Sang Fat Company Ltd v. Rajlal (Mauritius) [2003] UKPC 4 (21 January 2003)

Privy Council Appeal No. 87 of 2001

Sang Fat Co. Ltd. *Appellant*

v.

Rajlal Aodhora *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 21st January 2003

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hutton
Lord Walker of Gestingthorpe
Sir Martin Nourse

[Delivered by Lord Walker of Gestingthorpe]

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1. On 18 July 1986 the appellant Sang Fat Co Ltd ("the tenant") entered into a written agreement in the French language with the respondent Rajlall Aodhora ("the landlord"). The property let to the tenant was at Sivananda Street, Mahebourg. It was described (in clause 4) as comprising three buildings and an open space (60 feet by 90 feet) on which the landlord would be able to build if he wished. The three buildings were described as the first building made from wood with a roof of iron sheets, 50 feet by 46 feet; the second building made of stone, with a roof of iron sheets; and (close to the second building) a third small building housing toilets.

2. Clauses 1 to 3 and 5 to 7 of the agreement provided (in translation) as follows:

> "(1) The present lease is made for a period of three years, renewable thereafter.

(2) The tenant rents the building for the purposes of a hotel business including a restaurant and a boarding house.

(3) The costs of all repairs shall be borne by the tenant.

(5) The company shall enjoy the above mentioned buildings as it so wishes.

(6) The rent has been fixed at 2,000 rupees payable at the end of each month, as from the month of September.

(7) The company shall have the rights to innovate or repair in wood the buildings for the purpose of improvement."

Clause 7 incorporates an agreed correction of the translation in the record.

3. There was some evidence (though no findings were made below) that the premises were in a poor state of repair at the time of the letting. The tenant ran the premises under the name of "Le Vacancier" and claimed to have spent over Rs300,000 on refurbishing them. It appears that from the first relations between the landlord and the tenant were unfriendly. In 1987 the landlord was held to be in contempt of court after an incident in which he attempted to evict the tenant without a court order. In 1989 the landlord took proceedings to increase the monthly rent, and it was increased to Rs3,000.

4. On 3 August 1991 there was a serious fire at the premises. There was a dispute about the exact extent of the damage but it is now common ground that the main building was either completely or almost completely destroyed (at one stage the tenant was contending that two rooms, including one used for washing up, survived); but that the other two buildings were substantially undamaged.

5. There was also a dispute, which is no longer a live issue, as to the use to which the buildings were put immediately before the fire. The landlord's case was that the first building was used as a boarding house and restaurant, and that the second building was a garage, used as a store. The tenant's case was that the first building was a boarding house with a residents' dining room (but no kitchen) and that the second building was a restaurant. The

landlord's case was that it was only after the fire that the tenant tried, by hasty and unauthorised buildings operations, to re-establish what was left of the business in the second building.

6. On 10 September 1991 the landlord's attorney served notice on the tenant stating that the main building had been completely destroyed by fire and that the tenant was carrying out work on the garage. The notice required the tenant to stop work at once and to vacate the premises by 30 September 1991 at latest. The tenant did not comply with this notice. There was evidence that he continued with building work and carried on business at the second building.

7. In these circumstances the landlord on 21 September 1991 applied to the Supreme Court of Mauritius for the issue of a writ in the nature of an interlocutory injunction to restrain the tenant from continuing his building work on what was referred to as the garage and from opening a restaurant there. On 26 November 1991 counsel for the tenant gave an undertaking in respect of building works. It was also agreed that there should be an official inspection (a *constat*) conducted by an usher of the Supreme Court. Three inspections took place in November and December 1991 and February 1992. The tenant's undertakings were continued, but the landlord contended that they were repeatedly breached. This led to another round of contempt of court proceedings, this time by the landlord against the tenant.

8. While these proceedings were pending in the Supreme Court the landlord on 7 January 1992 commenced proceedings with a *proecipe* in the District Court of Mahebourg. He pleaded that the effect of the fire was that the object of the lease had been destroyed, and that the tenant, by converting the garage into a restaurant, and by making structural alterations and additions, had abused his enjoyment (*abus de jouissance*) and was in breach of the tenancy agreement. He claimed a declaration that the tenancy was at an end; orders that the tenant pull down his building works, restore the garage and vacate the premises; and damages of Rs10,000.

