Privy Council Appeal No. 11 *of* 1950

Ngara Hotel Limited and Others - - - - - *Appellants*

v.

Rajabally Kassam Suleman and Others - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND APRIL, 1952

Present at the Hearing:

LORD NORMAND
LORD RADCLIFFE
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD ASQUITH OF BISHOPSTONE]

This is an appeal by certain of the defendants in the suit from a judgment (of 14th March, 1949) of the Court of Appeal for Eastern Africa. This judgment affirmed a judgment (of 27th and 29th July, 1948) of the Supreme Court of Kenya which granted to the respondents—who were plaintiffs in the action—possession of certain business premises known as Ngara Hotel, Salim Road, Mombasa.

The suit was instituted (by plaint 30th September, 1947) by one Kassam Suleman Damji, the owner of the premises in question. The said Damji (hereinafter referred to as "the deceased" or "the landlord") has since the institution of proceedings died and is represented by the respondents R. K. and B. K. Suleman as his legal personal representatives. The defendants in the suit, at the time when it came on for hearing before the Court of first instance, were eight persons, hereinafter referred to as "defendant 1" "defendant 2" and so on. Of these, Nos. 4 to 8 inclusive were dismissed from the suit by the learned trial judge as having been improperly joined: with the result that of the original defendants only three—"defendants 1, 2 and 3"—are appellants in the present appeal.

The deceased by an agreement of tenancy dated the 24th April, 1946 (page 54 of the Record) agreed to let and defendants 2 and 3 (the defendants Jessani and Patel) agreed to take on lease, the premises in question as from the 1st April, 1946, for a period terminable by either party giving one calendar month's notice in writing, at a rent of 500 shillings a month payable in advance. The said agreement contained a covenant by the tenants that they should not "assign, underlet or part with the possession of any part thereof without the written consent of the landlord" viz. the said deceased, and there was a proviso for re-entry on the breach or non-observance of this amongst other covenants or conditions.

It is conceded that these defendants did in fact violate this covenant, and did so on at least three occasions as will appear hereafter. But the appellants set up a number of grounds for inviting the court to say that the landlord's prima facie right of re-entry was in the circumstances of this case barred.

Their Lordships will deal *first* with the admitted breaches of covenant, and *secondly* with the grounds on which it is argued that the landlord is precluded from asserting his right of re-entry.

(1) The findings of fact of the learned trial judge on the first point appear at the foot of page 23 of the Record. The passage in question reads as follows:—

> "In my view there were three purported assignments of the lease viz.: on the 24th November, 1946, when the original tenants (*viz. defendants* 2 *and* 3) sold the hotel as a going concern to the 4th and 5th defendants: the second on the 2nd March, 1947, when these two defendants sold to the 6th, 7th and 8th defendants; and finally on the 23rd June, 1947, when it is common ground that the Ngara Hotel Limited" (*defendant* 1) "was formed and took over the hotel as a going concern. The consent of the landlord" adds the learned judge "was in none of these cases asked for or obtained."

Ex concessis these three transactions and each of them amounted to assignments, and the case has been argued throughout on that footing; but apart from concessions, the transactions could not have amounted to less in each case than a "parting with possession" within the covenant.

(2) In these circumstances the next point which their Lordships have to consider is whether as the defendants contended any or all of these admitted and admittedly unlicensed assignments took place in circumstances which precluded the deceased and his successors from relying on them as grounds for an order for possession. Four reasons were and are advanced by the appellants in support of this contention:—

(*a*) It was said that the right to possession had been barred by a waiver arising from acceptance of rent by the landlord (or his representatives) after, and with the knowledge of, the unauthorised assignments, and in respect of periods subsequent thereto.

(*b*) It was said that an order for possession could, apart from this, not properly be granted unless all the requirements of section 111 of the Indian Transfer of Property Act, 1882 as amended by amending legislation passed up to 1907, and made applicable (subject to that but to no later amendments) to Kenya, had been complied with: and that in this case a material requirement of that provision was not satisfied.

Two other points were taken in the courts below which their Lordships think it convenient to refer to only to dismiss them before dealing with the two points just indicated. (*c*) It was suggested that the defendants were protected by the Rent Restrictions Ordinance applicable to Kenya. This point was not pressed, nor was it easy that it should be. The provisions of the Ordinance only protect (i) a tenant, and (ii) as their Lordships read it, a tenant who is in occupation.

Of the persons who have invoked the protection of these provisions, the 1st defendant—the limited company—was at the material time in occupation but was not a tenant; and the 2nd and 3rd defendants at that time, if tenants, were not in occupation.

Their Lordships consider the decision of the two courts a quo right in rejecting this contention which in any case was but faintly argued.

