Privy Council Appeal No. 32 *of* 1958

Kiriri Cotton Company Limited - - - - - - - *Appellant*

v.

Ranchhoddas Keshavji Dewani - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER 1959

Present at the Hearing:
LORD DENNING
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* LORD DENNING]

The plaintiff Ranchhoddas Keshavji Dewani is an Indian merchant living at Kampala in Uganda. The defendant is the Kiriri Cotton Company Limited which owns a block of flats in Salisbury Road, Kampala. The plaintiff claims the sum of 10,000 shillings as money received by the defendant company for the use of the plaintiff. The High Court of Uganda (Lyon, J.) gave judgment for the plaintiff for that amount with costs. The Court of Appeal for Eastern Africa (O'Connor, P., Forbes, J.A., Keatinge, J.) affirmed the decision. The defendant company appeals to Her Majesty in Council.

The facts are simple. The plaintiff came to Kampala in March, 1953, and looked for somewhere to live. At the end of May, 1953, he took a flat in Salisbury Road but he had to pay 10,000 shillings premium. He now says that this premium was illegal because it was in contravention of the Rent Restriction Ordinance, and he claims the return of it.

The oral evidence is so short that their Lordships set it out in full. Only the plaintiff gave evidence. He said :—

> "I came to Kampala, Uganda, in 1953—March. I lived with a brother for 1½ months. I took a flat but I had to pay key money. I was searching for sometime.
>
> I got a flat at Kololo but after 2–3 days I had to leave as I had trouble with a co-tenant. Then I got in touch with C. B. Patel, after having difficulty. I borrowed 10,000/- from the company as my brother was a director.
>
> Cross-examination : I paid the money by borrowing the money."

It is apparent from this evidence, as the Trial Judge said, that during the negotiations for the flat the plaintiff was at a disadvantage. He was having difficulty in obtaining accommodation—and he only got the flat by paying a premium of 10,000 shillings, which he borrowed for the purpose. He took it under a sub-lease dated 17th September, 1953. This was prepared by lawyers. It contained provisions whereby the defendant company, in consideration of the sum of 10,000/- paid by the plaintiff by way of premium, sub-leased to him Flat No. 1 on the first floor for residence only, having three rooms, one kitchen, one bathroom and one lavatory. The term was seven years and one day from

Their Lordships desire to point out at once that neither party thought they were doing anything illegal. The lease was for more than seven years and it was thought that, on a lease for that length of time, there was nothing wrong in asking for a premium or receiving it.

This was an easy mistake to make as will be seen if one reads section 3 (1) and (2) of the Rent Restriction Ordinance :—

> " 3.—(1) No owner or lessee of a dwelling-house 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 dwelling-house 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 Shs. 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 :
>
> 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."

Anyone reading the last proviso to that section—without more—might well think that a premium could be charged on the lease of this flat for seven years and one day. He would readily assume that the word " premises " included a flat. But he would be wrong. For if he took pains to look back to the definition section 2 he would find that in this Ordinance, the word " premises " refers only to business premises and not to residential flats at all. And so this proviso does not apply to this flat—because by the very terms of the sub-lease it was let " for residence only ". Their Lordships ought perhaps to set out the material words of the definition clause which produces this result—it says that—

> " " dwelling-house " means any building or part of a building let for human habitation as a separate dwelling.
>
> " " premises " means any building or part of a building let for business, trade or professional purpose or for the public service."

It was owing to the failure of the lawyers to refer to those definitions —or at any rate to appreciate the importance of them—that the mistake arose.

Their Lordships also think it right to point out that there was no evidence to show whether the premium of 10,000/- was extortionate or not. Their Lordships were told that no standard rent had been fixed for this flat because it was a new flat. It is obvious that if the standard rent were to be fixed at, say, 450/- a month for seven years, there would be nothing extortionate in a premium of 10,000/- down and a rent of 300/- a month thereafter : for it would come in the long run to much about the same.

Nevertheless, no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate, the fact remains that the landlord received a premium contrary to the provisions of the Ordinance : and the question is whether the tenant can recover it back—remembering always that there is nothing in the Uganda Ordinance, comparable to the English Acts, enabling a premium to be recovered back.

This omission in the Ordinance was considered to be decisive by the

> to section 8 (2) of the Rent Restriction Act of 1920. . . . Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself has committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he could not go to a Civil Court with clean hands and the principle stated by Lord Ellenborough in *Langton* v. *Hughes* 1 M. & S. 593–596 would have application 'What is done in contravention of an Act of Parliament cannot be made the subject-matter of an action'."

