Present : Akbar J.

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SCHOKMAN *v.* RATNAYAKE.

352—C. R. Galle, 7,903.

Landlord and tenant—Failure to effect repairs—House unfit for habitation—Tenant's right to quit without notice.

Where a landlord fails to effect the necessary repairs to a house which becomes useless for the purpose for which it is hired,—

Held, that the tenant was entitled to quit the premises without due notice.

THE plaintiff sued the defendant to recover a sum of Rs. 70 as rent for a house and premises for the month of March, 1928. The defendant denied his liability on the ground that he had given reasonable notice of his intention to quit at the end of February, and on the ground that the house was in a state of disrepair which entitled him to quit even without notice. The learned Commissioner of Requests gave judgment for the plaintiff.

N. E. Weerasooria, for defendant, appellant.—The notice given by the defendant is sufficient in law. Even if it is not, the house was not in a tenantable condition. In such a case notice to quit is unnecessary. The landlord had been informed of the condition ; he had not effected necessary repairs. A tenant has in such circumstances the option of one of three remedies. He may claim an abatement while remaining in occupation ; he may quit

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without being liable for any rent after quitting; or he may continue as tenant and make the necessary repairs and set the costs off against the rent.

See *Wille on Landlord and Tenant, 1910 ed., pp. 273 to 275 ; Voet, XIX. 2, 23.*

R. C. Fonseka, for plaintiff, respondent.—There is evidence that the house was tenantable. It was in a condition similar to others in the locality. Even if it was not, a tenant who does not give due notice can claim only an abatement of rent (see *Morice English and Roman-Dutch Law, 2nd ed., pp. 158 and 159 ; Walter Pereira, 1913 ed, p. 671 ; Binsley v. Clear* [1]).

Weerasooria, in reply.—The facts of *Binsley v. Clear* (*supra*) are not available. The extract shows that the word " only " refers to the extent of the abatement. The abatement claimed can only be to the extent to which he has been deprived of the means of enjoying the premises or the expenses for repairs. The question as to what remedies are available did not arise.

February 25, 1929. AKBAR J.—

This is an appeal by the defendant against the order of the Commissioner condemning him to pay Rs. 70, being rent due by him to the plaintiff, his landlord, for the month of March, 1928, and costs of action.

There were two issues in this case, namely, (1) did the defendant give reasonable notice of his intention to quit at the end of February, 1928, and (2) was the house in such a state of disrepair as to entitle the defendant to leave it without notice.

As regards the first issue, I think the Commissioner came to a right conclusion. Even if plaintiff had received the notice to quit which the defendant alleges he had posted on January 27, 1928, yet, because the defendant stated in that letter that he may have to leave the house by the end of February, unless the repairs are effected, this cannot be construed as a valid notice to quit. It is nothing more than a request that the repairs should be effected, with a threat that the defendant would leave the premises if his request was not complied with.

As regards the second issue, this is more difficult because Mr. Weerasooria has attacked the finding of facts on this issue by the Commissioner, by reason of the fact that the Commissioner himself has given leave to appeal.

After listening to the evidence, the arguments of Counsel, and the reasons given by the Commissioner, I regret that I cannot accept the Commissioner's finding on this issue. The defendant by his letter P 1 complained on December 21 that the house had not been given a coat of paint, and that of the other repairs,

[1] *8 Buch 89.*

the most important was the cleaning of the water service pipes, as he did not get sufficient water even for household needs. There was no reply to this letter, so that it must be accepted that the defects in fact existed. Then the defendant wrote a letter on January 27 actually threatening to leave the house unless the repairs were effected. The Post Office receipt D 1 shows that such a letter was actually posted. The plaintiff denied the receipt of such a letter. This denial is, to say the least, very unaccountable. Then again by letter D 2, receipt of which is admitted, the defendant wrote stating that he would be leaving the house by the end of the month if the plaintiff did not put the roof in order and paint and whitewash the house. The plaintiff wrote P 5 in acknowledgment, in which he stated that he was "jolly glad" to hear that the defendant was leaving the house. It is a nasty letter, but the point is not its nastiness, but that there is no protest that the house did not need painting or whitewashing or that the roof was not leaking. This is significant in view of the plaintiff's evidence that he repaired all the leaks and whitewashed the whole of the house, including the roof, in the month of April before the letter. The plaintiff could very well have stated in his letter that he had done so last April, and that the next repairs would be attended to in the usual course in April that year.

Then we have the positive evidence of the defendant that it was impossible for him and his family to have lived in the house because the roof was leaking badly; the rafters and laths were rotten; the house was in a dangerous condition; and further, the door hinges were broken. He is corroborated by Mr. R. A. H. de Vos, who bought the house, and who stated that the leaking in one of the rooms was very bad and that it was due to the guttering in the adjoining house not being in order. He further states that the roof was leaking in other places also and that he replaced over 100 "reepers," some partly and some wholly, that the roof over one of the rooms leaked badly, and that the hinges were rusty. In cross-examination he stated "one of the bad leaks was in that part of the roof adjoining Ephraums'. Ephraums' roof is much higher and the drop heavy. I had to fix a galvanized zinc protector to protect the roof from the drop from Ephraums'." It should be noted that Mr. de Vos got possession of the house in March or April, 1928. Now this is very strong corroborative evidence, from an unimpeachable witness, of the defendant's story. It is no answer to say that other houses in the Fort of Galle also leak. The fact that other tenants are long suffering is no answer in a question of contract between the plaintiff and the defendant.

The only question is whether under the law the defendant was entitled to quit the house without notice under these circumstances. The law is stated clearly in Wille's *Landlord and Tenant in South*

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Africa, p. 273 to 275. The tenant has got one of three remedies when there is a default of the landlord. One of the remedies is that he may quit without being liable for any rent at all for the period after quitting, provided that he can prove that the defects were of so material a nature as to render the premises practically useless for the purpose for which he had, to the knowledge of the landlord, hired them, and that he could not remain in the premises without great inconvenience to himself. Mr. Fonseka urged that this remedy was unknown in Roman Dutch law, and he quoted an extract from a South African case from *Morice, pp. 158 and 159*, which is copied in Mr. Walter Pereira's book, p. 671. The word " only " in the sentence cannot be taken as restricting the remedies of the tenant to the two other remedies mentioned in Wille's book because the very case cited by Morice is given in Wille's book at p. 274. It is unfortunate that the case is not available here, but the word " only " can only have reference to the extent of the abatement of rent.

I would, therefore, allow the appeal with costs and dismiss the plaintiff's action with costs.

Appeal allowed.