In the Privy Council.

No. 24 of 1945.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE

BETWEEN

ARIEH ZVI LIPSHITZ ... ... (*Defendant*) APPELLANT

AND

HAIM ARON VALERO, SALOMON VALERO and SARA RACHEL VALERO (substituted for the deceased Respondent MOSHE VALERO by Order dated the 7th December, 1945) (*Plaintiffs*) RESPONDENTS.

CASE ON BEHALF OF THE RESPONDENTS

RECORD

1.—This is an Appeal from a Judgment of the Supreme Court of Palestine dated the 24th November, 1943, reversing a Judgment of the District Court of Jerusalem dated the 18th June, 1943, and restoring the Judgment of the Magistrate's Court of Jerusalem dated the 28th February, 1943, in favour of the Plaintiff Moshe Valero deceased (hereinafter called the Respondent). p. 57 p. 51 p. 37

2.—The action was brought by the Respondent claiming an order against the Appellant to vacate a plot of land belonging to the Respondent and let by him to the Appellant under a written agreement of tenancy of the 28th November, 1941, and by the Judgments of the Magistrate's Court of Jerusalem and of the Supreme Court the Appellant was ordered to vacate the said land and to pay the Respondent's costs. The questions arising in this Appeal are, firstly, whether under the terms of the Palestine (Appeal to Privy Council) Order in Council, 1924 (which allows an appeal as of right where the matter in dispute is of the value of £500 or upwards or involves some claim respecting property or some civil right of that value) an appeal lies to His Majesty in Council from the decision of the Supreme Court; secondly, if so, whether the agreement of tenancy had come to an end; thirdly, if so, whether the provisions of the Rent Restrictions (Business Premises) Ordinance, 1941 (which limits the power

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of the Court to make an order for eviction of a tenant of premises to which the ordinance applies notwithstanding that his contract of tenancy has expired), apply to the land; and fourthly, whether, if the provisions of the Ordinance do apply to the land, the Court was on the facts of this case precluded from making an order for eviction of the Appellant.

3.—The main facts found by the learned Magistrate are as follows.

p. 37

4.—The plot of land in question is situated in King George Avenue, Jerusalem, and is part of a larger plot the property of the Respondent. The Appellant is the owner of a café abutting on the plot, and from 1937 to 1940 the Respondent had let part of the plot to the Appellant on annual agreements, to be used as a garden for his café during the summer months. In the latter part of 1940 the Appellant purposed to erect on the plot so let to him a " winter garden " for his café, and obtained from the Respondent

p. 67

a written Agreement of tenancy of the 28th November, 1940 (Exhibit D. 3).

5.—This agreement provided (*inter alia*) as follows :—

" The lessor hereby lets to the lessee an area of $7\frac{1}{2}$ x $6\frac{1}{2}$ square metres of his plot of land in King George Avenue Jerusalem, for the arrangement of a garden for his café house for a period of 12 months beginning from the date of signature of this agreement . . ."

" In the event of the lessor needing the plot for the purpose of building or for any other purpose whatsoever the lessee must vacate the said plot of land within three days from the day he receives 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 of land in consequence of the demand of the lessor as aforesaid, and this agreement shall be deemed abrogated upon the delivery of the notice by the lessor as stated above."

" 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."

p. 38, ll. 9 to 22

6.—Some weeks after the date of this agreement the Appellant applied to the Town Planning Committee for permission to build a " winter garden " on the said plot of land, and for that purpose he had to submit to that body a copy of the agreement of tenancy. He was not in possession of a copy signed by the Respondent, and the Respondent was prepared to supply him with a copy on condition that the following words were added thereto :—

p. 68

" 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."

These words were in fact added and initialled by the Appellant, and the Respondent delivered to him a copy of the agreement including the above additional words.

7.—On the 12th February, 1941, the Appellant received a permit to construct the " winter garden " and completed it about the beginning of March, 1941. p. 38, ll. 23 to 25

8.—The agreement of the 28th November, 1940, ran its full length of a year, and was not terminated by the Respondent under the above provisions. In these circumstances it was not in dispute that the structure remained the property of the Appellant. p. 40, ll. 24 to 29.

