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IN THE PRIVY COUNCIL

No. 33 of 1961

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

MISTRY AMAR SINGH
(Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA
(Plaintiff) Respondent

74046

CASE FOR THE APPELLANT

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1. This is an Appeal from a judgment and order of the East African Court of Appeal (Forbes V.P., Crawshaw J.A. and Corrie Ag. J.A.) dated the 25th day of January 1961 allowing the Appeal of the Respondent from a judgment and decree of Her Majesty's High Court of Uganda at Kampala (Lyon J.) dated the 3rd day of August 1960. Final leave to appeal to the Privy Council was granted to the Appellant by the said Court of Appeal by order dated the 5th day of July 1961. pp.38-56 pp.10-18 p.57

2. The question raised in this Appeal is whether the Plaintiff can recover land from the Defendant which the Defendant possesses as a result of leases between the parties which were contrary to law and rendered both the Plaintiff and the Defendant liable to be punished for criminal offences.

3. By his amended Plaint dated the 26th day of April 1960 the Respondent to this Appeal (hereinafter called "the Plaintiff") stated that he was an African landowner and registered proprietor of three plots of land which he had leased to the Defendant who was an Indian resident in Uganda. The leases commenced upon the 29th day of March 1946, the 21st day of November 1946 and the 1st day of October 1947 and after the expiry of the original duration of one year, the Defendant held over in respect of each of them as tenant from year to year as he was permitted to do by the respective tenancy agreements. pp.1-3

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p.2 4. In paragraph 7 of the said Plaint the Plaintiff admitted that the necessary consents for these leases had not been obtained. He further stated that upon the 12th day of November 1959 he gave the Defendant three notices to quit. pp.3-5 Copies of such notices which were identical in form were annexed to the said Plaint and each purported to be effective as from the 1st day of January 1960. Further each notice described the Defendant as having a "statutory tenancy". The p.2 said Plaint continued as follows:-

> "9. The Defendant has neither paid nor tendered any rent in respect of the said land subsequent to the 31st day of December, 1958 (quaere 1959) and remains illegally in occupation of the land."

5. After complaining that the Defendant had not removed a fence and shed and had thus caused the Plaintiff to suffer damages in trespass, the Plaintiff put his claim in the following terms:-

> "(a) Possession of the said land and eviction of the Defendant therefrom;
>
> (b) Mesne profits from the 1st day of January, 1959 (quaere 1960) at the rate of Shs.890/- per annum until possession is granted;
>
> (c) An junction perpetually restraining the Defendant from trespassing on the said land;
>
> (d) Costs;
>
> (e) Damages;
>
> (f) Further or other relief."

pp.5-6 6. Upon the 20th day of April 1960 the Defendant delivered a written statement of Defence which was stated to be "under protest". After contending that the Plaint did not disclose any cause of action, the Defendant continued:-

> "3. In the alternative, the Defendant states that the Plaintiff was party to illegal agreements. The said agreements are referred to in paragraphs 3, 4 and 5 of the

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plaint. Therefore the Plaintiff is not entitled to file any action on the said agreements."

The remaining paragraphs dealt with an alleged subsequent agreement between the parties upon which the Defendant relied for an order of specific performance by way of counterclaim. This was subsequently withdrawn.

7. Upon the 28th day of July 1960 the Plaintiff delivered a Reply around which much argument took place in the Courts below. The relevant paragraphs are as follows:- p.7

"2. The Plaintiff agrees that the Agreements referred to in paragraphs 3, 4 and 5 of the Plaint were illegal without consents of the Governor and the Lukiko and admits that such consents have not been given.

3. The Plaintiff asserts that the Defendant has at all material times occupied, and still occupies, the land referred to in the said Agreements illegally.

5. The Plaintiff abandons his claim for rent, mesne profits and damages."

8. The proceedings commenced in the High Court of Uganda upon the 2nd day of August 1960 when on behalf of the Plaintiff it was stated that the following facts and legal consequences (inter alia) were agreed:- pp.7-8

1. The Plaintiff was an African registered landowner: the Defendant was an Indian.

2. The three leases referred to in the amended Plaint.

3. The three tenancies were not registered.

4. The leases were void.

5. After the agreements, the consents of the Governor and Lukiko were sought and

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the Lukiko refused consent on the 12th day of November 1949.

6. The Defendant had entered into occupation and remained in occupation. He was thereby guilty of an offence under section four of the Land Transfer Ordinance.

