

612 G. A.

Judgment 20, Kenya 1958

IN THE PRIVY COUNCIL

No. 6 of 1957

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N :

MOHAMEDALI JAFFER KARACHIWALLA  
(First Defendant) ... Appellant

- and -

- 1. NOORALLY RATTANSHI RAJAN NANJI  
(Plaintiff)
- 2. ISMAILIA CORPORATION LIMITED  
(Second Defendant)
- 3. KARMALI KHIMJI PRADHAN  
(Third Defendant) ... Respondents

RECORD OF PROCEEDINGS

HERBERT OPPENHEIMER, NATHAN & VANDYK,  
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London Wall, E.C.2.  
Solicitors for the Appellant.

WALTONS & CO.,  
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Solicitors for the Respondents.

IN THE PRIVY COUNCILNo. 6 of 1957ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBIB E T W E E N :MOHAMEDALI JAFFER KARACHIWALLA  
(First Defendant) ...Appellant

- and -

1. NOORALLY RATTANSHI RAJAN NANJI  
(Plaintiff)
2. ISMAILIA CORPORATION LIMITED  
(Second Defendant)
3. KARMALI KHIMJI PRADHAN  
(Third Defendant) ...

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IN THE PRIVY COUNCIL

No. 6 of 1957

ON APPEAL  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

MOHAMEDALI JAFFER KARACHIWALLA  
(1st Defendant) ... Appellant

- and -

- 1. NOORALLY RATTANSHI RAJAN NANJI  
(Plaintiff)
- 10 2. ISMAILIA CORPORATION LIMITED  
(2nd Defendant)
- 3. KARMALI KHIMJI PRADHAN  
(3rd Defendant) ... Respondents

RECORD OF PROCEEDINGS

No. 1  
PLAINT

IN HER MAJESTY'S SUPREME COURT OF KENYA  
AT MOMBASA DISTRICT REGISTRY

Civil Case No.213 of 1953

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

- 20 NOORALLY RATTANSHI RAJAN NANJI Plaintiff
- and -
- 1. MOHAMEDALI JAFFER KARACHIWALLA
- 2. ISMAILIA CORPORATION LIMITED
- 3. KARMALI KHIMJI PRADHAN Defendants

No. 1.  
Plaint,  
8th August, 1953

- 1. The plaintiff is a merchant residing and working at Mombasa and his address for the purpose of this suit is c/o Messrs. A.B. Patel & Patel, Advocates, P.O. Box 274, Mombasa.
- 30 2. The Defendant No.1 is a landowner and is working for gain and residing at Mombasa and his address

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 1.

Plaint,  
8th August, 1953  
- continued.

for service is "Mohamedali Jaffer Karachiwalla, c/o Blue Room, Station Road, Mombasa".

3. The Defendant No.2 is a private Limited liability company incorporated in Kenya having its registered office at Mombasa and its address for service is "Ismailia Corporation Limited, Jubilee Insurance Building, Kilindini Road, Mombasa.

4. The Defendant No.3 is a merchant residing and carrying on business at Mombasa and his address for service is "Karmali Khimji Pradhan, Cliffe Avenue, Mombasa".

10

5. The Defendant No.1 is the Lessee of ALL THAT piece or parcel of land containing 0.1075 of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as subdivision No. 259 (Orig. No.237/16) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34702 attached to the Indenture dated the 18th day of July, 1944, for a term of ninety nine years from the 1st day of March 1946, at the annual rent of Shs. 2,000/- by virtue of an Indenture of Lease dated the 19th day of November, 1951, and registered in Mombasa Registry in Volume L.T.XII Folio 152/19 on the terms and conditions therein contained.

20

6. The Defendant No.1 is also the Lessee of ALL THAT piece or parcel of land containing 0.0881 of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Sub-division No.260 (Orig. No.237/17) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34703 attached to the Indenture dated the 18th day of July 1944, which piece of land was assigned to the Defendant No.1 by an Indenture dated 1st day of April, 1949 and registered in the Mombasa Registry in Volume L.T. XII Folio 153/3 for a term of ninety nine years from 1st day of March 1946 created by an Indenture of Lease dated the 1st day of March 1946 at the annual rent of Shs.1,500/- on the terms and conditions therein contained.

30

40

7. The Defendant No.1 is the Lessee of ALL THAT piece or parcel of land containing 0.0881 of an acre or thereabouts situate in the Island of Mombasa in the District of Mombasa known as Sub-division No.261 (Orig. No.237/18) of Section No. XVIII which is more particularly demarcated and

10 delineated on Deed Plan No.34704 attached to the Indenture dated the 18th day of July, 1944 which piece of land was assigned to the Defendant No.1 by an Indenture dated the 1st day of April,1949 and registered in the Mombasa Registry in Volume L.T.XII Folio 228/2 for a term of ninety nine years from 1st day of March 1947, created by an Indenture of Lease dated the 10th day of March, 1947 at the annual rent of Shs.1,800/- on the terms and conditions therein contained.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 1.

Plaint,  
8th August, 1953  
- continued.

8. By an Indenture dated 29th October, 1951 registered in Mombasa Registry in Volume L.T. XII 337/20 and inter alia the Defendant No.1 mortgaged in favour of Defendant No.2 the hereditaments and premises described in paragraphs No. 5, 6 and 7 aforesaid to secure the repayment of the sum of Shs.84,000/- together with interest thereon at the rate and in the manner as more particularly therein set out.

20 9. By an Indenture dated the 29th day of October, 1951 registered in Mombasa Registry in Volume L.T. XII Folio 337/21 and inter alia the defendant No.1 mortgaged, subject to the Mortgage described in paragraph 8 hereof, in favour of Mohamed Dhanji, Merchant of Mombasa the hereditaments and premises described in paragraphs Nos. 5, 6 and 7 hereof to secure the repayment of the sum of Shs. 21,623/- together with interest thereon at the rate and in the manner as more particularly therein set out.

30 The said Mohamed Dhanji has assigned all his right title and interest in the said second mortgage to Defendant No.3 by duly registered assignment dated 20.11.51.

40 10. By an Indenture of Mortgage dated the 29th day of October 1951 and registered in Mombasa Registry in Volume L.T. XII Folio 337/22 and inter alia the Defendant No.1 mortgaged in favour of the Plaintiff, subject to the first and second mortgages described in paragraphs 8 and 9 hereof, the hereditaments and premises described in paragraphs Nos, 5, 6 and 7 hereof to secure the repayment of the sum of Shs. 150,000/- together with interest thereon at the rate of 4% on the first Shs.100,000/- 9% on the second 25,000/- and 12% on the third Shs.25,000/- and in the manner as more particularly therein set out.

11. Inter alia the said mortgage between the Plaintiff and the defendant No.1 provides that:



In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 1.

Plaint,  
8th August, 1953  
- continued.

(a) he will pay on due dates the principal sums and interest thereon due and payable under the said first and second mortgages, (b) he will pay to his landlord ground rent on due dates in respect of the pieces of land described in paragraphs Nos. 5,6 and 7 hereof, (c) he will regularly and on due date pay the Municipal rates in respect of the said three pieces of land, (d) he will also pay regularly insurance premium to the Jubilee Insurance Company Limited of Mombasa for insurance policy of the buildings standing on Plot No. 259 Section XVIII, and (e) he will also pay regularly and on due dates the instalments and interest payable by the defendant No.1 to the Plaintiff under the third mortgage.

10

12. The defendant No.1 has failed or neglected to pay the principal sum and interest thereon due under the first mortgage and also the principal and interest thereon due under the second mortgage. The Principal sums under both the mortgages became payable prior to 2nd July, 1953, and interest in respect of both the mortgages were in arrear prior to 2nd July, 1953. The defendant No.1 has also failed to pay the ground rent and Municipal rates in respect of the said three pieces of land which fell due prior to 2nd July, 1953. The defendant No.1 has also failed to pay insurance premium and instalments and interest payable under the third mortgage prior to 2nd July, 1953.

20

13. The third Mortgage aforesaid provides that if the defendant No.1 failed to comply with any of the covenants contained therein the Plaintiff would be entitled to serve a notice on the defendant No.1 as provided in the third mortgage to comply with such covenants of the mortgage and if the defendant No.1 still failed to comply with such covenants within a space of five weeks from the date of the service of the notice the Plaintiff would be entitled to recover the whole of the principal amount and interest thereon notwithstanding the time for repayment provided in the said mortgage.

30

40

14. By a notice dated 2nd July, 1953, duly served on the defendant No.1 on the same day the Plaintiff gave notice to the defendant No. 1 referring to the said breaches of the several covenants of the said third mortgage committed by the defendant No.1 demanding repayment of the principal sum and interest as set out in the said notice and

informing the defendant No.1 that the plaintiff will file action for recovery of the principal sum and interest of the third mortgage unless the defendant No.1 complied with the said several covenants of the said mortgage within five weeks from the date of the notice but the defendant No. 1 has failed to comply with the said several covenants and also with the terms of the notice given to him.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 1.

Plaint,  
8th August, 1953  
- continued.

WHEREFORE the Plaintiff prays as against the defendant No.1 judgment for:-

- 10 (a) Shs.163,874/94 being Shs.150,000/- principal sum under the said Indenture of the third mortgage, and Shs.13,874/94 interest thereon as set out in the said Mortgage from 1st February, 1952, to 31st July, 1953;
- 20 (b) Further interest on the said principal sum of Shs.150,000/- at the rate of and in the manner set out in the Indenture of the third Mortgage from 1st August, 1953 till judgment;
- (c) Interest at 9% per annum on Shs.163,874/94 from the date of this suit till judgment;
- 30 (d) Order for the sale of the said hereditaments and premises together with the buildings standing thereon, if the defendant No.1 fails to pay the total decretal amount by a date to be fixed by the Court; payment to defendants No.2 and 3 of their respective amounts due under their respective mortgages and payment to the plaintiff his decretal amount;
- (e) All proper directions to be given and all necessary accounts to be taken;
- (f) Costs of this suit;
- (g) Interest at 6% on decretal amount and costs;
- (h) Personal decree for balance (if any) after the realisation of the security in full;
- 40 (i) Any other relief this Honourable Court may deem fit to grant.

Mombasa, dated this 8th day of August, 1953.

Sgd. A.B. PATEL  
FOR A.B. PATEL & PATEL  
ADVOCATES FOR THE PLAINTIFF.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 2.

DEFENCE OF DEFENDANT NO. 1.

No. 2.

Defence of  
Defendant No.1.  
5th December  
1953.

The defendant No.1 states as follows:-

1. He admits paragraphs 1,2,3 and 4 of the plaint.

2. He admits paragraphs 5,6 and 7 of the Plaint.

3. He admits paragraphs 8 and 9 of the Plaint.

4. The Defendant No.1 denies paragraph No. 10 of the Plaint and without prejudice states that the alleged mortgage deed was executed on 29th October, 1951. The Defendant No.1 only became the registered lessee of Plot No.259 Section XVIII on 19th November, 1951. The alleged mortgage did not therefore encumber Plot No. 259 in any manner whatsoever. 10

5. He admits paragraph 11 of the Plaint subject to paragraph 4 hereof.

6. He denies paragraph 12 of the Plaint and states that he has committed no breach as alleged in the said paragraph or at all. He further states that the first mortgagee Mohamed Dhanji and second mortgagee have at the request of the Plaintiff and the Defendant No.1 extended the time for repayment of their respective principal sums by a further term of two years. The Plaintiff advanced the loan on the third mortgage to the Defendant No. 1 with full knowledge that the time for repayment of the principal sums under first and second mortgages was extended by two years. The Plaintiff cannot now base his claim for his principal sum on the alleged failure on the part of the Defendant No.1 to repay the principal sums alleged to be due under the first and second mortgages. 20 30

7. The defendants Nos.2 and 3 have also extended the time for repayment of their mortgages, that is up to 30th September, 1955.

8. Without prejudice to paragraph 4 hereof he admits paragraph 13 of the Plaint and adds further that no valid notice was served on him in respect of any breach as alleged in paragraph 12 of the Plaint or at all. 40

9. He denies paragraph 14 of the Plaintiff.

10. The Plaintiff's suit is premature and must therefore be dismissed.

11. Without prejudice to the above defences, the Defendant will pray at the trial hereof that he be granted equitable relief against the forfeiture, if any, of the property of the Defendant No. 1 claimed by the Plaintiff.

10 12. Without prejudice to the above Defence, the Defendant submits that by virtue of a compromise arrived at between the Plaintiff and the Defendant No.1 in the month of September, 1953 the present action has been wholly adjusted.

WHEREFORE the Defendant prays that the Plaintiff's suit be dismissed with costs.

DATED this 5th day of December, 1953.

Sgd. T.J. INAMDAR

ADVOCATE FOR THE FIRST DEFENDANT

To:

20 Messrs. A.B. Patel & Patel,  
Advocates for the Plaintiff,  
Mombasa.

Filed by:-

T.J. Inandar,  
Advocate,  
Mombasa.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 2.

Defence of  
Defendant No.1.  
5th December  
1953 - continued

Added pursuant  
to the Order of  
Court dated  
29-7-1954

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 3.

PROCEEDINGS

No. 3.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA  
DISTRICT REGISTRY

Proceedings  
29th July 1954.

Civil Case No. 213 of 1953

NOORALLY RATTANSHI RAJAN NANJI

Plaintiff

- and -

1. MOHAMEDALI JAFFER KARACHIWALLA
2. ISMAILIA CORPORATION LIMITED and
3. KARMALI KHIMJI PRADHAN

Defendants

10

29.7.54. PATEL for Plaintiff

D.D. DOSHI for 1st Defendant.

SATCHU for 2nd and 3rd Defendants.

DOSHI: Before proceeding with suit, I have an application to make.

About 10-12 days ago I learned that in September, 1953 after filing of suit a general settlement of dispute between Plaintiff and first Defendant was arrived at. Talks for settlement conducted in Patel's office in his presence and after about 2 hours discussion, a draft settlement was drawn up by Patel in handwriting. That draft was signed by Plaintiff, by first Defendant and by Patel. That settlement according to my instructions adjusted this case wholly. Immediately on learning this fact, I wrote to Patel asking for a copy of the settlement, undertaking to pay copying charges. My letter dated 21st July. I received reply on same date. 21st July but no copy of the draft settlement sent to me. Patel's reply didn't deny the existence of the signed settlement. I therefore now apply that if there is any signed settlement which deals with this matter as well as with other matters, I should be given inspection of it or a copy. Order XXIV R.V. obliges the Court to pass a decree in terms of adjustment.

20

30

PATEL: Inamdar represented Defendant No. 1 in September of last year in this suit. Application was made by Plaintiff for summary judgment. It

will appear from Court record that on 17th September, the Notice of Motion for summary judgment was stood over for a month in view of probable settlement. In due course Inamdar and I informed Windham J. that matter could not be filed for hearing. On 8th March, 1954, Defendant No. 1 swore affidavit which states in Para. 7 "A draft mortgage deed was prepared but difference arose between him and me and the same did not go through".

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

                      
No. 2.

Proceedings,  
29th July 1954 -  
continued.

10           In November 1953, after negotiations discontinued, Notice of Motion for summary judgment was heard and dismissed. Thereafter First Defendant filed his defence. Subsequently Plaintiff filed application for appointment of receiver. This too dismissed.

20           DOSHI: Expect either confirmation or rejection of my instructions that a signed document exists signed by Plaintiff, and 1st Defendant and Patel adjusting this matter completely. If Patel had denied existence of such document my submission would have been withdrawn as I would have accepted his word in preference to my instructions. Had I been assured that there was such a document, I would either have offered evidence of terms of that settlement or applied for adjournment to move court formally for adjournment to amend defence by insertion of plea alleging settlement. Those were my reasons for asking in open Court production of document because I know that there was no jurisdiction to order production at this stage.

30

PATEL: interposes.

40           I will not take any objection to the tendering of evidence intended to establish that a compromise was arrived at, nor will I object that such allegation should have been pleaded and if an amendment is sought to allow such evidence to be tendered I will not oppose the application for amendment and will not seek an adjournment to meet it as Plaintiff is desirous of this matter being concluded as quickly as possible.

Court reads to Patel notes of what he has said as above.

Patel agrees that it is correct.

DOSHI: Apply for leave to amend defence by inserting as para. 12 following paragraph:

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry  
                    

"WITHOUT PREJUDICE to the above defence, the Defendant submits that at some time in September, 1953, a compromise was arrived at between the Plaintiff and himself adjusting this suit fully".

No. 3.

Proceedings  
29th July 1954 -  
continued.

PATEL: Do not oppose amendment - do not seek time to answer it.

SATCHU: Do not oppose - don't seek time to answer it.

ORDER: Amendment as prayed.

10

HENRY MAYERS.

PLAINTIFF'S CASE

PATEL: Action on mortgage by Plaintiff who is 3rd mortgagee. Defendants 2 and 3 are joined formally as first and second mortgagees. Principal amount of 3rd mortgage is Shs.130,000. Several breaches of mortgage alleged against Defendant No. 1.

(a) no interest paid since Feb. '52.

(b) failure to pay ground rent and Municipal Rates on due dates.

20

(c) failure to pay principal amounts due under first and second mortgages.

(d) failure to pay interest on first and second mortgages.

(e) failure to pay insurance premium on due date.

(f) failure to pay instalments payable to Plaintiff towards the principal.

Defence is that 1 plot under mortgage is not subject to mortgage because mortgage was executed on 21st October, 1951, while lease was taken of this plot on 19th November 1951. Defence also denies all of alleged breaches and alleges that 1st and 2nd mortgages have extended time for payment of principal.

30

Defence denies having received notice under mortgage and alternatively that it is invalid. Finally he seeks equitable relief against forfeiture and he alleges compromise.

PLAINTIFF'S EVIDENCE

No. 4.

ALRED VINCENT DE SOUZA

ALRED VINCENT DE SOUZA, sworn

10 Clerk, Registry of Titles. Produce File re Plot 259 Section 18, Mombasa. A lease is registered in respect of that plot dated 1st March 1946 between Said bin Ali as Trustee for Jellabhai Patel and others. Subsequently on 1st April 1949 this lease assigned to Defendant No.1. On 19th November, 1951 another lease by Said bin Said as administrator to first defendant. As result of this lease of 19th November, 1951 the original lease between same parties was cancelled. Lease dated 19th November, 1951, registered on 28th November 1951. On same day and at same time a mortgage of this plot by first defendant to Plaintiff was registered. Surrender of lease antecedent to 19th November, 1951, the grant of lease

20 of that date and several mortgages of this plot are all registered on 28th November, 1951.

