

GEORGE KYRIAKIDES,

*Applicant.*

v.

LOULLA A. HILIMINTRI,

*Respondent.*

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(Civil Application No. 1/63).

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*Prerogative Writs—Order of prohibition—Article 155, paragraph 4 of the Constitution—Common law—Instances where and grounds upon which prohibition issues—Order of prohibition is granted as of right where the application is made by the person aggrieved and the defect of jurisdiction is apparent on the face of the proceedings—Otherwise it is granted as a matter of discretion—Delay, laches, acquiescence—Delay in applying for an order of prohibition is a material factor to be considered by the High Court in the exercise of such discretion.*

*Rent Control—The Rent (Control) Law, Cap. 86—Business premises exempted therefrom as from the 1st January, 1959, by virtue of Notification No. 1154 published in Supplement 3 of the Cyprus Gazette No. 4202 of the 31st December, 1958—The Courts have no jurisdiction to issue orders of ejectment in respect of protected premises except on the grounds specified in section 18 of Cap. 86 (supra)—And the parties cannot confer jurisdiction upon the Courts by agreement—Nor the tenant can waive his statutory rights by agreement—And before making such order the Court must be satisfied by evidence or admission that the statutory grounds upon which the action is founded have been established.*

By a contract of lease dated the 24th July, 1959, the respondent leased to the applicant in this case certain premises to be used as business premises only for a period commencing on the 1st August, 1959, ending on the 30th July, 1960, at the agreed rent of £600. The applicant having failed to evacuate the premises on the expiration of the term, the respondent brought on the 4th November, 1960, an action against him for the recovery of possession of the premises in question. The action was based on trespass in consequence of the absolute exemption of "business premises" from the Rent (Control) Law, 1954 (now Cap. 86) as from January 1, 1959, by virtue of

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Notification No. 1154 published in Supplement 3 of the Cyprus Gazette of the 31st December, 1958. (It is to be noted that as from the 17th October, 1961, business premises on certain conditions became protected premises under the Rent Control (Business Premises) Law, 1961). By his defence in that action the defendant (applicant) alleged, *inter alia*, that he used the premises in question, to the knowledge and with the consent of the plaintiff, partly as bar-restaurant, and partly as dwelling house and that, consequently, the premises were covered by the Rent (Control) Law (*supra*).

This was the position of the pleadings at the hearing of the action on the 2nd October, 1961, when the trial Judge granted by consent of the parties an order of ejectment with effect as from the 1st January, 1963. From the record of the proceedings it appears, *inter alia*, that on that day, *i.e.* on the 2nd October, 1961, the parties being legally represented and both being present, the defendant made certain statements recorded by the trial Judge as follows: “(a) the defendant acknowledges that the plaintiff is entitled to an order of ejectment, (b) he submits to an order to evacuate and deliver to the plaintiff the vacant possession of the premises on or before the 1st January, 1963”. Whereupon the trial Judge granted by consent of the parties an order of ejectment as per (b) hereabove.

The defendant not having delivered possession of the premises in question by the 1st January, 1963, a writ of possession was issued against him in January, 1963 by the District Court of Nicosia on the application of the plaintiff; and when the Registrar proceeded to the execution of that writ of possession the defendant on the 18th March, 1963, applied for leave to move the High Court for an order of prohibition preventing the District Court from further proceeding with the execution of the said order of ejectment and, particularly, prohibiting the Registrar from executing the aforesaid writ of possession. The application for prohibition was based on the ground that the trial Judge did not disclose on what ground he granted the order of ejectment of the 2nd October, 1961 (*supra*) and that, consequently, he lacked jurisdiction to grant such an order.

JOSEPHIDES, J., in refusing to grant leave to move the High Court for an order of prohibition and after reviewing the powers of the High Court in proceedings for prohibition,

conferred on it by Article 155, paragraph 4, of the Constitution and the common law :—

Held, (1) in the case of *Dionyssios Lambrianides v. Alexandrōs Mavrides*, (1958) 23 C.L.R. 49, at page 51, it was held that the Courts have no jurisdiction to issue an order of ejectment or for recovery of possession in respect of protected premises except on the grounds provided by the *Rent (Control) Law, 1954, (now Cap. 86) section 18*. The parties cannot confer jurisdiction upon the Court by agreement ; nor the tenant can waive his statutory protection by agreement. Before making such order the Courts must be satisfied by evidence or admission that the statutory grounds upon which the action is founded have been established.