9. The landlord's claim that the tenancy was at an end was based on article 1722 of the Code Civil, which is in the following terms:-

> "Si, pendant la durée du bail, la chose louée est détruite en totalité par cas fortuit, le bail est résilié de plein droit; si elle n'est détruite qu'en partie, le preneur peut, suivant les circonstances demander ou une diminuition du prix, ou la

résiliation même du bail. Dans l'un et l'autre cas, il n'y a lieu à aucun dédommagement."

English translation of Article 1722 Code Civil Mauricien (CCM):

> "If during the currency of the lease, the thing leased is totally destroyed by accident, the lease is automatically rescinded. If it is destroyed in part, the lessee may, depending on the circumstances, claim either a reduction of the rent or the rescission of the lease itself. In either case, there shall be no claim for compensation."

10. At a hearing on 7 April 1992 the tenant disputed the District Court's jurisdiction and also disputed the matter on the merits. The positive case put forward on behalf of the tenant was that the first building had not been wholly destroyed, that none of the buildings was a garage, and that the tenant was still running a restaurant on the demised premises.

11. On 16 November 1992 the district magistrate set aside the plea *in limine* objecting to his jurisdiction. His decision on jurisdiction was upheld on appeal by the Court of Civil Appeal, and is the first issue before their Lordships.

12. At a hearing on 7 February 1994 the district magistrate heard oral evidence from the usher who had conducted the *constat* inspections and from the landlord. There was then an interval before a further hearing on 10 May 1995, when the district magistrate heard oral evidence from Mr Georges Ah Yan, the managing director of the tenant. He was cross-examined at some length, and was shown photographs of building works taken since the fire (in most cases at the *constat* inspections).

13. The district magistrate gave judgment a year later, on 10 May 1996. He gave a detailed summary of the pleaded issue. He stated that he had considered the evidence of both parties with the utmost care. He referred to the usher's three reports which stated that the main building had been completely destroyed, and described works which the usher had seen in progress during his three visits. These works were also shown in photographs taken by the landlord. According to the landlord the building works included a large veranda and an extension made of concrete blocks. The tenant's case was that all the work was done "*au vu et au su*" of the landlord and was in any case permitted by the tenancy agreement.

14. Having summarised the evidence and the parties' submissions the district magistrate set out his findings very shortly:-

> "The report of the constat made by the usher Eddoo indicates clearly that out of the three buildings leased to the defendant, the main building has been completely destroyed. On the other hand the photographs produced indicates clearly the extent of the repairs carried out by the defendant after the fire.
>
> True it is that the agreement reached between the parties gave the defendant certain rights to repair the building with a view to improving same. That right was limitative and did in no way confer the rights on the defendant to put up additions and causing structural repairs."

He then referred to article 1722 and to some authorities on the topic of total loss. He concluded that the landlord had made out his case and that the tenancy had come to an end. He made orders for possession, for restoration of the premises to their original state, and for Rs10,000 damages.

15. The tenant appealed on numerous grounds. The Court of Civil Appeal (Narayen J and Seetulsingh J) dismissed the appeal on all those grounds, with one exception. It held that the district magistrate had no power to make an order for the premises to be returned to their original state, since that order was in the nature of a mandatory injunction and outside the jurisdiction of the District Court. Apart from that the appeal was dismissed with costs.

16. Before their Lordships the tenant has maintained the objection to the District Court's jurisdiction which was rejected by both lower courts. The tenant has also relied on two general grounds of appeal (failure to identify and decide essential issues) and on a particular point on reasonableness under section 20 of the Landlord and Tenant Act ("the 1960 Act"). In order to assess these grounds of appeal it is necessary to refer to the relevant statutory provisions.

17. One of the purposes of the 1960 Act was to prevent the exploitation of tenants in the difficult conditions created by cyclones which had caused extensive damage to property in Mauritius in the years before its enactment. It contained far-reaching provisions providing tenants with security of tenure, restrictions on rent increases, provision of rent books, and machinery for compelling landlords to carry out repairs which

were not the responsibility of the tenant. Although the 1960 Act was expressed throughout to apply to dwelling houses which were let unfurnished, its scope was extended (by section 23) to business premises, subject to some modifications which are not now material. In 1999 the 1960 Act was repealed and replaced by a new Landlord and Tenant Act.

