1962 *Present :* **Sansoni, J., and Sinnetamby, J.**

C. D. SOLOMON, Appellant, *and* C. MOHIDEEN PATHUMMA (Wife of M. I. Aboobucker), *et al.*, Respondents

*S. C. 369/60—D. C. Colombo, 44047/M*

*Landlord and tenant—Sub-tenancy—Rent due from sub-tenant—Sub-tenant's right to pay it to head landlord.*

*Appeal—Section 772 of Civil Procedure Code—Meaning of expression " support the decree on any of the grounds decided against him in the Court below ".*

Where a landlord (A) lets a house to a tenant (B) who subsequently sub-lets it to C, C cannot plead that he has discharged his obligation to pay B the rent due to him by paying such rent to A, unless he proves that such payments were made for the benefit of B or to prevent his own goods being distrained by A.

Without filing an objection in terms of section 772 of the Civil Procedure Code a party respondent to an appeal is not entitled to attack any findings of the trial Court that are adverse to him. The respondent must accept the correctness of the decision which has been made against him and on that basis, if the findings help him, try to support the decree.

APPEAL from a judgment of the District Court, Colombo.

*H. W. Jayewardene, Q.C.*, with *C. D. S. Siriwardene* and *S. S. Basnayake*, for the 1st defendant-appellant.

*C. Thiagalingam, Q.C.*, with *M. L. de Silva*, for the respondents.

April 12, 1962. SINNETAMBY, J.—

The plaintiff instituted this action against the first defendant alleging that the first defendant was her tenant and that he had failed to pay rents from June, 1956. She also alleged that she gave due notice to the 1st defendant to quit and deliver possession of the premises at the end of March, 1958. She claimed a sum of Rs. 6,195 as arrears of rent from 1st July, 1956 to 31st March, 1958, and also claimed damages thereafter from 1st April, 1958, till she was restored to possession at the same rate as the rent. She also asked for ejectment of the two defendants, the 2nd defendant being a sub-tenant of the 1st defendant. The first defendant in his answer denied any contract of tenancy between himself and the plaintiff and alleged that he was a tenant under the owners of the property namely Mrs. F. V. de Silva and Mrs. Sumitra Aratchi. It was not denied that the two ladies were the owners of the property but plaintiff's case is that she had taken the premises on rent from them and then rented it to the 1st defendant. The 1st defendant in his answer stated that he had taken the premises on rent from the owners and had paid rents to them. For the sake of convenience I shall hereafter refer to the owners as the head landlords, the plaintiff as landlord, 1st defendant as the tenant and the 2nd defendant as the sub-tenant.

On a perusal of the answer it is quite evident that the 1st defendant based his defence entirely on the averment that he was not liable to pay the plaintiff inasmuch as there was no contract of tenancy between them. He did no doubt say that he paid rents to the head landlord, namely the two ladies, but there was no specific plea based upon it. When the time came for issues to be framed, Mr. Kanagarajah for the plaintiff suggested the following :—

1. Did the plaintiff let premises No. 179, 4th Cross Street, Pettah, on a monthly rental of Rs. 295 to the 1st defendant on 28.10.1955 ?
2. Has this tenancy been terminated by a notice expiring on 31.3.1958 ? (Notice to quit given by the plaintiff to the 1st defendant is admitted.)
3. Is the 1st defendant in arrears of rent since 1.7.1956 for more than one month after it has become due ?
4. If the above issues are answered in the affirmative, is the plaintiff entitled to eject the 1st defendant and those holding under them ?
5. What amount is due on account of arrears of rent and damages from the 1st defendant to the plaintiff.

Mr. Advocate Somasunderam who appeared for the 1st defendant while accepting these issues suggested only the following issues :—

6. Is the 1st defendant in occupation of the premises in question as a tenant under Mrs. F. V. de Silva and Mrs. Sumitra Aratchi as from October, 1955 ?
7. If so, can the plaintiff maintain this action ?

All the issues framed were accepted.

