

1955

Present: K. D. de Silva, J.

M. D. MUNIDASA, Appellant, and G. D. RICHARD
APPUHAMY, Respondent

S. C. 111—C. R. Colombo, 40,133

*Rent Restriction Act, No. 29 of 1948—Sections 13 (1) (a) and 15—Overpaid rents—
Set-off against rent in arrear—Appropriation of the overpayments—Prescription
Ordinance (Cap. 55), s. 10.*

Under section 15 of the Rent Restriction Act any rent paid in excess of the authorised rent must be appropriated by the landlord in the way which is most favourable to the tenant for the purposes of prescription. Therefore, if overpayments of rent were made by the tenant during a period of three years immediately preceding the date when he fails to pay rent for a particular month, the sum due as rent for such month should be deducted from the earliest overpayment in the hands of the landlord.

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

S. J. V. Chelvanayakam, Q.C., with *K. Rajaratnam*, for the defendant-appellant.

H. W. Tambiah, with *Felix R. Dias*, for the plaintiff-respondent.

Cur. adv. vult.

July 22, 1955. DE SILVA, J.—

The plaintiff who is the landlord of premises bearing assessment No. 102, Armour Street, Colombo, instituted this action on 23.7.'52 to eject the defendant his tenant from the said premises and to recover arrears of rent. The ejection was claimed on two grounds, namely, (1) that the rent had been in arrear for one month after it became due, and (2) that the premises were reasonably required for his use and occupation as a place of business within the meaning of Section 13 (1) (c) of the Rent Restriction Act of 1948 (hereinafter referred to as the Act). The defendant filed answer on 29.9.'52 denying the plaintiff's right to eject him on either ground. The learned Commissioner held that the plaintiff had failed to establish his claim to eject the defendant on the second ground. He has given valid and cogent reasons for his decision on that point, and it must be upheld. In fact, his finding on this point was not canvassed in appeal. The learned Commissioner however held that the defendant was in arrear of rent for a month after it became due and entered judgment for plaintiff as prayed for. The defendant has appealed from that judgment.

That he failed to pay any rent after the end of February, 1950, is admitted by him. So that at the institution of the action he owed the plaintiff a sum of Rs. 386.10 as rent. The authorized rent for the premises for the whole of the year 1948 was Rs. 15.60 a month, and from 1949 onwards it was Rs. 14.30. The plaintiff however recovered rent from the defendant at the rate of Rs. 40 a month from 1.1.'48 to 28.2.'50. Thus between 1.1.'48 and 28.2.'50 there had been an overpayment of Rs. 652.60. The defendant in his answer averred, *inter alia*, that in view of the fact that the plaintiff had recovered from him a sum of Rs. 652.60 in excess of the authorized rent he was not in arrear at the time of the institution of the action. The learned Commissioner, however, held that the defendant was entitled to set-off only overpayments made during a period of three years immediately preceding the date on which the deduction was claimed. He further held that the defendant claimed the deduction for the first time in his answer which was filed on 29.9.'52. Consequently he was entitled to credit only in respect of the overpayments from September, 1949, to February, 1950, that is to say, for a period of six months. The excess payment during that period amounts to only Rs. 154.20 but as the arrears amounted to Rs. 386.10 the learned Commissioner decided that the defendant was in arrear within the meaning of Section 13 (1) (a) of the Act. It was argued on behalf of the defendant,

that the learned Commissioner had erred in holding that the three-year period during which the overpayments can be recovered should be reckoned from the date that the deduction is claimed. The learned Commissioner's view however finds support in the judgment of Pulle, J., in *Wijesekera v. Kanapathipillai*¹. In that case it was held that any overpayment made prior to three years of claiming the deduction was barred by prescription. Section 15 of the Act enacts "where any tenant of any premises to which this Act applies has paid by way of rent to the landlord, in respect of any period commencing on or after the appointed date, any amount in excess of the authorized rent of those premises, such tenant shall be entitled to recover the excess amount from the landlord, and may without prejudice to any other method of recovery, deduct such excess amount from the rent payable to the landlord". This Act came into operation in December, 1948, but Section 9 of the corresponding Ordinance of 1942 was identical with Section 15 of this Act. The Act itself does not set out the period within which overpaid rent can be recovered or deducted. In the English Act however the period during which that can be done is fixed at two years. The learned Counsel for the defendant was not prepared to concede that the Prescription Ordinance (Cap. 55) applied in the matter of recovery or deduction of overpaid rent. But, he argued that even if Section 10 of that Ordinance did apply his client was entitled to deduct the excess rent paid during the period of three years immediately preceding 1.3.'50. If that argument is sound the defendant could not have been in arrear at the time of the institution of this action. The judgment of Soertsz, J., in *Wijemanne & Co. Ltd. v. Fernando*² lends support to that contention. In that case too it was argued on behalf of the landlord that as the tenant had not pleaded a set-off or a counter claim he was not entitled to credit in respect of overpaid rent. That argument the learned Judge summarily rejected in the following words:—"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." There is no reason why this principle enunciated by Soertsz, S. P. J., should not apply to the facts in the instant case. Here too the defendant made the overpayment of Rs. 652.60 to the plaintiff as rent and not for any other purpose. Therefore, the defendant in March, 1950, was entitled to deduct any overpayment in the hands of the landlord which had not been prescribed. That is to say the defendant was entitled to the benefit of the overpayments made by him in the way of rent during a period of three years immediately preceding 1.3.'50. The appropriation of the overpaid rent must be made by the landlord in the way which is most favourable to the tenant. That is to say, when the defendant failed to pay rent for March, 1950, that amount should have been deducted from the earliest overpayment in the hands of the plaintiff and likewise in the case of rent which fell due during the subsequent months. Appropriation of overpayments would take effect on that principle. This principle is referred to by Megarry in his book "The Rent Acts" at page 299, as

¹ (1954) 55 N. L. R. 575.

² (1946) 47 N. L. R. 62.

follows :—“ In a case of deduction, any overpayment may be set against any sums due for rent within the following two years. So that, by setting the earliest of such overpayments against the next payment due for rent, the tenant may leave the liability for later payments for rent available for satisfaction by the later overpayments.” This statement is based on the English case *Gokee v. Burgener*¹. Therefore if the overpayments of rent made by the defendant during the three years immediately preceding 1.3.'50 were appropriated by the landlord on the principles set out above, the defendant would not have been in arrear of rent at the time of the institution of the action. Accordingly the plaintiff's action must fail. Therefore, I set aside the judgment of the learned Commissioner and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.
