1954 *Present :* **Pulle J. and Swan J.**

D. J. H. VITHARNE, Appellant, *and* W. R. DE ZYLVA, Respondent

S. C. 411—D. C. Negombo, 15,657

Rent Restriction Act, No. 29 of 1948—Premium paid as condition of grant of tenancy—Right of tenant to recover it—Illegal contract—Sections 8, 15, 23.

No claim can be grounded on an illegal contract. A tenant, therefore, is precluded from recovering from the landlord any premium paid by him in contravention of section 8 of the Rent Restriction Act as a condition of the grant of the tenancy.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q.C., with *H. A. Koattegoda*, for the defendant appellant.

N. M. de Silva, with *E. A. G. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

July 19, 1954. PULLE J.—

The defendant who is the appellant in this case was the owner of premises No. 316, Main Street, Negombo. On the 16th January, 1950, the defendant by an informal writing agreed to let these premises to the plaintiff at a rental of Rs. 60 a month. The third clause of the writing stated :

" The said party of the second part has paid as an advance unto the said party of the first part a sum of Rs. 60 being rent due for one month this day and the party of the first part received the same. "

The plaintiff sued for the recovery of Rs. 1,934·10 on the basis that he paid to the defendant at the time the informal writing was executed not the sum of Rs. 60 but Rs. 1,500. He claimed the balance amount of Rs. 434·10 as damages for breach of agreement to hand over the premises. The defendant denied the receipt of any sum in excess of Rs. 60 but the learned District Judge preferred to accept the plaintiff's evidence and gave judgment in his favour for Rs. 1,500. The claim for damages was disallowed.

I am unable to extract from the evidence any reasons for disturbing the finding that the amount paid on the 16th January, 1950, was Rs. 1,500 and not Rs. 60. The only question that falls to be determined is whether the payment was obnoxious to the provisions contained in the Rent Restriction Act, No. 29 of 1948, and if so, whether the plaintiff is debarred from recovering the money.

The nature of the payment can be gathered from two documents. Paragraph 3 of the plaint stated :

" On the day on which the agreement referred to in paragraph 2 of the plaint was entered into the defendant *wrongfully* demanded and was paid by the plaintiff a sum of Rs. 1,500, being a sum which the defendant demanded before he would allow the plaintiff to occupy the premises to which the said agreement related. "

The letter of demand sent by plaintiff's Proctor described the amount as follows :

" This sum of Rs. 1,500, as you are aware, was paid to you by my client as consideration for your agreeing to give him on rent the premises owned by you. "

In my opinion the payment is one which is prohibited by section 8 (*b*) of the Rent Restriction Act. It is a premium paid by the plaintiff as a condition of the grant of the tenancy. Both parties were, therefore, guilty of a contravention of section 8 which amounted to a criminal offence punishable under section 23. *Prima facie* a court would not lend its aid to relieve a person from the consequences of criminal acts committed by him. In regard to illegal contracts Wessels in the Law of Contract in South Africa says at p. 217, " It is one which the law forbids. The law is not indifferent to it. Not only does the law refuse to enforce it, but it refuses to help a party who has been the victim of such a contract. No claim can be grounded on an illegal contract. The court will have nothing to do with rights based directly or indirectly upon an illegal contract. "

It has been argued that this general rule should be relaxed in this case having regard to the class of persons the Act was intended to protect. Vide *Jafferjee v. Subbiah Pillai* [1]. I am unable to accept this argument. The Rent Restriction Act is concerned primarily to protect a tenant who

[1] *(1953) 54 N. L. R. 505 at p. 511.*

regularly pays the authorised rent from eviction. In regard to the payment of premium, penalties can be imposed equally on the giver and receiver and it is impossible to say that the law intended to protect the prospective tenant in a special manner. The identical penalties put them *in pari delicto*. Certainly it would not promote public policy to allow a man to plead his own criminal act as the very foundation of his claim in a court of civil jurisdiction. To debar him from maintaining such a claim would be to uphold the will of the legislature as reflected in the penal provisions. I do not see how the element of coercion enters into the transaction where the law has left the owner perfectly free to let his house or not.

Undoubtedly the position would be different if the Act enabled the recovery of a premium in spite of the payment thereof being a criminal offence. Unless the plaintiff can bring himself within section 15 of the Act, his action must fail. This section confers the right on the tenant to recover by process of law any sum paid " by way of rent " where the sum is in excess of the authorised rent, in spite of the prohibition imposed on the tenant against such payment by section 3 (2) and the payment being made punishable as an offence under section 23. Can it be said that the payment of a premium as consideration for granting a tenancy at a stipulated monthly rent is a payment " by way of rent " ? I do not think so. The word " rent " is used in relation to the authorised rent. If the Legislature intended that a premium, commission or gratuity could also be recovered it could easily have provided for it expressly in section 15. I find support for the view I have expressed in the judgment of Jenkins L.J. in *City Permanent Building Society v. Miller* [1]. In this case the statutory provision which had to be construed read as follows :

" Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine. "

The word fine in the context included a premium. Jenkins L.J. said,

" Surely, the expression ' rent ' in the context ' granted at a rent ', must connote a periodical payment issuing out of the land during the period of the grant, and I should hardly have thought that a grant of term of three years in consideration of a lump sum, expressed to be the whole of the rent payable during that period would appropriately be described as a lease granted at a rent. "

Finally it was submitted that in spite of the illegality of the payment the plaintiff had the right to recover because the defendant did not implement the promise made by him to place the plaintiff in possession of the premises. An issue was raised as to whether the defendant failed to give possession to the plaintiff. Although the learned Judge has not answered this issue I will assume it should have been answered in plaintiff's favour. To give effect to the argument would mean that in every case where money has been paid in pursuance of a prohibited contract,

[1] *(1952) 2 All E. R. 621 at p. 628.*

it ought to be recoverable upon proof of a total failure of consideration. I am unable to accede to this argument for if I do so I would deprive the maxim *in pari delicto potior est conditio defendentis* of its real content.

In my opinion the defendant succeeds. The decree under appeal should be set aside and plaintiff's action dismissed. The defendant will be entitled to draw the sum of Rs. 60 deposited in court. As the defendant has failed both here and below on the issues of facts there should be no costs in either court.

SWAN J.—I agree.

Decree set aside.