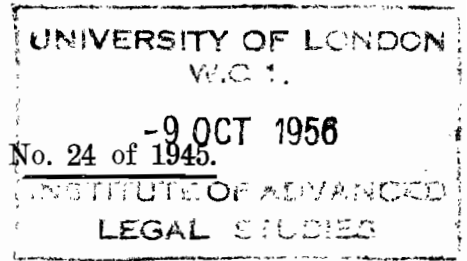


GJ5.91

79, 1947



In the Privy Council

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE
SITTING AS A COURT OF APPEAL

44455

BETWEEN

ARIEH ZVI LIPSHITZ

Appellant.

— AND —

- (1) HAIM ARON VALERO
- (2) SALOMON VALERO
- (3) SARA RACHEL VALERO

Respondents.

Case for the Appellant

1. This is an appeal from the Judgment dated the 24th November, 1943, of the Supreme Court of Palestine sitting as a Court of Civil Appeal setting aside the Judgment dated the 18th June, 1943, of the District Court of Jerusalem in its appellate capacity and restoring a Judgment of Dr. Benjamin Levy in the Magistrate's Court of Jerusalem given in favour of the Plaintiff on the 28th February, 1943, in an Action between Moshe Valero (Plaintiff) and the Appellant (Defendant).

10 2. The Plaintiff Moshe Valero was the original respondent to this appeal. He died on or about 6th July, 1945, and by an Order of His Majesty in Council dated the 7th December, 1945, the Respondents were substituted on the Record as Respondents in his place. p.63

3. The Appellant is the owner of a café situate in King George Avenue Jerusalem and known as "Tuv Taam." The deceased Moshe Valero was the owner of a piece of land adjoining the Appellant's café. From 1937 to 1940 the Appellant took on lease from the deceased part of the said land on yearly terms for use as a garden for the Appellant's café during the summer months.

4. By an Agreement in writing which was not dated but was in fact made on or about the 28th November, 1940, the deceased let to the Appellant part of the said land containing an area of $7\frac{1}{2}$ to $6\frac{1}{2}$ square metres as a garden for the café for a period of 12 months beginning from the date of signature of the Agreement at a rent of £P.60. The Agreement as subsequently amended contained a clause which contemplated that the Appellant might build on the land, in the words following :—

“ All the construction which the Lessee shall make shall remain his own property, provided it is removed on the expiry of the period of lease or on the demand being made by the Lessor therefor as aforesaid. (If the Lessee shall not vacate the property leased as above all the construction made by the Lessee shall be the property of the Lessor, and the Lessee shall not be entitled to ask for the expenses he has incurred thereon.)”

During the currency of this agreement the Appellant in fact built a Winter Garden on the plot comprised therein at a cost of over £P.500. The District Court held that the building was erected with the knowledge and in a way with the consent of the deceased.

5. The agreement of the 28th November, 1940, expired on the 27th November, 1941. The Appellant did not remove the Winter Garden he had built, and by an Agreement dated the 28th November, 1941, the deceased let to the Appellant the plot comprised in the earlier agreement and an additional area of 50 square metres “for the arrangement of a garden for his café.” The Agreement of the 28th November, 1941, contained the following provisions :—

(2.) The period of lease is for one month as from 28th November, 1941, at a rent of £P.13.500 which shall be paid in advance.

- 10 (3.) In the event of the Lessor needing the plot of land for the purpose of building or for any other purpose whatsoever, the Lessee must vacate the said plot within 3 days from the receipt of a notice in writing from the Lessor of his desire in that regard; in such an event the Lessor shall have to return to the Lessee the proportional rent for the remainder of the period during which the Lessee shall not have used the plot in consequence of the demand by the Lessor as aforesaid and this agreement shall be deemed abrogated upon the delivery of a notice as aforesaid.
- (4.) All the construction which the Lessee shall make shall remain his private property it being expressly provided that at the end of the term of lease or upon demand being made by the Lessor to vacate the land under clause 3 of this agreement it shall be removed. Should the Lessee fail to vacate the let property as aforesaid all the construction made by the Lessee shall remain the property of the Lessor, and the Lessee may not claim the expenses he had incurred therefor.
- 20 (5.) Should there be no notice by the Lessor under Clause 3 or for any other arrangement, this agreement shall be renewed automatically for one further month and so forth month by month on the same conditions as in this agreement are included, provided that the Lessee shall notify the Lessor of his such desire three days before the expiration of each month and shall pay the monthly amount of £P.13.500 in advance.

