

Arieh Zvi Lipshitz - - - - - *Appellant*

v.

Haim Aron Valero and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1947

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD MACDERMOTT

[*Delivered by* LORD NORMAND]

This is an appeal from the judgment of the Supreme Court of Palestine setting aside the judgment of the District Court of Jerusalem in its appellate capacity and restoring the judgment of the magistrate in the Magistrate's Court of Jerusalem in favour of the plaintiff. The plaintiff was the original respondent in this appeal, but he died in July, 1945, and the present respondents were substituted as respondents in his place by an Order in Council of 7th December, 1945.

The respondents deny the jurisdiction of this Board; and the appellant denies the jurisdiction of the Supreme Court to entertain the appeal from the District Court. It is first necessary therefore to decide whether this Board has jurisdiction to entertain the appeal, and if the Board's jurisdiction is upheld, it will then be necessary to decide whether the Supreme Court had jurisdiction to entertain the appeal from the judgment of the District Court; and this Board will become concerned with the merits of the dispute between the parties only if the jurisdiction of the Supreme Court also is upheld.

But in order that the first of these questions of jurisdiction may be understood it is necessary to explain the facts. The appellant, the defendant in the action, is the owner of a café in King George Avenue, Jerusalem. The deceased Moshe Valero, the plaintiff and the original respondent, was the owner of an adjoining piece of land. From 1937 to 1940 the appellant took a part of this land on yearly lease for use as a garden for his café. Then by agreement in writing, executed on 28th November, 1940, the plaintiff let to the appellant part of the land of an area of $7\frac{1}{2} \times 6\frac{1}{2}$ metres as a garden for the café for 12 months at a rent of £P60. Subsequently the parties added a clause to this agreement providing for the contemplated event of the appellant's building a winter garden on the leased land; and during the currency of the lease the appellant in fact built a winter garden at a cost exceeding £P500. On the 28th November, 1941, the parties entered into another agreement by which the plaintiff let to the appellant the same area of ground as had been let by the agreement of 28th November, 1940, and an additional area of 50 square metres. The lease bore to be granted "for the arrangement of a garden" for the appellant's café.

The lease was for one month and the rent was £P13.500 payable in advance. Other provisions of this lease were as follows:—

“ 3. In the event of the lessor needing the plot of land for the purpose of building or for any other purpose whatsoever, the lessee must vacate the said plot within 3 days from the receipt of a notice in writing from the lessor of his desire in that regard; in such an event the lessor shall have to return to the lessee the proportional rent for the remainder of the period during which the lessee shall not have used the plot in consequence of the demand by the lessor as aforesaid and this agreement shall be deemed abrogated upon the delivery of a notice as aforesaid.

4. All the construction which the lessee shall make shall remain his private property, it being expressly provided that at the end of the term of lease or upon demand being made by the lessor to vacate the land under clause 3 of this agreement it shall be removed. Should the lessee fail to vacate the let property as aforesaid all the construction made by the lessee shall remain the property of the lessor, and the lessee may not claim the expenses he had incurred therefor.

5. Should there be no notice by the lessor under clause 3 or for any other arrangement, this agreement shall be renewed automatically for one further month and so forth month by month on the same conditions as in this agreement are included, provided that the lessee shall notify the lessor of his such desire three days before the expiration of each month and shall pay the monthly amount of £P13.500 in advance.”

The appellant did not give notice under the fifth clause of this agreement but he paid the rent of £P13.500 on 28th November, 1941, and on the 28th day of each of the five following months. Instead of tendering payment of the next monthly rent on 28th May, 1942, the appellant tendered payment on 31st May, 1942. This tender was not accepted, and by letter of the same date the plaintiff gave notice under Clause 3 of the agreement, terminating the lease because the ground was needed by him for another purpose, and stating that the appellant had committed a breach of the agreement by failing to pay the rent due on 28th May, 1942. As the appellant remained in possession of the premises the present action was commenced on the 10th June, 1942, for an order on him to vacate. One of the grounds of defence and the only ground now maintained is that the action is contrary to the provisions of the Rent Restrictions (Business Premises) Ordinance, 1941. On the 28th February, 1943, the magistrate gave judgment in favour of the plaintiff, and on the 18th June, 1943, the District Court of Jerusalem on appeal set aside the magistrate's judgment and dismissed the action. Leave to appeal to the Supreme Court was applied for and granted, and on 24th November, 1943, the Supreme Court allowed the appeal and restored the magistrate's judgment. The appellant then applied to the Supreme Court under Article 3 (a) of the Palestine (Appeal to Privy Council) Order in Council, 1924, for leave to appeal to His Majesty in Council. This application was opposed, but on 1st February, 1944, the Supreme Court granted conditional leave as of right.