Principles laid down in *Thorne v. Smith* (1947) 1 All E.R. 39, at p. 44 *per* Bucknill L.J. and *Middleton v. Baldock* (1950) 1 All E.R. 708, at page 710 *per* Evershed M.R., *applied* :

(2) (a) The applicant's allegation is that the judge did not disclose on what ground he granted the order of possession dated the 2nd October, 1961 and that, consequently, he lacked jurisdiction to make that order.

(b) But in the present case the contract of lease expressly stipulated that the premises in question should be used as 'business premises' only. The plaintiff's claim was based on trespass in consequence of the absolute exemption of business premises from the *Rent (Control) Law* as from 1st January, 1959 ; and the defendant in his defence alleged that he had used the premises partly as dwelling-house and that, consequently, the premises were within the ambit of the *Rent (Control) Law (supra)*. On the day of the hearing (2nd October, 1961) when both parties were legally represented and they were both present in Court, the Judge's note states :—

(a) Defendant acknowledges that the plaintiff is entitled to an order of ejectment.

(b) Defendant submits to an order to evacuate and deliver to the plaintiff the vacant possession of the premises, the subject matter of the action, on or before the 1st January, 1963.

(c) *To my mind those words mean that "I, the defendant, although having alleged in my statement of defence that I used these premises partly as dwelling house, still, to-day, I acknowledge the plaintiff's allegation in the statement of claim that I am a trespasser, and,*

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consequently, outside that ambit of the Rent (Control) Law, and I, therefore, submit to Judgment.” If that admission is made, as it was made by the tenant, on the authorities it was not necessary for the Judge to investigate further whether the premises came within the provisions of the Rent (Control) Law, and, on the basis that the premises were outside the ambit of the Rent (Control) Law, the Judge was empowered, by consent of the parties, to grant a stay of execution for any length of time, exceeding the 12 months provided under that Law.

(d) The words appearing on the record in effect amount to an admission of defendant’s part recognizing a valid ground for recovery of possession. Consequently, the Court had jurisdiction to make the order for possession, and the applicant’s allegation fails.

3. As there is no defect of jurisdiction apparent on the face of the proceedings the order cannot go as a matter of right but it is a matter of discretion.

*Dionyssios Lambrianides v. Alexandros Mavrides* (1958) 23 C.L.R. 49, at p. 63 *per* Bourke C.J., *applied*.

4. The defendant applied for leave to move this Court some 17 months after the date of the possession order and after the issue of the writ of possession. In the circumstances of this case I am of the view that there has been a considerable and unjustified delay on the part of the defendant (applicant) and, as a matter of discretion, I would not be prepared to grant him leave to move this Court for an order of prohibition.

*Leave to move this Court  
for an order of prohibition  
refused.*

Cases referred to :

1. *Dionyssios Lambrianides v. Alexandros Mavrides* (1958) 23 C.L.R. 49, *followed* ;
2. *Mavronichis v. Michaelides* Civil Application No. 5/54 dated 10th November, 1955 (*unreported*) ;
3. *Thorne v. Smith* (1947) 1 All E.R. 39, at p. 44 *per* Bucknill L.J., *applied* ;
4. *Middleton v. Baldock* (1950) 1 All E.R. 708, at p. 710, *per* Evershed M.R., *applied*.

**Application.**

Application for leave to issue an order of prohibition preventing the District Court of Nicosia from further proceeding with the execution of an order of ejection given by that Court on the 2nd October, 1961 in Action No. 4740/60.

*Ph. Clerides* for the applicant.

The facts sufficiently appear in the judgment delivered by :—

JOSEPHIDES, J. : This is an application for leave to move this Court to issue an order of prohibition “preventing the District Court of Nicosia from further proceeding with the execution of an order of ejection given by that Court on the 2nd October, 1961 in Action No. 4740/60”, between the applicant and respondent ; and, particularly, prohibiting the Registrar of the Court from executing a writ of possession issued by the District Court in January 1963.

From the applicant’s (defendant’s) affidavit, it appears that the action in question was instituted by the respondent (plaintiff) on the 4th November, 1960, the statement of claim was filed on the 26th November, 1960, the statement of defence on the 10th January, 1961, and an order of possession was given on the 2nd October, 1961 directing defendant to deliver up possession of the premises on or before the 1st January, 1963. The defendant not having delivered possession of the premises, a writ of possession was issued in January, 1963, and when the Registrar proceeded with the execution of that writ, the defendant (applicant) applied to this Court for leave to move the High Court for an order of prohibition.

