

Fernando v. Jinadasa and others

COURT OF APPEAL.

WIMALARATNE, P., AND TAMBIAH, J.

S.C. (C.A.) APPLICATION NO. 607/78.

MAY 9, 1979.

Writ of Certiorari—Application to quash order of Rent Board of Review—Jurisdiction of Rent Boards—Power to decide whether what was let was “a business” or “business premises”—Natural justice—Need to observe rules of—Opportunity to be given to parties to lead evidence in support of their case—Order of Rent Board and Board of Review vitiated for non-compliance—Rent Act, No. 7 of 1972, sections 53 (2), 48.

Held .

(1) A Rent Board constituted under Rent Act, No. 7 of 1972, has power to determine the question as to whether what had been let to a tenant is a “business” or “business premises”.

(2) In the present case the decision of the Rent Board had been made in violation of the principles of natural justice in that an opportunity was denied to the landlord to lead evidence in support of his contention that what was let by him was “a business”. Rent Tribunals must hold a hearing if either party so wishes and it would be wrong to shut out evidence of this nature. The Board of Review, the members of which were respondents in the Court of Appeal did not appear to have given a ruling on this matter. Accordingly the decisions of the Rent Board and the Rent Board of Review were quashed.

Cases referred to

- (1) *Charles Appuhamy v. Abeysekera*, (1959), 56 N.L.R. 243.
- (2) *Sediris Singho v. Wijesinghe* (1965) 70 N.L.R. 185.
- (3) *Nicholes Hanvy v. James Appuhamy* (1950) 52 N.L.R. 137.
- (4) *R. v. Kingston-upon-Hull Rent Tribunal*, (1949) 65 T.L.R. 209.

APPLICATION for a Writ of Certiorari.

J. W. Subasinghe, with V. P. A. Almeida, for the petitioner.

Bimal Rajapakse, for the respondent.

Cur. adv. vult.

June 11, 1979.

WIMALARATNE, P.

The "Dolarosa Bakery" bears assessment number 1/60, Pallansena South, Kochikade, and is situated on just two perches of land. The petitioner is its owner. He gave it on lease to the 1st respondent for a period of 2 years from 1.10.71 on a consideration of Rs. 1,000. The notarial lease P2 describes the subject matter of the lease as "the bakery known as Dolarosa bakery situated on two perches of the land called Kongahawatte, (within certain boundaries) together with the two tables for making dough, and a pair of coal tongs". At the end of the period a further indenture of lease P3 was executed for another period of one year from 1.11.73 on a consideration of Rs. 900. This indenture provided that the annual licence for the bakery was to be obtained by the lesser, whilst the requisite payments were to be made by the lessee who undertook to conduct the business in accordance with the rules laid down by the government. He also undertook to hand over possession at the end of the period of lease. A third lease bond P4 was executed for a further period of one year from 1.11.74, also for a consideration of Rs. 900, but the clause relating to the license was deleted.

Notwithstanding the termination of the lease P4 the lessee continued in occupation of the premises. The lessor thereupon caused to be sent a notice requesting the lessee to hand over possession. The lessee replied that after the expiry of the lease he continued to be a monthly tenant protected by the Rent Act, No. 7 of 1972. The lessee went before the Rent Board of Negombo, and sought by his application dated 10.2.76 to obtain a certificate of tenancy under section 35 of the Act, and also for a determination of the authorised rent of the premises.

On the first date of inquiry (17.5.76) the parties were represented by counsel who stated their respective cases. Both counsel were agreed that the question for determination by the Board was whether the subject matter of the contract of letting and hiring was a "business" or "business premises". The lessor relied upon the decisions (1) and (2) for his case that what he let to the lessee was a "business". The lessee relied upon the decision (3) for his case that what he took on rent was "business premises", and not a business. On the next date of inquiry (17.7.76) counsel for the lessor asked for an opportunity to lead oral evidence to establish the position he had taken up. The Board put off inquiry stating

that in that event the lessee too would have an opportunity of calling evidence. On the next date of inquiry (13.9.76) the Board stated that it would limit the oral evidence to that of the Notary who attested P4. Accordingly Notary Maddumage was called as a witness. It is difficult to see how the evidence of the notary was relevant, considering the fact that the parties had embodied the terms of the contract in a notarial document. After recording his evidence the Board made order, holding that what was let by the lessor to the lessee was not a "business" but business premises. Accordingly the tenant was entitled to a certificate of tenancy under section 35 of the Act.

