WELLINGTON

v.

AMERASINGHE

SUPREME COURT.

SHARVANANDA, C.J., RANASINGHE, J., ATUKORALE, J., TAMBIAH, J. AND L. H DE ALWIS, J.

S.C. 15/85.

C.A. 215/79 (F).

D.C. MT. LAVINIA 230/RE.

MAY 27, JUNE 26 AND JULY 22, 1986.

Landlord and tenant – Notice to quit – Arrears of rent – Prescription – Set off of excess rent – Sections 22(1)(a) and 22(3) of Rent Act.

When there is excess rent in the hands of the landlord there will be an automatic set off. The three years prescribed by the Prescription Ordinance should not be calculated from the date of answer.

In terms of Section 22(1)(*a*), read with section 22(3)(*b*) of the Rent Act the condition precedent for proper institution of action on the ground of arrears of rent is that the rent of such premises has been in arrears for three months or more after it has become due and the tenant has not prior to the institution of such action tendered all arrears of rent. The tender of all arrears prior to the institution of action cures all default.

In terms of section 22(3) unlike before its enactment notice of termination of tenancy in order to be valid can be given only after the tenant had been in arrears for the requisite period and not beforehand. Under the present law advantage cannot be taken of an earlier termination of tenancy by notice to quit at a time when the tenant was not in arrears of rent for the required period to institute an action under s. 22(1) of the Rent Act for ejectment on the ground of arrears of rent

In the instant case notice was given when the defendant was admittedly in arrears for three months after the rent became due. The notice received by the defendant on 1.11.1974 requiring him to quit on or beofre 31.1.1975 does not become invalid. As on the civil mode of calculation a whole day is reckoned as one point of time a notice given on the first day of the month expiring at the end of the month is good.

Where there is no express agreement as to how an advance or deposit of rent in the hands of a landlord should be applied it can be set off against arrears of rent even without a request by the tenant in that behalf When credit is given for excess rent and the advance in the hands of the landlord the tenant in the instant case was not in arrears.

Cases referred to:

(1) *Wijemanne v. Fernando – (1946) 47 N.L.R. 62.*

(2) *Munidasa v Appuhamy – (1955) 57 N.L.R. 108*

(3) *Sinniahpillai v. Abdul Cader – (1967) 69 N.L.R. 547*

(4) *Mohideen v. Mohideen – (1975) 78 N.L.R. 108.*

(5) *Haniffa v. Sellamuttu – (1967) 70 N.L.R. 200, 201.*

(6) *Ismail v Sheriff – (1965) 68 N.L.R. 19.*

(7) *Robert v Fernando – (1967) 69 N.L.R. 572*

(8) *Sidebotham v. Holland – (1895) 1 Q.B.D. 378, 383*

(9) *Crate v. Miller – (1947) 2 All E.R. 45, 46.*

(10) *Fernando v. De Silva – (1966) 69 N.L.R. 164*

(11) *Abdul Hafeel v. Muttu Bothool – (1957) 58 N.L.R. 409, 411*

(12) *Tiopaizi v. Bulaway Municipality – (1923) A.D. 317.*

(13) *Sahul Hamid v. De Silva – (1932) 1 C.L.W. 354.*

(14) *Fonseka v. Jayawickrema – (1892) CLR 134.*

(15) *Thassim v. Cabeen – (1946) 47 N.L.R. 440.*

(16) *Kanapathi Pillai v. Dharmadasa – 58 C.L.W. 79.*

(17) *Samaraweera v. Ranasinghe – (1958) 59 N.L.R. 395.*

(18) *Makeen v. Selliah – (1956) 58 N.L.R. 231.*

(19) *David Appuhamy v. Subraniam – (1953) 55 N.L.R. 397.*

(20) *Meera v. Jayawardene – (1956) 58 N.L.R. 159, 161.*

APPEAL from judgment of the Court of Appeal.

H. L. de Silva, P.C. with *S.C. Crosette Tambiah* and *K. Thevarajah* for defendant-respondent-appellant.

V. C. Gunatilleke, P.C. with *J. C. Boange* for the substituted plaintiff-appellant-respondent.

Cur. adv. vult.

