1960 *Present :* **Basnayake, C. J., and H. N. G. Fernando, J.**

A. V. M. COOKE, Appellant, *and* D. K. W. PERERA, Respondent

S. C. 328—D. C. Kandy, 7465/MR

Rent Restriction Act, No. 29 of 1948—Excessive rent paid in advance—Right of tenant to recover it—Illegal contract—Sections 8, 15.

In an action brought by a landlord for arrears of rent due from the tenant, the tenant is not entitled to claim a deduction of any excessive rent paid in advance by him in contravention of section 8 of the Rent Restriction Act. In such a case the maxim *in pari delicto potior est conditio defendentis* is applicable.

APPEAL from a judgment of the District Court, Kandy.

F. C. Perera, for Plaintiff-Appellant.

R. Manikkavasagar, for Defendant-Respondent.

March 16, 1960. BASNAYAKE, C.J.—

This is an action for arrears of rent due from the defendant to the plaintiff. The plaintiff states that one P. U. de La Motte, acting for and on behalf of her, let to the defendant premises bearing assessment No. 2, Asgiriya Road, Kandy, at a rental of Rs. 51/08 per month ; that P. U. de La Motte died on the 3rd of June 1957 and that there is due to the plaintiff a sum of Rs. 919/44 as arrears of rent from the defendant for the period 1st February 1957 to 31st July 1958. The defendant admits the tenancy and states that no rent was paid after the death of P. U. de La Motte as he was unaware on whom the property devolved and to whom rent had to be paid. He further stated that to secure the tenancy he paid a sum of Rs. 1,500 to P. U. de La Motte and prayed that the rent due from him be set off against the sum of Rs. 1,500 paid by him and that he be given credit in that sum. The learned District Judge has held that the defendant is entitled to have the sum of Rs. 1,500 deducted from the rent due from him. It is submitted in appeal that section 15 of the Rent Restriction Act, No. 29 of 1948, authorises the recovery by a tenant of only any amount in excess of the authorised rent of the premises paid by the tenant, and that as the payment of the sum of Rs. 1,500 was in contravention of section 8 which provides that—

> " No person shall, as a condition of the grant, renewal or continuance of the tenancy of any premises to which this Act applies, demand or receive, or pay or offer to pay—
>
> (*a*) as an advance of rent, any amount exceeding the authorised rent for a period of three months ; or

(*b*) in addition to the rent of such premises, any premium, commission, gratuity or other like payment or pecuniary consideration whatsoever."

the defendant is not entitled to recover the excess amount paid by him to the landlord. Section 15 provides—

"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 authorised 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 by him to the landlord."

The payment of the sum of Rs. 1,500 is described in the receipt produced by the defendant as being an "advance undertaking to rent to him premises No. 6 Asgiriya Road, Kandy, owned by me." The contention of learned counsel for the appellant is therefore entitled to succeed as section 15 of the Rent Restriction Act does not authorise the recovery of such an advance. Both parties having acted in contravention of section 8 and the recovery of the illegal payment not being authorised the courts will not entertain an action for recovery unless it appears that the parties were not *in pari delicto*. In the instant case the parties were *in pari delicto* for both the landlord and the tenant were acting in contravention of the statute which forbids a person to receive or pay a premium. The maxim *in pari delicto potior est conditio defendentis* would therefore apply.

It has been brought to our notice by learned counsel that the reported decisions of this court on this point are in conflict. In the case of *Vitharne v. de Zilva*[1] it has been held that section 15 does not authorise the recovery of any payment made in contravention of section 8 of the Rent Restriction Act. In the case of *Amarasekara v. Abeygunawardene* [2] a contrary view has been taken. We are unable to agree with the decision in *Amarasekara's* case (*supra*). The decision in *Vitharne v. de Zilva* (*supra*) accords with our view.

The appeal is therefore allowed and the defendant's claim of Rs. 1,500 against the plaintiff is dismissed. We accordingly enter judgment for the plaintiff for a sum of Rs. 919/44 as prayed for with costs. The plaintiff is entitled to the costs of the appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

[1] (*1954*) *56 N. L. R. 57.*

[2] (*1955*) *56 N. L. R. 361.*