PUNYAWATHIE

v.

UVAIS

COURT OF APPEAL.
BANDARANAYAKE, J. AND VIKNARAJAH, J.
S.C. 331/77 (F).
D.C. COLOMBO 1961 RE.
NOVEMBER 16 & 17, 1987.

Landlord and tenant – Rent and Ejectment – actio locati – Increase of rent – Damages – Agreed rent – Wrong admission on question of law.

The plaintiff sued the defendant his tenant under the Rent Restriction Act on the ground of arrears of rent and the defendant pleaded illness and financial difficulties for his default and brought into Court a sum of money as arrears due and claimed a set off against repairs done. On 17.12.1969 the plaintiff gave the defendant notice to quit the premises in suit by 31.1.1970. On 5.3.1970 the plaintiff applied to the Rent Control Board of Colombo for written permission to institute action to evict the defendant from the building let to him so he could demolish it as it was old and dilapidated and erect a new modern building. He offered alternative accommodation to the defendant pending the demolition and construction of the new building where he would provide accommodation for the defendant to run his business. The defendant opposed the application and produced proof of the structural stability of the building. The rent that was being paid was Rs. 529.88 but consequent on an increase in the assessment of the annual value by the Colombo Municipal Council about March 1970 the landlord could have lawfully demanded a rent of Rs. 552.41 per month. The plaintiff did not wish to ask the defendant to pay the increased amount as rent thinking it would prejudice his proposed suit but instead called upon the defendant to pay the increased amount as damages. The application for demolition was dismissed. On 27.9.1971 a notice to quit on or before 31.12.1971 was served on the defendant on the ground of arrears or rent – this time abandoning the description of damages. On 30.12.1971 the plaintiff's lawyer described the payments due as rent and damages.

Held–

(1) The plaintiff's action was the Roman Dutch Law *actio locati* the freedom to bring which is now circumscribed by conditions imposed by statute. The basic ingredients of an *actio locati* are:

(*a*) the thing let,
(*b*) the rent agreed upon, and
(*c*) the consent of the contracting parties.

(2) The quantum of rent must be agreed upon. The mere fact that rates have been increased does not mean that an enhanced rent is immediately payable. There must be agreement on the quantum of the enhanced rent. The landlord must demand the new enhanced rent which the law allows him to levy and the defendant must agree to pay it. If he does not agree he can take the option of quitting the premises. If he continues to occupy the premises after the demand for the increased rent justified by the statute, he

will be treated as having agreed. In the instant case the defendant was required to pay only the agreed rent and there was no duty cast on him to pay the higher amount without a demand for it. He was therefore not in arrears.

(3) The switch in nomenclature from damages to arrears of rent came when the attempt to secure eviction by demolition of the building with the permission of the Rent Control Board failed. During the pendency of the application to the Rent Control Board the plaintiff purposely avoided the use of the word 'rent' for fear of reviving the tenancy. At this stage the word used was 'damages' treating the defendant as a trespasser. The attempt to convert damages into rent came in the later correspondence in order to found an action on arrears of rent on the later notice to quit.

(4) Although no point was made in the District Court regarding the distinction between rent and damages still this arose directly from the material placed before the lower Court and it is therefore open to an appellate tribunal to decide the question.

(5) An overholding tenant must continue to pay rent even after the tenancy is terminated.

(6) If the tenant pays as rent any amount less than the agreed rent, he would be reckoned as being in arrears.

Per Bandaranayake, J.: "It must be, borne in mind that there is no such thing as a 'statutory tenant' which is not a legal expression but one of convenience – 'a statutory tenant made of statutory straw' – as has been expressed elsewhere".