XXD: DOSHI: Surrender of previous lease is dated 19th November 1951. New lease continues on same title.

XXD: SATCHU: Order of registry in my book is first surrender, second withdrawal of caveat - (3) new lease, (4) three mortgages and sub-mortgage.

No. 5.

KASSAMALI RAJABALI PAROO

30 KASSAMALI RAJABALI PAROO, sworn.

Managing Director of several companies in Mombasa. Also of Ismailia Corporation and Diamond Jubilee Investment. Know Plaintiff and Defendant. Ismailia Corporation lent certain money on first mortgage to Defendant No.1. I produce the original

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 4.

Alred Vincent de  
Souza,  
29th July 1954.  
Examination.

Cross-  
Examination.

No. 5.

Kassamali  
Rajabali Paroo,  
29th July 1954.  
Examination.



In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

lease in respect of Plot No.259 and 260 and 261 of  
Section XVIII.

Tendered as Exhibits 1, 2, 3.

Plaintiff's  
Evidence.

Principal amount repayable under the first mort-  
gage of these plots fell due on 31st December,1951.  
No part of the principal moneys has been repaid.  
No interest has been paid on this first mortgage  
since first January 1953 for past 19 months.

No. 5.

Kassamali  
Rajabali Paroo,  
29th July 1954  
Examination -  
continued.

I act on behalf of Board of Ismailia Corpora-  
tion in relation to matters of this nature. Had  
any extension of time been given to the first de-  
fendant I would know of it. Ismailia Corporation  
has not given any extension of time to first de-  
fendant for repayment of mortgage. He applied  
for extension and we agreed to give him extension  
to 30th September 1955, upon certain conditions  
but first defendant has not complied with those  
conditions. The extension we had agreed to give  
him was not confirmed because of his non-compliance  
with our conditions.

10

20

Last fire insurance premium fell due on first  
July, 1954. It has not been paid up to date. I  
know that first Defendant paid two years premium  
together but I cannot remember on which date. That  
payment was in respect of 2 years arrears. The  
date of payment was after 12th September,1953 be-  
cause that was date on which I demanded the pay-  
ment.

Cross-  
Examination.

XXD: Fire insurance premiums are due to Jubilee  
Insurance Co. Ismailia Corporation is interested  
in Jubilee Insurance Co. Due date of insurance  
premium is 1st July. Period in respect of which  
payment on 1st July, 1954, should have been made,  
was period 1st July, 1954 - 30th June, 1955.

30

First Defendant has paid insurance premium  
for period ending 30th June, 1954. The insurance  
has been renewed. It was renewed on 1st July  
on instructions of Ismailia Corporation. Jubilee.  
Although policy has been renewed, premium has not  
been paid. Consequently if fire occurred Jubilee  
Insurance Co. might refuse to pay. General prac-  
tice is for Insurance Co. to renew policy and  
send an invoice for payment, Agree that risk of  
Insurance Co. commences from date of renewal but  
Insurance Co. can repudiate if premium not paid.

40

Document now handed to me is the renewal notice. I  
read it.

Tendered as Exhibit A.

Document now shown me is invoice of Jubilee Insurance Co. in respect of renewal. Tendered Ex. B.

In my view in spite of the renewal, Insurance Co. can repudiate if premium not paid.

I have not got the original policy with me. I will bring the policy with me after the adjournment.

10 Remember Defendant No.1 wrote to Ismailia Corporation Ltd., on 9th September, 1953. I produce the letter - tendered Exhibit C. Ismailia Corporation replied to Exhibit C on 10th September 1953.

Adjournment 12 a.m.

Court resumes 2.50 p.m.

Witness warned still on oath.

20 Witness: I would like to correct a mistake which I made. I said first Defendant had not paid interest since 2nd January '53, so had not paid for 19 months. I should have said he has not paid interest since 1st January, 1952. He has not paid for 32 months.

Doshi hands in typed copy of amendment ordered this morning.

XXN. continued:

30 The person referred to in Exhibit 1 as Noorally Nanji is the present plaintiff. Document now handed me is Ismailia Corporation's reply to Exhibit C. Letter tendered Exhibit D. Exhibit D is the letter to which I replied when I said that we had agreed to extend the loan to first Defendant subject to certain conditions.

Corporation has not recalled the loan to first defendant. I knew when Exh. D. written that this case was pending. When I read Exhibits and knew that first Defendant was seeking to raise money from first Plaintiff in 4th Mortgage, I was not surprised. I knew that efforts were being made for settlement about that time.

40 I now have the first Defendant's Fire Policy in respect of Plot 259. Jubilee Insurance Co. may cancel the Policy for non-payment of premium in spite of having renewed the policy. Until policy

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 5.

Kassamali  
Rajabali Paroo,  
29th July 1954.  
Cross-  
Examination -  
continued.

Cross-  
Examination  
continued.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 5.

Kassamali  
Rajabali Paroo  
29th July 1954  
Cross-  
Examination -  
continued.

is cancelled, the policy stands even if premium not paid. Premium which fell due on 1st July, 1953, has been paid. Policy has been renewed. Agree that no interruption in risk. The renewal instructions was given by Ismailia Corporation. Ismailia Corporation will not be debited with amount of premium.

XXN. SATCHU. Sub-Cl. 3 of Cl. 5 of first mortgage provides that Defendant No.1 will insure the property with Jubilee Insurance Co. He has not given instructions for renewal of insurance. 10

I now produce the first mortgage. Tendered Exh. X.

No Re-XXN.

No. 6.

Mohamed Farusi  
29th July 1954.  
Examination.

No. 6.

MOHAMED FARUSI

MOHAMED FARUSI, sworn.

Office boy of Patel, Advocate for Plaintiff. Was so in July, 1953. Knew Deft. No.1. Book now handed me is my employer's despatch book for July, 1952. On 3rd July, 1953, I served a letter on Defendant No.1; when I reached defendant No.1's hotel, he was just at the door about to come out. I showed him letter. He took it from me and signed the book. Signed in my presence. Book tendered as Exh. 4. 20

No XXN. DOSHI.

No XXN. SATCHU.

No. 7.

ABDUL HUSSEIN NAZERALI

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

ABDUL HUSSEIN NAZERALI, sworn.

Plaintiff's  
Evidence.

Court Clerk Mombasa. Produce Supreme Court File  
48 of 1952. Also 210 of 1950. Tendered as Ex-  
hibits 5 and 6.

No. 7.

XXD. DOSHI:

Abdul Hussein  
Nazerali.  
29th July 1954  
Examination.

10

In Exh. 5 there is a letter dated 9th Septem-  
ber, 1953 addressed by first Defendant to District  
Registrar. I flag this letter as Exh. 5A. I read  
Exh. 5A Case referred to in Exh. 5A is these same  
parties in this case. There is in Exh. 5A letter  
by Satchu & Satchu addressed to District Registrar  
dated 11th September. I flag it and mark it as 5B.  
Registrar replied to 5B on 14th September. I flag  
the copy of Registrar's reply and mark it as 5C.

No XYN. Satchu

20

PATEL: Usually do not like to give evidence in a  
matter in which I am appearing but as I was a party  
to proposed settlement, which was raised this morn-  
ing, I shall have to give evidence.

DOSHI: It may save Patel embarrassment if it is  
pointed out that under Order 17 Rule 3 where bur-  
den of proving several issues lies on one party  
and of others on other party - party who begins  
may choose to reserve his evidence in respect of  
issues the burden of which rests upon opposite  
party until that party has given evidence.

30

PATEL: In that event I will reserve my right to  
give evidence in rebuttal of first Defendant's evi-  
dence.

-----

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 8.

NOORALLY RATTANSHI NANJI.

Plaintiff's  
Evidence.

NOORALLY RATTANSHI NANJI, sworn

No. 8.

Plaintiff. Produce 3rd Mortgage by 1st Defendant to me.

Noorally Rattanshi  
Nanji  
29th July 1954  
Examination.

Tendered Exh. 7.

Prior to execution of Exh. 7 Defendant No. 1 had signed another mortgage in my favour. That would appear to be in October, 1950. That mortgage was for same amount. It was not registered; reason it was not registered was that the title to Plot No. 259 was defective. That defect was cured by the grant of a fresh lease on the plot. The fresh lease is Exh. 3 in the case.

10

Defendant has made following defaults under my mortgage:

(a) Not paid interest for 30 months - since 1st February, 1952.

(b) Not paid instalments as provided by mortgage deed. He was required to pay Shs.5,000/- every six months - paid none.

20

(c) He has failed to pay ground rent on due date.

(d) He has failed to pay Municipal rates on due dates.

(e) Failed to pay fire Insurance premium on due dates.

He has also failed to pay principal amounts under first and 2nd Mortgages.

He is in arrears with interest in respect of first and second mortgages.

30

I instructed my advocate to serve notice on Defendant for all breaches. I read the notice before it was served.

PATEL: Have serviced notice to produce letter of 2nd July, 1953. Call for it.

DOSHI: I hand over the letter to Patel for such use as he may make of it. Tendered as Exh. 8.

After 2nd July I had occasion to see Defendant No.1. Defendant No.1 came to my house and asked why I was after him, said we had better settle the case. Defendant saw me after present case filed. He did not bring the summons in the case. He did not bring Exh. 8 but he talked about it. He had read it. First Defendant has paid neither interest nor instalments since Ex. 8 was received. Have never assisted Defendant No.1 to obtain any extension of time from first and 2nd mortgages (Defendants 2 and 3). Have never approached Defendants 2 or 3 with view to their giving any extension of time to Defendant No. 1.

10

Court adjourned 4 p.m.

30.7.54

Court resumed 11 a.m.  
Appearances as before.  
Plaintiff warned still on oath.

XXD: DOSHI.

? Are you a Mohamedan by religion.

20

COURT: I am not prepared to allow a question of that nature unless I am satisfied that there is some real justification for its being made.

DOSHI: Reason is that one of defences is that 3rd mortgage was executed before the relevant plot had been acquired by mortgagor. In due course I purpose to submit that under Transfer of Property Act certain principles of Mohamedan Law apply to property transactions to which all parties are of that faith.

30

COURT DIRECTS that in those circumstances question is a permissible question.

A. I am a Muslim. Of Shia sect. First Defendant is also a Muslim - of Shia sect. We are both members of the Ismailia community.

September 1953 I signed a paper. I had read it before signing it. The writing was in handwriting of C.A. Patel. Defendant No. 1 also initialled. We both initialled. We did not sign it. Mr. C.A. Patel did not witness our signature.

In the Supreme Court of Kenya at Mombasa District Registry

Plaintiff's Evidence.

No. 8.

Noorally  
Rattanshi Nanji  
29th July 1954  
Examination - continued.

30th July 1954.

Cross-Examination.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 8.

Noorally  
Rattanshi Nanji  
30th July 1954  
Cross-  
Examination -  
continued.

There were two papers which I initialled so far as I recollect. I don't remember if they were signed on same day or different days. On thinking it over, I say I signed both on same day at same time in the afternoon in Patel's chambers. No one else present except Plaintiff, defendant No.1 and Patel. These documents were initialled after filing of this suit. Cannot say if it was after first Defendant was served with summons. My recollection is that at time of initialling documents, application for summary judgment had not been filed. I cannot say if application for summary judgment was filed on 2nd September, 1953.

10

Before initialling the papers there was discussion between first Defendant and myself. That was when he came to my residence. Discussion about the settlement of this case. I think that first Defendant came to my house 3 or 4 times about settling this matter. On each occasion discussion lasted for some time. Only persons present at my discussions with first Defendant at my house were my children.

20

As result of those discussions first Defendant and I jointly went to C.A. Patel. On day on which we initialled the papers at Patel's office we were together for about half an hour. During that period Patel was making notes. When I referred to two papers, I meant one document written on two pages. We initialled both pages.

We had been to Patel's offices several times before: we also went several times after. On consideration I say that Defendant No.1 and I never went to Mr. Patel's chambers together after the day on which we initialled the document. We went to Mr. Inamdar's chambers after that day.

30

The writing on the papers which I initialled referred to the settlement of this case and settlement of present suit. When we both initialled the paper, I took it that this claim was settled.

Early in 1953 I had filed an exactly similar case against the same Defendants. A claim on the third mortgage, joining the 1st and 2nd mortgagees as formal defendants. The previous case filed by me against Defendant No.1. I was to pay to Defendant No.1 50% of his taxed costs. At that time Defendant No.1 was represented by T.J.Inamdar. A bill of costs was lodged and taxed amount was roughly Shs. 7,000/-.

40

I have not paid 50% of that bill. Reason why I have not paid is that it was part of the settlement that Defendant No.1 should forego his costs. Part of the settlement was that Defendant No.1 was to pay the costs of 2nd and 3rd Defendants. Agree that a letter was sent to Court by Defendant No. 1 (letter numbered 5A) I read a copy of that letter. That letter was written consequent upon the settlement agreed upon.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 8.

10 Agree that Defendant No.1 wrote to Satchu offering to pay costs of Defendants 2 and 3. I have not paid anything towards Satchu's costs. They have not been taxed.

Noorally  
Rattanshi Nanji  
30th July 1954  
Cross-  
Examination -  
continued.

20 Our meeting at Patel's offices must have been on same day or day before the date of Exh. 5A, i.e. the 9th or 8th September. I was present when Defendant No.1 signed Exh. 5A. Also present when he signed letter to Satchu guaranteeing costs which I had to pay to 2nd and 3rd Defendants. These letters were signed in office of A.B. Patel in presence of C.A. Patel. They were typed in Patel's office. I was not given a copy of papers which were initialled. I do not know if Defendant No.1 was given a copy of those papers. He was not given a copy in my presence. Don't know if any copy was made. So far as I know, no typed copy was subsequently made. I now produce the papers which we initialled. Tendered Exh. E.

30 Under existent mortgage interest is graduated from 6 - 12%, the average interest comes out at  $6\frac{1}{2}\%$ . The first of the terms of settlement provides for 12% interest on whole loan. I do not consider that that term was in my favour. I am not now a merchant. I used to be. I agree that the term that I should get 12% instead of  $6\frac{1}{2}\%$  would be to my advantage.

40 The mortgagee referred to in 2nd term of settlement is myself. I know that Defendant No.1 applied to Ismailia Corporation for consent to create a fourth mortgage in my wife's name. I was prepared to advance 50,000/- more to first Defendant to create a fourth mortgage in favour of my wife. I did not consider it a safe investment. I only wanted it to help first Defendant. It was my wife's money.

Term 3. - Provides for 2 years instalments on 3rd mortgage; amount to be paid - 2 years - means 2 years from date of settlement.



In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 8.

Noorally  
Rattanshi Nanji  
30th July 1954  
Cross-  
examination -  
continued.

Term 4. - Provides for permission to sell if first and second mortgages redeemed.

Term 5. - Relates to interest on 4th mortgage.

Term 6. - Provides for 3rd mortgagee to take possession and collect rents and deliver the amount to 1, 2 and 4 mortgagees. I was to be paid S.120 for my labour. There is a building on one only of the plots. Other 2 plots are unimproved. Building on Plot 259 a single storey.

10

Term 7. - "Letters to be addressed to all tenants" means tenants of the building on Plot 259. I was to collect rents. If default, 1st Defendant and I were to discuss and decide what steps should be taken.

Term 9. - "Three and 2 years option" means that if terms are carried out then Defendant No. 1 is to have an option but I do not know what the option was.

Term 10. - All costs of 2nd and 3rd Defendants in both cases to be paid by first Defendant - means costs in this case and in case of 1952.

20

Court adjourned 12 p.m.

Court resumed.

Witness warned still on oath.

XXN - continued

Term No.9 provides for 3 years and 2 years option if terms carried out. I agree that that means that 4th mortgage was to be for 3 years with option to extend for 2 years if terms of 4th mortgage kept.

30

Term No.11 is S.50,000 including arrears of interest, costs of action, other amounts due and costs of mortgage, etc. This meant I was to deduct all arrears of interest due me under 3rd mortgage. Arrears of interest meant arrears due up to the date of 4th mortgage. Costs of action meant costs of this action. No other amounts were due to me.

40

Term No.12 provides that mortgage may be drawn in favour of my wife. It was to be drawn in her favour. I was serious about this settlement. I wanted it. I was ready to pay amount of S.50,000 less the deduction specified. My wife had the money. I am not still serious about the proffered settlement. I do not want it now. In portion of the building standing on the plot there is a restaurant called The Blue Room. I do not know who the proprietors of the Blue Room are.

10

? Do you know who is running Blue Room?

A. I see Defendant No.1, his brother-in-law, his son and Defendant No.1's wife, all working there. I do not know who are the proprietors. Whenever I pass I see the Defendant No.1 working there. I do not recollect what rent is paid for the Blue Room but it is in Defendant No.1's affidavit.

20

The aggregate rental of the building is S.3,000 per month. I have sworn to that in some of my affidavits. Before swearing to that affidavit, I did not make inquiries or verify what I was swearing to. The figures in my affidavit are taken from the Defendant No.1's affidavit. I gave evidence in C.C. 48 of 1952. I do not remember, exactly what rent of Blue Room is.

30

A few days after initialling Exh. E I did not demand from Defendant No.1 that he should be personally responsible for collecting rent of Blue Room. The entire building contains: 7 shops, including Blue Room. 6 shops and 1 restaurant, the Blue Room. The Blue Room occupies 3 shops. Apart from Blue Room there are 4 shops. Blue Room occupies nearly half the premises. I again deny that a few days after initialling Ex. E. I demanded that Defendant No.1 should be responsible for collecting rent from Blue Room as he was connected with it.

40

Reasons why I do not want the settlement now are: first Defendant No.1 is a man who does not keep his word. Secondly, instructions from members of my family are not to deal with him at all. These are all my reasons. I came to realise that Defendant was not a man of his word because after first case was dismissed he came to my house and wanted settlement promising that he would pay fully and so on. Originally asked for S.30,000 then put it

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Plaintiff's  
Evidence.

No. 8.

Noorally  
Rattanshi Nanji  
30th July 1954  
Cross-  
examination -  
continued.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Evidence.

No. 8.

Noorally  
Rattanshi Nanji  
30th July 1954  
Cross-  
Examination -  
continued.

up to S.35,000 then more - to 50,000, finally wanted 68,000. That was before the settlement was initialled. I did not know that amount of first mortgage was due when Defendant gave me 3rd mortgage. I remember that before my advocates filed the first case, they sent a notice to Defendant No.1. I agree that in that notice it was alleged that Defendant had defaulted in payment of certain amounts. Agree that at that time I knew Defendant had not fulfilled his promises.