9.—On the 28th November, 1941, the parties entered into a new agreement (Exhibit P.1) for the letting of the same plot with an additional piece of land, but the Respondent was only prepared to let it for a month, subject to renewal. This is the agreement sued upon in this action. Its material terms are as follows :— p. 38, l. 26 p. 64

" (1) The lessor hereby lets to the lessee an area of $7\frac{1}{2} \times 6\frac{1}{2}$ square metres of his land on King George Avenue at Jerusalem (i.e. the area which was let to the Lessee under agreement of 28.11.40) and in addition thereto an area of 50 sq. m. in the South-Eastern part of the plot of land, behind the portion already let to the lessee, for the arrangement of a garden for his café.

" (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.

" (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 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.

" (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

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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."

p. 39, l. 17 p. 47, ll. 13 to 25

10.—The Tenancy under this agreement continued from month to month until the 28th May, 1942. Subject to any notice by the Respondent, the Appellant had a right under Clause (5) thereof to renew the tenancy for a further month on giving a notice to that effect to the Respondent three days before the 28th May, 1942, and on paying the rent for that further month in advance on the 28th May, 1942. He did neither of these things and the learned Magistrate held that the tenancy therefore came to an end on the 28th May, 1942. On the 31st May the Appellant offered to pay the rent for a further month to the Respondent's attorney but he refused to accept it. In the two months prior to May the Respondent's attorney had sent his clerk to the Appellant's shop to collect the rent in advance, but prior to that the Appellant had called at the Respondent's office and paid the rent in advance.

p. 48, ll. 3 to 7

p. 39, ll. 19 to 30

11.—Further, the Respondent, on the 31st May, 1942, wrote to the Appellant a letter (Exhibit P. 2) the material parts of which read as follows :—

p. 65

"I hereby notify you that I terminate the tenancy of a part of the plot which you took on lease from me in King George Avenue, on the ground that the plot is needed by me for another purpose, *vide* Clause 3 of the agreement you signed on 28th November, 1941.

"You committed a breach of the provisions of the contract in that you failed to pay an instalment of the rent on date of maturity (28th May, 1942)."

p. 39, ll. 31 to 41

On the 4th June, 1942, the Respondent's Attorney wrote to the Appellant a further letter (Exhibit D. 4) the material parts of which read as follows :—

p. 68

"Notwithstanding my client's (Mr. M. Valero) notice to you dated 31.5.42, as regards the termination of the lease on the land situate in King George Avenue, you failed to vacate the land as you were bound to do in accordance with Clause 3 of the contract of lease which you signed on 28.11.41.

"I hereby notify you again *for the last time*, that if you fail to vacate the land as aforesaid within three additional days from to-day, I shall be compelled to take legal eviction proceedings against you, a thing which may cause you great inconvenience and unnecessary expenses."

12.—Section 4 (1) (a) of the Rent Restrictions (Business Premises) Ordinance No. 6 of 1941, reads as follows :—

"No court or judge or executive officer shall give any judgment or make any order for the eviction of any tenant from any premises,*

* NOTE.—In the official Hebrew version the word is " bayit " which means " house."

notwithstanding that such tenant's contract of tenancy has expired, unless :—(a) Such tenant has failed to pay any rent lawfully due in respect of such premises."

