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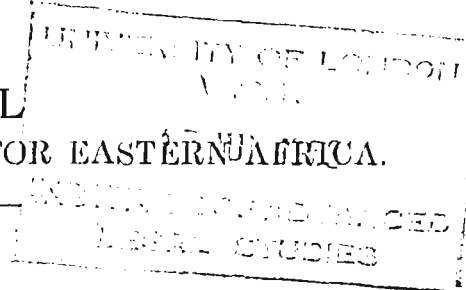
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No. 8 of 1950.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA.



BETWEEN—

HARNAM SINGH - - - Appellant

— AND —

JAMAL PIRBHAI - - - Respondent.

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal by leave from an Order dated the 9th p. 52.
10 March, 1949, of the Court of Appeal for Eastern Africa (The
President and Chief Justices Graham Paul and Edwards) dismissing
an appeal by the Appellant from an Order dated the 5th November, p. 34.
1948, of the Supreme Court of Kenya at Nairobi (Mr. Justice de
Lestang) whereby an action by the Appellant (Plaintiff) against the
Respondent (Defendant) for possession of premises in Nairobi owned
by the Appellant was dismissed with costs.

2. The principal questions arising on this appeal are:—

20 (a) Whether a Proclamation of the Governor of the Colony
and Protectorate of Kenya (No. 53 of 1941) purporting to be
made pursuant to Section 19 of The Increase of Rent and
Mortgage Interest (Restrictions) Ordinance 1940 of the said
Colony and Protectorate as subsequently amended (hereinafter
called "the 1940 Ordinance") and extending the operation of
the 1940 Ordinance to certain business premises was valid or
ultra vires and

30 (b) If the said Proclamation was valid, then whether upon
the true construction of the 1940 Ordinance and in particular
of Sections 11 and 19 thereof it is necessary (as the Court of
Appeal held) for a landlord who seeks to recover possession of
premises subject to the above Ordinance (as extended by the
said Proclamation) and used both as a dwellinghouse and for

business purposes, to show that the premises are reasonably required by him both as a dwellinghouse and for business purposes and that alternative accommodation is available for the tenant suitable both as a dwellinghouse and for business purposes; or whether (as the Appellant contends) there is a dichotomy of all premises subject to the Ordinance into dwellinghouses and business premises, and it is only necessary to show in respect of any one set of premises either if they are a dwellinghouse that the landlord reasonably requires the premises as such and that alternative accommodation is available for the tenant suitable as a dwellinghouse, or if they are business premises that the landlord reasonably requires the premises as such and that alternative accommodation is available for the tenant suitable as business premises. 10

pp. 46-52.

pp. 24-33.

3. The Court of Appeal unanimously based its judgments upon the above ground only and in so far as it expressed any opinion upon the alternative grounds hereinafter mentioned such opinion was in favour of the Appellant. But Mr. Justice de Lestang based his judgment on two alternative grounds in addition to the ground adopted by the Court of Appeal, and it is material therefore for the purposes of this appeal to consider also these alternative grounds. 20

pp. 6, 7.

4. The former of these grounds was that a contractual monthly tenancy had been created in favour of the Respondent which the Appellant had failed at the date of the issue of the Writ in this action to determine by notice and that therefore the provisions of the 1940 Ordinance as to recovery of premises subject to a statutory tenancy did not apply. The Appellant contends (a) that no such contractual tenancy was pleaded (b) that there was no evidence to support the finding of the same and (c) that the Respondent admitted that he was a statutory tenant and is estopped from alleging otherwise. 30

pp. 6, 7, 22, 23.

