Privy Council Appeal No. 8 of 1950

Harnam Singh - - - - - - - - - - *Appellant*

v.

Jamal Pirbhai - - - - - - - - - - *Respondent*

FROM

THE EASTERN AFRICA COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1951

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD OAKSEY
LORD RADCLIFFE
THE CHIEF JUSTICE OF CANADA
(THE RIGHT HON. T. RINFRET)

[*Delivered by* LORD RADCLIFFE]

This appeal concerns the claim of the appellant to be awarded possession of a property known as Plot No. 2555, Government Road, Nairobi, which belongs to him but is in the occupation of the respondent. The Supreme Court of Kenya (Mr. Justice de Lestang) and the Court of Appeal for Eastern Africa (Sir Barclay Nihill, President, Graham Paul and Edwards, Chief Justices) have held that the appellant is not entitled to an order for possession and have dismissed his suit (Civil Case No. 207 of 1948). Their Lordships have come to a different conclusion.

The relevant facts are clearly stated in the judgment of Mr. Justice de Lestang. It is sufficient for the purposes of this appeal to say that the respondent, whose calling is that of an Auctioneer, has been in continuous occupation of the appellant's property (which it is convenient to refer to as "the premises") since the year 1931. The premises consist of a dwellinghouse with 4 or 5 rooms and a verandah, a separate block of servants' quarters, and a considerable area that surrounds the buildings in the form of a yard. At the back of the premises, on the side furthest from Government Road, is another property, Plot No. 2556, which belongs to the respondent and consists of a sale room, yard and store. Both properties have been regularly used by him for the purpose of his auctioneer's business, but the appellant's premises only to the extent of storing goods in the yard and under the verandah and of using the verandah itself as a place from which to conduct some part of his auctions.

It seems that the respondent's right to occupation of the premises has been renewed from time to time since 1931. At any rate on the 27th June, 1939, he was granted a lease in writing for a term of two years from the 1st April, 1939, at a monthly rental of Shs. 280. That lease contained a clause to the effect that if either lessor or lessee should desire to determine the then demise at the expiration of the term thereby granted, then either party should give to the other six months' previous notice in

writing of his intention so to do. In fact no such notice was given. Whatever might have been the legal consequence had nothing more happened, what did happen was that in January, 1941, the parties came to a new agreement, recorded in writing, under which the respondent was to continue in possession of the premises for a further term of 11 months as from the expiry of the lease at a reduced rent of Shs. 250 per month. The respondent has throughout maintained that the effect of that new agreement, when imposed upon that already existing, was to extend the term created by the lease for an indefinite period, determinable only on 6 months' previous notice. Neither of the Courts in Africa has accepted this interpretation. Nor do their Lordships. It must be taken therefore that as from 1st March, 1942, the terms created under these two successive instruments in writing had come to an end.

No further written arrangement was recorded. The respondent remained in possession, paying monthly rents of varying amounts; but, as the nature of his title to possession during this period has been a matter of controversy in these proceedings, it is convenient to defer dealing with it until reference has been made to the relevant legislation.

There has been a system of rent and mortgage restriction operative in Kenya at all material times. This was instituted by the Increase of Rent and Mortgage Interest (Restrictions) Ordinance 1940, an ordinance which, while adopting the general scheme and much of the phraseology of the comparable legislation of the United Kingdom, is not by any means the same measure as the Act of 1920 (10 & 11 Geo. V. c. 17) nor has it undergone the same frequent amendments as the scheme that has prevailed in this country. It has the effect of protecting the tenant of a dwellinghouse (defined by S. 2 of the Ordinance as " any house or part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwellinghouse and garden or other premises within the curtilage of the dwellinghouse ") from being subjected to an order for the recovery of possession or for ejectment except under the restrictions and subject to the conditions which are set out in S. 11 of the Ordinance. A tenant who holds over after his contractual tenancy has expired but in reliance upon the protection of the Ordinance thus acquires a form of statutory holding the obligations of which are laid down by S. 17, and he is usually referred to as a " statutory tenant ".

