

SETUNGA
v.
W.M.G. FERNANDO

SUPREME COURT

SAMARAKOON, C.J., WANASUNDERA J., AND RATWATTE, J.
S.C. APPEAL NO. 15/82; CA NO. 333/81; D.C. MOUNT LAVINIA CASE
NO. 406/RE
JULY 28, 1982.

Landlord and tenant - Consent decree - Writ of ejectment - Resistance to Fiscal - Application under s. 325 of the Civil Procedure Code - Waiver - Election.

One of the terms of settlement of a suit for rent and ejectment was that writ of ejectment would not issue provided damages were paid monthly commencing from the 1st of January 1979 before the 10th day of each and every month, i.e. the rent for the month of January 1979 should be paid before the 10th of the same month. In the event of a single default writ was to issue.

Payments for January, February and March, 1979 were duly made. The payment for April 1979 sent by T.M.O. was received by the plaintiff on 11th April 1979. The plaintiff acknowledged receipt by his letter (R 12) dated 16.4.1979 by which he wrote to the defendant inter alia as follows:

"Your T.M.O. was received on the 11th evening. As you are aware, you are required to ensure that the rent remittance reaches me by the 10th of each month and no later. I should advise you that I am not obliged to accept the rent if it should reach me any later than the 10th. I have accepted your rent in this instance, but if it should be at all delayed again, I shall not hesitate to take appropriate action. Should the 10th be a Sunday or a holiday please send it to reach me on the 9th".

However the plaintiff applied for a writ of possession alleging that payments for January, February and March 1979 had not been made according to the terms of settlement and the payment for April 1979 had been received on the 11th April. The application was allowed but when the Fiscal went to execute the writ, he was resisted by the defendant-appellant and two others. The Fiscal reported the resistance to Court. The plaintiff-respondent then initiated proceeding under s. 325 of the Civil Procedure Code. After inquiry the District Judge found the appellant guilty of the charge of resisting the Fiscal and fined him Rs. 1000/- and ordered the writ of execution to be reissued. The appellant moved the Court of Appeal in revision but the application was dismissed. He then appealed to the Supreme Court.

Held -

- (1) In an inquiry under s. 325 of the Civil Procedure Code the only question before the Court is whether the resistance to the Fiscal was justified or not and any evidence to justify it is admissible.
- (2) The resistance to the Fiscal was justified because.
 - (a) The payments for January, February and March 1979 had all reached the appellant before the 10th of the month and receipts had been issued by the respondent. Therefore the respondent's complaint that these payments were not made in accordance with the settlement is incorrect.

(b) Although the payment for April 1979 had been late the forfeiture arising out of the delayed payment had been waived by the respondent by R 12. If a man determines, his election shall be determined forever.

Case referred to:

(1) *Clough v. London and North Western Railway Co. (1871) L.R. VII Exchequer, 34.*

APPEAL from judgment of the Court of Appeal.

P. Wimalachanthiran with *A.P. Niles* and *A. Shirly H. Perera* for defendant-petitioner-appellant.

E. Gunaratne for plaintiff-respondent-respondent.

August 9, 1982

SAMARAKOON, C.J.

The respondent instituted this action against the appellant to have him ejected from premises No.15, Abeywickrema Avenue, Mount Lavinia, of which he was the respondent's tenant, on the ground that the appellant was in arrears of rent. The appellant denied this allegation. On the 30th June, 1978, the dispute was settled and the terms of settlement were entered of record. Decree was entered accordingly. The relevant portion of the decree reads as follows:—

“Of consent, judgment be entered in favour of the plaintiff against the defendant:

- (a) in a sum of Rs. 2,860/05 and continuing damages rate of Rs. 190/67 per month from 1/2/77 till possession is restored to the plaintiff;
- (b) for ejection of the defendant his servants, agents and all those holding under him from the premises described in the Schedule hereto;
- (c) for costs as taxed by an Officer of this Court.

It is further ordered and decreed:

That the defendant do pay the damages due in respect of the premises in suit bearing No. 15, Abeywickrema Avenue, Mount Lavinia commencing from the 1st of January 1979 before the

10th day of each and every month. That is, the rent for the month of January 1979 be paid before the 10th day of the same month. In the event of a single default both writs to issue.

If the defendant pays the aforesaid sum of arrears of rent and damages on or before the 30th day of June 1982 writs not to issue till 30th June 1984.

In any event both writs to issue after the 30th day of June 1984."

The stipulation regarding the payment of damages from 1st January 1979 is somewhat confusing because the same para refers to the payment for the month of January as "rent" and not damages. The terms of settlement are recorded in Sinhala and the words used are "භෙවල් කුලී". However no point was made of this at the argument and I therefore proceed on the basis that what was meant was damages for the month of January.

The terms of settlement and the decree stipulated that each month's damages should be paid "before the 10th of each and every month". By letter dated 26th December 1978 (R1) the respondent wrote to the appellant stating *inter alia* as follows:-

"You are aware that commencing January 1979 you are required to pay your rent each month *by the 10th of the month*. No grace time can be allowed. Therefore please ensure that the rent for each month is sent to reach me by the due date by Money Order (not cheque)".

By this letter the respondent seems to have altered the mode of payment. Thereafter money due was not paid before the 10th of each month. Whether this constituted a complete waiver of the time of payment or a variation of it was not argued before us. The Court of Appeal held that both parties understood the settlement to mean payment or a variation of it was not argued before us. The Court of Appeal held that both parties understood the settlement to mean payment "by the 10 of each month", and it was so accepted and adhered to by both parties. This finding has not been contested before us.

