

*Privy Council, Appeal No. 110 of 1929.*

The Official Assignee of the Estate of Mahomed bin Salem El  
Jaseri and another - - - - - *Appellants*

*v.*

Cowasji Dinshaw and Brothers, a firm, and others - - - *Respondents*

FROM

HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1930.

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*Present at the Hearing :*

VISCOUNT DUNEDIN.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD TOMLIN.]

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This is an appeal from the Court of Appeal for Eastern Africa, allowing the respondents' appeal from the High Court of Zanzibar. The facts are shortly as follows. One Mahomed Bin Salem el Jaseri owned certain shambas. In August, 1921, he mortgaged them to the respondents, Cowasji Dinshaw & Brothers, and he made a second mortgage in April, 1923, to the respondent Dr. Lawrence D'Albuquerque. Both mortgages were in the same form. On the 2nd March, 1928, Mahomed Bin Salem el Jaseri granted a lease to the appellant, Fazel Mohamed Champsi. The mortgagees did not concur in that lease. Later on, on the 16th March, 1928, he granted a second lease to the respondent, Pedro Domingos D'Sa. It is said that either the second lease was granted with the concurrence of the mortgagees, or, the mortgagees approbated the lease afterwards by joining in the present suit. The mortgagees and Pedro Domingos D'Sa, the second lessee, launched the suit against the mortgagor and the appellant Fazel Mohamed Champsi, the first lessee, asking for a declaration that Fazel Mohamed Champsi's

lease was void against the mortgagees and seeking for possession of the property to be delivered to Pedro Domingos D'Sa as the lessee under the second lease. After the suit was launched, Mahomed Bin Salem el Jaseri went bankrupt and his assignee was added in his place, and the assignee and Fazel Mohamed Champsi are the present appellants.

Issues were directed. They were two in number. The first issue was as to the validity of the first lease, having regard to the fact that it was not registered. On that point both Courts have determined that it was valid, notwithstanding the absence of registration, and no question now arises under that head. The second issue was : If the first lease was valid, does the consent of the two mortgagees, even if proved, to the second lease oust the first lessee's rights under the first lease ? On that issue the Trial Judge held that the mortgagor remained the owner of the property, and that, that being so, he was in a position to grant the lease. The learned Judge said that the mortgagor in possession continued, even after executing the plaintiffs' mortgage, to be the owner of the property, and that he was entitled to lease the property provided that this act did not come within Section 66 of the Transfer of Property Decree.

The respondents, that is, the plaintiffs in the action, appealed to the Court of Appeal, and the Court of Appeal determined that the mortgagor was not free as against the mortgagees to lease the property without their concurrence and that, therefore, as against the first lessee, the second lease must prevail.

The appeal to His Majesty in Council is by the assignee of el Jaseri and the first lessee against that decision. There was some debate as to the meaning and effect of the mortgages. It was questioned whether the mortgages were in form English mortgages within the meaning of Section 58 of the Transfer of Property Decree of 1917, or whether they were anomalous mortgages as defined in Section 98 of the same decree. The learned Judge in the Court below had taken the view that they were not English mortgages, but anomalous mortgages. The Court of Appeal took the view that it did not matter whether they were English mortgages or anomalous mortgages because in either case the effect of the mortgages was to transfer the property to the mortgagees and that that being so, whether they were English mortgages or an anomalous mortgages, the property being in the mortgagees, the mortgagor was not free to grant a lease which would bind the mortgagees.

Their Lordships are of opinion that, having regard to the terms of the mortgages, which convey the property to the mortgagees, the view which the Court of Appeal took of the matter is correct and that the first lease cannot, therefore, prevail as against the second lease, assuming that the second lease was concurred in by the mortgagees.

The Court of Appeal set aside the judgment of the learned Judge in the Court below and directed that relief should be

granted in accordance with the prayer of the plaint, which was that the lease should be declared void and that possession should be delivered to the second lessee. It has been said that that order was wrong in point of form, because the question whether or not the mortgagees had concurred in the second lease had been left open and that the issue on the point of law was determined upon the assumption only that they had concurred and that the suit ought to have been sent back for further hearing.

Their Lordships are of opinion that the concurrence of the mortgagees in the suit in which they sought to establish the validity of the second lease is in itself an approbation of the second lease and that no issue as to their concurrence is therefore now open.

Some other points upon the pleadings were suggested as matters to be tried before the suit could be finally disposed of but in none of those matters, in their Lordships' judgment, is there anything which, even if established, would afford the present appellants any defence to the suit.

Their Lordships are therefore of opinion that the appeal fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY LORD TOMLIN.

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