

16/83

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 31 of 1980

ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

B E T W E E N :

KANDASAMY s/o KALIAPPA  
GOUNDER Appellant

- and -

MOHD. MUSTAFA s/o  
SEENI MOHD. Respondent

CASE FOR THE APPELLANT

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- 1. This is an Appeal by Kandasamy s/o Kaliappa Gounder (hereinafter called the Appellant) from a Judgment of the Federal Court of Malaysia (Appellate Jurisdiction) (Raja Azlan Shah F.J. Chang Min Tat F.J. and Syed Othman F.J. dated the 2nd day of February 1979 allowing with costs the appeal of Mohd. Mustafa s/o Seeni Mohd. (hereinafter called "the Respondent") from a judgment and order of the High Court of Malaya at Penang (Gunn Chit Tuan J.) dated the 30th day of June 1978, which granted to the Appellant an order declaring that the Appellant is the tenant of the ground floor (hereinafter referred to as the said ground floor) of the premises known as No. 43 Penang Street, Penang (hereinafter referred to as the said premises) and that he was entitled to the protection of the Control of Rent Act, 1966. P. 79
- 2. The principal issue raised in this appeal is whether the Appellant was the tenant or licensee of the said ground floor. P. 50

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- P. 22            3.     The said premises is a four storeyed building and is controlled under the Control of Rent Act 1966. The chief tenant of the said
- P. 44            premises is the Penang Civil Storage Co. Ltd. who has sub-let the whole of the said premises
- P. 4             to the Respondent at a monthly rental of \$174.25. An eating shop business was carried on the said ground floor by the Respondent for some years under the name of Nava India Restaurant and Cafe under a licence (hereinafter referred to as the said licence) issued by the City Council of George Town Penang. The said licence is valid from the 1st day of January to the 31st day of December each year and is renewable. For some months prior to March 1970 the said business was not carried on.
- P. 31
- P. 20            (i)     In March 1970 the Appellant was looking for suitable premises to carry on an eating shop business and the Respondent represented to the Appellant that he was the chief tenant of the whole of the said premises and the owner of the said business. Relying on the said representation of the Respondent the Appellant in March 1970 entered into an oral agreement with the Respondent whereby the Respondent agreed to sub-let the whole of the said ground floor to the Appellant as from the 1st day of April 1970 and to grant to the Appellant the use and benefit of the said licence to carry on an eating
- P. 21            shop business at a rental of \$230/- per month payable at the end of each month.
- (ii)     It was also agreed that the Appellant should pay to the Respondent a deposit of two months rental and the Appellant paid the sum of \$460/- to the
- P. 22            Respondent in March 1970 and went into occupation of the said ground floor and commenced the business of an eating shop as from the first day of April 1970 under the name Nava India Restaurant and Cafe.
- P. 27            (iii)  In May 1970 the Respondent promised to

- sub-let to the Appellant a room on the first floor of the said premises for an extra rental of \$70/- per month and increased the overall rental for the whole of the said ground floor, a room on the first floor and the use of the said licence to \$300/- per month. P. 22
- (iv) The Respondent did not give to the Appellant the use of a room on the first floor of the said premises but collected rent from the Appellant at the rate of \$300/- per month as from July 1970. No receipts were issued for the rent paid. P. 23
- (v) On the 30th day of July 1970 at the request and for the benefit of the Respondent an agreement (hereinafter referred to as the said written agreement) was signed by the Appellant and the Respondent relating to the said ground floor. This written agreement was to enable the Respondent to circumvent the Control of Rent Act 1966. P. 25  
P. 89  
P. 29  
P. 25  
P. 14
- (a) By the said written agreement the Respondent purported to let to the Appellant the said ground floor together with full right and liberty to carry on the business of an eating shop, the use of furniture and the said licence at a rental of \$300/- per month for a period of one year as from the 1st day of August 1970. P. 89
- (b) In the said written agreement the parties are referred to as the lessor and lessee. P. 89
- (c) The first recital states that the Respondent is the tenant of the said premises and the owner of the said eating shop business. P. 89
- (d) The second recital states that the Respondent wishes to lease to the Appellant the said business for a year from the first day of August 1970. P. 89

