1956 *Present:* H. N. G. Fernando, J.

O. L. M. MACKEEN, Appellant, *and* M. V. M. SALLIEH, Respondent

S. C. 80—C. R. Colombo, 58,773

Rent Restriction Act, No. 29 of 1948—Section 13—" Arrear of rent "—Informal written agreement between landlord and tenant—Deposit of sum to cover last two months' rental—Should it be set off against any unpaid rent?—Prevention of Frauds Ordinance.

A tenant would be in arrear of rent within the meaning of section 13 of the Rent Restriction Act even if a small portion only of the rent due remains unpaid.

An informal written contract of monthly tenancy contained a recital that the tenant had deposited a certain sum of money to be taken as rent for the last two months " on the determination of the tenancy by consent or by process of law ".

Held, that the landlord was not bound, even without a request of the tenant in that behalf, to apply the deposited sum in satisfaction of unpaid rent for any two months. It could not be contended that the provision in the agreement regarding the deposit of two months' rent was unlawful as being in breach of the Prevention of Frauds Ordinance in that it purported to have the effect of creating a tenancy for a period longer than one month.

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

C. Thiagalingam, Q.C., with *M. I. M. Cassim* and *T. Parathalingam*, for the defendant-appellant.

S. H. Mohamed, for the plaintiff-respondent.

Cur. adv. vult.

November 19, 1956. H. N. G. FERNANDO, J.—

This appears to be a hard case, but I do not think it should be allowed to make bad law. The learned Commissioner has found that the rent taken by the plaintiff for a certain period was in excess of the authorised rent. The amount of the excess at the end of March 1955 was found to be Rs. 27·60 ; rent at the authorised rate of Rs. 14·70 had not been paid for the months of April, May and June 1955, and but for the excess the tenant would at the time of the notice (8th July 1955) have been in arrears within the meaning of section 13 of the Rent Restriction Act No. 29 of 1948, in respect of the months of April and May 1955 ; if the amount of the excess was equal to or greater than the rent due for two months then the tenant would not have been in arrears within the meaning of the Act. Unfortunately for him, the amount of the excess while fully covering the rent for April was insufficient, by Rs. 1·80, to cover also the rent for May. The Commissioner therefore had no option but to hold the tenant was in arrears of rent for May.

Counsel has argued that in the expression " the rent has been in arrear for one month after it has become due ; . . . . . " the term rent means the full rent and not also a part of the full rent ; upon this argument what was in arrear was not the rent but only a part of it. I think the fallacy of the argument is exposed if one were to take the case of

premises the authorised rent of which is say Rs. 500; the tenant cannot in my view plead that section 13 does not apply because he had made a payment of Rs. 50 against the rent. The rent should properly be said to be in arrear if the landlord has not in fact received the whole rent, and the landlord cannot be said to have received the whole rent if in fact he has only received a part of it.

Counsel has taken a further point which is of interest and perhaps of importance. The informal written agreement between the parties was for the tenant to take the premises on rent *at the monthly rent of Rs. 14·70 payable on the first day of each month* and was effective to create a tenancy from month to month. There was in addition a recital in the agreement that the tenant had deposited the sum of Rs. 29·40 "to be taken as the last two months rental on the determination of my tenancy of consent or by process of law." Counsel's argument has been that this sum of Rs. 29·40 was a debt owing by the landlord to the tenant and that it was his duty even without a request of the tenant in that behalf, to apply that sum in satisfaction of unpaid rent for any two months. If this be correct then the appropriation of the sum of Rs. 29·40 in that manner would mean that the tenant in the present case was not in arrears at all.

In order to sustain his argument counsel had to contend that the provision in the agreement for the deposit of Rs. 29·40 was unlawful as being in breach of the Prevention of Frauds Ordinance in that it purported to have the effect of creating a tenancy for a period longer than one month. In my opinion, however, the deposit neither had that effect nor even purported to have that effect. The agreement itself did not provide for a deposit but merely recited that a deposit had been made and provided for the manner for the application of that deposit if a certain event occurred. The contemplated event was a possible one, namely "the determination of the tenancy by consent or by process of law." If, for example, the landlord and the tenant had at any stage agreed that the tenancy should terminate on a specified future date, then the effect of the parol agreement would be that instead of the tenant paying any sum as rent for the two months ending on the date of termination the landlord would apply the deposit in satisfaction of the rent. The deposit would become returnable to the tenant only if the contemplated event became at any stage impossible—for instance if either party had given one month's notice of termination; in the latter case the landlord would be bound by the agreement to apply half the sum in satisfaction of the rent for the last month and would immediately on the giving of the notice become a debtor in respect of the other half.

The making of the deposit and the provision in the agreement as to the manner of its application was not, in my opinion, an agreement relating to land but merely an agreement providing for the manner in which the deposit would be applied if and when a particular situation arose in consequence of the operation of the parol agreement for a tenancy from month to month.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.