Privy Council Appeal No. 85 of 1946

H. K. Shah and another - - - - - - - *Appellants.*

v.

Osman Allu - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1947

Present at the Hearing:

LORD ROCHE
LORD NORMAND
MR. JAMES STRATFORD

[*Delivered by* LORD ROCHE]

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and they feel themselves in a position to give now their reasons for tendering that advice.

The appellants were in possession of and occupying a shop in Nairobi, being Plot No. 2485, Bazaar Road, Nairobi. That shop was let by the respondent to this appeal to the first defendant, Shah, at a rent which at various times during the tenancy varied between about £150 per annum to about £200 per annum. The second defendant, Mulchand Brothers, in a manner which is not clear, got into possession of that shop, whether by virtue of a sub-tenancy or an assignment or otherwise was not, owing to the course of the proceedings, proved.

The matter came before a Magistrate by way of an application for possession, under the relevant Order of the Colony of Kenya. When the matter was heard by the Magistrate both sides were represented by Counsel. The defendants' Counsel, that is to say, Counsel for the present appellants, rose and said: "This matter has been settled." Counsel for the plaintiff, the respondent in the appeal, disagreed and said on his information it was not settled and he had no instructions about a settlement. Thereupon the Counsel for the present appellants expressed themselves to be in a difficulty and asked for an adjournment. They got an adjournment for half-an-hour in the first instance and they proceeded to consult their clients who were either in the Court or in the precincts of the Court. When they had consulted they came back and said they wanted a further adjournment to discuss this matter and to receive instructions upon this matter of settlement. When asked by the Magistrate they were not prepared, despite their consultation with their clients who were supposed to have made the settlement, to say what were the terms of the settlement. It subsequently appeared that the alleged terms were that the second appellant should pay the costs of the proceedings and upon that basis the matter should be compromised and they should be left in possession. It is not a matter which could have taken a great deal of examination or discussion to find out from their clients had the clients desired to tell them and had Counsel desired to know. Albeit they came back, assigned no reasons at all except that they were told there was a settlement and asked for a further adjournment.

Therefore, not unnaturally, the learned Magistrate arrived at the conclusion that he was being, in effect, played with, and that what was

being sought was time. He therefore refused the adjournment and thereupon Counsel for the appellants withdrew. The Magistrate after listening to the statement and arguments and evidence tendered on behalf of the respondent to this appeal, gave judgment and made the Order.

Later an application was made to the Magistrate to set aside this judgment and restore the *lis* on the same ground as before and nothing appeared in the affidavits upon that occasion showing any divergence of view between the advocate for the appellants and the appellants themselves. There was no case made that the appellant was suffering because his Counsel had mismanaged the case or not proceeded properly in the matter. The Order sought for to set aside the judgment of the Court was refused.

Thereupon an appeal was lodged in the Supreme Court of the Colony, and after hearing arguments the learned Judge, Mr. Justice Horne, allowed the appeal and remitted the matter for further hearing before the learned Magistrate on the ground that he had wrongly refused an adjournment.

Their Lordships have perused this judgment and in their opinion it was erroneous. In effect it does not amount to more than this, that the learned Judge himself would have made a different Order. It falls far short of establishing any facts or reasons why the learned Magistrate could not legitimately, and acting judicially, be of a contrary opinion to the learned Judge. Their Lordships do not think it at all necessary to re-state at length what has been many times stated before, the grounds upon which an appellate tribunal, including the Board will interfere with the discretion of a court below. It is sufficient to say that a mere difference of opinion between the appellate court and the lower court as to the proper Order to make is no sufficient ground for interfering with the discretion which has been exercised below. There must be something much more than that, amounting to proof (to put it quite summarily) that there has been an unjudicial exercise of discretion, or an exercise of discretion at which no Judge could reasonably arrive whereby injustice has been done to the party complaining.

The respondent to this case thereupon appealed to the Appeal Court for Eastern Africa and the matter was heard by three Judges, Mr. Justice Sheridan as President, Chief Justice Paul and Mr. Justice Whitley. The court, by a majority consisting of the President and Chief Justice Paul, allowed the appeal and set aside the judgment of Mr. Justice Horne and discharged the Order remitting the case for re-hearing. The grounds are fully set out in the judgments of the President and Chief Justice Paul and their Lordships are content to say they agree entirely with the reasons assigned by those two learned Judges for their judgments. Their criticism of Mr. Justice Horne's judgment was substantially the criticism which their Lordships have already made and those judgments their Lordships are content to adopt as correct. The dissenting judgment was in substance and effect on the lines of the judgment of Mr. Justice Horne, and the observations that have been made by their Lordships with regard to the earlier judgment may be applied also to this dissenting judgment.

Accordingly their Lordships being of that opinion the appeal on the main ground before the Board that the discretion of the Magistrate was wrongly exercised and the matter ought to be remitted to him to consider *de novo*, is dismissed.

It remains to consider a point that was urged with great ingenuity by Mr. Sutton and was further developed with equal ingenuity by Mr. MacKenna. The argument was that even assuming the matter was never sent back and is not to be sent back at all to the Magistrate, yet on the particular facts before the Magistrate it appears that the judgment was bad in law, or, to put it another way, that it was made without jurisdiction. A critical examination has been made of the Ordinance to establish that point. The relief sought is either that this Board should now, on the materials before it enter judgment for the appellants to this appeal, or that they should, not on the ground of the adjournment being wrongfully refused, but on the ground that the real matter in dispute

has never been investigated, send the matter back to the courts below for study and investigation. That would really mean sending it back to Mr. Justice Horne.

Their Lordships do not think they would be justified in taking, and certainly are not inclined to take either of those courses.

As to the first point, the courts, including the House of Lords, have many times said that they are not constituted, and they do not exist, to try hypothetical cases. In the arguments addressed to their Lordships they have been asked to assume certain facts which have been pleaded, some of them in the alternative, and base a decision upon that assumption. One of the assumptions on which their Lordships have been asked to base a decision is that the second defendants, the second appellants in this case, Mulchand Brothers, were assignees. Their Lordships are not prepared to take that course. This is a matter of some nicety upon which apparently on certain states of the facts there is not entire harmony between the Court of Appeal in this country and the Court of Session of Scotland, and it would be profoundly unfortunate, and to be avoided if possible, that upon uncertain facts, in a case that arises in Eastern Africa, the Board should consider which of those two not entirely harmonious views is correct: all the more because this point has never been considered in either of the courts in the Colony, either the Supreme Court or in the Court of Appeal, and all the more because the appellants have had most ample opportunities in those courts of adducing evidence and offering arguments in support of their version of the facts and of the thesis which is now put forward. That they have not availed themselves of any of these opportunities is in their Lordships' view a conclusive reason why they should not receive the advantage of a judgment here based upon either guesswork or hypothesis.

With regard to the application to remit for consideration by Mr. Justice Horne and for the further consideration, if necessary, of the Court of Appeal, their Lordships are of opinion that there has been quite enough litigation about this shop, of no great value, already; that the appellants have had most ample opportunities of raising this point and disposing of it in those courts and they have entirely failed, indeed avoided, availing themselves of those opportunities and their Lordships would think it wrong to advise His Majesty to give them an opportunity now.

For these reasons the appeal is dismissed with the usual consequences as to costs and their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

H. K. SHAH AND ANOTHER

v.

OSMAN ALLU

DELIVERED BY LORD ROCHE

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