12, 1956

# In the Privy Council.

No. 31 of 1954.

## ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA



BETWEEN

MAHERALI HIRJI AND CO. and POPAT JADAVJI (*Respondents*) APPELLANTS

AND

SHAH RAMJI KANJI ... ... ... (*Applicant*) RESPONDENT.

## CASE FOR THE APPELLANTS

RECORD

1.—This is an appeal from an Order of the Court of Appeal for Eastern Africa (Worley v.-P., Briggs, J.A. and Lowe, J.), dated the 22nd December 1953, reversing the judgment of the High Court of Tanganyika (Mahon, J.), dated the 9th December 1952, which allowed an appeal from the Order of the Moshi Township Rent Restriction Board, dated the 10th September 1952. p. 24 p. 11 p. 8

2.—The action concerns the right of the Respondent to recover possession of certain premises on Plot No. 10, Block H., Section III, Moshi, Tanganyika (hereinafter called " the said premises ") of which the Appellants claim to be contractual tenants. The issue of the contractual tenancy was not expressly dealt with by the said Board and the decision of the Board was reversed by Mahon, J. on the ground that the Respondent has failed to tender any evidence showing the determination of the contractual tenancy granted to the Appellants and had therefore failed to establish any right to possession of the said premises independently of the provisions of the Tanganyika Rent Restriction Ordinance 1951 (hereinafter called " the said Ordinance ") restricting such right. The Court of Appeal for Eastern Africa reversed the decision of Mahon, J. first on the said ground that the Board must be presumed by the fact of making the Order it did to have been satisfied that there has been a determination of the contractual tenancy notwithstanding the absence of evidence to this effect and secondly on the ground that Counsel for the Appellants did not take the point p. 12, ll. 20–42 p. 21, l. 41–p. 23, l. 5

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before the said Board that the contractual tenancy had not been determined and the Appellants were thereby estopped from so asserting at a later stage. The principal questions arising on this appeal are whether the Court of Appeal rightly so decided.

3.—The facts material to this appeal may be shortly summarised as
p. 6, ll. 11–13 follows. The first Appellant is a partnership in which the sole partners
p. 7, ll. 22, 23 are Mrs. Maherali Hirji and the second Appellant Popat Jadavji. The second Appellant has at all material times been in occupation of the said
p. 6, l. 20 premises and has carried on there the business of a petrol station on behalf
p. 1, l. 21 of the first Appellants who are contractual tenants of the Respondent. 10 Alternatively the second Appellant is a contractual tenant of the
p. 11, ll. 31–33 Respondent.

p. 26, ll. 1–20 4.—By a letter dated September 1950 addressed to the Respondent's Advocates by Messrs. Reid and Edmonds, Advocates on behalf of the said Maherali Hirji it was stated that the said Maherali Hirji had agreed to vacate the said premises as soon as a new building which he was erecting on another Plot was complete. The Appellants were at such date intending
p. 6, ll. 18–20 to remove the said petrol station to the said new building with the consent
p. 7, ll. 25–28 of the said Maherali Hirji but permission to use the said building as a petrol station was later refused by the local authority. 20

pp. 1–3 5.—By an Application dated the 27th June 1952 the Respondent applied to the Moshi Rent Restriction Board for an order for possession of the said premises against the Appellants. It was alleged in the said Application that the Appellants through their advocates Messrs. Reid and Edmonds had agreed in writing in the month of September 1950 to vacate the said premises but no further ground why the Respondent should be entitled to possession of the said premises against the Appellants at Common
p. 3, ll. 11–21 law and apart from the restrictions imposed by the said Ordnance was alleged.

6.—By their Answer dated the 1st August 1952 the Appellants alleged 30
p. 3, ll. 1–4– that they were in possession of the said premises and stated (inter alia)
ll. 17, 18 " (c) that the Application disclosed insufficient facts or grounds to justify " any order being made thereon."

p. 5, l. 33 7.—The Respondent called no evidence upon the hearing of the said Application before the said Board and apart from the said Agreement contained in the said letter of September 1950 there was no evidence before the Board to show why the Respondent should be entitled to possession
p. 26, ll. 1–20 of the said premises.

pp. 8, 9 8.—By its judgment dated the 19th September 1952 the said Board carefully considered whether there were any restrictions under the said 40

Ordinance which would protect the Appellants' statutory tenancy if the Respondent was otherwise entitled to an order for possession but it wholly failed to consider whether independently of such provisions the Respondent was entitled to possession of the said premises and nevertheless ordered possession thereof to be delivered to him by the 10th March 1953.

