

Heptulla Brothers Limited - - - - - Appellants

v.

Jambhai Jeshangbhai Thakore - - - - - Respondent

FROM

EASTERN AFRICA COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 7TH MARCH, 1956

Present at the Hearing:

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

[*Delivered by* LORD KEITH OF AVONHOLM]

This appeal arises out of an action brought by the respondent (hereafter called the plaintiff) against the appellants (hereafter called the defendants) in the Supreme Court of Kenya at Nairobi to obtain possession of certain business premises in Nairobi occupied by the defendants, or alternatively for an injunction against their committing breaches of certain covenants, and for other relief. One of the issues between the parties is whether the parties are in the relationship of landlord and tenant or of licensor and licensee of the premises in question. The defendants, however, take the plea that this is not a live issue being already *res judicata* of another tribunal in proceedings to which some reference must first be made.

This appeal is a stage in a series of actions between the same parties. The matter started with proceedings before the Central Rent Control Board at Nairobi on an application dated 27th January, 1951, by the plaintiff, described as "landlord", against the defendants, described as "tenant", for ejection of the tenant for failure to pay rent and other charges and for "breaches of the tenancy existing between the tenant and landlord". After defence had been entered the plaintiff restricted the grounds of his application to non-payment of rent and matters touching the payment of rent and ultimately a consent order was made by the Rent Control Board on 9th May, 1951, in the following terms:—

"The arrears due (Shs.5018/32 including rent for May, 1951) and admitted must be paid by 15th May, 1951. The rent of each month must be paid in future in full, viz. Shs.285/- inclusive of water and dust bin only, in advance by the 5th day of that month. Should there be any breach of the above conditions, the landlord (head-tenant) will be entitled to vacant possession forthwith.

The parties agree to leave the question of costs to the Board and the Board directs that each party bear its own costs."

Some seven weeks later, on 21st June, 1951, the defendants started proceedings before the Rent Control Board in respect of alleged interference by the plaintiff with the defendants' enjoyment of the shop premises

occupied by them as his tenants. It appears from the "tenants' case" that there was some part excepted from the alleged let to the tenants which left that part in the occupation of the plaintiff and that the plaintiff also occupied an upper floor to which access was had by a staircase situated near the front door of the shop. The defendants alleged that their use of, or access to, the shop was obstructed by a glass counter introduced by the plaintiff who threatened further to erect an access to the staircase and that this obstruction and threat had in view "to annoy and harass the tenants so as to compel the tenants to vacate the premises". Their Lordships would observe that they find it impossible to appreciate from the "tenants' case" the nature and extent of the division of the premises between the parties and the manner of annoyance said to be caused or apprehended by the glass counter or by the threatened access. The plaintiff in his defence denied that he was the defendants' landlord, "having no privity of contract with the claimants", and without prejudice to this denial admitted certain of the facts stated by the defendants, but in terms that do not make any clearer to their Lordships the nature of the division of the premises between the parties. He denied any right of the defendants to call for removal of the counter and that it or the proposed structural alteration would in any way harass and annoy the tenants and prayed that the "tenants' case" be dismissed with costs.

No action appears to have been taken in these proceedings before the 20th April, 1953. On that date the plaintiff made application under section 16 (1) (b) of the Rent (Restriction) Ordinance, 1949, to the Rent Control Board for recovery of possession of the premises "on the grounds that the tenants have been guilty of conduct which is a nuisance or annoyance to the claimant who is a joint occupier" in a variety of respects specified in the application. The defendants entered a defence denying the plaintiff's allegations and this and the previous application having been consolidated, the Rent Control Board gave judgment on 26th November, 1953, in which they held that it was plain from the pleadings of the plaintiff that the relationship of landlord and tenant existed between the parties but that the plaintiff and the defendants were joint occupiers of the shop and not adjoining occupiers within the meaning of section 16 (1) (b) of the Ordinance. Accordingly the Rent Control Board dismissed the application brought by the plaintiff under this section and gave leave to the defendants to withdraw their application against the plaintiff with liberty to bring a fresh case later upon the same facts.