The statement of claim, which is an exhibit to the applicant’s affidavit, shows that the plaintiff landlord leased her premises to the defendant (applicant) “as business premises, that is to say, as restaurant and bar”, by virtue of a contract of lease dated the 24th July, 1959, for a period commencing the 1st August, 1959 and ending the 30th July, 1960, at the agreed rent of £600 payable monthly (paragraph 2). The contract of lease, which is also an exhibit to the applicant’s affidavit, *inter alia*, states that “the premises shall be used only as restaurant or bar and by the tenant only.”

It was further alleged in the statement of claim that the aforesaid premises were leased to the defendant as business premises for use by him as restaurant and bar

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and as such "are exempted absolutely from the provisions of the Rent (Control) Law, Cap. 86, by virtue of Notification No. 1154 of the 30th December, 1958, published in Supplement No. 3 of the Cyprus Gazette No. 4202 of the 31st December, 1958".

Paragraph 5 alleged that the defendant failed to evacuate and deliver to plaintiff vacant possession of plaintiff's aforesaid premises by the 1st August, 1960, and "he (defendant) is still unlawfully in occupation of plaintiff's aforesaid premises". This shows clearly that the plaintiff's claim against the defendant for an order of possession was based on trespass.

The defendant, by his defence, admitted the contract of lease dated the 24th July, 1959, and alleged that the premises were "to the knowledge and consent of the owner used partly as a bar-restaurant and partly as a house, so that they are covered by the Rent (Control) Law, Cap. 86". The defendant further alleged that he had spent £1,200 to repair the plaintiff's house "which was in a dilapidated condition before accepting the lease on the oral statement of the plaintiff and/or her husband that he could have it for as long as he pleased"; and that "if defendant is evacuated from same he would claim the sum of £1,000 as damages for fraud"; and he reserved his rights "on this item pending the outcome of the case".

This was the position on the pleadings when both parties appeared before the Court on the 2nd October, 1961, each legally represented.

The note of the Judge reads as follows :

"By consent arrived at an amicable settlement as follows :—

- (a) Defendant acknowledges that the plaintiff is entitled to an order of ejectment.
- (b) Defendant submits to an order to evacuate and deliver to the plaintiff the vacant possession of the premises, the subject matter of the action, on or before the 1st January, 1963.
- (c) The defendant abandons any claim to which he may be entitled for repairs he carried out to the premises, the subject matter of the action.
- (d) Defendant undertakes to pay all arrears of rent to day and furthermore he undertakes to pay the rent of the premises every month by remittance of same to plaintiff's address.

Settlement read over to parties who agree.

*Court* : Judgment and order as per settlement.  
Each party to pay own costs”.

An endorsed copy of the formal judgment was served on the defendant on the 4th October, 1962, but as he failed to deliver up possession by the 1st January, 1963, a writ of possession was issued by the District Court in January, 1963 (the exact date is not given by the applicant). The present application for leave to move the High Court for an order of prohibition was filed on the 18th March, 1963.

These are shortly the facts of this case and the record of the Court in respect of which prohibition is sought.

Before proceeding further I think it will be useful to refer to the powers of the High Court in proceedings for prohibition, conferred on it by the Constitution (Article 155 (4)) and the common law. Prohibition issues to restrain all inferior Courts, acting, or purporting to act, in the exercise of judicial functions, from acting in excess or outside the jurisdiction with which they are legally vested. Grounds, upon which application may be made, apart from excess or absence of jurisdiction, are departure from the rules of natural justice, and interest or bias on the part of the judge. The order is granted as a matter of discretion, save, possibly, where application is made by the person aggrieved and the defect of jurisdiction is apparent on the face of the proceedings. In exercising its discretion, the Court will not be fettered by the fact that alternative remedies may exist; and prohibition may issue at any stage in the course of the proceedings which it is sought to restrain, and, in general, application must be made at the first instance after the defect of jurisdiction becomes apparent. In general prohibition lies in every case where *certiorari* would lie if the proceedings were completed.

In Cyprus we have two decided cases on this point. The one is the case of *Dionyssios Lambrianides v. Alexandros Mavrides* (1958) 23 C.L.R. 49, and there is also the judgment of Zekia J., dated the 2nd October, 1957, against which the appeal was made. Prior to that case the same point was considered by Zekia J. in the case of *Mavronichis v. Michaelides*, Civil Application No. 5/54 dated the 10th December, 1955 (unreported).

In the case of *Lambrianides v. Mavrides*, quoted above, it was held that the Courts have no jurisdiction to issue

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an order of ejectment or for recovery of possession in respect of protected premises except on the grounds provided by the Rent (Control) Law, 1954, section 18. The parties cannot confer jurisdiction upon the Court by agreement; nor the tenant can waive his statutory protection by agreement. Before making such order the Courts must be satisfied by evidence or admission that the statutory grounds upon which the action is founded have been established (page 51).