Section 4 (3) of the Ordinance reads as follows :—

" 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 will, in so far as they may be applicable, be deemed to apply to such occupation . . . . "

13.—In the Magistrate's Court it was contended on behalf of the Respondent that the tenancy created by the agreement of the 28th November, 1941, had come to an end on the 28th May, 1942, by reason of the failure of the Appellant to notify the Respondent of his desire that it should be renewed for a further month three days before the 28th May, 1942, and to pay the monthly rent in advance ; that even if the tenancy had not come to an end for that reason it had come to an end by reason of the notices given by the Respondent on the 31st May and 4th June, 1942, referred to in paragraph 11 hereof ; that on the proper construction of the word " premises " in the Rent Restrictions (Business Premises) Ordinance, 1941, that word did not refer to land but referred only to buildings ; and that even if the Ordinance did apply to land the Appellant had failed to pay the rent lawfully due in advance on or before the 28th May, 1942, and that, therefore, the Court could make an order for his eviction.

p. 33, ll. 6 to 20

pp. 35 to 36

It was contended on behalf of the Appellant that the tenancy had not come to an end because (it was said) the Respondent had agreed with the Appellant to collect the monthly rent on the 28th day of every month, and had failed to do so on the 28th May, and because the Respondent did not need the plot of land for the purpose of building or any other purpose and, in any event, the notice in writing given by the Respondent was bad because it did not state for what purpose he needed the land ; that the word " premises " in the Ordinance did refer to land ; and that there had been no failure to pay the rent lawfully due in advance as the failure to pay was due to the breach of the Appellant's agreement to collect the rent in advance. The Appellant also contended that the action was contrary to the principles of equity.

pp. 26 to 32

There was no dispute that the tenancy agreement was an agreement for the letting of the land and not of the " winter garden " erected on the land and the learned Magistrate said in his judgment :—

" Whether or not the ' winter garden ' belongs to the Plaintiff or the Defendant, Defendant has not taken on lease the ' winter garden ' from the Plaintiff nor has Plaintiff let it to Defendant ; Defendant is in possession of the ' winter garden ' not as the tenant of the Plaintiff. Therefore, and this was not disputed by Counsel of the parties, the

pp. 40, ll. 33 to 41 (see also p. 49, ll. 7 to 12)

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issue is whether the plot of land let by Plaintiff to Defendant under contract of lease P/1.—*i.e.*, the land itself disregarding the ' winter garden ' which is not part of the property let—constitutes ' premises ' within the meaning of the Ordinance."

p. 43, ll. 29 to 35

14.—The learned Magistrate held (1) that on the proper construction of the Ordinance as a whole the word " premises " referred to " buildings " and that the Ordinance was not therefore applicable to the tenancy agreement of the 28th November, 1941, which was an agreement for the letting of land ; (2) that the Respondent had discharged the onus of proving that he needed

p. 44, l. 29

the land for the purpose of sale, and that in any event he was entitled to give a notice to vacate under Clause 3 of the tenancy agreement if he desired the

p. 46, ll. 43 to 49

land for his own purposes and that it was not necessary for the notice to state the purposes for which he needed the land. While basing his judgment

p. 47, ll. 45 to 50

on the holdings set out above the learned Magistrate also held that the tenancy agreement came to an end on the 28th May, 1942, by reason of the

p. 48, ll. 33 to 34

failure of the Appellant to notify the Respondent three days before the

p. 48, ll. 14 to 16

28th May, 1942, of his desire to renew it for a further month and his failure to pay rent in advance. The learned Magistrate dismissed the contention that the action was contrary to the principles of equity, pointing out that

p. 48, l. 45

the Appellant when he erected the " winter garden " knew that he was doing so at his own risk (as had indeed been admitted by the Appellant).

p. 52, l. 38

15.—On appeal the District Court expressed no opinion on the question whether the word " premises " in the Ordinance applies to land, but held that as the land referred to in the tenancy agreement was " land on which

p. 53, ll. 18 to 19

to the knowledge of both parties there happened to be a building " the Ordinance did apply to the present case. With regard to the contention that even if the Ordinance did apply, the Appellant had failed to pay the

p. 53, ll. 23 to 36

rent lawfully due and could not therefore take advantage of Section 4, the Court said:—" Now of the three grounds for eviction in this case, the only one valid under the Rent Restrictions (Business Premises) Ordinance, 1941, is that relating to the failure to pay rent in time, and the learned Magistrate found, and we think quite rightly, that this was not a good ground, in view of the circumstances of this case. In fact, at the end of each of the last two months out of the six months of the tenancy under P/1., the Plaintiff used to send his clerk to the shop of the Defendant to collect the rent, so that the Defendant, not being aware of any change of instructions or attitude, expected the clerk to come again on the 28th May, 1941. That was a Thursday. The clerk did not come on that day, nor on the following day, the 29th of the month. The 30th of that month was a Saturday. On Sunday the 31st, the Defendant went to the office of Plaintiff and tendered the rent. The Plaintiff however refused to accept it and the Defendant paid it into Court."