30 6. The Appellant duly paid the rent of £P.13.500 which was payable under the contract on the 28th November, 1941, and paid five further monthly instalments. The first four payments were made in the deceased's office but the fifth and sixth were collected by the clerk to the deceased's Attorney who sent such clerk to collect the same from the Appellant, and the Appellant therefor expected the clerk to come on the 28th May, 1942, and depended on his coming on about that date. The clerk not having come to the Appellant on the 28th or 29th May, 1942, the Appellant on the 31st May, 1942, tendered the

sum of £P.13.500 to the deceased's Attorney but the latter refused to accept payment. The Appellant never at any time gave to the deceased notice under Clause 5 of the Agreement of the 28th November, 1941, of his desire to renew the Agreement. The deceased nevertheless accepted the monthly payments of rent up to and including that payable in advance on the 28th April, 1942.

7. By letter dated the 31st May, 1943, the deceased gave notice ^{p.65.} to the Appellant under Clause 3 of the Agreement of the 28th November, 1941, purporting to terminate the Appellant's tenancy on **10** the ground that the plot was needed by the deceased for another purpose (without stating what purpose) and stating that the Appellant committed a breach of the provisions of the Agreement in that he failed to pay an instalment of rent on date of maturity (28th May, 1942).

8. The Appellant having continued in possession of the premises comprised in the Agreement the deceased by Statement of Claim dated ^{p.1.} the 10th June, 1942, commenced

THE PRESENT ACTION

In the Magistrate's Court of Jerusalem praying for an order against the Appellant to vacate the said land for all or any of the **20** following reasons :—

- (A) The Appellant had no right to remain on the land because the contract of lease had been terminated and had ceased to exist since the day of the receipt by the Appellant of the deceased's notice to that affect.
- (B) The Appellant had breached the agreement by his failure to pay in advance to the deceased the sum of £P.13.500 on the day of payment and also by his failure to notify the deceased of his desire to renew the lease.
- (C) The Appellant had breached the said Agreement by using **30** 57 square metres more than the area which was leased to him. The deceased also claimed £P.6.300 and costs, interests and advocate's fees.

9. The Appellant delivered a Statement of Defence dated the 18th June, 1942, whereby he prayed that the action might be dismissed on the following alternative grounds, viz. :—

- (1) The action was contrary to the provisions of the Rent Restrictions (Business Premises) Ordinance 1941.
- (2) The deceased did not need the land for the purpose of building or any other purpose whatsoever and therefore the deceased's notice dated the 31st May, 1942, was not effectual.
- 10 (3) The agreement of lease was in force and had not been annulled.
- (4) He had not committed a breach of the agreement.
- (5) He was not using the deceased's land other than the land let to him or the user of which had been allowed him by the deceased.
- (6) The Action was inconsistent with the principles of equity.
- (7) The deceased was trying to get into possession of the building which the Appellant had erected without reimbursing the Appellant for his expenses.

20 10. Pursuant to an order of the said Magistrate's Court made upon notice by the Appellant dated the 8th September 1942 for further and better particulars the deceased by Particulars dated the 6th October 1942 stated that the land in issue was required by him for the purpose of building thereon or in the alternative for the purpose of selling the same.

11. The full title of the Rent Restrictions (Business Premises) Ordinance No. 6 of 1941 is " An Ordinance to make certain provisions as to the relationship of landlords and tenants of certain premises " and enacts (so far as material) as follows :—

2. In this Ordinance, unless the context otherwise requires :—
30 " Premises " means any premises other than dwelling

houses to which the Rent Restrictions (Dwelling-Houses) Ordinance, 1940 applies.