November 10, 1986.

SHARVANANDA, C.J.

The plaintiff instituted this action on first April 1975 for the ejectment of the defendant-appellant from premises No. 24/1, Collingwood Place, Wellawatte, on the ground of arrears of rent. The trial judge held that the appellant was not in arrears of rent and dismissed the

action. The plaintiff appealed to the Court of Appeal from the judgment of the District Judge. Pending the appeal, the plaintiff died and the present substituted plaintiff was substituted as plaintiff-appellant to the said appeal. The Court of Appeal by its judgment dated 16.11.1984 allowed the appeal. The defendant has with the leave of this court, preferred this appeal to this court. As the appeal involved an important question of law relating to the sufficiency of the notice to quit given in respect of which there appear to be conflicting judgments pronounced by the earlier Supreme Court, an order was made under Article 132(3) of the Constitution that the appeal be heard by a Bench of five judges. Hence this appeal was argued before a Bench of five judges.

Though this court at the time it granted leave restricted the leave to the question of the validity of the notice to quit purported to be given under section 22(3) of the Rent Act No. 7 of 1972 and expressly ruled out the question whether the defendant was entitled to set off the sum of Rs. 1,866.24 which represented rent paid in excess during a period of three years prior to the defendant failing to pay rent – it being common ground between the parties no rent was paid by the defendant as from April 1973 – viz: for the period of thirty-six months, commencing April 1970, as this court was of the view, that Abdul Cader, J. when he granted leave was in error in assuming that only excess payments made three years prior to 28.4.1976, the date of the defendant's answer could be set off, the appellant was permitted to argue that the aforesaid sum of Rs.1,866.24, should be taken into account in ascertaining whether the defendant fell into arrears of rent.

The tenancy of the premises admittedly commenced on 1.12.1968. The finding of the trial judge was that the rent agreed upon by the parties and collected by the plaintiff was Rs. 200 per month from the defendant and that the defendant had at the commencement of the tenancy paid plaintiff Rs. 600 as advance rent for three months. It is common ground that the appellant ceased payment of rent as from April 1973. The authorised rent for the premises as determined by the Rent Board, was Rs.148.16 per month. Hence, the defendant had overpaid a sum of Rs.51/84 per month. According to the judgments reported in *Wijemanne v. Fernando* (1) *Munidasa v. Appuhamy* (2) and *Sinniahpillai v. Abdul Cader* (3), the defendant was entitled to credit from plaintiff in a sum of Rs.1,866.24, being the amount of excess rent paid by defendant

for the three years preceding April 1973, when he failed to pay rent. This sum was lying in the hands of the plaintiff to be set off against the rent accruing from April 1973. I agree with these judgments that there is an automatic set off. No argument was urged by Counsel for the plaintiff in support of the view of the law taken by Abdul Cader, J. With all respect to Abdul Cader, J., on no principle of the law can it be held that the three years prescribed by the Prescription Ordinance should be calculated from the date of the answer.

The plaintiff by letter dated *31.10.1974* gave the defendant notice to quit the premises on or before 31.1.1975 on the ground that the rent was in arrear from 1.7.73. This notice to quit was received by defendant on *1.11.1974*. After the notice to quit was received by him, the defendant deposited on 3.12.74 as rent a sum of Rs.350 for October with the Colombo Municipal Council and continued depositing the further accruing rents in respect of the premises for each month in the Colombo Municipal Council. In her evidence given on 12.9.78 the plaintiff stated:

> "From November 1974 the defendant deposited at the Rent Branch of the Colombo Municipal Council Rs.148/16 being the rent fixed by the Rent Board. The last payment received by me from the Municipal Council was Rs.148/16 in respect of June 1978."

