

1958

Present : Sansoni, J.

U. G. HELENAHAMY, Appellant, and EASTERN
HARDWARE STORES LTD., Respondent

S. C. 17—C. R. Colombo, 66,331

Rent Restriction Act—Arrears of rent—Effect thereof—Waiver by landlord of his right to sue tenant—Duty of tenant to plead it—Payment of rent—Effect of accepting it late occasionally.

Once a tenant has been in arrear of rent for one month after it has become due he forfeits the protection given to him by the Rent Restriction Act against being ejected.

Where waiver by a landlord of his right to sue his tenant is neither pleaded nor put in issue, the question cannot be agitated for the first time in appeal.

An occasional late payment of rent which the landlord is prepared to overlook does not alter the term of the contract as regards the time of payment.

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

H. W. Jayewardene, Q. C., with N. R. M. Daluwatte, for the defendant-appellant.

V. Thillainathan, for the plaintiff-respondent.

Cur. adv. vult.

October 28, 1958. SANSONI, J.—

The plaintiffs rented premises No. 562 and premises No. 568/56 to the defendant on two tenancy agreements. The rent for the former premises was agreed at Rs. 35/50 a month and for the latter at Rs. 14/78 a month. It was agreed also that the rent should be paid on or before the 5th of each month.

This action was filed on 5th June 1957 in respect of premises No. 562, to recover arrears of rent and to eject the defendant on the ground that rent was in arrear for one month after it became due. In her answer the defendant pleaded that the rent was payable, not on or before the 5th of each month, but on or before the 10th of the following month. She also pleaded that rent was not in arrear. After trial the Commissioner gave judgment in favour of the plaintiffs and the defendant has appealed.

It is common ground that the authorised rent for premises No. 568/56 is Rs. 11/8½ a month, and that the plaintiffs had recovered a sum of Rs. 105/5½ in excess of the authorised rent up to 1st December 1956. It is also clear that the defendant paid no rent between 1st December 1956 and 12th March 1957, but it has been claimed that the excess rent recovered amounting to Rs. 105/8½ should be set off against the rent which fell due during that particular period. But even this set-off will not help the defendant, since the correct rent for both premises is Rs. 47/3½ a month and the rent for December 1956 and January and February 1957 would therefore amount to Rs. 142/02. If the Rs. 105/8½ is deducted from this sum, Rs. 36/18 was still due from the defendant on 5th February 1957. Nothing was paid thereafter until 12th March 1957. By that date the rent was in arrear for one month after it fell due.

Mr. Jayawardene submitted that as notice to quit was not given until 16th March and a payment was accepted on 12th March the plaintiffs cannot avail themselves of proviso (a) to section 13 of the Rent Restriction Act, No. 29 of 1948. I cannot agree, for it was held in *Dias v. Gomes*¹ that once a tenant has been in arrear of rent for one month after it has become due he forfeits the protection given to him by the Act against being ejected.

Another point which was argued was the question of waiver. It was said that the plaintiffs waived their right to sue for ejectment by accepting a payment on 12th March of a sum of Rs. 50/28. This payment did not settle the amount due up to 5th March and was therefore only a part payment. But the question of waiver cannot be considered at this stage, for waiver depends on evidence of fact, and where waiver was neither pleaded nor put in issue the question cannot be agitated for the first time in appeal—see *Hedridge v. Rustomji*².

A faint suggestion was made that because rent had occasionally been accepted by the plaintiffs when it was offered after the due date it ceased to be payable on the 5th of each month. A passing reference was made to *Suppiah v. Kandiah*³, which dealt with an entirely different state of facts. I do not understand the law to be that an occasional late payment of rent which the landlord is prepared to overlook alters the term of the contract as regards the time of payment. There must at least be acquiescence extending over a long period from which it may be reasonably inferred that the tenant has been granted permission to pay rent later than the date stipulated. I need not dwell longer on this topic since even the defendant has made no reference to rent being payable on the 10th of the following month when she gave evidence.

The appeal is dismissed with costs.

Appeal dismissed.

¹ (1954) 55 N. L. R. 337.

² A. I. R. (1933) P. C. 233.

³ (1957) 59 N. L. R. 479.