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- P. 89 (e) The habendum says that
- "In consideration of the rents and covenants hereinafter reserved and contained and on the Lessee's part to be performed and observed the Lessor hereby lets to the Lessee the ground floor only of the said premises together with the full right and liberty to the Lessee to carry on the business of an eating shop house on the said premises under the aforesaid licence issued to the Lessor and the right of use of all the furniture and fittings therein to Hold the same unto the Lessee ....."
- P. 89 (f) Clause 2 contains the usual obligations that a lessee of a shophouse is required to perform.
- P. 90 (g) Clause 3 states inter alia
- "That the Lessee paying the rent hereby reserved ..... shall peacefully hold and enjoy the demised premises during the said term ....."
- P. 91 (h) Clause 5 states
- "It is expressly agreed and understood that the right of tenancy whatsoever of the said premises or any portion thereof is intended to be passed to the Lessee by the Lessor and that the relationship of the Landlord and Tenant does not exist between the Lessor and Lessee as regards the said premises or any part thereof."
- P. 23 (vi) By February 1971 the relationship between the Appellant and the Respondent became strained largely due to the failure of the Respondent
- (a) to renew the said licence for the year 1971
- (b) to give the Appellant possession of a

- room on the first floor
- and (c) to give receipts for the rents paid by the Appellant. P. 23
- (vii) Between February 1971 and September 1971 the Respondent and/or his agents committed various acts to pressurise the Appellant to vacate the said ground floor. These acts included a false allegation that the Appellant had not paid the rent for the month of January 1971 and the obtaining of a warrant for Distress in March 1971.
4. On the 11th day of September 1971 the Appellant filed a Writ of Summons against the Respondent in the High Court of Malaya at Penang. In his Statement of Claim dated 24th November 1971 the Appellant P. 1
- (i) stated inter alia
- (a) that the said premises is controlled under the Control of Rent Act 1966. P. 4
- (b) that the Respondent was at all material times and is the chief tenant of the whole of the said premises. P. 4
- (c) that in March 1970 he and the Respondent entered into an oral agreement whereby the Respondent sub-let the whole of the said ground floor to him as from the 1st day of April 1970 and granted him the use and benefit of the said licence and that the aggregate rental was \$230/- per month. P. 4
- (d) that in May 1970 the Respondent increased the rent to \$300/- per month and promised to sub-let in addition to the said ground floor a room on the first floor. P. 5

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- P. 5 (e) that on or about the 31st day of July 1970 he on the insistence of the Respondent executed a document purporting to be a lease.
- P. 5 (f) that sometime in June 1971 the Respondent had refused to return to the Appellant the books of account of the Appellant.
- and (ii) prayed inter alia for
- P. 8 (a) a declaration that the Appellant is the sub-tenant of the Respondent in respect of the whole of the said ground floor and that his sub-tenancy is protected by the Control of Rent Act 1966.
- (b) for an order for the return of his books of account.

5. In his Defence dated 5th June 1972 the Respondent inter alia stated that he only leased to the Appellant the eating shop business known as Nava India Restaurant and Cafe carried on at the said ground floor together with the furniture and fittings for a period of one year as from the 1st day of August 1970 at a rental of \$300/- per month. He denied

- (i) that he was at all material times and is the chief tenant of the said premises.
- (ii) that the Appellant was given possession of the said ground floor in pursuance of the oral agreement.

6. In 1974 the Appellant obtained an eating shop licence in his own name from the City Council of George Town Penang and has since then carried on an eating shop business on the said ground floor under the name of Sri Kaliamma Vilas. About two and a half years after filing his Defence the Respondent filed an Amended Defence and a Counter-Claim dated

30th January 1975. Therein he admitted that he was at all material times and is the chief tenant of the said premises and claimed possession of the eating shop business known as Nava India Restaurant.

7. The Appellant filed a Reply to the Amended Defence and a Defence to the Counter-Claim dated 20th February 1975 whereby he inter alia joined issue with the Respondent on the Amended Defence and pleaded the protection of the Control of Rent Act 1966.

8. The Appellant filed an Amended Reply to the Amended Defence and Defence to the Counter-Claim dated 30th April 1975 wherein he stated inter alia that he has been in continuous possession of the said ground floor since March 1970.

9. The Respondent then filed an Amendment to the Amended Defence and Counter-Claim dated 18th January 1977 wherein he denied that he was the chief tenant of the said premises at the material time and stated inter alia

- (i) that his father was the chief tenant at the material time.
- (ii) that he became the chief tenant only in March 1973.
- (iii) but that at the material time he was in possession of the said ground floor.

