51, 1948

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL, JERUSALEM.

BETWEEN

Case No. 287/1943
ESTHER MAMANOFF and MICHAEL MAMANOFF

Case No. 284/1943
DOV GUTERMAN and DVORA GUTERMAN
(Defendants) *Appellants*

AND

JOSEPH FORER (Plaintiff) *Respondent.*

AND BETWEEN

Case No. 291/1943
REUVEN LEV and ETIA MALKA LEV

Case No. 290/1943
MEIR WIND

Case No. 289/1943
GERSHON MABOVITZ

Case No. 288/1943
NISSIM MIRAKOV COHEN and MALKIEL MIRAKOV COHEN

Case No. 286/1943
BENJAMIN MANN

Case No. 285/1943
BLUMA VORTMAN

Case No. 283/1943
BRACHA BEN-YA'ACOV (Defendants) - - - *Appellants*

AND

JOSEPH FORER (Plaintiff) - - - - *Respondent.*

CASE FOR THE APPELLANTS.

RECORD.

1. This is an Appeal, by Special Leave in the case of the last seven Appellants, from the Judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 13th April, 1945, affirming the Judgment of the District Court, Tel-Aviv, dated the 11th September, 1944, in favour of the Respondent in nine consolidated actions in which he was the Plaintiff. p. 45. p. 36.

2. The question raised by this Appeal is whether the Respondent is entitled to claim from the Appellants " equivalent rent " in respect of their occupation of certain flats in a building erected by the Respondent in Tel-Aviv.

3. The Appellants would respectfully refer to their Case in Privy Council Appeal No. 32 of 1947, which by His Majesty's Order in Council, dated 2nd August, 1946, was ordered to be heard either together with or immediately prior to the hearing of this Appeal as their Lordships of the Judicial Committee might determine.

p. 53.

4. The actions giving rise to the present appeal were commenced in the District Court, Tel-Aviv, on the 30th July, 1943, the claim in each action being founded on an allegation that the agreements under which the Appellants had been let into possession of the flats in question had been declared void by the Magistrate's Court, Tel-Aviv.

5. During the pendency of these actions in the District Court, Judge Windham also sitting in the District Court, Tel-Aviv, had upheld the judgment of the Magistrate's Court in the preceding paragraph referred to. The hearing of these actions, which by then had been consolidated, in the District Court, began on the 19th June, 1944, and was concluded on the 13th July, 1944, when judgment was reserved. On the 28th July, 1944, before judgment was delivered in the consolidated actions, the Supreme Court, Jerusalem, gave judgment in a consolidated appeal that seven of the present Appellants had lodged from the said judgment of Judge Windham. The Supreme Court allowed these Appellants' appeal, holding that the Magistrate had no jurisdiction to entertain the matters before him, as in conformity with " a long line of authorities " where the principal question involved was a claim to ownership of immovable property it was only the Land Court that had jurisdiction. It is not known whether Judge Ross, who tried in the District Court, Tel-Aviv, the consolidated actions giving rise to this appeal to his Majesty in Council, was aware of this judgment of the Supreme Court when he delivered his judgment herein, on the 11th September, 1944. His judgment is silent on the point.

p. 97.

p. 100.

p. 101, l. 6.

The Appellants submit that it follows from the said judgment of the Supreme Court, which is printed in full in the Record, that Judge Ross himself had no jurisdiction to entertain the present actions.

p. 100.

6. As appears from the following paragraphs of this Case, the principles of English law and the Ottoman Civil Law (the Mejelle) were both referred to in the Courts below. Articles 365, 417, 472 and 598 of the Mejelle are particularly material. In Hooper's translation they read as follows :—

Art. 365. For a sale to be executory, the vendor must be the owner of the thing sold, or the agent of the owner, or his tutor or guardian, and no other person must be entitled thereto.

Art. 417. Prepared for hire is said of anything designed and prepared to be let on hire. It relates to real property such as inns, houses, baths and shops originally built or bought in order to be let on hire, and also such things as carriages and horses let on hire.

