1956 *Present :* Gunasekara, J.

F. DE ALWIS, Appellant, *and* SIR E. A. L. WIJEYEWARDENE, Respondent

S. C. 241—C. R. Colombo, 55,938

Rent Restriction Act, No. 29 of 1948—Section 13 (1), proviso (a)—Overpayment of rent—Extinguishment of rent due.

For the purpose of computing whether a tenant is in arrear of rent within the meaning of proviso (*a*) to section 13 (1) of the Rent Restriction Act, any sum of money overpaid as rent extinguishes *pro tanto*, by operation of law, the rent as it falls due.

Wijesekera v. Kanapathipillai (1954) 55 N.L.R. 574, distinguished.

APPEAL from a judgment of the Court of Requests, Colombo.

M. M. Kumarakulasingham, with *F. R. Dias*, for defendant-appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for plaintiff-respondent.

Cur. adv. vult.

July 9, 1956. GUNASEKARA, J.—

This is an appeal from a decree for the ejectment of the appellant from certain premises that had been let to her by the respondent on a contract of monthly tenancy and for the recovery of damages from her for overholding. At the close of the argument, on the 20th June, I dismissed the appeal with costs and said that I would give my reasons later. I also directed, with the consent of counsel for the respondent, that a writ of ejectment should not issue until after the lapse of three months from that day.

The tenancy had been duly determined on the 31st December, 1954, by a notice given by the respondent to the appellant on the 27th November, 1954, but the premises were premises to which the Rent Restriction Act, No. 29 of 1948, applied. The question raised by the appeal is whether, in terms of section 13 subsection (1) of the Act, the authority of the Rent Control Board was necessary for the institution of the action for ejectment. The learned commissioner of requests has held that such authority was not necessary, for the reason that the case fell within each of the provisos (*a*) and (*d*) to that subsection.

In terms of proviso (*a*) the authority of the Board is not necessary where the rent has been in arrear for one month after it has become due. The commissioner holds that the rent for each month was payable by the end of that month and that the rent for the months of August and September, 1954, was paid only on the 8th November, 1954, and was therefore in arrear for more than a month after it became due.

The tenancy began in August, 1940, and originally the agreed rent was Rs. 20 a month. It was raised to Rs. 35 a month from the 1st June, 1945, and again to Rs. 60 a month from the 1st June, 1947. It was reduced to Rs. 27 a month from the 1st February, 1951, and that was the agreed rent till the determination of the tenancy. It is common ground that the authorized rent was only Rs. 27 a month from a date earlier than the 1st February, 1951, and that the respondent had recovered as rent sums in excess of the authorized rent for some time before 1st February, 1951. The precise period during which he did so is not material to the present question, but according to the respondent himself the total sum recovered in excess of the authorized rent was Rs. 825. When he found that he had been recovering rents in excess of the authorized rent he refunded to the appellant a sum of Rs. 336 and credited himself with the balance as the cost of repairs effected by him in the years 1949 and 1950. It was contended for the appellant that the respondent was not entitled to credit himself with this sum, and therefore there was in his hands a sum of at least Rs. 489 recovered by him in excess of the authorized rent, and that if this sum was taken into account the rent was not in arrear at the material time.

The learned commissioner holds that under the Act it was the duty of the landlord to effect repairs. But quite apart from the provisions of the Act that was the agreement between the parties in respect of the period 1st June, 1947, to 31st January, 1951. The respondent was therefore not entitled to credit himself with the sum of Rs. 489 as he purported to do. The learned commissioner holds, however, that the appellant " is not entitled to set off any excess payments made by her prior to March 1952 " ; for the reason that " it was only in her answer filed on 24/3/55 that the tenant pleaded for the first time that she was entitled in law to continue in occupation without payment of rent until such period as the overpaid rent in the plaintiff's hands shall have become exhausted " and the claim is therefore prescribed. He cites in support of this view the judgment of Pulle J. in the case of *Wijesekera v. Kanapathipillai* [1]. The learned counsel for the appellant contends, on the authority of the decision in *Wijemanne & Co., Ltd. v. Fernando* [2], which is a decision of two judges and is therefore binding on me, that the overpaid amount in the hands of the landlord, " overpaid *as rent*, and not for any other purpose, extinguished *pro tanto* by operation of law, the rent as it fell due ". In this view of the matter, after January, 1951, the debt in respect of the rent for any month was extinguished as soon as the rent fell due at the end of that month, and every payment made after the end of a month as rent for that month was a payment of a debt that had already been extinguished. The reason for the decision in *Wijesekera v. Kanapathipillai* appears to be that there was not at any time in the material period a debt due from the tenant in respect of rent, and therefore no occasion for extinguishment of any debt by operation of law. Pulle J. says in his judgment :