Cases referred to:

(1) *De Silva v. Perera 29 NLR 506, 507.*
(2) *Sellahewa v. Ranaweera 59 NLR 66, 67.*
(3) *Abdul Rahman v. Justin Fernando 79 NLR 97, 98, 99.*
(4) *Samaraweera v. Ranasinghe 59 NLR 395.*
(5) *Theivadarajah v. Sanoon 71 NLR 12.*
(6) *Appuhamy v. Seneviratne [1981] 2 Sri LR 45.*
(7) *Dean v. Bruce [1951] 2 All ER 926.*
(8) *Asia Umma v. Cader Lebbe 47 NLR 230.*
(9) *Gunaratne v. Thelenis 47 NLR 433.*
(10) *Siddick v. Samalunatchchia 55 NLR 367.*
(11) *Vincent v. Sumanasena 55 NLR 478.*
(12) *Mackeen v. Sallich 58 NLR 231.*
(13) *Perera v. Samarakoon 23 NLR 502, 504.*
(14) *Eliyathamby v. Gabriel 25 NLR 373, 377.*
(15) *Eliyathamby v. Eliyathamby 27 NLR 396, 399 (P.C.).*
(16) *H. Clark Ltd. v. Wilkinson [1965] 1 All ER 934, 936 (C.A.).*
(17) *Society Belge de Banque v. Gardhari Lal AIR 940 P.C. 90, 92, Col. 2.*

APPEAL from judgment of the District Judge of Colombo.

Dr. H. W. Jayewardene, Q.C. with *Lakshman Perera, Miss T. Keenawinna* and *H. Amarasekera* for defendant-appellant.

P. A. D. Samarasekera P.C. with *Gamini Jayasinghe* for plaintiff-respondent.

Cur. adv. vult.

December 17, 1987.

BANDARANAYAKE, J.

The arguments of appellant's Counsel in this appeal centered upon a question of law arising upon the facts and raised for the first time at this hearing and not specifically raised before the trial Court.

The plaintiff-respondent sued the defendant-appellant in ejectment for arrears of rent upon notice to quit dated 27.9.71 – document 'P10', in that she failed to pay Rs. 416.34, being the balance arrears of rent at the rate of Rs. 552.41 per mensem during the period 1.4.70 – 30.9.71 and the full rent at that figure thereafter. The action was filed under the Rent Restriction Act of 1948. The defendant-appellant pleaded illness and financial difficulties for failure to pay rent on time and claimed statutory reliefs and brought into Court a sum of money as arrears due and claimed a set off against repairs done. The case was decided against the defendant-appellant upon a rejection of these defences.

It is necessary to set down the facts which are as follows: The defendant-appellant had attorned to the plaintiff-respondent after the plaintiff purchased the business premises in suit No. 176, Main Street, Pettah, on 30.11.68 for his daughter. The premises had at the time been assessed at an annual value of Rs. 5305–Vide 'P2'. The monthly rent at the time was Rs. 529.28.

On 5.3.70 the landlord-plaintiff-respondent had applied to the Rent Control Board of Colombo for written permission in terms of s.13(1) of the Rent Restriction Act No. 29 of 1948 as amended by Act No. 10 of 1961 and Act No. 12 of 1966 to institute action to eject the respondent (the defendant-appellant) from the premises to enable the applicant to demolish the building on the grounds that it was old and dilapidated and not in a tenantable condition. The applicant averred that he had a plan approved by the Colombo Municipality to construct a new building and the applicant proposed offering the respondent,

(*a*) premises No. 197, Main Street, Colombo standing opposite the premises in suit, or,

(*b*) premises No. 198, 2nd Cross Street, within a distance of 20 yards as alternative accommodation for a period of 5 months from time of surrender of occupation of premises in suit.

In his application the landlord-applicant also stated *that the respondent-tenant had paid rents up to end of December 1969 and that the applicant on 17.12.69 gave the respondent-tenant notice to quit and deliver peaceful possession of the said premises on or before 31.1.70* to enable the tenant to vacate the premises so that the applicant might demolish the building and build a new modern one. The foregoing application of the plaintiff-respondent is evidenced by document 'D1' produced by the defendant-appellant. The application was supported by the plaintiff's Architect's Report 'D2' which Dr. Jayewardene submitted was a self serving document. The defendant's Architect's Report 'D8' shows the building as a solid structure which can stand another 100 years.