If a thing is let continuously on hire for a period of three years, it is a proof that it is prepared for hire. If a person has a thing made for himself and tells people that it is prepared for hire, such thing is deemed to be prepared for hire.

Art. 472. If a person uses the property of another person without the conclusion of a contract and without such person's permission, and if it is property prepared for hire, an estimated rent must be paid, but not otherwise. But if the owner of the property has previously demanded payment of rent, and such person uses such property, rent is payable, even though no benefit can be derived from such property. The reason for this is that by using the property, such person is deemed to have agreed to pay the rent.

Art. 598. If use is made of property which is claimed to be owned as a result of contract, even though it is prepared for hire, nothing need be paid in respect to such use.

Examples :—

(1) A is joint owner of a shop and sells such shop to B without the permission of the other joint owner. B holds such shop for a certain period. The other joint owner does not give his assent to the sale and seizes his share. He cannot claim rent in respect to his share, however much the shop may have been prepared for giving on hire, because the purchaser, having asserted that he has used it as an owner, his ownership being claimed to be based upon a contract, that is to say, upon a contract of sale, is not obliged to pay for the benefit received.

(2) A sells and delivers his mill to B which he asserts is his own property held in absolute ownership. After having held it for a certain period another person appears claiming the mill and after proving his case and obtaining judgment, takes it from the purchaser. Such person cannot claim anything from B in the way of rent in respect to that period, since this is claimed to be based on a contract.

7. As stated above, on the 11th September, 1944, Judge Ross gave judgment in the consolidated actions. In giving judgment he said :— p. 36.

The only major points at issue are whether the agreements (Ex. P1–9) are void and if so whether the Plaintiff is entitled to charge rent for the period during which the Defendants (or the persons from whom they derive title) have been in occupation. For this reason I consider it to be irrelevant the evidence given by some of the Defendants to the effect that a committee was formed to which the Plaintiff was asked to transfer the property in the flats. If the original agreements were void I cannot see that subsequent but abortive negotiations designed to put the matter on a legal footing can affect the case. p. 36, l. 26.

As to whether these agreements were void or otherwise I think it is unnecessary to say more than that I entirely agree with the view expressed by the learned Magistrate and hold all these

agreements (Ex. P1–9) to be void and I find that the Defendants are in fact occupying the block of flats owned by the Plaintiff and that they have no legal title thereto. The question then remains, and it is the main question in these cases, whether the Plaintiff is entitled to charge equivalent rent over the period during which these Defendants have been in occupation.

Although it seems definite that the Mejelle does apply to cases of this character it is not without interest or importance that English law is not (as I first thought) against the Plaintiff on this point and the case (*Howard* v. *Shaw* (1842), R.R. 641) referred to by Mr. Goitein does seem to show that in similar cases in England a charge for use and occupation can be made. This is indeed common sense and may be of some importance in considering which articles of the Mejelle have application. The terms of the articles referred are indeed obscure but it does seem to me that here is a block of flats " prepared to be let on hire " within the meaning of Art. 417 and that this property is being used " without contract or permission " within the meaning of Art. 472, since the contract is void and no " permission " by the Plaintiff has been proved. Art. 598 which was relied on by the Defendants, clearly refers in my opinion (in so far as it supports their contention) to quite different

p. 37, l. 13. classes of agreements from the present . . . I think that the liability by the occupier to pay equivalent rent in a case such as the present is beyond dispute. There can be no equitable lien on the property because equity will only interfere where there is a valid contract which can be enforced and here there is none.

p. 38, l. 39. 8. In the result the learned Judge gave judgment for the Respondent against each of the Appellants on the basis that he was entitled to recover from them equivalent rent for the whole time that they had been in possession of the flats.