5. The latter of such grounds was that the Appellant already occupied a dwellinghouse and that an order for possession in his favour would confer upon him the right to occupy more than one dwellinghouse at the same time contrary to the provisions of Section 11 (2) of the 1940 Ordinance. This ground was neither pleaded nor before Mr. Justice de Lestang argued by the Respondent and is in the Appellant's submission directly contrary to the Judgment of Chief Justice Webb, (sitting as a member of the Court of Appeal for Eastern Africa) as to the construction of the said sub-section in *Tara Singh v. Harnam Singh* XI E.A.C.A. 24 which Judgment in the absence of argument on this point was not cited to Mr. Justice de Lestang. 40

6. In order to obtain an order for possession of the said premises it is also necessary for the Appellant under the provisions

of the 1940 Ordinance to show that it was reasonable at the date of the hearing before Mr. Justice de Lestang to make an order in the Appellant's favour. Neither of the Courts below, deciding as they did against the Appellant on other grounds, made any express finding on the question of reasonableness. But all the evidence on this issue is included in the Record of Proceedings appended hereto and the Appellant will submit that upon such evidence it would not be open to a reasonable man to say that it was other than reasonable to make an order. Accordingly the Appellant respectfully invites

10 His Majesty in Council to consider the question of reasonableness and to make an order for possession in favour of the Appellant. Alternatively the Appellant submits that if he is successful upon the rest of this Appeal the question of reasonableness should be remitted for the decision of the Supreme Court of Kenya.

pp. 24-33
and 46-52.

7. The provisions of the 1940 Ordinance relevant to the decision of this appeal are as follows:—

(a) S. 11 (1) thereof provides that “No order for the “recovery of possession of any dwellinghouse to which this “Ordinance applies, or for the ejection of a tenant therefrom

20 “shall be made unless:—

“(d) the dwellinghouse is reasonably required by the “landlord for occupation as a residence for himself or for “his wife or minor children, or for any person *bona fide* “residing, or to reside, with him, or for some person in his “whole time employment or in the whole time employment “of some tenant from him, and (except as otherwise pro- “vided by this sub-section) the Court is satisfied that “alternative accommodation, reasonably equivalent as “regards rent and suitability in all respects is available.

30 “and in any such case as aforesaid the Court consider “it reasonable to make an order.”

(b) S. 11 (2) thereof provides that “Nothing in this section “contained shall be deemed to permit a landlord to recover “possession of a dwellinghouse if by such recovery he and his “wife and/or minor children would be in occupation of, or “would acquire the right to occupy, more than one dwelling- “house at the same time”.

(c) S. 19 thereof (as amended by S. 5 of Ordinance No. XXVI of 1943 of the Colony and Protectorate of Kenya) provides that “The Governor in Council may, by Proclamation, declare

40 “that the provisions of this Ordinance shall apply to any area, “district or place in the Colony in respect of premises used for “business, trade or professional purposes, or for the public “service, as it applies to a dwelling-house in that area, district “or place, and with effect from the date of such Proclamation

“or from a date specified therein, the Ordinance shall be read
 “as though references to ‘dwelling-house’, ‘house’ and
 “‘dwelling’ included references to any such premises, provided
 “that the Ordinance in its application to such premises shall
 “have effect subject to the following modifications:—

“(a) The following paragraph shall be substituted for
 “paragraph (d) of sub-section (1) of section 11 of this
 “Ordinance:—

“(d) The premises are reasonably required by
 “the Landlord for business, trade or professional 10
 “purposes or for the public service, and (except as
 “otherwise provided by this sub-section) the Court is
 “satisfied that alternative accommodation, reasonably
 “equivalent as regards rent and suitability in all
 “respects, is available’

“(d) Sub-section (2) of Section 11 and Section 14
 “of this Ordinance shall not apply”.

8. By Proclamation No. 53 of 1941 made by the Governor of
 the Colony and Protectorate of Kenya in Council pursuant to
 Section 19 of the 1940 Ordinance the provisions thereof were applied 20
 to the area in which the said premises are situate “in respect of
 “premises where the annual amount of the standard rent does not
 “exceed £500 and for business trade or professional purposes or for
 “the public services as it applies to a dwellinghouse in the said
 “area” or from the 1st January, 1941. The 1940 Ordinance applies
 to all dwellinghouses situate within the areas mentioned in the
 Schedule thereto irrespective of the rent of such dwellinghouse.

