1946 *Present :* **Soertsz S.P.J. and Cannon J.**

WIJEMANNE & CO., LTD., Appellant, *and* FERNANDO, Respondent.

223—D. C. Colombo, 15,540.

Landlord's action for ejectment—Alternative accommodation for tenant—Agreement by tenant to pay rent in excess of standard rent—Validity of—Computation of standard rent—Overpaid rent extinguishes, pro tanto, *rent due—Rent Restriction Ordinance, No. 60 of 1942, ss. 5 (1) (b), 8, 17.*

Suitable alternative accommodation for the tenant is a question of importance and has to be taken into account when considering whether, under section 8 of the Rent Restriction Ordinance, premises are " reasonably required " for the landlord.

Section 17 of the Rent Restriction Ordinance does not enable a landlord to recover a rental above the standard rental even although the tenant undertook to pay it.

Where the tenancy is one in which the landlord pays the rates the standard rent has to be determined in the manner provided by section 5 (1) (*b*), that is to say, by adding the annual value and the amount of rates leviable for the year and dividing the result by twelve.

In regard to computing whether a tenant is in arrear with his rent for one month, any sum in the hands of the landlord overpaid as rent extinguishes *pro tanto* the rent due.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *H. W. Jayawardene*), for the defendant, appellant.

L. A. Rajapakse, K.C. (with him *E. B. Wikramanayake*), for the plaintiff, respondent.

Cur. adv. vult.

February 25, 1946. SOERTSZ S.P.J.—

The respondent to this appeal sued the appellant to recover rent for the month of March, 1944, in respect of the premises bearing assessment No. 26, Bagatelle road, which he had let to the appellant on a contract of monthly tenancy, and he also asked for ejectment, and for damages on the ground that the appellant was overholding the premises after the tenancy had been duly determined by notice. In view of the Rent Restriction Ordinance, No. 60 of 1942, he pleaded that he required these premises as a residence for himself and that the rent had been in arrear for one month after it had become due. The appellant filed answer admitting that he had received notice to quit, alleging that there had been no demand made by the respondent for the rent for the month of March implying that, in the absence of such a demand, his failure to pay the rent for that month was not legally imputable to him. He prayed

that the respondent's action be dismissed. But, when the case came up for trial, issues were framed raising not only the questions involved in the pleadings, but other questions as well, for instance the questions—what the standard rent for these premises is ; whether the respondent had been in receipt of a rental in excess of the standard rent ; and whether, taking the overpayment into account, the appellant could be said to have been in arrear with the rent for March, 1944. In the course of the final address made by the respondent's Counsel, he appears to have made a further submission in which he contended that because the rent charged was charged in accordance with a written agreement between his client and the appellant, his client was protected by section 17 of the Ordinance.

In the judgment delivered by the learned trial Judge, he said that if he had to answer the question whether, in all the circumstances of the case, the respondent " reasonably required " the premises for occupation as a residence for himself, on the evidence before him he would have held in favour of the appellant as " his necessity was perhaps greater than that of the plaintiff ". Counsel for the respondent asked us to reverse that finding and to hold that, in all the circumstances, the respondent " reasonably required " the premises. I do not think we ought to accede to that request. This question of reasonableness has to be considered and determined in view of the relative difficulties of the landlord and of the tenant in regard to the acute disproportion between supply and demand in the matter of housing accommodation today and for that reason, suitable alternative accommodation is a question of importance and has to be taken into account. The evidence in this case shows that these premises were taken on rent by the appellant for conducting a tutorial academy, and for that purpose laboratories for scientific work were installed at a fairly high cost. It would be very difficult indeed, under the conditions prevailing at the date of this action, for the appellant to find suitable alternative accommodation. I am, therefore, of the opinion that the trial Judge was right when he said that the appellant's necessity was greater than the respondent's and we should not disturb that finding, although it may be said to have been made *obiter*.

The grounds on which the trial Judge found for the respondent were : (*a*) that in view of the written agreement (P 4) by which the appellant undertook to pay a rental above the standard rental, the respondent was entitled in virtue of section 17 to recover that rental ; (*b*) that, on that basis, the appellant was in arrear with his rent for the month of March. In regard to (*a*), the view taken by the trial Judge appears to me to be quite untenable. Section 17 enacts that " Nothing in this Ordinance shall be deemed to authorise any increase of the rent of any premises otherwise than in accordance with the terms of any lawful agreement relating to the tenancy of those premises or with the provisions of any law applicable in that behalf ". The reasoning by which the trial Judge reached his conclusion is clearly fallacious in as much as it ignores the fact that it is not merely a *voluntary* agreement to pay an increased rent that justifies the payment of such a rent by one party and the receipt of it

by the other, but a *voluntary* as well as *lawful* agreement. But section 3 provides that "It shall not be lawful for the landlord . . . . to demand, receive, or recover . . . . any amount in excess of the authorised rent", and section 14 penalises the breach of that requirement. If I may say so, the view taken by the Judge, if given effect to, would result, as he himself appears to have appreciated, in a *reductio ad absurdum* of the whole Ordinance. It is not in dispute between the parties that the rent received and recovered is in excess of the authorised rent.

In regard to (*b*), the learned Judge has found that assuming over-payments during the relevant period, the total sum resulting from those over-payments was not sufficient to make good the rent due for March, 1944, and that, therefore, the appellant must be held to have been in arrear with his rent and, in that way, liable to be ejected in accordance with section 8 of the Ordinance. Here again there is a fallacy in the reasoning of the learned Judge. In this case, the tenancy was one in which the landlord paid the rates, and for that reason, the standard rent has to be determined in the manner provided by section 5 (1) (*b*), that is to say, by adding the annual value and the amount of rates leviable for the year and dividing the result by *twelve*. The learned Judge, however, appears to have divided the result by *ten* evidently misled by the fact that the annual value represents the monthly rental multiplied by ten. If he had addressed himself to the calculation in the manner provided by section 5 (1) (*b*) he could not but have found that there was in the hands of the respondent, by way of payments in excess of the authorised rent, an amount larger than the recoverable rent for March. In other words, he would have found that it could not be said, having regard to the provisions of the Rent Restriction Ordinance, that the appellant was in arrear with his rent for March at the date of the institution of this action. Counsel for the respondent, however, if I may say so without intending any offence at all, sought to surmount this difficulty by juggling with words. He submitted that the appellant had not pleaded a set off or a counter claim and was, consequently, debarred from asking that the overpaid amount he applied in payment of the rent for March. But the answer to that is that the overpaid amount in the hands of the respondent overpaid *as rent*, and not for any other purpose, extinguished *pro tanto* by operation of law, the rent as it fell due. In other words the law secured for the appellant what, in other circumstances, the appellant would have had to achieve for himself.

For these reasons the appeal must be allowed and the plaintiff's action dismissed. Ordinarily, costs follow the event, but in the special circumstances of this case, I am of the opinion that we should depart from that rule and make no order for costs either here or below.

CANNON J.—I agree.

Appeal allowed.