1972 *Present:* **Wijayatilake, J.**

M. M. GOMEZ, Appellant, *and* Mrs. J. M. A. MORAIS, Respondent

S. C. 76/70—C. R. Colombo, 97723/R. E.

Landlord and tenant—Deposit by tenant of a sum of money in advance —Whether it can be set off against arrears of rent.

At the commencement of a tenancy agreement, a sum of Rs. 144.42 was deposited with the landlord in respect of three months rent in advance. It was given on condition that it should be returned to the tenant at the time of his quitting the premises. The agreement further provided that in case of failure to pay the rent regularly every month, the deposit would "become forfeited" to the landlord.

Held, that the amount deposited was liable to be set off against arrears of rent due.

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

A. C. Nadarajah, for the defendant-appellant.

B. J. Fernando, with *D. M. N. Jayamaha,* for the plaintiff-respondent.

December 1, 1972. WIJAYATILAKE, J.—

Mr. Nadarajah, learned counsel for the appellant, submits that at the commencement of the tenancy agreement a sum of Rs. 144.42 was deposited with the landlord as an advance being three months rent to be returned to the defendant when he quits the house. He refers to the tenancy agreement P1 wherein it is clearly stated that the said sum is deposited in respect of three months rent in advance. The agreement further provides that in case the rent is not paid every month this deposit will become forfeited to him. Mr. Nadarajah submits that at the stage this action was filed if this amount was set off the defendant would not have been in arrears and therefore it is not open to the plaintiff to maintain this action. Mr. B. J. Fernando, learned counsel for the respondent, has drawn my attention to the case of *Kanapathipillai v. Dharmadasa*[1] 58 C. L. W. 79 which he says is precisely in point. The head note reads as follows:—

[1] *(1960) 58 C. L. W. 79.*

"The 1st defendant had deposited three months rent 'in advance' with the plaintiff at the commencement of his tenancy. He later fell into arrears for more than a month after the rent became payable. *Held*: That in the absence of an express agreement to the contrary it could properly be inferred from the course of conduct between the parties during the tenancy that it was an implied term of contract that the rent deposited 'in advance' was to be retained as a deposit by the landlord while the tenancy subsisted and that it did not relieve the tenant of his obligation to pay the rent of each month on the due date."

Mr. Nadarajah seeks to distinguish this case as in the instant case there is a written agreement and it has been categorically set out that in case the rent is not paid regularly every month this sum in deposit as an advance will "become forfeited" to her. It is clear that it would not have become forfeited to her by way of penalty or liquidated damages. So that in my view according to the terms of this agreement the intention is quite clear that the amount deposited as an advance was to be set off against the arrears if any due. I do not think that the principle set out in the case cited by Mr. Fernando applies strictly to the facts in the case before me. Furthermore, it is quite clear from the tenancy agreement that this sum is not a mere deposit to cover prospective damages to the premises in question.

The defendant amended his answer and at paragraph 11 he has set out this defence and when the issues were reframed it has been raised by way of issues 6 and 7. The learned Commissioner too has scrutinised the agreement P1 and has discussed its terms and the contents of the receipt D1 which also shows that this amount has been accepted as an advance of three months rent. Mr. Fernando has also referred me to the case *Helenahamy v. Eastern Hardware Stores Ltd.*[1] reported in 61 N. L. R. 140 and Sections 8, 12 and 15 of the Rent Act. But on a consideration of the facts before me I am of opinion that there is merit in this appeal and I would accordingly set aside the judgment and decree of the learned Commissioner and dismiss the action with costs in both Courts.

Appeal allowed.

[1] *(1958) 61 N. L. R. 140.*