

## ORIGINAL CIVIL.

Before Mr. Justice Pratt.

1922.  
February 18.

MATHURADAS MAGANLAL, PLAINTIFF *v.* NATHUBHAI VITHALDAS,  
DEFENDANT<sup>a</sup>.

*Bombay Rent (War Restrictions) Act (Bombay Act II of 1918), section 9 (1)*  
—Landlord and tenant—Non-payment of rent—Ejectment—Tender of rent  
in Court—Whether tenant entitled to protection of Rent Act—The Increase  
of Rent and Mortgage Interest Act (5 & 6 Geo. V, ch. 97).

The conditions laid down in section 9 (1) of the Bombay Rent (War Restrictions) Act, 1918, are conditions precedent which must be fulfilled by a tenant at the date of the cause of action.

*Held*, accordingly, that where a tenant has not paid the rent allowable by the Act before the landlord has filed a suit for ejectment against him, but has tendered the same into Court after service of summons upon him, he cannot plead the protection of the Act.

Provisions of the Increase of Rent and Mortgage Interest Act, 1915 (5 & 6 Geo. V, ch. 97), compared.

*Beavis v. Carman*<sup>(1)</sup> and *Davies v. Bristow*<sup>(2)</sup>, referred to.

SUIT in ejectment.

The plaintiff was the owner of an immoveable property situate at Sandhurst Road outside the Fort of Bombay and consisting of a ground floor and three upper floors. The property was purchased by the plaintiff in October 1918, when the defendant was in occupation of a portion of the third floor as a monthly tenant paying Rs. 45 per month. On 29th October 1918, the plaintiff gave notice to all the tenants including the defendant to vacate the premises in their occupation on the ground that the plaintiff required the whole premises for his own use and occupation. As the defendant and other tenants did not vacate the premises the plaintiff filed separate ejectment suits

<sup>a</sup> O. C. J. Suit No. 131 of 1922.

(1) (1920) 36 T. L. R. 396 at p. 397. (2) [1920] 3 K. B. 428 at p. 429.

against them in April 1920. The trial Judge held in those suits that the plaintiff did not reasonably require the premises for his own use and the suits were accordingly dismissed with costs without prejudice to the plaintiff's claim against the tenants to recover arrears of rent.

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The taxed bill of costs of the defendant's attorneys in the suit filed against him came to Rs. 403-0-8 and the defendant's attorneys demanded the same from the plaintiff's attorneys who replied that the amount of costs should be set off against the arrears of rent due by the defendant and the balance of the rent be paid to the plaintiff. The defendant failed to pay the balance and had indeed failed to pay rent from 1st July 1919 up to the date of the filing of the present suit (*i.e.*, 7th January 1922) although several demands were made by the plaintiff. The plaintiff had, by his attorney's letter dated 18th July 1921, determined the defendant's tenancy from 1st September 1921 and called upon the defendant to give vacant possession of the premises on or about 31st August 1921.

In para. 8 of the plaint, the plaintiff contended as follows :—

"8. The plaintiff says that he has rightfully terminated the tenancy of the defendant by his said notice as the defendant had failed to pay the said rent up to date. The plaintiff submits that by non-payment of the rent the defendant has committed a breach of the condition of his tenancy and the plaintiff is therefore entitled to recover possession of the portion occupied by the defendant from him."

The plaintiff accordingly prayed that the defendant be ejected from the premises in suit and that he be ordered to pay Rs. 766-15-4 being the amount due to the plaintiff up to 31st August 1921 after giving credit to the defendant for the amount of his taxed costs. The plaintiff also claimed compensation for use and

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occupation from 1st September 1921 at the rate of Rs. 45 a month.

The defendant stated in his written statement that for the major part of 1920-21 his wife was laid up with tuberculosis of which she ultimately died and that during that period both he and his wife were absent from Bombay; that owing to his absence from Bombay he could not reply to the plaintiff's attorneys' notice dated 18th July 1921; and that on his return to Bombay in August 1921 he offered to pay up all arrears of rent but the plaintiff declined to receive the same stating that he had terminated the tenancy by his notice dated 18th July 1921. The defendant further paid into Court along with his written statement Rs. 1,128-15-4 being the arrears of rent together with the advance rent for three months ending April 1922 and submitted that as he was always ready and willing to pay rent, the plaintiff's suit should be dismissed.

*F. S. Taleyarkhan*, for the plaintiff.

*Campbell*, for the defendant.