The first question is whether the Supreme Court should have refused the application on the ground that this Board has no jurisdiction. Article 3 (a) of the Palestine (Appeal to Privy Council) Order in Council, 1924 (S.R. & O. 1924, No. 1243), is in these terms:—

“ Subject to the provisions of this Order an appeal shall lie (a) as of right, from any final judgment of the Court, when the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards or where the Appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards.”

The respondents maintain that the Board has no jurisdiction because all that is in dispute or in any way involved in the appeal is the appellant's right to occupy a small piece of land, and that this right of occupation, having been granted under a lease for one month terminable on three days' notice and at a rent of only £P13.500 a month, is worth £P50 at

most. They maintain also that the value of the building erected by the appellant on the land leased by him does not enter into the value of "the matter in dispute" or of the right claimed, since there is no mention of the building in the Statement of Claim or Pleadings and no decision has to be made respecting it. Their Lordships are of opinion that this is too narrow a construction of Article 3, and that the true test under the article is whether it is worth £500 to the appellant that the Rent Restriction Order should be held to give him protection against an order to vacate the land leaving on it a building which cost £450 to erect. This is the test which was applied by the learned judges of the Supreme Court, who held that the tenancy right amounted in value to at least £P50 and the value of the building to £P450.

It is therefore necessary to consider next whether the Supreme Court had jurisdiction to entertain the appeal from the District Court of Jerusalem. Article 12 of the Magistrates' Courts Jurisdiction Ordinance (No. 45 of 1939) provides that "The decision of the District Court in an appeal from a Magistrate's Court shall be final, but the presiding judge of the District Court which heard the appeal may, if the decision involves a point of law of novelty, complexity or general importance, grant leave to appeal to the Supreme Court sitting as Court of Appeal." In this case the presiding judge of the District Court granted leave to appeal, and accordingly there was jurisdiction in the Supreme Court unless Article 12 can be successfully challenged as *ultra vires*, and that is what is now in issue. The decision depends primarily on the meaning and effect of Article 43 of the Palestine Order in Council, 1922 (S.R. & O. 1922 No. 1282). It is one of a series of articles forming Part V of the Order in Council, the heading of which is "Judiciary", and it will be convenient to set out those articles in Part V or so much of them as was specially referred to in the argument.

Article 38 (as amended by the Palestine (Amendment) Order in Council, 1935). Subject to the provisions of this part of this Order and any Ordinance or Rules, the civil Courts hereinafter described, and any other Courts or Tribunals constituted by or under any of the provisions of any Ordinance, shall exercise jurisdiction in all matters and over all persons in Palestine.

Article 39 (as amended by the Order in Council of 1935). Magistrates' Courts shall be established in each District and Sub-District as may be prescribed from time to time by Order under the hand of the High Commissioner. These Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates Law of 1913, as amended altered or extended by any subsequent law or Ordinance or Rule for the time being in force.

Article 40. District Courts shall be established in such Districts as may be prescribed from time to time by Order under the hand of the High Commissioner, and every such Court shall exercise jurisdiction

(1) As a Court of First Instance:—

(a) In all civil matters not within the jurisdiction of the Magistrates' Courts in and for that District.

(b) In all criminal matters which are not within the jurisdiction of the Court of Criminal Assize.

(2) As an Appellate Court from the said Magistrates' Courts subject to the provisions of any Ordinances or Rules.

Article 41. There shall be a Court of Criminal Assize which shall have exclusive jurisdiction with regard to offences punishable with death and such jurisdiction with regard to other offences as may be prescribed by Ordinance.

Article 42 (as amended by Order in Council of 1939). The High Commissioner may by order under his hand establish Land Courts and determine the area of their jurisdiction. The constitution of such courts and the matters in which they shall have jurisdiction within the area so determined shall be prescribed by Ordinance.

