1950 *Present:* **Dias S.P.J. and Swan J.**

NICHOLAS HAMY, Appellant, *and* JAMES APPUHAMY, Respondent

*S. C. 439—D. C. Colombo, 16,697*

*Rent Restriction Ordinance—Letting of a "workshop"—Does such agreement fall within the Ordinance?—Meaning of word "premises"—Ordinance No. 60 of 1942, sections 2 (2), 8 (c).*

The defendant took charge from the plaintiff of "a workshop" called "The City Engineering Works", together with certain tools, machinery and implements. The defendant undertook to pay a sum of Rs. 160 *per mensem* "for the above workshop until such time as I am in occupation". The defendant also agreed to quit on receiving three months' notice.

*Held*, that what was let was a building and not a "a business" and that the agreement contained all the ingredients necessary to constitute a valid letting of "premises" within the meaning of the Rent Restriction Ordinance.

APPEAL from a judgment of the District Court, Colombo.

*N. K. Choksy, K.C.*, with *U. A. Jayasundera, K.C.*, and *D. Wimalaratne*, for the defendant appellant.

*H. V. Perera, K.C.* with *E. B. Wikramanayake, K.C.*, and *S. Canagarayer*, for the plaintiff respondent.

*Cur. adv. vult.*

June 30, 1950. DIAS S.P.J.—

The question for decision in this case is whether the contract of letting and hiring which, admittedly, exists between the plaintiff and the defendant is one which is governed by the provisions of the repealed Rent Restriction Ordinance, No. 60 of 1942. Mr. H. V. Perera for the plaintiff respondent has strongly contended that the transaction is one of letting and hiring "a business" called "The City Engineering Works", and that the Rent Restriction Ordinance of 1942 does not apply to such a contract. He further submits that in the final analysis, the case involves a pure question of fact on which the trial Judge has held in his favour. He, therefore, submits that a Court of Appeal would be slow in setting aside the findings of the trial Judge on what is after all a question of fact. Mr. Perera concedes that if the transaction amounts to the letting and hiring of "premises" his argument would fail and that the plaintiff's action will have to be dismissed.

There is one point on which the trial Judge, admittedly, has erred. At page 4 of the record it is recorded that learned counsel for the plaintiff said " that his issue for damages is only with regard to a sum of Rs. 160 he claims *per mensem*, and not with regard to the value of any tools ". In the plaint a claim was made for a sum of Rs. 10,000 being the value of machinery and tools unless the defendant restored the same to the plaintiff. When the Judge came to write his judgment he failed to notice this express waiver of this claim, and he entered judgment for the plaintiff " as prayed for with costs ", and the decree perpetuates that error. If the judgment and decree of the trial Judge have to be affirmed, it must be varied by deleting this item therefrom.

It is admitted that the subject-matter of this contract is situated in Colombo, and that it lies within an area proclaimed under section 2 (1) of the Ordinance. Section 2 (2) of the Ordinance reads as follows:—

> " So long as a Proclamation under sub-section (1) is in force in respect of any area, this Ordinance shall subject as hereinafter provided, apply to all *premises* in such area which are used or occupied or intended to be used or occupied, whether in their entirety or in separate parts, for the purposes of residence or for the purposes of any trade, *business*, undertaking, profession, vocation or employment or for any other purpose whatsoever ".

What is the case foreshadowed in the plaint? In paragraph 1 it is said that " the property is situated . . . . within the jurisdiction of this Court ". In paragraph 2 the proctor, obviously on instructions and after considering the facts, says that " *By agreement dated 1. 2. 44 marked letter 'A' (P2)* which is filed herewith and pleaded as part and parcel of this plaint ", the defendant agreed to take charge of and use *the workshop* known as " The City Engineering Works " . . . . along with the machinery, tools and implements mentioned in the said agreement ". There are two misstatements of fact in this paragraph. In the first place the document P2, although it bears the date 1. 2. 44, was not written on that day but later. In the second place, the defendant had all along been in occupation of the workshop long before the plaintiff acquired the place. Paragraph 3 states that " the defendant agreed to pay monthly a sum of Rs. 160 for the use of *the workshop* and *the said machinery and tools*, and further expressly contracted to hand back *the workshop* and tools and implements and vacate *the premises* on receipt of three months' notice ". Paragraph 4 states that notice to quit was given to the defendant on August 25, 1945. In paragraph 7, the draftsman of the plaint, having in mind the provisions of section 8 Proviso (a) of the Rent Restriction Ordinance, pleaded—" The plaintiff further states that *the workshop* is reasonably required for the plaintiff's use and occupation ". In his prayer the plaintiff *inter alia* asked " that the defendant be ejected from *the workshop* ".

