1962 *Present :* **H. N. G. Fernando, J., and L. B. de Silva, J.**

SALLY M. J. HOHAMED, Appellant, *and* SYED M. S. MOHAMED, Respondent

S. C. 380/1960—D. C. Colombo, 43843/M

Rent restriction—Joint assessment in 1941 of premises bearing separate assessment numbers—Separate assessments of the same premises in later years—Computation of standard rent—Meaning of term " rent "— Rent Restriction Act, ss. 4, 5 (1), 13 (1) (a).

(i) In November 1941, premises Nos. 102 and 104 were assessed jointly with premises No. 100. In 1945 premises Nos. 102 and 104 were assessed together, but separately from premises No. 100. In 1955 separate assessments were made for each of the two premises Nos. 102 and 104.

Held, that, under section 5 (1) of the Rent Restriction Act, the standard rent of premises Nos. 102 and 104 was and is the amount of the assessment made for the premises jointly with premises No. 100 in November 1941, and that will remain unchanged, despite the separate assessments made in 1945 and 1955, unless the board in the exercise of the power given by the proviso introduces an alteration by fixing separate standard rents for the two numbers. In the absence of such a fixation by the board, the 1941 assessment still holds good, and the standard rent has to be calculated on that basis.

(ii) Where a lessee agrees to pay something more than the former rent if the Rent Control Board fixes a higher amount, the agreement cannot be regarded as an agreement to pay extra *rent* in respect of any period prior to the fixation of the higher rent by the board. But even assuming that the Common Law would regard it as an agreement to pay extra rent, the " rent " in the proviso to section 13 (1) of the Rent Restriction Act does not include any sum other than a rent pre-agreed between the parties.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *Nimal Senanayake*, for the Defendant-Appellant.

H. W. Jayewardene, Q.C., with *M. T. M. Sivardeen*, for the Plaintiff-Respondent.

Cur. adv. vult.

November 28, 1962. H. N. G. FERNANDO, J.—

This was an action for the ejectment of the Defendant from certain premises which he had occupied as tenant from the year 1949. The first lease to him ceased on 31st July 1952, and the second lease was executed in June 1952 for a period of three years ending in July 1955. The rent provided for in the lease was Rs. 295.83. After the termination

of the lease the Defendant continued in occupation of the premises paying as rent the same amount of Rs. 295·83. It would appear from the correspondence that some time prior to the year 1957 the Plaintiff demanded a higher rent, namely sum of Rs. 524·33, and some explanation of this demand is necessary.

The premises in question bear assessment numbers 102 & 104, Second Cross Street, Pettah. As at November, 1941, these two premises, together with premises No. 100, Second Cross Street, were jointly assessed in a single assessment for the purpose of rates, the annual value of the three jointly assessed premises being Rs. 3,000, and the rates being Rs. 600 p.a. In 1945, however, Numbers 102 & 104 were assessed together, but separately from No. 100, the annual value then being Rs. 2,500, and the annual rates Rs. 500. It was apparently because of this valuation that the figure of Rs. 295·83 was fixed as rent, this amount being presumably the authorised rent in terms of section 4 of the Rent Restriction Ordinance. In 1955, however, Nos. 102 & 104 were assessed separately. In consequence the Plaintiff appears to have been advised that these separate assessments had the effect of changing the authorised rent in the following manner, that is to say, for No. 102 the authorised rent became Rs. 178·75, and for No. 104 it became Rs. 345·58. It was on this basis that he made the demand already mentioned for these two amounts in respect of the buildings separately assessed, making a total of Rs. 524·33.

When this demand was made, the Defendant took up the position that the authorised rent for both parts of the premises still remained at the previous figure of Rs. 295·83. His proctor, nevertheless, informed the Plaintiff that he would make the necessary application to the Rent Control Board " to ascertain the authorised rent, but would continue (presumably pending its determination) to pay Rs. 295·83 as monthly rent. " The application made in March 1957 clearly shows that the Defendant was invoking the proviso to section 5 (1) of the Rent Restriction Act in order to obtain from the Board an order fixing the authorised rent of the premises. After making this application, the Defendant's proctor wrote the letter P 16 of 2nd August, 1957, undertaking that his client would pay as from 1st March, 1957, the rent which the Board would determine as the authorised rent. While stating that his client would continue to pay Rs. 295·83 until the decision of the Board, the proctor further stated " my client also states that if the Rent Control Board decides that the authorised rent is higher than the rent which my client is paying now, he will pay the difference from 1st March, 1957. " This proposal was agreed to in the Plaintiff's reply P 17.