The submission of appellant's Counsel was that the said notice to quit given on 17.12.69 in fact terminated the contract of tenancy between the parties as it constituted a breach of the bond of tenancy. This is a relevant collateral fact which gives the true background to this case.

The defendant-appellant however continued in occupation and continued paying the said sum of Rs. 529.28 every month to the landlord and kept the premises in repair.

In about March 1970 the Colombo Municipal Council increased the assessment of the annual value of the premises to Rs. 6230 – vide 'P3'. Thus the authorised rent increased to a sum of Rs. 552.41 per month which the landlord could have lawfully demanded as rent.

It was also the contention of appellant's Counsel that the tenancy that was terminated as aforesaid was never restored. Instead the plaintiff-respondent after 31.1.70 treated the defendant-appellant as a *trespasser* and demanded the payment of *damages* for wrongful occupation. Nor was any demand made for the payment of an increased rent consequent to the increase in the annual value of the premises as aforesaid. No demand for the payment of rent of a sum of Rs. 552.41 as aforesaid was ever made. The defendant-respondent thus continued to pay the full authorised rent of Rs. 529.28 earlier agreed upon during the pendency of the tenancy and was thus not in arrears of rent. Dr. H. W. Jayewardene, Q.C., argued that inasmuch as the *contract of tenancy* was governed by the Roman Dutch common law, enforcement of such contract was by the actio locati.

Under the common law contract of letting and hiring there must be *agreement* between the parties on the *price* which was the *rent* – vide Wille on "Landlord and Tenant in South Africa" – 4th Edition, Part 3, p.167:60010168. The question of rent and increase of rent is a matter of mutual agreement – the basic principles being,

(a) the thing let;
(b) rent agreed upon; and
(c) the consent of the contracting parties–

– Vide – Pothier's Treatise on "Contract of Lease" – translated by G. A. Mulligan, Chapter II, Essentials of Lease, p.4. The conclusion of the contract of letting and hiring imposes the duty on the tenant to pay the agreed rent. This duty the landlord may enforce by means of the actio locati – Voet 19.2.21. Simply because rates are increased it does not mean that parties have *agreed* to it. The tenant can leave or he can agree to pay but if he chooses to stay it must be presumed after being told to pay that it is a tacit consent and acceptance of his agreeing to pay. The landlord must communicate and demand the increase and agreement on the new price may be express or implied by conduct of remaining in occupation. Decisions of the Supreme Court deciding that relations between parties are governed by agreement were cited, to wit:

(i) *de Silva v. Perera* (1) – "The tenant agrees to pay and the landlord agrees to receive it. The latter has no more rights to enhance it than the former has to reduce it."

(ii) *Sellahewa v. Ranaweera* (2) – "tenant not liable to pay enhanced rent without agreeing to pay it".

(iii) *Abdul Rahaman v. Justin Fernando* (3) – "tenant must be given notice by the landlord of such higher rent when there is an authorised increase of rent".

In the instant case however there was never a demand to pay an increased rent after termination of tenancy as aforesaid. In this background the plaintiff-respondent brought this action for ejectment on the basis that there was still a subsisting tenancy and that the defendant was in arrears of rent for not paying the increased authorised rent and sent notice to quit 'P10' and hoped to succeed in the action. if he is to succeed he must show that the increased rent

was the agreed rent on a subsisting contract of tenancy which had revived and a failure to pay resulting in arrears of rent. Counsel invited the Court to examine the letters written between the parties where the landlord was insisting that he be paid *damages*. The tenant paid the landlord calling it *rent*. So there was disagreement between the parties and the tenant having appealed against the increase in the annual value paid what he had paid during the contractual tenancy.

A reference to this correspondence is necessary at this point in view of the turn of events in September 1971. The document 'P5' is important and I reproduce relevant portions: 'P5' dated 8.5.70 from respondent's Attorney to the defendant states – "under instructions from my client C. M. M. Uvais . . . I do hereby give you notice that the assessment for taxes in respect of above premises have been revised and you are liable to pay damages from 1.4.70 at the rate of Rs. 552.41. This notice is given to you without prejudice to the notice to quit served on you and the application pending before the Rent Control Board."