It was not disputed in this court that the standard rent of the premises does not exceed one hundred rupees and that the rent was to be paid on or before the last day of the month. In this background the relevant provisions of the Rent Act of 1972 that fall for consideration are sections 22(1)(*a*) and 22(3). These sections provide as follows:–

Section 22(1) (a)–

> "Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises the standard rent (determined under section 4) of which for a month does not exceed one hundred rupees shall be instituted in or entertained by any court, unless where –
>
> (*a*) the rent of such premises has been in arrear for three months or more after it has become due, or ...."

Section 22(3) –

"The landlord of any premises referred to in subsection (1) .... shall not be entitled to institute, or as the case may be, to proceed with, any action or proceedings for the ejectment of the tenant of such premises on the ground that the rent of such premises has been in arrear for three months or more ... after it has become due –

(*a*) if the landlord has not given the tenant three months' notice of the termination of tenancy if it is on the first occasion on which the rent has been in arrear, two months' notice of the termination of tenancy, if it is on the second occasion on which the rent has been in arrear and one month's notice of the termination of tenancy if it is on the third or any subsequent occasion on which the rent has been in arrear; or

(*b*) if the tenant has prior to the institution of such action or proceedings tendered to the landlord all arrears of rent;

(*c*) if the tenant has, on or before the date fixed in such summons as is served on him, as the date on which he shall appear in court in respect of such action or proceedings, tendered to the landlord all arrears of rent."

In terms of section 22(1)(*a*) read with section 22(3)(*b*) of the Rent Act the condition precedent for proper institution of action on the ground of arrears of rent is that the rent of such premises has been in arrear for three months or more after it has become due and the tenant has not prior to the institution of such action tendered all arrears of rent. The tender of all arrears prior to the institution of action cures all default. An action for the ejectment of the tenant lies only if it is established that the rent of the premises has been in arrears for three months or more after the rent has become due and the tenant had not prior to the institution of action tendered all arrears of rent. It is not sufficient for the tenant to have fallen into arrears for the required period at some time during the currency of the tenancy or prior to the notice terminating the tenancy is given. It is imperative that at the time of the filing of the action, the tenant should continue to remain in arrears of rent. If prior to the institution of the action the defaulting tenant tenders all the arrears of rent no action for ejectment on the ground of arrears of rent will lie.

Section 22(3)(*a*) bars institution of action on the ground of arrears of rent, if the landlord has not given the tenant three months' notice of termination of tenancy if it is on the first occasion on which the rent has been in arrears.

Section 22(3)(*a*) is a difficult provision to construe. It was submitted by senior counsel for the plaintiff that the word "occasion" appearing in section 22(3)(*a*) means nothing more than the number of times that the tenant gets into arrears. He pointed out that the section refers to "occasion on which rent has been in arrear" and said that the section does not stipulate "occasion on which action for ejectment could be instituted". He urged that the defendant-appellant was undisputedly three months' in arrears, viz for the months of August, September and October 1974 when the notice to quit P1 was given, viz. 1.11.1974 and that in respect of the month of August he was in arrears on three occasions, i.e. 1st September, 1st October and 1st November and hence was entitled to only one month's notice in terms of section 22(3)(*a*)

I do not agree with the counsel's construction of the phrase 'occasion on which the rent has been in arrear'.

Section 22(3)(*a*) provides for the length of notice required to terminate the tenancy prior to action being instituted for the ejectment of the tenant on the ground that the rent of the premises has been in arrears for three months or more or for one month, as the case may be after it became due. In view of the provision in section 22(3) (*b*) that if the tenant has prior to the institution of the action tendered to the landlord all arrears of rent, the landlord would not be entitled to institute action for ejectment on the ground of arrears of rent, the notice of termination of tenancy that was given will be rendered nugatory and inoperative to terminate the tenancy and the tenancy will be revived. Then the landlord will have to wait for another occasion on which the rent would fall in arrears for three months or one month as the case may be to entitle him to sue for ejectment on the ground of arrears. This would be the second occasion on which the rent would be in arrears for the specified period of three months or one month. If the landlord wishes to avail himself of such default by the tenant, he will have to give two months' notice of the termination of tenancy preliminary to instituting action for arrears of rent. If again, prior to the institution of action the tenant tenders to the landlord all arrears, the second notice to quit will be rendered nugatory and the tenancy will be

revived. In the event the landlord will have to wait for a third occasion when the tenant would fall into such arrears. On this third occasion and on any subsequent occasion the landlord need give only one month's notice of the termination of tenancy to enable him to institute action for ejectment on the said ground of arrears of rent.

