1964 *Present :* Alles, J.

S. R. VAN TWEST, Appellant, *and* U. D. LEWIS APPUHAMY, Respondent

S. C. 34/1963—C. R. Colombo, 83,249

Rent Restriction Act—Sections 18 (b) and 15—Money paid in advance by tenant—Presumption that it was given to be set off against future arrears of rent.

Any sum of money paid in advance by a tenant to his landlord at the commencement of a tenancy must be presumed to be an advance against future arrears of rent unless it can be unequivocally related to a deposit claimed by the landlord or is held by the Court to be an illegal payment in contravention of section 8 (*b*) of the Rent Restriction Act.

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

J. A. L. Cooray, with *L. W. Athulathmudali*, for defendant-appellant.

B. J. Fernando, for plaintiff-respondent.

Cur. adv. vult.

[1] *(1944) 45 N. L. R. 251 at p. 253.*

October 9, 1964. ALLES, J.—

The plaintiff in this case sued the defendant, his tenant, for ejectment from the premises in question on two grounds :

(*a*) that the defendant had been in arrears of rent from 1.3.62 to the date of the action (16.10.62) and

(*b*) that the premises were reasonably required as a residence for the plaintiff's eldest daughter.

On the question of reasonable requirement the learned Commissioner has held in favour of the defendant but in giving judgment for the plaintiff the learned Commissioner decided that the defendant was in arrears of rent. The only question that arises in this appeal is whether the Commissioner was justified in coming to the conclusion that the rent was in arrear for the relevant period on the evidence led in the case.

Briefly, the facts that gave rise to the present appeal are as follows :—

The defendant became the plaintiff's tenant in January, 1960. The premises in question were described in the schedule to the plaint as a ' house bearing Assessment Nos. 100/1 and part of No. 100/2 standing on the land called Delgahawatta ..... '. It is not in dispute that the authorised rent of the premises was Rs. 25 per month, and that the defendant paid rent at the rate of Rs. 30 per month. The plaintiff's position is that he charged Rs. 25 for the house and an extra Rs. 5 for the produce of the coconut trees on No. 100/2. In July, 1962, the plaintiff says that he took possession of the coconut trees and that thereafter the rent was reduced from Rs. 30 to Rs. 25 per month. Counsel for the defendant-appellant submits that as the authorised rent for the premises was only Rs. 25 it was not open to the plaintiff to charge an extra sum for the produce of the coconut trees, as the defendant was entitled to the produce without any extra payment. The learned Commissioner has given judgment to the plaintiff on the basis that the rent was Rs. 30 even though he has held that the authorised rent was Rs. 25. The Commissioner has therefore misdirected himself on this point and not given the defendant credit for the excess rent paid by him. This amounts to Rs. 130 for the duration of the tenancy. Counsel submits that when this sum is added to the advance paid by the defendant in January 1960, there is a sum of Rs. 265 to the credit of the defendant which, when deducted from the sum of Rs. 200 claimed as arrears of rent, leaves a balance of Rs. 65 in the defendant's favour. He therefore maintains that the defendant is not in arrear of rent.

In this appeal, Counsel also challenged the true character of the ' advance ' of Rs. 135 given by the defendant to the plaintiff at the commencement of the tenancy.

In giving evidence at the trial the plaintiff stated that he took this sum as a deposit from the defendant and said that he was prepared to return this money to the defendant when he vacated the premises. The defendant stated that the plaintiff asked him for an advance of six months

