Privy Council Appeal No. 21 of 1971

Siew Soon Wah alias Siew Pooi Yong and others – *Appellants*

v.

Yong Tong Hong (sued as a firm) – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH FEBRUARY 1973

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD KILBRANDON
LORD SALMON

[*Delivered by* VISCOUNT DILHORNE]

By a specially indorsed writ the appellants sought *inter alia* an order that the respondent should vacate the ground floor of No. 61 Jalan Pasar Bharu, Pudu, Kuala Lumpur and should pay the appellants double rental from 1st December 1966 until vacant possession was given. They contended that the respondent's tenancy had been determined by notice to quit.

In its Defence the respondent admitted that the appellants were the registered proprietors of the premises for which it was paying a rent of $200·00 a month and in its Counterclaim it alleged that the premises were formerly registered in the name of the father of the appellants, Siew Kim Chong, and that on 1st June 1964 an agreement in writing had been made between it and Siew Kim Chong, the material terms of which were:

(*a*) that the respondent paid Siew Kim Chong the sum of $8,000;

(*b*) in consideration of that payment Siew Kim Chong rented to the respondent the whole of the ground floor;

(*c*) the duration of the tenancy was expressed to be for so long as the respondent wished to occupy;

(*d*) the monthly rent was fixed at $200·00 per month and Siew Kim Chong undertook not to increase it unless an increase was made in the assessment.

The respondent alleged that there had been no increase in the assessment on the premises since that date and that it was entitled to continue in possession of the ground floor at a monthly rent of $200 if there was no increase in the assessment, for as long as it wished. The respondent sought specific performance of this agreement.

In their Defence to the Counterclaim the appellants denied that Siew Kim Chong had entered into any such agreement and denied that he had received the sum of $8,000 on 1st June 1964 from the respondent.

The respondent has occupied the ground floor since February 1958, the premises having been built shortly before then, and originally paid a rent of $150·00 a month. In its further and better particulars of the Defence and Counterclaim the respondent stated that the $8,000 had been paid as to $500 in cash and the balance by three cheques dated respectively the 4th, the 10th and the 12th February 1958. In cross-examination Siew Kim Chong admitted that he had been paid $8,000 in consideration of the tenancy. He swore that he never had signed any agreement for the renting of the ground floor and asserted that his signature to the agreement put forward by the respondent was a forgery.

Chooi Siang Khoon, the proprietor of the respondent firm, testified that in 1964 he had received a letter from Siew Kim Chong purporting to terminate his tenancy and offering him a new tenancy at a rent of $220·00 a month. He said that they had agreed a rent of $200·00 a month and that the written agreement was then drawn up. He said it was copied from an old agreement between Siew Kim Chong and his father and that the new agreement was signed at the shop by him and Siew Kim Chong. He said that this new agreement was made to show the new rent of $200 a month. His father, Chooi Yong How, testified that he wrote the agreement and that it was based on the first agreement relating to the premises between Siew Kim Chong and Chooi Siang Khoon, which he said was taken back by Siew Kim Chong. The agreement bore the signature of Lim Ping Choo who testified that he had seen Siew Kim Chong and Chooi Siang Khoon sign it and that he had witnessed it.

The agreement is a curious document on one sheet of paper. The left side, that signed and witnessed, is in Chinese. The right side is in English and is headed " Rough Translation of a Chinese Agreement ". That translation reads as follows:—

> " This Tenancy Agreement is made this 1st day of June 1964
> *BETWEEN* Siew Kim Chong as Owner of House No. 61 Jalan Pasar Bharu, Pudu, Kuala Lumpur (hereinafter referred to as ' The House Owner ') of the first party and CHOP YONG TONG HONG also of No. 61 Jalan Pasar Bharu, Pudu, Kuala Lumpur (hereinafter referred to as ' The Tenant ') of the other party.
>
> WHEREAS The House Owner had agreed to rent to The Tenant the whole of the ground floor of premises No. 61 Jalan Pasar Bharu, Pudu, Kuala Lumpur, upon the terms, conditions and stipulations hereinafter appearing.
>
> NOW IT IS HEREBY AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:—
>
> In consideration of the sum of Dollars Eight thousand ($8,000) only paid by The Tenant to the House Owner (the receipt of which sum the House Owner hereby acknowledges on the signing of this Agreement) the House Owner hereby rent to the Tenant the whole of the ground floor of No. 61 Jalan Pasar Bharu, Pudu, Kuala Lumpur, from the first day of June 1964 at a monthly rent of Dollars Two Hundred ($200) as long as The Tenant wishes to occupy.