In the present suit the appellant took up the position, which is detailed in his amended Plaint, that the respondent had been a statutory tenant, at the latest, since the 1st April, 1943, and that his own action in seeking to recover possession complied with all the requirements which the Ordinance imposed upon a landlord in those circumstances. In fact, he wanted the premises for himself and his family to live in and was prepared to offer what was, he said, suitable alternative accommodation. The respondent's position on the other hand, as already mentioned, was based on the contention that he was in possession as a contractual tenant who had never received the notice to quit to which his tenancy entitled him. It is necessary therefore to decide what was the nature of the respondent's holding at the time when the suit was begun.

The trial Judge rejected the view that there was a statutory tenancy and came to the conclusion that as from 1st March, 1942, the respondent had been in possession as tenant from month to month, the tenancy being terminable by 15 days' notice expiring at the end of any month of the tenancy. This implication he imported from the terms of the Indian Transfer of Property Act. He recognised, no doubt correctly, that under a system of rent restriction such as prevailed here the legal significance of a tenant remaining in possession after the expiry of a fixed term may not be the same as it would be under a system which contains no such restriction: but he thought that the conduct of the parties since March, 1942, pointed conclusively to the creation of a contractual tenancy. The conduct to which he alluded was the fact that during the months that followed that date the parties had agreed upon varying amounts for the monthly rent, which did not rise to the sum of Shs. 280

(presumably the standard rent) until March, 1943. In his view, had there been a statutory tenancy, the respondent must have been paying " one rent, i.e., the standard rent at all times ".

Their Lordships have found it impossible to accept the learned Judge's conclusion that at the date of suit there was in existence something other than a statutory tenancy. They consider that as between these parties this point is disposed of by the letter which the respondent's solicitors wrote to the appellant on the 25th August, 1943, and which is referred to in para. 11 of the amended Plaint. The appellant had on the previous day served the respondent with one of several successive notices to quit, possession being required on or before the 30th September, 1943. To this the solicitors replied :—" Our client will not vacate the premises in accordance with your notice but will remain in occupation as a statutory tenant from the date of the expiry of the notice ". This statement is both explicit and conclusive. It is an unequivocal intimation that as from the coming 30th September, the respondent will claim no tenancy rights as a matter of subsisting contract but will thereafter treat himself as a tenant holding over under the protection of the Ordinance. In their Lordships' view that letter created an estoppel between the parties. The trial Judge declined to treat it in this way, partly because estoppel had not been specially pleaded and partly because the appellant had relied on his notice being a good and valid notice to quit. As regards the first ground it would be a mistake to invoke it in this case. The appellant's counsel made a full argument to the effect that the notice to quit as at the 30th September, 1943, had been " accepted " and that the respondent had thereby become a statutory tenant (which is only another aspect of the estoppel argument) and he contended that the respondent was " estopped " by subsequent conduct in paying increased rent under S. 9 of the Ordinance. Indeed the learned Judge found that he had " behaved as a statutory tenant " and paid rent as such. Moreover, the conclusion that the true position was that of a contractual tenancy from month to month was itself inconsistent with the defence of the respondent: and it would be unsatisfactory to allow a departure from the facts as pleaded on one side while treating the other as debarred by defect of pleading from raising an answer the substance of which was plainly in issue before the Court. As to the second ground, it is not a relevant consideration for this purpose, since there is nothing to suggest that after receiving the letter of 25th August, 1943, the appellant ever supposed that he had anything but a statutory tenant to deal with.

Their Lordships conclude therefore that the respondent must be regarded as a statutory tenant. This is not inconsistent with the views of the Court of Appeal in Africa, who were content to treat him as a statutory tenant for the purpose of their judgments, without deciding the question whether that was or was not his true legal position.

