# MACAN MARKAR LIMITED

v.

# NICHOLAS AND OTHERS

SUPREME COURT.
RANASINGHE, J., L. H. DE ALWIS, J. AND H. A. G. DE SILVA, J.
S.C. No. 36/85 – CA/LA 61/84.
MAY 30, JULY 2, 3, AUGUST 26, 27 AND 28, 1986.

*Landlord and Tenant – Certificate of tenancy – Section 35(2) of Rent Act No. 7 of 1972 – Question of Law.*

The 1st respondent filed an application to the Rent Board of Colombo seeking a certificate of tenancy under s. 35(2) of the Rent Act No. 7 of 1972 in respect of certain premises belonging to the appellant. There was overwhelming evidence that the appellant always regarded the 1st respondent's employer as its tenant and was not prepared to accept the 1st respondent as its tenant. The Rent Board held that 1st respondent was the appellants' tenant but the Board of Review reversed this finding treating the question of sufficiency of evidence as a question of law. The Court of Appeal quashed the decision of the Board of Review on the footing that the Board of Review was not entitled to review findings of fact made by the Rent Board. The appellant appealed from the decision to the Supreme Court.

**Held–**

Whether the evidence placed before the Rent Board was sufficient to establish a contract of tenancy between the 1st respondent and the appellant company is clearly a question of law. So is the proper interpretation of the documents produced. The Board of Review was entitled to review the Rent Board's decision. There was no contract of tenancy between the appellant and 1st respondent.

**Cases referred to:**

(1) *Edward v. Bairstow – (1955) 3 All E.R. 48.*

(2) *Commissioner of Inland Revenue v. Fraser – (1942) 24 Tax Cases 498.*

(3) *Ceylon Transport Board v. Gunasinghe – (1968) 72 NLR 76.*

APPEAL from decision of the Court of Appeal reported at [1985] 1 SLR 130.

*Dr. H. W. Jayewardene, Q.C.* with *S. J. Kadirgamar, Q.C., D. S. Wijesinghe* and *Miss T. Keenawinna* for petitioner-appellant.

*H. L. de Silva, P.C.* with *Bimal Rajapakse* and *P. A. Abeyakoon* for respondents.

*Cur. adv. vult.*

November 7, 1986.

**H. A. G. DE SILVA, J.**

The 1st respondent filed an application to the Rent Board of Colombo seeking a certificate of tenancy under section 35(2) of the Rent Act No. 7 of 1972 in respect of Flat No. 47, Galle Face Court II, Colombo 3, alleging that he was the tenant of the appellant in respect of these premises. The appellant denied that there was such a contract of tenancy and further pleaded that the Rent Board had no jurisdiction to inquire into the question as to whether there was a contract of tenancy. The Rent Board after inquiry held that there was a legal relationship of landlord and tenant between the 1st respondent and the appellant. Thereupon the appellant appealed to the Board of Review and the appeal was heard without any objection being taken by the 1st respondent. The Board of Review after hearing submissions by its order set aside the decision of the Rent Board and dismissed the 1st respondent's application for a certificate of tenancy. The 1st respondent then filed an application in the Court of Appeal praying for a mandate in the nature of a Writ of Certiorari to quash the order of the Board of Review. The Court of Appeal allowed the application of the 1st respondent and issued the Writ quashing the decision of the Board of Review. It is from this judgment of the Court of Appeal that the appellant has appealed to this court.

The facts are briefly as follows: The 1st respondent was employed at M/s. George Steuart & Co. as its Mills Manager and was in occupation of a flat within the company's premises. After the death of his wife, he expressed a desire to vacate that flat and find accommodation elsewhere. The company was agreeable to this and by A1 confirmed that the 1st respondent would be paid a rent allowance of Rs. 350 per month with effect from January 1973 with a view to assisting him to meet the rent he would have to pay for the new flat. One Mrs. Muthucumaraswamy who knew that the 1st respondent was searching for a flat introduced him prior to November 1973 to Mecci Macan Markar a member of the appellant-company, but the latter informed him that no flats at Galle Face Court, owned by the appellants were available at that time.