In the instant case the defendant was in arrears of rent for the months of August, September and October 1974, after it became due, on 1.11.1974 when the notice to quit P1 was delivered to the defendant. This was the first occasion on which the tenant had fallen into arrears in terms of section 22(3) of the Rent Act and it was obligatory on the plaintiff to serve three months' notice of termination of tenancy to entitle him to institute action for ejectment on the ground of arrears. In view of what I state later as the correct legal position, the notice to quit (P1) appears to satisfy the requirement of law

It was held by a Divisional Bench of the last Supreme Court in *Mohideen v. Mohideen* (4) that where a landlord institutes action for ejectment of his tenant from premises to which the Rent Restriction Act of 1948 as amended by Act No 12 of 1966 applied, on the ground of arrears of rent it was not necessary that the tenant should have been in arrears of rent for the necessary period, at the time of service of notice.

For the purpose of the application of section 12A (1) (*a*) of the amended Rent Restriction Act (1948) a notice to quit was not rendered invalid by the fact that the tenant was not in arrears of rent for three months or more on the date of giving of the notice But section 22(3) of the Rent Act of 1972 has altered the law In terms of this action, notice of termination of the tenancy in order to be valid can be given only after the tenant had been in arrears for the requisite period and not beforehand. Hence under the present law, advantage cannot be taken of an earlier termination of tenancy by notice to quit at a time when the tenant was not in arrears of rent for the required period, to institute an action under section 22(1) of the Rent Act of 1972 for ejectment on the ground of arrears of rent. In the present case, when the notice to quit P1 was given on 1.11.1974 the defendant was admittedly in arrears of rent for August, September and October 1974 and was in arrears of the August rent for three months.

Counsel for the defendant conceded that after giving credit for the excess rent of Rs. 1,866/24 and the sum of Rs. 600 paid on account of three months rent in advance the defendant was in arrears of rent for August 1974 on 1st September. Hence when P1 was delivered to the defendant on 1.11.74 the defendant was in arrears of rent for August for three months after it became due. Hence, subject to the further submission of counsel for the defendant-appellant, referred to below, the notice P1 satisfies the requirements of section 22(3)(*a*) of the Rent Act that three months' notice of termination of tenancy was given on the basis that it was the first occasion on which the defendant had been in arrears.

The plaintiff's attack on the validity of the notice to quit (P1) is based on the allegation that P1 reached the defendant on 1.11.74 when a new monthly tenancy had already conceptually commenced on the midnight of 31.10.1974–1.11.1974 and that on 31.10.1974, the date of the notice to quit P1, the defendant was not in arrears of rent for three months after it had become due. This last contention fails as the relevant date of the notice to be taken into consideration is 1.11.1974 when the notice was delivered to the defendant. On 1.11.1974 the defendant was admittedly in arrears of the August rent for three months after it became due. The notice P1 cannot be attacked on ground that it does not satisfy the requirement of three months' arrears, specified by section 22(3)(*a*) of the Rent Act. In my view the notice to quit P1 conforms to the requirement of section 22(3) of the Rent Act.

The sufficiency of P1 was challenged mainly the ground that the tenancy in suit was tacitly renewed at midnight of 31.10.1974 and therefore the three months notice given on 1.11.1974 would have expired at midnight of the 1st day of February, 1975, hence, the notice to quit terminating the tenancy on 31.1.1975 was alleged to be bad in law.

The Court of Appeal has held that the trial judge erred in law in holding that the notice to quit received by defendant on 1.11.1974 requesting the defendant to quit on 31.1.1975 did not give three months' notice to quit.