10

When I refer to my family not wanting me to have dealings with Defendant No.1 I mean my wife and my brothers. They do not like him. This dislike started when the Defendant No.1 started changing his mind after signing Ex. E. Up to time Ex.E was signed they neither liked nor disliked him. I was able at that time to carry out my part of Ex.E. I am still able financially to do so. Agree I said this morning that the defect in the first lease was cleared by granting a 2nd lease. The defect was that by order of the Court the old lease had to be surrendered. I look at Ex. 7. I do not know if the old lease had been surrendered on date when Ex.7 was executed. I know that Defendant No. 1 failed to pay principal and interest due on 2nd mortgage. Knew it because my advocates found it out. I did not know it of my own knowledge.

20

Agree para. 12 of the Plaint charges that Defendant No.1 was in arrear with the interest on 2nd mortgage up to April 1953. I know that Defendant No.1 had not paid the principal or interest on 2nd mortgage because I was so informed by 2nd mortgagee.

30

The third Defendant is the source of my information. My knowledge that Defendant No.1 failed to pay ground rent was gained by being served with a notice from lessor, and from my asking him about the ground rent.

My knowledge of failure of Defendant No.1 to pay Municipal rates was gained on inquiry at Municipal offices.

40

Defendant wanted certain changes in terms of settlement. I did not agree to any changes suggested by Defendant No.1. A draft of the mortgage deed was prepared but it was not signed by anybody. I say no but I don't remember if it was signed. It was never sent for registration. It was prepared

by Messrs. A.B. Patel. I remember seeing the mortgage. I read it. My recollection is that it was in accordance with terms of the settlement. If Defendant now wants the terms of settlement to be carried through without any alteration, I would not now agree.

No XXN. -- Satchu.

ReXXD:

10 At time of alleged settlement, Inamdar represented Defendant No.1. The agreement finally did not go through. If matter had been settled the 4th mortgage was to be executed or registered. No. 4 mortgage was not executed or registered. Reason why 4th mortgage was not executed and registered was that at last moment Defendant No.1 changed his mind and proposed some new terms.

20 I look at Ex.E. I refer to the clause re my right to collect rent. Intention was that that was to be done if any of tenants defaulted. Was to be decided after 4th mortgage registered. That term was never settled. Reason that this term was not finally agreed was that agreement was not reached.

30 To Court: The intention then was that we should agree on a policy to be applied if default occurred on part of any tenant and that this agreement as to policy should be arrived at after the mortgage deed was concluded. We did not intend to wait until each particular default occurred and then agree what should be done in relation to that particular default.

Did 1st Defendant ever demand the taxed costs from you?

Doshi: I object to any document being produced in re-examination.

40 Court: While my recollection was that some question had been addressed to this witness in XXN as to whether demand had been made for the payment of these costs - on referring to my notes, I find that his cross-examination as to that matter appears merely to have settled that although ordered by the court to pay  $\frac{1}{2}$  taxed costs, he had not done so because he regarded the matter as disposed of by the

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Plaintiff's  
Evidence.

No. 8.

Noorally  
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30th July 1954  
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Examination -  
continued.

In the Supreme  
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"settlement". I therefore rule that the document now sought to be produced cannot be produced by this witness in re-examination.

HENRY MAYERS.

Plaintiff's  
Evidence.

No. 8

Noorally  
Rattanshi Nanji,  
30th July 1954  
Cross-  
Examination -  
continued.

Defendant has not carried out any term of settlement re mortgage in Ex. E. Not paid Satchu's costs or carried out terms imposed by Ismailia Corporation for extension of time. Intention was that case was to be mutual settlement if suitable settlement had gone through - that was to be done after 4th mortgage had been executed. 10

Patel: Close case for Plaintiff; call for evidence in respect of Defendant No.1's allegation of settlement.

Court adjourned 12 p.m.

23rd August 1954

23.8.54

Patel for Plaintiff.

D.D. Doshi for 1st Defendant.

Satchu for 2nd & 3rd Defendants.

Doshi: Plaintiff's case closed except for evidence in 20  
have already opened - call Defendant

Defendants'  
Evidence.

No. 9.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Examination.

DEFENDANTS' EVIDENCE

No. 9.

MOHAMEDALI JAFFER KARACHIWALLA

MOHAMEDALI JAFFER KARACHIWALLA, sworn

First Defendant. Look at Exhibit E. The settlement note. I initialled it on both pages. I was prepared to abide by those terms, to do everything necessary to give effect to it. After Ex. E. initialled a typewritten draft was taken by Mr.C.A. Patel to Mr. Inamdar my then advocate - the 30

typewritten draft contained conditions not in the original hand written draft. The typed draft was a draft of a mortgage. It was made in pursuance of the settlement. The additional terms were that rent of Blue Room premises was to be collected by me myself, and if rent not paid by Blue Room I would be sued in my own capacity and would not defend the suit. I rejected that condition. Plaintiff's advocate insisted on writing that condition.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Defendants'  
Evidence.

No. 9.

10 XXD: Patel:

Do you say that a settlement was arrived at and this case was settled?

A. Yes.

Q. Was 4th Mortgage to be created?

A. Yes. There was no specific condition that if 4th mortgage was registered this case was to be considered settled. According to the term of hand written draft of 4th mortgage was drawn, the case was arbitrarily settled. Do not agree that case was to be settled when mortgage signed by me. I say case was settled as soon as Ex. E. signed. I instructed Plaintiff to send draft of 4th mortgage and of variation of 3rd mortgage to my then advocate, Inamdar. Not correct that I was not prepared to sign 4th mortgage when asked by Inamdar. I was prepared to sign 4th mortgage if prepared in accordance with terms of Ex. E. Amount of 4th mortgage was to be Shs.50,000/-. Amount of 4th mortgage was not varied subsequently. Not correct that amount was subsequently varied at my instance absolutely untrue that it was increased to Shs.67,000/-. Never agreed that 4th mortgage was to be for Shs.62,000/-. It was agreed that if I paid the ground rent and municipal taxes, the amount would be S.50,000/- but if I paid them the amount would be increased to Shs. 62,000/-. Document now handed to me is the draft mortgage sent to Mr. Inamdar. It bears my initials but I hadn't initialled the alterations (handed Ex. 10). I think that there was a later document sent to Mr. Inamdar. I don't agree that ultimately the amount of 4th mortgage was Shs.68,000/-. I read the additions in ink to the typewritten document. I initialled under these alterations. I only agreed to amount of Shs.50,000/- in Exh. E. Never agreed to amount of Shs.67,000/- that was suggestion made by you and which I didn't object. I put my initials to Ex.10 after the handwritten document at your suggestion.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Examination -  
continued.

Cross-  
Examination.

In the Supreme  
Court of Kenya  
at Mombasa  
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Defendants'  
Evidence.

No. 9.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Cross-  
Examination -  
continued.

Can't remember when first raised question of ground rent. Possibly it may have been suggested by my advocate. I don't think that my advocate raised question of ground rent on my instruction because I didn't expect to be able to pay it myself. I discussed with the Plaintiff all terms of 4th mortgage. I told him I objected to the clause about my collecting rents. I look at my affidavit dated 8th March '54. I read para. 7 -it is correct. "The insignificant matter" was that if Plaintiff did not get rent he would take present action against me. I look at Ex. E. I read clause 7 of it. I agree that under clause 7, decision as to whether action should be taken against defaulting tenants was postponed for time being. Agree that term was principally to meet case of Blue Room. My son and my wife are owners of Blue Room. Agree that discussions with view to settlement were going on after the application for summary judgment. Agree other discussions took place before application for judgment heard.

10

20

Don't know if Inamdar told Court that settlement could not be reached. Agree that after this discussion my advocate filed my defence. I did not read it. I didn't inform my advocate that the matter was settled. I didn't do so because I didn't remember it. I only remembered recently that I had initialled a document.

Agree that until meeting no steps taken to make this matter settled. I can read English. I signed affidavit of March, 1954, after reading it. When I read para. 7 of that it reminded me that I had signed the settlement. I wrote to Deputy Registrar, Supreme Court, Mombasa that letter was sent from your (Patel's) office. I wrote also to Satchu - that letter also sent from your office - the document now handed me is the letter sent to Satchu (tendered Ex.11). I read Ex.11. I don't know if Satchu refused to confirm that they would not claim costs from Plaintiff.

30

I don't remember if Satchu & Satchu refused to accept my undertaking after writing to Deputy Registrar to have Civil Case No.48 of 1952, marked settled, my advocate Inamdar wrote to Patel asking for payment of costs. Document now shown me is the letter from Inamdar (tendered Ex. 12).

40

I wrote to Ismailia Corporation seeking an extension of 2 years within which to repay principal due under first mortgage. Letter now shown me

is the letter to Ismailia Corporation (tendered Ex. 13). Wrote similar letter to Defendant No.3, the 2nd Mortgagee. Document now shown me is the letter tendered Exh. 14.

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Court of Kenya  
at Mombasa  
District Registry

I think I received consent of Ismailia Corporation. I also received consent from the 3rd Mortgagee himself and from his assignee, the 2nd Defendant. I got no written consent from 3rd Mortgagee.

Defendants'  
Evidence.

No. 9.

10 First mortgagee's consent to extension of time was subject to conditions, had 4th mortgage been created, those conditions would have been applicable.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Cross-  
Examination -  
continued.

Wanted extension from 1st and 2nd mortgagees because I was creating 3rd mortgage. Don't agree that 4th mortgage was to be conditional upon my obtaining consent of 1st and 2nd mortgagees to extension of time.

20 Agree that principal of first mortgage was due for repayment on 31st December, 1951. Can't remember if principal of 2nd mortgage was to be repaid on same date.

30 I read the letter of 2nd July 1952, giving notice of action. As far as I remember that letter was not mentioned and I agree that I have not paid interest since 1st February, 1952. Haven't paid first mortgage interest but as for 2nd mortgage I have paid all interest but have not paid principal moneys. Have paid up all arrears in my part of 2nd mortgage. Paid to Mohamed Ganji the original 2nd mortgagee. He has paid to 3rd Defendant the assignee of 2nd mortgage. Mohamed Ganji paid money to 2nd Defendant. I got no vouchers.

Court adjourns for lunch 1.5 p.m.

Court resumes 2.15 p.m.

Witness warned still on oath.

XX contd.

During adjournment have read Ex.8 letter written on my behalf to first Defendant.

40 Q. Do you agree that you have committed all those breaches or do you deny any of them?

A. The letter is correct.



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Court of Kenya  
at Mombasa  
District Registry

Defendants'  
Evidence.

No. 9.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Cross-  
Examination -  
continued.

I agree that I have committed all breaches specified in the letter. That was still the position when this suit filed on 11/8/53 except that I do not remember if by that date I had paid the premium or the municipal tax. Agree that in my affidavit of 17th December, 1953 I said that premium paid on 15th December, 1953. Agree that in same affidavit I also said that Municipal rates paid on 15th December, 1953. I now agree that when this suit was filed, the defaults complained of in Ex. 8 had not been remedied.

10

I had a lease over Plot 259 think I had that lease from 1947 or 1948. Agree that about 1950 or '51, Court held that persons who had created the lease in my favour had no power to do so. A fresh lease was given to me my old lease was surrendered by me. Can't remember if the surrender of old lease and new lease were registered on same date. Old lease was surrendered long ago and there was delay in granting new lease.

20

R.N. Doshi, advocate acted re surrender of lease and granting of new lease. I think he wrote to me saying I had to surrender old lease and would be granted new one but I can't quite remember. I was not asked to pay anything more when new lease granted. On 27th October, 1951, I sent the letter now handed to me to Plaintiff - letter tendered as Ex. 15.

Agree that about 1 year before the 3rd mortgage in respect of which this suit is brought I had executed another 3rd mortgage in favour of Plaintiff.

30

Doshi: I wasn't shown Ex.15 before it was shown to witness. Now object to its admissibility as it purports to be an undertaking or guarantee and is unstamped.

Patel: Don't know whether document requires a stamp but if suggested that it should be sent to stamp authorities for duty if any to be assessed, Plaintiff will pay duty and any penalty.

Court: For what purpose is Ex. 15 tendered?

40

Patel: To counter allegation in para. 4 of Defence that Defendant only became lessee of plot after mortgage created.

ORDER -

S.39 of the Stamp Ordinance on the face of it

precludes documents which are required to be stamped, from being received evidence unless they are duly stamped and the party if any in neglect of them not being thus stamped at the proper time is liable. Mr. Patel has given his undertaking to have this document stamped if it requires to be stamped and to pay any penalty imposed. This course will in my view overcome the objection and I therefore direct that the document be submitted to the proper authority with a view to its being determined whether it requires to be stamped and for the amount of the penalty, if any.

Henry Mayers.

Agree that my original 3rd mortgage could not be registered because of difficulty over plot 259. Agree that present 3rd mortgage concluded because that difficulty had ceased to exist. Formerly I received Shs.42,000/- per year approx. Being amount of rent on the premises now receive only Shs.36,000. I could have paid interest, ground rent and Municipal rates if I had not been involved in the expenses of all these cases. I could not pay them all today but as I get money I will be able to pay.

Haven't paid Municipal rates for this year. Have paid ground rent for 1 plot and am about to pay for another. Am about to pay for 2 plots.

I again look at Ex. E. If you regarded the case as settled, why did you not instruct your advocate to write to Court that it was settled?

A. I signed it and left the rest to my advocates. Reason why I did not write to tenants was that my letter was typed in Patel's office. The typist there didn't bring the letters to me for signature. Have never paid Plaintiff rent he has never asked for it. I don't know if first and 2nd Mortgagees have consented to this suit Plaintiff went to them about negotiation about which I knew nothing.

Ex. E. was signed on or about the same day as the 3 letters signed by me which have been handed to me in XX.

XX. Satchu - None.

Re-XD: I look at Ex.12 (Inamdar's letter demanding costs) It is dated 1st July 1954. A reply was written by Patel to Inamdar dated 2nd July. I produce it - tenders Ex. F. Those costs have not yet been paid.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Defendants'  
Evidence.

No. 9.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Cross-  
examination -  
continued.

Re-Examination

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Defendants'  
Evidence.

No. 9.

Mohamedali  
Jaffer  
Karachiwalla  
23rd August 1954  
Re-Examination -  
continued.

All of the letters which I sent off written after signing the settlement were sent off to their office. The difference between myself and the Plaintiff which prevented my signing the mortgage and taking Plaintiff's ...?.... was simply that he to be responsible for Blue Room and I was not prepared to take that responsibility. Also they said that if I didn't pay I was to submit to judgment and not seek to defend. I refused to accept those terms. Patel said that unless these additional terms were included, Plaintiff would not be prepared to accept the terms on Ex. E already agreed. 10

To best of my recollection it was about 15 - 20 days after day on which I initialled Ex. E that I was asked to accept responsibility for rent. I look at Ex. 11. It was drafted by C.A. Patel. Plaintiff present when original Plaintiff received letter before me. When I referred to having "settled the new case" I meant this case. I wasn't to receive any cash in respect of the 4th mortgage. It was all to be applied in satisfaction of outstanding liabilities. Plaintiff made some calculations and he arrived at sum of Shs.50,000/-. I look at first mortgage. I am not certain if Plaintiff showed me his calculations. I was satisfied at time that Plaintiff's figures were correct. Reason why in my affidavit of 8th March 1954, I referred to sum of Shs.62,000/- is that it was agreed if I did not pay Municipal taxes the Plaintiff would do so for me and the amount would be added to the mortgage debt. 20 30

Similar arrangement regarding rent. These together all amounted to Shs. 12,000

Plaintiff was to try to obtain consent of 1st and 2nd mortgagees to grant of 4th mortgage. So far as I know they were prepared to give it on my paying up all arrears of interest. Plaintiff was to pay them out of amount of 4th mortgage. No loan having been granted to me on 4th mortgage, I could not comply with new conditions. 40

To Court: Between time when I received letter from Doshi saying that all leases had been cancelled until I received the new lease the land remained under my power.

#### C A S E

Court asks Patel if he proposes to call evidence in relation to 1st Defendant also as to the alleged settlement.

Patel replies in affirmative.

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PLAINTIFF'S FURTHER EVIDENCE

No. 10.

CHIMANLAL A. PATEL.

CHIMANLAL A. PATEL, sworn

Advocate Supreme Court. Partner in firm of  
A.B.Patel & Patel, Advocates for Plaintiff.

10 After Plaintiff instituted present action,  
about 9th September, 1953, both Plaintiff and Defen-  
dant No.1 came to see me, with view to settling  
their differences. As first step Ex. E was prepared  
and initialled by both parties. The main term which  
could not then be settled was which should take in  
rent of tenants not paying rent regularly. Nothing  
could be settled re that mainly because of the rent  
of Blue Room which was a family concern of Defendant  
No.1. Amount of that rent was substantial £.90 per  
month. Defendant No.1 estimated goodwill of Blue  
Room at about £.3,000 he did not want his family to  
20 be turned out of that business. That term was left  
to be agreed later on. Thereafter several discuss-  
ions in my office both parties brought in new terms  
re one matter or another. Defendant No.1 wanted to  
get bigger amount of mortgage. My recollection is  
that the amount gradually increased from 50,000/- -  
Shs.67,000/-. Present case was to be considered  
settled on execution and registration of 4th mort-  
gage, and on additional variation being also regis-  
tered in respect of 3rd mortgage. Defendant also  
30 told me to have all drafts re variations and 4th  
mortgage confirmed by his advocate, Inamdar.  
Inamdar and I interested to see mortgage was regu-  
larly drawn and that everyone got his interest under  
the 4th mortgage. Agreement broke down on question  
of securing regular payment of rent for Blue Room.  
Thereafter about 10th November, Inamdar and I re-  
gretted that our efforts to settle had failed.

XXD. Doshi:

40 Exh. E. initialled by Plaintiff and 1st Defen-  
dant in my presence. Purpose of initialling was for  
there to be evidence of what they had decided at  
that time. At that time they were agreed as to  
everything except securing rent from Blue Room.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Further  
Evidence.

No. 10.

Chimanlal A.  
Patel,  
23rd August 1954  
Examination.

Cross-  
Examination

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Plaintiff's  
Further  
Evidence.

No. 10.