9. The facts giving rise to the present appeal so far as material
 to be herein stated are as follows.

p. 10, ln. 20-22.
 p. 25, ln. 10-12.

10. The Appellant has been at all material times the owner of 30
 Plot 209/2555 situate in Government Road, Nairobi, upon which is
 erected an old wood and iron house on stone foundation consisting
 of 4 or 5 rooms and a verandah. The Respondent has been at all
 material times the owner of the adjacent Plot 209/2556 and has used
 the same as sales premises in connection with his business as an
 auctioneer.

p. 15, ln. 42.
 p. 32, ln. 4-11.

pp. 53-56.

11. By a written Lease dated the 27th June, 1939, the
 Appellant let Plot 209/2555 to the Respondent for two years from
 the 1st April, 1939, at a monthly rent of Shs. 280. The said Lease
 included the following material clauses:—

“5. The Lessee shall use the said hereditaments and 40
 “premises for the purposes of business and/or residence includ-
 “ing the business of auctioneer’

“10. (b) If the Lessor or the Lessee shall desire to determine the present demise at the expiration of the said term then either party shall give to the other six months’ notice in writing of his intention so to do.”

12. On the 20th April, 1940, Plot 209/2555 became subject to the provisions of the 1940 Ordinance at a controlled monthly rent of Shs. 280.

13. No notice was in fact given by either party in accordance with Clause 10 (b) of the said Lease. On the 4th January, 1941, it was orally agreed between the parties that the Respondent should continue in possession of Plot 209/2555 as from the expiry of the two years period provided for by the said Lease for a further period of eleven months at a monthly rental of Shs. 250. p. 25, ln. 30-45.

14. After the further period of eleven months had expired on the 1st March, 1942, the Respondent remained in possession without any further express agreement between the parties. Until the 1st June, 1942, he continued to pay rent at the rate of Shs. 250 per month. From the 1st June, 1942, until the 1st January 1943, he paid rent at the rate of Shs. 265 per month. From the 1st January, 1943, onwards he paid rent at the basic rate of Shs. 280 per month, subject to the addition thereto as from the 1st December, 1945, of varying amounts representing the increase in the municipal rates the amount of which may be legally added to the rent of controlled premises pursuant to Section 9 of the 1940 Ordinance. p. 26, ln. 1-8.

15. On the 24th August, 1943, the Appellant gave notice to the Respondent to vacate the premises on or before the 30th September, 1943. By a letter dated the 25th August, 1943, replying to this notice the Respondent’s Advocates stated on his behalf “Our client will not vacate the premises in accordance with your notice but will remain in occupation as a statutory tenant from the date of the expiry of the notice”. p. 26, ln. 14.
p. 64.

16. On the 3rd March, 1948, the Rent Control Board gave permission pursuant to Section 4 of the 1940 Ordinance to the Appellant to commence proceedings for recovery of possession of Plot 209/2555 despite the opposition of the Respondent and by a Complaint dated the 4th May, 1948, the Appellant commenced the present action for possession of the said plot and consequential relief. p. 72.
p. 1.

17. At the date of the said Complaint and at all material times thereafter the Appellant reasonably required the said plot for occupation as a residence for himself his wife and his six children aged from 6 to 19 years. The Appellant has at all material times been living at factory premises in Canal Road, Nairobi, part of which p. 11, ln. 1-9.
p. 31, ln. 30-43.

premises are occupied as a dwellinghouse. The living accommodation consists of two bedrooms, kitchen, pantry, store and water-closet. There is no proper bathroom and one small cubicle originally built as a water-closet is used as a bathroom. The locality is an unhealthy one surrounded by other factories. The Appellant's wife is in poor health and three of his children have already died while living in the said premises.

p. 10, ln. 32-47.
p. 18, ln. 1-19.
p. 31, ln. 46.
p. 32, ln. 31.
p. 47, ln. 34, 35.