The House Owner agrees with the Tenant that the rent of the ground floor of No. 61 Jalan Pasar Bharu, Pudu, Kuala Lumpur, shall not be increased except in the case of assessment increase. Such increase shall be calculated on the percentage.

Dated this 1st day of June 1964

Signed by the House Owner in the presence of

Signed by The Tenant in the presence of

"

The respondent's Defence and Counterclaim was clearly based on this rough translation, which has some resemblance to an English agreement for a tenancy.

The Document Examiner in his report stated that after comparing signatures of Siew Kim Chong with that on the agreement he was unable to express any opinion on whether or not Siew Kim Chong had signed the agreement.

The trial Judge, Raja Azlan Shah J., came to the conclusion that no agreement was ever entered into between the respondent and Siew Kim Chong. He based his conclusion on the fact that the "Rough Translation" stated that the $8,000 was paid in consideration of the tenancy purported to be agreed on on 1st June 1964 whereas that sum had been paid six years before. He also held that as the duration of the tenancy was to be for so long as the respondent wished to occupy the premises, he was bound to hold that the agreement was void for uncertainty.

On appeal Ong C.J. noticed that there was a material error in the rough translation and caused a certified translation to be made by the official interpreter.

That translation reads as follows:—

"The person Siew Kim Chong executing this document has built a shop house situated at No. 61 Jalan Pasar Bharu, Kuala Lumpur. He desires to lease out the whole of the ground floor to Chop Yong Tong Hong and the tenancy shall be permanent.

It is clearly stated here that the rent per month shall be $200·00 of Malayan currency and hereinafter the person leasing out this house shall not increase the rent as he likes or eject the tenant by force etc.

If the rent is to be increased or reduced, the increase or reduction shall be carried out in accordance with the provisions of government proclamations and the percentage in the increase or reduction of rent shall be determined proportionately by the increase or reduction in assessment.

A deposit of $8,000 was received on the 1st day of February 1958 and as it is feared that verbal words are not proof this document is written as evidence."

The official and the "rough translation" bear little resemblance to each other and it is perhaps astonishing that they should both be translations of the writing in Chinese. As Ong C.J. pointed out, had a proper translation been produced at the trial, much needless confusion would have been avoided. The terms of the official translation show that the ground on which the trial Judge held that the agreement was a forgery was invalid.

Although he did not say so expressly, Ong C.J. clearly rejected the allegation that the agreement was a forgery for he said that the question to be determined was " the effect to be given to the agreement that ' the tenancy shall be permanent '—or, in the words which fell to be decided by the learned trial Judge—' for as long as the tenant wished to occupy ' ". Those words do not appear in the official translation and Ong C.J.'s reference to them appears to indicate that he drew no distinction between them and the meaning to be given to the word " permanent " in the context of the agreement. If the use of the word " permanent " meant that the landlord was bound to let and the respondent to rent the shop in perpetuity, the agreement would be of no effect for, as Jessel M.R. said in *Sevenoaks, Maidstone & Tunbridge Ry. Co. v. London, Chatham & Dover Ry. Co.* [1879] 11 Ch. 625 at p. 635, there is no such thing in law as a lease in perpetuity.

What was meant by the words " the tenancy shall be permanent " was made clear in the paragraph which followed. The landlord bound himself not to increase the rent as he liked and not to eject the tenant by force etc. In their Lordships' opinion the agreement was not so vague and uncertain as to be void for uncertainty. The intention clearly was that the landlord should let the premises to the respondent for as long a period as it was within his power to do so and that he should not be able to eject the respondent so long as he paid the stipulated rent and that the respondent should be entitled to occupy the property so long as he wished and so long as he paid the rent. S. 47 of the Land Code (Chapter 138) of 1928 provided that no lease executed after the code came into force should be for a longer period than thirty years and s. 221 (3) of Act No. 56 of 1965 provides that the maximum period for which land can be let which does not consist wholly of alienated land—and the premises here did not consist of such land—is thirty years. So it was not in the landlord's power to grant the respondent a lease for more than thirty years.

