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of subrogation cannot be exercised unless there is a registered agreement permitting subrogation. This was so held in a well considered judgment by a Division Bench of the Lahore High Court in *Karam Chand* v. *Ram Singh*, (1). This decision is fully applicable to the facts of the present case. Following this decision it must therefore be held that Bishan Kaur is subrogated to the rights of Ishar Singh and Hakam Singh and she has precedence over the plaintiffs' mortgage.

Finally Shri Hem Raj Mahajan, the learned counsel for the appellants, submitted that his clients were entitled to possession of fields Nos. 1499, 1508 and 1509 as these fields were not specially mortgaged with Bishan Kaur. There is no substance in this argument. The mortgage in favour of Bishan Kaur shows that these fields were specifically mortgaged with her.

The result is that this appeal fails and I would dismiss it. Considering that the plaintiffs have lost part of their security by partition between the family members, I would order the parties to bear their own costs of this appeal.

Bhandari, C.J.

BHANDARI, C. J. I agree.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Bishan Narain, J.

S. HARBHAJAN SINGH,—*Appellant*

versus

MUNSHI RAM,—*Respondent*

Letters Patent Appeal No. 38 of 1952.

1956

March, 20th

Landlord and Tenant—Notice to quit—Acceptance of rent after the expiration of the notice period—Whether constitutes a waiver of the notice.

(1) A.I.R. 1937 Lah. 665

Held, that the question of waiver is one of intention and acceptance of rent by the landlord for the period subsequent to the expiration of the notice is not in itself a waiver on his part of the notice so given nor does the acceptance of rent create a new tenancy. It is merely a circumstance which must be considered along with other circumstances of the case and from which an intention to waive may or may not be inferred.

Deo Ex. Dim Chaney v. *Hatten* (1), relied upon, *Hartell* v. *Blackler* (2), *Davis* v. *Bristoll* (3), *Morrison* v. *Jacobs* (4), referred to.

Appeal under Clause X of the Letters Patent from the judgment of the Hon'ble Mr. Justice Dulat, dated the 28th May, 1953, in E.S.A. No. 358 of 1952.

(Civil Suit No. 78 of 1950, decided by Shri Suchet Singh Kalha, Sub-Judge, III Class, Jullundur, on 27th July, 1951 and Civil Appeal No. 60 of 1951, decided by Shri Shamsher Bahadur, District Judge, Jullundur, on 14th March, 1952)

S. D. BAHRI, for Appellant.

K. L. GOSAIN, for Respondent.

JUDGMENT

Bhandari, C.J.

BHANDARI, C. J. These two appeals under clause 10 of the Letters Patent raise a common question of law, namely, whether acceptance by a landlord of rent in regard to a period subsequent to the expiration of the notice to quit constitutes a waiver of the said notice

The petitioner in this case is the owner of a certain house situate in Jullundur, while the respondents are two legal practitioners of the same town who are in occupation of two separate portions of the said house. The landlord brought actions against his tenants for their eviction and obtained consent decrees against them according

(1) 98 E.R. 1066
(2) (1920) 2 K.B. 161
(3) (1920) 3 K.B. 428
(4) (1945) 1 K.B. 577

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to which one of the tenants was to vacate the premises on the 29th June, 1949, and the other on the 19th November, 1949. On the 23rd March, 1949, that is while the tenants were still in occupation of the premises let out to them the Provincial Legislature enacted a measure known as the East Punjab Rent Restriction Act, 1949, section 13 of which made the following somewhat unusual declaration, namely:—

> "13(1). A tenant in possession of a building or rented land shall not be evicted therefrom in execution of a decree passed before or after the commencement of this Act or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section."

The enactment of this measure made it impossible for the landlord to execute the decrees against his tenants and on the 22nd September, 1949, he was reluctantly compelled to issue fresh notices of ejectment to them in accordance with the provisions of section 13 of the Act of 1949. These notices failed to achieve the object which the landlord had in view and on the 28th January, 1950, in one case and the 6th February, 1950, in the other the landlord brought two separate actions for the eviction of his tenants. While the cases were pending in Court the Governor of the Punjab promulgated an Ordinance known as the East Punjab Urban Rent Restriction (Amendment) Ordinance, 1950, section 2 of which added the following words to subsection (1) of section 13 of the Act of 1949, namely :—

> "Or in pursuance of order made under section 13 of the Punjab Urban Rent Restriction Act, 1947, as subsequently amended."

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This amendment had the effect of reviving and resuscitating all decrees or orders which had been passed under the Act of 1947, and which were lying dormant and in suspended animation ever since the passing of the Act of 1949. On the 24th June, 1950, the landlord presented two separate applications for the execution of the consent decrees which had been passed in his favour and on the 6th November, 1950, he formally withdrew the fresh proceedings which had been started by him on the 28th January, 1950 and the 6th February, 1950. The tenants objected to the execution of the decrees on the ground that as the landlord had accepted rent from the tenants after the notice to quit had been issued, the acceptance of rent must be deemed to constitute a revocation or waiver of the notice of ejectment previously given and the creation of a new relationship of landlord and tenant between the parties. This plea was rejected by the Rent Controller, was accepted by the District Judge and was again rejected by a learned Single Judge of this Court. The tenants are dissatisfied with the order of the learned Single Judge and have preferred an appeal under clause 10 of the Letters Patent.