Article 43. There shall be established a Court to be called the Supreme Court of which the constitution shall be prescribed by Ordinance. The

Supreme Court sitting as a Court of Appeal shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance.

Article 49. The Chief Justice may, with the approval of the High Commissioner, make rules for regulating the practice and procedure of the Supreme Court and of all other Civil Courts which are or may be established in Palestine.

Article 64 (1). Matters of personal status affecting foreigners other than Moslems shall be decided by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner, provided always that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.

It will also be necessary to refer to the following:

Article 17 (1) (a) (as amended by Order in Council of 1923). The High Commissioner shall have full power and authority, without prejudice to the powers inherent in, or reserved by this Order to His Majesty, and subject always to any conditions and limitations prescribed by any such instructions as may be given to him under the Sign Manual and Signet or through a Secretary of State, to promulgate such Ordinances as may be necessary for the peace, order and good government of Palestine, provided that no Ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship, save in so far as is required for the maintenance of public order and morals; or which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion, or language.

Article 87. The High Commissioner may by Proclamation in the Gazette at any time within one year from the date of the commencement of this order, and provided he has previously obtained the approval of the Secretary of State, vary, annul or add to any of the provisions of this order in order to carry out the purposes of the same, and may provide for any other matters necessary in order to carry into effect the provisions thereof.

Article 88. His Majesty, His heirs and successors in Council, may at any time revoke, alter or amend this order.

The Orders in Council are, it may be noted, made in exercise of the powers vested in His Majesty by the Foreign Jurisdiction Act, 1890 (53 and 54 Victoria c. 37), section 12, to assign to or confer on any court held under the authority of His Majesty, any jurisdiction, civil or criminal, original or appellate, which may lawfully by Order in Council be assigned to or conferred on any British Court in any foreign country, and to make such provisions and regulations as to His Majesty in Council seem meet respecting the exercise of the jurisdiction so assigned or conferred and respecting the enforcement and execution of the judgments, decrees, orders and sentences of any such Court, and respecting appeals therefrom.

The Appellant maintained that Article 12 of the Magistrate's Courts Jurisdiction Order (No. 45 of 1939) is *ultra vires*, because the Order in Council has by Article 43 specified the appellate jurisdiction of the Supreme Court and the Order has not given power to the High Commissioner to extend that jurisdiction by Ordinance. The respondents maintained that *Part V* of the Order in Council is but an outline of the Civil Courts which the High Commissioner is given power to fill in by means of Ordinances and in particular that he has power under Article 43 itself to vary and extend the jurisdiction therein conferred on the Supreme Court sitting as a Court of Appeal. Their counsel construed the words "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals" as meaning "shall have jurisdiction to hear certain appeals and such other appeals as any Ordinance shall provide", and the question really is whether that construction is right or whether the sound construction is, "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals and no others." If the restrictive construction is the true one, the ordinances contemplated by the Article would, it is admitted, necessarily be confined to the regulation of matters of procedure and practice (for example prescribing the time for appeals or the conditions

under which appeals may be taken without leave) which are not appropriate for Rules of Court made under Article 49. Their Lordships are of opinion that that is the true meaning of the Article and that the respondent's construction strains and distorts its language. This opinion is fortified by a comparison of the language of the Article with that of other Articles in Part V. Article 38 gives to the Civil Courts as a whole universal jurisdiction in all matters and over all persons in Palestine. It is impossible to widen this jurisdiction by a Palestine Ordinance, and it cannot be supposed that power would be given to exclude by Ordinance any matter or person in Palestine from the jurisdiction of the Civil Courts. Therefore the Ordinances to which the jurisdiction of the Civil Courts as a whole is declared by the Article to be subject can only be such as might deal with matters of practice and procedure. The language of Articles 39, 41, 42 and 64 (1) shows that, when it is intended to provide for amendment, alteration or extension of jurisdiction by Ordinance, the intention is expressed in clear and unambiguous terms, and nothing is left to doubtful inference or implication. Article 40 (1) draws the distinction between District Courts as Courts of first instance and as Courts of Appeal, and this important distinction becomes in Article 43 the basis of the definition of the Supreme Court's jurisdiction. In Article 40 (2) the Ordinances contemplated can only be Ordinances regulative of procedure and practice, for the Article has already given to the District Courts all the appellate jurisdiction which can be given to them, by giving them jurisdiction to hear appeals from the only Court subordinate to them established by the Order in Council. The powers of amendment under Articles 87 and 88 are fully adequate for the purpose of amending those Articles which deal with jurisdiction and which themselves make no express provision for amendment by Ordinance.