" There was no automatic extinguishment of debts because at the end of every month the tenant was the creditor and in each month

[1] *(1954) 55 N. L. R. 575.*

[2] *(1946) 47 N. L. R. 62.*

there came unlawfully into the hands of the landlord a sum which represented the difference between the rent actually paid and the authorised rent."

In the present case each payment purporting to be a payment of rent was made several days (and, more frequently, several weeks) after the rent had fallen due. Every payment made after the 31st January, 1951, was therefore a payment made after the extinguishment of the debt in payment of which it purported to be made. The sum of Rs. 489, which was in the respondent's hands on the 31st January, 1951, was more than enough to pay the rent for the next 18 months, and as a result of the overpayments subsequent to that day the rent was not in arrear at any time thereafter.

The appellant has pleaded in her answer that " there is a substantial sum of overpaid rent in the plaintiff's hands which she reserves the right to recover, if necessary, in a separate action in the District Court of Colombo ". It is contended for the respondent that, having pleaded that she reserves this right, the appellant cannot have the overpaid rent set off against the rents that became due after January, 1951. But there can be no question of such a set-off, for the overpaid rent that was in the appellant's hands at the time of the termination of the tenancy consisted of payments made in respect of debts that had already been extinguished. Although at the end of the tenancy the total of the excess would, as a result of these payments, have been equal to the overpaid rent that was in the respondent's hands on the 31st January, 1951, and not refunded by him, it was nevertheless a sum made up of subsequent overpayments in a period when the rent was never in arrear.

I agree with the contention that the case does not fall within proviso (*a*). I may observe in passing that although the appellant has sought to reserve the right to sue for the recovery of the overpaid rent in the hands of the respondent I do not think that she will find it necessary to institute an action for the purpose. The respondent's attitude has been stated quite clearly in his evidence. Having referred to the refund of Rs. 336, he said :

" If there was any more money which I should have refunded to the defendant I would have done so. If the court finds that I have to refund any money I will refund it as I am bound to do ."

Under proviso (*d*) to section 13 (1) of the Act the authority of the Board is not necessary for the institution of an action for the ejectment of a tenant in any case where the condition of the premises has, in the opinion of the court, deteriorated owing to acts committed by or to the neglect or default of the tenant or any person residing or lodging with him. The demised premises were a dwelling house, and according to the learned commissioner's findings of fact, which I see no reason to disturb, substantial damage has been done to the floor upstairs by the acts and by the neglect of the appellant and of persons lodging with her. The floor, which was of seasoned jakwood, was scorched over an area of about 2′ × 2′ and was burnt right through at one place in this area. The

commissioner holds that this damage was the result of a " Jaffna hearth " (a stove which burns firewood) being used at that place over a period of several weeks. According to the appellant herself, though there was a kitchen downstairs this stove was used in the sleeping quarters upstairs by the occupants of the house to boil water for their tea and coffee. There were about 12 permanent residents, and in addition to them as many as 15 to 20 others would lodge there from time to time. There were vessels filled with water for their use placed on the floor upstairs, and water constantly leaking and dripping from these vessels over a long period of time had soaked into the floor-boards until they were in danger of decaying as a result. It was contended for the appellant that these facts were insufficient to justify the finding that the condition of the premises had deteriorated. I do not agree. There was a permanent and substantial change for the worse in the condition of the floor-boards. In the learned commissioner's opinion this change amounted to a deterioration of the condition of the dwelling-house. I am unable to say that there was no basis for that view.

There appeared to be no sufficient ground for interfering with the learned commissioner's finding that the case fell within proviso (*d*) and the appeal was therefore dismissed with costs.

Appeal dismissed.