The next question is the substantial one in this appeal. For both the trial judge and the Court of Appeal have held that, in the case of premises such as these, which are used by the tenant both for residential and for business purposes, the effect of the Ordinance is to give the tenant what has been called " double protection ". The meaning of that may be expressed in the words of the trial judge :—" In my view a landlord who seeks to recover what I may for convenience call mixed premises must satisfy the requirement of the law relating to both kinds of premises, i.e., he must require the premises both for the purpose of residence and for business and he must offer in return premises suitable both for dwelling and business purposes ".

It must be observed that, if that is the law in Kenya, it imposes upon landlords of such premises very onerous conditions indeed as a prerequisite to the recovery of their possession. But in Kenya, though not in the United Kingdom except for the brief period, 2nd July, 1920, to 24th June, 1921, when S. 13 of the Act of 1920 was in force, business premises are within the scope of the Ordinance. This is brought about by S. 19, whereby the Governor in Council is given authority,

by Proclamation, to apply the provisions of the Ordinance 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 dwellinghouse in that area, district or place ". The section then goes on to declare that, on that being done, the Ordinance is to be read as though references to " dwellinghouse " " house " and " dwelling " included references to any such premises and that in its application to such premises the Ordinance is to have effect subject to certain prescribed modifications. These modifications include the substitution of a new paragraph (*d*) for paragraph (*d*) of subsection (1) of S. 11 of the Ordinance. As this paragraph is the material one for the purposes of the present claim to possession it will be convenient to set out the two contrasting paragraphs (*d*).

As applied to a dwellinghouse, it runs:—

> " (*d*) the dwellinghouse 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 ; "

As applied to premises used for business purposes, it runs:—

> " (*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 ; "

In the year 1941 a Proclamation of the Governor in Council applied the provisions of S. 19 to the Municipality of Nairobi.

In their Lordships' view the effect of this legislation was to create two independent codes applying to dwellinghouses on the one hand and to premises used for business purposes and the other specified purposes (which for brevity may be called " business premises ") on the other. In each the subject the possession of which is under statutory protection is a physical unit, either the dwellinghouse or the business premises ; and in the case of " mixed " premises, which have some connection with both descriptions, the true problem is to discover to which of the two categories such a property ought the more appropriately to be ascribed, since it is a contradiction in terms that it should be ascribed simultaneously to both. To concede double protection, in the sense that that phrase has been used by the Courts in Africa, is in reality to protect the same unit of property as if each of its two different aspects constituted a separate unit : but the Ordinance is not expressed in terms that admit of such a form of protection. Indeed their Lordships have found it impossible to see how this conclusion can legitimately be arrived at. The two alternative forms of S. 11 (1) (*d*) illustrate the contradiction which is involved in such a construction. If proceedings are taken to obtain possession of a piece of property, say Plot No 2555, Government Road, Nairobi, either the provisions of subsection (1) (*d*) as applied to a dwellinghouse will be the operative statutory provision governing the right to possession of that property or the different provisions of subsection (1) (*d*) as applied to business premises. But, since one is substituted for the other, they cannot both apply at the same time to the same property, nor can either provision both apply and not apply at the same time. The result is that a system of legislation that affords protection both to dwellinghouses and to business premises, though not in all respects in the same terms, necessarily involves a decision whether any particular property is a dwellinghouse or is business premises or is neither of these for the purposes of the Act.

It is obvious from a perusal of their judgments that the conclusion which the African Courts arrived at on this point was much influenced by the English decision *Tompkins v. Rogers* 1921 2 K.B. 94 : a decision which,