Dr. Jayewardene submitted that 'P5' refers unequivocally to,

(*a*) the application made by the landlord to the Municipal Council for permission to demolish the building and permission to sue the defendant in ejectment,

(*b*) the notice to quit dated 17.12.69 terminating the tenancy; and,

(*c*) for *damages* for continuing in possession of the owner's premises as a trespasser.

It purposely regards the defendant not as a tenant but as a trespasser. At this time the landlord was awaiting permission to demolish the building. The relationship of the parties as envisaged by the landlord is thus manifested by this document and it cannot be treated as a demand for an enhanced *rent* nor could the continuance in occupation of the premises be regarded as conduct tantamount to a tacit agreement to pay an *increased* rent as there was no demand for it. It was argued that had the landlord accepted payments as rent that would be conduct on his part of acceptance of restoration of tenancy which the landlord did not want. It must be borne in mind that the notice to quit given by the landlord in December 1969 was of his own free will for no reason except to pave the way for the demolition of the

building. That notice was not in consequence of a situation having arisen where the law permits proceedings in ejectment being taken without the authorization of the Board as set out in s.13 of the Act of 1948. In fact permission to demolish the building was not granted and provision to institute action or proceedings in ejectment of the defendant-appellant was not granted. The defendant-appellant was therefore protected by the Act and he was irremovable although the contract of tenancy was terminated in December 1969.

On the other hand, learned Counsel for the plaintiff-respondent contended that 'P5' gave sufficient particulars of the increase in the authorised rent despite the nomenclature of 'damages' being used; that it was a clear communication of such an increase and there was a plain duty and obligation on an overholding tenant to pay the full amount of the increased sum whether it was called *rent* or *damages*. Counsel relied on the aforementioned cases of *Samaraweera v. Ranasinghe* (4) and *Theivadarajah v. Sanoon (5)* in supporting his submission in the latter case it is to be noted that the landlord had demanded damages from the overholding tenant. I will deal with these cases presently.

I now pass on to the other letters exchanged between the parties.

'P6' dated 30.6.70 from Attorney for plaintiff to Attorney for defendant – I refer to . . . the two money orders for Rs. 529.28. My client accepts these payments on account of *damages* due and without prejudice to his rights . . . . to file action. Your client is in *arrears of damages* in that she has remitted less than the Rs. 552.41 per month claimed by my client.".

'P7' dated 19.9.70 a letter from defendant's Attorney to plaintiff's Attorney – " . . . my client has remitted to you the usual *rent* since the appeal against the assessment has not yet been decided. Once this is done the correct amount with all arrears (if any) would be paid. In the meantime my client would continue to send *you* the *rent* as before."

'P8' dated 30.5.71 to plaintiff's Attorney-at-Law to defendant's Attorney-at-Law – "With reference to your letter informing . . . that taxes have been raised please inform me the total amount by way of *increased rent* which my client must pay." Mr. Samarasekera submitted that this represented an inquiry as to how much has accrued due.

'P9' dated 27.7.71 from plaintiff's Attorney to Defendant's Attorney giving the arrears of damages due on revised assessment from 1.4.70 to 31.5.71 as Rs. 323/82 and damages from June 1971 being Rs. 552/41.

Next came the second notice to quit 'P10' from the plaintiff–"I hereby give you notice ... to quit and deliver peaceful possession of the ... premises ... on 31.12.71 as you are in arrears of rent."

Dr. Jayewardene pointed out that for the first time now in September 1971 a notice to quit is being sent for *arrears of rent*. From this point of time the demands made by the plaintiff is for payment of *rent* and *damages*. There is thus a purposeful, intentional, shift in the posture of the plaintiff trying to found an action on arrears of rent with the new notice to quit 'P10'. No evidence has been led on the date of dismissal of the application for demolition of the building. In any event 'P10' made no difference as the contract of tenancy had already been terminated from 31.1.70, although the plaintiff need not have been given the defendant notice to quit in order to apply for demolition of the building. With 'P10' the plaintiff was trying to convert damages to rent.

