Privy Council Appeal No. 11 *of* 1953

Meghji Lakhamshi & Brothers - - - - - - *Appellants*

v.

Furniture Workshop - - - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1954

Present at the Hearing:

LORD TUCKER
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

On this appeal the respondents took a preliminary objection that no appeal lay as of right under Article 3 (*a*) of the Eastern African (Appeal to Privy Council) Order in Council, 1951. The appeal is by the landlords against an order dismissing their application for possession of a plot of land at Thika in Kenya which had been let by them to the respondents together with an adjoining building, which premises were within the scope of the Kenya Rent Restriction Ordinance No. 22 of 1949.

The article provides that an appeal shall lie as of right from any final judgment of the Court of Appeal "where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards".

Leave was granted by the Court of Appeal for Eastern Africa on affidavits to the effect that the capital value of the plot in question exceeded £500. The respondents contended that the true test is how much it is worth to the appellants to succeed in the appeal and that this is to be measured by deducting from the value of the land with vacant possession its value to the owners subject to the statutory tenancy, and that as no evidence of this had been adduced there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue.

It is quite possible that a case may fall in whole or in part within more than one limb of article 3 (*a*) and it will suffice for an appellant to show that it comes within any one. It was laid down by this Board in *Macfarlane* v. *Leclaire* (1862) 13 Moore's Reports 181 that "the value of the subject matter in dispute", under corresponding legislation

relating to Canadian appeals, must be determined by looking at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to appeal. The same test was applied in *Allan* v. *Pratt* (1888) 13 A.C. 780 to a case of an appeal from a judgment awarding damages for personal injuries, it being held that the value was the sum awarded and not the sum claimed. More recently in *Lipshitz* v. *Valero* (1948) A.C. 1 it was held that, where a tenant appellant had been evicted from a plot of land valued at £50 on which he had constructed a building at a cost of £450, the true test was whether it was worth £500 to him that the Rent Restriction Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which had cost him £450 to erect.

The first two of these cases were dealing only with the value of " the subject matter in dispute ", and it would appear that in the last case also it was the first limb of the article that was, primarily at any rate, under consideration.

Their Lordships have no doubt that under whichever limb of the article any case may fall the " value " must be looked at from the point of view of the appellant, with the result that an appeal may sometimes lie where the landlord is the appellant although there could be no appeal by the tenant, or vice versa.

Whatever the result might be in the present appeal if the words " where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards " stood alone, their Lordships are of opinion that the case falls within the latter part of the article which deals with " some claim or question to or respecting property . . . of the said value or upwards ", and that on the true construction it is the value of the property not the value of the claim or question which is the determining factor. The presence of the word " indirectly " seems to require this construction. Looked at from the angle of the landlords the value of the property vacant possession of which they were claiming was correctly taken on a capital value basis. It by no means necessarily follows that the result would have been the same if the tenants had been appellants, and their Lordships do not intend to imply any doubt as to the correctness in this respect of the recent decisions of the Court of Appeal for Eastern Africa in the cases of *Popatlal* v. *Hirji* and *Chogley* v. *Bains*.

Their Lordships have read a transcript of the shorthand note of the proceedings before this Board on the occasion of the application for leave to appeal in the case of *The Africa Boot Co.* v. *Morley* (where, however, the respondent was not represented) from which it would appear that article 3 (*a*) must have been construed in the sense indicated above.

Their Lordships were accordingly of opinion that the preliminary objection failed and proceeded to hear the case on its merits.

The appellants' application to the Central Rent Control Board was dismissed on the ground that the Board had no jurisdiction to make an order for partial ejectment which was what the appellants were asking for.

On appeal to the Supreme Court it was held that the Rent Board had jurisdiction to make the order claimed and the case was remitted to the Board for further consideration on the merits.

On appeal by the appellants to the Court of Appeal for Eastern Africa it was held that the Supreme Court had rightly decided that there was jurisdiction in the Rent Control Board to order possession of part of the premises but that the case should not have been remitted for further consideration since the application did not come within the ambit of Section 16 (1) (*k*) of the Increase of Rent (Restriction) Ordinance (No. 22 of 1949) under which the claim had been made, since the landlords were not asking for possession for the purpose of reconstructing or rebuilding and that the application should have been made under Section 5 (1) (*g*) of the Ordinance.

The appellants were desirous of erecting shops on land adjoining the demised premises and for this purpose they desired to obtain possession of a plot of land 20′ × 40′ in area which formed part of the premises demised to the respondents and which adjoined the building occupied by them and constituting the remainder of the demised premises.

The appellants accordingly gave notice to the respondents to quit the demised premises and made an application to the Central Rent Control Board which was in form an application for possession of the whole of the demised premises. The application was made under Section 16 (1) (*k*) of the Ordinance. It is clear, however, that on the hearing of the application the landlords were asking for an order for possession of part only of the premises, viz., the plot of land on which the respondents had erected a lean-to shed the removal of which the appellants had required in 1947. The claim has been treated throughout in all the courts below and on this appeal as a claim for partial ejectment and their Lordships consider it must be so regarded.