4. (1) No Court or Judge or execution officer shall give any judgment or make any order for the eviction of any tenant from any premises, notwithstanding that such tenant's contract or tenancy has expired unless—

(a) such tenant has failed to pay any rent lawfully due in respect of such premises; or

10 (b) such tenant has failed to comply with any term of any agreement of tenancy in respect of such premises.

(3) Where by reason of the provisions of this section any tenant continues in occupation of any premises after the expiration of any contract of tenancy the terms and conditions of such contract of tenancy shall in so far as they may be applicable, be deemed to apply to such occupation.

12. The Rent Restrictions (Dwelling-Houses) Ordinance, No. 44 of 1940 enacts as follows :—

20 3. (1) This Ordinance shall apply to a house, or any part of a house, let as a separate dwelling where such letting does not include any land other than the site of the dwelling house and a garden or other premises within the curtilage of the dwelling house, and every such house or part of a house shall be deemed to be a dwelling house to which this Ordinance applies Provided that this Ordinance shall not apply to an hotel or boarding house. p.40 L.10.

30 13. The action came on for trial before Dr. Benjamin Levy on the 6th October 1942. Oral and documentary evidence was tendered on behalf of the parties. On the 26th March 1943 the learned Magistrate delivered judgment in favour of the deceased. He held that the Appellant was not protected by the Rent Restrictions (Business Premises) Ordinance 1941 for the following reasons :— p.37.

(a) The Winter Garden which the Appellant had built upon the land let to him by the deceased did not form part of the p.40 para 5.

demised premises but at the commencement and during the continuance of the tenancy was the property of the Appellant. Therefore the issue was whether the plot let by the deceased to the Appellant under the agreement dated the 28th November 1941 (disregarding the Winter Garden) constituted premises within the meaning of the Rent Restrictions (Business Premises) Ordinance 1941.

- 10 (b) For the reasons which he expressed he was of opinion that p.42 para 9.
 a plot which has no building on it was beyond the term p.43 L.30.
 “ premises ” within the meaning of the said Ordinance.

14. The learned Magistrate then proceeded to consider what he stated to be the main cause of action, namely the purported termination of the agreement by the deceased by his notice dated the 31st May 1945. He found that the deceased was not at the date of the notice or subsequently in need of the plot for building purposes. As to the deceased requiring possession of the land for the purpose of sale, the learned Magistrate found that from a date prior to the Agreement of the 28th November 1941 the deceased had continued to offer the land for sale and was still doing so; that he had received no offer which he was willing to accept; and that he claimed possession in order to make the sale easier. On these findings the Magistrate held that the deceased had discharged the onus of proving that he was in need of the plot for the sale thereof.

15. The learned Magistrate went on to express the view that according to the true construction of the Agreement dated the 28th November 1941 there was no necessity at all to hear evidence as to the need by the deceased of the plot or that in any event the slightest of proofs would be sufficient and that the words “ in the event of the Lessor needing the plot for the purpose of building or for any other purpose ” meant in the event of the Lessor feeling a need for the land. He found that the notice was effective and that the Agreement became void with the delivery thereof and held that the deceased must succeed in his action for eviction.

16. The learned Magistrate also held that the absence of a notice p.47 para 18
 by the Appellant under Clause 5 of the Agreement dated the 28th
 November 1941 and the non-payment of the £P.13,500 on the 28th May
 1942 resulted in the non-renewal of the lease and that the deceased
 could only on these omissions notwithstanding the fact that the Appel- p.48 para 19
 lant was expecting the deceased's Attorney to send his clerk to collect
 the rent as he had done for the two previous months and the fact that
 the deceased had dispensed with a notice of renewal in each of the
 previous months of the tenancy. He held that the Appellant was not p.48 para 20
 10 entitled to equitable relief. He adjudged the Appellant to vacate the
 plot and to pay the deceased's costs. He further ordered that out of p.49 L.52.
 the sum of £P.13,500 which the Appellant had paid into Court there
 should be paid to the deceased a sum of £P.6,300.