It appears at some point of time thereafter a two bed-roomed flat at Galle Face Court fell vacant and by A2 the 1st respondent's employers, the company, intimated to the appellants that a flat should be reserved for the 1st respondent. By A3 the appellants offered the

vacant flat to the company on the conditions stated therein. The company by A4 confirmed that the 1st respondent was prepared to take the flat on the terms listed in the appellant's letter with effect from 15th January 1974 and forwarded a cheque A4A for Rs. 2,054.75 issued by the 1st respondent being three months rent in advance. The company also confirmed that the monthly rental of Rs. 656.25 would be paid direct to the appellant by them. The appellants issued a receipt A5 for the three months rent, in the name of the company. The company thereupon by A6 returned the receipt to the appellant requesting a fresh receipt to be issued in the name of the 1st respondent who it said was the tenant of the flat. It further stated that the rental payments were being made by the company on account of the 1st respondent. The appellants however refused to issue a fresh receipt in the name of the 1st respondent; and in A10 stated that in their books the flat is registered in the name of the company. This reply was sent by the appellants after inquiries were made by them from the company as to whether the flat was occupied by the 1st respondent and his family or whether there were others too occupying it (A7), and the company had by A9 confirmed that the sole occupants of the flat were the 1st respondent and his family.

A further attempt was made by the 1st respondent by A8 to have a receipt issued in his name but this attempt too did not succeed whereupon the company wrote to the appellants A13 inquiring whether it would be possible to register the flat in the name of its occupant the 1st respondent and also informed the appellants that the "company was only involved as far as payments of rent which were being attended to, by way of recoveries from the 1st respondent's emoluments". This is confirmed by A16, the particulars of emoluments for April 1978 of the 1st respondent which show that a sum of Rs. 350 has been credited to his emoluments as rent allowance and a sum of Rs. 686 has been deducted therefrom as rent paid. The company further informed the Deputy Food Controller in A11 that the 1st respondent, their Mills Manager was the tenant of the flat concerned and that rents were being paid by the company on account of him. A18 confirms this latter position where the company acknowledges the receipt from the 1st respondent, a sum of Rs. 686 being the rent of flat at Galle Face Court occupied by him.

The appellants by A19 made a complaint to the company as regards a nuisance caused by the servants of the 1st respondent and the fact that this letter was passed on to the 1st respondent the occupier of

the flat who would reply direct to the appellants was intimated by A20 and in fact the 1st respondent by A21 informed the appellants that he had taken action to inform this servant about the complaint. He further requested the appellants to address all communications regarding the actual running of the flat, its proper maintenance or any other problem to him who is the appellant's tenant and not to the company who are only his employers and have merely consented to deduct the rent from his remuneration and forward it to the appellants. To this the appellants wrote A22 to the 1st respondent stating that the tenant of flat in question, according to their books was the company and as such all communications regarding the flat would continue to be addressed to them. A further communication from the appellant inquired from the company as to the position of the flat occupied by the company as the appellant's tenant in view of the fact that the Government had decided to take over all the Agency Houses in Sri Lanka. The company replied that only a part of their Agency business had been taken.

The Court of Appeal in its judgment gave the grounds for issuing the Writ of Certiorari to quash the decision of the Board of Review as follows:

(1) The Rent Board had come to a conclusion on the plain reading of the documents and the Board of Review had done the same;

(2) the Rent Board had taken into account that the sheet anchor of the appellant's case was that their books or registers had the company as tenant, but these books were not produced while the Board of Review had not taken into account that the 1st respondent had given evidence and it had also glossed over the non-production of the books and registers by the appellants;

(3) the Board of Review had not shown that there was no evidence for the finding of the Rent Board and that the finding was inconsistent with the evidence and contradictory of it;