'P11' – dated 30.12.71 – Attorney for plaintiff writes accepting two money orders for Rs. 529/28 each as part payment of *rent* and *damages*, without prejudice to notice to quit dated 27.9.71 and informs that arrears of rent is Rs. 416/34 from 1.4.70 to 30.9.71 calculated as the difference between Rs. 529/28 and Rs. 552/48. This again, it was submitted for the appellant, was an attempt to convert the earlier claim for damages into rent.

'P12' dated 11.1.72 was a further attempt made on behalf of the plaintiff to convert the claim for damages into rent. It refers to 'P11' and claims rent.

With 'P13' dated 28.1.72 Attorney for defendant sent plaintiff a money order for Rs. 529/28 as rent.

Plaint was filed as aforesaid on 18.1.72.

By 'P14' dated 29.2.72 plaintiff accepted Rs. 529/28 as part payment of *rent* and *damages*.

With 'P15' dated 19.5.72 the defendant's Attorney sent a money order for Rs. 529/28 to the plaintiff's Attorney. 'P16' dated 22.5.72 is an acknowledgement of the said money order as rent and damages.

Similarly with 'P17' of 17.6.72 a money order for Rs. 525/28 was sent to plaintiff.

By 'P18' of 1.2.75 the plaintiff objects to the defendant repairing the premises. Defendant's position is that the roof was leaking and she had to effect repairs as the landlord was not to do so.

Upon the foregoing it was the contention of Counsel for the appellant that the main issue arising upon the plaint was whether there has been arrears of rent. The learned trial Judge has not considered the background of the case. Was there an agreement between the parties to pay the larger amount? There was not, contended appellant's Counsel. There was no demand for payment of the increased rent. What is in 'P5' is not enough. The defendant was treated as a trespasser and the plaintiff claimed increased damages upon the increased assessment. As there was no demand for payment of the increased assessment as rent there could not be any agreement to pay the increased assessment as rent. Nor was there restoration of the status of tenant since 31.1.70 for a claim for arrears of rent to arise on 27.8.71. In the result 'P10' was meaningless. The fact that in his letters the defendant's lawyer referred to the payments made as rent made no difference. It merely reflected the true position as the tenancy had not been terminated for arrears of rent in January 1970. Had the defendant accepted termination of tenancy and paid money as damages, then irrespective of Rent Laws he can be ejected as he is simply a trespasser. It was submitted the District Judge wrongly held the defendant liable for arrears of rent.

For the plaintiff-respondent it was submitted that matters raised at the hearing of this appeal were not raised before the District Court. No point had been made in the Court distinguishing rent from damages and no question raised of the invalidity of the demand for higher rent. Counsel referred to paragraphs 4 and 5 of the plaint which he submitted were admitted by the defendant in paragraph 2 of the answer filed.

Paragraph 4 of the plaint reads "...On 8th May 1970 the plaintiff...gave notice to the defendant in writing to pay rent at the rate of Rs. 552/41 per mensum from 1.4.70. Paragraph 5 of the plaint reads

"The defendant who had objected to the assessment for 1970...agreed to pay the authorised rent on the determination of the objections."

It was contended by the respondent that 'P5' and the above admissions show that the plaintiff had demanded the payment of an additional amount as rent even though 'P5' mentions the word 'damages'. The respondent claimed that liability to pay the higher amount was not disputed at the trial nor was any issue raised as to validity of increase or an issue distinguishing damages from rent. Nor were the plaintiff's witnesses questioned on the basis of such invalidity arising out of 'P5' and 'P7'. Nor was there any evidence given by the defendant that she was asked to pay only damages and that she had been under notice to quit from January 1970. Thus it was submitted that the trial followed upon an unconditional admission of arrears of rent the defences taken being those mentioned earlier in this judgment, viz., economic distress and ill-health etc., and the District Judge decided upon the matters raised at the trial.

