Privy Council Appeal No. 24 *of* 1954

Ismail Mohamed Chogley - - - - - - - - *Appellant*

v.

Jagat Singh Bains - - - - - - - - - *Respondent*

FROM

THE EASTERN AFRICA COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JULY, 1955

Present at the Hearing:

LORD OAKSEY
LORD RADCLIFFE
LORD COHEN
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD RADCLIFFE]

This appeal from a judgment dated the 14th May, 1953, of the Court of Appeal for Eastern Africa arises out of proceedings on the part of the respondent to obtain possession from the appellant of certain premises in Nairobi consisting of a bakery and shop on plot No. 230/3 Race Course Road.

The respondent is the owner of the premises in dispute and it is common ground that at all times material to this appeal they were capable of being within the protection of the Increase of Rent (Restriction) Ordinance, 1949 (hereinafter referred to as "the Ordinance"). The dispute turns on the question whether that Ordinance accords to the appellant, who has been in occupation of the premises since the autumn of 1942, the right to retain possession against the respondent.

The latter has been trying to recover possession since December, 1946. It is convenient at this stage to make a short statement as to the original letting of the premises and the previous proceedings concerned with their recovery. As will be seen later, those proceedings have some bearing on the matters to be considered in this appeal.

By a written agreement dated the 10th June, 1941, the respondent leased the premises to one Sidi Bilal for five years from 1st July, 1941, at a monthly rent. There was no restriction upon sub-letting. Sidi Bilal went into possession and carried on the business of a baker in the premises until September/October, 1942, when he went to India leaving the appellant in occupation and in charge of the business. It appears that some time later the appellant took over the business and ran it on his own account.

In December, 1946, the respondent sued Sidi Bilal and the appellant for possession of the premises, on the ground that the lease had expired by effluxion of time. These proceedings were begun in the Resident Magistrate's Court at Nairobi: the first outcome was that they reached the Court of Appeal for Eastern Africa, which decided that the written Agreement was void for want of registration, pursuant to Section 107 of the Indian Transfer of Property Act, 1882, and ordered a retrial before the Resident Magistrate. The second outcome was that, after the Magistrate on retrial had made an order for possession, the Supreme Court of Kenya,

on appeal, set this order aside by Judgment dated the 19th November, 1948, holding that Sidi Bilal was entitled to a yearly tenancy which had not been lawfully determined and that the appellant was his licensee; and on 11th April, 1949, the Court of Appeal dismissed an appeal by the respondent from this judgment.

By a letter dated the 1st December, 1948, the respondent's solicitors gave notice on his behalf to Sidi Bilal determining the latter's tenancy on 1st July, 1949, in the form appropriate to a notice to quit for a tenant from year to year. This notice was thus given after the Supreme Court judgment and before the judgment of the Court of Appeal.

By a sub-lease in writing dated the 25th January, 1949, Sidi Bilal sub-let the premises to the appellant from 1st January, 1949, up to and including 1st July, 1949, " determinable thereafter as the law shall permit." Thus the sub-lease was granted after the notice to quit had been given, but before the expiry of the period of the notice: after legal proceedings for possession had been taken by the respondent against the appellant, but before the legal proceedings were begun which are the subject of the present appeal. These legal proceedings were begun on 4th February, 1950, by an application in writing by the respondent to the Rent Control Board at Nairobi, asking for an order against Sidi Bilal and the appellant for recovery of possession of the premises and consequential relief. Sidi Bilal did not defend the proceedings and his part in the matter does not require further notice.

To understand the course of the suit up to the present appeal to their Lordships it is necessary at this stage to make some reference to the provisions of the Ordinance, upon the true construction and effect of which must turn the questions to be decided in the appeal.

