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23, 1951

No. 8 of 1950.
31285

In the Privy Council.

ON APPEAL

FROM HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

UNIVERSITY OF LONDON
M.C. 1.
17 JUL 1953
INSTITUTE OF APPLICED
LEGAL STUDIES

BETWEEN

HARNAM SINGH

AND

JAMAL PIRBHAI

Respondent.

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CASE FOR THE RESPONDENT

1. This is an appeal from a judgment of His Majesty's Court of Appeal for Eastern Africa, dated the 9th March 1949, dismissing the Appellant's appeal against a judgment of the Supreme Court of Kenya, dated the 5th November 1948, whereby the learned trial judge dismissed with costs the Appellant's suit for possession of certain premises occupied by the Respondent and for the ejection of the Respondent therefrom.

RECORD.
p. 46. ---
p. 25.

20 2. The Appellant is the owner and the Respondent has since the 1st April 1939, been in occupation of the said premises which consist of a plot of land in Government Road, Nairobi, known as Plot 209/2555 and certain buildings erected thereon. The principal issue to be decided in this appeal is whether the Court of Appeal were right in holding that the Respondent was a statutory tenant within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, and that the Appellant had failed to satisfy the requirements of the said Ordinance relating to a landlord's claim for possession.

If this issue were decided in the Appellant's favour the further issue would arise as to whether the trial judge was right in holding that the Respondent occupied the said premises on a month-to-month tenancy and had not received a valid notice to quit.

30 3. The material sections of the said Ordinance are as follows :—

"11. (1) No order for the recovery of possession of any dwelling-house to which this Ordinance applies, or for the ejection of a tenant therefrom, shall be made unless—

* * * * *

(d) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself or for his wife or minor children, or for any person bona fide residing, or to reside, with him, or for some person in his whole time employment or in the whole time employment of some

tenant from him, and (except as otherwise provided by this subsection) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available ;

* * * * *

(2) Nothing in this section contained shall be deemed to permit a landlord to recover possession of a dwelling-house if by such recovery he and his wife and/or minor children would be in occupation of, or would acquire the right to occupy, more than one dwelling-house at the same time."

" 19. The Governor in Council may, by Proclamation, declare that the provisions of this Ordinance shall apply to any area, district or place in the Colony in respect of premises used for business, trade or professional purposes, or for the public service, as it applies to a dwelling-house in that area, district or place, and with effect from the date of such Proclamation, or from a date specified therein, this Ordinance shall be read as though references to ' dwelling-house ', ' house ' and ' dwelling ' included references to any such premises, provided that the Ordinance in its application to such premises shall have effect subject to the following modifications :—

(a) The following paragraph shall be substituted for paragraph (d) of subsection (1) of section 11 of this Ordinance :—

' (d) The premises are reasonably required by the landlord for business, trade or professional purposes or for the public service, and (except as otherwise provided by this subsection) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available ' ;

" (d) Subsection (2) of section 11 and section 14 of this Ordinance shall not apply."

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By Proclamation No. 53 of 1941 the provisions of the Ordinance were applied to the area under the jurisdiction of the Municipal Council of Nairobi. The premises in this case are within the said area. Section 110 of the Indian Transfer of Property Act which applies in Kenya is as follows :—

" 110. Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

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Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option."

4. By a written agreement, dated the 27th June 1939, the said premises were demised by the Appellant to the Respondent for a term of two years from the 1st April 1939 at a monthly rent of 280 shillings. The said agreement contained (inter alia) the following provisions :—

“ 6. The Lessee shall use the said hereditaments and premises for the purpose of business and/or residences including the business of auctioneers.”

10 “ 10. The Lessor shall not erect any building or do or alter the present arrangement of the demised premises so that the Lessee may be obstructed or hindered in his present business except if he is ordered and/or obliged to remove the buildings encroaching on the sanitary lane and also in having to erect the w.c. mentioned above.

* * * * *

(B) If the Lessor or the Lessee shall desire to determine the present demise at the expiration of the said term then either party shall give to the other six months' previous notice in writing of his intention to do so.”

20 5. At all material times after the conclusion of the said agreement the Respondent (who was the owner of adjacent premises known as Plot 209/2556) occupied the said premises and used the same both for his business as an auctioneer and also as a residence for himself and his family.

6. On the 4th January 1941 it was verbally agreed between the parties that the rent of the said premises should be Shs.250/- per month on an 11 months' agreement as from the expiry of the lease then in force. The said verbal agreement was confirmed by a letter from the Respondent to the Appellant dated the 7th January 1941. The rent was raised to Shs.265/- as from the 1st June 1942 and to Shs.280/- as from the 1st January 1943.

