SELVARAJAN
V.
VIGENDRA AND WIFE SHYAMALA

SUPREME COURT.
G. P. S. DE SILVA C.J.
RAMANATHAN J.
WIJETUNGA J.
S.C. 54/96
S.C. SPL. LA 287/95
C.A. 472/83 (F)
D. C. COLOMBO 4848/RE
JUNE 24, 1996
JULY 31, 1996

Rent Act 5 of 1972 - S. 22(3)(c) - Tender of arrears - Credit of Case - Supervening Impossibility - Lex Non Cogit ad Impossibilia.

The Plaintiffs Respondents instituted proceedings for the ejectment of the Defendant - Appellant from the premises in question. The 2nd Plaintiff is the Landlord and the 1st Plaintiff the 'Thesawalamai Husband'. The Defendant - Appellant in his answer took up the position that he had deposited in Court before the Summons returnable date the arrears of rent and relied on S. 22(3)(C) of the Rent Act. The District Court entered judgment in favour of the Plaintiffs, the Defendants appeal to the Court of Appeal was dismissed.

It was contended that it was impossible to comply with the provisions of S 22(3) (C) because the plaintiffs were resident abroad.

Held:

(1) Evidence discloses that the Defendant used to deposit the rent to the Credit of the Plaintiff in their Bank Acounts in Sri Lanka and on one occasion the rent had been paid to the Attorney-at-Law for the plaintiffs. This is not a Case where the *Maxim lex non cognit ad impossibilia* could be applied. The previous course of conduct of the Defendant himself negatives the plea of supervening impossibility. There was no insuperable difficulty in adopting either of the two modes of payment which he had previously adopted and had been accepted by the landlord.

(2) Deposit of money to the credit of the case does not constitute a tender of arrears of Rent to the landlord within the meaning of S. 22(3)(c).

AN APPEAL from the judgment of the Court of Appeal.

Cases Referred to:

1. Jayakody v. Lilian Perera - 1993(2) SLR 74

S. Mahenthiran for the Substituted - Defendant-Appellant.

P.A.D. Samarasekera P.C. with *R.K.S. Sureshchandra* for Plaintiff-Respondent.

Cur. adv. vult.

August 22, 1996.
G. P. S. DE SILVA, C.J.

The Plaintiffs instituted these proceedings on 19.8.81 for the ejectment of the Defendant from the premises in suit on the ground of arrears of rent. The 2nd Plaintiff is the landlord of the premises and the 1st Plaintiff is the "Thesawalamai husband" of the 2nd Plaintiff. The original Defendant was the tenant of the premises but he died whilst the application for special leave to appeal to this court was pending. His wife has now been substituted in the room of the original deceased Defendant.

The Defendant in his answer took up the position that he had deposited in court before the summons returnable date the arrears of rent and accordingly relied on the provisions of section 22(3) (c) of the Rent Act.

The Plaintiffs did not give evidence, but produced documents marked P1-P3. The Defendant gave evidence on his behalf. After trial, the District Court entered judgment in favour of the Plaintiffs. The Defendant's appeal to the Court of Appeal was unsuccessful, and hence the pesent appeal to this court.

It is common ground that the Defendant deposited the arrears of rent in court prior to the summons returnable date. It was also not disputed that the Plaintiffs were residing in the United Kingdom.

Special Leave to appeal to this court was granted on the following question:-

"Since the Plaintiffs were not in Sri Lanka, is the deposit of money in court on 23.8.82 by the Defendant in accordance with section 22(3) (c) of the Rent Act?"

Mr. Samarasekera for the Plaintiff-Respondents relied strongly on the decision of *Jayakody v. Lilian Perera*[1], where the court held, "that the deposit of money to the credit of the case does not constitute a tender of arrears of rent to the landlord within the meaning of section 22(3) (c) of the Rent Act."

Mr. Samarasekera urged that there must be strict and proper compliance with the requirements of section 22 (3) (c) in order that the tenant might get the benefit of the "concession" granted to him by law. Counsel submitted that it is only where there is a valid tender of the arrears of rent as contemplated by section 22(3) (c) of the Rent Act that the landlord will not be entitled to proceed with the action for ejectment of the tenant. Counsel further pointed out that the evidence discloses that the Defendant used to deposit the rent to the credit of the Plaintiffs in their bank account in Sri Lanka and on one occasion the rent had been paid to the Attorneys-at-Law for the Plaintiffs. Payments so made have been accepted as payment to the landlord.

