27/1959

IN THE PRIVY COUNCIL No. 32 of 1958

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

55476

BETWEEN

KIRIRI COTTON COMPANY LIMITED Appellants

- and -

RANCHHODDAS KESHAVJI DEWANI Respondent

CASE FOR THE RESPONDENT RECORD

1. This is an Appeal from an Order dated the 18th April, 1958, of Her Majesty's Court of Appeal for Eastern Africa (O'Connor, P., Forbes, J.A., and Keatinge, J.) dismissing an appeal by the Appellants from a Decree dated the 24th September, 1957, of the High Court of Uganda (Lyon, J.) whereby it was ordered that judgment be entered for the Respondent, in an action brought by him against the Appellants, for the sum of Shgs. 10,000/- and costs. p.55 p.27

2. The question which arises in the Appeal is whether the Respondent, having been granted by the Appellants a sub-lease of a residential flat in Kampala, Uganda, and having paid to the Appellants in consideration of the grant of the said sub-lease a premium of Shgs. 10,000/-, the receipt of which by the Appellants was illegal under the Uganda Rent Restriction Ordinance (Cap. 115 of the Laws of Uganda, and hereinafter referred to as 'the Rent Restriction Ordinance'), is entitled to recover from the Appellants the amount of the said premium as money received by them to his use.

3. The material facts of the case as stated in evidence by the Respondent, who was the only witness called on the hearing of the said action and whose evidence was not challenged, were as follows:
The Respondent came to Kampala, Uganda, in March, 1953, and lived with a brother for 1½ months. He then, after searching for some time, took a flat for which he had to pay key-money but after two or three days he had to pp.10,11

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leave this flat because he had trouble with a co-tenant. He then, after some difficulty in finding accommodation, got in touch with the Appellants and entered, in or about the month of May, 1953, into negotiations with them for the grant by them to him of a sub-lease of a residential flat known as Flat No.1 on Plot 55, Salisbury Road, Kampala aforesaid, and agreed to pay, and did in fact pay, to them in consideration of the grant of the sub-lease hereinafter mentioned a premium of Shgs. 10,000/- which sum he borrowed for that purpose from the Kampala Flour Mills Limited of which his brother was a director.

4. Thereafter, by a written sub-lease dated the
p.4 17th September, the Appellants sub-let to the Respondent the said flat for a period of seven years and one day from the 31st May, 1953, at a rent of Shgs. 300/- per month, such sub-letting being expressed to be in consideration of the said sum of Shgs. 10,000/- paid by the Respondent by way of premium to the Appellants (the receipt of which sum the Appellants acknowledged) and of the rent and sub-lessee's covenants in the said sub-lease reserved and contained.

5. At the time of payment of the said premium and execution of the said sub-lease Section 3 of
p. - the Rent Restriction Ordinance provided as follows:

"3(1) No owner or lessee of a dwellinghouse or "premises shall let or sub-let such dwelling-"house or premises at a rent which exceeds the "standard rent.

"(2) Any person whether the owner of the property "or not who in consideration of the letting or sub-"letting of a dwellinghouse or premises to a "person asks for, solicits or receives any sum of "money other than rent or any thing of value "whether such asking, soliciting or receiving is "made before or after the grant of a tenancy shall "be guilty of an offence and liable to a fine not "exceeding Shgs. 10,000/- or imprisonment for a "period not exceeding six months or to both such "fine and imprisonment:

"Provided that a person acting bona fide as an "agent for either party to an intended tenancy "agreement shall be entitled to a reasonable "commission for his services:

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"And provided further that nothing in this "section shall be deemed to make unlawful the "charging of a purchase price or premium on the "sale, grant, assignment or renewal of a long "lease of premises where the term or unexpired "term is seven years or more."

6. The second of the said provisos to the said Section 3(2) of the Rent Restriction Ordinance has no application to the present case, 'premises' being so defined in Section 2 of the said Ordinance as not to include a building or part of a building let for residential as distinct from business, trade, or professional purposes.

7. The Rent Restriction Ordinance has at no time included any express provision such as is to be found in the corresponding English legislation (Section 8 of the Rent and Mortgage Interest (Restrictions) Act, 1920) to the effect that the amount of an illegal premium shall be recoverable by the person by whom it was paid.