30 7. On the 24th August 1943 the Appellant addressed to the Respondent a letter purporting to be a notice to quit. On the following day the Respondent's solicitors sent a reply to the Appellant in which they stated (inter alia) that the Respondent would not vacate the premises but would remain in occupation as a statutory tenant from the date of the expiry of the notice.

40 8. On the 9th April 1946 the Appellant's solicitors addressed to the Respondent a letter stating that they had been informed by the Appellant that the Respondent had verbally agreed to vacate the premises. On the 11th April the Respondent's solicitors replied that the Respondent did not intend and never had intended to vacate the premises as long as the Rent Restrictions Ordinance was in force.

9. By letters dated the 12th February and 17th February 1948 to the Rent Control Board set up under the Rent Restrictions Ordinance, the Appellant's solicitors offered or purported to offer the Respondent alternative accommodation at Plot 60, Eastleigh Section 1, Nairobi.

p. 72, l. 1.

10. On the 3rd March 1948 the Rent Control Board granted the necessary sanction for the Appellant to institute proceedings against the Respondent for recovery of possession under Section 11 of the said Ordinance.

p. 72, l. 20.

11. By a letter dated the 11th March 1948 the Appellant's solicitors gave or purported to give the Respondent notice to quit the premises on the 30th April 1948.

pp. 1-4.

12. By a Plaint dated the 4th May 1948, and amended on the 27th May 1948, the Appellant instituted

THE PRESENT SUIT

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p. 5, l. 1.

claiming possession of the premises, ejection of the Respondent therefrom, mesne profits from 1st May 1948 until such date as the Respondent should vacate the premises, interest and costs. He pleaded (inter alia) that as from the 1st April 1943 the Respondent continued in occupation as a statutory tenant; that in January and February 1948 the Respondent was offered alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, which the Respondent refused and/or neglected to accept without cause or justification; and further that he was prepared to offer alternative accommodation as stipulated by law. He also pleaded that he had given the Respondent notice to quit on the 24th August 1943 and again on or before the 30th April 1948. 20

p. 73.

13. On the 12th August 1948 the Appellant's solicitors addressed to the Respondent a letter containing the following passages:—

“ On the instructions and on behalf of my client, Mr. Harnam Singh, the owner and the landlord of the above Plot and the premises thereon, I hereby give you notice to quit the above premises on or before 31st August 1948. This notice is to be regarded as without prejudice as far as C.C.207 of 48 is concerned.”

“ Take notice that the monthly rent of the above premises will from the date of expiry of the notice to quit, be Shs.483/45 made up as under.”

* * * * *

“ If you continue in occupation you will be deemed to be a statutory tenant at the said increased rent.”

p. 6.

14. By his defence dated the 8th September 1948 the Respondent pleaded (inter alia) that the alternative accommodation offered by the Appellant was not reasonably equivalent as regards rent and suitability in all respects within the meaning of the Ordinance; that no such accommodation as was required by the Ordinance was available; that he was entitled under the lease to a six months' notice to quit and that the notices received by him did not operate to determine his tenancy; that if his contractual tenancy had been determined by a notice to quit such notice was waived by the giving of subsequent notices which however did not themselves operate to determine the tenancy. 40

15. The Appellant deposed in the course of his evidence that he had offered the Respondent a house of seven rooms in Eastleigh and was prepared to offer him a new house of six rooms in Parklands Avenue. p. 10, l. 32.

16. The Respondent deposed in the course of his evidence that he would lose his business altogether unless access remained from Government Road (i.e. through the demised premises) and that he required residential and business premises together because of his business, and also because his wife's health made it necessary that she should not be left alone. There was no proper road leading to the Parklands house and it was impossible to take a car right up to the house. Moreover it was about three miles from his business premises. A person who had lived in Government Road would not look at premises in Eastleigh. p. 17, l. 13.
p. 18.
p. 16, l. 20.
p. 19, l. 20.

17. The trial judge (M.C. Nageon de Lestang J.) held as follows :—

(A) The Respondent never became a statutory tenant. p. 28, l. 2.

(B) On the expiry of the period of 11 months after the original term the tenancy became a tenancy from month to month determinable by 15 days' notice in accordance with Section 106 of the Indian Transfer of Property Act. p. 28, l. 21.

(C) The variations in rent were the subject of agreement between the parties ; had the Respondent been holding as a statutory tenant he would have been paying one rent (i.e. the standard rent) at all times. p. 29, l. 20.