The Court also expressed the view, while not founding their judgment on it, that even if the Ordinance did not apply, the notice to vacate given

by the Respondent was invalid " in view of the clear findings of the Magistrate that the Plaintiff was not in need of the land." p. 54, ll. 5 to 7

16.—It is respectfully submitted that the District Court clearly misunderstood the judgment of the Magistrate in two respects. In the first place the Magistrate did not hold that the circumstances of the case justified the failure to pay the rent in time. In fact in paragraph 19 of his judgment he came to an exactly contrary conclusion. What he did hold was that the failure of the Appellant to give notice in advance of his desire to renew the tenancy and his failure to pay the rent in advance brought the tenancy agreement to an end, but was not a breach of contract as the Appellant was entitled to bring it to an end. In the second place the Magistrate did not find that the Respondent was not in need of the land but said " I find that the Plaintiff has discharged the onus of proving that he is in need of the plot for the sale thereof." p. 48 p. 48, l. 15 p. 44, ll. 28 to 29

17.—The Supreme Court on appeal reversed the decision of the District Court and restored the judgment of the learned Magistrate on the ground that the Respondent's notice to vacate was valid and that the word " premises " in the Ordinance did not include land let without buildings. p. 58, l. 4 p. 58, ll. 22 to 32

18.—The Appellant then applied to the Supreme Court for leave to appeal to His Majesty in Council, supporting his application by a number of affidavits, namely, an affidavit of one Alexander Cohen deposing that the land exceeded in value the sum of £P.500, an affidavit of one Herman Cohn, advocate, deposing to the evidence given at the trial as to the value of the land and of the summer house built on it by the Appellant, and an affidavit of one Meyouhas as to the value of the summer-house. p. 59 p. 60 p. 61

19.—On the 1st February, 1944, the Court gave a decision on this application which is not printed in the Record herein, but reads as follows :—

Privy Council Leave Application No. 24/43.

In the Supreme Court sitting as a Court of Civil Appeal.

Before : Mr. Justice Edwards and Mr. Justice Frumkin.

In the Application of :—

Arieh Zvi Lipshitz... ... ... Applicant

— v.—

Moshe Valero ... ... Respondent.

Application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Civil Appeal dated the 24th day of November 1943 in C.A. No. 240/43.

For applicant : Mr. Herman Cohn.

For Respondent : Mr. Aharon Valero.

Order

This is an application under Article 3 (a) of the Palestine (Appeal to Privy Council) Order in Council, 1924. The facts are sufficiently set out in the judgment of this Court of the 24th November, 1943.

The sole question is whether the matter in dispute amounts to the value of £P.500 or upwards or whether the appeal involves directly or indirectly some claim or question to or respecting property or a right of lease amounting to £P.500 or upwards.

With regard to the building which the present applicant erected on the land, there is before us an affidavit sworn by Mr. Moreno Meyouhas, a licensed land valuer, in which he has sworn that the present cost of the said building would be about £P.450. We accept this affidavit and we think that it may safely be said that, apart from the value of the building there is involved in this appeal a tenancy right which must, in the very nature of things, amount to at least £P.50. In these circumstances we think that an appeal lies as of right. We refer to P. C. L. A. No. 1/40 P.L.R. Vol. 7, p. 160. We accordingly granted conditional leave to appeal subject to the usual conditions, namely, that the applicant give security for the costs of the appeal in the sum of £P.300 by bank guarantee of one of the three banks, namely, Barclays, Anglo Palestine or Ottoman, and that the applicant do take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England within two months from the date of this order. After fulfilling the above conditions the appellant may apply to this Court with notice to the respondent for final leave to appeal. We order stay of execution pending the decision of His Majesty in Council.