The Court of Appeal in reaching that conclusion has followed the judgment in *Haniffa v. Sellamuttu* (5). It however, has failed to notice the vital distinction between the notice in issue in *Haniffa's case (supra)* (5) and notice P1 in this case. The notice in *Haniffa's case (supra)* (5) dated 27.8.1964 required the tenant to quit on or before

the first day of December, 1964. But in this case the notice P1 was given on 1.11.1974 requesting the defendant to quit on or before 31.1.1975. In one the date of termination of tenancy by the notice to quit was the first day of the following month while in the other the date of commencement of the operation of the notice to quit P1 was challenged on the ground that at the relevant time, a new monthly tenancy had come into existence. It was correctly held in *Haniffa's case (supra)* (5) that the monthly tenancy commencing on the first day of a month and ending on the last day of a calendar month could validly be terminated by a notice terminating the tenancy on the first day of the following month. It overruled the earlier decisions in *Ismail v. Sheriff* (6) and *Robert v. Fernando* (7), that the requisite notice to quit did not terminate at the end of a current month of the tenancy. It disapproved the process of reasoning of Alles, J., that a notice dated May 11, 1963 requiring the tenant to quit on July 1, 1963 was bad for the reason that "at midnight a new tenancy on the same terms and conditions would have commenced which would expire at midnight on 31.7.1963." It quoted with approval the rule of interpretation formulated by Lindley, L.J., in *Sidebotham v. Holland* (8).

> "The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

In *Crate v. Miller* (9), Somervill, L. J., delivering the judgment of the Court of Appeal, appositely said:

> "As a matter of language a notice terminating a tenancy on the last day of a current period may, fairly be said to mean the same thing as a notice to quit and deliver up possession on the following day, for in both cases the landlord is intimating that the last day of the current period is to be the last day of the tenancy According to this view, where a tenancy had commenced on *1st April* and the tenant is given notice to quit on *1st December,* the notice is a valid one. It does not matter whether the notice received by the tenant on 1st November requires him to quit the premises on 30th November or on Ist December. The intention of the party giving notice is clear."

The question in issue in the present case is whether the notice P1 which was received by the defendant on 1.11.1974 requesting him to quit on or before 31.1.75 satisfied the requirement of law stipulating three months notice of termination of tenancy.

In the present case the tenancy commenced on 1st December 1968 and ran from month to month until it was terminated by a month's notice, expiring at the end of a month. It is said in *Wille on "Landlord and Tenant"* 4th ed. at page 42 that–

> "The essence of such a tenancy (monthly tenancy) under the common law, is that it continues for successive periods until it is terminated by notice, given by either party."

This concept of monthly tenancy was adopted in *Fernando v. De Silva* (10), by Manicavasagar, J., (with H. N. G. Fernando, C. J., agreeing) in preference to the view of Basnayake, C. J., expressed in *Abdul Hafeel v. Muttu Bathool* (11)–

> "In a monthly tenancy, the lease is tacitly renewed on the first day of each month by the lessor not indicating to the tenant before the day that he wants to terminate the lease and the lessee remaining in the house without notifying the lessor that he proposes to quit."

As Manicavasagar, J., observed the citation from Voet (Book XIX 2.9 and 10) and the Censura Forensis (iv.xxii 14) to which reference was made by Basnayake, C. J., in support of his view of the nature of monthly tenancy referred to a case of a lease for a definite period–and not to monthly tenancy–when after the expiry of the period of the lease, the lessee continues in the enjoyment of that which was let and the lessor permits him to do so. If on the expiration of the term of a lease, the lessee does not vacate or restore to the lessor the property leased but remains in occupation thereof, without objection by the lessor, a fresh lease or tacit relocation of the property on the same terms as the expired lease is presumed to have been entered into between the lessor and lessee. Such relocation is not a continuation of the old lease but is a new lease formed by fresh tacit agreement of the parties, which succeeds to the previous lease.

I agree with the judgment in *Fernando v. De Silva (supra)* (10) that a monthly tenancy does not terminate at the end of the month and that is not tacitly renewed from month to month. "A monthly tenancy is a periodic tenancy, it is a tenancy which by agreement between the parties runs from month to month and is terminated by a month's notice," per T. S. Fernando, J., in *Haniffa v. Sellamuthu (supra)* (5).