PRATT, J.:—The plaintiff in this suit seeks to evict the defendant who is a monthly tenant of the plaintiff's house at Sandhurst Road and, on 18th July 1921, gave notice to quit terminating the tenancy on 1st September 1921. The defendant pleads the Bombay Rent (War Restrictions) Act No. II of 1918, and the plaintiff's reply is that the defendant is not entitled to protection under the Rent Act as he has not paid the rent. The defendant admits that his rent is in arrears from 1st July 1919, but he states that he tendered arrears of rent to the plaintiff in August 1921 and that the plaintiff refused to accept the rent.

On these pleadings the following issues were framed:

(1) Whether the defendant did not in August 1921 offer to pay all arrears of rent?

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(2) Whether plaintiff declined to recover arrears as he said he had terminated the tenancy by his letter of July 1921?

(3) Whether in any event the plaintiff under section 9 of the Rent Act is entitled to an order for possession?

Now the plaintiff had in Suit No. 941 of 1920 sued the defendant for possession and the suit had been dismissed on the ground that the plaintiff's requirements had not been proved, and that dismissal was without prejudice to the plaintiff's claim to recover the arrears of rent from the defendant. Since the dismissal of that suit the plaintiff's attorneys have been repeatedly demanding payment of rent. The first letter was Exhibit A of June 1920, and it was followed up by a second letter of 9th August 1920. To neither of these letters did the defendant make any reply until April 1921 when the defendant wrote demanding payment of the taxed costs in Suit No. 941 of 1920. The plaintiff in reply, on 19th April 1921, claimed to set off the amount of taxed costs against the amount of rent which was payable by the defendant, but the defendant objected to this and the plaintiff's demands of payment of the arrears of rent continued on 5th May 1921, Exhibit D, and 24th June 1921, Exhibit E, without eliciting any reply from the defendant. Eventually, on 18th July 1921, the plaintiff gave notice to quit.

Now, the defendant admits that he received these letters and that he made no reply to them and the only excuse that he gives is that his wife was dying and that he was absent with her at Miraj and then at Deolali. This excuse is very inadequate, for the house was in the

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occupation of a son and son-in-law who could have paid for him; and after he returned from Miraj he spent some time in Bombay and could have paid then.

His unwillingness to pay the rent is manifest from his objection even to allow the amount of taxed costs to be set off against the arrears of rent.

I, therefore, disbelieve his uncorroborated statement that in August 1921 he offered to pay the plaintiff the arrears of rent and I have not called upon Mr. Taleyarkhan for evidence to contradict that statement.

That disposes of the first and second issues, but, however that may be, the fact remains that no rent has been paid since July 1919. That is admitted in the written statement and it is only after suit filed that the defendant with his written statement, on 8th February 1922, paid into Court all the arrears of rent including rent up to the end of April 1922.

Mr. Campbell contends, and has contended very strenuously, that under section 9 (1) of the Bombay Rent Act the effect of this payment is that the Court is unable to make an order for eviction. Section 9 (1) runs as follows :—

“No order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Act and performs the conditions of the tenancy.”

Mr. Campbell's contention is that the conditions here laid down are conditions which apply at the date of the order, and that even if a tenant has made any default in paying the rent and is in arrears at the time that the suit is filed, yet he has under section 9 (1) a *locus penitentiae* and if he brings the arrears of rent into Court the Court cannot make an order for the recovery of possession.

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The section is based on the corresponding section of the English Act, the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which is as follows :—

“No order for the recovery of possession of a dwelling-house to which this Act applies or for the ejection of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy.”

This section is also in the present tense but nevertheless it has been construed in England as importing a condition precedent which must be fulfilled by the tenant not at the time when the Court has to make its order, but at the time when the writ is served.

In *Beavis v. Carman*<sup>(1)</sup>, Lawrence J. said :—

“There was a right in the landlord to possession when the writ was served, ...and there was no *locus penitentie* on the part of the tenant, nor could he (his Lordship) reinstate the tenant, as though he had continued to pay the rent and perform the terms of the tenancy.”

So also in the case of *Davies v. Bristow*<sup>(2)</sup> the section was construed as constituting a condition precedent to the right of a tenant to claim the protection of the Act, that he should have paid the rent and performed his obligations under the tenancy agreement.

I think that is the proper construction of section 9 (1) of the Bombay Rent Act. The present tense is used not to describe anything that the tenant does or may do at the time when the Court's order is made, but to describe the conduct of the tenant which entitles him to plead the Rent Act, i.e., the conduct of the tenant up to or at the time when the suit was filed.

Mr. Campbell contends that there is a distinction between section 9 (1) of the Bombay Act and the English section in that the English section uses the words “continues to pay” the rent, instead of the word “pays” which is used in the Indian section.