It was thus clear on a consideration of the issues that the 1st defendant at no time contended that he had paid any rents to the head landlords for and on behalf of his landlord and thereby discharged his obligations to pay rents to her. On the contrary. his defence was that he was a tenant of the owners and was not at all liable to pay rent to the plaintiff. On the main issues the learned trial judge came to the conclusion that the 1st defendant was a tenant of the plaintiff. He, nevertheless, held that the 1st defendant was not in arrears of rent for more than one month after it had become due and that, therefore, the plaintiff was not entitled to maintain his action. He also held that the 1st defendant had by payment to the head landlords discharged his obligations to pay rents to the plaintiff and that on issue 5 no sum of money was due as rent to the plaintiff for the period 1st July, 1956, up to 31st March, 1958, but he held that the 1st defendant had not paid for the month of April, 1958, and on that ground had been in arrears of rent for more than one month after it had become due. He accordingly entered judgment in ejectment and ordered the defendant to pay the plaintiff damages from 1st April, 1958, till the plaintiff was restored to possession.

Against this judgment the plaintiff did not appeal. He did not contest the validity of the Judge's findings that the 1st defendant had discharged his obligations to pay the plaintiff by direct payment to the plaintiff's head landlord at the rate of Rs. 295 per mensem for the period 1st July, 1956, to 31st March, 1958. The 1st defendant, however, preferred the present appeal against the learned Judge's findings. The plaintiff who received the usual notice in regard to the appeal did not in terms of section 772 " take any objection to the decree which he could have taken by way of appeal " in order to reverse the learned Judge's findings on issues 3 and 5. Counsel appearing for her, thus, was compelled to accept the Judge's findings that no rent was due to her in respect of the period 1st July, 1956, to 31st March, 1958.

The first question that arises for consideration is whether the defendant can be said upon the learned Judge's findings to have been in arrears of rent within the meaning of the Rent Restriction Act. Plaintiff's contention was that she gave notice to the 1st defendant because he was in arrears of rent for more than one month after it had become due. The notice was given at the end of February to quit and deliver possession on 31st March. Indeed, the plaintiff could not have instituted this action for ejectment if the 1st defendant had not been in arrears of rent for more than one month after it had become due in respect of a period prior to 1st March, 1958. The learned Judge, however, having regard to the general terms in which issue 3 was framed, took the view that it was open to him to hold that rent had not been paid for the month of April, 1958; but, in my opinion, he was not entitled to do so for that was certainly not the plaintiff's case. The plaintiff's case was that arrears of rent was in respect of a period prior to the giving of the notice. That is the only inference one could draw from a consideration of the plaint, and the issues must ordinarily be referable to the plaint unless it is obvious that

something else was intended. If the 1st defendant was not in arrears of rent for the period stated by the plaintiff, his action must necessarily fail.

The learned trial Judge on his own and without any argument being addressed to him also took the view that the tenants had paid the head landlord a sum of money which was sufficient to cover the rents for the period July 1956 to April 1958 and that these payments having been made for the benefit of the landlord should be set off against the rent. In coming to this conclusion he relied on a principle of Roman-Dutch law referred to by Wille in his book " Landlord and Tenant " in the following terms :—

> " The tenant has the actio locati against his sub-tenant for rent due under the sub-lease. Unless the tenant had paid to the landlord himself what he owes to the head landlord in which case the sub-tenant is discharged from liability to the tenant ."

For this proposition, Wille has referred to Voet 19.2.21 and 46.3.7. Wille's statement of law in that particular paragraph is not quite complete for, according to Wille himself, the payment by a sub-tenant to a landlord would discharge his liability for payment of rent to his own landlord if only such payment was for the purpose of preventing his own goods from being seized under the landlord's tacit hypothec. At page 178 of the same edition, Wille puts it in this way :—

> " Privity of contract is not created by the landlord accepting rent from a sub-tenant, even if he does so for a substantial period of time, since that is not sufficient to constitute a *delegatio* or assignment, for a sub-tenant is entitled to pay to the landlord rents due to him by the tenant either to free his goods (the sub-tenant's) from the landlord's *tacit hypothec* or acting as *negotiorum gestor* for the tenant ."

Voet makes it clear that the payment to operate as a discharge of the debt due to the landlord must be for the benefit of the landlord. In Book 46 Title 3 Section 7 on which Wille relies for his statement of the law, this is what Voet says (Gane's translation) :—

> " Although payment to my creditor's creditor will not be valid without my creditor's consent except in so far as my actions on his behalf have been for his benefit though unknown to him ."