For reasons which it is not necessary to mention, the application to the Rent Control Board was withdrawn by the Defendant and dismissed by the Board on 8th February, 1958. Almost immediately the Plaintiff wrote P 18 of 12th February, 1958, demanding a sum of Rs. 2,513·39, " being the difference of rent due as from 1st March, 1957, to the end of January 1958 ". He demanded this payment on or before 17th February,

threatening action in the even of default. This amount was calculated on the basis that the authorised rent was to be determined according to the two separate 1955 assessments making a total of Rs. 524·33. The Defendant duly paid rent for February and March, 1958, on this new basis but he failed to pay the sum of Rs. 2,513·39 until 31st March, 1958. By this time the Plaintiff had already instituted an action for the recovery of that sum which was claimed in the action to be due as arrear of rent. A short while later he instituted this present action for ejectment.

The principal question agitated at the trial related to the matter of the true authorised rent, and the District Judge decided in favour of the Plaintiff that the authorised rent of No. 102 was Rs. 178·75 and of No. 104 was Rs. 345·58. In view of another point upon which Mr. H. V. Perera has relied, it is not necessary to decide the dispute as to the authorised rent, but it is in the interest of the parties that our opinion on this dispute be stated. Section 4 of the Act declares that the authorised rent of any premises shall be its standard rent together with the addition of increases permitted by section 6. Under sub-section (1) of section 5, the standard rent is—

(i) the amount of the annual value specified in the assessment in force during November, 1941, *or*

(ii) if the assessment of the annual value of the premises is made for the first time after that month, the amount of such annual value as specified in such first assessment.

The difficulty which arises in this case is that in November 1941, Nos. 102 and 104 were assessed jointly with No. 100. On this ground it is argued for the Plaintiff that there did not attach to Nos. 102 and 104, in November 1941, a standard rent. One answer to this argument may be that although Nos. 102 and 104 were not the subject of a separate assessment in November 1941, nevertheless there had been then in force an assessment of the premises though made for them jointly with No. 100, in which case under section 5 (1) the standard rent would be the annual value of the three numbers assessed together. Considering that the object of the Legislature was to fix an upper limit of permissible rents, the circumstance that Nos. 102 and 104 together would have a standard rent determined by an assessment of these premises jointly with No. 100 would mean only that for lack of separate assessment of Nos. 102 and 104, their standard rent would be somewhat higher than reasonable. Such a consequence would in the light of the intention of the Legislature be preferable to the only alternative situation, namely that Nos. 102 and 104 had no standard rent, and could therefore have been let at any figure without restriction. But even if this second alternative has to be adopted, the change of assessment in 1945 clearly brought the premises within the ambit of paragraph (*a*): if it be correct to say that Nos. 102 and 104 were not assessed in November 1941, then clearly they were assessed as one premises in 1945, and the amount of the standard rent would be

determined by that assessment. This position was not challenged by the Plaintiff and indeed he had accepted it in fixing Rs. 295·83 as the agreed rent in the lease. It is argued, however, that the standard rent became changed again in 1955, and that when separate assessments were then made for each of the two numbers, the standard rent of each became the annual value as assessed in the respective assessments. There is no support for this proposition in paragraph (*a*) of section 5 (1) the full contents of which has been set out earlier in this judgment. But in support of this the Plaintiff relies on the second proviso to section 5 (1) :—

> " Provided, further, that in the case of any such premises which are first assessed or first separately assessed after the appointed date, the board may, on the application of the tenant, fix as the standard rent of the premises such amount as may in the opinion of the board be fair and reasonable ."

It should be noted that this proviso does not state that any assessment is to determine the standard rent. It provides only for two matters, namely, that in the case of any premises which are (i) first assessed, or (ii) first separately assessed, after the appointed date, the board may fix a reasonable amount as the standard rent. In other words, the proviso in my opinion merely permits the board in either of the two cases to alter a standard rent by substituting some new amount for the amount which would otherwise in terms of section 5 (1) (*a*) be the standard rent. Thus if premises were assessed by the Municipality for the first time in the year 1943, the annual value as so assessed would in terms of section 5 (1) (*a*) be the standard rent ; but the board would have power to fix some amount in lieu of the assessed amount. As for the second case, if two parts of premises have been assessed jointly whether before or after November 1941, the standard rent would be determined in terms of section 5 (1) (*a*) by reference to that assessment : but if thereafter separate assessments are made for the two parts, then the board would have power to fix a standard rent for each or both parts. In the instant case, therefore, in my opinion, the standard rent of Nos. 102 and 104 was and is the amount of the assessment made for the premises jointly, with premises No. 100, in November 1941, and that will remain unchanged, despite the separate assessments made in 1945 and 1955, unless the board in the exercise of the power given by the proviso introduces an alteration by fixing separate rents for the two numbers. In the absence of such a fixation by the board, the 1941 assessment still holds good, and the standard rent has to be calculated on that basis. Counsel for the Plaintiff stated that on that basis the authorised rent would be something less than Rs. 400 p.m.