18. At the date of the hearing of the said Plaintiff alternative accommodation as a dwellinghouse reasonably equivalent to Plot 209/2555 as regards rent and suitability in all respects was available to the Respondent. 10

p. 33, ln. 23-25.
p. 48, ln. 27-32.

19. The Respondent at all material times used the said plot primarily as a residence but partly also for purposes in connection with his business of auctioneer. The Appellant does not seek to contend on this Appeal that he required the said plot for business purposes or that alternative accommodation was available to the Respondent equally suitable to the said plot both as business as well as residential premises. He submits that upon the true construction of the 1940 Ordinance and in the events which have happened the test of business requirement or suitability is not relevant in considering whether or not the Appellant is entitled to recover possession of the said plot. 20

20. If the Appellant is not precluded by the 1940 Ordinance on other grounds from recovering possession of the said plot then it was at the date of the hearing of the said plaintiff reasonable to make an order in favour of the Appellant more particularly in the light of the following facts:—

(a) The Appellant urgently required to occupy the said plot in view of the facts stated in paragraph 17 hereof.

(b) Alternative residential accommodation was available to the Respondent. 30

(c) The Respondent admitted in cross-examination that he was a wealthy man himself owning a number of properties and that he could have bought a house with vacant possession.

p. 10, ln. 32-47.
p. 18, ln. 1-19.
p. 31, ln. 46.
p. 32, ln. 31.
p. 47, ln. 34, 35.
p. 18, ln. 9-18.
p. 16, ln. 12.

pp. 8-24.
pp. 25-33.

21. The action was tried by Mr. Justice de Lestang on the 24th August and the 14th, 19th, 21st and 22nd October, 1948, and on the 5th November, 1948, he delivered a reserved judgment dismissing the same with costs upon three alternative grounds. The question of the validity of the said Proclamation was not argued before him, and upon the assumption that it was valid he held that upon the true construction of Sections 11 and 19 of the 1940 Ordinance it was necessary for the Appellant to show that he reasonably required Plot 209/2555 both for residential and business purposes and that 40

pp. 30-33.

alternative accommodation was available to the Respondent suitable both for residential and business purposes. He held that the Appellant had failed to satisfy such parts of the above test as relate to business purposes.

22. The learned Judge also held that the existence of a contractual monthly tenancy between the parties must be inferred from their conduct, in as much as after the eleven months tenancy mentioned in paragraph 13 hereof had expired on the 1st March, 1942, the Respondent continued in possession of the said plot and paid
 10 rent at varying rents instead of merely at the standard rent under the 1940 Ordinance, and that such tenancy had not been verbally determined and therefore afforded a defence to the action. The Appellant submits that the learned Judge was wrong in drawing such an inference having regard (a) to the decision of the Court of Appeal in England in *Morrison v. Jacobs* 1945 K.B. 577 as to the proper inference to be drawn from acceptance of rent by a landlord of a property subject to the Rent Acts and (b) to the fact that the Respondent paid to the Appellant the permitted increase of rent mentioned in paragraph 14 hereof, which he would not have been
 20 obliged to do had he held under a contractual tenancy. The Appellant also submits that it was not in any event open to the learned Judge to find that such contractual monthly tenancy existed because the same was never pleaded. Finally the Appellant submits that the Respondent is estopped from alleging that he was not a statutory tenant by reason of his statement to the Appellant mentioned in paragraph 15 hereof that he was such a tenant and the payment by him of the said permitted increases of rent with the result that the Appellant commenced proceedings upon the basis that the Respondent was a statutory tenant. The Appellant will
 30 rely in support of such submission upon *Re Swanson's Agreement* 1946 2 A.E.R. 628 the facts of which are upon this point indistinguishable from those of the present case. Mr. Justice de Lestang refused to entertain the Appellant's plea of estoppel on the ground that he had not pleaded the same. It is submitted that he was wrong in so refusing (a) because the statement which formed the basis of the estoppel was in fact pleaded and (b) because the Appellant only sought and now seeks to rely thereon to rebut the existence of a contractual tenancy which the Respondent never pleaded against the Appellant. Alternatively the Appellant sub-
 40 mits that in all the circumstances of the case and in view in particular of the fact that the point arises on admitted facts and that the Respondent will in no way be taken by surprise, it is just that the Appellant should be allowed if necessary further to amend his Plaint by pleading such estoppel as is herein alleged and humbly seeks leave so to do.