It will thus be seen that before the sub-tenant can plead that he has discharged his obligation to pay his landlord the rent due to him by paying such rent to the head landlord, he must also prove that such payments were made for the benefit of the landlord or to prevent his own goods being distrained by the head landlord. These are questions of fact involving evidence and must be covered by express issues. It was never the 1st defendant's case that he was a tenant of the plaintiff and discharged his obligations by payment of rents to the head landlord. On

the contrary he repudiated his contract of tenancy with the 1st defendant and it was not open to the judge on his own to have thought of this defence which neither party contemplated in his pleadings or in his issues.

In appeal before us it was not suggested that the sub-tenant can pay the head landlord unless such payment was made for the benefit of his own landlord. Whether that be the true legal position or not, specific issues should have, in my opinion, been framed; otherwise, it would have caused prejudice to the parties. Indeed, the learned Judge at one stage in rejecting the evidence of the plaintiff states that she did not produce any receipt in support of her statements that she had paid rents due from her to the head landlords. It was not necessary for her to produce such receipts. She said she had them with her and ordinarily it would have been totally irrelevant to produce them as the question of whether she was or was not in arrears in regard to rent payable by her to the head landlords was not put in issue. Nevertheless, there is some evidence given by her to the effect that she had made payments to the head landlords and that if an accounting is taken there would be monies due to her from them. One of the head landlords namely Mrs. F. V. de Silva when questioned as to whether she had received Rs. 6,000 as an advance from the plaintiff's husband who held her power of attorney, at first said she could not remember but when a receipt bearing her signature was produced and shown to her, she acknowledged her signature. She had also written a letter P 2 to the plaintiff admitting having taken Rs. 6,000 in advance. She further stated that she remembered having received Rs. 1,000 or Rs. 1,500 as advance against rent due to her. She was questioned in regard to these matters solely for the purpose of showing that the 1st defendant was not her tenant and that it was the plaintiff who was her tenant. All these matters would have been properly gone into if proper issues in respect of them had been framed.

In my opinion, the learned Judge has totally misdirected himself in embarking on these lines of thought and in deciding the case on matters which were not put in issue. The question he had to determine was first whether the 1st defendant was a tenant of the plaintiff and secondly whether he was in arrears of rent prior to April, 1958, for more than one month after it had become due. These matters have not been satisfactorily dealt with.

It was contended on behalf of the appellant that having regard to provisions of section 772 of the Civil Procedure Code it was not open to the plaintiff-respondent to question the validity of the Judge's findings that the 1st defendant was not in arrears of rent for the period ended 1st April, 1958. In as much as there has been no objection filed to the above decree as provided for in the relevant sections, it is perfectly correct that the respondent is not entitled, in appeal, to obtain a variation of the decree in regard to the rents payable to him for that period, but it was contended on his behalf that even without filing an objection he could in terms of section 772 support " the decree on any of the grounds decided against him in the court below ". The meaning of the expression

' 'support the decree on any of the grounds decided against him in the court below " contained in section 772 (1) does not appear to have been interpreted in any of the decisions of our courts, but it was contended on behalf of the respondent that he could attack so much of the findings as are adverse to him for the purpose of his argument, so long as he does not ask for the judgment and decree of the lower court to be in any way altered. I do not agree. The meaning of the expression appears to me to be that the respondent must accept the correctness of the decision which has been made against him and on that basis, if the findings help him, try to support the decree. This appears to be the view taken by the High Courts of Calcutta, Madras, Lahore and Rangoon in respect of similar provisions contained in the Order No. 41 Rule No. 22 of the Indian Civil Procedure Code, vide Chittaley 1908 ed. page 2674.

From what has been stated above, it is manifest that the learned trial Judge has decided this case on a consideration of matters which were not in the contemplation of the parties and in respect of which they did not tender evidence.

In the circumstances, the judgment of the learned trial Judge cannot be allowed to stand and I think that the proper course for us to follow is to set it aside and remit the case for a fresh trial upon proper issues. If the 1st defendant desires to do so, he may adopt the view of the learned District Judge that he made payment on behalf of the plaintiff to the head landlord. Neither party will be entitled to the costs of this appeal but the costs of the court below will be costs in the cause.

SANSONI, J.—I agree.

*Case remitted for a fresh trial.*