquiry into his first application for writ. The petitioner's position has always been that, since a valid tender of payment had been rejected by the landlord without justification, she was under no obligation to keep on tendering payment. There was not only the wrongful refusal to accept payment, but also the fact that the plaintiff-respondent rushed into court and applied for a writ to have the petitioner ejected from the premises. The petitioner was therefore entitled to assume that the conduct of the plaintiff-respondent amounted to an unequivocal intimation that any payment of tender for subsequent months would not be accepted. There is authority for the proposition that, when the landlord has made it clear that he will not accept further payment, there is no obligation on the tenant to tender payments as and when they fall due. It is a well-known principle that a party is not required to make a formal tender when it appears that the tender would have been mere form and that the party to whom it was made would have refused to accept the money. (*Vide Annamalai Chettiar v. Greasy*,<sup>1</sup> *Vadivel Chetty v. Abdu*,<sup>2</sup> *Sideek v. Sainambu Natchiya*,<sup>3</sup> and *Wijesekera & Co., Ltd. v. The Principal Collector of Customs*.<sup>4</sup> this is enough to dispose of the matter. But, before concluding I would like to advert to another matter.

What is in issue here is also the effect of a court order. The parties in respect of whom such an order is made, whether of consent or otherwise, are bound by it, and are expected to comply with the provisions. The order cast an obligation equally on the plaintiff-respondent to accept payment when it was offered in time, as much as it was the duty of the petitioner to make payment within the stipulated period. The failure to make a payment in due time is visited with the sanction which has been expressly set out that the plaintiff-respondent could ask and obtain a writ of possession for the ejectment of the petitioner. When there is a default on the part of the

<sup>1</sup> (1955) 56 N.L.R. 477.

<sup>3</sup> (1954) 55 N.L.R. 367.

<sup>2</sup> (1954) 55 N.L.R. 67.

<sup>4</sup> (1955) 53 N.L.R. 329.

plaintiff-respondent, I think it was always open to the court to take action and grant relief to ensure the just determination of the matter and to prevent the process of court being abused.

Acting in revision, I would substitute the following order and direct that the petitioner be restored to possession on the fulfilment of the following condition, namely, that the petitioner should be called upon to pay, within one week of her being so noticed by court, all amounts legally due to the plaintiff-respondent up to that date in terms of the consent order. If such payment is made and she is restored to possession, the terms of the consent order would continue to govern the relationship of the parties until its effect is exhausted.

As the petitioner has so far failed to bring the money into court, she would not be entitled to the costs of this application.

WIJESUNDERA, J. – I agree.

*Decree varied.*

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