Chimanlal A.  
Patel,  
23rd August 1954  
Cross-  
Examination -  
continued.

Question of securing rent for Blue Room was to be decided later, but after discussion between the parties, it was to be incorporated in 4th mortgage.

On occasion of initialling it was agreed that question of what was to be done re arrears of rent should be held in abeyance because of the situation as regards Blue Room. I remember that Blue Room was specifically mentioned on occasion of initialling. First Defendant mentioned it first he was quite agreeable to Plaintiff doing whatever he liked with other tenants if they fell into arrears but he didn't want there to be any proceedings against Blue Room. He said that he wanted to be personally responsible for rent. Everyone was in a hurry. So we made the note that this point was to be decided later. 10

I think that the letters signed by Defendant on 9th September, were drafted by me, that was also after to Exh. 11 - the letter to Satchu & Satchu.

The words "the new case" in that letter means this case. 20

Court adjourns 4 p.m.

24th August 1954

Court resumes 10.45 a.m.

Witness warned still on oath

I look at Exh. 10. The words written in ink at end of document are in my handwriting. It is signed by Plaintiff. When parties signed the draft they accepted it on that date along with the additional terms in handwriting. No engrossment of mortgage was prepared incorporating these terms. A further draft in ink was prepared. It was prepared after Ex. 10. 30

Q. Do you remember Defendant No.1 telling you that Plaintiff went to collect 50/- per day from Blue Room for a few days in September.

A. I don't think Defendant No.1 told me so. But I think that the Plaintiff told me so. Although I am not certain as to amount collected.

No XX. - Satchu.

Patel: I only wish to say in re-examination that clause 6 of Exh.10 on P. 5 is in my writing later it was not acceptable by Defendant No.1. 40

Patel leaves box.

Patel: Not calling any other evidence in rebuttal.

No. 11.

FIRST DEFENDANT'S COUNSEL

(Objected to by Messrs. D.N. and R.N.  
Khanna, Advocates for the Appellant)

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 11.

First Defendant's  
Counsel,  
24th August 1954.

Doshi: Could split my address but that it would be more convenient to make them all together necessary my reply to comment on any cases cited by Patel re compromise by settlement.

10 Patel & Satchu: Agree course proposed by Doshi is most convenient.

COURT CALLS DOSHI:

First point is that while application for summary of judgment pending parties have fully adjusted this case.

20 ORDER 24 R. VI. Corresponding Indian Rule is Order 23 R. 3. Only material difference is that Indian Rule uses word "shall" while Kenya Rule uses word "may". May here is mandatory not permissive. Refers to Halsbury 2nd Edition Vol. 31 p. 571 - 572 "shall & may". A duty may exist ..... whereby those upon whom faculty conferred may be compelled to exercise it. Unless qualified by some such following words as "in its discretion" may usually mandatory.

30 Settlement alleged is proved to be by oral evidence and documentary evidence. Documentary evidence is Ex. E. and various letters drafted and typed in Patel's office and sent to various persons. In pursuance of Ex. E certain letters written Exs. 11 & 13 - 14, 5 etc. In one, and possibly two of the letters drafted by Plaintiff it is stated "I have settled the new case....." not, I am going to settle,

Main contention is that as soon as parties put their signatures on Ex. E. its terms became binding. Perfectly true that parties subsequently sought to introduce new term but any failure does not affect original agreement.

Chittaly Civil Procedure Vol. 2 (5th edition) p.2777.  
Note 7 p.2776 question whether party has agreed or not is question of fact.

40 Rule applies also to mortgage see 2775. P.2786  
- jurisdiction exercised up to time of judgment.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 11.

First Defendant's  
Counsel,  
24th August 1954  
- continued.

2793 - where compromise includes matters extraneous to suit is not unlawful and can't be entirely rejected.

Plaintiffs explanation of his non-signing of letters to tenants is that they were never brought to him.

Exhibit E, headed Terms of Settlement - Cl. No. 7 letters to be addressed to all tenants.

Court adjourns 12 p.m.

Court resumes 2.20 p.m.

10

Doshi continues:

In a compromise not necessary for all terms of bargain to be complied with before settlement becomes effective. Even if letters had not been written to Satchu and others, a binding settlement had been reached.

Sukhdo vs. Pathak Singh 1937 A.I.R. Patna P. 39.

In law consent of 1st and 2nd mortgagees unnecessary to grant of 3rd and 4th mortgage. Had 4th mortgage been sought without obtaining consent of prior mortgagees, Defendant No.1 would have committed further breach of antecedent mortgages but Plaintiff's position would have been no worse than if consent had been obtained because in any event 4th mortgage ranks after 1st and 2nd. Consent of 1st and 2nd mortgagees was a condition precedent to 4th mortgage.

20

Further there is evidence that first mortgagee was always prepared to consent to mortgage.

A compromise to which some of parties are not parties not wholly bound but may be enforced between the parties to it. First part of settlement provided for Plaintiff paying outstandings in respect of interest. Defendant to forego his costs previously awarded to him.

30

Part 2 of compromise provided for rates out of interest (?). Plaintiff virtually admits that he no longer wants the mortgage. Obvious that Ex.E not shown to Inamdar. Had it been so shown he might have advised his client that it constituted a settlement. Ex. E represents a concluded settlement. Only failure was in parties' attempt to revise the completed settlement. Ex.10 in no way affects Ex.E-

40

it is a mortgage which also incorporates certain other terms.

Legal effect of transaction was to change the status of the Plaintiff, making him a mortgagee in possession because he was to collect rents, etc.

Clause IV confers on mortgagee right to collect rents and charges him with duty of paying rates.

10 Ismailian Corporation wrote Ex. D. On 12th September, in reply to Exh. C. Ex. D. is in reality a consent because it is agreed that purpose of 4th mortgage was to pay existing obligations, nothing to go to 1st Defendant himself. Hence had Plaintiff had these amounts Defendant No.2 would have had no objection to grant of mortgage. As regards consent of 2nd mortgagee, evidence of Defendant No.1 is unchallenged that they were prepared to give consent.

Procedure is for court to record the terms of settlement and then to issue a decree in those terms.

Shri Sachidivail vs. Shri Naisihu 1927 A.I.R.P.C.57.

20 There was complete settlement when either Ex.E. or Ex. 10 signed. Chittaley p. 2776 "present rule indicates court has jurisdiction to inquire into whether there has been a lawful compromise. Plaintiff himself seems to have taken case for settled P. 12 of typescript.

30 Even in absence of any oral evidence to support the Defendant's case the letters are such as to demolish the Plaintiff's case. Both parties acted on settlement for few days; hence the Plaintiff actually collected rent.

Next ground of defence.

Evidence that when mortgage executed no lease in favour of Plaintiff. Mortgage was granted about month before lease executed - nobody can mortgage what they haven't got.

S.58 of Indian Transfer of Property Act.

Gower Vth Edition p.942 para. 1316.

Final part - equitable relief under S.86 or 87.

Doshi sits.

40

Court adjourns 4 p.m.

Court resumes 10.25 a.m.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 11.

First Defendant's  
Counsel,  
24th August 1954  
- continued.



In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 12.

No. 12.

PLAINTIFF'S COUNSEL

(Objected to by Messrs. D.N. & R.N. Khanna,  
Advocates for the Appellant)

Plaintiff's  
Counsel,  
25th August 1954

25.8.54

Patel:

Doshi's arguments have abandoned defence put in original defence and now relies only on plea that action was compromised.

Only question now to be dealt with is compromise. R. requires party alleging compromise must satisfy court that there has been lawful agreement for compromise. 10

Allegation of Defendant No.1 is that suit has been wholly adjusted. Defendant No.1 failed to prove any compromise. Plaintiff in fact established no compromise. Parties were only negotiating. Exhibits E. and ll go no further than state of negotiation.

Chittaley makes it clear that there must be a completed compromise. Chittaley p. 2777. 20

Facts are that in September, 1953, after notice of motion for summary judgment filed, parties started negotiations for settlement.

On 15th September, 1953, matters stood over to 19th October, for further settlement.

On 19th October, 1953, again stood over 29th October.

On 29th again stood over to 10th November, 1953.

On 10th November, Inamdar, Defendant No. 1's advocate then informed court no settlement. 30

Notice of motion heard and dismissed on 17th November. Subsequently Defendant No. 1 filed his defence. Subsequently application made by Plaintiff for receiver, Defendant filed an affidavit in reply dated 8th March, 1954 - in para. 7 of that affidavit he states that a 4th mortgage of \$62,000 was to be created by Plaintiff's wife - secondly

that that mortgage could not be created because an insignificant difference between Plaintiff and 1st defendant.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

Defendant No.1 admitted knowing that difference was slight. Also said in XX that reason why defence filed if matter settled was that he didn't remember that he had signed Ex. E. Conduct of parties clearly indicates that they didn't treat this as leading up to Ex. E. as settlement.

No. 12.

Plaintiff's  
Counsel,  
25th August 1954  
- continued.

10 Defendant No.1 said negotiations were behind hand as result of Plaintiff's mentioning that defendant No.1 should be personally responsible for rent of Blue Room. If there was completed agreement in first place, would 1st Defendant have waited until now to raise this plea. Defendant explains failure to raise settlement earlier by saying Inamdar never informed of Ex. E. At any rate Inamdar had draft of Ex. 10 which was also initialled by parties; that draft is dated 7th October, 1953. Defendant bound by advice of his advocate. Hence bound by statement that no settlement arrived at. Defendant admitted reading affidavit of March, 1954. Where parties have made a compromise they must come to court properly if court is to enforce it.

20

Alternatively, even if parties have compromised matter they have subsequently cancelled the compromise. Compromise can be rescinded just as can any other contract.

Exhibit E.

30 Clause 7. What is to happen in mind of Defendant is to be decided later.

Contract to be complete requires all terms to be agreed. As was explained in Patel's evidence. Omission as to what was to be done re arrears of rent before case marked settled. S.62 of Indian Contract Act.

40 If parties agree to substitution of new contract or to rescind the original contract must not be enforced (?), parties having initialled Ex. 10 can't rely on Ex. E. Clearly Ex. 10 is only draft P.2 of Ex.10 "AND WHEREAS the Mortgagor being desirous of adjusting and settling all litigations. There was clearly contemplation that litigation not yet settled. As 4th Mortgage clearly condition precedent to settlement. Ex. 11 is of importance as it clearly shows that all terms had not been agreed upon. "... certain terms which will be

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry  
                    

No. 12.

Plaintiff's  
Counsel,  
25th August 1954  
- continued.

recorded in due course". Also it clearly contemplates other formalities which are to be complied with. From this letter it follows that one of the conditions was that Satchu will be paid by first Defendant not so paid.

Ex. X (First Mortgage) Clause 3 renders consent of 1st mortgagee prerequisite to creation of any other mortgage. Defendant merely testified that assigns of 2nd mortgage had given consent not that assignee had given it.

10

As regards letters by Defendant No.1 to Registrar re marking decree in earlier case settled. Only a few days before the hearing of this case counsel Defendant was deciding the point for which he wrote to Registrar asking him to have case marked settled.

Court adjourns 12 p.m.

Court resumes 2.20 p.m.

PATEL continues:

Burden of proof on party making application.

20

ORDER XXIV R. 6.

Fact that Defendant No.1 hasn't called Inamdar his then advocate should be held against him Inamdar acted in negotiations for Defendant No.1.

Most material reason why Inamdar had it recorded on Nov. 10th that parties had not arrived at settlement, could only have been proved by Inamdar. Court should hold that reason why Inamdar's evidence not tendered was that it would have been unable to .....

30

Defendant No. 1.

If possible to make any decree on alleged compromise it would be most unjust and inconvenient to do so. Second and 3rd defendants have not given this consent to alleged compromise. Further by Ex.10, Defendant No.1 has agreed to take 4th mortgage from defendant's wife who was not a party to these proceedings. S.41 of Indian Contract Act. Again alleged compromise relates to matters beyond scope of this suit.

40

Was due to failure to agree re Blue Room -

Defendant No.1 wanted security of tenure for Blue

Room and to be put in preferred position.

Further contends that where it is necessary for a formal document to be drawn up - there is no binding contract until formal document is drawn up.

Ex. E clearly contemplates the drawing up of:-

- (a) 4th mortgage,
- (b) variation of 3rd mortgage,
- (c) consent order by Court,
- (d) letters to tenants.

10 Ex.10 is by its very nature, a draft. Subsequent portions written in ink show that it was only a draft. Next proposition is that if document contains reciprocal promises it must be decided which is to be done first. Here although Ex. E. says nothing about settlement of case, assuming that this case was the settlement agreed to - there are 2 things to be done - the 4th mortgage and terms settled. First the mortgage must be created - then settlement. Fourth proposition is that party who  
20 commits a breach of contract can't thereafter come to Court and insist on fulfilment of contract Clause 6 of Ex.10 not agreed to by Defendant No.1 although he signed the document.

Hence he wasn't bound (?) on the document so can't now seek to enforce it.

Authority for proposition that nothing must remain to be done for contract to be regarded as concluded.

30 Pollock and Mulla Indian Contract Act 5th Edition p. 49 - 51.

Until Clause 7 settled between parties no final agreement. S.39 of Indian Evidence Act where a party has refused to perform or disabled himself from performing promise may put an end to contract.

Subsequent to Ex. E. the defendant No.1 asked for an increase in amount to S.62,000/-.

40 Defendant not addressed any letters to tenants re payment of rent. S.52 of Indian Contract Act - reciprocal promises are to be performed in order specified if no order specified in that order which nature of transaction requires.

Nature of transaction required the Defendant to execute the mortgage and write letters to tenants.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 12.

Plaintiff's  
Counsel,  
25th August 1954  
- continued.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 12.

Plaintiff's  
Counsel,  
25th August 1954  
- continued.

Fourthly letters were to be written requiring tenants to pay rent to Plaintiff or 4th mortgagee from 1st October, 1953 and rent to be collected by Plaintiff or 4th mortgagee from 1st October. So too variation in interest to apply from October, 1953.

Sixthly (?) amount of mortgage agreed on in or about October, 1953 not sufficient now to pay all amounts to be paid. So too amount of 4th mortgage inadequate to pay off liabilities as they stand at present. 10

Rule 6 gives greater discretion to the Court than does word stated in Indian C.P.C. Under Kenya provision Court has discretion.

Reason why it is contended that "may" is permissive only is that in Rule 4, both words "may or shall" be used in one sense (?).

Following are conditions precedent to settlement:-

1. Execution of mortgage and registration. 20
2. Variation of 3rd mortgage payment to mortgagees.
3. Letters to be written to tenants.
4. Decision by parties as to what steps shall be taken against tenants who do not pay regularly with special reference to Blue Room.
5. Consent of prior mortgagees authorising creation (?) 4th mortgage.

S. 63 of Indian Contract Act Promisee may dispense with performance vide applicant saying that 4th mortgage not created by reason of small difference. 30

So on 10th November, defendant had it recorded that no settlement had been reached.

S. 31 of I.C.A.

Patna case cited by Doshi is only authority for proposition that a contract does not merely require performance to render it enforceable.

Defence lays great stress on advantages to Plaintiff for settlement but that is of no concern to Court. 40

Term in first mortgage forbidding further mortgages without consent disqualifies mortgagee from obligation to create 4th mortgage without consent.

In the Supreme Court of Kenya at Mombasa District Registry

Evidence shows that it was not Plaintiff but Defence who went back on bargain.

No. 12.

Summarize arguments about compromise.

Plaintiff's Counsel,  
25th August 1954  
- continued.

10

- 1) Ex. E. not final agreement as something still remains to be done by parties.
- 2) If Ex. E. is a contract it has been broken by Defendant No.1 in asking for greater amount of loan.
- 3) Defendant No.1's conduct since Ex. E. is that of person who says no agreement at all.
- 4) If there was any agreement Defendant No.1 has dispensed with performance.
- 5) Ex. E. by its nature requires final documents to be created.

As regard Ex.10 which is alternatively (?) relied upon by defence.

20

- 1. Ex.10 is a draft and requires final document.
- 2. It has to be accepted by Counsel for both parties.
- 3. Counsel did not approve.

Finally, nature of Ex. E and Ex. 10 render it obvious that before any compromise could be made, all conditions precedent must be fulfilled.

Plaintiffs (?) motion for appointment of receiver may stand over pending judgment.

No. 13.

No. 13.

30

SECOND AND THIRD DEFENDANTS' COUNSEL

Second and Third Defendants' Counsel,  
25th August 1954

(Objected to by Messrs. D.N. & R.N. Khanna, Advocates for the Appellant).

Satchu: If Plaintiff succeeds, provision should be made for prior rights of 1st and 2nd mortgagees. Instructions are to support Patel in all his arguments.

C.A.V.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 14.

J U D G M E N T

No. 14.

Judgment,  
11th November,  
1954.

In this suit the plaintiff seeks inter alia to enforce a third mortgage (hereinafter referred to as this mortgage) which was created in his favour by the first defendant by a written instrument dated the 29th day of October registered under the Land Titles Ordinance (hereinafter referred to as this Ordinance) on the 28th day of November 1951 over Plots Nos. 259, 260 and 261, all of Section XVIII, Mombasa, of which plots the first defendant is now and, as the plaintiff alleges, was at the time of the creation of this mortgage the lessee, upon the grounds that in breach of the terms of the mortgage the defendant has failed to pay certain principal sums and interest accrued due under two prior mortgages and to pay upon due dates the ground rent and the municipal rates in respect of such plots and the instalments at interest and certain insurance premia which he was required to pay under this mortgage. The second and third defendants are the persons in whom the two prior mortgages already referred to are vested and are joined merely for conformity as no relief is sought against them. Although in the defence the breaches complained of were denied and it appeared from certain of the cross-examination directed to a Mr. Paroo who was called for the plaintiff that the defendant was seriously disputing the allegation that the failure to pay insurance premia upon due dates constituted a breach of his contractual obligations, in cross-examination he admitted, after some pressure, that he had in fact committed all of the breaches specified in a letter (Exhibit 8) dated the 2nd of July 1953 written to him by the plaintiff's advocates, those breaches being the breaches complained of in this suit. In effect therefore the two defences relied upon are: First that the mortgage sought to be enforced is in law invalid by reason of the fact that at the time when that mortgage was executed, one of the plots to which it purports to relate was not vested in the first defendant, and secondly, that subsequent to the institution of these proceedings, they were compromised by agreement between the plaintiff and the first defendant.