Dealing with the defences taken at the trial respondent's Counsel pointed to the evidence that in 1968 she had bought a house. Later she bought a Benz car although her husband had died in 1955. The District Judge held she had not suffered economic distress. Further it was not open to her to effect repairs to the house on her own. She must apply to the Rent Board who will direct the landlord to repair and only if he does not will the Board permit the tenant to repair and deduct amount spent from rent – vide – *Appuhamy v. Seneviratne* (6). Thus in this case a set off is not permissible and it can amount to arrears of rent. Again she had in fact brought money into Court and she could have paid during the inquiry period.

Dealing with the legal submissions made on behalf of the appellant learned Counsel for respondent submitted that an overholding tenant must fulfil her part of the obligation to pay as this is a statutory situation and no agreement is necessary. A statutory tenant's protection is conditional upon his performing his statutory obligations. Counsel cited the English case of *Dean v. Bruce* (7) approved by Jurist Megarry in his book on the English Rent Acts – 7th Edition, p. 200, in the chapter dealing with terms of a statutory tenancy, which held that once a contractual tenancy is over and the tenant remains in possession the landlord can on giving proper notice raise the rent to the full amount permitted by statute. Counsel referred to the case of *Asia Umma v. Cader Lebbe* (8) which held that where a lease expires the lessee cannot thereafter rely on the Rent Restriction Ordinance to continue the tenancy. The relationship of the parties is then the of

owner and trespasser; and *Gunaratne v. Thelenis* (9) where the decision in *Asia Umma v. Cader Lebbe* (8) was considered and overruled and it was held that a tenant includes persons who at one time had been tenants and the Ordinance was applicable. This was important in view of the contention of the apellant that there had been an earlier termination of tenancy. Reference was also made to *Siddick v. Samalunatchchia* (10) which dealt with a three year lease and no monthly rent was specified and Rs. 1000 was paid for the whole period in advance and it was held that a tenant who enjoys a statutory right of occupation notwithstanding the termination of the earlier contract of tenancy must fulfil his obligation to pay the statutory rent at the original monthly rate. Again in *Vincent v. Sumanasena* (11) tenant must continue to pay rent as it falls due during pendency of a tenancy action. Therefore the fact of absence of a pending tenancy is not material – if she is in occupation of the premises she must pay the statutory rent as it falls due.

Reference was also made to the decisions of the Supreme Court reported in (1) *Samaraweera v. Ranasinghe* (4) and a divisional Bench decision where it was held that the Rent Restriction Act imposes on a monthly tenant the obligation of paying rent even after the contract of tenancy had been determined by notice to quit and this obligation persists even if the landlord is not prepared to receive it; and (2) *Theivadarajah v. Sanoon* (5) which held that an overholding tenant is liable to pay the rent to the full amount permitted by statute after the termination of tenancy.

Upon the foregoing Counsel's submission was: In any event an overstaying tenant must pay rent. Landlord demanded increased amount by 'P5' although he called it damages. Look at the true sense of 'P5' and not merely at difficulties of language. By 'P7' tenant agreed to pay the correct rent with all arrears. There was thus no misunderstanding over the use of the word *damages*.

The defendant did not pay the increased amount. She was thus making short payments amounting to Rs. 23.16 per month and was in arrears every month. In *Mackeen v. Sallieh* (12) it was held that even a small portion remaining unpaid amounts to arrears. The landlord is entitled to recover the whole rent and receipt only of a part of it amounts to arrears.

Conclusions:

Appellant's Counsel has raised an important question of law as to whether all tenancy actions are to be treated as ordinary actions brought for ejectment as known to the Roman Dutch Law, whilst statute law may have placed new conditions which must be satisfied if the action is to be brought.

