Present: De Sampayo J. 1920.

FONSEKA *v.* NAIYAN ALI.

142—C. R. Colombo, 72,312.

Landlord and tenant—Notice to quit—Action in ejectment and arrears of rent—Damages—Receiving rent for period subsequent to date of action—Waiver of notice—Failure of cause of action.

Where a landlord gave notice to a tenant to quit on December 31 and instituted an action for ejectment and arrears of rent on January 9, but subsequently received rent for January and February without any reservation.—

Held, that the notice must be taken to have been waived, and that the tenancy continued.

THE facts appear from the judgment.

Nagalingam, for appellant.

De Zoysa, for respondent.

September 3, 1920. DE SAMPAYO J.—

This appeal involves an interesting point of law. The plaintiff had hired his house to the defendant at a rental of Rs. 90 per mensem payable on or before the 10th of each month. On November 30, 1919, he gave notice to the defendant requesting him to quite on or before December 31, 1919.

He brought his action to eject the defendant for non-compliance with the notice, and to recover rent for December, and damages at the rate of Rs. 90 per mensem from January, 1920, until he be restored to possession. The defendant denied the receipt of the notice, but the case was finally disposed of on the footing that notice was in fact given to the defendant. But the defendant further pleaded that he paid to the plaintiff the rent, not only for December, but also for January and February, and that the plaintiff accepted the same and thereby waived the notice. There is no question of the payment of this rent, for there are three receipts signed and granted by the plaintiff, each for Rs. 90, as rent of the house in question. The Commissioner says he attaches no importance to the word "rent" appearing in the receipt, as the defendant is a Tamil, who is ignorant of English.

But the question is not so much how the defendant views the receipts, as the sense in which plaintiff, who reads and writes English, used the word "rent." The more noticeable feature.

1920.

DE SAMPAYO J.

Fonseka v. Nayjan Ali

however, is that in each case payment was stated to be for a particular month. Moreover, in each case payment was made on the 10th of each month. It will be remembered that the original terms of hiring was that the rent should be paid on or before the 10th.

I have no doubt that these payments were made for the three months in question. The usual result of the acceptance of rent for a period subsequent to the period of notice without any reservation is that the notice is waived and the tenancy continues, but the peculiarity in this case, which is strongly pressed upon me, is that the action was filed on January 9, 1920, and the payments were made and accepted thereafter.

No specific authority has been cited to me to show that acceptance of rent after the action is brought prevents the usual consequence of acceptance of rent from arising. All that Mr. de Zoysa has urged is that the rights of the parties must be determined as at the date of the action. I find it difficult to see that that principle bears on the question under consideration. Moreover, although the plaint in the action is dated January 9, 1920, and was presumably accepted by Court on that day, the summons was not served on the defendant till March 9, 1920. Consequently, so far as the defendant is concerned, the action cannot be said to be pending before that date.

In the meantime he made at least one payment, viz., for January, 1920. It does not appear that the plaintiff informed the defendant of the action or accepted the rent conditionally.

In these circumstances, I think the defendant's plea should have prevailed, and the action should have been dismissed on the cause of action alleged by the plaintiff.

I set aside the judgment appealed from, and dismiss the plaintiff's action, with costs of the action and of this appeal.

Appeal dismissed.