The history of the first defendant's title to Plot No.259 - the plot, title to which he now

alleges not to have been validly vested in him on the date of the execution of this mortgage, as revealed by him under cross-examination and by the evidence of a Mr. de Souza, is that in or about the year 1947 he became the assignee of a lease of this plot. In or about the year 1951 however judgment was given by this Court in C.C. No.210 of 1950 (a suit to which this defendant was not a party but the case file of which was tendered in evidence) in which it was held that the parties who had purported to create the lease in favour of the defendant's predecessor in title, were not entitled so to do. In consequence of this decision the defendant was required to surrender the lease then held by him and was granted another lease of Plot No.259 by the parties entitled to grant such lease upon the same terms and for the same consideration as the original lease.

In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

—————  
No. 14.

Judgment,  
11th November,  
1954 - continued

In the course of his cross-examination of the plaintiff, Mr. Doshi who appeared for the first defendant, advanced in justification of a question as to the plaintiff's religious belief, that if the plaintiff were a Muslim he proposed at the appropriate stage to submit that by virtue of certain provisions of the Indian Transfer of Property Act, Muslim law was applicable to this aspect of this case and that under that law the mortgage was invalid by reason of there not having been vested in the first defendant at the time of the creation of mortgage a valid leasehold interest in Plot No.259. In his concluding address, however, Mr. Doshi did not cite any Muslim authorities in support of this proposition and merely referred to para. 1316 of Gour's Law of Transfer in British India, 5th Edition, at p.943. The passage so referred to appears to me to lay it down that the English equitable rule is now accepted in India - that rule is that although a grant of future property does not operate as an immediate alienation of that property, it can be enforced the moment that the property comes into being if the contract is one of which the Court will decree the specific performance. Here the Court would not in my view have any difficulty in decreeing the specific performance as it is perfectly clear what are the parcels of land intended to be mortgaged.

According to Mr. de Souza, a clerk in the Land Registry, the sequence of events subsequent to the judgment of the Court in C.C.210 of 1950 already referred to was that on the 28th day of November 1951 the following documents were registered in



In the Supreme  
Court of Kenya  
at Mombasa  
District Registry

No. 14.

Judgment,  
11th November,  
1954 - continued.

relation to the title of this land in the following order:

- (a) a surrender of the then existing lease which had been executed on the 1st March 1946,
- (b) the grant of a lease dated 19th November 1951 to the first defendant,
- (c) a series of mortgages, including this mortgage.

Section 57 of the Ordinance requires every document affecting any holding or any interest in any holding in relation to which a certificate of title has been issued under the Ordinance, to be registered under the Ordinance, and Section 59 is, so far as material, in the following terms:-

10

"No lien, charge or mortgage (other than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or other enactment) shall be created or effected so as to be of any legal validity upon or in respect of a holding or interest therein, unless the same be created or effected by a last will, of which probate is registered under this Ordinance, or by the order of a competent court or by a duly executed instrument, such order or instrument being duly registered under this Part..."

20

Consequently I think that any instrument by which a mortgage of lands to which the Lands Titles Ordinance is applicable is purported to be created, is devoid of any effect until it is registered under the Ordinance. I can find no provision in the Ordinance which renders documents which are executed upon some date prior to the date of their registration retroactive upon registration to the date of their execution. Hence it seems to me that both the lease to the first Defendant and this mortgage took effect upon the day of their registration. A similar conclusion can be reached by two other courses of reasoning.

30

At the time of the execution of this mortgage, the first defendant appeared upon the register as the holder of a leasehold interest in the relevant land. Admittedly that entry was subsequently cancelled by order of the Court but it seems to me that until it was cancelled, not merely ordered to be cancelled, the first defendant was entitled to create a mortgage upon the land, and therefore that the mortgage of the 19th November was validly executed.

40

Furthermore, there is a principle of law that

where a person in whom is vested a voidable title to personal property purports to transfer that title to someone else and subsequently acquires a perfect title, that perfect title will go to feed the defective title previously transferred by him. In this connection reference should be made to the observations of Vaughan Williams L.J. & Buckley L.J. in Whitehorn Brothers v. Davison 1911 I.K.B. p.463. In that case the plaintiffs who were manufacturing jewellers, supplied a necklace to one Bruford with a view to its being sent to one of Bruford's customers on approval. Bruford however pledged the necklace with the defendant, a pawnbroker. Subsequently Bruford informed the plaintiffs that his customer had accepted the necklace but required to be given credit for it and ultimately it was arranged that the plaintiffs should invoice the necklace as sold to Bruford in consideration of certain bills of exchange which he gave to them. Bruford then absconded and the defendant having refused to return the necklace to the plaintiffs, they brought action against him for, inter alia, detinue. At p.474 Vaughan Williams, L.J., after reciting the introductory facts continues:

"Ultimately they" (the plaintiffs) "made a contract with him for the sale of the necklace to him out and out on the terms that the two bills were to be taken for the price. It is by reason of this event that I have come to the conclusion that the question of larceny by a trick becomes of no importance in this case. The title of Bruford to the necklace was, at any rate for the time being, perfected by that transaction, and would go to feed the title of the defendant, his pledgee, the result being that, if the defendant's title is not vitiated by bad faith on his part or notice, he has a good title to the necklace."

So, too, at p.480, Buckley L.J., says:

"The plaintiffs assented to that, and they ultimately sold him the necklace out and out upon the terms that he should give two bills for the price, one at five months and the other at six months. The position, therefore, is that, assuming that there was originally larceny by a trick, and that Bruford had stolen the necklace, he comes to the plaintiffs, who do not know that, and asks them to sell the necklace to him, and they accordingly do so, and he pays them the price by

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bills. After that, it appears to me immaterial for the present purpose whether he obtained possession of the goods originally by larceny or not. The defendant's title is obtained in this way. Upon the hypothesis that the original transaction was a larceny, then on August 5 when the necklace was pledged with him, he had no title to it at all. If Bruford had stolen it, he had that which is sometimes incorrectly called a void title, but which is really no title at all; Bruford could not then give the defendant a title. Upon this hypothesis, the defendant on August 5 got no title, but afterwards, when Bruford became the owner of the necklace, and had the property in it, his title would go to feed the defendant's title; and as from that time it appears to me to be immaterial whether Bruford originally stole the necklace or not." 10

Likewise, in Butterworth v. Kingsway Motors Ltd. ET AL 1954 II All E.R. at p.694 it was held by Pearson J. that where the hirer of a motorcar under a hire purchase agreement in breach of that agreement purported to sell the car to a fourth party (but none the less continued to pay the instalments due under the hire purchase agreement) and the fourth party acting in good faith purported to re-sell it to the third party, who also in good faith, purported to re-sell it to the defendant who in turn re-sold to the plaintiff, the good title to the car which was ultimately acquired by the fourth party upon completion by her of the payments due under the hire purchase agreement, went to feed the defective titles successively purported to be created by her and the third party respectively. 20 30

While I know of no authority precisely in point, I can see no reason why the principle upon which these decisions rest should not apply with equal force to the purported creation of mortgages of leasehold interests which are, historically, a form of personal property as distinct from real property. 40

I turn to the consideration of the second contention of the first defendant that the plaintiff compromised these proceedings with the first defendant subsequent to action brought. As this is in the nature of a plea of confession and avoidance, the burden of proving the existence of this compromise rests upon the defendant. According to the defendant in his examination in chief, after the 50

10 institution of these proceedings, discussions took place between the plaintiff and himself as a result of which Exhibit E which, in examination he maintained was a final settlement of these proceedings, was drawn up and initialled by all parties. Subsequently a typewritten copy of Exhibit E was taken by Mr. Patel, the plaintiff's advocate to Mr. Inamdar, the advocate then acting for the first defendant, but the typewritten draft so taken contained a term to which the plaintiff never assented. In cross-examination the defendant, although considerably amplifying his account of events subsequent to the initialling of Exhibit E remained unshaken as to that document having been a concluded agreement for the compromise of this action, and this version appeared, strange to say, to be borne out by an answer of the plaintiff in cross-examination in which he stated categorically "when we both initialled the paper" (Exhibit E) "I took it that this claim was settled". It also appears to be borne out by the admitted facts that subsequent to the initialling of Exhibit E, certain letters were addressed by the first defendant to the 2nd and 3rd Defendants seeking permission (which was requisite under the terms of the mortgages to those defendants) to raise a 4th mortgage from the plaintiff and to permit of the collection by the plaintiff of rents from the relevant premises, and to the advocates acting for the 2nd and 30 3rd defendants informing them that he had settled the case and requesting them, in accordance with the terms of such settlement to pay to them certain costs already awarded to the 2nd and 3rd defendants in certain related proceedings, as well as by the plaintiff's having subsequently for a short period collected those rents. In re-examination however the plaintiff said that the agreement had not gone through and that the settlement was not to be made until the 4th mortgage had been executed and registered.

40  
50 Mr. Patel on the other hand, the advocate for the plaintiff, gave evidence in rebuttal of the plaintiff as to this agreement and according to him Exhibit E was in reality merely a note of the point at which the parties had arrived in their discussion with a view to settlement at the time when that document was drawn up. The first defendant's demeanour impressed me as being that of an intelligent and very astute, although not necessarily particularly scrupulous business man while the plaintiff seemed to me to be by no means a clear thinker, and I am quite satisfied that Mr. Patel's

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evidence represents the real nature of Exhibit E, although I have no doubt that the plaintiff believed at that time that negotiations had reached a point when he could regard the case as being at an end and that the letters already referred to were drafted by Mr. Patel (as is admitted) in anticipation of a settlement being arrived at. In this view of the facts I am fortified by the defendant's conduct. Had anyone of his obvious acumen regarded Exhibit E as a concluded agreement for the settlement of this dispute, I have no doubt at all that instructions would have been given to his then advocate which would have resulted in this matter (in which at the time when Exhibit E was drafted application for summary judgment under Order 35 had already been made) being finally disposed of on the next occasion on which it came before the Court, - instead of which on that occasion, the 15th September 1953, it was adjourned with the consent of Mr. Doshi who then held Mr. Inamdar's brief for the defendant until the 19th October in anticipation of settlement, and thereafter was successively adjourned for the same reason to the 29th October, and 10th November, and finally when the application for summary judgment came on for hearing on the 18th November, that application was, after argument in which no reference at all was made to the matter having been settled, dismissed upon the ground that the relief claimed was not confined to relief which could properly be granted upon such application. Moreover thereafter application was made for the appointment of a receiver and upon the proceedings in relation to that application no reference at all was made to this alleged settlement. Nor can I credit that had the first defendant ever regarded Exhibit E as a concluded agreement to settle the matter, instructions as to the nature and existence of Exhibit E would not have been given to Mr. Doshi, at the time when or immediately after the defendant caused Mr. Doshi to be substituted for Mr. Inamdar as his advocate upon the record, i.e. on the 15th May 1954 instead of waiting until some ten days before the hearing as was stated by Mr. Doshi when he sought leave to make the amendment pleading this alleged settlement, and the first defendant's explanation for not informing his advocate that the matter was settled that he had forgotten it, is completely incredible.

In the light of the foregoing I have no doubt at all that Exhibit E was not intended by either party to be a concluded settlement of this action.

Quite apart from the view which I have arrived at upon the evidence in relation to Exhibit E, it appears to me upon examination of that document that it cannot be regarded as a concluded agreement. As was said in May & Butcher Ltd. vs. The King 1934 II K.B. at p.17 by Lord Buckmaster at p.20:

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10 "It has long been a well recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all",

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and by Lord Warrington of Clyffe at p. 22:

"The decision of this case depends upon the application of a well-known and elementary principle of the law of contract, which is that, unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation."

20 Para. 7 of Exhibit E is as follows: "Letters to be addressed to all tenants; if rent not paid within certain time, terms to be agreed as to what will happen in default." The premises to which this mortgage relates are premises which are let to a number of establishments for business purposes at rentals amounting in the aggregate to more than S.3000/- per month, one of these establishments being a restaurant known as the Blue Room occupied by the Defendant's wife and son. In my view a term of the nature of para. 7 supra clearly renders Ex-

30 hibit E if an agreement at all, an agreement in which a critical part of the contract matter is left undetermined. That this is so becomes all the more apparent upon reference to para.6 which provides for the mortgagee to be in possession and to collect the rent and to apply the rent so collected towards payment of interest to the first and second mortgagees. Clearly had the defendant and the plaintiff been unable to agree as to what action should be taken in relation to tenants who

40 might default in the payment of their rent - a not unlikely eventuality if the occupants of the Blue Room had so defaulted - the rights sought to be conferred upon the mortgagee would have been rendered nugatory.

Alternatively Mr. Doshi contended that the negotiations subsequent to the initialling of Exhibit E which culminated in the preparation of Exhibit 10 - a draft mortgage - constituted a

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concluded settlement of this matter. That negotiations took place and that Exhibit 10 was drawn up with a view to settlement is not disputed but in my view those negotiations never resulted in a concluded contract. Exhibit 10 is headed "draft" and although the name of the defendant appears at the end of the schedule, it is neither signed nor sealed by either party. Furthermore the first defendant said in cross-examination that he was prepared to sign a fourth mortgage if prepared in accordance with the terms of Exhibit E which Exhibit 10 is not and denied that the amount to be secured by such mortgage was ever increased from S.50,000/-, the figure referred to in Exhibit E. He further denied that he had ever agreed to be personally responsible for the rent of the Blue Room. Upon examination of Exhibit 10 it is apparent that although the sum intended to be secured by that mortgage as originally typed was 50,000/-, in the final recital of the preamble the figure 50 and the word 'fifty' where they appear in the statement of the amount to be secured are struck out and replaced by the figures 68 and the words 'sixty-eight' and in the second line of Clause (1) the figures 50,000 and words 'fifty thousand' are amended in ink by the substitution of the figures 56 and words 'fifty-six thousand', and in another place in the same clause those figures and words are amended in pencil by the substitution of the figures 68 and words 'sixty-eight thousand'. Furthermore Exhibit 10 contains a number of pencilled additions to the typewritten script and in the schedule which is hand-written there is a specific provision for the defendant to pay the rent of the Blue Room and for that rent not to be allowed to fall into arrear. The alterations in the text of Exhibit 10 are in my view wholly consistent with the plaintiff's version of what happened and with his reason for ultimately declining to agree to any compromise, that version being that the defendant was continually trying to vary the terms by increasing the amount to be secured by the mortgage. I have no hesitation therefore in entirely rejecting the evidence of the defendant that any agreement for a compromise was arrived at and I do not see how it is possible to regard an unsigned document which, although initialled by one of the parties, contains terms which that party specifically denies having agreed to and contains alterations and additions which are not initialled, as a concluded agreement for the settlement of this suit.

Regarding the evidence as a whole I am satisfied that the negotiations merely reached a point

which may fairly be characterised as being an agreement that if and when the first defendant executed a fourth mortgage for a consideration and containing terms approved by the plaintiff and agreed between the parties, these proceedings would be settled, but so far from any such fourth mortgage having ever been executed, the parties failed to agree alike as to the consideration to be secured by the mortgage and as to certain of those terms, and therefore I am satisfied that neither Exhibit E alone nor that exhibit taken in conjunction with everything that passed subsequent thereto including the letters addressed by the Plaintiff to the 2nd and 3rd defendants and to their advocate, and including also Exhibit 10 can be regarded as a concluded settlement of this suit.

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In the defence it was alleged that the first defendant had not received valid notice of the alleged breaches of covenant. In evidence however he admitted that the breaches of covenant alleged in Exhibit 8 in fact existed at the time of the institution of these proceedings and as that document was produced from the custody of his advocate, it appears to me that there can be no doubt that he received it. No argument was addressed to me with a view to establishing that this document was not a valid notice and therefore this defence does not appear to have been relied upon.

For the foregoing reasons there will be judgment for the plaintiff.

(Sd.) HENRY MAYERS.

11/11/54

No. 15.

O R D E R

15.11.54

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The substantial matter now to be determined is how long should be allowed to the first Defendant within which to redeem or order to discharge this mortgage. Mr. Doshi contends that the difficulty in raising so large a sum as that requisite in the present case, is such as justifies the Court in

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No. 15.

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1954.



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No. 15.

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granting to the first Defendant the maximum period - that of 6 months - and he urges further that there has been no delay in these proceedings which is attributable to the conduct of the first Defendant.

In my view the purpose of the section conferring upon the Court to postpone an order for sale for a period not in excess of 6 months is to prevent a mortgagee acting oppressively. In the instant case the mortgagee has during the last 35 months received interest in respect of one month only. Moreover the very proposal advanced by Mr. Doshi as being the course by which the Defendant hopes to raise the moneys necessary to pay off the mortgage, is a course which was present to his mind in December 1953 but which if he has pursued it in the interim, would not appear to have been successful.

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I order an account to be taken by the Registrar and the amount found to be due to the plaintiff and 1st and 2nd mortgagees to be certified to this Court on or before the 15th day of December 1954. The first Defendant will have 3 months from the date on which such account is delivered in the Court within which to pay all such sums as may be found to be due upon the filing of such account and in default of such payment within such period, preliminary decree to issue for sale of the mortgaged property free from prior mortgages and a final decree to issue against the 1st defendant for the amount if any by which the sum realised upon such sale is executed to discharge the first defendant's liability to the plaintiff in full.

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Plaintiff and 2nd and 3rd Defendants will tax the costs of these proceedings. Proceeds of sale to be applied in schedule of costs due to first and second mortgagees in priority to that due to 3rd mortgagee. The Notice of Motion seeking the appointment of a receiver will be dismissed but no order as to costs is made in respect of that motion.

HENRY MAYERS, J.

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15.11.54

No. 16.

NOTICE OF APPEALIn the Supreme  
Court of Kenya  
at Mombasa  
District RegistryIN HER MAJESTY'S SUPREME COURT OF KENYA  
AT MOMBASA DISTRICT REGISTRY

CIVIL CASE No.213 of 1953

Notice of Appeal  
24th November  
1954.

NOORALLY RATTANSHI RAJAN NANJI

Plaintiff

versus

1. MOHAMEDALI JAFFER KARACHIWALLA
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHIMJI PARDHAN

Defendants

TAKE NOTICE that the 1st named Defendant herein, Mohamedali Jaffer Karachiwalla, being dissatisfied with the decision (judgment) of the Honourable Mr. Justice Henry Mayers, given herein at Mombasa in open Court on the 11th day of November 1954, intends to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision (judgment).