18. Two provisions of the 1960 Act call for particular mention. In relation to the jurisdiction of the court section 3(1) provided as follows:-

> "(a) Notwithstanding any rule of law or enactment, the court shall, irrespective of the amount of rent claimed, have exclusive jurisdiction to hear and determine any matter or action arising out of, or brought under, this Act, on the plaint of any landlord or tenant, and, in the exercise of that jurisdiction, shall have all the powers the court has in civil cases.
>
> (b) Except where, in the opinion of the court, the application or plaint was frivolous, no costs shall be allowed in any such proceedings other than proceedings under section 20(1)(a)."

19. Section 20(1) of the 1960 Act contained a general prohibition on any order for recovery of possession of any dwelling house (or, under section 23, business premises) being made by a court except in the circumstances covered by one of the eight paragraphs set out in section 20(1), the terms of which are reminiscent of the English Rent Acts (or, as modified by section 23, the English Landlord and Tenant Act 1954, Part II). Paragraph (a) covered the case where:-

> "any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy, whether under the contract of tenancy or under this Act, so far as is consistent with this Act has been broken or not performed."

Paragraph (h) covered the case where the premises were in such a dilapidated condition that the repairs required to put it in tenantable condition could not be effected without the tenant vacating the premises (but neither side placed any reliance on that paragraph, either before their Lordships or below).

20. In every case falling within section 20(1) no order for possession was to be made unless the court considered it reasonable to make such order. The district magistrate did not make any express reference to this requirement in his judgment,

and another issue for their Lordships was whether the Court of Civil Appeal was right to assume that he must have had it in mind (or to form its own view that it was reasonable to make an order for possession).

21. Their Lordships were also referred to some provisions of the Courts Act and the District and Intermediate Courts (Civil Jurisdiction) Act ("the Civil Jurisdiction Act"). Section 106 of the former provides as follows:-

> "(1) The Intermediate Court or a District Court shall have jurisdiction in any action by a landlord to obtain cancellation of a lease, with or without damages, or to recover possession of real property from a tenant or occupier, including an action where the value of the property exceeds the prescribed amount.
>
> (2) Where the yearly rent or rental value of the property does not exceed the prescribed amount and the sum claimed for damages, if any, and for rent do not together exceed the prescribed amount, the cancellation of any lease, damages and possession of real property from a tenant or occupier may be claimed in the same plaint in which rent is claimed.
>
> (3) This section shall not affect the operation of the Landlord and Tenant Act."

Section 11 of the latter provides as follows:

> "(1) (a) No plaintiff shall divide any cause of action for the purpose of bringing two or more suits, but a plaintiff who has a cause of action for more than the prescribed amount may abandon the excess, and may, on proving his case, recover an amount not exceeding the prescribed amount.
>
> (b) The judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly.
>
> (2) The plaintiff may join several causes of action in the same plaint provided they do not exceed the jurisdiction of the court."

22. It is not easy to see how these provisions (and section 3 of the 1960 Act, referred to earlier) are intended to operate in a case which has all the features of the present case, that is (i) a claim for possession of premises falling within section 20(1) of the 1960 Act; (ii) an additional claim for a declaration based on total loss under article 1722 of the Code; (iii) a claim for damages of Rs10,000 (which was at the relevant time the prescribed amount for proceedings before the District Court); (iv) an annual rent far in excess of the prescribed amount; but (v) no claim for arrears of rent. In the absence of fuller argument than time permitted, their Lordships are reluctant to decide the issue of jurisdiction on any broader ground than is necessary in order to dispose of this appeal.

23. The district magistrate's decision to assume jurisdiction, and the Court of Civil Appeal's upholding of that decision, were based mainly on *Ramcharan v Natien* [1981] MR 530. In that case the Court of Civil Appeal held that a plaintiff making a claim in the District Court under the 1960 Act could also make a claim arising otherwise than under the 1960 Act, so long as there was no procedural obstacle. Section 11(2) of the Civil Jurisdiction Act removed any procedural obstacle provided that the relevant monetary limit (the prescribed amount) was not exceeded.