Mr. Bahri, who appears for the tenants, contends that although his clients having no moral right to retain possession of the premises which they had agreed to vacate on the 29th June, 1949, and the 20th November, 1949, they have acquired a legal right to retain possession thereof, (1) because the landlord had accepted rent from them for periods subsequent to the dates on which they should have vacated the premises, and (2) because the tenants continued to remain in uninterrupted possession of the premises for several months following the expiration of notices and even the passing of the decrees. The acceptance of rent

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from the tenants, it is contended, constitutes a very strong circumstance in support of the contention that the previous decrees were nullified and were replaced by fresh agreements.

The question of implied waiver by acceptance of rent subsequent to the expiration of the notice to quit has come up for consideration in a very large number of cases but the Courts are by no means agreed as to whether it constitutes a waiver of the notice to quite. Divergent and mutually inconsistent views have been expressed. According to one view it constitutes a waiver of the notice and the creation of a new tenancy, *Hartell* v. *Blackler* (1), according to another it does not constitute a waiver (*Davies* v. *Bristoll* (2), *Morrison* v. *Jacobs* (3)). According to the third view the question of waiver is one of intention and acceptance of rent by the landlord after the expiration of a notice is not in itself a waiver on his part of the notice so given. It is merely a circumstance which must be considered along with other circumstances of the case and from which an intention to waive may or may not be drawn. In *Deo Ex. Dim Chaney* v. *Hatten* (4), Lord Mansfield, observed as follows:—

> "The fact in this case is that the landlord has received rent *eo nomine* for a quarter of a year which became due after the time of the demise in the declaration laid. This circumstance, it is insisted, is in fact a declaration on his part that he departs from the notice he had given, and is an acknowledgment that

(1) (1920) 2 K.B. 161
(2) (1920) 3 K.B. 428
(3) (1945) 1 K.B. 577
(4) 98 English Reports. 1066

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> he still considers the defendant as his tenant. But let us suppose the landlord had accepted this rent under terms, or made an express declaration that he did not mean to waive the notice, and that, notwithstanding his acceptance or receipt of the rent, he should still insist upon the possession. Or suppose any fraud or contrivance on the part of the tenant in paying it. Clearly under such circumstances the plaintiff ought not to be barred of his right to recover; but all these are facts which ought to be left to the consideration of the jury."

This decision represents, in my opinion, a correct enunciation of the law.

The history of this litigation makes it quite clear that at no stage of the proceedings did the landlord abandon his right to secure the eviction of his tenants and at no stage did he agree to let them remain as his tenants. He brought two separate actions against them with the object of obtaining possession of the property leased out to them and obtained two consent decrees against them. There can be no doubt that he would have executed both these decrees had it not been for the fact that on the 23rd March, 1949, the Provincial Lagislature decided to enact a measure which declared that no decrees for eviction which were passed either before or after the passing of the Act would be capable of being executed. In view of the restrictions which were placed on the execution of decrees the landlord had no alternative but to issue fresh notices to the tenants for eviction in accordance with the provisions of East Punjab Act III of 1949, and later to present applications for their eviction under the provisions of the said Act. On the promulgation of Ordinance VI of 1950, which revived the landlord's right to execute the

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decrees which had been passed in his favour, he promptly presented applications for the execution of the said decrees and later withdrew the proceedings which had been initiated by him under Act III of 1949. At no stage of the proceedings did the landlord evince the slightest possible intention of acknowledging the respondents as his tenants. On the other hand, there is abundant material on the file to justify the conclusion that he never intended to retain the respondents as his tenants. He was compelled by force of circumstances and by the mandatory provisions of law to permit the tenants to continue in occupation of the premises in question. It may be that he accepted rent from the tenants for the use and occupation of the premises occupied by them, but that fact alone cannot be regarded as a determinative factor. He was entitled to compensation for the use and occupation of his property even though he was not entitled to rent as such because rent presupposes the continuance of the tenancy. What he received from the tenants was not rent but compensation. Even if he received rent *eo nomine* even then it seems to me that the receipt of rent did not create a new tenancy, for as pointed out in *Kai Khushroo Bezonjee Capadia* v. *Bai Jerbai Hirjibhoy Warden and another* (1), acceptance of rent by a landlord from a statutory tenant, whose lease has already expired, cannot be regarded as evidence of a new agreement of tenancy.

After a careful consideration of all the facts and circumstances of the case I entertain no doubt whatever that although the tenants had agreed to vacate the premises in the year 1949, and had suffered consent decrees to be passed against them, they continued to retain possession of the premises for all these years and successfully prevented the

(1) A.I.R. 1944 F.C. 124

landlord from enjoying the fruits of his decrees. Mr. Bahri requests that as these tenants may have some difficulty in finding alternative accommodation they may perhaps be permitted to stay on in these premises for another two months and in the meantime look for other accommodation. Mr. Gosain, who appears for the landlord, has no objection to this small concession being given.

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For these reasons, I would uphold the order of the learned Single Judge and dismiss the appeals with costs. The tenants will be allowed two months within which to vacate the premises.

BISHAN NARAIN, J.—I agree.

Bishan Narain, J.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Bishan Narain, J.

MESSRS JAWAHAR SINGH-SOBHA SINGH,—

Plaintiff-Appellant

versus

UNION OF INDIA AND OTHERS,—*Defendants-Respondents*

Letters Patent Appeal No. 38 of 1953.

1956

June, 29th

Code of Civil Procedure (Act V of 1908)—Section 20—Cause of action—Meaning of—When accrues.

Cotton Cloth and Yarn (Control) Order, 1945—Permit issued under, for purchase and sale of cloth—Whether constitutes a contract.

Held, that a cause of action arises when a person fails to do something which ought to be done or when he does something which ought not to be done. The existence of a cause of action implies the existence of a legal right in the