as they rightly appreciated, had a direct bearing on the problem before them, since it was given at a time when the United Kingdom system, like the Kenya system, protected business premises as such as well as dwelling-houses as such. But unfortunately *Tompkins* v. *Rogers* is not itself a case that has escaped criticism in the English Courts. It related to a claim for possession of a house which was kept partly as a private residence and partly as a boarding house for lodgers. The alternative accommodation offered by the claimant was a vacant dwellinghouse: he required possession of the house in question for private occupation, not for business. The justices before whom the case originally came decided that he was entitled to possession. This decision was reversed on appeal, the respondent not being represented. If the decision amounted to no more than a decision that the premises must be treated as business premises and not as a dwellinghouse for the purposes of the 1920 Act, it might provoke comment as an unusual decision on the facts of the case, but it would not otherwise call for comment. But if it was intended as a decision that a property could be at one and the same time a dwellinghouse and business premises for the purpose of the Act and protected as such under both heads, their Lordships are unable to regard this case as one which offers a satisfactory construction of the Act. Their reasons have been set out above. It is, if understood in this sense, inconsistent with the previous decision of *Waller* v. *Thomas* 1921 1 K.B. 541, in which a public house used as such but also as a dwellinghouse was held not to be entitled to protection as business premises within S. 13 of the same Act. When these two cases came to be considered together in *Colls* v. *Parnham* 1922 1 K.B. 325 it is clear that *Waller* v. *Thomas* (which had not been cited in *Tompkins* v. *Rogers*) was the decision that was preferred. Shearman J. spoke of *Tompkins* v. *Rogers* as a case that " presents great difficulties ". He also said that the Court had recently refused to follow its authority when another appeal came before them on a similar set of facts. Salter J., who had been a party to the decision in *Tompkins* v. *Rogers*, said of it that if the decision was that " if premises are used for business purposes they cannot be a dwelling house within the Act, I think myself that it cannot be supported ": a retraction which, at least, does nothing to dispel the uncertainty as to what it was that the Court in *Tompkins* v. *Rogers* did intend to decide. Moreover in the later case of *Richmond* v. *Dewar* 38 T.L.R. 151, *Tompkins* v. *Rogers* was spoken of as a decision that might well require reconsideration. For these reasons their Lordships are of opinion that the reasoning of that unsatisfactory case cannot be used as a guide in the present appeal.

It becomes necessary to decide therefore whether the premises are a dwellinghouse or business premises. It seems reasonably clear that they are a dwellinghouse. Since the statutory scheme requires a choice between the two categories of property it is unavoidable that some test such as that of dominant feature or user should be applied. The lease itself is of no assistance, because it sanctioned user for either purpose or both. But, structurally, the premises are residential; and such business user of them as has taken place was ancillary to the main user as living accommodation. In coming to this decision their Lordships have not found it useful to place reliance on English authorities. For the course of those decisions has been affected by the fact that one of the leading authorities, *Epsom Grand Stand Association* v. *Clarke*, 35 T.L.R. 525, was decided at a time when there was nothing in the statutory scheme that involved a choice between residential and business premises: and by the fact that, following that decision, S. 12 (2), Proviso (ii), of the Act of 1920 contained a legislative provision that the application of the Act to a house or part of a house is not to be excluded by reason only that part of it is used as a shop, office or for business purposes. The Kenya legislation contains no comparable provision.

There remain two questions to which an answer must be given in order to dispose of this appeal. The first question is whether the appellant has shown that " alternative accommodation, reasonably equivalent

as regards rent and suitability in all respects, is available." Their Lordships think that it would be wrong to decide against him on this point. Owing to the view that was shared by the Courts in Africa as to the existence of "double protection", no positive finding on this point is available. But there does not seem to have been any real controversy that, if by law the alternative accommodation to be considered was alternative residential accommodation and no more, the respondent had nothing to complain of. The President of the Appeal Court in fact speaks of "good residential alternative accommodation" being "undoubtedly available". It may seem curious at first sight that in considering what is an alternative "equivalent as regards suitability in all respects" it should be permissible to attend only to the residential aspect where the premises to be given up have been lawfully used both for residential and for business purposes. But this is a necessary consequence of the fact that the Ordinance protects a property, if a dwellinghouse, as a dwellinghouse, or, if business premises, as business premises. If it is as a dwellinghouse that the property qualifies for protection, then it must be in respect of its suitability as dwelling accommodation that the alternative accommodation is to be regarded.