In the case of *Thorne v. Smith*, (1947) 1 All E.R. 39, at page 44, Bucknill, L.J. said :

“ But in the present case it is, I think, reasonably clear that the tenant, in effect, agreed to the order because at the time when the landlord asked the court to make the order the landlord by his own statements had satisfied the tenant that he intended to occupy the house himself and he, the tenant, could not hope successfully to resist the claim. If the tenant had stated this expressly in court the judge would surely have had jurisdiction to make the order on that ground. I think in the events which happened here, the tenant being legally represented, the judge was entitled to proceed on the view that this was the true position. Before making an order for possession the judge is under a duty to satisfy himself as to the truth if there be a dispute between landlord and tenant, but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Acts, without further inquiry.”

In the case of *Middleton v. Baldock*, (1950) 1 All E.R. 708, which was referred to by counsel for the applicant in this case, Evershed, M.R. said at p. 710 :

“ If the tenant, when sued for possession on some such ground as I have indicated, chooses to admit the truth of the allegation on which the landlord's claim is based, I think it is also established (and was so stated by Scrutton L.J. in *Barton v. Fincham*) that the judge can accept the admission as sufficient to found his jurisdiction and is not bound himself to investigate the matters of fact alleged. He has jurisdiction to make an order.”

On the question of delay, Bourke, C.J., delivering the judgment in the case of *Lambrianides v. Mavrides*, at page 63 said :

“ There remains the point referred to under (b) above,

namely that prohibition should not have been allowed to issue as a matter of the exercise of the discretion because of the delay in moving for the remedy. I think the answer may be given shortly. The excess of jurisdiction appears clearly upon the face of the record. Where the defect of jurisdiction is apparent on the face of the proceedings and the application is made by a party, the order goes as of right and is not a matter of discretion. Prohibition in such case lies at any time, even after judgment or sentence in spite of laches or acquiescence of the applicant; and can go to prohibit steps being taken in execution to enforce anything that had been done in transgression of the limits of jurisdiction."

I think that it is well settled that where the defect of jurisdiction is apparent on the face of the record no question of any discretion arises, because the applicant is entitled, as a matter of right, to the order sought for. But, where the defect is not apparent on the face of the proceedings the order is granted as a matter of discretion; and the Court in exercising such discretion would have to consider whether the delay in moving for the remedy was reasonable or not.

The applicant's allegation is that the Judge did not disclose on what ground he granted the order of possession and that, consequently, he lacked jurisdiction.

In the present case the contract of lease expressly stipulated that the premises should be used as business premises only. The plaintiff's claim was based on trespass in consequence of the absolute exemption of business premises from the Rent (Control) Law as from 1st January, 1959; and the defendant in his defence alleged that he had used the premises partly as dwelling-house and that, consequently, the premises were within the ambit of the Rent (Control) Law. On the day of the hearing (2nd October, 1961) when both parties were legally represented and they were both present in Court, the Judge's note states—

- "(a) Defendant acknowledges that the plaintiff is entitled to an order of ejectment;
- (b) Defendant submits to an order to evacuate and deliver to the plaintiff the vacant possession of the premises, the subject matter of the action, on or before the 1st January, 1963."

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To my mind those words mean that " I, the defendant, although having alleged in my statement of defence that I used these premises partly as dwelling house, still today, I acknowledge the plaintiff's allegation in the statement of claim that I am a trespasser, and, consequently, outside the ambit of the Rent (Control) Law, and I, therefore, submit to Judgment". If that admission is made, as it was made by tenant, on the authorities it was not necessary for the Judge to investigate further whether the premises came within the provisions of the Rent (Control) Law and, on the basis that the premises were outside the ambit of the Rent (Control) Law, the Judge was empowered, by consent of the parties, to grant a stay of execution for any length of time, exceeding the 12 months provided under that Law.

The words appearing on the record in effect amount to an admission on defendant's part recognizing a valid ground for recovery of possession. Consequently, the Court had jurisdiction to make the order for possession, and the applicant's allegation fails. As there is no defect of jurisdiction apparent on the face of the proceedings the order cannot go as a matter of right but it is a matter of discretion. The defendant applied for leave to move this Court some 17 months after the date of the possession order and after the issue of the writ of possession. In the circumstances of this case I am of the view that there has been a considerable and unjustified delay on the part of the defendant (applicant) and, as a matter of discretion, I would not be prepared to grant him leave to move this Court for an order of prohibition.

*Leave refused.*