17. The Appellant appealed to the District Court of Jerusalem p.50.
 in its appellate capacity and on the 18th June 1943 the District Court p.51.
 (Bardsky and Hasna JJ) delivered judgment allowing the appeal and
 setting aside the judgment of the learned Magistrate with costs in the p.52 L.48.
 said Court and below. After stating that in a way the deceased had
 consented to the erection of the Winter Garden the Court, without p.52 L.38.
 20 expressing any opinion upon the question whether the term "premises"
 in Section 2 of the Rent Restrictions (Business Premises) Ordinance p.53 L.18.
 covers unbuilt on land, held that the real and actual subject-matter of
 the agreement dated the 28th November 1941 was land on which to the
 knowledge of both parties there was a building. They therefore held p.53 L.21
 that the Ordinance did apply. They further held that only one ground p.53 L1.23-27
 for eviction which was valid under the Ordinance had been put forward,
 namely the failure to pay rent in time but that the learned Magistrate
 was right in finding that this was not a good ground in view of the
 circumstances of the case.

30 18. The learned Judge also held that the Magistrate erred in his p.54 L1.1-9
 interpretation of Clause 3 of the contract of the 28th November 1941.
 They expressed the view that the simple "desire" of the Plaintiff was
 not intended to be sufficient to determine the contract, and they held
 that in view of the clear findings of the Magistrate that in fact the
 Plaintiff was not in need of the land, it followed that the condition

precedent for the notice, with a view to determining the contract, as envisaged by Clause.3 of the contract, did not materialise.

19. On the 8th July 1943 the deceased obtained leave from Hasna p.55. J. to appeal to the Supreme Court sitting as a Court of Appeal and on the 19th July 1943 he gave notice of appeal.

20. The Appellant submits that the Supreme Court had no jurisdiction to entertain the Appeal for the reasons appearing in paragraph 21 to 23 inclusive of this case.

21. The Supreme Court derives its jurisdiction from the Palestine
10 Order in Council, 1922 (S. R. & O. 1922, No. 1282) and amending Orders in Council. The relevant provisions of the Order in Council 1922 are as follows :—

Article 38 is in the following terms :—

“ Subject to the provisions of this part of this Order and any Ordinance or Rules, the civil Courts hereinafter described, and any other courts or tribunals constituted by or under and of the provisions of any Ordinance, shall exercise jurisdiction in all matters and over all persons in Palestine.”

20 Article 39 provides for the establishment and prescribes the jurisdiction of Magistrates Courts.

Article 40 provides for the establishment of District Courts and prescribes their jurisdiction as Courts of First instance and Appellate Courts respectively.

Article 43 so far as material is in the following terms :—

“ There shall be established a Court to be called the Supreme Court of which the constitution shall be prescribed by Ordinance. The Supreme Court sitting as a Court of Appeal shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance.”

By the new Article 17 (substituted for the original Article 17 by Article 3 of the Palestine (Amendment) Order in Council, 1923, (S.R. & O. 1923 No. 619) the power of promulgating Ordinance is vested in the High Commissioner after consultation with the Advisory Council.

22. It is submitted that the Supreme Court has no jurisdiction to hear any appeal from judgment of a District Court sitting as an Appellate Court. The words "subject to the provisions of any Ordinance" in Article 43 of the Order in Council in the Appellant's
10 submission refers to the manner in which appeals shall be brought, and cannot extend the jurisdiction of the Supreme Court to allow it to hear appeals from a District Court in its appellate capacity. This was held by the Supreme Court (Copland Acting C. J. Frumkin and Khayat JJ) in the case of Doukhan and another (Appellant) -v- Drucker (Respondent) Civil Appeal No. 177/38 reported Annotated Supreme Court Judgments (Apelbom) 1938 Vol. 2 page 54. On the other hand in the appeal of the Municipal Corporation of Jerusalem -v- Nakhlen Catton, 1938 5 P.L.R.488, the Supreme Court (Trusted C. J. Copland Frumkin Khayat and Abdulhadi JJ) held by a majority (Trusted C. J. Frumkin and Abdulhadi JJ, Copland and Khayat JJ. dissenting)
20 that the words "subject to the provisions of any Ordinance" enabled the enlargement by Ordinance of the jurisdiction of the Court. The Appellant submits that the Supreme Court erred in so construing the words quoted and that the decision of that Court in Doukhan -v- Drucker was right.

