1953 *Present :* **Weerasooriya J.**

VADIVEL CHETTY, Appellant, *and* ABDU, Respondent

S. C. 254—C. R. Colombo, 37,171

Landlord and tenant—Enhancement of rent—Not effective until there is agreement—Refusal of landlord to accept rent due—Resulting position—Rent Restriction Act, No. 29 of 1948, s. 13 (1) (a).

Where a tender of payment of the rent due was made by the tenant and was refused by the landlord on the ground that, as the monthly rent had been enhanced by him, a larger amount was due—

Held : (i) A landlord's unilateral act in demanding payment of a higher rent than that agreed upon does not render the tenant liable to pay the higher rent demanded.

(ii) Where a landlord refuses to accept the rent due when it is tendered to him, and has by his conduct made it clear that he will not, in the future, accept rent at the rate agreed upon, the tenant is not obliged to tender the rents for the subsequent months as and when they fall due. The tenant must, however, pay all the unpaid rent within a reasonable time if the landlord subsequently demands it or signifies his readiness to accept it.

(iii) Where the tenant has been given reasonable time to pay all unpaid rent, he cannot be said to be in arrear within the meaning of section 13 (*a*) of the Rent Restriction Act until one month elapses after the expiry of such reasonable time.

APPEAL from a judgment of the Court of Requests, Colombo.

S. J. V. Chelvanayakam, Q.C., with *S. Canagarayar* and *A. Sivagurunathan*, for the plaintiff appellant.

H. W. Jayewardene, with *D. R. P. Goonatilleke*, for the defendant respondent.

Cur. adv. vult.

August 3, 1953. WEERASOORIYA J.—

The defendant in this case, who is the respondent to the present appeal, became the monthly tenant of premises bearing No. 90, Silversmith Lane, Colombo, belonging to the plaintiff, who is the appellant. The tenancy commenced on the 1st January, 1951, and the rent as agreed between the parties was Rs. 18 per month payable on or before the 10th of the month immediately following.

On the 7th March, 1951, before the rent for February had fallen due, the appellant through his proctor wrote the letter P4 to the respondent in which certain facts (which for the purpose of this judgment it is not necessary to set out) were alleged as entitling the appellant to demand from the respondent, as from the 1st February, 1951, a sum of Rs. 29·18 as the monthly rent in lieu of the Rs. 18 agreed upon.

On the 10th March, 1951, the respondent's proctor wrote to the appellant's proctor the letter P5 calling for proof of the facts on the basis of which the demand for enhanced rent had been made, and on the same day the respondent wrote the letter P6 by which he forwarded a money order for Rs. 37·90, of which Rs. 18 represented the rent for the month of February in respect of No. 90, Silversmith Lane, and the balance was rent in respect of certain other premises of which also the respondent was the appellant's tenant.

The sum of Rs. 18 forwarded by the respondent as the February rent for premises No. 90, Silversmith Lane, was returned to the respondent by the appellant's proctor by his letter P7 dated the 14th March, 1951, with a further request that rent should be paid as from February at the rate of Rs. 29·18 per month. On the 9th April, 1951, the respondent wrote the letter P9 to the appellant forwarding a money order for Rs. 55·90 which included a sum of Rs. 36 as the February and March rents for premises No. 90, Silversmith Lane. The letter also set out the views of the respondent as to why the rent of these premises should continue to be Rs. 18 per month, and not Rs. 29·18 as claimed by the appellant. A reply to P9 was sent by the appellant's proctor by his letter P10 dated the 23rd April, 1951. That letter intimated to the respondent that the appellant was not prepared to accept rent at Rs. 18 per month for the premises, and the sum of Rs. 36 paid as rent for February and March was returned to the respondent and he was again called upon to pay rent at

the rate of Rs. 29·18. This letter was followed up by letter P11 dated the 26th April, 1951, from the appellant's proctor in which the respondent was informed that as he had failed to pay rent at the rate of Rs. 29·18 from February onwards he should quit and deliver vacant possession of the premises on the 31st May, 1951, and that on his failure to do so an action would be instituted against him. A specific issue was raised at the trial whether this letter had the effect of terminating the contract of tenancy between the parties, and this issue was answered in the affirmative by the learned Commissioner. No argument was addressed to me at the hearing of the appeal that this finding of the learned Commissioner was erroneous, and I shall therefore proceed on the footing that when this action was filed the contract of tenancy between the parties had already been determined by P11.