p. 28, ln. 42.
 p. 29, ln. 35.

pp. 6, 7.

p. 30, ln. 28-33.

p. 4, ln. 35, 37.

pp. 6, 7.

p. 33, ln. 32-40.

23. The third and last ground upon which Mr. Justice de Lestang based his judgment was that the Appellant occupied a dwellinghouse at the date of the hearing and was therefore debarred by the provisions of S. 11 (2) of the 1940 Ordinance (quoted in paragraph 7 hereof) from obtaining possession of another dwellinghouse. If this construction of the Ordinance be correct the result must be that no landlord who himself lives in a dwellinghouse can ever evict a tenant from another dwellinghouse of his even although for example such tenant fails to pay the rent, damages the property or uses the same for an immoral purpose. It is submitted that such construction would create chaos in the areas to which the 1940 Ordinance applies and should therefore be rejected in favour of the construction placed upon the Section by Chief Justice Webb in *Tara Singh v. Harnam Singh* XI E.A.C.A. 24, to the effect that S. 11 (2) of the 1940 Ordinance is only intended to apply to the case of a landlord seeking to recover possession of more than one dwellinghouse pursuant to paragraphs (d) or (i) of S. 11 (1) thereof. Alternatively the Appellant is prepared if necessary as a condition of an order for possession of Plot 209/2555 being made in his favour to undertake to give up the right of possession of the said premises in Canal Road where he now lives immediately before the date as from which such order for possession becomes effective; and submits that an order embodying such an undertaking will not infringe the terms of S. 11 (2) of the 1940 Ordinance. 10 20

pp. 34-36.

pp. 37-45.
pp. 46-52.

24. By a Memorandum of Appeal dated the 13th December, 1948, the Appellant appealed from the judgment of Mr. Justice de Lestang to the Court of Appeal for Eastern Africa. The appeal was heard on the 11th, 14th, 15th and 16th February, 1949, and on the 9th March the Court of Appeal delivered reserved judgments dismissing the appeal with costs. 30

p. 46, ln. 43-46.

p. 48, ln. 10-12.
p. 47, ln. 32-34.

p. 47, ln. 35-42.

p. 47, ln. 12-23.

25. The leading judgment was delivered by Sir Barclay Nihill, President. The President for the purposes of his judgment assumed without deciding the point that the Respondent was a statutory and not a contractual tenant. Upon the construction of S. 11 (2) of the 1940 Ordinance he saw no reason to differ from the view expressed by Webb, C.J. in *Tara Singh v. Harnam Singh*, XI E.A.C.A. 24. But he expressed complete agreement with the conclusion reached by de Lestang, J. on the issue of double protection in respect of both residential and business user; and he held that since the Appellant had failed to show that equivalent alternative accommodation was available to the Respondent suitable for business as well as residential purposes the Appellant had not complied with the requirements of S. 19 of the 1940 Ordinance. In reaching this conclusion he relied strongly upon the decision of the English Divisional Court in *Tompkins v. Rogers*, 1921, 2 K.B. 94. This case was 40

decided at a time when the English Acts applied to business premises, and it was held that to recover possession of premises used by the tenant both as a dwellinghouse and for the business of a lodging house the landlord must show that he reasonably required the premises for business purposes.