23. Section 12 of the Magistrate's Courts Jurisdiction Ordinance, No. 45 of 1939, provides that the decision of a District Court in an appeal from a Magistrate's Court shall be final but the presiding judge at the District Court which heard the appeal may, if the decision
30 involves a point of law of novelty, complexity or general importance, grant leave to appeal to the Supreme Court sitting as Court of Appeal. For the reason stated in para. 22 of this case it is submitted that this Section is *ultra vires* and of no validity or effect.

24. The Supreme Court (Rose, Frumkin Khayat JJ) nevertheless heard the appeal in the present Action and on the 24th November 1943

delivered judgment allowing the appeal and restoring the Magistrate's decision with costs in the Court and the both Courts below. The Court held (a) that the words " for any other purpose whatsoever " in Clause 3 of the Agreement dated the 28th November 1941 were of so wide a nature as to exclude the *ejusdem generis* rule : (b) that the lease related only to unbuilt-on land and (c) that the Rent Restrictions (Business Premises) Ordinance 1941 does not apply to such land.

p.57.

p.58 L.7.

p.66.

p.58 L.15.

p.58 L.26.

25. On the 26th April 1944 the Appellant was granted by the Supreme Court final leave to appeal to His Majesty in Council.

p.62.

10 26. The Appellant humbly submits that the Appeal ought to be allowed, the judgment of the Supreme Court reversed and the judgment of the District Court restored for the following amongst other :—

Reasons

(1) Because the Supreme Court had no jurisdiction to hear and ought not to have heard the appeal.

(2) Because the District Court was right in holding that the subject-matter of the Appellant's tenancy under the Agreement dated the 28th November 1941 was land with a building thereon to which the Rent Restrictions (Business Premises) Ordinance 1941 applies.

20

(3) Because assuming that the subject-matter of the Agreement was land unbuilt upon the Rent Restrictions (Business Premises) Ordinance 1941 according to its true construction applies to such land.

(4) Because the District Court was right in holding that the notice dated the 31st May 1942 by the deceased under Clause 3 of the Agreement was invalid because the deceased was not in need of the land comprised in the agreement.

(5) Because the deceased was bound by his Particulars and there is no evidence that he required the land either for building thereon or for the purpose of selling the same.

30

- (6) Because the deceased was estopped or precluded from relying on the omission of the Appellant to notify the deceased of the Appellant's desire to continue the tenancy (under Clause 5 of the Agreement) by reason of the fact that the deceased had previously month by month treated the tenancy as still continuing in spite of the absence of any such notification.
- (7) Because the deceased was estopped or precluded from relying on the omission of the Appellant to tender a month's rent before the 31st May, 1942, by reason of the fact that the deceased's Attorney had in each of the two preceding months sent his clerk to collect such rent and the Appellant was thereby induced to suppose that the deceased's Attorney would do so again.
- (8) Because the Appellant is entitled to relief against the forfeiture of his tenancy.
- (9) Because the Judgment of the Magistrate was wrong.
- (10) Because the Judgment of the Supreme Court was wrong and ought to be reversed and the Judgment of the District Court was right and ought to be restored.

(Sgd). RAYMOND JENNINGS.

DONALD H. COHEN.

18.9.46.

No 24 of 1945

In the Privy Council

ON APPEAL FROM THE SUPREME
COURT OF PALESTINE SITTING AS
A COURT OF APPEAL.

LIPSHITZ

— v —

VALERO & ORS.

Case for
Appellant

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E.C.2.