Pausing there, it is clear that this plaint refers to the document P2 as containing the agreement binding the parties. It is clear that what was let was " a workshop " and not a business. The word " Premises " is not defined in the Ordinance. Its ordinary meaning applicable in this context is either " a building " or " a building on a land ". Therefore, it is clear that what the plaintiff is stating in his plaint is that certain

premises, which are a workshop, were let to the defendant together with the machinery and tools in that workshop, that the plaintiff requires the workshop for his own use and occupation, and that the defendant although duly noticed to quit, in terms of the agreement, had failed to vacate the place. The intervention of the Court was, therefore, sought to eject him from the workshop. The answer of the defendant contained the usual plea made in cases under the Rent Restriction Ordinance. He denied that the document P2 was signed on 1. 2. 44, and asserted that it was signed on or about August 25, 1945, at the request of the plaintiff himself who stated " that a document was necessary as regards *the tenancy* for some purpose of his ", and that " the date was inserted as 1st February, 1944, at the request of the plaintiff ". The defendant denied that the " *premises in question* " were reasonably required for the occupation of the plaintiff. He also made a claim in reconvention.

In his replication the plaintiff admitted that the document P2 " was executed later than 1st February, 1944 ". He went on to say " At the time of its execution *by agreement* between the plaintiff and the defendant, the date put on the document, viz., 1st February, 1944, was the date on which *by agreement in terms of the document A (P2)*, the defendant took charge from the plaintiff *of the said workshop* and the materials contained in the list set forth in the said document A (P2) ". Even at this point nothing is stated about the letting and hiring of *a business*. In paragraph 2 of the replication the plaintiff says that the rent of Rs. 160 was the " authorised rent ". If what was let was " a business " to which the Rent Restriction Ordinance does not apply, there was no need to refer to " authorised rent ". In paragraph 3 of the replication it is stated " The plaintiff denies that the provisions of the Rent Restriction Ordinance are applicable to the transaction between the plaintiff and the defendant and the contract on which the plaintiff's action is based ". It seems to be clear that it was at that point that misgivings appear to have struck the advisers of the plaintiff. Up to that point the action was framed as one by a landlord who had let a workshop to a tenant who was overholding. At this point the nature of the action undergoes a change. No doubt " second thoughts are best ", but as counsel for the plaintiff has strongly urged that the findings of fact of the trial Judge are not lightly to be disturbed, it is well to realize the nature of the case first set up, and the case which was eventually pressed at the trial.

At the trial a large number of issues were framed. It is only necessary to refer to two of them. Issue 1 reads " Did the defendant take charge of and use *the workshop* known as The City Engineering Works situated at No. 399, Skinners Road South, including the machinery, tools and implements ?". After the eleventh issue had been framed, counsel for the plaintiff stated " that in framing Issue 1 he intended to convey the following, viz., that his client let to the defendant *the business* known as The City Engineering Works ". One would have expected counsel for the defence at once to have objected on the ground that that was not the case he was called upon to meet, and moved that the plaintiff should amend his pleadings so that the defendant could adequately answer the new case set up. He did not do so, and counsel for the plaintiff framed Issue 12 which reads as follows: " Do the provisions of the

Rent Restriction Ordinance apply to the transactions that took place between the plaintiff and the defendant?". I agree with counsel for the plaintiff, that once the issue was framed, the case which the Court had to try became crystallised in the issues. Nevertheless, in assessing the evidence, and in judging the credit which had to be placed on the testimony, oral and documentary, the Court has the right to see what took place before those issues were framed. For example—there is a definite admission by the plaintiff in his pleadings that the agreement or contract between the parties is to be found in the document P2. Not only did the plaintiff so state in his plaint and replication, but he also said so in his evidence.

Mr. Perera argued that P2 does not embody the contract between the parties. He submits that P2 is unilateral and is nothing more than a receipt and does not reproduce the contract between the parties. I am unable to accept this argument. P2 was produced by the plaintiff and was made part and parcel of the plaint. It is in the teeth of the plaintiff's sworn evidence. He said in chief: " On the 1st February, 1944, the defendant took over the business from me, and an agreements was subsequently entered into *which is filed of record.* I produce *the agreement* marked P2 ". In the light of the plaint and the replication and in view of the plaintiff's sworn evidence, it is impossible to accept the argument now set up—that despite the pleadings and the plaintiff's evidence, P2 does not contain accurately the agreement or contract between the parties. I hold that P2 correctly reproduces the agreement between the parties.