(D) The notice to quit in 1943 purported to terminate the tenancy "on or before the 30th September, 1943." It did not expire on the last day of the tenancy and therefore was invalid. p. 29, l. 36.

(E) Although by his reply and from his conduct in behaving as a statutory tenant and in paying the increased rent from time to time the Respondent accepted the notice a bad notice to quit could not be cured by acceptance unless, which had not happened in this case, the acceptance had amounted to a surrender. p. 30, l. 11.

The trial Judge held, further, that on the assumption that he was wrong in holding on the first issue that the Defendant's tenancy had not been lawfully determined and that consequently the Plaintiff was not entitled to possession :—

(A) A landlord seeking to recover "mixed premises" (i.e. premises used both for business and residential purposes) must satisfy the requirements of the law relating to both kinds of premises. This meant that he must require the premises both for residence and for business and he must offer in return premises suitable both for dwelling and business purposes. p. 33, l. 10.

(B) Reference to the lease and to the evidence showed that the premises in the present case were both let and used for business and residential purposes and it was clear that the Appellant sought to obtain possession of them for his own occupation as a dwelling house and that the alternative accommodation available was a dwelling house which was definitely unsuitable for the kind of business carried on by the Respondent. p. 33, l. 23.

p. 33, l. 33.

(c) A further reason why the Appellant could not succeed was that he himself occupied a "dwelling house" within the meaning of the Ordinance and an order for possession would confer upon him the right to occupy more than one dwelling house. This was expressly forbidden by Section 11 (2) of the Ordinance.

p. 33, l. 39.

The learned Judge therefore dismissed the Appellant's suit with costs as aforesaid.

p. 46, l. 19.

18. In the Court of Appeal, Nihill P. held that the precise nature of the contractual relationship between the parties was immaterial. He further held that :—

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p. 47, l. 20.

(A) Premises used for business and also let in whole or in part as a "dwelling house" were doubly protected by the Ordinance.

p. 47, l. 34.

(B) Good residential alternative accommodation was undoubtedly available for the Respondent but bearing in mind the business uses to which the premises in Government Road had always been put with the knowledge and approval of the Appellant it was impossible to maintain that a house in a residential suburb such as Parklands represented alternative accommodation reasonably equivalent as regards suitability in all respects.

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p. 47, l. 52.

(c) For the purposes of this appeal it was unnecessary for the Court of Appeal to decide whether the construction put on the wording of Section 11 (2) of the Ordinance by the trial judge was correct or not.

p. 51, l. 15.

Graham Paul C.J. held that under the terms of the Ordinance the letting in the present case was protected as a letting of a "dwelling house" in so far as it was used as a dwelling-house and as a letting of premises used for business in so far as it was so used. The Ordinance therefore applied to the whole of this distinct letting. He further held that before the Court below could make an order for possession it had to be satisfied

p. 51, l. 45.

(A) that the Appellant reasonably required the premises both for residential and business purposes and (B) that "alternative accommodation reasonably equivalent as regards rent and suitability in all respects was available." As regards the use of the premises for business purposes the Appellant had failed to establish either (A) or (B).

p. 52, l. 11.

Edwards C.J. concurred with these judgments and did not wish to add anything.

The appeal was therefore dismissed with costs.

p. 52, l. 40.

p. 53, l. 1.

19. On the 14th March 1949, the Court of Appeal granted the Appellant conditional leave to appeal to His Majesty in Council. Final leave was granted on the 12th January 1950.

The Respondent respectfully submits that this appeal should be dismissed with costs for the following amongst other

REASONS

- (1) Because the Respondent was a statutory tenant under the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940.

- 10 (2) Because the Appellant failed to satisfy the Courts below that he reasonably required the premises both for residential and business purposes.
- (3) Because the Appellant failed to satisfy the Courts below that alternative accommodation reasonably equivalent as regards rent and suitability in all respects was available.
- (4) Because an order for possession would have conferred upon the Appellant the right to occupy more than one dwelling-house at the same time and would therefore have been contrary to Section 11 (2) of the said Ordinance.
- (5) Because even if the Respondent was not a statutory tenant but was still at the time of the trial a contractual tenant his tenancy had never been terminated by a valid notice to quit.
- (6) Because the trial judge rightly held that except where there had been a surrender, a bad notice to quit could not be cured by acceptance.
- 20 (7) Because even if the Respondent received any valid notice to quit such notice was waived by a subsequent notice or notices from which a fresh tenancy could be inferred.
- (8) Because the decisions in both the Courts below were right.

S. P. KHAMBATTA.

DINGLE FOOT.

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