(*d*) It was also suggested that the Courts (Emergency Powers) Ordinance 1944 of Kenya barred the remedy by way of a claim for an order for possession. The material provision reads as follows:—

> S. 3 (2) "Subject to the provisions of this Ordinance a person shall not be entitled, except with the leave of the appropriate court—
>
> (*a*) to proceed to exercise any remedy which is available to him by way of—
>
> (ii) the taking of possession of any property;
>
> (iv) re-entry upon any land;"

It is true that no leave was sought or obtained under this provision. This point had not been pleaded or argued before the court of first instance. It seems to their Lordships very doubtful whether those of the provisions

of the Ordinance which purport to apply to "the taking possession of any property" apply to anything but physical re-entry or recaption by way of self-help. It would be indeed strange if a landlord entitled, otherwise, to an order for possession, should have to obtain two distinct leaves or consents, one from the Rent Control Board, under the Rent Restrictions Ordinance, and another from the "appropriate court" under the Courts (Emergency Powers) Ordinance 1944. But however that may be, the appellants, while not formally abandoning the point, elected to rest their case substantially on reasons (*a*) and (*b*) above. To these points, accordingly, their Lordships revert.

(*a*) And first as to the alleged waiver of forfeiture. The English law on this subject is well-settled. The breach of a covenant in a lease, upon which, under the terms of the lease, the landlord is entitled to re-enter, makes the lease voidable at his option if and when it becomes known to him. But if, after he has acquired the necessary knowledge, he affirms the tenancy, he cannot afterwards avoid it; and he affirms it, if with that knowledge, he accepts rent in respect of a period subsequent to the breach or levies distress for such rent or by some other unequivocal act treats the lease as still subsisting. Until 1882 he was entitled, if in the circumstances he desired to avoid the lease, to re-enter physically, or to issue a writ in ejectment, without previous notice. The Conveyancing Act, 1881, required him as a precondition of doing either, in the case of the breach of certain covenants, to give a notice specifying the breach and calling on the lessee to remedy it. It was not until the Law of Property Act, 1925 (section 146 (1)), that a similar requirement was extended to breaches of a covenant not to assign, underlet or part with possession of the premises let. At common law a writ could be issued without preliminaries.

The relevant statutory provisions in this matter which prevail in Kenya are as has already been indicated contained in the Indian Transfer of Property Act, 1882, as amended up to but not beyond 1907. The relevant section is section 112, but since section 111 is relevant to the second of the outstanding points, and since section 111 is in any case organically related to section 112, it may be convenient to set out both sections together at this stage:—

"Section 111.

A lease of immovable property determines—(*g*) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease.

Section 112.

A forfeiture under Section 111, clause (*g*) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver."

The provisions of section 112 manifestly reproduce, in essentials, the law of England as to waiver. The question in each case is whether the lessor with knowledge of a breach of covenant entitling him to re-enter, accepted rent due in respect of a period subsequent to such breach or by some other unequivocal act elected to affirm the tenancy. There is in their Lordships' opinion ample warrant for the view expressed on this issue by the learned trial Judge to the effect that although the landlord accepted sums tendered as rent in respect of periods subsequent to each of the first two unauthorised assignments, he did not have sufficient

knowledge of the existence, nature or extent of the breaches which had occurred for his acceptance to constitute a waiver thereof. Indeed it is manifest that every possible attempt was made by the original lessees and the parties in whose favour they had parted with possession, to mislead the landlord, to withhold information from him, to evade enquiries, and to bemuse him with a succession of mutually contradictory stories, It required some audacity on the part of persons who had so behaved, to say to the landlord "you cannot avoid the lease because you knew all the material facts"; the very facts which they had been at such successful pains to suppress.

These considerations apply to the first two "assignments"; but as regards the third—the assignment which *ex concessis* took place when the Ngara Hotel concern was incorporated as a limited company—the plaintiffs do not need to rely on the landlord's ignorance of the facts, since no rent falling due in any period after the landlord came to know of this assignment was accepted; except indeed rent which, by virtue of the statutory provisions applicable, can be accepted without operating as a waiver, viz., rent accepted after the landlord has taken steps to "institute a suit to eject the lessee on the grounds of forfeiture". No rent was accepted which was due in respect of any period after the third unlicensed assignment before the suit was instituted.

This being so, it appears to their Lordships that the alleged waiver has not been established.