In May 1979 the respondent applied for a writ of possession alleging that the payments due for the months of January, February and March 1979 had not been made according to the terms of settlement

and that payment due for the month of April 1979 had been received on the 11th April. The District Judge allowed the application. When the Fiscal went to the premises on the 9th August 1979 to execute the writ of possession he was resisted by the appellant and two others. The Fiscal therefore could not execute the writ and he reported the matter of the resistance to the District Court. The respondent then initiated proceedings in terms of section 325 of the Civil Procedure Code against the appellant and two others. After inquiry the District Judge found the appellant guilty of the charge of resisting the Fiscal. He imposed a fine of Rs.1,000/- on the appellant and ordered the reissue of the writ of possession. The appellant filed papers in revision in the Court of Appeal. That application was dismissed. Hence this appeal with leave of the Court of Appeal.

The payments due for the months of January, February and March 1979 have been made in accordance with the instructions given by the respondent in letter 'R'. They have all reached him before the 10th of the month and receipts have been issued by the respondent for such payments. He cannot now complain that these payments were not made in accordance with the terms of settlement. The payment for April 1979 was received by the respondent on the 11th April and a receipt dated 12th April (R5A) was issued. Counsel for the appellant argued that this money was sent by Telegraph Money Order on the 10th April and it should have been received by the respondent that same evening. The District Judge has found as a fact that this Telegraph Money Order was received on the 11th April and I see no reason to disturb this finding of fact. The respondent sent the receipt 'R5A' to the appellant with a covering letter dated 16th April 1979 (marked R12) which reads as follows:-

"Dear Mr. Setunga,

I am enclosing herewith your receipt for the April rent. Your TMO was received on the 11th evening. As you are aware, you are required to ensure that the rent remittance reaches me by the 10th of each month and no later. I should advise you that I am not obliged to accept the rent if it should reach me any later than the 10th. I have accepted your rent in this instance, but if it should be at all delayed again, I shall not hesitate to take appropriate action. Should the 10th be a Sunday or a holiday please send it to reach me on the 9th.

To ensure quicker delivery you may address your remittance to my home address: 1A, Upper Hantane, Peradeniya.

Yours sincerely,
Sgd. W.M.G. Fernando
Prof. W.M.G. Fernando"

Counsel for the appellant argued that by this letter the respondent waived his right to obtain a writ of possession on the ground of forfeiture of the right of occupancy granted by the settlement. Counsel for the respondent contended that the Court of Appeal should not have entertained this argument because the question of waiver was neither pleaded nor put in issue at the inquiry in the District Court. I cannot agree. This being an inquiry in terms of section 325 of the Civil Procedure Code, the only question before the Court was whether the resistance to the Fiscal was justified or not and any evidence to justify it was admissible. Therefore R12 and the interpretation of it became relevant. Furthermore no issues are framed at such inquiries as is done in a regular trial. I therefore reject this contention.

In rejecting the argument that the forfeiture has been waived. Cader, J. has relied on the first four sentences only of 'R12' as being the relevant portions. He holds that: "All that this letter says is that he may not accept a late payment of rent made thereafter" and further that "the letter contains no express promise not to sue." He concedes that "Perhaps, by implication some forbearance on the part of the respondent may be read into the letter" but he holds that "this is not sufficient to save" the appellant because "he did not act upon the respondent's representation." I find myself unable to agree with this reasoning. The relevant portion of 'R12' is not that quoted by Cader, J. but the latter portion which reads as follows:-

"I have *accepted your* rent but if it should be at all delayed *again*, I shall not hesitate to *take appropriate action*. Should the 10th be a Sunday or a holiday please send it to reach me on the 9th.

To ensure quicker delivery you may address your remittance to my home address: 1A, Upper Hantane, Peradeniya."(The underlining is mine.)

The respondent accepts the April rent though late and warns the appellant that if it happens again he will take appropriate action, meaning thereby, that he will take action upon a forfeiture in terms of the settlement. It is clear to my mind that the respondent by this statement conveyed to the appellant his decision not to take

advantage of the default as was his right under the settlement. He was excusing him this time but warned that he would not do so in case of default in the future. The use of the word "again" make this clear. This was a clear waiver of his right to apply for writ of possession. That the *status quo* was to continue becomes apparent from the fact that the respondent gives instructions to the appellant to ensure quicker delivery of Money Orders in the future. "If a man once determines, his election shall be determined for ever." (Comyns' Digest Election C2) Mellor, J. quoting this in the case of *Clough vs. London and North Western Railway Co.* (1) said:

"The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture."

Payments were made and accepted after receipt of letter 'R12' and receipt 'R5A'. When the appellant resisted the Fiscal on 9th August, he also had in his possession receipt for payments for the months of May (R6A) June (R7A) and July (R8A). He resisted the Fiscal on the faith of these documents and letter 'R12'. Strangely these receipts were all for rent paid and not for damages. But no argument was based on this aspect of the matter before us. I am of the view that the forfeiture arising out of the delayed payment for April 1979 was waived by the respondent by 'R12'. The appellant was therefore justified in his resistance to the Fiscal. The respondent could not in the circumstance blow hot and cold at the same time. I would therefore allow the appeal and set aside the order of the Court of Appeal and the District Court. The punishment meted out to the appellant is also set aside. The appellant will be entitled to costs of appeal to the Court of Appeal and this Court and his costs in the District Court.

WANASUNDERA, J. - I agree.

RATWATTE, J. - I agree

Appeal allowed.