Counsel for the defendant-appellant contended that the notice P1 which reached the defendant on 1.11.1974 requiring the defendant to quit on or before 31.1.1975 was not a valid three months notice of the termination of tenancy in terms of section 22(3)(*a*) of the Rent Act. According to him at midnight of 31st October 1974, a new tenancy on the same terms and conditions would have, prior to the receipt of the notice P1 by the defendant, commenced which would expire on 30.11.1974 and hence the said notice which could be operative only from 1.12.1974 would not be a three months notice of termination of tenancy. This argument is based on the concept referred to above that a monthly tenancy comes to an end at the end of the calendar month but is tacitly renewed on the first day of each month-the tenancy stood terminatd on the midnight of 31st October but was tacitly renewed as a new tenancy operative from 12.00 a.m. of 1.11.1974 and the notice P1 which was served on the defendant during the day of 1.11.1974 was too late to hinder the November tenancy from coming into existence. I do not agree with this submission. As explained above the contract was a letting for an indefinite period running from month to month and terminable by either party by due notice. That being so no question of tacit relocation arises. The parties contemplated that the tenancy should remain in force until duly terminated by reasonable notice. In the absence of an agreement as to the length of a notice, reasonable notice in the case of a monthly tenancy has come to mean a month's notice given so as to expire at the end of a month. Therefore a monthly tenancy is terminable upon a month's notice expiring at the end of the period. The dispute in the present case is as to the computation of the three months time. Can a period, which begins during the currency of the first day and ends at midnight of the last day be properly described as a full month? The question must be answered in the affirmative on the civil mode of calculation which reckons a whole day as one point of time. It was held specifically in the South African case of *Tiopaizi v. Bulaway Municipality* (12) that a month's notice may be given at any time on the first day of the month expiring at the end of the month. On the basis of this judgment, Wille states the law as follows:

> "If the tenancy commence on the first day of a calendar month, the month's notice may be given at any time on the first day of a subsequent month and is effective to terminate the lease at the end of that month-" *Landlord and Tenant*-4th Ed. at page 42.

In Sri Lanka too, it has been held that notice of termination of tenancy given on the first day of the month in which the tenancy is to terminate is sufficient notice–vide *Sahul Hamid v. De Silva* (13).

On the other hand Withers, J., had held in *Fonseka v Jayawickrama* (14) that a notice dated 1st August 1892, requiring the tenant–

> "To quit the premises on, the 31st instant was insufficient notice, on the ground that a notice to quit must be given before the commencement of the month at the expiry of which the tenancy is to determine so that the party noticed shall have from midnight of the last day of the month immediately preceding the month at the end of which the tenancy is determined by the notice to midnight last day of the expiring month of the tenancy as thus determined for the purpose of making fresh arrangements.

This case was followed in *Thassim v. Cabeen* (15) where it was held that a letter sent by the landlord asking the tenant to quit at the end of December was not sufficient notice if it was posted on November 30 but reached him on December first.

In this conflict of decisions I would prefer to follow the law laid down in the South African case of *Tiopaizi v. Bulaway Municipality (supra)* (12) that–

> "A month's notice may be given at any time on the first day of the month and such a notice covers the entire month especially as it is in accordance with the civil mode of calculation. By that method the reckoning is ad dies; no account is taken of broken units; the whole of the first day is excluded and the whole of the last day is excluded, so that a calendar month reckoned from any moment on the 1st December would terminate at midnight on the 31st." per Innes, C.J., at 321.

The civil computation of time reckons a whole day as one point of time–Per Villiers, J. at 326. Therefore I hold that the notice to quit P1 is a sufficient and valid notice satisfying the requirements of section 22(3) (*a*) of the Rent Act.