On the 3rd April, 1951, the respondent had made an application to the Rent Control Board praying, *inter alia*, for an order on the appellant to accept rent for premises No. 90, Silversmith Lane, at the rate of Rs. 18 per month. On the 7th June, 1951, the appellant also made an application to the Board, the object of which was to obtain an order on the respondent to pay on or before a date to be specified all arrears of rent from the 1st February, 1951, at the rate of Rs. 29·18 per month and, in default of such payment, the authority of the Board to institute an action for ejectment against the respondent.

Pending the determination of his application to the Board the respondent made no tender of payment of rent, even at Rs. 18 per mensem, for the months following March, 1951. On the 5th February, 1952, the appellant's proctor wrote to the respondent the letter P12. At the date of that letter no final determination had been given by the Board on either of the applications made by the appellant and the respondent. In P12 the respondent was informed that as any order made by the Board would not have retrospective effect he should remit to the appellant within 7 days all arrears of rent at the rate of Rs. 18 per month. The rent then outstanding was the rent for the period February, 1951, to January, 1952. The respondent's proctor replied to P12 by letter P14 dated the 12th February, 1952. In that letter particulars were called for as regards the aggregate amount of the appellant's claim and the period in respect of which it was made, and the appellant was informed that a remittance would be sent on receipt of these particulars.

On the 14th February, 1952, the appellant filed action against the respondent praying for his ejectment from premises No. 90, Silversmith Lane, and for the recovery from him of arrears of rent at Rs. 18 per month for the period February, 1951–January, 1952, and damages at the same rate from February, 1952, until the date of ejectment.

For the institution of this action no authority was obtained from the Rent Control Board. Paragraph 6 of the plaint averred that the respondent was in arrears of rent for more than one month after it had become due " within the meaning of section 13 (1) (*a*), of the Rent Restriction Act, No. 29 of 1948 " (hereinafter referred to as " the Act ") and the question that arises for decision in this appeal is whether in the

circumstances stated that averment has been made out, and the appellant's action is maintainable. The decision of that question involves a consideration of the legal position when a tender of payment of the rent is made by the tenant and is refused by the landlord on the ground that a larger amount is due.

It might be stated here that the agreed rate of rent when the tenancy commenced being Rs. 18 per month, even assuming that anything subsequently happened as a result of which the view could be taken that the sum of Rs. 29·18 per month represented no more than the authorised rent recoverable under the Act, the appellant could not, in my opinion, by his unilateral act in demanding payment of rent at that rate change an essential term of the contract of tenancy. It was held in the case of *De Silva et al. v. Perera* [1] that a mere demand made by a landlord for the payment of a higher rent than that agreed upon did not render the tenant liable to pay the higher rent demanded. The decision in that case would apply to the present case notwithstanding that the tenancy under consideration is governed by the provisions of the Act. This appeal must, therefore, be decided on the basis that at all material times the rent of the premises was Rs. 18 per month.

It was conceded by Mr. Chelvanayagam, who appeared for the appellant, that there was a valid tender by the respondent of the rents that fell due for February and March, 1951. Where a tenant has made a valid tender of the rent due, while the non-acceptance of it by the landlord would not place the tenant in default or *in mora* in the payment of that rent, the tenant is not thereafter entirely discharged from the obligation to pay the amount tendered if the landlord subsequently demands it or signifies his readiness to accept it. Wessels in his treatise on the Law of Contract in South Africa [2], in dealing with a tender of money in the attempted performance of a contract, states as follows :—

> *Para 2339 (3) :* " It is submitted that in the case of a money debt, the tender of the money does not liberate the debtor, and he does not hold the money after tender at the risk of the creditor . . . . "
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> *Para 2340 :* " The debtor must always continue ready and willing to pay the money due, and if sued upon the debt, can plead his tender and payment of the money into Court . . . . If this plea is proved the plaintiff will be entitled to the money paid into Court, but the defendant will be entitled to the costs of the action ".

The position in English Law is similar, as appears from the following passage in Anson on the Law of Contract [3] :—

> " If the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into Court.

[1] *(1928) 29 N. L. R. 506.*

[2] *Wessels on the Law of Contract in South Africa (1937 edition), Vol. 1, pp. 703–4.*

[3] *Anson on the Law of Contract (1937 edition), p. 329.*

If he proves his plea, the plaintiff gets nothing but the money that was originally tendered to him, while the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender ".