7. The Plaintiff in permitting the Defendant to take the leases was guilty of an offence under section 2 (D) of the Buganda Land Law.

p.9 l.4-16. 9. As a result of this statement the following four issues were framed:-

"1. Are the parties not in pari delicto being each in turn guilty of an offence in permitting and taking a lease?

2. If yes, can the Plaintiff recover possession on the strength of the illegality of the lease to which he was a party?

3. Has any possession or property been transferred by the illegal agreements?

4. Having pleaded illegality in order to support his claim and seeking to found his claim on the illegal contracts, can the Plaintiff recover possession or obtain an injunction to restrain the alleged trespass?".

p.10. l.6. 10. After argument, the Defendant was called upon to open the case, but the further arguments of Counsel are not included in the Record. No evidence was called by either side.

pp.10-13 11. In the course of his judgment the learned Judge referred to the pleadings, emphasizing the Reply of the Plaintiff, and after observing that it was common ground that both parties had committed offences punishable by fine and imprisonment, he continued:-

p.13.l.33-40. "The main contest here is, are the parties in pari delicto? And that is the crux of the case because, if so, as I understand the law, the defendant must win,

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as the plaintiff's case in those circumstances would not lie at all. This settled law rests upon the principle that no court will entertain any suit brought by a wrongdoer or one who does not come to court with clean hands."

12. After referring to and quoting from certain authorities both English and East African including some on the subject of mistake which it is respectfully submitted are not relevant to this case, the learned Judge stated that the main point put forward by the Plaintiff was that the parties were not of the same class. There were two authorities cited in support namely Browning v. Morris 98 E.R. 1364 and Charan Kant v. Mistry Makanji (1956) 23 E.A.C.A.14. The learned Judge held that the authorities did not apply. It is respectfully submitted that this finding is correct and in particular that the Plaintiff in this case, as was subsequently found by the Court of Appeal, could not bring himself within the category of "the person injured". p.16.l.41-43.

13. Thereafter the learned trial Judge in dismissing the Plaintiff's claims made the following observations and findings:- pp.16-17

"On the issues as framed and agreed by Counsel I find that the parties in the instant case are in pari delicto. Both parties knew all their transactions were illegal, both of them knew that consent, the necessary consents, had been refused, yet the Plaintiff allowed the Defendant to occupy the plots in dispute for over thirteen years, and accepted rent for many years, and now seeks an order for eviction in circumstances where even if the so-called lease were valid no proper notice to quit has been given. The Plaintiff's claim has no merit; and I am surprised that the Court was ever troubled with it. All the transactions were illegal, and certainly the plaintiff does not come to this Court with clean hands."

14. Upon the 13th day of September 1960 the Plaintiff filed a Memorandum of Appeal in the East African Court of Appeal in which he set out the following grounds:- p.19 ll.6-31

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"(a) That the learned judge erred in holding that the parties were in pari delicto in that he failed to take into account that

(i) the maximum fine and period of imprisonment permitted for a breach of the Land Transfer Ordinance are respectively four times and twice those permitted by the Possession of Land Law;

(ii) the object of the Land Transfer Ordinance and the possession of Land Law was, and is, to protect African landowners against non-African tenants;

(b) That if (which is denied) the parties were in pari delicto, the learned judge erred in holding that the doctrine in Browning v. Morris 98 E.R. 1364 did not apply;

(c) That the learned Judge erred in not holding that the Plaintiff was entitled to possession as against the Defendant as (i) the latter had no estate or interest in the land concerned of which the Plaintiff was the Registered Proprietor, and (ii) the Plaintiff had withdrawn his consent to the occupation by the Defendant of the land concerned with effect from the 1st day of January, 1959; (quaere 1960)

(d) That the learned judge erred in holding that the Plaintiff was suing on an illegal contract.

pp.20-22 15. On behalf of the Plaintiff was argued (inter alia):-

1. That in view of the object of the legislature to protect the African landowner and because the Defendant was liable to heavier penalties than the Plaintiff the parties were not in pari delicto.

2. That since the claims for rent, mesne profits and damages have been abandoned as they necessitated suing upon illegal contracts,

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the claim had been "reduced to an action to recovering possession and occupation of lands, which had changed as a result of the illegal contracts."