(4) what the Board of Review had done was that it had on the same material substituted for the findings of facts and opinion of the Rent Board its own findings on facts and its opinion, i.e. the Board of Review had come to a different conclusion on the facts from that of the Rent Board and given its finding "a legal decoration or embellishment" by reference to the three cases cited in its order;

(5) the main question before the Rent Board was to determine who was the tenant of the flat i.e. whether it was the 1st respondent or the company and the order of the Rent Board showed that it correctly directed itself as to who is a tenant. Its finding from the facts that Nicholas was the tenant was an inference of fact as set out in the judgment of Viscount Simonds in the *Edward v. Bairstow* (1);

(6) the decision of the Board of Review was not in accordance with the principles set out in the cases cited by it in the course of its order;

(7) the Board of Review had acted without jurisdiction or in excess of jurisdiction in holding that the 1st respondent was not the tenant of the appellant in respect of that flat.

Appellant's counsel submitted that since the Court of Appeal does not act as an appellate tribunal in granting a Writ of Certiorari, there was no ground in this case which would justify interference by the Court of Appeal. He submitted there was no case put forward on the basis that as far as the Board of Review was concerned there was (*a*) a lack of jurisdiction (*b*) a denial of natural justice or (*c*) an error on the face of the record. He further submitted that the decision of the Board of Review was final and conclusive under section 40(4) of the Rent Act and even if one assumes the Court of Appeal had the power, it still could not interfere with the final and conclusive determination of the Board of Review and deliver a judgment of its own. It was his contention that the interpretation of documents and their application was a question of law and at the least it is a question of mixed law and fact. He cited the case of *Edward v Bairstow (supra)* (1) where it was held per Viscount Simonds at pages 53 and 54 that–

"though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are I think, fairly summarised by saying that the Court should take that course if it appears that the Commissioners have acted without any evidence or on a view of the facts which could not reasonably be entertained ..... To say that a transaction is or is not an adventure in the nature of a trade is to say that it has or has not, the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words what the statutory language means. It follows that the inference can only be regarded as an inference of facts if it is assumed that the tribunal which made it is rightly directed in law what the characteristics are".

Lord Radcliffe in his speech at page 57 states–

"When the case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad in law and which bears on the determination, it is obviously erroneous in point of law. But without any such misconception appearing *ex facie,* it may be that, the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances too the Court must intervene. It has no option but to assume that there has been some misconception of the law, and this has been responsible for the determination. So there, too, there has been an error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the true and only reasonable conclusion contradicts the determination".

In *Commissioner of Inland Revenue v. Fraser* (2) it was held that–

"in cases where it is competent for a tribunal to make findings of fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears either that the tribunal has misunderstood the statutory language – because a proper construction of the statutory language is a matter of law – or that the tribunal had made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it. It is not as a rule possible to say whether the tribunal in any particular case where the Court finds that it has erred, has failed to appreciate the meaning of the statute or whether it has made a finding without having evidence to support it".

It has been contended that as an appeal to the Board of Review from a decision of a Rent Board was, by the proviso to section 40(1) of the Rent Act No. 7 of 1972, only upon a matter of law, the Board of Review could not substitute its views on the facts for those found by the Rent Board.

The Board of Review in its order had correctly stated the position when it cited the case of *Ceylon Transport Board v. Gunasinghe* (3) in which Weeramantry, J. sets out and approves the principles that an appellate body should adopt where an appeal on a finding of fact is not available. He states that–

"where the statute makes an appeal only in respect of questions of law, the appropriate Court is not without jurisdiction to interfere where the conclusion reached on the evidence is so clearly erroneous that no person properly instructed on the law and acting judicially could have reached that decision".

This judgment also goes on to follow the dictum referred to earlier of Lord Normand in *Inland Revenue v. Fraser (supra)* (2).

The Board of Review has enumerated the grounds on which it has set aside the order of the Rent Board as follows:–

(1) The finding of the Rent Board that there was a lawful contract of tenancy was based on an incorrect construction of the documents filed and the evidence led.