This question of law though not determined at the trial directly arises from the material placed before the lower Court and it is therefore open to an appellate tribunal to decide it. The question arises for consideration between the two notices to quit. Again, admissions made by the parties involving questions of law are not binding on them unlike admissions on questions of fact. There are certain admissions in the pleadings but they are in the teeth of the correspondents. Thus if the lawyer has misconstrued documents on a question of law it is not a binding admission precluding a party from presenting a correct view of the law. It is the interpretation of documents that must determine whether the parties have agreed on the rent. See *Perera v. Samarakoon* (13), *Eliyathamby v. Gabriel* (14), *Eliyathamby v. Eliyathamby,* (15) *H. Clark Ltd., v. Wilkinson* (16) per Lord Denning M.R.: an admission made by Counsel in the course of interlocutory proceedings could be withdrawn unless there is estoppel—and *Society Belge de Banque v. Gardhari Lal* (17)—Court can determine the law looking at the evidence. You can even go back on a wrong admission. The respondent's lawyer admitting paragraph 4 of the plaint upon a misconstruction of the legal effect of 'P5' taking it to be a demand for increased rent does not preclude the legal issue of the proper construction of 'P5' being decided by this Court. So the question whether payment of increased rent after termination of tenancy became due and if so when, is a question which the Court can properly decide as it is a jurisdictional question that may be a bar to relief.

There is no difficulty in accepting the view that an action for ejectment of a tenant is the *actio locati* of the Roman Dutch law. Thus in contracts of letting and hiring the law requires the element of 'agreement' in order to constitute a valid contract. See also "Principles of Ceylon Law" by H. W. Tambiah (1972) p. 329 as well as the references (ante) to the works of Pothier and Wille. This agreement in such a contract is in regard to the rent. The question of rent and increase is a matter of mutual agreement. If a party brings an *actio locati* and the statutory law imposes a new condition viz.: that you

need approval of the Rent Board, then even if you do get approval of the Board it still remains the *actio locati*. If you do not get such approval and the premises are under the Rent Restriction Act then you must prove one of those ingredients in the proviso to s. 13(1) to institute the action which again is the *actio locati*. But the statutory law also requires that you cannot bring the *actio locati* until you break the bond of tenancy (i.e) notice to quit.

Now, one must go to the situation in this case (which is not denied) as it existed when the first notice to quit was given on 17.12.69. The plaintiff-respondent gave that notice but he could not bring the action because, being protected premises and none of the ingredients in the proviso to s. 13(1) were available to him, he had to get the sanction of the Board. Therefore he went before the Board and asked for permission to demolish the building. It must be borne in mind that had he got permission to demolish having given notice to quit but in the meantime he had accepted *rent*, then the position vis-a-vis landlord and tenant would have been revived. (i.e. accepting rent after termination of tenancy).

The application for demolition was contested by the defendant before the Board. By the Architect's Report 'D8' the tenant placed material before the Board that the building was in sound structural condition and could conceivably last another hundred years.

Whilst this matter was pending, the authorised rent for the premises was increased. The plaintiff-respondent obviously did not wish to ask for payment of the increased amount as rent as payment of it as rent would restore the tenancy. But probably thinking it was a permitted increase and because the defendant was not handing over possession he asked for his increased amount as *damages*. Thus 'P5' is a very important document. It is sent at a time (May 1970) when an action for ejectment with approval is still contemplated; thus it bears repetition that acceptance of Rs. 552/41 as rent would have jeopardised the contemplated action for ejectment upon notice to quit of December 1969 as the contract of tenancy would revive. I may say that the plaintiff rightly called it damages in the context of his contemplated action. It must also be borne in mind that there is no such thing as a "statutory tenant" which is not a legal expression but one of convenience – "a statutory tenant made of statutory straw" as has been expressed elsewhere. The point is therefore that the *actio*

locati prevails and the defendant is required to pay only the *agreed rent* and there is no duty cast on the defendant-appellant to pay the higher amount without a demand for it. This finding is supported by the cases referred to, to wit:

(i) *de Silva v. Perera* (1)

(ii) *Sellahewa v. Ranaweera* (2)

(iii) *Abdul Rahman v. Justin Fernando* (3) which clearly indicate that even though the standard or authorised rent is increased, unless the landlord transmits that increase to the tenant by calling upon him to pay the tenant is not obliged to pay the new authorised rent.