9. The Appellants appealed to the Supreme Court, sitting as a Court of Appeal, Jerusalem (Edwards J. and Plunkett A/J.).

p. 45. 10. On the 13th April, 1945, the Supreme Court delivered judgment dismissing the Appellants' appeal on the grounds set out in the following passages from the judgment :—

p. 46, l. 8. The learned A/Relieving President of the District Court considered it unnecessary to decide whether the agreements were in fact void, although he went on to say that he entirely agreed with the finding of the Magistrate that they were void . . .

p. 46, l. 17. Dr. Eliash, advocate for the Appellants, tells us that on 21st December, 1944, the Land Court held that these agreements were void and that there are pending in this Court Civil Appeals Nos. 16-24 inclusive of 1945, in which the correctness of that judgment will be queried.

The first question, which in my view we have to decide, is whether the Mejelle applies. Although the Respondent's advocate argued that the Mejelle does not apply, nevertheless, the Court below which decided the cases in his favour held that the Mejelle did apply. With this part of the finding of the Court below I am

in agreement. It is clear that the Respondent asked for equivalent rent, and provision for such a remedy is found in the Mejelle. There is here no question of any local Ordinance passed on the lines of an English Act of Parliament such as the Rent Restrictions Ordinance coming into play or interfering with the rights of landlords and tenants. In my view, we have here an Ottoman Law dealing with this branch of juristic remedies. The dictum in Civil Appeal No. 240/37, Palestine Law Reports, Vol. 5, page 159, especially at the bottom of page 163, is in point. In spite of Mr. Goitein's citation of English authorities, I think that we must confine ourselves within the four walls of Article 472 of the Mejelle. The question arises whether the Respondent is entitled to recover rent under Article 472. Now, whichever translation of the Mejelle is relied upon, I consider that it is essential for the landlord to prove user of his premises without his (the landlord's) permission. Mr. Goitein's argument is that, although his client gave permission, it was only given on the understanding that the tenant would be on the premises as a result of the conclusion of a valid contract . . .

Even assuming that the Appellant did originally use the premises with permission, yet as soon as he himself in 1941 set up the defence that the contract was void, there was therefore no longer any valid contract, and the character and nature of his occupation changed, and it is clear that the Respondent had ceased to allow the Appellant to use the premises, this fact being obvious from the Respondent's conduct in bringing an action for eviction. The Appellant could therefore no longer be regarded as using the premises with the Respondent's permission. In my view, therefore, the learned Relieving President came to a correct conclusion in holding that Article 472 Mejelle applies. p. 47, l. 4.

The reason given above apply to all the appeals which are therefore all dismissed.

11. None of the Appellants other than Lev had at any time set up the defence or otherwise submitted that the agreements in question were void. None of these other Appellants were parties to the 1941 proceedings referred to in the judgment of the Supreme Court. It is therefore respectfully submitted that the passage in the judgment, "the reasons "given above apply to all the appeals" has no foundation and that the merits of their cases have not been considered by the Supreme Court at all. The Supreme Court did not decide that the divers agreements were not valid, and, in the Appellants' submission, on an appeal from the District Court it had no jurisdiction so to do. p. 84.

12. The Appellants submit that the judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 13th April, 1945, is wrong and should be reversed for the following among other p. 45.

REASONS.

(1) Because the agreements in question are not void.

(2) Because neither the District Court nor the Supreme Court decided that the said agreements were void nor did they have jurisdiction so to do.

(3) Because neither under the Mejelle nor by English Law is equivalent rent or a sum for use and occupation payable in the circumstances of these cases.

(4) Because in any event no sums would be due either for equivalent rent or for use and occupation until the said agreements had been declared void by a competent Court.

(5) Because none of the Appellants other than Lev had submitted that the agreements were void.

(6) Because throughout their occupation of the flats in question, alternatively until the Respondent had or should be held to have withdrawn or cancelled his permission, the Appellants were using the said properties with the Respondent's permission.

(7) Because the properties in question were not " prepared for hire " within the meaning of Article 472 of the Mejelle.

(8) Because of the Reasons appended to the Appellant's Case in Privy Council Appeal No. 32 of 1947.

(9) Because the judgments of the District Court and of the Supreme Court are wrong and ought to be reversed.

PHINEAS QUASS.

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No. 30 of 1947.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL, JERUSALEM.

BETWEEN

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Appellants

AND

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