In considering the validity of this reasoning, their Lordships would point out that the observation of Lord Ellenborough was made in a case where a party was seeking the aid of the Court in order positively to enforce an illegal contract. It should be confined to cases of that description. His observation has no application to cases such as the present where a party is seeking to recover money paid or property transferred under an illegal transaction. In such cases the general principle was stated by Littledale, J. in *Hastelow* v. *Jackson* (1828) 8 B. & C. at p. 226 :—"If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." In accordance with this principle, so long as the illegal transaction has not been fully executed and carried out, the courts have in many cases shown themselves ready to entertain a suit for recovery of the money paid or property transferred. These were cases in which it appeared to the Court that, even though the transaction was illegal, nevertheless it was better to allow the plaintiff to resile from it before it was completed, and to award restitution to him rather than to allow the defendant to remain in possession of his illegal gains, see *Taylor* v. *Bowers* [1876] 1 Q.B.D. 291 which was approved by their Lordships' Board in *Petherpermal Chetty* v. *Muniandi Servai and Ors.* (1908) L.R. 35I.A. 98. But so soon as the illegal transaction has been fully executed and carried out the courts will not entertain a suit for recovery, see *Herman* v. *Jeuchner* (1885) 15 Q.B.D. 561, unless it appears that the parties were not *in pari delicto* (see *Lowry* v. *Bourdieu* (1780) 2 Doug. 468 at p. 472 by Lord Mansfield).

It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the plaintiff must show that he was not *in pari delicto* with the defendant. That was indeed the way he put his claim in the pleadings.

After setting out the lease, the payment of the premium and the entry into occupation, the Statement of Claim proceeded simply to say :—

> " By virtue of the provisions of subsection (2) of section 3 of the Rent Restriction Ordinance, the receipt of the said sum of Shs. 10,000 by the defendant from the plaintiff . . . was illegal but the plaintiff is entitled to recover the same since he (the plaintiff) was not *in pari delicto* with the defendant.
>
> The plaintiff claims the sum of Shs. 10,000 as money received by the defendant for the use of the plaintiff."

The issue thus becomes—Was the plaintiff *in pari delicto* with the defendant? Mr. Elwyn Jones for the appellant said they were both *in pari delicto*. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True it was paid under a mistake of law, but that was a mistake common to them both. They were both equally supposed to know the law. They both equally mistook it and were thus *in pari delicto*. In support of this argument the appellant referred to such well-known cases as *Harse* v. *Pearl Life Assurance* [1904] 1 K.B.

that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat.* Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James, L.J. pointed that out in *Rogers* v. *Ingham* 3 Ch.D. at p. 355. If there is something more in addition to a mistake of law —if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake— then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not *in pari delicto* and the money can be recovered back, see *Browning* v. *Morris* (1778) 2 Cowp. at p. 792 by Lord Mansfield. Likewise if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not *in pari delicto* and the money can be recovered back, see *Harse* v. *Pearl Life Assurance* [1904] I K.B. at p. 564 by Romer, L.J. These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received. Their Lordships have in mind particularly his judgment in *Smith* v. *Bromley* 2 Douglas 696 *in notis* which he delivered when he sat at Guildhall in April, 1760: and his celebrated judgment three or four weeks later, on 19th May, 1760, in *Moses* v. *Macferlan* 2 Burr 1005 when he sat *in banco*. Their Lordships were referred to some cases 30 or 40 years ago where disparaging remarks were made about the action for money had and received: but their Lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract. If it were, none such could be imputed here, as their Lordships readily agree. It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. This was explained by Lord Wright in *Fibrosa Spolka* v. *Fairbairn Lawson* [1943] A.C. at pp. 62–64. All the particular heads of money had and received, such as money paid under a mistake of fact, money paid under a consideration that has wholly failed, money paid by one who is not *in pari delicto* with the defendant, are only instances where the law says the money ought to be returned.

In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant "key-money". Section 3 (2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the "person who asks for, solicits or receives any sum of money" but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see *Johnson* v. *Youden* [1950] 1 K.B. 544 and section 3 of the Rent Restriction (Amendment) Ordinance, 1954) but he can hardly be said to be *in pari delicto* with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to "jump the queue", or a poor tenant who is at his wit's end to find accommodation, neither is so much

omission of a statutory remedy does not, in cases of this kind, exclude the remedy by money had and received. That is amply shown by the numerous cases to which their Lordships were referred, such as those arising under the Statutes against usury, lotteries and gaming, in which there was no remedy given by the Statute but nevertheless it was held that an action lay for money had and received. It was accepted, too, by Parker, J. (as he then was) in his considered judgment in *Green* v. *Portsmouth Stadium* [1953] 1 W.L.R. 487 : and his decision was only reversed by the Court of Appeal [1953] 2 Q.B. 190 because they thought the Statute there was of a different kind. It was not intended to protect book-makers from the demands of race-course owners but was rather for the regulation of race-courses. There was nothing in that case to show that the plaintiff was not *in pari delicto* with the defendants.

Their Lordships find themselves in full agreement with the judgment of the High Court of Uganda and of the Court of Appeal for Eastern Africa and will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

In the Privy Council

KIRIRI COTTON COMPANY LIMITED

v.

RANCHHODDAS KESHAVJI DEWANI

DELIVERED BY LORD DENNING

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