The 1st respondent gave evidence and relied on the documents produced. His only witness was Mrs. Muthucumaraswamy whose evidence did not in any way help the Board to come to the conclusion it did. Learned counsel for the 1st respondent contended that the Rent Board considered a multiplicity of facts and circumstances before it came to the conclusion that the 1st respondent was the tenant of the appellants and not the Company. In fact the Rent Board in its subsequent findings has clearly shown a misconception of the evidence and a perusal of the order belies its assertion that all the documents produced have been analysed in their true perspective. It appears that the Rent Board has failed to consider the contents of the documents.

(2) (*a*) The letter A3 constitutes the offer and was made to the Company and not to the 1st respondent.

In fact the only occasion that the 1st respondent had any contact with the appellants was at the time Mrs. Muthucumaraswamy introduced the 1st respondent to Mr. Mecci Macan Markar but on that occasion there was no vacant flat and as such no offer could have been made to the 1st respondent.

(*b*) Similarly A4 indicates that though the offer was to the Company it was being accepted on behalf of the 1st respondent, i.e. a person to whom no offer was made. The rent was to be paid by the Company.

(*c*) The receipt A5 for the three months advance of rent was issued by the appellants to the Company.

(3) The letter A6 asked for the receipt to be issued in the name of the 1st respondent but this was refused by A10 as the Company had been registered as tenants in the appellant's books. From this it was clear that the appellant was not prepared to accept the 1st respondent as its tenant.

(4) The continued payment of the monthly rent by the Company after letter A14 indicates that they had accepted the appellant's position as set out in A 14.

(5) The documents clearly indicated that the appellants were at no time willing to accept the 1st respondent as their tenant and hence there was no agreement as was necessary to create a lawful contract of tenancy. In short there was no consensus ad idem between the 1st respondent and the appellants. Learned counsel for the appellants submitted that the reason why the 1st respondent was so anxious to be considered the tenant was because he wanted to purchase the flat under the Ceiling on Housing and Property Law and to this end he had made an application which had been rejected.

(6) The documents subsequent to A14 and the contract of the parties appear to indicate that though the Company had not wanted to take the premises on rent, they acquiesced in the position adopted by the appellants, subsequent to the receipt of A14. They probably adopted this attitude in order to ensure that their employee had 'convenient and suitable' accommodation to enable him to attend to his duties as Mills Manager. Whatever their motive may have been it would not create a contract of tenancy between the appellant and 1st respondent.

The non-production of their books by the appellants does not detract from the overwhelming evidence afforded by the documents produced, that the appellants had the Company in mind as their tenants and not the 1st respondent.

(7) Apart from the material provided by the documents, there was no oral evidence given of an agreement between the 1st respondent and the appellants.

Whether the evidence placed before the Rent Board was sufficient to establish a contract of tenancy as between the 1st respondent and the appellant-company, is clearly a question of law. So is the proper interpretation of the documents produced. In my view the Board of Review has rightly held that–

"The finding of the Rent Board is inconsistent with the evidence and contradictory of it".

Hence the Board of Review was entitled to review the Rent Board's decision and make the order the Board of Review has made.

Submissions were also made on the question whether the Court of Appeal had jurisdiction to review the decision of the Board of Review in view of section 40(11) of the Rent Act which states that the decision of the Board of Review on an appeal from the order of a Rent Board shall be final and conclusive. In view of my conclusion that the Board of Review had the jurisdiction to review the Rent Board's order in the circumstances of this case, it is not necessary for me to deal with the question regarding the jurisdiction of the Court of Appeal to entertain this application.

I therefore allow the appeal and set aside the judgment of the Court of Appeal. The 1st respondent will pay to the appellants Rs. 4,200, as costs in the Court of Appeal and as costs of the appeal to this Court.

**RANASINGHE, J.** – I agree.

**ALWIS, J.** – I agree.

*Appeal allowed.*