Mr. Samarasekera further contended that the absence of the Plaintiffs from Sri Lanka was not a "new situation". In any event, counsel argued, that the deposit of arrears of rent in court is not in conformity with the provisions of section 22 (3) (c) of the Rent Act.

The principal submission of Mr. Mahenthiran for the Defendant Appellant was that it was impossible to comply with the provisions of section 22 (3) (c) because the Plaintiffs were resident in the United Kingdom. To use Counsel's own words "there existed a practical impossibility of performance by the Defendant to tender to the landlord the arrears of rent." Counsel urged that the situation was one of "a supervening impossibility"and that this crucial fact was sufficient to distinguish the present case from the case of *Jayakody v. Lilian Perera* (*supra*).

On a consideration of the submissions of Mr. Mahenthiran it would appear that counsel is in fact relying on the principle embodied in the

maxim "*lex non cogit ad impossibilia*". The true question which arises for decision is whether the application of this maxim is warranted, having regard to the evidence of the Defendant himself. It is in evidence that there was a time when the Defendant paid the rent by crediting it to the Plaintiffs bank account in Sri Lanka. In the written submissions filed on behalf of the Defendant in the District Court it is stated that "the Defendant gave evidence that the Plaintiffs were out of Sri Lanka and upto 4 years ago rent was deposited at the bank." In the notice to quit (P3) dated 23.2.1981 addressed to the Defendant by the Attorney-at-Law for the Plaintiffs it is stated, inter alia, that the Defendant is in arrears of rent for the months of May 1979, December 1980 and January 1981 at the rate of Rs. 750/- per month. When the Defendant was questioned as to why he failed to pay the arrears of rent, his answer was "I had no money at that time. I intended to collect the money and pay it." He was further questioned as to why he did not send a cheque to the Attorney-at-law for the Plaintiffs. His reply again was "at that time I had no money". The matter does not rest there. There is evidence that on a previous occasion by the notice to quit dated 5.8.80(P1), the Defendant was informed by the Attorneys-at-law for the Plaintiffs that he was in arrears of rent from May 1979. In reply to P1 the Defendant by letter P2 dated 28.11.1980 forwarded to the Plaintiffs' Attorneys-at-law a cheque for Rs. 13,500/- drawn in favour of the 2nd Plaintiff (landlord). The cheque was accepted as rent for the period June 1979, to November 1980. Thus it is seen that apart from the practice of paying rent to the credit of the bank account of the Plaintiffs, there is clear evidence that the Defendant himself has paid arrears of rent to the Attorneys-at-law of the Plaintiffs and such payment has been accepted as payment to the Plaintiffs. As rightly submitted by Mr. Samarasekera, the absence of the Plaintiffs from Sri Lanka was not a new situation that had arisen all of a sudden. The evidence shows that the true reason for the Defendant's failure to pay forthwith the arrears of rent set out in the notice P3 was not the absence of the Plaintiffs from the Island but his inability to find the money.

In my view the evidence of the Defendant himself shows that this is not a case where the *maxim lex non cogit ad impossibilia* could properly be applied. The previous course of conduct of the Defendant himself negatives the plea "of supervening impossibility". From a strict, legalistic, stand point it would at first sight appear that this is a case of

"impossibility of performance" since the Plaintiffs resided abroad. However, on a scrutiny of the Defendant's evidence it is manifest that he has himself adopted two modes of payment of rent to her. Was there then, an insuperable difficulty in adopting either of the two modes of payment which he had previously adopted and had been accepted by the landlord? The evidence certainly does not reveal any such difficulty. The resulting position is that there is in truth no valid ground upon which this case could be distinguished from *Jayakody v. Lilian Perera (supra).*,

I accordingly hold that on the evidence the plea of "supervening impossibility of performance" fails. The appeal is accordingly dismissed but in all the circumstances without costs.

The Defendant is now a widow and is in difficult circumstances. Immediate ejectment from the premises would naturally cause grave hardship. In the special circumstances of this case I direct writ of ejectment not to issue till 31st August 1998. The Plaintiffs will be entitled to take out writ without notice after 31st August 1998 and to be placed in possession of the premises in suit.

RAMANATHAN, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.