DATED at Mombasa this 24th day of November, 1954

Sgd. D.D. Doshi

for DOSHI &amp; CHOCHAN

ADVOCATES FOR THE APPELLANT

To:-

1. The Assistant Registrar,  
Supreme Court of Kenya,  
Mombasa.
2. The Registrar,  
Court of Appeal for Eastern Africa,  
Nairobi City.
3. M/s. A.B. Patel & Patel,  
Advocates,  
Mombasa (on behalf of the Plaintiff).

The address for service of the Appellant is  
c/o Messrs. Doshi & Chohan, Advocates, Fort Jesus

In the Supreme  
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at Mombasa  
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No. 16.

Notice of Appeal  
24th November  
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Road, P.O. Box 549, Mombasa.

NOTE: A Respondent served with this notice is required within fourteen days after such service to file in these proceedings and serve on the Appellant a notice of his address for service for the purposes of the intended appeal and within a further period of fourteen days to serve a copy thereof on every other Respondent named in this notice who has filed notice of an address for service. In the event of non-compliance, the Appellant may proceed ex-parte. 10

FILED the 25th day of November, 1954 at Mombasa.

REGISTRAR.

No. 17.

NOTICE OF ADDRESS FOR SERVICE,  
2nd December 1954

(Not Printed)

No. 18.

Preliminary  
Decree for Sale,  
21st January  
1955

No. 18.

PRELIMINARY DECREE FOR SALE

IN HER MAJESTY'S SUPREME COURT OF KENYA AT 20  
MOMBASA DISTRICT REGISTRY

CIVIL CASE No.213 of 1953

NOORALLY RATTANSHI RAJAN NANJI Plaintiff

versus

1. MOHAMEDALI JAFFER KARACHIWALLA  
2. ISMAILIA CORPORATION LIMITED  
3. KARMALI KHIMJI PRADHAN Defendants

CLAIM for (a) Shs.163,874/94 being Shs.150,000/- principal sum under an Indenture of the third mortgage, and Shs.13,874/94 interest 30

thereon as set out in the said Mortgage from 1st February, 1952 to 31st July, 1953 (b) Further interest on the said principal sum of Shs.150,000/- at the rate of and in the manner set out in the Indenture of the third Mortgage from 1st August 1953 till judgment; (c) Interest at 9% per annum on Shs.163,874/94 from the date of filing this suit till judgment; (d) An order for the sale of the said hereditaments and premises together with the buildings standing thereon, if the Defendant No.1 fails to pay the total decretal amount by a date to be fixed by the Court; payment to Defendants Nos.2 and 3 of their respective amounts due under their respective mortgages and payment to the Plaintiff his decretal amount; (e) All proper directions to be given and all necessary accounts to be taken; (f) Costs of this suit; (g) Interest at 6% per annum on the decretal amount and costs; (h) Personal decree for balance (if any) after the realisation of the security in full; and (i) Any other relief this Court may deem fit to grant.

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Court of Kenya  
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District Registry

No. 18.

Preliminary  
Decree for Sale  
21st January,  
1955 - continued

WHEREAS this suit came on the 11th day of November, 1954 for final disposal before the Honourable Mr. Justice T.H. Mayers in the presence of Mr. Chimanlal A. Patel, Advocate for the Plaintiff, Mr. D.D. Doshi, Advocate for the Defendant No. 1 and Mr. A.C. Satchu, Advocate for the Defendants Nos.2 and 3.

IT IS HEREBY DECLARED THAT the amount due to the Plaintiff from the Defendant No. 1 on account of principal, interest and costs calculated up to the 15th day of March 1955 is Shs.196,005/21 as appears by the registrar's certificate in the First Schedule hereto and that such amount shall carry interest at the rate of 6 per cent per annum until realization AND IT IS HEREBY FURTHER DECLARED THAT the amount due to the Defendant No.2 from the Defendant No.1 on account of principal, interest and costs calculated up to the 15th day of March, 1955 is Shs.105,138/70 only as appears by the registrar's certificate in the Second Schedule hereto and that such amount shall carry interest at the rate of 6½ per cent per annum until realization AND IT IS HEREBY ALSO FURTHER DECLARED THAT the amount due to the Defendant No.3 from the Defendant

In the Supreme Court of Kenya at Mombasa District Registry

No. 18.

Preliminary Decree for Sale 21st January, 1955 - continued

No.1 on account of principal, interest and costs calculated up to the 15th day of March 1955 is Shs.23,598/93 only as appears by the registrar's certificate in the Third Schedule hereto and that such amount shall carry interest at the rate of 9 per cent per annum until realization AND IT IS DECREED AS FOLLOWS:-

(1) That if the Defendant No.1 pays into the Court the three amounts so declared due on or before the said 15th day of March 1955, the Plaintiff and the Defendants Nos.2 and 3 shall deliver up to the Defendant No.1 or to such person as he appoints all documents in their possession or power relating to the properties under the said charges, and shall, if so required, discharge the said charges from all incumbrances created in favour of the Plaintiff or the Defendants Nos. 2 and 3 or any persons claiming under them;

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(2) That if such payment is not made on or before the said 15th day of March 1955, the properties charged or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment firstly of what is declared due to the Defendant No.2 as aforesaid, secondly in payment of what is declared due to the Defendant No.3 as aforesaid and thirdly of what is declared due to the Plaintiff as aforesaid, together with subsequent interest and subsequent costs of the Defendants Nos.2 and 3 and the Plaintiff and that the balance, if any, be paid to the Defendant No. 1;

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(3) That if the net proceeds of the sale are insufficient to pay such amounts and such subsequent interest and costs in full, a Personal Decree be issued against the Defendant No.1 in favour of the Defendant No.2, Defendant No.3 and or the Plaintiff as the case may be, for the amount of the balance.

AND IT IS FURTHER DECREED THAT the Notice of Motion seeking the appointment of a receiver be dismissed but no order is made in respect of the costs of that motion.

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GIVEN under my hand and the Seal of the Court this 21st day of January, 1955 at Mombasa.

Sd. HENRY MAYERS, JUDGE, H.M. SUPREME COURT OF KENYA

FIRST SCHEDULE

THIS IS TO CERTIFY THAT the amount due to the Plaintiff from the Defendant No.1 on account of principal interest and costs calculated up to the 15th day of March, 1955, is Shs.196,005/21.

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District Registry

No. 18.

SECOND SCHEDULE

THIS IS TO CERTIFY THAT the amount due to the Defendant No.2 from the Defendant No.1 on account of principal, interest and costs calculated up to the 15th day of March, 1955 is Shs.105,138/70.

Preliminary  
Decree for Sale  
21st January,  
1955 - continued.

THIRD SCHEDULE

THIS IS TO CERTIFY THAT the amount due to the Defendant No.3 from the Defendant No.1 on account of principal, interest and costs calculated up to the 15th day of March 1955 is Shs.23,598/93.

FOURTH SCHEDULE

ALL THAT piece or parcel of land containing 0.1075 of an acre or thereabouts situate in the Island of Mombasa in the District of Mombasa known as sub-division No.259 (Orig. No.237/16) of Section No. XVIII which is more particularly demarcated and delineated on Deed Plan No.34702 attached to the Indenture dated the 18th day of July 1944 which piece of land was assigned by the Defendant No. 1 by an Indenture of Lease dated the 19th day of November 1951 and registered in Mombasa Registry in Volume L.T. XII Folio 152/19 for a term of ninety nine years from the 1st day of March 1946, at the annual rent of Shs.2,000/- on the terms and conditions therein contained;

ALL THAT piece or parcel of land containing 0.0881 of an acre or thereabouts situate in the Island of Mombasa in the District of Mombasa known as subdivision No.260 (Orig. No.237/17) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34703 attached to the Indenture dated the 18th day of July 1944, which piece of land was assigned to the Defendant No.1 by an Indenture dated 1st day of April 1949 and

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Decree for Sale  
21st January,  
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registered in the Mombasa Registry in Volume L.T. XII Folio 155/3 for a term of ninety nine years from 1st day of March 1946 created by an Indenture of Lease dated the 1st day of March 1946 at the annual rent of Shs.1,500/- on the terms and conditions therein contained;

ALL THAT piece or parcel of land containing 0.0881 of an acre or thereabouts situate in the Island of Mombasa in the District of Mombasa known as Subdivision No.261 (Orig. No.237/18) of Section No. XVIII which is more particularly demarcated and delineated on Deed Plan No.34704 attached to the Indenture dated the 18th day of July 1944 which piece of land was assigned to the Defendant No.1 by an Indenture dated the 1st day of April 1949 and registered in the Mombasa Registry in Volume L.T. XII Folio 228/2 for a term of ninety-nine years dated the 10th day of March 1947 at the annual rent of Shs.1,800/- on the terms and conditions therein contained.

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Sd. R.M.H. RODWELL  
DEPUTY REGISTRAR  
H.M. SUPREME COURT OF KENYA.

Law Courts  
Mombasa.

21st January 1955.

No. 19.

No. 19.

Final Decree for  
Sale,  
20th May 1955.

FINAL DECREE FOR SALE

UPON READING the preliminary decree for sale passed in this suit on the 21st day of January 1955 and the chamber summons filed by the Advocates for the plaintiff and dated the 31st day of March 1955 for final decree for sale and the affidavits of the plaintiff and his advocate, both sworn on the 16th day of March 1955 and annexed to the said chamber summons and after hearing Mr. Richard P. Cleasby, Advocate for the Plaintiff, Mr.D.D. Doshi, Advocate for the Defendant No.1 and Mr. A.C.Satchu,

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Advocate for the Defendants Nos.2 and 3 and it appearing that the payment directed by the said preliminary decree for sale has not been made by the Defendant No.1 or any person on his behalf;

In the Supreme Court of Kenya at Mombasa District Registry

No. 19.

Final Decree for Sale, 20th May 1955 - continued.

10 IT IS HEREBY ORDERED AND DECREED THAT the immovable properties charged in favour of the defendant No.2, defendant No.3 and the plaintiff and described in the aforesaid preliminary decree for sale be sold and that for the purpose of such sale the defendant No.2, the defendant No.3 and the plaintiff shall produce before the Court or such officer as it appoints all documents in their possession or power relating to the said immovable properties;

20 AND IT IS HEREBY FURTHER ORDERED THAT the moneys realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of sale) in payment firstly of what is due to the defendant No.2, secondly in payment of what is due to the defendant No.3 and thirdly of what is due to the plaintiff under the aforesaid preliminary decree for sale and under further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant No.2, defendant No.3 and the plaintiff for costs incurred subsequent to the aforesaid preliminary decree and such other costs, charges and expenses payable together with such subsequent interest as payable and that the balance, if any, shall be paid to the defendant No.1 or other person entitled to receive the same.

30 AND IT IS HEREBY ALSO FURTHER ORDERED THAT if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the defendant No.2, the defendant No.3 and or the plaintiff, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

40 GIVEN under my hand and the Seal of the Court this 20th day of May 1955 at MOMBASA.

Sgd. ? ?

JUDGE

H.M. SUPREME COURT OF KENYA

I certify that this is a true copy of the original.

Sgd. ? ?

Registrar,  
Supreme Court, Nairobi.



In the Court  
of Appeal for  
Eastern Africa

No. 20.

MEMORANDUM OF APPEAL

No. 20.

Memorandum of  
Appeal,  
22nd January  
1955.

IN HER MAJESTY'S COURT OF APPEAL FOR  
EASTERN AFRICA

CIVIL APPEAL No.6 of 1955

B E T W E E N

MOHAMEDALI JAFFER KARACHIWALLA

Appellant

- and -

1. NOORALLY RATTANSHI RAJAN NANJI
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHEMJI PRADHAN

Respondents

10

(Appeal from a Judgment of the Supreme Court  
of Kenya at Mombasa (Mr. Justice Henry  
Mayers) dated 11th November, 1954 in Civil  
Case No.213 of 1953

BETWEEN

NOORALLY RATTANSHI RAJAN NANJI

Plaintiff

- and -

1. MOHAMEDALI JAFFER KARACHIWALLA
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHEMJI PRADHAN

Defendants)

20

MOHAMEDALI JAFFER KARACHIWALLA, the Appellant  
above-named, appeals to Her Majesty's Court of  
Appeal for Eastern Africa against the whole of the  
decision above-mentioned on the following grounds,  
namely:-

1. The Learned Judge has erred in entering judg-  
ment for the Plaintiff as prayed. The mortgage  
deed, executed by the Appellant in favour of the  
Respondent No.1 (Exhibit 7), by its terms required  
that the principal amount of Shillings 150,000/- is  
repayable on 30th June 1968 and the Learned Judge  
should have held that the default clause therein,  
requiring repayment of the said principal amount,  
on breach by the Appellant of any of the covenants

30

on his part to be performed, is bad in law as it is a stipulation by way of penalty.

In the Court  
of Appeal for  
Eastern Africa

-----  
No. 20.

Memorandum of  
Appeal,  
22nd January  
1955 - continued

2. The Learned Judge erred in applying the principles of English Law and equity in construing the legal effect of the mortgage (Ex. 7) which was created before the vesting of the leasehold estate in the Appellant in respect of Plot No.259 Section XVIII Mombasa.

10 3. The Learned Judge in construing the effect of the said mortgage should have applied the principles of Mohamedan Law applicable thereto, the parties to the said mortgage being Muslims by religion.

4. The decision of the Learned Judge in so far as it relates to the question of settlement between the Appellant and Respondent No.1, subsequent to action brought, is contrary to the weight of evidence.

20 5. The Learned Judge erred in holding that the Appellant regarded the Draft Fourth Mortgage (Ex. 10) as not being in terms of the Settlement Note (Ex. E). The Learned Judge has confused the Draft Fourth Mortgage with a subsequent draft not produced at the trial. It was the said second draft and not Exhibit 10, which the Appellant had rejected.

30 6. The Learned Judge has misconstrued the "Terms of Settlement" initialled by the Appellant and Respondent No.1 (Ex. E in C.C. No.213 of 1953) and misjudged the circumstances in which it was made and the legal consequences thereof.

7. The Learned Judge has misconstrued the Draft of the Fourth Mortgage (Exhibit 10 in C.C. No.213 of 1953) and misjudged the circumstances in which it was made and the legal consequences thereof.

40 8. The Learned Judge should have found that the Appellant had accepted and was willing to abide by the Terms of Settlement (Ex. E) and the Draft Fourth Mortgage (Ex.10) which jointly or severally constituted a binding settlement between the Appellant and Respondent No.1 and he should have found that the suit was fully adjusted by virtue of the said settlement and should have dismissed the suit and ordered the Appellant and Respondent No. 1 to adhere to the terms of the said settlement.

9. The Respondents Nos.2 and 3 are joined in this

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appeal merely as formal parties and are not directly affected by the appeal.

WHEREFORE the Appellant humbly prays that the Appeal be allowed with costs here and in the Court below and that the judgment of the Lower Court and all proceedings subsequent thereto, if any, be set aside.

DATED this 22nd day of January, 1955 at Mombasa.

Sd. K.K. CHOHAN

for DOSHI & CHOHAN

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ADVOCATES FOR THE APPELLANT

To,

The Honourable the Judges of Her Majesty's  
Court of Appeal for Eastern Africa;

And to,

1. Noorally Rattanshi Rajan Nanji,  
c/o Messrs. A.B. Patel & Patel,  
Advocates, Mombasa.

2 & 3. Ismailia Corporation Ltd., &  
Karmali Khimji Pradhan, c/o Messrs.  
Satchu & Satchu, Advocates, Mombasa.

20

The address for service of the Appellant is the  
Chambers of Messrs. Doshi & Chohan, Advocates,  
Mombasa.

FILED the 22nd day of January, 1955 at Mombasa.

(Sgd.) R.M.H. RODWELL

DEPUTY REGISTRAR OF THE COURT OF APPEAL

No. 21

NOTICE OF ADDITIONAL AND REFRAMED GROUNDS OF  
APPEAL TO BE READ AS SUPPLEMENTAL TO THE  
ORIGINAL GROUNDS OF APPEAL.

In the Court  
of Appeal for  
Eastern Africa

No. 21.

Notice of  
additional and  
reframed grounds  
of appeal to be  
read as supple-  
mental to the  
original grounds  
of appeal,  
7th February,  
1955.

TAKE NOTICE that the Appellant will ask for the leave of the Court to put forward the following additional and reframed grounds, at the hearing of this Appeal :-

- 10 1. Prior mortgagees should not have appeared or received costs against the Appellant.
2. Property should (if at all) have been ordered to be sold subject to prior mortgages, without directing repayment or realisation of those.
3. The only covenant was to repay on 30-6-1968 and there was no express covenant to pay earlier (nor was there any room for any inconsistent implied covenant other than to pay on 30-6-1968), in any eventuality, and the suit was misconceived and founded upon no cause of action at all.
- 20 4. On a true construction, of the covenant for repayment, the redemption clause, notwithstanding any liberty reserved to the mortgagor, there was no cause of action to sue for sale or to recover any judgment (which was never passed) for the loan personally against the mortgagor.
- 30 5. The mortgage did not vest the entire estate of the mortgagor, but had a term less the last two days, and the mortgage had not been so constituted as to fall under Section 58 (e) of the Transfer of Property Act, 1882 so as to confer any right to sue for sale under Section 67 thereof.
6. The Respondents Nos. 2 and 3 are affected by grounds 1, 2 and 3 hereof.

DATED this 7th day of February, 1955

Sgd. K.K. Chohan

Advocates for the Appellant

1. To the Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa;

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No. 21

Notice of  
additional and re-  
framed grounds  
of appeal to be  
read as supple-  
mental to the  
original grounds  
of appeal,  
7th February,  
1955 - continued

2. To Messrs. Atkinson & Company, Advocates,  
Mombasa;
3. To Messrs. Satchu & Satchu, Advocates, Mombasa.

The address for service of the Appellant is  
care of Messrs. Doshi & Chohan, Advocates, Mombasa.

FILED the 7th day of February, 1955, at Mombasa.

Sd. R.M.H. RODWELL,

DEPUTY REGISTRAR,  
H.M. COURT OF APPEAL FOR EASTERN AFRICA.

Filed by:-

10

Doshi & Chohan,  
Advocates,  
Mombasa.

No. 22

President's Notes  
2nd February,  
1955.

No. 22.

PRESIDENT'S NOTES

2.2.55 Coram Worley, Vice President.  
O'Connor, Chief Justice.  
Jenkins, Justice of Appeal.

Budhdeo, Chohan with him for Appellant.  
Cleasby for Respondent No.1.  
A.C. Satchu for Respondent Nos. 2 & 3.