The Ordinance enacts a system of rent control for Kenya upon the general lines that have become familiar in the system of the United Kingdom. The Kenya system did not originate with the Ordinance, which itself repealed an earlier Ordinance of 1940 and seven supplementary and amending Ordinances made since that date. The Ordinance now in question came into operation on 6th September, 1949; it has been amended more than once during the currency of the present proceedings, but the citations from it are from the text as originally enacted, unless otherwise stated.

The Section of which the effect is directly in dispute is Section 16, entitled " Restriction on Right to Possession ". The purport of Subsection (1) of this Section is first to impose a general prohibition on the right of a landlord to obtain from the Court an order for recovery of possession of any premises to which the Ordinance applies or for the ejectment of a tenant therefrom, and then to define a series of circumstances or occasions the existence of which will nevertheless entitle the landlord to obtain an order.

There is nothing in the Section to create rights to resume possession against contractual tenants unless those rights exist at common law; its aim is to prescribe the conditions under which such rights, if they exist, can be enforced. The circumstances or occasions so defined are very various, some depending on a failure of the tenant to observe conditions of the tenancy, some depending on objective facts bearing on the state or user of the premises, some depending on the landlord's own needs or claims. Subsection (1) (i) of Section 16 contains the following definition of one of these circumstances:—

> " (i) the tenant has, without the consent in writing of the landlord, at any time betwen the 1st day of December, 1941, or the prescribed date, whichever is the later, and the commencement of this Ordinance assigned or sub-let the whole of the premises, the remainder being already sub-let; or, at any time after the commencement of this Ordinance, has, without the consent in writing of the landlord, assigned, sub-let or parted with the possession of the premises or any part thereof.

A landlord who wishes to obtain an ejectment order on this ground may have the option of obtaining a similar order against the occupier or having the occupier as his direct tenant.

* * * * * * *"

Section 5 of a later Ordinance of 1949 added to this subsection the words "or sub-let part of the premises" before the words "the remainder being already sub-let"; thereby correcting what seems to have been an obvious slip in the original text.

The remainder of Section 16, after Subsection (1), contains a number of separate provisions bearing upon the circumstances in which or the conditions under which an order for possession can be obtained. Of these it is only necessary to set out two.

"(2) In any case arising under Subsection (1) of this Section no order for the recovery of possession of premises shall be made unless the Central Board, the Coast Board, or the Court, as the case may be, considers it reasonable to make such an order."

"(6) An order against a tenant for the recovery of possession of any premises or ejectment therefrom under the provisions of this Section shall not affect the right of any sub-tenant, to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under the provisions of this Section or be in any way operative against any such sub-tenant."

It is in the light of these provisions and of other provisions that will be noticed later that the respective claims of the respondent and the appellant have been dealt with by the Courts in Kenya. The course of decision has been, briefly, as follows:—

(1) The Board of Control gave judgment on 29th January, 1951, holding the respondent entitled to an order for possession. In their view the appellant was not entitled to any protection under Section 16 (6) because (*a*) the landlord not having given his consent to the sub-letting, the premises had not been "lawfully sub-let" to the appellant within the meaning of the subsection, and (*b*) the sub-letting had been made after "proceedings for recovery of possession . . . were commenced", since the notice to quit, which was given before the date of the sub-lease, ought to be regarded as the commencement of proceedings for this purpose. As the landlord had given no consent to the sub-letting, Section 16 (1) (i) had been satisfied.

(2) The Supreme Court of Kenya gave judgment on 9th June, 1952, affirming the Board's order for recovery of possession but allowing the appellant an appeal against part of the consequential relief which related to liability for mesne profits. The Court (Bourke, J.) rested its decision on the ground that the premises had not been lawfully sub-let to the appellant in the absence of any consent on the part of the landlord. No decision was given on the issue whether the sub-letting had been made before proceedings for recovery of possession were commenced, since that question would be of no moment if the sub-letting were not lawful anyway.