8. By a Plaint dated the 21st September, 1956, the Respondent alleged the said sub-letting to him of the said flat, and that in consideration thereof the Appellants asked for and received from the Respondent or on his behalf from the said Kampala Flour Mills Limited the said sum of Shgs. 10,000/- by way of premium and other than by way of rent, and that by virtue of the provisions of the said Section 3(2) of the Rent Restriction Ordinance the receipt of the said sum by the Appellants was illegal, and that the Respondent was entitled to recover the same since he was not <u>in pari delicto</u> with the Appellants; and claimed from the Appellants the said sum, as money received by them to the Respondent's use, together with interest thereon and costs. pp.1,2,3

9. By their Statement of Defence dated the 31st October, 1956, the Appellants alleged <u>inter alia</u> that the Plaint disclosed no cause of action, and that if the payment of the said premium was illegal the Respondent being a party to such illegality could not recover the said sum. They also denied that the Respondent was not <u>in pari delicto</u> with the Appellants and contended that he was estopped from claiming the said sum by reason of delay, acquiescence and laches. pp.9,10.

10. The said action came on for hearing in the

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pp.16-27 High Court of Uganda on the 18th September, 1957, before Mr. Justice Lyon who on the 24th September, 1957, gave judgment in favour of the Respondent for Shgs. 10,000/- and costs to be taxed.

11. In his judgment the learned judge found as a
p. 17 fact that during the negotiations for the flat the Respondent was at a disadvantage and said that the sub-lease had obviously been drafted by a lawyer and that the term of seven years and one day had been intended to bring the transaction within the second proviso to Section 3 of the Rent Restriction Ordinance but failed to do so by reason of the
p. 19 definition of 'premises'. He held that the receipt of the Shgs. 10,000/- by the Appellants was illegal and proceeded to consider certain East
pp.19-21 African decisions as to payments made in contravention of the Rent Restriction Ordinance and also a number of English decisions bearing upon the ambit of, and exceptions to, the maxim in pari delicto potior est condicio possidentis.

12. The learned Judge concluded that he was not bound by the decision of the Court of Appeal for
p. 21 Eastern Africa in the case of Rex v Norman Godinho (Criminal Appeal 62/50) 1950 E.A.C.A. (Volume XVII) 134, that being a criminal appeal in which, in his view, all that was decided was that a particular complainant ought not to be awarded
p. 21 compensation, and the decision, moreover, implying that the parties were in pari delicto. In his view the Rent Restriction Ordinance as a whole was
p. 22 enacted almost entirely to protect the rights of tenants and to prevent a rapacious landlord from taking advantage of a tenant unable to obtain accommodation owing to the housing shortage caused by war, and the English legislation during and after both wars had the same purpose. He held that in the
p. 22 present case the Landlords and the tenant were not in pari delicto and a review of relevant Engish
pp.24-26 decisions (Langton v Hughes (1813) 1 M & S. 593-6, Falmouth Boat Construction Co. Ltd. v Howell, (1950) 2 K.B.16, Gray v Southhouse, (1949) 2 A.E.R. 1019, Browning v Morris, 2 Cowp. 790, Green v Portsmouth Stadium Ltd., (1953) 2 A.E.R. 102, and Kearley v Thomson (1890) 24 Q.B.D. 742) led him to the conclusion that the Respondent was not precluded by the illegality from recovering the premium. He was, moreover, disposed to follow the decision of
p. 26 Edwards C.J. in Jamnadas Samlabhai v Haribhai

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Mangalbhai Patel (High Court of Uganda - Civil Appeal No.20 of 1949) where a tenant was held entitled to recover rent paid in excess of the standard rent notwithstanding that the Rent Restriction Ordinance contained no express provision for such recovery.

13. The learned Judge proceeded to consider and reject the Appellants' defence of laches, and held the Respondent entitled to recover the amount of the premium with costs. p. 26

14. The Appellants having appealed from the said judgment of Mr. Justice Lyon to the Court of Appeal for Eastern Africa the said appeal came on for hearing in the said Court of Appeal (O'Connor, P., Forbes, J.A. and Keatinge, J.) on the 17th March 1958, and on the 18th April, 1958, the said Court of Appeal gave judgment dismissing the appeal with costs. pp.31-54