Counsel for the plaintiff contended that in the computation of arrears due, the sum of Rs. 600 admittedly paid by defendant to plaintiff as advance of rent for three months should not be taken into account. He submitted that this advance of Rs 600 was not available

to be set off against arrears of rent whilst the tenancy subsisted. He said that it was no doubt a sum due to the tenant to be settled on the determination of the tenancy. He referred to *Kanapathi Pillai v. Dharmadasa,* (16) in support of his submission. In that case Basnayake, C. J., observed, in relation to the facts of that case:

> "In the absence of an express agreement to the contrary it may properly be inferred from the course of conduct between the parties for the thirteen years of the tenancy that it was an implied term of contract that the rent deposited in advance was to be retained as a deposit by the landlord while the tenancy subsisted and that it did not relieve the tenant of the obligation to pay the rent on the due date."

In view of the fact that in that case, counsel for, the defendant tenant admitted, that even if the advance, held by the plaintiff landlord, was utilised against the rent payable for the three months of February, March, and April 1957 (for which months the defendant was in default) he was unable to maintain in view of the decision in *Samaraweera v. Ranasinghe,* (17) that the rent had not been in arrears for one month after it had become due, as the defendant has not paid any rent for the following months and the action was not instituted till January 1958. In *Samaraweera v. Ranasinghe (supra)* (17) it was held that a monthly tenant should continue to pay rents even after the contract of tenancy had been determined by notice to quit and that if he failed to do so, proceedings for ejectment could validly be instituted if the rent was in arrears at any time thereafter for one month after it became due in terms of section 13(1) of the Rent Restriction Act of 1948. In view of the stance of counsel for the defendant-tenant in that case, and of the course of conduct between the parties *(Kanapathi Pillai v. Dharmadasa (supra)* (16) cannot be treated as an authority for the proposition that it is an implied term of the contract that rent paid as an advance should not be set off against arrears of rent falling due during the subsistence of the tenancy. Counsel referred to *Makeen v. Selliah* (18) as further supporting his proposition. In that case, however it was an express term of the agreement of parties that the sum deposited by the tenant was to be taken as rent for the last two months "on the determination of the tenancy by consent or by process of law." Here, the agreement provided for the manner of the application of the deposit and hence it was correctly held that the landlord was not bound without a request from the tenant in that behalf to apply the sum deposited in satisfaction of unpaid rent. In my

view, money paid as an advance of rent represents money in the hands of the landlord as debt owing to the tenant, to be set off against arrears of rent that may fall due even without a request by the tenant in that behalf. But, if there is an express agreement between the parties about the application of the advance rent or deposit such agreement identifies the happening and manner in which the said money may be accounted for. Pulle J., in *David Appuhamy v. Subramaniam* (19), brings out in relief this distinction between ordinary advance and a deposit where there is express agreement how it is to be accounted for. In that case, the tenant paid to the landlord two months rent in advance and also deposited a sum of Rs. 500 on the agreement that the deposit was to be held by the landlord and paid back to the tenant on the termination of the tenancy. In an action for ejectment on the ground of the defendant being in arrears, the trial judge held that the tenant was not in arrears because the advance for two months together with the deposit of Rs. 500 was well within the sum required to liquidate the alleged arrears of rent. In appeal, Pulle J., held that the trial judge:

> "Was wrong in setting off the rent as it fell due each month after 30th April 1951 (when the tenant defaulted in paying rent) against the deposit held by the landlord. There was no extinguishment of the obligation to pay rent as it fell due because the holding of the deposit by the landlord to be returned in terms of the tenancy agreement did not constitute a debt which could be set off against the rent."

It is to be noted that Pulle, J. did not fault the trial judge for setting off the rent paid in advance against the arrears of rent. This holding supports my view that as distinguished from money deposited to be returned to the tenant on the happening of some event, rent paid in advance and lying in the hands of the landlord at the time the tenant falls into arrears is a debt owing to the tenant by the landlord to be set off against arrears of rent if any, without even a request from the defaulting tenant.

T S. Fernando, J., in *Meera v. Jayawardena* (20), referred with approval to this distinction drawn by Pulle, J., between rent in advance and the deposit of money. I agree with counsel for the defendant in this case that the sum of Rs. 600 representing rent in advance paid by the defendant would automatically go to liquidate the arrears of rent falling due from April 1975 and that the defendant is entitled to the credit of the said Rs. 600 in the computation of the arrears of rent.