Before considering whether the Rent Control Board could or could not have made an order for possession of part of the demised premises under Section 16 (1) (*k*) of the Ordinance it will be convenient to dispose of a subsidiary question which was strongly urged by Counsel for the appellants. It was to the effect that assuming the application properly fell to be made under Section 5 (1) (*g*) the Rent Control Board should have dealt with it under that section or should have given the appellants an opportunity of amending. Further or alternatively it was contended that the Court of Appeal should have remitted the case to the Rent Control Board for them to deal with under that section. The short answer to this point is that the Rent Control Board were never asked to give leave to amend and in any event the grant or refusal of such leave is a matter of discretion with the exercise of which their Lordships would not interfere.

Turning now to the question of the Rent Control Board's refusal to order partial ejectment. The relevant provisions of Ordinance No. 22 of 1949 in force at the material date were as follows:—

> Section 1 (2): "This Ordinance shall apply to all premises, whether dwelling-houses or business premises, situate in any area in the Colony in which a Rent Control Board has been established, other than—
>
> > "(*a*) premises of which the standard rent is in excess of ten thousand shillings per annum and of which the landlord shall, after the commencement of this Ordinance, have recovered vacant possession under the provisions of this Ordinance".
>
> Section 2 (1): "In this Ordinance unless the context otherwise requires—
>
> > "business premises" means a building or part of a building let for business, trade or professional purposes or for the public service and includes land within the curtilage of such building or part of a building and comprised in the letting.
> >
> > "dwelling-house" includes any house or part of a house or room let as a separate dwelling (whether or not such house, part of a house or room is occupied by one or more tenants) . . .
> >
> > "premises" means premises to which this Ordinance is applied by sub-section (2) of Section 1 thereof".
>
> Section 16 (1): "No order for the recovery of possession of any premises to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall be made unless:—
>
> > "(*k*) the landlord requires possession of the premises to enable the reconstruction or rebuilding thereof to be carried out, in which case the Central Board . . . may include in any ejectment order for such purpose an order requiring the landlord to grant to the tenant a new tenancy of the reconstructed or rebuilt

premises or part thereof on such terms as may be reasonably equivalent to the old tenancy, and fixing a date for the completion of the new building and for its occupation by the tenant and imposing such reasonable conditions as the Board may think necessary ".

In contrast with Section 16, which deals with ejectment orders, Section 5 (1) provides:—

" The Central Board . . . shall have power to do all things which it is required or empowered to do by or under the provisions of this Ordinance, and in particular shall have power—

" (*g*) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Ordinance, the landlord could have recovered possession, where such a course is, in the opinion of the Central Board . . . desirable in the public interest:"

" (*k*) to impose conditions in any order made by the Central Board . . . under the provisions of this section:"

Their Lordships do not find it necessary to enquire in what circumstances at common law or under this Ordinance the Court or Rent Control Board may be able to make an order for partial ejectment. One such case in which it was held that such an order is possible in England is *Salter* v. *Lask* (1924) 1 K.B. 754, but in that case the landlord was already in possession of the remainder of the premises and Lord Justice Atkin's judgment was expressly limited to such a case.

In the present case the only question is whether Section 16 (1) (*k*) is so framed as to envisage or make provision for such an order.

An application for possession under Section 16 presupposes that the contractual tenancy of the demised premises has been determined. It is not possible to determine it as to part and keep it in being as to the remainder. In the present case the tenancy of the entire demised premises had been determined. If an order for possession of the plot of land is made, what is the legal position of landlord and tenant with regard to the remainder which was included at one rent with the plot in the original demise? No provision is made for a reduction in the contractual rent proportionate to the part of which possession has been given. The contrast between " the old tenancy " and " the new tenancy " in the subsection together with the words " or part thereof " in line 6 and their absence in line 1 all point to the conclusion that " the premises " possession of which is required " to enable the reconstruction or rebuilding thereof to be carried out " are the demised premises and not some portion thereof selected by the landlord.

The provisions of Section 5 (1) (*g*) are clearly designed to meet a case of this kind although their Lordships are not to be taken as expressing any view as to the result of such proceedings on the facts of this case.

Having regard to the language of Section 16 (1) (*k*) their Lordships are of opinion that the Central Rent Control Board rightly decided that it was not open to them to make an order for possession of the plot of land which formed a part only of the demised premises the tenancy of which had been determined, and that for this reason the appeal must be dismissed.

In these circumstances it is not necessary to express any concluded view on the ground upon which the Court of Appeal held that the application for possession could not succeed in any event. Their Lordships feel that a further investigation of the facts, including the circumstances regarding the shed erected by the respondents, might well lead to the

same conclusion as that reached by the Court of Appeal, but they feel some doubt whether there was sufficient material for an appellate Court to reach this conclusion in the absence of any investigation by the Rent Control Board directed to this aspect of the case.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs before the Rent Control Board and in the Supreme Court and the Court of Appeal for Eastern Africa, and four-fifths of the respondents' costs of the present appeal.

(20211) Wt. 8269—26 100 1/54 D.L.

In the Privy Council

MEGHJI LAKHAMSHI & BROTHERS

v.

FURNITURE WORKSHOP

DELIVERED BY LORD TUCKER

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