20

Budhdeo: D.D. Doshi who has been dealing with this  
matter from the beginning is in India at present  
and is not expected to return before end of March.  
Therefore request the appeal be not heard this  
sittings of the Court.

Cleasby: I object.

Satchu: I too object.

Buddheo: Judgment on 11.11.54.

Notice of Appeal on 25.11.54

30

Appeal lodged on 22.1.55

Appeal has not been advertised so far as we know.

Court: It was in a list prepared.

In the Court  
of Appeal for  
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No. 22.

Budhdeo: D.D. Doshi went to India on 17/12 after 8 years in Kenya. Eye trouble. Justice for appellant requires him to have services of D.D. Doshi to argue his appeal. Appellant has been given time to pay up to 15.3.55 - respondent will not be prejudiced.

President's  
Notes,  
2nd and 10th  
February 1955 -  
continued.

10 Court: We cannot agree to take it out of list altogether but will give counsel as long as possible to get ready.

Fixed for hearing Thursday 10th at 9 a.m.

N.A. Worley, V.P.

10.2.55 Coram Jenkins, Justice of Appeal.

Chohan for Appellant.  
Cleasby for Respondent No.1  
M.C. Satchu for Respondents Nos. 2 & 3.

20 Chohan: Doshi returning in middle of March. Due to sail from Bombay 7th March. Ask that date be fixed for after middle of March and for hearing to be at Nairobi.

Cleasby: My instructions are to oppose any delay. At last application the court decided that the case should be heard without delay. I understand Mr. Khanna was briefed for today's hearing.

Chohan: That is so.

ORDER: Hearing set down for Nairobi on a date to be notified in due course.

ENOCH JENKINS, J.A.  
10.2.55

30 19.3.56 Coram: Worley, President  
Briggs, Justice of Appeal.  
Bacon, Justice of Appeal.

19th March 1956

D.N. Khanna for appellant (D.D. Doshi with him).  
Cleasby for 1st Respondent.  
Satchu for 2nd & 3rd Respondents.

P.O. by Satchu for 2nd & 3rd Respondents.

In the Court  
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No. 22.

President's  
Notes,  
19th March 1956 -  
continued.

P.53 - Notice of Appeal - addressed to R.1's ad-  
vocates only. R.54(5).

Original Memo: para. 9.

Supplementary Memo: para. 6.

Briggs: It was never correct that R.2 & R.3 were  
affected.

Satchu: 1891 1 L.R. 13 All 443

Mata Din Kasodhan v. ?

We had to be joined - directly affected.

No appeal lies against R.2 & R.3.

10

Khanna: No notice - taken by surprise.

They accepted service of Memo. and record.

Court to Satchu: You appeared without objection  
on 2.2.55 and took hearing date for 10.2.55. Not  
heard because Court could not be constituted owing  
to illness. We think you have waived any objec-  
tions that could have been taken.

Khanna opens:

Original Memo. ground 1 and add. memo. grounds 3 &  
4.

20

No cause of action before 30.6.68.

I apply for leave to argue additional grounds.  
Ground 2 is certainly new. Connecticut Fire Insur-  
ance Co. v. Cavanagh 1892 A.C. 473, 480, 75 L.J.  
CH.480

Cites: Williams v. Morgan 1906 1 Ch. D. 804

Ct. p.107-108 clause (e) distinguishes this case.

Khanna: I say this is repugnant to covenants to  
repay and to reconvey. Or rather it is a liberty.

I say no right to foreclose here because of default. 30

Halsbury Vol.23 p.462 paras. 678-680.

Edwards V. Martin 1856 25 L.J. Ch.284 27 L.T.(Os)  
164.

Kidderminster Mutual v. Haddock 1936 W.N. Pt.I &  
II 58.

Bolton v. Buckingham 1891 1 Q.B. 278 64 L.T. N.S.  
(223) 279.

Forbes v. Gitt 1922 1 A.C. 256 (Py Co.) 126  
L.T. 616.

Rules for construction of deed.

Khanna: I say most important clause is the redemption clause and it concludes matter.

Act: no covenant to pay before June '68.

But there is liberty reserved to mortgagee to sue on default - no covenant but mortgagor to pay on default.

10 I say here no repugnancy in the covenants.

Watling v. Lewis 1911 1 Ch.D. 414.

p.104 Mortgage Deed.

p.105 Covenant to pay capital and interest on 30.6.68.

p.105 Covenant to pay interest monthly.

p.107, I say para (e) is otiose - mortgagor would  
108 always have right to sue.

20 p.109 Para (h) - I say this does not refer to (f) or if it does, it is inconsistent with clause to pay on 30.6.68. I say obligation to reconvey is absolute if principal and interest repaid by 30.6.68.

Khanna: Ground 2. T.P.A.1882 Sect.96. 1895 22 Cal.33.

NB. This is a new ground; not taken at trial.

30 Court: There is no point here which goes to jurisdiction. No breach of any statutory restriction. Implication is that prior mortgagees consented. We won't hear you further on that.

Ground 1.

I concede that A's advocate at trial considered that Rs. 2 & 3 were necessary parties to be served with the Plaint, but I say that they need not have appeared at the trial. On the application for sale, their consent could have been annexed - if it was not then the sale would be subject to their prior mortgages.

40 Remuneration of Advocates Order 1955 rule 65 - Eng.O.65 R.27 Regn.23.

Their interests were protected by the plaint.

Kenya O.21 r,61(3)

To 9.0 a.m. on 20/3.

In the Court  
of Appeal for  
Eastern Africa

No. 22.

President's  
Notes,  
19th March 1956  
- continued.



In the Court  
of Appeal for  
Eastern Africa

No. 22.

President's  
Notes,  
20th March 1956  
- continued.

Resumed 9.10 a.m. 20/3.

Khanna:

Settlement - rely on admission by R.1 on  
p.18.

I appreciate that this was admission of law  
but I say it is clear on document.

p.103 Parties acted on it: Ex. E.

First suit had been dismissed with costs -  
these orders waived in Ex.E.

Registrar's letter re decree. 10

Wallis v. Semark 1951 2 T.L.R.222

p.127 Ex.E finalised the agreement.

p.128 Ex.E clause (7) Judge held this was  
inchoate - further terms to be arranged.  
Initialled by parties - agreement was to de-  
cide on action if and when default agreed.

p.114 Draft 4th mortgage. - Not necessary that  
this should be definite enough for S.P.

A was not separately represented.

A has signed the draft mortgage and someone 20  
illegibly initialled it.

Briggs: Quaere, correct view is that it was  
the 4th mortgage which was to effect settle-  
ment.

Khanna: No: so long as Ex. E is legally  
enforceable agreement. Chitale Civil Pro-  
cedure 5th Ed. II 2780 and p.2794 Consent  
decree.

Cleasby: (called on on (1) construction (2)  
settlement) 30

True construction of deed, K's argument  
fallacious.

p.104 - Reads Ex.7. Concede that use of "on" in  
first l.4 clause is not very apt. Prima  
facie, to pay on that date and not before.

p.108 - But there is covenant in clause (f) to pay  
by instalments.

p.109 Clause (h) - "as herein before provided".  
True construction is:

1. Loan of Shs.150,000. 40

2. Covenant to repay Shs.150,000 on 30.6.68  
by paying off 43 stipulated instalments  
so that whole paid off by 30.6.68.

3. ditto to pay interest monthly.

4. Covenant to reconvey if money and interest repaid by 30.6.68.
- p.107 5. Clause (e) provides what is to happen if the mortgagor does not perform his covenants. Effect has to be given to every word:- clear that he can sue before 30.6.68. I say that if principal sum can be recovered under the deed, a right of sale must arise. If it merely meant a personal judgment could be obtained, it would not be mortgage.

In the Court  
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President's  
Notes,  
20th March 1956  
- continued.

10

Ind. T.P.A. sect.67 (1882) (up to 1907)

(N.B. No express power of sale in the mortgage)

Yeo Htean Sew v. Abu Zaffer Koreeshee.

27 I.A. 98. (1900) 27 Cal.941 (P.C.)

indistinguishable from instant case.

Payne v. Cardiff R.D.C. 106 L.J. K.B.626  
(C.A.)

20

Hanworth M.R. at 629. - suit for two instalments.

As to Williams v. Morgan - exceptional case - purely question of construction of deed.

Simple covenant to pay principal on named date and interest on same. No covenant to pay interest "in the meantime".

Forbes v. Gitt.

If no repugnancy, whole is to be read together. Covenant to repay has not been nullified but qualified.

30

Was action compromised?

p.42 Judgment Ind. 4-10 - finding of fact on credibility.

p.31, Patel's evidence. Ex.E - could not even pur-  
32 port to be final settlement. Clause (1) - interest at 12% from what date? Clause (7) - Mortgagee was to take rents as M. in possession - but not agreed what steps he could take if arrears - particularly as to Blue Room.

40

Clause (12) - what type of mortgage?

As to R.1's admission

See p.23 L.22 RXn.

Judge accepted respondent.

If settled, why was defence filed?

In the Court  
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President's  
Notes,  
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- continued.

Satchu: I associate myself with Cleasby.

As to ground 2 - 1.

(Court - don't wish to hear you on ground 2)

Then as to costs:

T.P.A. sect.85 - we were necessary parties.

O.34 r.1.

Chitaley III 5th Ed. 3009.

Gour T.P.A. 5th Ed. Vol.II 1580.

To avoid multiplicity of suits.

Cites: Kenya (Mombasa) Civil Case 48/52 - Connell 10  
J. on 20/8 ruling

(stopped)

Khanna in reply:

As to costs, I say R.2 & 3 were not entitled to participate as full parties; they were not entitled to instruction fees, etc. which have been allowed.

Court: Matter for taxing master - no application for review.

As to compromise:

20

I say Patel's evidence inadmissible to vary document.

Agreement not conditional on its being fully carried out.

I say Ex.E was final and effective settlement.

Construction of the mortgage deed.

The Py: Co: case has no application to this case - report does not shew if there was reconveyance clause.

All important clause is (h): does it stop A from taking all monies due on 29.6.68 and demanding reconveyance. 30

It is conceded that covenant to pay on 30.6.68 is inconsistent with covenant to pay by instalments - therefore earlier clause prevails.

"As hereinbefore provided" refer to covenant to pay on 30.6.68 cannot refer to provision for instalments, premia, etc. - merely refers to amount due.

Sect.67 must be construed according to the particular deed under consideration. 40

C.A.V.

N.A. Worley, P.

No. 23.

NOTES OF MR. JUSTICE BRIGGS

In the Court  
of Appeal for  
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No. 23.

19.3.56 10.0 a.m.Coram: Worley, P.  
Briggs, J.A.  
Bacon, J.A.Notes of Mr.  
Justice Briggs,  
19th March 1956.D.N. Khanna for Appellant (D. Doshi with him).  
Cleasby for 1st Respondent.  
Satchu for 2nd and 3rd Respondents.10 Satchu: Preliminary point. Rule 54(5).P.53 Notice of Appeal. Not addressed to  
Respondents 2 & 3. Additional grounds of  
appeal directly involve Respondents 2 & 3  
admittedly so - para. 6.

Qua these grounds, we are necessary parties.

Para.9 of original grounds, even if true then,  
cannot be true now.Mata Din Kasodhan v. Kazam Husain (1891) 13  
All.44320 We were essential parties in the suit. Equal-  
ly essential in appeal. Appeal so far as it  
concerns Respondent 2 & 3 should be dismissed.Khanna: Respondents 2 & 3 were served with memor-  
andum, and appeared on earlier hearing. Too  
late to object. On 2.2.55 they did appear.  
Satchu then objected to adjournment. Fixed  
for 10th, but Court could not sit. Satchu  
again appeared.30 Court: Satchu took a step in the appeal on 2.2.55?  
Amounts to a waiver?Satchu: Judgment 11.11.54. Very little time.Court: Preliminary objection disallowed - waived  
by taking step at previous time.Khanna: Ground 1 of original and Ground 4 of new  
grounds of appeal. Nothing payable till  
30.6.68. I ask leave under Rule 72 to rely  
on the additional grounds.Connecticut Fire V. Kavanagh (1892) A.C. 473,  
480.40 Court: You may rely on Grounds 3 & 4.

In the Court  
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Eastern Africa

No. 23.

Notes of Mr.  
Justice Briggs,  
19th March 1956  
- continued.

Khanna: Williams v. Morgan (1906) 1 Ch. 804.

Notice calling in money when just default  
of intt.

(No provision that principal to become  
immediately due in case of default in pay-  
ment of interest.)

Not treated as a slip, but deliberate.  
Proviso for redemption p.108 p.107 Para (e).  
I do not say so much that this creates a  
penalty, but that it is repugnant. Not in  
usual form. 10

Respondent 1 will be entitled to a recon-  
veyance, in spite of default.

23 Hailsham 462 Ss. 678-680.

Edwards v. Martin (1856) L.J. 25 Eq.284-  
285.

Kidderminster Mutual v. Haddock (1936)  
W.N. 158.

Bolton v. Buckanham (1891) 1 Q.B. 278.

Forbes v. Git (1922) 1 A.C. 256. 20

On repugnancy.

Watling v Lewis, (1911) 1 Ch.D. 414.

do. If wholly repugnant, earlier provision  
prevails.

Cannot enlarge the obligation.

Mortgage pp.104-105.

Initial covenant, (k) (e) (f)

(h) no condition for performance of covenants

Ground 2 of Supplementary Memorandum.

Position of prior mortgagees 30

S.90 of Transfer of Property Act 1892.

In England it is discretionary - can be  
done either way - secus in India.

S.96-97 (Consent required).

The prior encumbrancers were in no position  
to consent, because their mortgage monies  
were not due.

Kanti Ram v. Kutubuddin, (1895) 22 Cal.33

I admit they did not refuse their consent.

Court: In view of the fact that there was juris- 40  
diction to make such an order as this in some

circumstances, which appear to obtain, the new point should not be taken now. We will not hear you further on this ground.

In the Court  
of Appeal for  
Eastern Africa

Khanna: Ground 1.

No. 23.

I cannot now contend that Respondents 2 & 3 were not necessary parties because my client's counsel below said that they were.

Notes of Mr.  
Justice Briggs,  
19th March 1956  
- continued.

Rule 65, Advocates Remuneration Ord.

Eng. O.65 r.27 reg. (23)

K. Ord. 21 r.61(3).

10

Court: Discretionary - we cannot interfere.

to 9.00 a.m.

20.3.56 9.0 a.m.

20th March 1956

Khanna: Settlement. Admissions p.18. Parties started acting on the settlement.

103. Exh. 5(c).

No attempt was made to pay the costs. They relied on the settlement as barring the claim.

20

Conduct goes a long way to show the settlement was intended to be binding.

Wallis v. Semark (1951) 2 T.L.R. 222.  
I rely on Exh. E at p.127

and on Exh. 10 at p.114

Cl. 7.

Cl. 5. There is a draft memorandum of mortgage.

(The recital suggests that the settlement was only to be complete on execution of the mortgage).

30

Chitaley Civil Proc. 5th ed. Vol. 2 2780.  
2794.

Cleasby: (Not called on on grounds 1 & 2 of supp. memo.)

On construction

Covenant to pay principal in 1968 and intt. regularly monthly.

Clause (f)

" (h)

In the Court  
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Notes of Mr.  
Justice Briggs,  
20th March 1956  
- continued.

Read together Loan for repayment by 1968 by  
43 stipulated instalments covenant to pay  
intt. monthly.

Clause (e) all becomes due.

If the principal sum is due before the date  
of legal redemption.

S.67 (1882 Ind. Transfer of Property Act  
as amended to 190)

Yeo Htean Sew v. Abu Zaffer Koreeshee (1900) 27  
Cal. 941 P.C. 27 I.A.

10

Red. date. 22.10.99

Suit 30.1.99 default in intt.

Sale was allowed, notwithstanding that date  
of redemption not reached, because principal  
monies became due.

Payne v. Cardiff R.D.C. 100 L.J.K.B. 629.

Can sell for instalments due, even though  
others not yet due.

Williams v. Morgan (1906) 1 Ch. 805.

No covenant for punctual payment of interest. 20

Settlement of action.

42. Judgment.

31-2 Patel's evidence.

If correct no settlement. Exh. E does not  
look like final settlement. Item 1 is incom-  
prehensible without further terms. 4th mort-  
gage and deed of variation of 3rd mortgage  
both needed before the settlement could be  
complete.

p.23. This evidence accepted.

30

Satchu: I adopt Cleasby's argument on the points  
he has taken.

Ground 2 of add. memo. (Stopped).

Ground 1 -do-

Appearing. s.85 of T.P.A.

We were essential parties to the suit.

Chitaley 5th Vol.III 3009.

Mombasa S.C.C.S. 48/52.

Khanna: Costs. Defendants 2 & 3 did not have to  
plead and didn't. Need only notify interest

40

and retire. No instructions for brief. These have been allowed.

In the Court of Appeal for Eastern Africa

Court: That was a matter for the taxing officer, no appeal from him is before us.

No. 23.

Khanna: The original order could be modified.

Settlement.

Notes of Mr. Justice Briggs, 20th March 1956 - continued.

Patel's evidence is inadmissible to interpret, alter or add to the doct.

No issue as to approval by Defts. advocate

10 No conditions pleaded. Agreement final and binding without mortgage, and pleaded.

Constr. of mortgage.

Yeo Htean Sew v. Abu Zaffer, 27 I.A.98, 101.

No inconsistency in the clauses there.

S.67.

Fayne v. Cardiff, turns on s.101, 2 P.A. 1925.

Here the repugnancy of the clauses makes s.69 inapplicable.

20 ".....As hereinbefore provided" in cl. (h) must be read with "due", not with "repay".

C.A.V.

F.A. BRIGGS.  
J.A.

27.3.56. as before.

Judgment read by President.

Appeal dismissed with costs.

Sd. F.A. BRIGGS J.A.

Objected to by Messrs. D.N. and R.N. Khanna.

30

No. 24.

No. 24.

NOTES OF MR. JUSTICE BACON

Notes of Mr. Justice Bacon, 19th March 1956.

19 March '56.

Appeal by 1st Defendant against judgment of Supreme Court for:

(1) Shs.196,005/21 in favour of Plaintiff (1st



In the Court  
of Appeal for  
Eastern Africa

No. 24.

