KARSANJI NARANJI *v.* LEE JANG HEE

[Appellate Jurisdiction (Hyne, C.J.) December, 28th, 1953]

Fair Rents Ordinance—meaning of word " shop " and " dwelling house ".

The appellant let premises to the respondent by the month and after the tenancy had existed for some time, after giving due notice, instituted proceedings claiming vacant possession in the Magistrate's Court, Suva.

The Magistrate, Suva, held that the premises were used as a dwelling house and therefore he refused to grant the appellant vacant possession because of the application of the Fair Rents Ordinance.

On appeal against the Magistrate's decision.

HELD.—Any user, even to a minor degree for the purpose of residence under the provisions of the Fair Rents Ordinance brings premises within the meaning of the word " dwelling house ".

Cases referred to:—

Green & Ors. v. Coggins [1949] 2 A.E.R. 815.
Harnam Singh v. Jamal Pirbhai (1951) A.C. 688.

D. M. N. McFarlane for the appellant.

J. Falvey for the respondent.

HYNE, C.J.—This is an appeal from the judgment of the learned Magistrate, Suva, in an action in which the appellant claimed an order for vacant possession of certain premises situated in Toorak Road wrongfully retained by the respondent, rent for the period 1st March, 1953, to 30th April, 1953, at the rate of 10 guineas per month, mesne profits, and costs.

The grounds of appeal are:—

1. That the Magistrate was in error in holding that the premises came within the definition of a " dwelling house " rather than within the definition of a " shop ".
2. That the primary purpose of the premises is use as a shop and that therefore the whole of the premises should be regarded as coming within the definition of a shop.
3. That because the premises are shop premises that part of the Fair Rents Ordinance dealing with shop premises applies and the appellant having given proper notice to quit to the respondent is entitled to possession of the premises.
4. That it is reasonable having regard to all the circumstances of the case that the appellant should be given possession of the premises as the owner.

The respondent is a monthly tenant of the appellant, the tenancy being based on an agreement dated the 27th June, 1947. The agreement sets out that the respondent is the lessee of all that piece of land situated in the town of Suva containing 7.6 perches known as Lot 2 on Deposited Plan No. 638, being part of allotment 1 of section 1, and being part of the land comprised in the certificate of title Vol. 56, Fol. 5548, together with the buildings and other erections thereon, for the term of five years commencing on the 1st day of July, 1947, at a rental payable monthly in advance on the first day of each and every month.

The appellant bought the premises from K. W. March in 1952, the fact of such purchase being communicated to the respondent. There is nothing anywhere in the agreement to indicate whether the premises were to be let as as a shop or as a dwelling house.

Although a formal agreement to lease the premises was not entered into until 1947 the premises had previously been occupied by the respondent's father for a considerable period, and it seems quite clear that the respondent's father used part of the premises as a dwelling house. The building has been used both as a dwelling house and a shop ever since.

Mr. McFarlane, for the appellant, submitted that it was quite clear from the learned Magistrate's judgment that the primary purpose of the letting was for a shop, although it was not denied that portion of the house was later used as a dwelling house. Mr. McFarlane further submitted that, as the house is in a commercial area, this must also be taken into consideration in deciding the primary use to which the building was to be put.

Referring further to the learned Magistrate's judgment, Mr. McFarlane contended that the knowledge and acquiescence of the landlord that part of the premises was used for residential purposes could not give the premises the character of a dwelling house. He submitted that it would be wrong in law and as a matter of policy to say that the tenant could turn the premises into a dwelling house for the purposes of the Ordinance.

In the Fair Rents Ordinance the terms " dwelling house " and " shop " are both defined.

A dwelling house means " any land or premises leased wholly or in part for the purpose of residence by the lessee and includes ", amongst other things, " any premises part of which is used for the purposes of residence and part as a shop ". " Shop " means " any premises leased wholly or in part for the purposes of a shop ".

Mr. McFarlane submitted that the onus is on the tenant to prove that it was a dwelling house, and he cited in support the case of *Green and Ors. v. Coggins* [1949] 2 A.E.R. 815. In this case the tenant was granted in 1938 the tenancy of premises consisting of a dance hall, cafe and cloak rooms on the first floor and an upper part which was used as a dwelling house for him and his family. In 1946 the tenant bought a house in the neighbourhood and moved into it, but he continued to use one of the rooms on the upper floor of the original premises as a bedroom. He slept there on certain nights of the week. The landlords issued a summons for possession on the ground that the premises were no longer used as a dwelling house. The Court of Appeal held that the learned Judge was entitled to consider, as he did, that the premises had been let in 1938 as a dwelling house, and that the onus of proof lay with the landlord to show that that user, which still continued, was not a user of what was originally a dwelling house entitling the tenant to claim protection. There was evidence to suport the finding of the Judge that the premises were still used as a dwelling house and, therefore, the Court of Appeal could not interfere.