The plaintiff then took further proceedings before the Rent Control Board against the defendants on 7th December, 1953. In his plaint, he alleged that he was tenant of the plot in question and by lease dated 1st May, 1941, sub-let part of it to Mr. Ahamedali M. Heptulla for a period of two years and eleven months by whom it was assigned to the defendants on 9th May, 1942, and that on the expiry of the lease the defendants held over as statutory tenants upon the same terms and conditions as to rent and all other matters as were set forth in the lease. The plaint then set out certain covenants contained in the lease, which it is unnecessary for present purposes to specify, alleged breaches of the covenants in various respects, referred to the previous proceedings of 20th April, 1953, and applied under section 16 (1) (a) of the Ordinance for an order for recovery of possession; an injunction; damages; costs; and such further and better relief as the Court might consider just. This plaint was dismissed on 14th December, 1953, on the ground that "the matter having been absolutely disposed of by the Board and the previous case dismissed without permission to bring a fresh case, this fresh plaint cannot be entertained by the Board at all and must be summarily rejected". Their Lordships' Board are not able fully to appreciate the grounds of this decision as the earlier application (of 20th April, 1953), was brought under section 16 (1) (b) of the Ordinance, whereas the later was brought under section 16 (1) (a) of the Ordinance. But their Lordships do not find it necessary to enter into the merits of any of the proceedings brought before the Rent Control Board.

The plaintiff next started the present proceedings in the Supreme Court of Kenya at Nairobi on 3rd February, 1954. In his plaint he repeats verbatim the whole of the allegations made against the defendants in the earlier proceedings before the Rent Control Board commenced on 7th December, 1953. The basis of his action has, however, been enlarged. He sues the defendants first as sub-tenants holding over as statutory tenants of part of the shop premises of which he alleges he is the tenant. Alternatively he sues the defendants as his licensees of part of the premises. Further alternatively he sues the defendants as occupiers of part of the aforesaid premises. He alleges that he has given the defendants notice to quit and he prays for (i) an order for recovery of possession or, in the alternative, (ii) an injunction restraining them from committing either further breaches of the aforesaid covenants of their tenancy, or further breaches of the terms and conditions of their licence or further acts of nuisance; and, in any event, for damages, costs and further and other relief.

In defence the defendants plead *res judicata* and estoppel in respect of the proceedings before the Rent Control Board, claim to be contractual tenants of the plaintiff, deny that they are his licensees and otherwise traverse the allegations of the plaintiff in various detailed respects to which their Lordships do not find it necessary to refer.

The action came before Mr. Justice Corrie, who, relying largely on a judgment of the Court of Appeal for Eastern Africa in *Karamat Ali v. Champion Shoe Company* (1948) 16 E.A.C.A. 15, held that there was not a letting such as would bring the parties within the scope of the Increase of Rent (Restriction) Ordinance, 1949, and that accordingly the Rent Control Board had no jurisdiction to deal with the matters at issue between the parties. There was thus no *res judicata* or estoppel. He further held that the relationship between the parties was that of licensor and licensee and that the term of the licence having expired, it was competent for the plaintiff to give the defendants notice to quit and that this had been done. He therefore made an order for recovery of possession.

From this judgment the defendants appealed to the Court of Appeal for Eastern Africa. Their grounds of appeal were that as the case had been argued by agreement between counsel only on two preliminary points, viz. the jurisdiction of the Supreme Court (now abandoned) and *res judicata* the case, in the event of these objections being overruled, should have proceeded to a hearing on the merits; further that the judge had erred in overruling the defendants' plea of *res judicata* and estoppel; in holding that the relationship between the parties was that of licensor and licensee; and in making an order for recovery of possession. On 22nd October, 1954, the Court of Appeal, without delivering any judgment, made the following order:—

“ 1. That this appeal be dismissed.

2. That the Order for possession made by the Supreme Court and the finding of fact that the licence had been revoked be set aside, but that the finding that the relationship between the parties was that of licensor and licensee be confirmed.

3. That the action be remitted to the Supreme Court for the determination of the following issues only:—

(i) Whether the licence granted by the Respondent to the Appellants was revoked in fact.

(ii) Whether the Appellants committed the alleged breaches of covenants or terms of the licence, or, alternatively, the alleged nuisance.

(iii) (a) whether the said licence was lawfully determined, and

(b) whether the Respondent is entitled to the relief claimed in the plaint, or any part of it, and the amount of damages, if any.

AND with a direction that judgment be entered accordingly.

AND IT IS FURTHER ORDERED that the Appellants do pay three-quarters of the costs of this appeal and that the costs of the previous proceedings in the Supreme Court be paid as ordered by that Court and that the costs of the re-trial be reserved to the discretion of the trial Judge."

From this order an appeal has been taken to their Lordships' Board. The submissions for the defendants before the Board were that the issues between the parties, having already been determined by the Rent Control Board from whose decisions no appeal had been taken, were *res judicata* and could not be re-opened before the Supreme Court and that the plaintiff was also barred by estoppel *in pais* from reopening these issues. If wrong on these points the case, it was submitted, should be sent back for trial on all issues other than *res judicata* and estoppel. Before the Board defendant's counsel ultimately abandoned his plea of estoppel. These submissions were traversed by counsel for the plaintiff.