rent at Rs. 55 a month but was prepared to accept a lump sum of Rs. 300. The sum of Rs. 135, he said, represented the balance due after the deduction of three months rent at Rs. 55 per month. Although the learned Commissioner has rejected the defendant's evidence that he paid Rs. 300 to the plaintiff, the defendant has at least given an explanation as to how the sum of Rs. 135 was computed. The plaintiff on the other hand is unable to give any explanation as to how this sum was calculated. The plaintiff in his plaint ' was prepared to give credit to the defendant in the sum of Rs. 135 paid by him on 2.1.60 as an advance ' but in his evidence he said he was only prepared to return this sum after the defendant vacated the premises. I have no doubt that the plaintiff's position in Court with regard to this sum, which was the same position advanced before me by Counsel on his behalf, was an after-thought. Counsel for the plaintiff cited in support, the decisions of this Court in *David Appuhamy v Subramaniam* [1] and *Meera v Jayawardene* [2]. In the former case, the tenant paid the landlord two months rent in advance and also deposited a sum of Rs. 500 on the agreement that it was to be held by the landlord and paid back to the tenant when the premises were handed over to him. Pulle, J. held 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. '

The case of *David Appuhamy v. Subramaniam* was considered and distinguished by T. S. Fernando, J. in the later case of *Meera v. Jayawardene.* In that case there was clear and unequivocal evidence that a sum of Rs. 750 was ' to be taken and accounted as and for the rent of the last six months of the term. ' and T. S. Fernando, J. said that the decision in *David Appuhamy v. Subramaniam* was clearly inapplicable to the facts in *Meera v. Jayawardene* as the latter case was not ' concerned with a sum of money agreed to be received as a deposit but with a sum of money accepted to be accounted as and for rent '.

What therefore is the true character of the advance of Rs. 135 paid by the defendant to the plaintiff at the commencement of the tenancy ? The receipt D2 given by the defendant to the plaintiff is in the following terms :—

> ' Received from S. R. Van Twest a sum of Rs. One Hundred and Thirty-five (Rs. 135/-) only being *deposit as advance* for house No. 100/1, Kawdana Road, Dehiwela. '

The plaintiff came into Court praying for ' judgment against the defendant in the sum of Rs. 90/-. . . . ' This sum of Rs. 90/- was computed after giving credit to the defendant for the sum of Rs. 135 paid as advance. As I said earlier, this position is different from the evidence given by the plaintiff in Court. He was only prepared to return this sum

[1] *(1953) 55 N. L. R. 397.* [2] *(1956) 58 N. L. R. 159.*

after the premises were vacated and this he could only achieve after he has succeeded in this appeal. Even the learned Commissioner understood that this amount was to be set off against the arrears of rent due. It seems to me therefore that having regard to all the evidence available the plaintiff is not entitled to claim this sum as a deposit to be refunded after the defendant vacates the premises. In dealing with the character of any payment made by a tenant at the commencement of a tenancy the Court must have due regard to the provisions of Section 8 (*b*) of the Rent Restriction Act which deals with the payment of unauthorised advances. It will be only in the exceptional case that a landlord would ask for a deposit from a tenant. One can envisage such a situation when, for instance, there is a possibility of damage to the leased premises as a result of the tenant's occupation. Otherwise, the demand for a deposit can ordinarily be only construed as an advance against the rent due unless of course the tenant is *in pari delicto* and makes payment to the landlord in contravention of Section 8 (*b*). Our Courts have held that a tenant is precluded from receiving from the landlord any premium paid by him in contravention of Section 8 as a condition of he grant of the tenancy—*Vitharne v. de Zylva* [1]—and that payment of key money is illegal and cannot be set off by the tenant against arrears of rent—see *Dahalan v. Yoosoof* [2].

Unless therefore any advance can be unequivocally related to a deposit claimed by the landlord or has been held by the Court to be an illegal payment in contravention of Section 8 (*b*) of the Rent Restriction Ordinance it must be presumed that the payment is an advance against the arrears of rent. Applying the maxim *omnia praesumuntur rite esse acta* such an inference would be reasonable, rebuttable only by clear and cogent evidence to the contrary. I am satisfied in the present case that the sum of Rs. 135 was given by the defendant to the plaintiff as an advance against the rent due and was a lawful deduction under Section 15 of the Act. The defendant is therefore not in arrears of rent and is entitled to succeed in this appeal. The appeal is allowed with costs in both Courts.

Appeal allowed.

[1] *(1954) 56 N. L. R. 57.*

[2] *(1964) 66 N. L. R. 143.*