Thus, simply because rates are increased it does not mean that parties have agreed to it for the tenant can leave or he can agree to pay upon demand. Here there was no contract which said that tenant shall pay the authorised rent which would cast the matter in a different light. In bringing this action the plaintiff obviously saves another opportunity to eject the defendant.

So the important question as to whether there was a demand for the higher amount has to be determined by examining the documents placed in evidence. 'P5' is the document relied upon by the plaintiff-respondent in this regard. It gives notice of the revision of the assessment for taxes of the premises and states that the defendant is liable to pay damages at Rs. 552/41 from 1.4.70 and that the notice is given without prejudice to the notice to quit or the application for demolition pending before the Municipal Council. Thus it refers to specific events that have taken place. The contents of this document have therefore to be taken in the background of those events which had led to it. Those events were that –.

(*a*) the tenancy had been terminated;
(*b*) the plaintiff was seeking to demolish the building;
(*c*) the defendant was being treated as a trespasser.

There was thus a clear indication in 'P5' that the plaintiff did not wish to create any legal obligation vis-a-vis the defendant by accepting rent upon the increased assessment but was merely seeking to receive the benefit of the increase but as damages. He evaluates damages by reference to authorised rent. The application to the Board was the *causa causans* for demanding damages. Thus in my view 'P5' does

not constitute a demand for payment of increased authorised rent. This being so there can be no agreement between the parties on the increased rent. If the plaintiff-respondent took the payments as damages then the defendant-appellant is not in arrears of rent. They are two different concepts which need no explanation here. There is no such thing as statutory rent. There is authorised rent. There is no such request in the correspondence for payment of increased rent. All that I see is an attempt to convert damages into rent by the later correspondence in order to found an action on arrears of rent upon the notice to quit 'P10'.

Again, the fact that defendant's Attorney called his payments 'rent' makes no difference to the position in law that there must first be a demand for the increased amount for there to be an agreement upon it. Just because the pleadings may upon a misconstruction of the law appear to support that the parties have admitted they were agreed that rent payments were made it does not mean the Court is entitled to ignore the evidence led at the trial which is part of the case and refrain from construing the documents correctly upon a correct view of the law. In point of fact, by paragraph 5 of the amended answer whilst reciting admitting paragraph 4 of th plaint (ante) the defendant denies he is in arrears of rent during the period 1.4.70 – 30.9.71. So we have a situation where there is no straight admission of the said averment in paragraph 4 of the plaint that the plaintiff gave notice in writing to the defendant to pay the increased rent. Again, issues 1 and 2 raise the question whether the tenant has been in arrears of rent. So the Court is obliged to search for "agreed" rent and not authorised rent. At most it is an admission on two sets of letters. Those letters show there was no agreement to pay enhanced rent. Nor has the plaintiff acted on them to his prejudice.

None of the cases cited on behalf of the respondent meet the point of law raised on the necessity for there to be agreement between the parties in regard to the payment of an increased rent. The defendant has paid rent of Rs. 529/28 per month.

In *Theivadarajah v. Sanoon* (5) (ante) which was an action for ejectment and for arrears of rent the defendant was an overholding lessee who was requested to pay Rs. 89/66 per month *as damages.* The point distinguishing rent from damages was never raised and it was merely treated as non payment of rent and the case decided on

that basis. Hence the case is neither authority for any proposition that nomenclature is immaterial in this situation and that even if the word 'damages' is used, still if in the context it must mean rent it is sufficient; nor does it deal with an increase in the authorised rent and its consequences whilst overholding. Thus it is unhelpful.

For these reasons I hold that the plaintiff-respondent has failed to prove that the defendant-appellant was in arrears of rent upon the facts and circumstances of this case in order to succeed in the action for ejectment he has brought. The Learned District Judge has failed to consider the issue of law on the question of arrears of rent. I set aside the judgment and decree of the District Court and allow this appeal. The defendant-appellant is entitled to costs in this Court and in the Court below.

VIKNARAJAH, J.—I agree.

Appeal allowed.