It will be seen that while the respondent tendered to the appellant the rents for February and March, 1951, as they fell due, no tender was made of the rents for April–December, 1951, and January, 1952. Mr. Chelvanayagam did not, however, contend that despite the refusal of the appellant to accept the rents for February and March, 1951, and his having returned to the respondent the sums tendered, the respondent was under an obligation to tender the rents for the subsequent months as and when they fell due. Up to the time when the letter P12 was written to the respondent by the appellant's proctor, the appellant by his conduct had made it clear that he would not accept rent at Rs. 18 per month, and applying the maxim *lex non cogit ad inutilia* I would hold on the admitted facts that the respondent was not obliged to tender the rents for the subsequent months as and when they fell due. The position is analogous to the case where although a land has been transferred subject to the condition that if the transferor pays a certain sum within a specified period he would be entitled to a re-transfer of it, the transferee subsequently, at a point of time prior to the expiry of the period of the option, repudiates the agreement to re-transfer. It was held in *Muthuvel et al. v. Markandu* [1] that in those circumstances it was unnecessary for the party entitled to ask for the re-transfer to allege or prove tender of the purchase price within the specified period in an action subsequently instituted for specific performance of the agreement.

S. 13 (1) of the Act provides that no action for the ejectment of a tenant shall be instituted in or entertained by any Court except with the written authorisation of the Rent Control Board. Under the proviso to that sub-section an action for ejectment may, however, be instituted without the authorisation of the Board on the grounds set out in paragraphs (*a*)–(*d*) of the proviso, of which paragraph (*a*) requires as a condition precedent that the rent has been in arrear for one month after it has become due. The words " in arrear " in that paragraph are not used in any special sense and their ordinary meaning is that the payment of the rent has been in default. Now a tenant who has tendered to the landlord the rent as it fell due and has taken all reasonable steps towards the landlord's acceptance of it cannot be regarded as in default in paying that rent ; nor can it be said that the tenant has been in default in paying the rent where as a result of the landlord's conduct in refusing acceptance of the rent for a previous month he did not tender the rent for a subsequent month on the ground that the tender would have been useless. It is only of the rent outstanding from a tenant who is behind in the discharge of his liability to pay rent punctually that it may be said that the rent is in arrear. Whether in a given case the rent has been in arrear would largely be a question of fact.

Mr. Chelvanayagam while conceding that the respondent cannot be said to have been in default in the payment of the rent up to the time of

[1] *(1952) 54 N. L. R. 462.*

the receipt by him of P12, submitted that on the respondent failing to remit to the appellant, within the period specified in P12, all the rent that was then outstanding at the rate of Rs. 18 per month, he was in default in the payment of that rent. Mr. Chelvanayagam also conceded that where a creditor makes a subsequent demand for payment of money previously tendered, but refused by him, the debtor must be allowed a reasonable time for the payment of the money, but he contended that the period of seven days specified in P12 was a reasonable time. What a reasonable time is is, however, a question of fact. In this case there is a finding by the learned Commissioner that the time limit imposed by the appellant in P12 was neither adequate nor reasonable, and that the respondent was not in arrear in the payment of the rent, and I see no reason to disturb that finding ; but even assuming that such time limit was reasonable the respondent would have commenced to be in default (or in arrear) only on the expiry of that period. This action was instituted on the 14th February, 1951 ; that is to say one day, or at the most two days, after the expiry of the specified period, and even if the respondent was in arrear for one day, or two days, at the time of the institution of the action, that fact alone would not have entitled the appellant to dispense with the authority of the Rent Control Board, as, in terms of s. 13 (1) (*a*) of the Act, such authority is unnecessary only when the rent has been in arrear *for one month* after it has become due, and in my opinion on no view of the matter could it be said that when the action was instituted the rent was in arrear for one month after it had become due.

In the result the order of the learned Commissioner dismissing so much of the appellant's action as relates to the ejectment of the respondent is correct and the appeal from that order is dismissed. With regard to that part of the action which relates to the recovery of the rent outstanding at the date of action, the respondent in his answer admitted that it was due, and pleaded tender of the rent for February and March, 1951, and his readiness at all times to pay that rent as well as the other rents which were outstanding, and although he did not, as required by s. 414 of the Civil Procedure Code, at the time that the answer was filed pay the money into Court or take the requisite steps for the purpose of such payment, the money was in fact paid into Court on or about the 15th September, 1952, and before the actual trial of the case, along with the rent for the months of February–May, 1952.

The order of the learned Commissioner dismissing that part of the appellant's action for the recovery of the sum of Rs. 216 as representing the rent outstanding for the months of February–December, 1951, and January, 1952, is set aside, and judgment will be entered for the appellant for that amount. The appellant will be entitled to withdraw that amount from the sum deposited in Court. The respondent will, however, be entitled to his costs of the trial which will have to be paid by the appellant. Each party will bear his own costs of appeal.

Order varied.