Given this 1st day of February 1944.

(Sgd.) D. EDWARDS,
British Puisne Judge.

(Sgd.) G. FRUMKIN,
Puisne Judge.

20.—The Respondents humbly submit that in so deciding the Court misdirected itself.

21.—Article 3 (a) of the Palestine (Appeal to Privy Council) Order in Council, 1924 (S.R. & O. 1924, No. 1243) under which the application was made, reads as follows :—

> " Subject to the provisions of this Order an Appeal shall lie
>
> (a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards or where the Appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards."

22.—The Respondents humbly submit that the only matter in dispute is the Appellant's right to occupy the land ; and the only claim or question to or respecting property and the only civil right involved in this Appeal, is the Appellant's right to occupy the land. Throughout these proceedings the building (which was removable by the Appellant at the end of the tenancy) was not claimed or in dispute, and the learned Magistrate said in his judgment : " I am not to decide in this case to whom the said building now belongs, for, in this case, Plaintiff only sued for the vacation of the plot, and Plaintiff's advocate explicitly said (during the hearing of the Notice of Motion in File M. 208/42) that in Statement of Claim plaintiff did not claim the building. Accordingly, the parties' Advocates never raised any argument on the question of ownership." Accordingly, the Supreme Court, it is submitted, was wrong in taking into account, in valuing the matter in dispute, the figure of £P.450 which they found to be the present cost of the building. The only matter in dispute namely the tenancy right, they valued at " at least £P.50." The Respondents submit that the value of the tenancy right is the capital value of a merely temporary occupation subject to the rent (£P.13.500) provided for by the tenancy agreement ; and as that rent had been freely negotiated only six months before, the value of the tenancy right was merely nominal, or at most something in the neighbourhood of the figure of £P.50 referred to by the Supreme Court. Even if the building, on being erected on the Respondent's land, had become his property, and even if the Appellant had had no right to remove it at the termination of the tenancy, it is submitted that the value of the matter in dispute, namely the tenancy right, would still be the same.

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p. 49, ll. 7 to 12

23.—The Respondents humbly submit that this Appeal should be dismissed with costs for the following among other

REASONS.

(1) Because the matter in dispute is not of the value of £500 sterling.

(2) Because the Appellant failed to give notice to the Respondent three days before the 28th May, 1942, to renew the agreement of the 28th November, 1941, for a further month.

(3) Because the Appellant failed to pay a month's rent in advance on or before the 28th May, 1942.

(4) Because the Respondent gave notice in writing to the Appellant on the 31st May and 4th June, 1942, of the termination of the said agreement.

(5) Because for each of the above reasons the said agreement had come to an end prior to the commencement of this action.

(6) Because the agreement of the 28th November, 1941, was an agreement for the letting of a plot of land without buildings.

(7) Because on its true construction the Rent Restrictions (Business Premises) Ordinance did not apply to the said plot of land.

(8) Because even it the Ordinance did apply the Appellant failed to pay rent in advance as provided by the agreement and cannot therefore pray in aid Section 4 of the Ordinance.

(9) Because the judgments of the Learned Magistrate and of the Supreme Court were right for the reasons given therein and the judgment of the District Court was wrong.

VALENTINE HOLMES.
A. S. DIAMOND.

In the Privy Council.

No. 24 of 1945.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

BETWEEN

ARIEH ZVI LIPSHITZ
(*Defendant*) APPELLANT

AND

HAIM ARON VALERO, SALOMON VALERO and SARA RACHEL VALERO (substituted for the deceased Respondent MOSHE VALERO by Order dated the 7th December, 1945)
(*Plaintiffs*) RESPONDENTS.

CASE ON BEHALF OF THE RESPONDENTS.

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