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EBRAHIM.  
CARR, J.

factory to leave the plaintiffs, if so advised, to file a fresh suit properly framed.

The appeal is dismissed with costs. I allow seven gold mohurs as advocate's fees.

NOTE.—A very recently reported case—*F. A. Shihan v. Abdul Alim Abed* (1)—has just come to my notice. The third paragraph of the head-note and the judgment at pages 499 *et seq.* seem to support the view I have taken.

## APPELLATE CIVIL.

*Before Mr. Justice Heath.*

### PALE ZABAING RURAL CO-OPERATIVE CREDIT SOCIETY

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### MAUNG THU DAW AND ANOTHER.\*

*Rent paid by tenant before being due—Advance to landlord—Transfer of property by landlord—Plea of payment against purchaser—Transfer of Property Act (IV of 1882), s. 50.*

S. 50 of the Transfer of Property Act protects a tenant against having to pay his rent twice over, if paid in good faith, but if he has paid rent before it was due it is merely an advance to the landlord and is not a payment in fulfilment of an obligation to pay rent. A payment in advance cannot free the tenant from liability to pay rent to a purchaser who acquires the property from his landlord before the date on which the rent falls due.

*Ram Lal v. Marwari*, 3 Pat. L.T. 128; *Tlok Chand v. Beattie*, 29 C.W.N. 953—*referred to.*

*Ba Han* for the appellant.

*Ba Maung* for the respondents.

Applicant sued the respondents in the Township Court of Kawa as a Court of Small Causes for rent and for compensation for use and occupation of a house which he had purchased from the former owners on the 26th of April 1930. He claimed rent

(1) (1930) I.L.R. 58 Cal. 474.

\* Civil Revision No. 463 from the judgment of the Township Court of Kawa in Civil Reg. No. 130 of 1930.

or compensation for use and occupation at the rate of Rs. 15 a month from the 30th April to the 10th of May 1930 and at Rs. 25 a month from the 11th of May 1930 to the 5th of July 1930, when the respondents vacated the house. The main defence was that the second respondent was the tenant and that when he engaged the house in March 1930, he paid the former owners Rs. 100 as rent in advance and that when he vacated the premises on the 5th July, he got back from them the balance of the rent paid in advance, and so nothing was payable by him to the applicant.

The trial Court accepted the story of the respondents and dismissed the suit. Applicant appealed, but the appeal was dismissed as no appeal lay. He then applied to the High Court for revision under section 25 of the Provincial Small Causes Courts Act, 1887.

HEALD, J. (After setting out the facts of the case proceeded as follows).—On the evidence I have not the slightest doubt that the story that Rs. 100 was paid to the former owners of the house as rent in advance was entirely false, and that the lower Court was wrong in finding that such payment had been made, but assuming, as I am bound to assume, that that payment was made, I see no reason to believe that it would be a good defence to applicant's suit.

The trial Court relied on the provisions of section 50 of the Transfer of Property Act, but in the case of *Ram Lal v. Marwari* (1) a Bench of the Patna High Court referring to the English decision in *De Nicholls v. Saunders* (2), said:—

“Section 50 of the Transfer of Property Act protects a tenant against having to pay his rent twice over, if paid in good faith, but if he has paid rent before it was due it is merely an advance

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(2) (1870) 5 Common Pleas 589.

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to the landlord and is not a payment in fulfilment of an obligation to pay rent. If then, before the date on which the rent falls due, the landlord makes an assignment, the receipt of rent in advance cannot be treated as a discharge by him, because by assignment before the rent falls due he has parted with the power of giving such a discharge, and payment of rent before it falls due cannot free the tenant from further liability."

Similarly in the case of *Tilok Chand v. Beattie* (1), which was also a Bench case, the present Chief Justice of the High Court of Calcutta said :—

"In order to get the benefit of the protection of section 50 the tenant must pay rent as rent and must not pay rent in advance, which in these circumstances is a mere loan."

It appears therefore that the judgment of the Small Cause Court, which held that the supposed payment in advance to the previous owners relieved the respondents from liability to applicant for the rents was not according to law, and I set it aside.

## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

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*Attachment before judgment—Dismissal of suit for default—Effect on attachment—Restoration of suit—Revival of Attachment—Civil Procedure Code (Act V of 1908), O. 38, R. 9.*

When a suit is dismissed for default all interim and ancillary orders in the proceedings must fall with it. An attachment before judgment comes to an end when the suit abates and is dismissed, and the attachment does not revive if the suit is restored. The last words of Order 38, rule 9, of the Code of Civil Procedure are directory only and not imperative, and are not intended to effect the survival of interlocutory proceedings after the suit has come to an end.

(1) (1925) 25 Cal. W.N. 953.

\* Letters Patent Appeal No. 7 of 1931 from the judgment of this Court in Special Civil Second Appeal No. 276 of 1930.