Therefore, the chief thing that had to be done in this case was to interpret and construe the document P2. This Court is in as good a position as the trial Judge to interpret P2. What does P2 say?

> " This is to certify that I the undersigned Delpe Archarige Nicholashamy of Nandana Niwasa Nagoda Kalutara on this 1st day of February 1944 do hereby take charge of the workshop which is known as the City Engineering Works situated at No. 399 Panchikawatte Colombo along with the machinery tools and the implements mentioned under from the legal owner Watarakagamage James Appuhamy of Glenwyde No. 53 Mayfield Road Kotahena. I hereby agree with him that I will pay him monthly One hundred and sixty rupees (Rs. 160) for the above workshop until such time I am in occupation. I also agree that I shall vacate the same on three months' notice ".

There is not one word in P2 from its commencement to the end of the letting and hiring of " *a business* ". The defendant took charge of " *a workshop* " called by a certain name, together with the tools, machinery and implements referred to in the list annexed to P2. The defendant undertook to pay a sum of Rs. 160 *per mensem* " for the above *workshop* until such time I am in occupation ". The defendant also agreed to quit on receiving three months' notice. This agreement contains all the ingredients which constitute a valid letting of " *premises* " from month to month. What is let are " *Premises* " called a workshop, together with the machinery, tools, &c. The letting and hiring is to be terminated on three months' notice, and a definite rent or hire has been fixed. There is not one word in P2 which justifies the

inference that what was let was " a business ", or the " goodwill of a business ", or that the workshop was a mere accessory to the hire of a business, and not severable from the business.

The trial Judge while definitely holding that P2 contains the agreement between the parties, has made no attempt to construe it. He has not considered the question as to how the plaintiff himself when he drafted his plaint regarded the transaction. I agree with the learned Judge that the Rent Restriction Ordinance is confined to the hire of " premises ". I also agree with him that, if it be the fact that this contract of letting and hiring is that of " a business " and not the hiring of " premises ", the Ordinance will not apply. He correctly addressed his mind to the question he had to decide when he said: " The chief question to be decided in this case is whether the provisions of the Rent Restriction Ordinance apply to the contract of letting and hiring pleaded in the plaint ". He would have been more correct had he stated " pleaded in Issues 1 and 12 ", because the contract pleaded in the plaint clearly shows that the Ordinance would apply to it. The Judge then went on to point out that by deed P1 the plaintiff had purchased a land called The City Engineering Works and the goodwill of a business bearing that name. The Judge says " It is *this business* which by P2 was let to the defendant. " In my opinion this is a clear misdirection. Had the Judge considered the terms of the document P2, he would find that no business called The City Engineering Works was let to the defendant. This misdirection, in my opinion, has affected the rest of his judgment. If as definitely found by the learned Judge, the document P2 embodies the agreement between the parties, then P2 speaks for itself. By no stretch of the imagination can one construe P2 to mean the letting and hiring of a business.

The plaintiff swore : " I am getting Rs. 160 from the defendant, that is rent for the premises Rs. 100 and rent for the business Rs. 60. By ' business ' I mean the use of all the workshop materials and the name. I may have given a receipt to the defendant for Rs. 160. I was in the habit of giving a separate receipt for the Rs. 60. I did not want to give a receipt for Rs. 160 because the Municipal assessment rate was Rs. 100. He said he did not want a receipt for Rs. 160. So I gave a receipt for Rs. 100 and Rs. 60. " If that evidence makes sense, it can only mean that the plaintiff was admitting that there was a letting of the premises (workshop) and a letting of the workshop materials and the name. Although his learned counsel argues that the two things cannot be severed, the plaintiff has done so.

I am of opinion that the judgment cannot stand. Counsel for the plaintiff stated that even if there was a letting of premises, he might be able to argue that the decision of the trial Judge was right, but that he took the responsibility of staking his case on the submission that this was a letting of a business. I do not think that contention can succeed on the facts of this case.

I, therefore, set aside the judgment and decree appealed against, and dismiss the plaintiff's action with costs both here and below.

*Appeal allowed.*

SWAN J.—I agree.