Mr. McFarlane's submission was that, by reversing this argument, it was for the tenant to show that the house was originally a dwelling house.

Mr. Falvey, for the respondent, submitted that the case cited was in his favour rather than in the favour of the appellant, as it clearly shows that a building having commercial premises below and residential premises above is a dwelling house, that the conversion of part of the premises in the present case was done by the respondent's father fourteen years ago, and that at the time when the respondent took over in 1947 the conversion was a *fait accompli.*

There is nothing in the agreement, as I have said before, which stipulates the purpose for which the premises are to be used. Mr. Falvey submitted, and I think rightly, that the Court cannot go behind the agreement to find the purpose of the letting. There is, I think, no doubt that the landlord knew, when the agreement of 1947 was entered into, that part of the premises was used for the purposes of residence: If he had wished to restrict its use provision could have been made accordingly. The present landlord had similar knowledge of the purposes for which the building was being used.

Referring to the definition of " shop ", Mr. Falvey contended that the definition contains the words " leased for the purposes of a shop " and that this throws the onus of proving the purpose of the lease on the landlord as in the case of *Green and Ors. v. Coggins.* With this contention I feel bound to agree.

There is, as learned Counsel submitted, ample evidence that the premises were used partly as a residence and partly as a shop, and referring to that part of the definition of " dwelling house " which says that the term " dwelling house " includes any premises a " part of which is used for the purposes of residence and part as a shop ", he stressed that the operative word is " used ". He argued that premises leased wholly or in part for the purpose of a shop will be classed as a shop; but, if any portion of it is used for residential purposes, then, under the definition of " dwelling house " the premises become a dwelling house. He finally submitted that the clearly established user of these premises for commercial and residential purposes puts them fairly and squarely within the definition of " dwelling house ".

In reply to the submissions of learned Counsel for the respondent, Mr. McFarlane cited the case of *Harnam Singh v. Jamal Pirbhai,* (1951) A.C. 688 Privy Council. This was a case on appeal from the Full Court of East Africa and concerned the claim of the appellant to be awarded possession of property at Government Road, Nairobi, belonging to him but in the occupation of the respondent.

In the judgment of their Lordships read by Lord Radcliffe, the following appears:—

> " The result is that a system of legislation that affords protection both to dwelling house and to business premises, though not in all respects in the same terms, necessarily involves a decision whether any particular property is a dwelling house or is business premises or is neither of these for the purposes of the Act."

Their Lordships also held that since the statutory scheme in Kenya requires a choice between the two categories of property, dwelling house or business, some test such as that of dominant feature or user should be applied in ascertaining in which category the particular mixed property falls. Mr. McFarlane therefore submitted that it is necessary to go into the history of the premises to ascertain what this dominant feature is, and he submitted, further, that inasmuch as the Magistrate found that the property was originally used as a shop, it must therefore follow that the premises in this particular case constitute a shop.

Our Ordinance does not, it seems to me, require that the test should be what was the dominant user. All the definition says is ' any premises part of which is used for the purposes of residence and part as a shop ". It would seem, therefore, that any user, even to a minor degree, for purposes of residence, would under our Ordinance, bring the premises within the meaning of the term " dwelling house ".

If, too, as Mr. McFarlane submitted, it is necessary to go into the history of the premises to determine whether they constitute a dwelling house or a shop, this will show that they were used partly as a dwelling so long as fourteen years ago and certainly since the agreement of 1947 there can be no doubt that they were so used, even if there were any doubt as to their user before that date.

There is substance in Counsel's submission that premises now let as shops can by the action of the tenant come within the definition of a dwelling house. This will only be so if the landlord has not, in any agreement entered into, limited the user of the premises by leasing the premises for use as a shop only. In such case any attempt to convert the premises for use as a dwelling house would be a breach for which the landlord would have his remedy.

In the present case there is nothing in the agreement, or otherwise, to indicate the purposes for which the premises were let, and one is therefore compelled to consider the actual use to which the premises have been put. Upon such consideration the conclusion is inescapable that the premises constitute a dwelling house within the meaning of the Ordinance.

In my opinion, therefore, the Magistrate was right in the conclusion at which he arrived and the appeal must be dismissed with costs.