It is agreed between the parties and seems also to their Lordships clear that the Rent Control Board has jurisdiction only on issues arising between landlord and tenant. The relevant Ordinance is the Increase of Rent (Restriction) Ordinance, 1949, as amended by the Increase of Rent (Restriction) (Amendment No. 2) Ordinance, 1951. The Ordinance applies to all premises, whether dwelling-houses or business premises, situate in the area of a Rent Control Board with certain exceptions which are not material to the present case. (Section 1 (2) of the Ordinance of 1949.) By the Ordinance of 1951 "business premises" is defined as meaning "a building or part of a building let or to be let for the public service or for business trade or professional purposes, and includes the land occupied therewith and comprised in the letting"; and "dwelling-house" means "any house or part of a house or room let as a dwelling or place of residence and includes the site of the house and the garden and other lands or buildings comprised in and incidental to the letting, but not let as a separate entity or source of profit". The Ordinance accordingly only applies to let premises. It was submitted, however, for the appellants that the Rent Control Board had committed to it by the Ordinance, either expressly or impliedly, the power to determine conclusively (subject to any right of appeal) the question of its own jurisdiction. This submission was based on the terms of section 5 (1) (n) of the Ordinance of 1949, which runs as follows: "[The Board] shall have power to do all things which it is required or empowered to do by or under the provisions of the Ordinance, and in particular shall have power—(n) to exercise jurisdiction in all civil matters and questions arising under this Ordinance". In their Lordships' view this provision does not have the meaning or effect for which the defendants contend. It does no more than confirm the competence of the Board to deal with all civil matters and questions arising under the Ordinance. It does not give to the Board the power to determine what civil matters and questions arise under the Ordinance. The Board have in any particular case to be satisfied that a relationship of landlord and tenant does exist as a preliminary to bringing the Ordinance into operation, but that is a function merely incidental to the application of any section of the Ordinance that is invoked and not a power conferred by any section of the Ordinance.

On this view it is unnecessary to deal with various aspects of the plea of *res judicata* which were canvassed before their Lordships' Board. The matter is really ruled by the following passage in the judgment of Lord Esher, M.R., in *The Queen v. Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313 at 319:

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether

that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

In their Lordships' opinion the present case falls within the first of the two types of cases mentioned by Lord Esher. The question of the relationship of landlord and tenant cannot, therefore, be made *res judicata* by a finding of the Rent Control Board, if a superior Court decides that the facts to constitute that relationship do not exist. The finding of the Rent Control Board in these circumstances can never be anything more than a collateral finding which cannot raise a plea of *res judicata*.

There remains only the question whether the order of the Court of Appeal should stand. That order confirms the finding of the Supreme Court that the relationship between the parties was that of licensor and licensee. Their Lordships have been unable to discover from the material before them any evidence on which this question can be satisfactorily determined and they have been referred to nothing other than the pleadings and the admissions and actings of the parties therein, as disclosed in the record of the various proceedings to which reference has already been made. In their Lordships' opinion these are quite insufficient to establish whether the relationship was one of landlord and tenant, or of licensor and licensee. No evidence other than the pleadings before the Rent Control Board and the Orders made therein was before the Supreme Court. Their Lordships have reached the conclusion that the finding of the Court of Appeal on the relationship of the parties cannot, in the circumstances, be supported without evidence of the relevant facts, including the titles, if any, to possession and the nature of the occupation of the premises.

The appellants were unable to obtain from the Court of Appeal a stay of proceedings pending the present appeal to their Lordships' Board and their Lordships have been informed that further procedure under the Order of the Court of Appeal has taken place, including the granting of an order for possession of the premises in question. These are not, however, matters which can affect the judgment of their Lordships' Board.

The Board will humbly advise Her Majesty that the orders of the Supreme Court and of the Court of Appeal for Eastern Africa be set aside; and that the case be remitted to the Supreme Court to be tried on all the issues between the parties other than the issues of *res judicata* and estoppel. Their Lordships direct that the appellants (defendants) bear the costs of the hearing before the Supreme Court on the preliminary points of *res judicata* and estoppel and that otherwise each party bear their own costs in the hearing before the Court of Appeal and before their Lordships' Board.

In the Privy Council

HEPTULLA BROTHERS LIMITED

v.

JAMBHAI JESHANGBHAI THAKORE

DELIVERED BY
LORD KEITH OF AVONHOLM

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.
1956