<sup>(1)</sup> (1920) 36 T. L. R. 396 at p. 397.      <sup>(2)</sup> [1920] 3 K. B. 428 at p. 436.

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But I do not think that the words "continues to pay" import any distinction. Whether the words are "continues to pay" or "pays", the real question is whether they refer to the time anterior to the filing of the suit or the time subsequent thereto. I think that in both the English and the Indian section the words "continues to pay" and the word "pays" respectively, refer to the time anterior to the filing of the suit.

Then Mr. Campbell refers to the words "is ready and willing to pay the rent to the full extent allowable by this Act". These words do not appear in the English section, but here again the question is whether readiness and willingness to pay refers to the time before the suit is filed or the time subsequent to the filing of the suit. I think it refers to the time prior to the filing of the suit and it has been inserted to meet cases in which failure to pay rent has been due to a dispute between the landlord and the tenant as to the amount of standard rent. Mr. Campbell says that this cannot be the true construction because otherwise a tenant who made a wrong estimate as to what the standard rent was would find himself evicted merely because his estimate was wrong and the landlord's estimate was right. But that is a case which could easily be met by the tenant offering not to pay any fixed sum as rent, but such sum as the Rent Controller or the Court may adjudge to be the standard rent.

Mr. Campbell's third argument is that the use of the past tense in section 9 (2) as contrasted with the present tense of section 9 (1) shows that the acts of the tenant referred to in section 9 (2) are past acts while the acts referred to in section 9 (1) are present acts, i.e., acts at the date of the order. But I do not think that that is so. Section 9 (2) is in the past tense because it refers to past acts of waste or conduct in the

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past which has been an annoyance. Section 9 (1) is in the present tense because that section merely describes the sort of tenant who is entitled to claim protection under the Act.

I think that is the only admissible construction of the section for otherwise the tenant might refuse to pay rent and the landlord will be unable to evict him. For every time that the landlord filed a suit to evict him he would bring the rent into Court and then withhold it again until such time as the landlord should file a fresh suit.

I, therefore, think that the conditions in section 9 (1) are conditions precedent which must be fulfilled at the date of the cause of action. The defendant has contumaciously refused to pay rent and I think he was encouraged to this attitude by the dismissal of Suit No. 941 of 1920 in June 1920.

Mr. Campbell says that the Court has jurisdiction to relieve against forfeiture. But this is not a case for the exercise by the Court of its equitable jurisdiction, for the tenancy was not determined by forfeiture but by a notice to quit. The question is one simply whether the defendant has proved that he has fulfilled the conditions of section 9 (1), for unless he has fulfilled those conditions, he is not entitled to protection of the Rent Act. The Act gives the Court jurisdiction to create a statutory tenancy after the termination of the previous tenancy by the notice to quit. The jurisdiction does not arise unless the terms on which the statute gives it are strictly complied with. The principle is that set forth in the judgment of the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynooddeen Khan*<sup>(1)</sup>. I, therefore, find issue No. 3 in the affirmative and that the plaintiff is entitled to an order for possession.

<sup>(1)</sup> (1855) 6 M. I. A. 134



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Decree for the plaintiff for rent from 1st July 1919, to 31st August 1921, at the rate of Rs. 45 per mensem, less a sum of Rs. 403-0-8, and for rent and compensation at the same rate per mensem from 1st September 1921, till possession given. Liberty to plaintiff to recover this amount from the amount paid into Court by the defendant. Decree for plaintiff for possession on or before 30th July 1922. No order as to costs.

Solicitors for the plaintiff : Messrs. *Mulla and Mulla*.

Solicitors for the defendant : Messrs. *Ferreira and Vallabhdas*.

*Suit decreed.*

G. G. N.

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### ORIGINAL CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.*

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March 28.

V. V. KANEMAR VENKAPAIYA, APPELLANT AND DEFENDANT v. NAZERALLY TYABALLY SINGAPOREWALLA, RESPONDENT AND DEFENDANT<sup>c</sup>.

*Limitation*—"Application"—*Notice of motion filed in proper office of the Court within time—Motion brought on in Court after expiry of the period of limitation—Whether application within time—Bombay Rent (War Restrictions) Act (Bombay Act II of 1918), section 10A—Practice.*

Where an "application" is to be made to the Court within the period of limitation prescribed by any Act, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court.

*In re Gallop and Central Queensland Meat Export Company*<sup>(1)</sup>, referred to and applied.

APPEAL from the order of Pratt J. in an application made by way of motion.

<sup>c</sup>O. C. J. Appeal No 110 of 1922; Suit No. 2676 of 1921.

<sup>(1)</sup>(1890) 25 Q. B. D. 230.