Accordingly, the conclusions relevant to the issue in the appeal which result from this examination of the Order are:—

(1) Article 43 specifies and limits the appellate jurisdiction of the Supreme Court, and (2) when a specified jurisdiction is declared to be subject to Ordinances, it is intended only that the High Commissioner shall have power to prescribe by Ordinance such procedure and practice as cannot appropriately be dealt with by rules made under Article 49. If these conclusions are well founded it is not necessary to give separate consideration to the respondents' alternative contention, that the extension of the Supreme Court's appellate jurisdiction by Ordinance is warranted by Article 17 (1) (a) (as amended), for the respondents' counsel admitted that if Article 43 confers a limited jurisdiction the High Commissioner has no power to extend it by Ordinance made under Article 17 (1) (a).

It should be added that the respondents submitted an argument *ab inconvenienti* for recognising the validity of Article 12 of the Magistrates' Courts Jurisdiction Ordinance. This, however, is not an argument which can be allowed to affect the judicial construction of the Order in Council and it is for the legislative power to remedy any inconvenience which may result from the present decision.

Their Lordships therefore hold that Article 12 of the Magistrates' Courts Jurisdiction Ordinance is not within the powers conferred on the High Commissioner by the Order in Council and is *ultra vires*.

This question first came before the Supreme Court in *Doukhan v. Drucker* (No. 177 of 1938). In that case Acting Chief Justice Copland, Mr. Justice Frumkin and Mr. Justice Khayat held that they had no jurisdiction to entertain an appeal from the District Court sitting as an Appellate Court. The learned Acting Chief Justice said, "The words 'subject to the provisions of any Ordinance', in our opinion refer to the manner in which such appeals shall be brought, such as imposing a limit of penalty below which an appeal does not lie, imposing a definite period for appealing, ordering that in any particular class of cases appeal shall only be by leave, and such like matters, but cannot extend the jurisdiction of the Supreme Court to allow it to hear appeals from the District Court in its appellate capacity." With this opinion their Lordships agree. The same

question again came before the Supreme Court in *Municipal Corporation of Jerusalem v. Catton* (Civil Appeal No. 158 of 1938), Palestine Law Reports, 1938, page 488. On this occasion it was considered by a bench of five judges, who by a majority held that the words "subject to the provisions of any Ordinance" do empower the High Commissioner to enlarge the jurisdiction by Ordinance. Chief Justice Trusted based his decision partly on the ground that the practice of the Supreme Court had since 1924 conformed to the view that its jurisdiction had been enlarged and that an amending Order in Council had been passed in 1935 which contained no provision correcting this practice, and he said that it was too late to raise the question of jurisdiction. Mr. Justice Copland after examining the relevant articles of the Order in Council adhered to the opinion which he had expressed in the earlier case. Mr. Justice Frumkin on this occasion came to the opposite conclusion from that to which he had come in the previous case, and held that Article 43 did not restrict the jurisdiction of the Supreme Court to hearing appeals from the District Court sitting as a Court of first instance. Mr. Justice Khayat agreed with Mr. Justice Copland and Mr. Justice Abdul Hadi with the Chief Justice. Their Lordships find themselves in agreement with the clearly reasoned judgment of Mr. Justice Copland. They are unable to attach any importance to practice as interpreting an Order in Council of recent date, and they find in the amending Order in Council of 1935 nothing that implies approval of the practice of the Supreme Court or of the construction of Article 43 on which that practice had tacitly proceeded.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside and that the judgment of the District Court should be restored.

Counsel for the respondents submitted that as the appellant had not objected to the jurisdiction of the Supreme Court when application was made in the District Court for leave to appeal, nor when the case was before the Supreme Court itself the costs to be awarded to him should be modified. But it does not appear that the appellant could, in view of the decision in the *Jerusalem Municipal Council v. Catton*, have done more than reserve the point in the event of an appeal to this Board or that such a reservation could have had any effect on the course of the litigation. The appellant is entitled to the costs of this appeal and in the Courts in Palestine.

DR. J. W. H. H. H.

In the Privy Council

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DELIVERED BY LORD NORMAND

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