10. Then the Appellant re-amended his Reply and filed a Re-Amended Reply to the Re-Amended Defence and Counter-Claim dated 8th February 1977 wherein he stated inter alia

- (i) that the Respondent had in March 1970 represented to the Appellant that he was the chief tenant of the said premises.
- (ii) that relying on the said representation he had entered into an oral agreement with the Respondent in March 1970.

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- P. 15 (iii) that the Respondent was estopped from denying that he was the chief tenant at the material time.
- P. 19 11. The hearing of the action in the High Court commenced on the 24th day of March 1977 and continued until the 3rd day of May 1978 when judgment was reserved. On the 3rd day of May 1978 the parties informed the judge that they had amicably settled most of the claims in the Statement of Claim and in the Counter-Claim and that there were only two issues that remained for the Court to decide namely
- (i) whether it was a sub-tenancy or a licence that was granted to the Appellant by the Respondent in respect of the said ground floor.
  - (ii) whether there should be an order for the return of the books of account of the Appellant.
- P. 20 12. (i) At the hearing the Appellant gave oral evidence and stated that in March 1970 he was in search of a place to carry on the business of an eating shop. He found that the said ground floor was vacant. He was later introduced to the Respondent who said that he was the chief tenant of the said premises and the owner of an eating shop business that had been carried on the said ground floor under the name of Nava India Restaurant and Cafe and that he had the said licence. The Appellant entered into an oral agreement with the Respondent whereby the Respondent sub-let the said ground floor to the Appellant as from the 1st April 1970 at the rental of \$230/- per month. The Respondent also granted to him the right to use the said licence and carry on the business of an eating shop thereat under the name of Nava India Restaurant and Cafe. He was the tenant of the ground floor on a month to month basis.



- (ii) The Appellant further stated that he paid to the Respondent in March 1970 a deposit of two months rent and went into occupation of the said ground floor and commenced business thereat on the 1st April 1970. P. 22
- (iii) The Appellant further stated that the said written agreement was entered into to enable the Respondent to circumvent the Control of Rent Ordinance 1966. That he was already in occupation of the said ground floor in pursuant of the oral agreement since the said March 1970 when the written agreement was signed. P. 25
- (iv) He denied under cross-examination that from March 1970 to July 1970 he was employed as a cook by the Respondent. P. 26
- (v) The Appellant called five witnesses three of whom gave evidence to the effect that to their knowledge the Appellant had started his business on the said ground floor in April 1970.
13. The Respondent gave oral evidence and stated that his father had carried on an eating shop business under the name of Nava India Restaurant for sometime before July 1967 on the said ground floor. The said business was assigned to him in July 1967 and he carried on the business until sometime prior to March 1970 when business was stopped to carry out repairs. P. 34
- (i) He said that his father was the chief tenant until 1972 when his father died. He became the chief tenant in March 1973. P. 34
- (ii) He further stated that in April 1970 the Appellant joined him as P. 34

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- P. 41 a cook and remained so until the 1st August 1970. He did not maintain an employment register in respect of the Appellant.
- P. 38 (iii) He further stated that he only wanted to lease the said business to the Appellant.
- P. 39 (iv) Under cross-examination he admitted that he did tell the lawyer who drew the said written agreement that he wanted to lease the premises too to the Appellant.
- P. 63 14. The learned trial judge Gunn Chit Tuan J. delivered judgment on the 30th day of June 1978 in favour of the Appellant and made an order declaring that the Appellant was the sub-tenant of the said ground floor and that he was entitled to the protection of the Control of Rent Act 1966. He further ordered the Respondent to return to the Appellant the books of account.
15. In his judgment Gunn Chit Tuan J. accepted the evidence of the Appellant to be more creditable and rejected that of the Respondent. He said
- P. 54 (i) "After watching and listening to the Defendant for nearly three days ----- I had no doubts and found him to be a most untruthful witness."
- P. 55 (ii) "I found on a balance of probabilities that in the month of March 1970 there was an oral agreement between the Plaintiff and the Defendant whereby the former was allowed to enter and occupy the said premises for an indefinite period after paying the Defendant a deposit of \$460/- being two months rental of \$230/- per month which was agreed to include light water use of furniture and fittings and the use of the Defendant's eating shop licence and

business name."