The lessor appealed from this decision to the Rent Board of Review. The Board of Review took the same view as the Rent Board of Negombo that "the primary intention of the parties as seen from the terms and conditions set out in V1 (i.e. P4) has been to let the premises in question to the respondent and not the business as contended by learned Counsel for the appellant". The appeal was accordingly dismissed and the order of the Rent Board was affirmed.

The lessor has invoked the jurisdiction of this court to have the orders of the Rent Board and of the Board of Review quashed. One of the contentions of learned counsel for him has been that the Rent Board acted without jurisdiction in determining the question as to whether what was let was a "business" or "premises". The powers of the Board are defined in the Rent Act. Any exercise of powers other than those vested in the Board by the enabling statute is *ultra vires*, and any determination on any matter over which it has no jurisdiction has no force or validity in law.

Although the members of the Rent Board of Negombo have not been made parties to this application, it is necessary to consider the validity of this argument. The powers of the Board are not defined in any one section of the Act. They are wide and varied and are contained in several provisions. One such provision is section 35(2) which states that where the landlord of any premises refuses to give the tenant a certificate of tenancy, the Board shall, upon application made to it by the tenant, give to the tenant a certificate of tenancy relating to such premises in the prescribed form. Section 48 of the Act defines "premises" as meaning "any building or part of a building together with the land appertaining thereto". "Business premises" means "any premises other than residential premises".

Now, there will be numerous occasions when the Board will be called upon to decide whether premises are business premises or residential premises. A good example is provided by section 4, which spells out the formula for determining the standard rent. Subsections 1 to 4 deal with the calculation of the standard rent of residential premises only. In the case of any premises to which the provisions of those subsections do not apply the standard rent per annum of the premises means, according to subsection 6, such rent as may be fixed by the Board on application made either by the landlord or the tenant for the time being of such premises. If then, the statute enables the Board to determine whether premises are residential or business premises why should there be a limitation by preventing the Board from determining the question as to whether what has been let as a contract of letting and hiring is "business premises" or "a business". I am of the view that when the question arises, on an application made to the Board, as to the nature of a contract in respect of premises as defined in the Act, the Board has the power and the jurisdiction to decide that question.

Counsel for the 1st respondent has contended that in any event the petitioner cannot have a grievance because he readily submitted to the Board's jurisdiction to decide that question. The lessor in fact invited the Board to decide that question. Counsel, in making his submissions before the Board, relied upon the decided cases referred to earlier in support of his contention that the building on which the Dolarosa bakery stood was merely accessory to the business carried on there. There appears to be much substance in this contention.

Another argument of counsel for the petitioner has been that the Board acted in violation of the principles of natural justice by not permitting the petitioner to lead evidence on the question the Board was called upon to decide. The Board permitted only the notary to be called as a witness. Section 39 of the Act provides by subsection 3 that before making any order upon any application under this Act, the Board shall give all interested parties an opportunity of being heard and of producing such evidence, oral or documentary, as may be relevant in the opinion of the Board. The lessor made an application on 17.6.76. for an opportunity to lead evidence. The Board agreed. But on the next date the Board withdrew that permission and limited the oral evidence to that of the notary. The lessor had to establish that what was let was a "business" in the sense of "a going concern". Had the lessor been given an opportunity of giving evidence he may have been able to satisfy the Board that a business had been carried on either by him or on his behalf for

a long period of time before the first letting to the lessee on 1.10.71. That opportunity was denied to the lessor. Rent tribunals must hold a hearing if either party so wishes. *R. v. Kingston-upon-Hull Rent Tribunal, ex parte Black* (4). If the lessor wishes to give evidence in relation to his transactions with the lessee, or in relation to the subject matter of the lease, it would be wrong for a rent tribunal to shut out such evidence. The decision of the Rent Board has therefore been made in violation of the principles of natural justice, and is therefore subject to judicial review.

An aggrieved party is given a right of appeal to a Board of Review, set up under section 40 of the Act, on a matter of law. Although the appellant-lessor complained to the Board of Review that he had been unreasonably precluded from giving evidence to prove his case the Board of Review does not appear to have given a ruling on that matter.

For these reasons I would quash the decisions of the Rent Board of Negombo and of the Rent Board of Review. Because the error has been on the part of the Rent Board I would order no costs of this application.

TAMBIAH, J.—I agree.

Application allowed.

Orders of Rent Board and Board of Review quashed.
