1978 *Present :* **Walpita, J., Gunasekera, J. and Ratwatte, J.**

A. H. M. M. HADJIAR, Plaintiff-Appellant

and

MARZOOK AND CO. LTD., Defendant-Respondent

S. C. 356/69 (F)—D. C. Colombo No. 1012/RE

***Rent** Restriction Act (Cap. 274) as amended by Act No. 10 of 1961, section 13 (1A)—Excepted premises—Act becoming applicable during subsistence of tenancy—Whether original contract subsists—Tenant in arrears in respect of period prior to premises coming under Rent Act—Liability to ejectment on failure to pay agreed rent for that period.*

Deposit in excess of amount permitted by Rent Restriction Act in hands of landlord—Act becoming applicable thereafter—Is landlord liable to refund excess—Can it be set off against arrears.

Where the provisions of the Rent Restriction Act become applicable to premises which were earlier excepted premises the contract of tenancy which subsisted prior to the Act becoming applicable continues until terminated by a notice to quit. No new contractual relationship thereby arises but a landlord cannot thereafter recover more than the authorised rent payable in respect of such premises. Accordingly, a tenant who failed to pay the agreed rents that fell due prior to the Act becoming applicable to such premises though such rent was in excess of the authorised rent, falls into arrears and is liable to ejectment on this ground even after the premises became subject to the Rent Restriction Act. It is not sufficient for him to tender anything less than the agreed rent for the period prior to the premises becoming subject to the Act.

Where a deposit in excess of the amount permitted by the Rent Restriction Act was in the hands of the landlord prior to the Act becoming applicable the landlord could retain this sum. Where the tenant has not asked for the excess to be refunded but on the other hand asked the landlord to hold the full sum as a deposit to be refunded only when vacant possession was handed over, it is not open to the tenant to say thereafter that the amount in excess of the amount permitted by the Rent Act should have been set off against arrears of rent due from him.

Cases referred to :

Sideek v. Sainambu Natchiya, 55 N.L.R., 367.
David Appuhamy v. Subramaniam, 55 N.L.R., 397.
Dias v. Peries, 52 N.L.R., 51.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *Motilal Nehru*, for the plaintiff-appellant.

C. Ranganathan, Q.C., with *J. W. Subasinghe*, for the defendant-respondent.

Cur. adv. vult.

March 28, 1973. WALPITA, J.

In this action judgment has been entered in favour of the plaintiff-appellant for arrears of rent and damages, but an order for ejectment of the respondent was refused. This appeal is against that part of the order refusing ejectment.

When the appellant became owner of the Premises No. 175, Second Cross Street, Pettah, the respondent was already occupying it as a tenant of the previous owner. The premises was then not subject to the Rent Restriction Act. The respondent attorned to the appellant and became his tenant undertaking to pay the monthly rent of Rs. 1,000 as from 1. 4. 67. There was also a sum of Rs. 10,000 which was taken charge of by the appellant which the respondent wanted the appellant to keep as a deposit to be refunded to the respondent on his giving vacant possession of the premises.

The respondent failed to pay the rent of Rs. 1,000 agreed on for the months April to July, 1967. In July the premises became subject to rent control and the authorised rent of the premises was now Rs. 632.17 per month but still no rent was paid.

On 31.8.67 the respondent by his letter P1 dated 31.8.67, tendered Rs. 3,160.85 which he alleged was the rent for the period April to August 1967 at Rs. 632.17 per month. This the appellant refused to accept contending that rent was payable at Rs. 1,000 per month.

The appellant thereafter on 13.10.67 gave the respondent notice to quit by the 31st January, 1968, and filed this action for ejectment.

The learned District Judge has found that the respondent was in arrears of rent for the period 1.4.67 to 30.6.67, but he refused to allow the ejectment of respondent as in his view the respondent did not refuse to pay the rent but only offered to pay what was the authorised rent.

Mr Thiagalingam, for the appellant has submitted that the learned District Judge was wrong when he refused to give an order for ejectment. His contention is that once the respondent was found to be in arrears of rent an order for ejectment should have followed as he has lost the protection of the Rent Act and was liable to be ejected.

The contract of tenancy entered into between the parties on 1.4.67 was a common law contract of tenancy where the respondent was obliged to pay Rs. 1,000 per month as rent for the premises. This contract could be terminated by a notice to quit and ejectment obtained if the respondent failed to quit. When the premises became subject to rent control the original contract continues but by operation of the provisions of the Rent Act the tenant could not be ejected unless he was in arrears of rent for more than a month after it was due. Besides the landlord was prohibited from charging any rent more than the authorised rent. Even though the landlord could have terminated the tenancy after reasonable notice and obtained vacant possession of the premises before 30.6.67 he could not have done so by a mere termination of tenancy after 1.7.67 as the Rent Restriction Act was in operation.

Mr. Ranganathan for the respondent submitted that under the Rent Act two conditions are necessary before the tenant could be ejected from a rent controlled premises, (1) a termination of the tenancy, that is, by a notice as required by the Act, and (2) the tenant must be in arrears of rent. This is correct.

In this case the notice to quit was admitted but it is Mr. Ranganathan's contention that the respondent was not in arrears of rent in terms of the Rent Act. The term rent according to him is what is contemplated by the Rent Act, that is the rent chargeable under the Act and not the rent agreed on under the contract prior to this premises being rent controlled. In this connection he drew our attention in his further written submissions to s. 12A (1) (*a*) of the Rent Act which provided that "Notwithstanding anything in any other law, no action or proceedings for ejectment of the tenant of any premises to which this Act applies and the standard rent of which for a month does not exceed one hundred rupees shall be instituted or entertained by any court unless where (*a*) the rent of such premises has been in arrears for three months or more after it has become due".

