

**RAJAPAKSA  
v.  
GURUSWAMY**

SUPREME COURT  
AMERASINGHE, J.,  
DHEERARATNE, J. AND  
GUNASEKERA, J.  
S.C. APPEAL NO. 9/97  
C.A. NO. 544/88 (F)  
D.C. COLOMBO NO. 6192 RE  
MAY 14, 1998.  
JUNE 5 AND 15, 1998.

*Rent and ejection – Rent Act, No. 7 of 1972 – S. 22 (3) (c) of the Act – Tender of arrears of rent – Dispatch of money by postal telegraphic money order.*

The date fixed in the summons for appearance of the tenant in court was 30th April, 1985. On 29th April, 1985, the defendant forwarded to the plaintiff through the Kotte Post Office by a telegraphic money order the sum due as rent. The money order was received by the landlord only on the 2nd May, 1985. It was not the case that the tenant had on earlier occasions tendered rent to the landlord by money order.

**Held:**

1. The act of mailing a money order does not amount to "tender" or "payment" until actual receipt of letter by the addressee, unless he has consented to make the post office his agent of the sender.
2. Accordingly, the tenant had failed to tender to the landlord arrears of rent in terms of the Act.

**Cases referred to:**

1. *Razik v. Esufally* (1957) 58 NLR 469 at 471.
2. *Medonza v. Silva* (1984) CA (1985) 1 Sri LR 44 at 52.
3. *Jayakody v. Lilian Perera* (1993) 2 Sri LR 74.
4. *Thomas v. Evans* – 1808 10 East; 101; 103 ER 714.
5. *Alexander v. Brown* – 1824 1 C and P 228 N.P.
6. *Palmer v. Rhodes* – 1888 5 H.C.G. 56, 61.
7. *Gunby v. Ingram* – 57 Wash '97, 36 R.L.A. P 232.
9. *Kerr v. United States* – 108F 2d 585, 586 71 App. DC 222.

**APPEAL** from the judgment of the Court of Appeal.

Rohan Sahabandu with Ms Dilhani Perera for plaintiff-appellant.

T. B. Dillimuni with Tissa Bandara for defendant-respondent.

*Cur. adv. vult.*

July 3, 1998.

### DHEERARATNE, J.

The only question which arises in this appeal is whether the defendant-respondent tenant (the tenant) has, in the eyes of the law, complied with the provisions of subsection 22 (3) (c) of the Rent Act, No. 7 of 1972, in duly tendering arrears of rent to the plaintiff-appellant (the landlord). The material parts of that subsection read as follows:

*(3) The landlord of any premises referred to in subsection (1) of subsection (2) shall not be entitled . . . to proceed with, any action or proceedings for the ejection of the tenant of such premises on the ground that the rent of such premises has been in arrear . . . after it has become due.*

*(c) if the tenant has, on or before the date fixed in such summons as is served on him, as the date on which he shall appear in court in respect of such action or proceedings, tendered to the landlord all arrears of rent.*

The date fixed in the summons for appearance of the tenant in court was admittedly 30th April, 1985. A sum of Rs. 420 representing arrears of rent was handed over on the 29th April, 1985, by the defendant to the Kotte post office to be forwarded to the landlord by way of a telegraphic money order. The money order was received by the landlord only on the 2nd of May, 1985.

"Tender" is clearly distinguishable from and therefore cannot mean either "offer" or "pay". "Offer" would mean mere readiness to pay and "pay" would mean the tender on the part of the tenderer followed by acceptance on the part of the creditor. To constitute tender, the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt. See *Razik v. Esufally*<sup>(1)</sup>; at 471, *Medonza v. Silva*<sup>(2)</sup> at 52. It may be mentioned here that the tender should be made to the landlord (or his agent) and it has been authoritatively decided that payment of arrears to court is not sufficient compliance with subsections 22 (3) 22 (4); *Jayakody v. Lilian Perera*<sup>(3)</sup>.

It is not the case that the tenant had on earlier occasions tendered rent to the landlord by money order; if he had done so in the past, different considerations may have applied. Wessels (The Law of Contract in South Africa, vol 11, 2nd edition at 649 and 650) says: "If the tender is one of money it must be made in lawful currency, and must be actually produced or the production waived by the creditor (*Thomas v. Evans*,<sup>(4)</sup> *Alexander v. Brown*,<sup>(5)</sup>.)

If a tender is made by cheque, the creditor is entitled to refuse it and insist on the money, but custom of paying large sums by cheque is apparently judicially recognised, and if the tender is not refused on the ground that it is by cheque, it will be regarded as a valid tender (*Palmer v. Rhodes*,<sup>(6)</sup>. See American case of *Gunby v. Ingram* <sup>(7)</sup>).

There is no reason to reject the transfer of money by money order, as a mode of lawful tender in modern times if the landlord has accepted such a mode of tender before. In such an event it could have been even contended in this case that the landlord had consented to make the post office his agent to receive payment.

Our own investigations on this aspect of the matter has led us to the case of *Kerr v. United States*<sup>(8)</sup> where it was held that the act of mailing a money order does not amount to "tender" or "payment" until actual receipt of letter by addressee, unless he has consented to make the post office his agent to receive payment, since otherwise the post office is the agent of the sender.

For the above reasons I hold that the tenant has failed to tender to the landlord arrears of rent in terms of the Act. The appeal is allowed and the judgment of the Court of Appeal and the District Court are set aside. Enter judgment in favour of the appellant as prayed for in the plaint with costs of the courts below and costs of this court fixed at Rs. 5,000. However I direct that writ of ejectment shall not be issued till 30th September, 1998; the appellant will be entitled to obtain writ of ejectment thereafter without notice to the respondent.

**AMERASINGHE, J.** – I agree.

**GUNASEKERA, J.** – I agree.

*Appeal allowed.*