(3) The appellant then appealed to the Court of Appeal for Eastern Africa. His appeal was dismissed by the judgment of that Court delivered on 14th May, 1953. The grounds on which the Court based its decision were different from those which had supported the decisions in the lower Courts. While it was held that the sub-letting was not unlawful for the purposes of subsection (6), since it was not made in breach of any covenant against sub-letting or any legal prohibition of such a sub-letting, and it was further held that the notice to quit of December, 1948, could not be treated as a commencement of proceedings, the Court was disposed to favour the view that the sub-letting was nevertheless made after the commencement of proceedings, because the original proceedings which were begun in 1946 had not been finally disposed of at the

date of the sub-lease. But the main ground on which the judgment rested was that the "occupier" referred to in the second paragraph of Section 16 (1) (i) could be a person who was at the same time a lawful subtenant within the meaning of Section 16 (6) and that there was nothing in the provisions of the latter subsection or in any other of the various sections of the Ordinance which prevented the Court from making an order for possession against such a sub-tenant, if the landlord could prove that the conditions of Section 16 (1) (i) had been satisfied in the sense that the sub-letting had taken place without his written consent.

This view of the matter, which has been referred to as the main ground of the Court of Appeal's judgment, commends itself to their Lordships as being clearly right and it is the one upon which their own advice to Her Majesty will rest. A decision upon it adverse to the appellant renders it unnecessary to consider the further questions which bear upon the application of the words of Section 16 (6) to this situation. Of such questions, one, the meaning of "before proceedings . . . were commenced," was argued on the appeal, but their Lordships express no view upon it. The other, whether the premises were "lawfully sub-let", was not argued on the appeal, because the respondent's counsel did not desire to contest the decision of the Court of Appeal on the point, a decision which is certainly supported by more than one judgment in Courts outside Kenya which have had to deal with analogous provisions in other rent control legislation. Upon this too their Lordships express no view. For the purpose of this judgment, therefore, they assume, without deciding, that the provisions of Section 16 (6) are applicable to the appellant's case and that the premises were "lawfully sub-let" to him in January, 1949.

Let them be so. It is still difficult to see why the terms of the second paragraph of Section 16 (1) (i), a paragraph which has been spoken of as "the option clause", do not govern the situation and authorise the making of an order against him. This option clause appears to be peculiar to the legislation of Kenya and does not find a counterpart in the legislation of the United Kingdom. But what it envisages is that there has been a sub-letting or assignment of controlled premises, without the written consent of the landlord, within the dates and under the conditions that are specified : and that the landlord may choose between having an order for possession against the actual occupier at the same time as he obtains one against his own tenant and having the actual occupier remain on in possession as his direct tenant for the future. As there was a sub-letting of the whole of the premises without the consent and the premises were in the appellant's occupation the respondent's right to ask for an order against him would seem to be clearly established, subject to any point arising as to "reasonableness" under Section 16 (2).

The argument on which the appellant seeks to rely in resisting this claim consists of two propositions interdependent upon each other. First, he says that there is a conflict between the option clause and Subsection (6) of Section 16, wherever there is found to exist a "lawful sub-tenant" within the meaning of that subsection, and that the conflict can only be reconciled by treating such "lawful sub-tenants" as a class whose rights to possession are not to be subject to the exercise of any landlord's option under the option clause. Secondly, he says that the true meaning of Section 16 (6), when read in conjunction with the meanings attributable by Section 2 to such words as "let", "tenant" and "tenancy", and with Section 23 (3), a subsection which prescribes that "where the interest of a tenant of any premises is determined, either as the result of an order for possession or ejectment or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Ordinance, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued", is that a landlord cannot rely on a sub-letting without consent by his tenant as the ground for an order for possession against a "lawful sub-tenant". If he wishes to get him out

under Section 16 (1) (i) he must prove against him a separate ground of possession consisting of a new sub-letting or assignment by him without the required consent.