26. Chief Justice Graham Paul delivered a separate judgment also relying upon *Tomkins v. Rogers* (supra) and based upon the failure of the Appellant to show either (a) that he reasonably required Plot 209/2555 for business purposes or (b) that equivalent alternative accommodation was available to the Respondent suitable for business purposes. He said nothing as to either of the two alternative grounds upon which Mr. Justice de Lestang had relied. Chief Justice Edwards expressed agreement but did not deliver a separate judgment.

p. 50, ln. 48.
p. 51, ln. 19.

p. 52, ln. 12.

27. The Appellant submits that the judgments of the Court of Appeal were based upon a fundamental misapprehension in that they wrongly assumed that the Proclamation No. 53 of 1941 was valid whereas in fact it was *ultra vires*. Section 19 of the 1940 Ordinance conferred upon the Governor a discretion as to the area to which he should apply the Ordinance in respect of premises used for business but no further discretion (except as to the date of application), and in particular no discretion to limit the application of the Ordinance to premises of a certain value as the said Proclamation purports to do. Accordingly the provisions of S. 19 as to business user never applied to Plot 209/2555 but only those of S. 11 and with these latter provisions the Appellant duly complied.

28. Alternatively if the said Proclamation was valid the Court of Appeal was nevertheless wrong in holding that the effect thereof was to confer upon premises subject thereto a double protection both in respect of residential and business user. Although premises may be used for both residential and business purposes, they remain a single set of premises for the purposes of protection under the 1940 Ordinance and it is the occupation of premises and not the user thereof which that Ordinance protects. In respect therefore of any given set of premises either the provisions of S. 11 (1) (d) thereof apply or they do not. If they do apply, then the provisions contained in paragraph (a) of S. 19 thereof cannot apply because it is thereby provided that such provisions shall not be added to but shall be substituted for those of S. 11 (1) (d). Where the draftsman means "added", he says so, as in paragraph (b) of S. 19. This shows that the two forms of protection are complementary but not cumulative. Indeed if they were cumulative it would be in practice almost impossible for a landlord ever to recover possession of premises which a tenant was not expressly prohibited from using for both business and residential purposes. This construction is further

supported by the fact that S. 11 (2) applies to premises used as a dwellinghouse, but by virtue of S. 19 does not apply to premises used for business. The same sub-section cannot both apply and not apply to the same premises.

29. If the above submission is correct, then S. 19 must be read as only applying to such premises as are not already protected as dwellinghouses under S. 11. Plot 209/2555 clearly is so protected whether the true test be (a) that adopted by the English Courts, that once user as a dwellinghouse is established concurrent user for business purposes is immaterial (as in *Vickery v. Martin*, 1944, K.B. 679) 10 or (b) dominant user, since the 1940 Ordinance contains no provisions corresponding to S. 12 (2) (ii) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 and to S. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939.

30. It is true that the above construction involves reading "used for business, etc." in S. 19 of the 1940 Ordinance as meaning "wholly used for business", or possibly as "used chiefly for "business" if dominant user be the true test. But it is submitted (a) that the language of the Section clearly shows that the two forms of protection are mutually exclusive and (b) that it would be 20 extravagant to suppose that it was intended by the Section to oust the protection already existing in respect of dwellinghouses whenever such a dwellinghouse was used, no matter how slightly, for a business purpose; so that the *prima facie* literal construction of the words "used for business" leads to an absurd result.