16. As regards the defence raised by the Respondent that he became the chief tenant only in March 1973 the learned judge held that the Respondent having allowed the Appellant to enter upon the said ground floor and to pay rent cannot deny the validity of any tenancy created in 1970 by alleging his own want of title then to create it. P. 58

17. As regards the said written document the learned judge said that it did not contain all the terms which the parties had negotiated previously and agreed upon and that it was not intended to be binding upon them. He then said that "even if the various clauses of the document D12 were to be considered, it would be seen that the majority therein are covenants such as those for quiet enjoyment and re-entry, which are normally found in standard tenancy agreement. In my opinion, therefore, the true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of a landlord and tenant and not that of a licensor and a licensee." P. 55  
P. 61

18. The Respondent appealed against the said decision to the Federal Court of Malaysia. The appeal was heard on the 5th and 6th day of December 1978 and judgment of the Court was delivered by Tan Sri Datuk Chang Min Tat on the 2nd day of February 1979 when the appeal was allowed with costs. P. 64  
PP.67-78

- (i) In that judgment the Federal Court criticised Gunn Chit Tuan J."s finding of fact
  - (a) on the credibility of the Appellant and the Respondent
  - (b) that the Appellant was let

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into possession of the said ground floor as a sub-tenant in March 1970 in pursuance of an oral agreement.

and proceeded to construe the said written agreement.

(ii) The Federal Court said

- P. 76 - 77 (a) that though drafted by a practitioner there was obviously a conflict between the second recital and the habendum.
- P. 76 (b) that the agreement stands to be construed on the habendum.
- P. 76 (c) that apart from the use of the terms and the imposition of obligations on both parts that are more usual in a lease than a licence the Appellant was obviously given exclusive possession of the ground floor.
- P. 77 (d) that except for clause 5 nothing is clearly stated.
- P. 77 (e) that the habendum must be seen to be an error of drafting.
- P. 77 (f) that in their judgment it was reasonably clear that what was given in the document was a licence.
- P. 77 (g) that though the legislation protects a tenancy but not a licence in their view it is not really necessary to say that such a licence is not "contracting out of the statute".

19. On the 9th day of July 1979 the Federal Court in Malaysia granted the Appellant final leave to appeal to His Majesty the Yang Dipertuan Agong.

20. The Appellant respectfully submits that the decision of the Federal Court was wrong and this appeal ought to be allowed with costs throughout for the following reasons among others

R E A S O N S

- (1) The finding of Gunn Chit Tuan J. that the Appellant went into possession of the said ground floor as a sub-tenant in April 1970 in pursuance of an oral agreement made with the Respondent is a finding of fact based on the evidence before him and on the credibility of witnesses.
- (2) The finding that the said written agreement was not intended to be acted upon was also a finding of fact based on the credibility of the parties.
- (3) Even if the said written agreement was intended to be binding on the parties it is quite clear from the clear words of the habendum and the general tenor of the agreement that the intention was to grant to the Appellant the sub-tenancy of the said ground floor together with the right to carry on the business of an eating shop with the said licence.
- (4) After having rightly stated that the written agreement stands to be construed on the habendum and that apart

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from the use of terms and the imposition of obligations on both parties that are more usual in a lease than a licence the Appellant was obviously given exclusive possession of the ground floor the Federal Court was wrong in holding that what was given was a licence.

- (5) The finding of Gunn Chit Tuan J. as to the conduct of the parties prior to the 30th July 1970 and the conduct of the Respondent in taking distress proceedings against the Appellant, a remedy that is available only to the landlord against his tenant, and the general conduct of the parties are relevant factors to which the Federal Court failed to give any or sufficient importance.
- (6) The Federal Court was wrong in holding that there was an error in the drafting of the habendum.
- (7) The Federal Court was wrong in holding that except for clause 5 nothing is clearly stated in the written agreement.
- (8) The insertion of clause 5 in the written agreement was a clumsy effort to contract out of the Control of Rent Act 1966 which protected tenancies and not licences.
- (9) The order of Gunn Chit Tuan J. was right and ought to be restored.

R.R. CHELLIAH  
RAJ KUMAR SHARMA

IN THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL

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GOUNDER Appellant

- and -

MOHD. MUSTAFA s/o  
SEENI MOHD. Respondent

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CASE FOR THE APPELLANT

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GASTERS,  
44, Bedford Row,  
London WC1R 4LL

Solicitors for the above named  
Appellant