The last point is that raised by subsection (2) of S. 11. This subsection runs as follows:—"Nothing in this section contained shall be deemed to permit a landlord to recover possession of a dwellinghouse 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 dwellinghouse at the same time." The trial judge expressed the view that this provision must constitute a bar to the appellant's action in any event. The Court of Appeal gave no decision on the point. It seems clear to their Lordships that, whatever its exact meaning may be, the provision has no application in this case. The word "dwellinghouse" is given a special statutory meaning by S. 2 of the Ordinance, and there is no reason to suppose that it is used in any different sense in either of the contexts in which it appears in this subsection (2). On the contrary, everything points to its being used in the statutory sense. But the appellant's present living accommodation is not a "dwellinghouse" in this sense, for it consists of some rooms in a factory of which he is himself the owner. This is not a "house or part of a house let as a "separate dwelling", for the statutory scheme has no concern with properties of which there is neither landlord nor tenant. Therefore an order for possession, if made in the present proceedings, could not amount to giving to the appellant the occupation of or the right to occupy more than one dwellinghouse at a time.

Their Lordships do not think that, in view of this, it would be appropriate for them to try to give any general exposition of the meaning of this, perhaps ill-drafted, subsection. It does seem an unavoidable conclusion that, if read according to the strict letter, it would be reduced to an absurdity. For it would confine the right to take proceedings for possession to the homeless man and the man who, like the appellant, happened to be in occupation of something that did not come within the statutory definition of a dwellinghouse. And this, in face of the numerous and often weighty grounds for the resumption of possession which are listed in the various subheadings of S. 11 (1). It is difficult to suppose that such a consequence can have been what the makers of the Ordinance intended. Their Lordships have noted however what is said on this matter by the learned President of the Court of Appeal at the end of his judgment and what has been said on a previous occasion in the case *Tara Singh* v. *Harnam Singh*, XI. E.A.C.A. 24: and they are anxious to say nothing that would discourage the Courts in Africa from working out on the spot either a construction of the subsection, if one is possible, that will not tie the Courts too closely to a strict adherence to its letter or a procedure (such, perhaps, as the suspension of orders for possession for periods that will allow landlords to bring themselves within the subsection) that will rescue the enactment from the suspicion of patent absurdity.

Their Lordships do not consider that it would be satisfactory for them to deal with the final question, whether, it being given, as they have found, that the appellant is in all other respects entitled to his order for possession, it would be "reasonable" to make such an order. That question ought to be dealt with in the Supreme Court of Kenya at Nairobi. But it is only fair to add that, when this question comes to be considered by a Judge in that Court, he should not, in their Lordships' opinion, take into account the circumstance that the alternative accommodation offered is not, or may not be, as convenient for the respondent's business as the premises themselves. Considering the situation of his adjoining property, hardly any other property could be. But to take that consideration into account on the question of reasonableness would be in reality to revive in another form the arguments as to double protection and equivalent suitability which have already been disposed of in this appeal.

For these reasons their Lordships will humbly advise His Majesty that the appeal be allowed and that (1) the Order of the Supreme Court dated 5th November, 1948, dismissing the appellant's claim with costs and (2) the Order of the Court of Appeal for Eastern Africa dated 9th March, 1949, dismissing his appeal with costs be reversed; that the proceedings be remitted to the Supreme Court in Kenya to be concluded on the basis of what has been said in this Opinion, the Supreme Court to make an order for possession, if the Court consider it reasonable so to do; and that the respondent should pay to the appellant his taxed costs of the appeal to the Court of Appeal for Eastern Africa and of the proceedings in the Supreme Court up to the present date. The respondent must pay the appellant's costs of this appeal.

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In the Privy Council

HARNAM SINGH

v.

JAMAL PIRBHAI

DELIVERED BY LORD RADCLIFFE

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