The second branch of this argument attributes to a provision such as Section 16 (6) a very far-reaching effect. It is not a construction which their Lordships are prepared to adopt. This is not the first occasion upon which it has been necessary for Courts of Law to consider the significance of such a provision when related to the rest of a rent control scheme of legislation, and the current of authority is not in favour of the appellant's argument. If that argument receives some support from *Ward* v. *Larkins*, 130 L.T. 184, it is directly in conflict with *Hylton* v. *Heal*, 1921 2 K.B. 438, which contains illuminating judgments by Rowlatt and Bailhache, JJ., on this point, with *Inniskillen* v. *Bartley*, 147 N.I.L.R. 177 (C.A.), and with the decision of the Court of Appeal in England in *Regional Properties Ltd.* v. *Frankenschwerth & Chapman*, 1951 1 K.B. 631. The purport of those latter decisions, in so far as they bear upon the present issue, is to treat a provision such as Section 16 (6) as being in essence procedural. It secures to a "lawful sub-tenant" the certainty that an order for possession or ejectment against his immediate sub-lessor will not destroy his own right to possession by destroying the tenancy out of which it arises and that, accordingly, a similar order must be made against him directly, if he is to be put out; and before such an order can be made against him, the Court is bound to consider any circumstances which may make it reasonable that he personally should not be deprived of possession. But these authorities are against the view that Subsection (6) has any such effect as to give the "lawful sub-tenant" a right to possession independent of the circumstances, such as sub-letting without consent, which have brought about the order for possession against the landlord's direct tenant, so that, to get possession against him, the landlord must find a new ground of possession.

Their Lordships do not think it necessary for the purposes of this decision to arrive at any final view on the question whether Section 16 (6) gives the "lawful sub-tenant" any further right than that of being heard as to "reasonableness" under Section 16 (2). It would be unsatisfactory to do so, in any event, unless it were possible to consider at the same time what is the precise meaning of a "lawful" sub-letting in this connection; and that has not been an issue in the present appeal. Even if the subsection does not secure to the sub-tenant anything more than the assurance that he is not to be bound by an order for possession made against his own lessor, it cannot be said that such an assurance is not worth legislating for if the ground upon which possession is obtained against the direct tenant is also to serve as a good ground of possession against the sub-tenant once he has been brought before the Court. For regard must be paid to the fact that, under English procedure, the writ of possession which issues upon a judgment for possession is a "real" writ and in effect is a Court order in favour of the plaintiff which is valid against possessors generally. Their Lordships were rightly reminded that there are significant differences in this respect between English procedure and Kenya procedure (which is derived from the code of British India). But for all that it would be deliberate blindness not to recognise that Section 16 (6) of the Ordinance is a reproduction of an English model—see, for instance, Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Section 5 (5)—and its purport must be understood in the light of its English origin.

However that may be, their Lordships are satisfied that there is nothing in Section 16 (6) which is capable of displacing the ostensible meaning of the option clause. And, if that is so, the appellant's case must fail. First, the range of Subsection (6), however wide, cannot extend beyond a saving in favour of a sub-tenant in respect of an order for possession made against a tenant. Such a saving does not bear upon what is in question under the option clause, which is the making of an order against the occupier himself in supplement to any order made against the landlord's direct tenant. Secondly, the option clause is a specific statutory

power annexed only to subhead (i) of the various subheads which are listed in Section 16 (1). It is obviously intended to deal with the particular situation which arises when the landlord's consent has not been obtained to a sub-letting, assignment or parting with possession and, whether a sub-tenant who has got in in those circumstances is truly a "lawful" sub-tenant or not, it would be an impossible method of construction to allow the general saving which Subsection (6) makes in respect of all orders for possession obtained under any subhead of Subsection (1) to overrule the particular and explicit option which the Ordinance confers on a landlord in a case which falls under subhead (i).

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

(39413) Wt. 8064—69 100 8/55 D.L.

In the Privy Council

ISMAIL MOHAMED CHOGLEY

v.

JAGAT SINGH BAINS

DELIVERED BY LORD RADCLIFFE

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