15. The leading judgment in the Court of Appeal for Eastern Africa was delivered by the President (Sir Kenneth O'Connor) who after reviewing the facts of the case and the terms of Section 3 of the Rent Restriction Ordinance said that the learned Judge's conclusion that the payment of the premium was illegal was accepted by both parties to the appeal. The learned President proceeded to consider the decision in Rex v Norman Godinho which the learned Judge had held not to be binding upon him. The learned President doubted whether this decision was deprived of binding authority by the circumstances of its being a criminal appeal but whether or not it should properly have been considered binding in the court below he was of opinion that it was not binding on the Court of Appeal for Eastern Africa because, in his view, it was a decision given in ignorance or forgetfulness of authorities binding upon that court, namely the decisions of English courts in Browing v Morris, 2 Cowp. 790, and Kearley v. Thomson, (1890) 24 Q.B.D. 742. which being prior to 15th August, 1902 (the date of reception into Uganda of the English common law and the doctrines of equity) were decisions in conformity with which the jurisdiction of the High Court of Uganda ought to be exercised, and which laid down exceptions to the general principle that money paid under an illegal contract cannot be recovered. pp.31-34 p. 34 p. 35 p. 40 p. 42 p. 43

16. The learned President therefore proceeded to consider, untramelled by the decision in Rex v Norman Godinho, whether the Respondent in the present case was entitled to recover the premium. He agreed with the p. 45

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learned Judge that the sub-lease had been intended to fall within the second proviso to Section 3 (2) of the Rent Restriction Ordinance and that there
p. 45 had been no deliberate delictum on either side. In his view the Rent Restriction Ordinance was passed, as were the Rent Acts in England, for the protection of tenants, and he agreed with the finding of fact of the learned Judge that the
p. 46 Respondent fell within a protected class. It followed that the Respondent and the Appellants were not in pari delicto.

17. In the view of the learned President the absence from the Rent Restriction Ordinance of any express provision (comparable to that contained in
p. 46 Section 8 of the Rent and Mortgage Interest (Restrictions) Act, 1920) entitling the tenant to recover an unlawful premium paid by him was not conclusive that the legislature did not intend that there should be a right of recovery at common law or in equity. The cases of Cutler v Wandsworth Stadium Ltd. (1949) A.C. 398 and Green v Portsmouth Stadium Ltd., (1953) 2 A.E.R. 102, were in his
p. 52 opinion distinguishable in that the statute there in question was not passed for the benefit of bookmakers whereas the Rent Restriction Ordinance here in question was passed for the benefit of tenants and prospective tenants, and in his opinion it was consistent with and in furtherance of the policy of the Ordinance that unlawful premiums should be recoverable. He had, accordingly, reached the conclusion that on the facts of this case the Respondent was entitled to recover the premium.

18. The learned Judge had found that the Respondent had not been guilty of laches and no sufficient reason had been shown for interfering
p. 54 with this finding. He must also have found against the allegations of estoppel and acquiescence and these matters had not been raised in the appeal.

p. 54 19. Forbes, J.A., and Keatinge, J. agreed with the judgment of the learned President.

20. On the 16th September, 1958, the Court of Appeal for Eastern Africa, having previously granted conditional leave to appeal and being satisfied that the conditions had been complied with, granted
p. 56 to the Appellants final leave to appeal from the

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said judgment to Her Majesty in Council.

21. The Respondent submits that the said judgment of Her Majesty's Court of Appeal for Eastern Africa is right and should be upheld for the following among other

R E A S O N S

(1) Because the Respondent belongs to the class of persons, namely tenants and prospective tenants, for whose protection the Rent Restriction Ordinance was passed.

(2) Because the Respondent, either by reason of his belonging to the said class or by reason of his being a person oppressed by the Appellants exaction of the said premium, was not in pari delicto with the Appellants.

(3) Because it is consistent with and in furtherance of the policy of the Rent Restriction Ordinance that unlawful premiums should be recoverable.

(4) Because on the true interpretation of the Rent Restriction Ordinance an action lies at the suit of a tenant or prospective tenant to recover the amount of an unlawful premium paid by him.

(5) Because, the Rent Restriction Ordinance having imposed a duty on landlords and prospective landlords for the benefit of tenants and prospective tenants, there arises at common law a correlative right in those persons who may be injured by this contravention.

(6) Because the decision of Mr. Justice Lyon in the High Court of Uganda was right and was rightly upheld by the Court of Appeal for Eastern Africa.

(7) Because the judgments delivered in the Court of Appeal for Eastern Africa were right for the reasons therein given.

ALAN S. ORR

Counsel for the Respondents

No. 32 of 1958

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FOR EASTERN AFRICA

B E T W E E N

KIRIRI COTTON CO. LTD. Appellants

- and -

RANCHHODDAS KESHAVJI DEWANI
... ... Respondent

C A S E FOR RESPONDENT

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