31. The construction for which the Appellant contends is in line with the balance of English authorities decided during the period until the 20th June, 1920, when the English Rent Acts applied to business premises by virtue of S. 13 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The case of 30 *Tompkins v. Rogers*, 1921, 2 K.B. 94, which was much relied on upon this point in the Courts below was decided without argument on behalf of the respondent landlord who was not represented on the appeal to the Divisional Court. Perhaps in consequence of this fact and of the fact that it had presumably not yet been reported, the previous contrary decision of the Divisional Court in *Waller v. Thomas*, 1921, 1 K.B. 541, was not cited to the Court in *Tompkins v. Rogers*. In *Waller v. Thomas*, it was held that a public house containing residential accommodation fell within the general provisions of the above Act relating to dwellinghouses and did not constitute 40 business premises within the meaning of S. 13 (1) thereof, the language of which is for this purpose identical with that of S. 19 of the 1940 Ordinance. In *Waller v. Thomas* precisely the same argument as to "double protection" which formed the basis of the judgments in the Courts below in the present case was put forward

by counsel for the tenant, but was rejected by the Court which held that it was not necessary to offer alternative business accommodation. *Waller v. Thomas* was not however cited to either of the Courts below in the present case. Moreover in *Colls v. Parnham*, 1922, 1 K.B. 235, a further decision of the Divisional Court, Shearman, J. said of *Tompkins v. Rogers* (at p. 327) "That case presents great difficulties".

32. On the 12th January, 1950, the Court of Appeal for Eastern Africa granted final leave to the Appellant to appeal to His Majesty in Council. p. 53.

33. The Appellant therefore humbly submits that this appeal should be allowed and that the Order of the Court of Appeal in East Africa should be reversed and an order made in the Appellant's favour for possession of Plot 209/2555 and for the consequential relief prayed in his Amended Complaint, or alternatively that the case be remitted to the Supreme Court of Kenya to decide the question of whether it would be reasonable to make such an order and to deal with the case accordingly, for the following amongst other p. 52.
p. 5.

REASONS.

- 20 1. BECAUSE the Proclamation No. 53 of 1941 was *ultra vires* and therefore in order to recover possession of Plot 209/2555 under the provisions of the 1940 Ordinance it was not necessary for the Appellant to show that he required the said plot for business purposes or that equivalent alternative accommodation suitable for business purposes was available to the Respondent. Alternatively
- 30 2. BECAUSE for the reasons stated in paragraphs 28-31 inclusive of this case it was not necessary upon the true construction of the 1940 Ordinance for the Appellant to show as aforesaid.
3. BECAUSE if for either of the above reasons the Appellant was not concerned with consideration of business user the requirements of S. 11 (1) (d) of the 1940 Ordinance were duly fulfilled upon the facts found in the present case and he is entitled therefore to an order for possession.
- 40 4. BECAUSE Mr. Justice de Lestang was wrong in holding that the provisions of S. 11 (2) of the 1940 Ordinance afforded a defence to the Appellant's claim. The construction adopted by the learned Judge would lead to an extravagant result and is contrary to the views expressed by Chief Justice Webb in *Tara Singh v.*

Harnam Singh, XI E.A.C.A. 24 and by the President in the Court of Appeal in the present case.

5. BECAUSE even if the construction adopted by Mr. Justice de Lestang was right the relevant date for applying the provisions of S. 11 (2) is the date when the Order takes effect, and the Appellant is prepared if necessary to undertake to relinquish the right to possession of the dwellinghouse he now occupies as a term of being granted possession of Plot 209/2555.
6. BECAUSE the Respondent was at the date of the commencement of this action a statutory and not a contractual tenant. Mr. Justice de Lestang was wrong in holding that a contractual tenancy had been created:
 - (a) Because such finding was based upon a wrong inference of law in the light of the admitted facts.
 - (b) Because the contractual tenancy found by the learned Judge was never pleaded by the Respondent and
 - (c) Because the Respondent was estopped from alleging that he was a contractual tenant by his statement to the Appellant that he was a statutory tenant.
7. BECAUSE it is reasonable in all the circumstances of the case that an order for possession should be made in the Appellant's favour.

ANDREW CLARK.

MICHAEL ALBERY.

No. 8 of 1950.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR
EASTERN AFRICA.

HARNAM SINGH

— v. —

JAMAL PIRBHAI.

CASE FOR THE APPELLANT.

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