I pass now to the decisive argument urged by Mr. Perera. When the present action for ejectment was instituted in May 1958 the Defendant was not in default for the months of February, March and April 1958, for he had paid rent for those months at the demanded rate of Rs. 524·33, which according to my opinion was higher than the authorised rent. The

basis of the action was that in respect of the period March 1957 to January 1958, the Defendant had paid at the rate only of Rs. 295·83 and that he was in arrears on the score that he had not, in response to the demand in the Plaintiff's letter of 12th February 1958, paid up the sum of Rs. 2,513·39 representing the difference between the monthly rents of Rs. 295·83 actually paid and the new monthly sum of Rs. 524·33, which according to the Plaintiff became payable forthwith upon the dismissal of the Defendant's application to the Rent Control Board. Having regard to my opinion that the proper authorised rent was something considerably less than Rs. 524·33, it may will be that the Defendant was entitled to ignore the Plaintiff's demand for the sum of Rs. 2,513·39 which was in excess of the difference in rent which could have been legally demanded. But Mr. Perera's argument goes further.

Under section 13 (1) of the Act as applicable in the instant case the Plaintiff had no right to institute his action unless, in terms of paragraph (*a*) of the proviso to that sub-section, " rent had been in arrear for one month after it had become due . " Clearly, in the case of a monthly tenancy paragraph (*a*) was intended to apply if the tenant had failed to pay the rent for any month on the due date and a further period of one month had expired after that date. It is contended, however, that that paragraph does not apply in the event of failure to pay the sum which was claimed by the Plaintiff in February 1958. In this connection, counsel relied on certain observations of the text-writers :

> *Wille* (" Landlord and Tenant ", 3rd Edition at page 34) : " If the parties purport to enter into a lease but no agreement has been made fixing the rent or making it ascertainable, there is no lease. Nor can occupation by the reputed tenant following on such agreement turn it into a lease, though Voet says that under the Roman Law, and in his time, the *locatio* was nevertheless valid as there was considered to have been a tacit agreement for that amount of rent which it was customary to promise.
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> " The occupier is liable, however, to pay the owner a reasonable amount for the ' use and occupation ' of the property. Such payment is frequently described as ' rent ', which is not strictly correct. This description has been used in cases where a tenant remained in occupation after the termination of his lease while negotiations for a renewal of the lease were in progress, and where occupation, originally with the owner's consent, was terminated by the latter giving notice to quit. "
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> *Lee* (" Introduction to Roman-Dutch Law ", 5th Edition, at page 301) : " Voet, 19.2.22. Strictly speaking, where no rent is agreed there is no contract of letting and hiring, but the owner of the property is entitled to compensation for ' use and occupation '. "

It would seem, therefore, that even for the purposes of the Common Law the agreement in the present case to pay something more than the former rent if the Rent Control Board did fix a higher amount would not

be regarded as an agreement to pay extra *rent* in respect of any period prior to the fixation of the higher amount by the board. But even if the Common Law would regard it as an agreement to pay extra rent, there is at least much room for doubt whether the Legislature intended in the proviso to section 13 (1) of the Act to include within the term "rent" any sum other than a rent pre-agreed between the parties. Since the proviso qualifies the protection given to a tenant by the substantive part of the section, the doubt as to its scope must be resolved in the tenant's favour.

There is yet another ground upon which the Plaintiff's action fails in my opinion. The Defendant's letter P 16 read with the Plaintiff's reply and other relevant correspondence shows that the parties had in mind three alternatives as to the correct amount of the rent for the premises, namely,

(1) the former amount of Rs. 295·83 ;

(2) the demanded amount of Rs. 524·33 ;

(3) such other sum as the board might fix as reasonable.

The board not having fixed such a sum as would have fallen under (3) above, there remained only the first two alternatives as being within the contemplation of the parties. The second alternative sum of Rs. 524·33 being, as I have held, in excess of the proper authorised rent, it could not lawfully be claimed or paid, since such a claim or payment was prohibited by section 5, and therefore there remained only the first alternative contemplated in the agreement, namely the former rent of Rs. 295·83. Although if there had been a doubt on the part of the Plaintiff as to what the true authorised rent was, the Defendant would undoubtedly have agreed to pay it if and when such true rent had been ascertained, there was in fact no agreement to pay such an "intermediate amount". The correspondence does not show that either party had realised that the Statute itself (without the intervention of the board) provided for the particular case an intermediate sum as the authorised rent. Although such an intermediate sum might have been claimed, there was in fact no claim for it nor an agreement to pay it. In this view of the matter there was no contractual obligation to pay anything more than the former rent, and consequently no question of arrears whether of back rent or of any extra sum due in respect of use and occupation.

For these reasons, the appeal is allowed and the Plaintiff's action dismissed with costs in both courts.

L. B. DE SILVA, J.—I ag

Appeal allowed.