16. On behalf of the Defendant it was argued (inter alia):- pp.22-27

1. That delictum was not to be equated with penalty, but with liability.

2. That the Plaintiff was not protected by the legislature for there was a duty on both parties to obtain the necessary consents.

3. There had been no proper notice to quit as a year to year tenancy could only be terminated by a six months notice terminating at the end of such year.

4. The Plaintiff had relied upon the illegal leases.

5. The illegality was not upon a collateral matter.

17. The judgments of the East African Court of Appeal were delivered upon the 25th day of January 1961 and in the course of the principal judgment Forbes V.P. after reviewing the pleadings and setting out the relevant statutory provisions relating to the transfer of possession of land, rejected grounds (a) (i) of the Appeal. He then stated the general principle arising from the statutory provisions in the following terms:- pp.38-55 p.44 l.31-43

"In general, the fact that a statute imposes penalties on both parties to a transaction, albeit penalties of a different severity, would seem to me to be a strong indication that the legislature intended the respective penalties to be the only consequence of a breach of the statute, that each party should be regarded as being as much a party to the breach of the statute as the other, and that no right to a civil action should arise,"

18. The learned Vice President then considered the relevant legislation and held that the object p.46 l.16-p.47 l.43.

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of both enactments was to protect the African landowner. He then held that the Plaintiff being an African landowner and thus a member of a protected class was not in pari delicto with the Defendant who was a non-African occupier. It is respectfully submitted that no such general principle obtains, but even if it does as the learned Vice President observed:-

p.48 l.8-10

> "It is true that in the instant case the Plaintiff can hardly claim that he himself has been either oppressed or imposed upon."

Nevertheless the learned Vice President held that
p.48 l.22 the general principle must prevail as this was "positively required by public policy." It is respectfully submitted that upon this point the learned Vice President came to a wrong conclusion in law and that upon the facts as agreed between the parties the correct conclusion was reached by the Court of first instance.

p.48 l.24-40 19. In support of his view that the parties were not in pari delicto the learned Vice President sought to draw some support from the Limitation Ordinance 1958 s.32(1), but it is respectfully submitted that the wording of this sub-section does not show that the Plaintiff in this case is able to sustain an action upon the facts as agreed between the parties.

20. The learned Vice President then gave an alternative ground for the Plaintiff proceeding which he expressed in the following way:-

p.48 l.42-46

> "I still think that the appellant is entitled to succeed on the basis of the principle that an owner is entitled to recover his own property so long as his claim is not founded on an illegal contract."

It is respectfully submitted that both in his pleadings and in argument the Plaintiff sought to rely upon the three leases and did not base his claim in trespass upon being the registered proprietor of the land which would not have been conclusive of the right of possession. Further, the learned Vice President asserted, it is submitted erroneously, that it was the Defendant who in his defence had set up the leases.

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21. In the course of his concurring judgment, Corrie Ag. J.A. after referring to paragraph 5 of the Plaintiff's Reply and the withdrawal by the Defendant of the Counterclaim stated:-

> "The appellant's claim thus became simply a claim by a registered owner for recovery of possession from an occupier whose only title to possession rested upon the appellant's permission, which had been terminated by a notice to quit."

p.54 l.28-32

It is respectfully submitted that the claim was not put upon this basis and even if it were, it does not necessarily follow in law that the Plaintiff was entitled to recover. Further, the notice to quit expressly referred to a "tenancy" and was held at first instance not to be a proper notice to quit. The Eastern African Court of Appeal did not consider whether if such notice was not a notice to quit as between landlord and tenant, it was a proper notice upon any other basis, in particular as to the adequacy of its duration.

22. The Appellant humbly submits that the dismissal of the Appeal by the East African Court of Appeal dated the 25th day of January 1961 be set aside, that the judgment and decree of Her Majesty's High Court of Uganda at Kampala dated the 3rd day of August 1960 be restored for the following amongst other

R E A S O N S

1. BECAUSE upon the facts as agreed between the parties the learned judge at first instance was right in holding that the parties were in pari delicto.

2. BECAUSE the East African Court of Appeal came to a wrong conclusion in law upon the application to the facts of this case of the maxim in pari delicto potior est conditio defendentis.

3. BECAUSE the East African Court of Appeal wrongly concluded that the Plaintiff in the action had not founded his claim upon an illegal contract.

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4. BECAUSE of the other reasons given in the judgment of the High Court of Uganda,

JOHN A. BAKER,

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- v -

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CASE FOR THE APPELLANT

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