Thus the excess rent of Rs. 1866/24 and the three months' advance rent of Rs. 600 aggregating Rs 2,466.24 will have to be credited to the defendant in the process of ascertaining from what date he was in arrears. It is common ground that defendant stopped paying the rent of Rs 148.16 after March 1973. The sum of Rs. 2,468.24 will cover rent for a period of sixteen months and will leave a balance of Rs. 95.68 to the credit of the defendant. On this computation after setting the sum of Rs. 2,370.36 out of Rs. 2,468.24 against the arrears of rent up to end of July 1974, the defendant remained in arrears of rent for August 1974 on September first. Thus the August rent was in arrears for three months on 1st November 1974, after it became due (the rent being payable at the end of each month). The plaintiff was thereafter entitled on 1st November 1974 to give the defendant three months notice of termination of tenancy, in terms of the provisions of section 22(3) of the Rent Act. I agree with counsel for plaintiff that the notice to quit P1 given by the plaintiff on 1.11.1974 was a sufficient and valid notice under section 22(3)(*a*) to terminate the tenancy by the end of January 1975. But a valid termination of tenancy in terms of section 22(3)(*a*) of the Rent Act is only one condition to entitle the plaintiff to institute action for ejectment: section 22(3)(*b*) provides that action for ejectment on the ground of arrears of rent cannot be instituted if the tenant has prior to the institution of such action tendered to the landlord all arrears of rent. If credit is given to defendant for moneys of defendant in the hands of the plaintiff prior to the institution of this action the defendant appears to have accounted for all arrears of rent and no rent was in arrears.

It is in evidence that the defendant had deposited on 3.12.1974 a sum of Rs. 350 on account of rent for October 1974 to the credit of the plaintiff in the Municipal Council. The defendant has, according to plaintiff's admission deposited the November 1974 rent and subsequent rents in the Municipality and no complaint is made by the plaintiff that on 1.4.1975 when this action was instituted, defendant was in arrears of rent in respect of these months. Then the plaintiff can succeed in this action only if the rents for August and September 1974 aggregating to Rs. 296.32 remained in arrears at the time of the institution of this action. Credit has to be given to the plaintiff for

the sum of Rs. 201.84 which was the amount of excess deposit by the defendant in the Municipal Council (Rs. 350–148.16) on account of October rent, and the sum of Rs. 95.68 representing the balance out of the excess sum of Rs. 2,466.24 after setting off the sum of Rs. 2,370.56 on account of arrears of rent for the sixteen months ending in July 1974. Hence a sum of Rs. 297.52 made up of the aforesaid sums of Rs. 201.84 and Rs. 95.68 was in the hands of plaintiff to the credit of defendant available for set off against the sum of Rs. 296.32 representing the rents for August and September 1974, which was more than sufficient for the liquidation of Rs. 296.32 (rents for August and September). On this computation the defendant has accounted for all arrears of rent and was not in arrears of rent in respect of any month at the time of the institution of action, to entitle plaintiff to institute action for ejectment of the defendant on the ground of arrears of rent for three months after it became due.

I allow the appeal of the defendant-appellant, set aside the judgment of the Court of Appeal and dismiss the plaintiff's action with costs in this court, the Court of Appeal and in the District Court.

ATUKORALE, J.–I agree.

TAMBIAH, J.–I agree.

L. H. DE ALWIS, J.–I agree.

RANASINGHE, J.

Although, with respect, I find myself unable to agree with the view expressed by My Lord the Chief Justice that "when P1 was delivered to the defendant on 1.11.1974 the defendant was in arrears of rent for August, September and October 1974 for three months after it became due". I however concur, with respect, with the view that the defendant "was not in arrears of rent in respect of any month at the time of the institution of the action " I too agree that this appeal be allowed, and the plaintiff's action be dismissed with costs, both here and below

Appeal allowed