The agreement of 1st June 1964 not being a forgery, it may well be that the evidence of Chooi Siang Khoon, the proprietor of the respondent firm, and of his father Chooi Yong How that the agreement was copied from an earlier agreement when the rent was increased to $200 a month was true. Its terms indicate that the document, written as evidence of what had been agreed, was intended to relate back, apart from the increased rent, to the commencement of the occupation of the premises by the respondent and, in the circumstances, it appears right to hold that the parties had agreed that from 1st February 1958 the respondent should rent the premises for as long as the landlord could let them and so long as the respondent wished to occupy them and paid the rent.

Is the respondent entitled to specific performance of that agreement? In *In re King's Leasehold Estates* (1873) L.R. 16 Eq. 521 a landlord had let certain premises and had agreed not to raise the rent or to give notice to quit so long as the tenant paid the rent when due. This agreement was in writing. The landlord and tenant also agreed verbally that the landlord should let the tenant remain in the premises for such a term of years, not exceeding the landlord's term, as the tenant might desire to be the tenant. A railway company agreed to buy the tenant's interest and then disputed that he had an interest. Malins V.C. said that:—

> " . . . upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord's interest exists."

He went on to say that such a tenant's right to possession would be enforced in equity.

In *Kusel v. Watson* [1879] 11 Ch. D. 129 a lessee of a house let it to Kusel at a fixed rent, agreed to let him have a lease at the same rent "at any period he may feel disposed" and further agreed not to molest or disturb him or raise his rent after Kusel had spent money improving the premises. Kusel, who had spent money on the premises and had occupied them, claimed against the personal representative of his landlord specific performance of the agreement. He succeeded at first instance, Bacon V.C. holding that he was entitled to have an underlease of the whole of his landlord's term less one day. On appeal, Jessel M.R., in the course of the argument, suggested that the agreement meant that the landlord was to grant as long a lease as he could, and the Court of Appeal directed that he should be granted a lease for the residue of his landlord's term less one day, if he should so long live.

In *Inwards v. Baker* [1965] 2 Q.B. 29 a son had built a bungalow on his father's land and had lived in it thereafter in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. The trustees of his father's Will brought proceedings for the possession of the bungalow. In that case Lord Denning M.R. said at p. 37:—

> ". . . in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that the bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house'. Nor could he at any time thereafter so long as the son wanted it as his home."

and Danckwerts L.J. said:—

> ". . . this is one of those cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

In the light of these decisions the case of *Hajara Singh v. Muthukaruppan* [1967] 1 M.L.J. 167 where the appellant alleged that there was an oral agreement between him and the owner of the land allowing him to occupy the land for as long as he wished during his lifetime, and where he had occupied the land and paid rent and also erected a house on it, and had judgment for possession of the premises given against him, must, as Ong C.J. said in his judgment in this case, be regarded as wrongly decided.

In this case the respondent occupied the ground floor since February 1958 and paid rent therefor. In February 1958 he paid the sum of $8,000 to his landlord. He cannot have done that for a tenancy of short duration. It must have been paid in consideration of the tenancy described in the agreement of 1st June 1964.

In these circumstances there arose in the respondent's favour an equity or equitable estoppel protecting his occupation of the ground floor for the period of thirty years, that is to say, until the 28th February 1988.

In their Lordships' opinion the order made herein by the Federal Court of Malaysia (Appellate Jurisdiction) should be affirmed and the appeal dismissed.

Their Lordships will report their opinion to the Head of Malaysia accordingly. They will also report that the appellants should pay the respondent's costs of the appeal.

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In the Privy Council

SIEW SOON WAH
alias
SIEW POOI YONG AND OTHERS
v.
YONG TONG HONG
(SUED AS A FIRM)

DELIVERED BY
VISCOUNT DILHORNE

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