24. In their Lordships' view the courts below were right to assume jurisdiction on these grounds. The starting point is that section 3 of the 1960 Act gave the District Court jurisdiction, and indeed exclusive jurisdiction, in respect of the landlord's claim for possession of the demised premises. That was, legally and economically, the landlord's most important claim. Section 11(2) of the Civil Jurisdiction Act enabled the landlord to join with the claim for possession a claim for damages not exceeding the prescribed amount. It appears that the district magistrate did not make any formal declaration about total loss under article 1722. The relief in the nature of a mandatory injunction granted by the district magistrate was discharged by the Court of Civil Appeal, and there is no cross-appeal on that point. In these circumstances their Lordships are satisfied that the district magistrate's order, as varied on appeal, was made within his jurisdiction. It is not necessary to consider the precise interrelation of subsections (1) and (2) of section 106 of the Courts Act, which may be a matter of some difficulty in a case outside the exclusive jurisdiction conferred by section 3 of the 1960 Act (that is, in a case concerned with a tenancy of furnished premises or undeveloped land).

25. In his submissions as to the merits Mr Ollivry QC criticised the district magistrate for having failed to make clear findings

about the alleged breaches of the tenant's obligations, and for having failed to address the reasonableness of making an order for possession (as section 20(1) of the 1960 Act required). The district magistrate did encounter problems in hearing the case. For reasons beyond his control (that is, the pending contempt of court proceedings in the Supreme Court) more than a year elapsed between the sitting at which he heard oral evidence from the usher and from the landlord, and the sitting at which he heard oral evidence from Mr Ah Yan. The district magistrate then reserved judgment for a year. In his judgment he did not make any clear findings about the layout and use of the buildings before the fire (for instance where the kitchen was, if it was not in the main building). Nor did he state in terms whether he accepted the landlord's oral evidence (which he recorded in detail) as to the structural works which the tenant put in hand after the fire.

26. There is some force in these criticisms. Nevertheless their Lordships are satisfied that the district magistrate did (in the passage of his judgment set out at para 14 above) find that the tenant had carried out extensive structural alterations and additions after the fire, and that this constituted a breach of the tenant's obligations under the tenancy agreement. The photographs to which the district magistrate referred had been taken by the landlord himself, mostly on the occasion of the second *constat* on 28 December 1991, and they were properly proved in the course of his oral evidence. They provided cogent evidence of the nature and extent of the building works. The district magistrate clearly intended to accept that evidence and to incorporate it into his judgment.

27. Mr Ollivry accepted that for the tenant to make structural alterations and additions to the demised premises, without the landlord's consent, would be a breach of his obligations under the tenancy agreement. That concession was correctly made, in view of the limited scope of clause 7 of the agreement. To give the clause any wider effect would be contrary to the general approach of the courts in Mauritius, reflecting the underlying influence of the Code Civil (see for instance *United Foods Ltd v Tropicana Ltd* 14 January 1992, SCJ 202 of 1992).

28. The district magistrate did not make any finding on the landlord's separate complaint relating to the use of the demised premises. The evidence before the court was unclear and probably did not establish that the tenant had changed the "*destination des lieux*" in such a way as to amount to a breach, especially in view of clause 5 of the agreement ("*La compagnie jouit les bâtiments*

mentionnés ci-dessus comme bon lui semble"). This alleged breach of obligation does not seem to have been an issue in the Court of Civil Appeal.

29. The Court of Civil Appeal did however have to deal with the issue of reasonableness under section 20(1) of the 1960 Act. It did so in the following terms:-

> "We were also addressed on the issue of reasonableness of the order. We agree that, although the learned Magistrate did not expressly state that he addressed his mind to the issue, it was reasonable to make the order prayed for, when we look at the evidence on record. See *Vaghjee v Gopee* 1960 MR 40 and *Durocher v Shanghai Company Ltd.* 1960 MR 164. The learned Magistrate did say very clearly in his judgment that he Appellant had no right to put up additions and cause structural repairs to be made on the building. Clearly the subject matter of the lease had been substantially affected, rendering it untenantable."

30. The two cases referred to in that passage were decisions on the Rent Restrictions Ordinance 1951, section 7 of which imposed the same test of reasonableness. They show that an appellate court should be slow to conclude that a magistrate sitting in the District Court, and dealing with possession proceedings on a regular basis, cannot have addressed his mind to this very important statutory requirement. It is obviously best practice for a magistrate to refer expressly to the requirement in every case, and where appropriate to state briefly the reasons for his conclusion. But their Lordships are not persuaded that the Court of Civil Appeal erred in dealing with this issue as it did.

31. Their Lordships will accordingly dismiss this appeal with costs.