It was indeed argued that this conclusion could be avoided by the following contention:—It was said that if a covenant not to assign without written consent had been waived once, the covenant itself is wholly waived, and the lessee free to disregard it and assign without licence as often as he liked from that time forward. This construction assumes that *Dumpor's* case (1 S.L.C., p. 35) (and indeed an extension of the principle applied in that case) is good law in Kenya. Few cases have "lived so dangerously and lived so long" (to quote Lord Buckmaster's phrase (in *Donoghue* v. *Stevenson* 1932 [A.C.] 562 at 570) about *George* v. *Skivington*) as *Dumpor's* case, or during its life incurred such continuous disparagement, until it was swept away by the operation of 22 and 23 Vic. c. 35 and 23 and 24 Vic. c. 38, now replaced by sections 143 and 148 of the Law of Property Act, 1925. Nevertheless their Lordships were invited to hold not only that this discredited authority is part of the Common Law of Kenya Colony today, but that it is to apply there in an extended form whereby a licence once given and a breach once waived would be equiparated; and the second process should be held to destroy the covenant *in toto* as the first at one time was held to do. Their Lordships feel unable to respond to this invitation.

(*b*) There remains the point that the provisions of section 111 of the Indian Transfer of Property Act, 1882, have not been complied with and that in these circumstances the lease was not effectively determined by forfeiture. It is, as has been more than once said, admitted that a breach of covenant *prima facie* entitling the landlord to determine the lease had occurred but reliance is placed *inter alia* on the concluding two lines of the section, which provide that the lessor must further "do some act showing his intention to determine the lease". It is contended that no such act was done.

In England, in the particular case of a covenant not to assign, underlet or part with possession, until the Law of Property Act the issue of a writ, without more, was held sufficiently to attest the landlord's intention to re-enter. It is only since and by the provisions of the Act of 1925 that this act has been insufficient, and a notice has become necessary (Law of Property Act, s. 146).

In Kenya the position is governed by the Indian Transfer of Property Act, 1882, as amended up to 1907. The Indian decisions as to the effect of these statutory provisions, though not technically binding on the courts of Kenya or Eastern Africa or *a fortiori* on this Board are of considerable persuasive authority, and deserve respectful consideration. Their effect

may be summarised as follows:—Until 1918, there were decisions of the courts of Calcutta and Madras to the effect that physical re-entry or the issue of a writ was not an act sufficiently showing the landlord's intention to determine the lease. There must be something different and earlier. The reasoning was that the landlord must possess a cause of action entitling him to possession before he issues his writ; not simultaneous with, and in part constituted by its issue; and that the issue of the writ could therefore not itself be relied on as perfecting his cause of action by showing an " intention to determine ".

Among Indian decisions some support this proposition, and some negative it. There have been two schools which may be loosely called that of Calcutta and Madras, and that of Bombay. (*a*) Among decisions following the first school are *Anandamoyee* v. *Lakhi Chandra Mitra* 1906 I.L.R. 33 Cal. 339; *Venkatramana Bhatta* v. *Gundaraya* 1908 I.L.R. 31 Madras 403; *Nowrang Singh* v. *Janardan Kishor Lal Singh* 1918 I.L.R. 45 Cal. 469. In these cases the courts held that the mere institution of a suit for possession cannot be considered as an " act showing an intention of the landlord to determine the lease ". (By subsequent amending legislation in 1929, which applied to India, a requirement of written notice before a writ was expressly made necessary. But this provision was not extended to Kenya and can be ignored.)

(*b*) Their Lordships now turn to the Indian authorities which favour the opposite view, those of the " Bombay School ". A Bombay decision of 1918 (*Isabali Tayabali* v. *Mahadu Ekoba*) (1918 I.L.R. 42 Bombay 195) led the way. This case decides that the mere institution of a suit for possession without more is an " act showing the landlord's intention to determine the lease ". This decision was considered by a Calcutta Court in 1931 (1931 I.L.R. 58 Calcutta p. 1359) which in effect recanted the earlier Calcutta and Madras decisions and approved that of Bombay, notwithstanding an intervening decision in Allahabad (1925 I.L.R. 47 Allahabad 348) which had affirmed the original Calcutta and Madras view. It is true that this palinode is strictly *obiter* since the court found that the case fell outside the Transfer of Property Act altogether; but it is nevertheless significant.

Their Lordships, if it were necessary to choose between the two, would prefer the view of the Bombay court, approved by a Calcutta court on second thoughts, to the older decisions of Calcutta and Madras. The view expressed in Bombay had been accepted in England till modified by statute; and the analogy of cases of fraud supports it. For when a contract is induced by fraudulent misrepresentation the plaintiff can exercise his election, and perfect his right, to rescind, by the same act which initiates proceedings—the issue of a writ. However, on the facts of the present case the same result can be reached by a simpler route: for it would seem that the act of applying to the Rent Control Board for leave to take proceedings for possession was clearly an act " showing the landlord's intention to determine the lease ".

All the grounds of appeal therefore fail, and their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

(15144) W... 8[illegible]6—1 [illegible] 5/52 D.L. P[illegible] 3

In the Privy Council

NGARA HOTEL LIMITED AND OTHERS

v.

RAJABALLY KASSAM SULEMAN
AND OTHERS

DELIVERED BY LORD ASQUITH OF
BISHOPSTONE

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