He submitted that at the time the '*rent becomes due*' that Act must apply to the premises and the rents in respect of the three months, April, May and June, were due before 1st July, 1967, on which date the Rent Act became applicable to the rented premises and therefore he says s. 12A (1) (*a*) cannot apply to the rents for April, May and June, 1967, or in other words that though he was in arrears of rent for these three months they are not the arrears of rent contemplated by that section.

In this case the authorised rent being over Rs. 100 namely Rs. 632.17, s. 12A (1) has no application. The section that applies

in s. 13 (1A) which states that where the rent of any premises exceeds Rs. 100 the landlord cannot institute an action for ejectment of a tenant on the ground that the rent has been in arrears for one month after it has become due unless three months notice of the termination of the tenancy has been given or if the tenant has before the date of the termination of the tenancy as is given in the landlrod's notice tendered to the landlord all arrears of rent.

Though this is so, Mr. Ranganathan's submissions can still apply but I am unable to accept this submission. If this argument is accepted it means the earlier contract of tenancy came to an end once the premises became rent controlled and a new contractual relationship unconnected with the original contract arose as a result of the operation of the Rent Restriction Act. The Rent Restriction Act does not have that effect. The original contract can only be terminated by a notice to quit. It therefore continued even after the premises became rent controlled though by operation of law the landlord could not recover a rent more than the authorised rent.

The obligation on the part of the tenant was to pay the rent in time and in this case he had to pay the rent due, that is Rs. 1,000 per month before July and the authorised rent thereafter. Failure to meet that obligation would make him be in arrears of rent and therefore liable to ejectment. He could avoid an ejecment only if he tendered to the landlord as required by s. 13 (1A) (*b*) all arrears of rent. It is not sufficient for him to tender something less than Rs. 1,000 per month for the months of April to July.

Where a lease or contract of tenancy has been terminated by effluxion of time or notice to quit, once the premises becomes rent controlled the tenant enjoys a statutory right of occupation or he becomes a statutory tenant.

> "It seems to be implicit in the Act that, so long as a tenant enjoys the statutory right of occupation notwithstanding the termination of the earlier contract, a statutory obligation is imposed on him to pay monthly 'rent' at the original contractual rate ; and if he fails to honour this obligation, s. (13) (1) (*a*) may be brought into operation to deprive him of the protection, which he previously enjoyed"— Gratiaen, J. in *Sideek v. Sainambu Natchia*, 55 N.L.R. 367.

That was a case where the tenancy had been terminated by effluxion of time and also by a notice to quit. If that is so in the case of a tenancy that has ended it is more so in the case of a tenancy that "still subsists". In this case the contract of tenancy continued right throughout until it was terminated on 13. 10.67 but

after the Rent Restriction Act was in operation. The respondent failed to observe the conditions of the original contract to pay the rent at Rs. 1,000 per month for the period 1.4.67 to 30.6.67. The Rent Act does not absolve him from that obligation.

He could still have remained a protected tenant if on receiving the notice of termination he had paid up all arrears of rent. But this he did not do. Clearly he has lost the protection of the Act and is liable to be ejected.

The learned Judge has found quite rightly that the respondent was in arrears of rent for the period April to July. This being his finding an order for ejectment should have followed. In my view the learned Judge has misdirected himself on this and this order must be revised. The appellant is entitled to an order for ejectment.

Mr. Ranganathan next submitted on behalf of the respondent that in any event as the appellant had in his hands a sum of Rs. 10,000 he should have utilized this to deduct any rents which were in arrears and therefore the respondent could not be ejected for arrears of rent.

Documentary evidence to show the conditions under which the deposit of Rs. 10,000 was held by the appellant was produced at the appeal and was permitted by us to be marked R1—R4 especially as there was no objection by Counsel for the appellant. These documents were not before the learned District Judge and we do not have his observations on them but we are in a position to consider them ourselves in the light of the submissions made by Mr. Ranganathan.

The deposit of Rs. 10,000 was received by the appellant before the premises became rent controlled and it was not illegal to do so then. In such circumstances the landlord could retain the excess advance. Vide 52 N. L.R. 51. The respondent could have asked for the release of the excess after the premises became rent controlled but did not seek to do so. On the contrary by his letter P1 of 31.8.67, he wanted the appellant to hold the sum of Rs. 10,000 as a deposit to be refunded when vacant possession of the premises was handed over. It is therefore not open to the respondent to say now that the excess advance should have been set off against the arrears of rent due. He could have recalled the deposit as it was illegal for the appellant to keep the deposit after the premises became rent controlled but as by his own volition he did not seek to do that ' ..... the holding of the deposit by the landlord to be returned in terms of the tenancy agreement did not constitute a debt which could be set off against the rent'—Pulle, J. in *David Appuhamy v. Subramaniam*, 55 N.L.R. 397.

This submission that the deposit in the appellant's hands should have been used to set off the arrears of rent due therefore fails.

In these circumstances therefore we hold that the learned Judge's decision that the respondent was in arrears of rent was a correct one but not that part of his order which holds that the appellant is not entitled to the ejectment of the respondent.

We therefore set aside that part of the judgment refusing ejectment and make order that the respondent in addition to paying the rent and damages due as held by the learned Judge be also ejected from the said premises.

The appellant is entitled to costs in both courts.

GUNASEKERA, J.—I agree.

RATWATTE, J.—I agree. *Appeal allowed.*