9.—The Appellants appealed from the said decision and by the firs ground of their Memorandum of Appeal alleged that the said Board erred in failing to ascertain whether the Appellants' tenancies were statutory or contractual. p. 10, ll. 19–22

10.—The said Appeal was heard by Mahon, J. on the 5th November 1952 and by a reserved judgment delivered on the 9th December 1952 the learned Judge reversed the decision of the said Board and dismissed the Respondent's application with costs. The learned Judge was of opinion that the Appellants were monthly tenants of the said premises and that the agreement to vacate the premises contained in the letter of September 1950 did not operate to terminate the said tenancy. He held further that there was no allegation in the Respondent's application that the tenancy had been otherwise terminated and no evidence to support such an allegation. pp. 11–13 p. 11, ll. 31–33 p. 12, ll. 32–34 p. 12, ll. 20–22

11.—The Respondent appealed from the said judgment of Mahon, J. to the Court of Appeal for Eastern Africa (Worley, V.-P., Briggs, J.A. and Lowe, J.) and the said appeal was heard on the 18th and 22nd December 1953. The leading judgment was delivered by Lowe J. and the other members of the Court delivered merely formal judgments agreeing therewith. The Court agreed with Mahon, J. that the letter of September 1950 did not operate to terminate the Appellants' tenancy and was also of opinion that Mahon, J. rightly entertained the point as to the existence of a contractual tenancy although not argued before the Board. It held, however, that the said Board was entitled under the provisions of sub-section 8 (3) of the Ordnance to take cognisance of relevant evidence in previous proceedings and that the said Board by virtue of the fact that it made the Order it did must be presumed to have found that there had been a determination of the contractual tenancy between the parties. By way of alternative ground the Court held that the conduct of Appellants' counsel in not objecting to the jurisdiction of the said Board on the ground that there was a contractual tenancy existing created an estoppel against the Appellants so as to preclude them from contending in a higher Court that such contractual tenancy existed. The Court accordingly allowed the appeal with costs and ordered the Appellants to deliver possession of the said premises within three months of the date of the said judgment. pp. 14, 15 pp. 16, 17 p. 19, l. 35 p. 21, l. 5 p. 21, ll. 6–17 p. 21, l. 33 p. 22, l. 17 p. 22, l. 17 p. 23, l. 5 p. 23, ll. 30–33

12.—Sub-section 8 (3) of the said Ordinance provides as follows: " In its determination of any matter a Board may take into consideration " any evidence which it considers relevant to the subject of the inquiry " before it, notwithstanding that such evidence would not be admissible

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"under the law relating to evidence." The Appellants submit that the Court of Appeal wrongly construed the said sub-section in holding that it empowered the said Board to take cognisance of matters transacted in other proceedings without any evidence at all of such matters or proceedings being tendered before it in the current proceedings.

13.—The Appellants further submit that even if the said Board was entitled to regard what occurred in previous proceedings without any evidence thereof being tendered the Court of Appeal was wrong in presuming that there was evidence of a determination of the Appellants' contractual tenancy in such previous proceedings and that the said Board in fact relied on such evidence pursuant to sub-section 8 (3) of the said Ordinance. The Court of Appeal itself stated that the issue of a contractual tenancy was not argued by Counsel before the said Board and there is no reference at all in the judgment of the said Board to any matters proved in previous proceedings between the parties nor any evidence that it relied on the same other than the conclusion which it reached. If the said Board considered the point at all, it is more reasonable to suppose it based its conclusion (wrongly as the Appellants submit) upon the said letter of September 1950.

p. 21, ll. 5–12

14.—The Appellants further submit that the Court of Appeal was wrong in holding that the Appellants were estopped by the conduct of their Counsel from objecting to the jurisdiction of the Board in a higher Court. No question of submission to the jurisdiction arose. Upon the true construction of the said Ordinance the said Board has power to determine before it makes an order for possession whether the Applicant is *prima facie* entitled to possession and in particular whether or not a contractual tenancy exists which bars such right. The contention of the Appellants that there was no evidence to support the Respondent's right to possession independently of the restrictions imposed by the said Ordnance is not an objection to the jurisdiction of the said Board but an objection to the correctness of its decision based on mixed grounds of law and fact. Such an objection cannot be waived by the failure of Counsel tc take the point in the Court of first instance so as to create an estoppel. Such failure merely entails that the Appellate Court may in the exercise of its discretion refuse to allow a new point to be taken on appeal. In fact Mahon, J. allowed such point to be taken in the present case as going to the root of the Respondent's cause of action and the Court of Appeal did not suggest that his discretion was wrongly exercised.

p. 25

15.—On the 6th July 1954 the Court of Appeal granted to the Appellants final leave to appeal to Her Majesty in Council.

16.—The Appellants therefore respectfully submit that this appeal should be allowed and that the order of the Court of Appeal dated the 22nd December 1953 should be reversed and the order of Mahon, J. dated the 9th December 1952 should be restored for the following amongst other

## REASONS

(1) BECAUSE the onus of establishing a right to possession of the said premises against the Appellants rested upon the Respondent.

(2) BECAUSE the letter of September 1950 did not confer any immediately enforceable right to possession upon the Respondent and the Respondent failed to discharge the onus aforesaid by adducing any other evidence.

(3) BECAUSE for the reasons alleged in paragraphs 12 and 13 hereof the Court of Appeal for Eastern Africa was wrong in holding that the Rent Restriction Board of Moshi must be presumed to have had evidence before it sufficient to discharge the said onus.

(4) BECAUSE for the reasons alleged in paragraph 14 hereof the Appellants were not estopped from taking the point that the Respondent had not discharged such onus by their failure to take it before the said Board but the matter became one within the discretion of the High Court of Tanganyika whether or not to allow such point to be taken on appeal.

(5) BECAUSE Mahon, J. in the proper exercise of his discretion allowed the said point to be taken and a further appellate Court ought not to interfere with the exercise of such discretion.

MICHAEL ALBERY

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# CASE FOR THE APPELLANTS

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