Notes of Mr.  
Justice Bacon,  
19th March 1956  
- continued.

Respondent) and 6% interest thereon until realization,

(2) Shs.105,138/70 in favour of 2nd Defendant (2nd Respondent) and 6½% interest thereon until realization,

(3) Shs.23,598/93 in favour of 3rd Defendant (3rd Respondent) and 9% interest thereon until realization,

(4) Sale of properties charged if amounts not paid into Court by 15th March 1955,

(5) Consequent distribution of proceeds of sales,

(6) Personal Decree against 1st Defendant (Appellant) for balance unprovided for, if any, by proceeds of sale.

10

19.3.56 10 a.m.

Coram: Worley, P.  
Briggs, J.A.  
Bacon, J.A.

D.N. Khanna for Appellant (D.D. Doshi with him) 20

Cleasby for 1st Respondent

M.C. Satchu for 2nd & 3rd Respondents.

M.C. Satchu: Preliminary point. Rule 54(1) and (5). No notice of p.53 (Notice of Appeal) was served on Respondents 2 and 3. See Additional Grounds of Appeal para 6: Respondents 2 and 3 are affected by these grounds; but we've had no notice. And see para. 9 of original Memo.

See Mata Din Kasodhan v. Kazim Husain I.L.R. (1891) 13 All. 443: It was essential that Appellant should have made us parties to his appeal. Otherwise no appeal lies.

30

Khanna for Appellant: This point is a surprise at last moment. These 2nd and 3rd Respondents accepted service of memo of appeal.

Per Curiam: You, Satchu, waived any objection you might have taken when on 2 February 1955 the question of fixing a hearing date was heard. Original memo of appeal was dated 22nd January 1955. You appeared without objection.

40

Khanna for Appellant opens appeal:-

See Ground 1 of original memo plus grounds 3

and 4 of additional: the time for a sale had not arisen; only due to arise on 30th June 1968 under terms of this third mortgage. That was the redemption date.

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10 I ask for leave to refer to Additional Memo:  
Rule 72(1). Even when a new point of law is raised this Court may allow it to be raised: See Connecticut Fire Insurance Co. v. Kavanagh (1892) A.C.473 at 480. "It is not only competent but expedient to allow it" where no new evidence is required. On the main points of appeal see Williams v. Morgan (1906) 1 Ch. 804: £10000 lent under a Deed of 1 January 1900, with covenants to pay interest at  $\frac{1}{2}$  yearly intervals and to repay the loan on 1 January 1914. Borrower not bound to repay before.

20 On 26 July 1905 default in interest. But on 3rd January 1906 mortgagee sued for repayment of capital. Held, they couldn't sue until due date for repayment: an express covenant to repay on a specified date excluded any right to recover earlier. Instant case on all fours. If the covenant to repay is dependent on failure to pay interest, the date for the former may be accelerated. Here, proviso for redemption is at p.109 L.12 (h). (And see p.108).

See Williams v. Morgan esp. at p.807. I submit this mortgage is in identical terms. The 1st Respondent will be bound to reconvey on the express date.

30 (No stipulation in that mortgage, as here, that in event of non-payment of interest whole principal becomes repayable).

Hals. 23, 462, paras 678-9-680.

Time when right of foreclosure arises depends on proviso for redemption, in England. But here we still go on the 1881 form of mortgage by assignment not by conveyance.

40 Edwards v. Martin (1856) 25 L.J. Eq. 284: There the proviso for redemption was on the other side of the line, but the V.C. adopted the dictum of the L.C., for which see at p.285.

Kidderminster Mutual Ben. Blg. Soc. v. Haddock (1936) W.N. 158: Express covenant for punctual payment of interest in order to keep open the legal right of redemption and stave off foreclosure. Exactly the same clause here. (Query: examine carefully).

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Bolton v. Buckanham (1891) 1 Q.B. 278.  
64 L.T. 279.

Partic. per Lord Esher M.R. passim.

That case shews that where there is an inconsistency between 2 clauses, the proviso for redemption and covenant to pay must prevail.

On the repugnancy point see -

Forbes v. Git (1922) 1 A.C. 256  
126 L.T. 616 P.C.

Held that there was repugnancy, and the earlier clause was to prevail, (the case of a deed). 10

(But their Lordships said that, if the later clause only modified the earlier, then the whole deed was to be read together).

I say (1) where the redemption clause is independent, that is the end of it;

(2) there's no covenant to pay the whole sum in case of default, so there's no inconsistency here, because there are not two covenants by the same person to pay on different dates. 20

Watling v. Lewis (1911) 1 Ch. 414 shews that you can't destroy an obligation expressed in an earlier clause in a deed by means of another and subsequent clause, but you may limit or qualify a previous clause.

Now see this third mortgage:-

Dated 29 October 1951.

See p.104-108

(Clause (b) near bottom p.106 does not cover the principal sum borrowed.) 30

p.108 clause (f) is inconsistent with both the proviso for redemption and with the covenant to pay on 30th June 1968.

p.109 para (h): (the only question is: to what does that relate back?)

As to ground (2) of Additional Memo:-

See S.96 of Transfer of Property Act (which applies to Kenya): a mortgaged property may be sold free from a prior mortgage with the consent of the prior mortgagee. 40

See S.97: priority of dealings with proceeds of Sale.

See S.92:

One authority on S.96:-

(1895) 22 Calcutta 33.

Per Curiam: Since you can't shew that 2nd and 3rd Respondents did NOT consent to this form of judgment, we won't hear you more on this point; you can't raise it now for first time; the form of judgment was regular.

10

Khanna: Ground 1 of Additional Memo:- 2nd and 3rd Respondents were necessary parties to be served with plaint, but not necessary parties at trial.

See R.65 of Remuneration of Advocates! Order 1955 - at p.10 Cf. R.S.C. O.65 r.27 regn. (23) in precisely same form: See Notes thereon under 2nd caption.

See Kenya R.S.C. 0.21 r.61(3).

20.3.56

20th March 1956

20

Lastly compromise: We rely on this case having been compromised by settlement: see p.18.

Parties started acting on the settlement: See p.103 Ext. 5C. Agreed under the settlement that present Appellant should pay all parties' costs. Registrar was there saying "you're no longer entitled to certain costs - you waived them by your settlement."

30

See Wallis v. Semark (1951) 2 T.L.R. 222: consideration or not, an agreement intended to be acted on and acted on in fact is enforceable.

For finalization of settlement here I rely on p.127 Ext. E "Terms of settlement" initialled by both parties. As for para (7) thereof, the trial Judge said this was inchoate, i.e. an agreement to agree. Ext.10 on p.114 was the agreed draft 4th mortgage.

President: But as for para (7), Appellant tried to hold out for a promise that if his wife defaulted they would not sue her.

40

Khanna: In para (7) they merely record that if and when there is a dispute of that kind it will be dealt with.

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Ext. E on page 127 is sufficiently precise to have enabled the 4th Mortgage to be drawn, which was done. Appellant (who desired to act for himself in that matter) initialled the draft - and it came out of the custody of the 1st Respondent.

The mortgage was not itself the settlement, but it arose out of the settlement: the recital at p.114 - 115 may be badly phrased - admittedly it's not accurate - but that's just bad drafting and in any event only a recital.

10

1st Respondent back out of the settlement. Chitaley Code of Civil Procedure 5th Edn. Vol. 2 p.2780, at top of page. At p.2794: "Execution of consent decree". Where certain terms are not included in the operative part of the settlement they're not enforceable.

To sum up:-

No decree for sale could be made until 30 June 1968. All my other points arise only if that point fails.

20

Per Curiam: We wish to hear Respondent on -

- (a) Construction of 3rd mortgage deed.
- (b) Alleged settlement of action.

Cleasby: (A) It is said against me that there was no breach by Appellant of a condition which made the principal sum recoverable by sale by mortgagee.

See this 3rd mortgage: p.104 onwards. At p.105: the covenant to repay. I concede that a covenant to pay "on" a certain date is inconsistent with payments before.

30

But see cl.(f) at p.108.  
and cl.(h) at p.109.

The three clauses mean this -

- (1) a loan of 150,000/-
  - (2) a covenant to repay by stipulated instalments ending on 30 June 1968
  - (3) a covenant to pay interest monthly
- and (4) clause (h), note word "by", and words "as hereinbefore provided".

Now see clause (e) at bottom p.107, which expressly provides for what is to happen on breach of any covenant.

40

S.67 Indian Transfer of Property Act: Yeo Htean Sew v. Abu Zaffer Koreshee (1900) 27 Calcutta 941: contractual date of redemption 27 October 1899. In January 1899 mortgagee sued on ground of non-payment of an instalment, asking for sale. Held, there had been a breach of a clear covenant and an order for sale or foreclosure was made. Same position as here.

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That case shews that on such a breach the power of sale arises.

10 Payne v. Cardiff R.D.C. 100 L.J. K.B. 629. Cardiff R.D.C. had a power to make a charge on adjoining premises, with the rights of a mortgagee under the 1887 Act, to cover costs of road etc. improvements. Payne was so charged, his debt to be paid in 5 instalments. He defaulted on an instalment. At p.69 per Lord Honworth: S.101(1) of Law of Property Act 1925 now contains same power of sale as the old 1881 Act; held, non-payment of three instalments sufficed to make an order for sale.

20 As for Williams v. Morgan, supra, there was a covenant to repay capital on 1st January 1914. There was an independent covenant to pay interest  $\frac{1}{2}$  yearly which Swinfen Eady refused to read into the proviso for redemption.

This case turns on construction of clause (h) - words "as hereinbefore provided".

As for Forbes v. Git, supra, on repugnancy : clause (f) on p.108 qualifies the absolute covenant on p.104. The two must be read together.

30 (B) Alleged settlement of action:- See Judgment p.47-48. A finding of fact: "Patel told the truth".

See Patel at pp. 31-32.

See Ext. E at p.127.

Cl.(7): rent of red room alone was £90 per month. It was never decided what was to happen if rents not paid.

40 Cl.(12): To say that "a mortgage may be drawn" is not to agree its terms - various kinds of mortgage might be drawn.

See p.22 - 23 : 1st Respondent's evidence clear that no agreement was reached.

To sum up: Ext "E" was only Heads of Settlement, not settlement.

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Satchu for 2nd and 3rd Respondents:-

As to ground 1 of Additional Memo:- See S.85 of Transfer of Property Act: "all persons etc. etc. must be joined." We were "necessary parties". See Indian O.34 r.1 (in same terms).

Chitaley 5th Edn., Vol.3, p.3009, commentary 3. This is "to avoid multiplicity of suits".

Gower's Law of Property in British India, 5th Edn. Vol.2 p.1580.

Cf. 1st Respondent as Plaintiff v. Appellant as Defendant in Civil Case 48 of 1952 Kenya Mombasa, where it was held that other mortgagees must be joined at instance of appellant.

10

Khanna in reply :-

Ground 1 of Additional Memo.:-

2nd and 3rd Respondents were not required to file pleadings. Their duty would be limited to appear on 1st day, declare their interests, and then proceed no further.

This Court could limit the extent to which these Respondents are entitled to their costs, despite taxation having taken place.

20

As to settlement of action:-

Patel's evidence was inadmissible to interpret or add to the document. An agreement is binding when entered into and complete. This agreement was final. It is late in the day for Respondent now to say Ext.10 was only "Heads of agreement", a volte-face for him.

As for the construction of the 3rd mortgage:-

30

The Calcutta case cited is irrelevant. The question to be decided there, as P.C. said, was whether there was any covenant to pay interest in the interim. There was there no question of inconsistency or repugnancy.

Payne v. Cardiff R.D.C. is also irrelevant, because it turned on S.101(1) of the Act of 1925 - which has no relevance here.

Cleasby is really relying on clause (h). The

question is: does it prevent Appellant from producing on 30 June 1968 all the capital and interest accrued due and unpaid? Does Cl.(h) really involve Appellant in an order for sale for failure to pay an instalment?

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10 The earlier of the two inconsistent clauses (on p.108 and Cl.(h)) must prevail. The words "as here-  
inbefore provided" merely refer to the total  
interest due as accumulated as on 30 June 1968. It  
does not refer to payments of insurance premiums etc.  
etc. or to payment of instalments of interest.

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S.67 of Indian Transfer of Property Act  
Edwards v. Martin, distinguished in Williams v.  
Morgan, is on all fours with the Indian case cited.

C.A.V.

R. BACON  
JUSTICE OF APPEAL.

20.3.56

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JUDGMENT

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IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA  
AT MOMBASA

CIVIL APPEAL No.6 of 1955

BETWEEN

MOHAMEDALI JAFFER KARACHIWALLA

APPELLANT

- and -

1. NOORALLY RATTANSHI RAJAN NANJI
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHIMJI PRADHAN

RESPONDENTS

30

(Appeal from a Judgment of the Supreme Court of  
Kenya at Mombasa (Mr. Justice Henry Mayers) dated  
11th November 1954 in Civil Case No.213 of 1953

BETWEEN

NOORALLY RATTANSHI RAJAN NANJI

Plaintiff

- and -

1. MOHAMEDALI JAFFER KARACHIWALLA
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHIMJI PRADHAN

Defendants

WORLEY P.

40

The appellant herein is the lessee of three  
parcels of land situate on Mombasa Island. By an



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indenture dated 29th October 1951 he mortgaged these three parcels in favour of the second respondent to secure repayment of the sum of Sh. 84,000 together with interest thereon; by a second indenture of the same date he mortgaged the same three parcels, subject to the first mortgage, in favour of the assignor of the third respondent to secure repayment of a sum of Sh.21,623 together with interest thereon. By a third indenture of the same date he mortgaged the same three parcels in favour of the first respondent (plaintiff in the Supreme Court), subject to the first and second mortgages, to secure repayment of the sum of Sh.150,000 together with interest thereon at the rate of 4% on the first Sh.100,000, 9% on the second Sh.25,000 and 12% on the third Sh.25,000. 10

It will be convenient at this stage to set out the covenants of this third mortgage which are relevant to the matters argued on this appeal: Firstly, after recitals, the mortgagor covenanted to pay to the mortgagee the sum of Sh.150,000 on the 30th June 1968 together with interest computed as therein provided and he covenanted to pay such interest at the end of every month as it accrued due and payable. Then follows an assignment by the mortgagor to the mortgagee of the three parcels of land for the balance of their respective terms of years together with buildings situate and to be erected thereon. The mortgagor further covenanted as follows:- 20 30

"(b) During the term of this mortgage and so long as any moneys remain due and owing under these presents the mortgagor will pay all the amounts whether for principal interest or otherwise due or to fall due under the first and second mortgages hereinafter referred to and will observe and carry out all the terms and conditions contained in the respective Indentures of Leases and on the part of the mortgagor as lessee to be observed, performed and carried out and also pay the ground rent and all Municipal rates and taxes and all outgoings in respect thereof regularly. 40

(d) To insure and keep insured all buildings situate and to be erected on the land; and should he fail to do so liberty was reserved to the mortgagee to pay the necessary premium or premia and to debit the mortgagor with all moneys so paid which were to be 50

repayable by the mortgagee on demand, and any such payments were to be a charge upon the land.

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10 (e) Should the mortgagor make any default in  
payment of the ground rents, Municipal rates  
and taxes insurance and payments of premium  
or premia in respect thereof or should he  
fail to pay interest regularly and punctual-  
ly to the mortgagee under the first and  
second mortgages or should he fail to pay  
the interest due on the principal sum or  
sums advanced regularly as hereinbefore pro-  
vided or should he fail to carry out any of  
the covenants and conditions and agreements  
herein contained then in any one of such  
cases the mortgagee shall be at liberty to  
demand the repayment of the principal sum  
together with all interest due thereon not-  
withstanding the time for repayment thereof  
20 hereinbefore provided and shall be entitled  
to recover the same through a Court of law;  
Provided Always that the mortgagee shall  
not enforce his right to claim and recover  
the whole principal sum in event of any of  
the above defaults until after 1st January  
1952, and even after the said date until  
after a five weeks previous written notice  
is first given by the mortgagee to the mort-  
gagor demanding the compliance of any  
30 default or breach as aforesaid ...."

40 "(f) He the mortgagor agrees that he will repay  
the sum of Sh.150,000 (Shillings one hundred  
and fifty thousand) to be advanced here-  
under by twenty five half yearly instalments  
of Sh.5,000 (Shillings Five thousand) the  
first of such half yearly instalments to be  
paid on the 30th day of June One thousand  
nine hundred and fifty two and the remain-  
ing twenty four at the end of every six  
months and thereafter the balance by eight  
half yearly instalments the first seven in-  
stalments of Sh.3,000/- (Shillings three  
thousand) each and the eighth instalment of  
Sh.4,000 (Shillings Four thousand) thus pay-  
ing off the whole amount by the 30th day of  
June One thousand nine hundred and sixty  
eight as hereinbefore provided..."

50 "(h) The mortgagee hereby covenants with the  
mortgagor that if the mortgagor shall repay  
the total principal sum advanced under these

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presents together with interest thereon due as hereinbefore provided by the 30th day of June One thousand nine hundred and sixty-eight the mortgagee will at any time thereafter after the expiry of the stipulated date at the request and cost of the mortgagor reassign and surrender the lands and all buildings to the mortgagor as he the mortgagor may direct."

The mortgagor having made default in payment of the principal sums and interest due under the first and second mortgages and having failed to pay the ground rent and municipal rates in respect of the mortgage property and also having failed to pay the requisite insurance premium and the instalments and interest payable under clause (f) of the third mortgage, the first respondent on the 2nd July 1953 sent him the prescribed notice (Ex.8) requiring him to rectify these defaults within five weeks, failing which the mortgagee would take action to recover the principal sum and interest due under the third mortgage. The appellant having failed to comply with the notice, first respondent filed his plaint on the 8th August 1953 claiming Sh.163,874, being his principal sum and interest up to 31st July 1953, further interest thereon as claimed and an order for the sale of the mortgage property. The first and second mortgagees were joined as second and third defendants. In a reserved judgment Mayers J. found for the plaintiff and passed a preliminary decree for sale, dated 21st January 1955, in which the amounts due to the plaintiff and the second and third defendants were certified and it was ordered that the mortgagor should pay into court these amounts on or before 15th March 1955, failing which the mortgage properties or sufficient part thereof were to be sold and the proceeds applied to the discharge of the mortgages in order of priority. Further, it was ordered that in the event of the nett proceeds of the sale being insufficient to pay these amounts and costs in full a personal decree should issue against the mortgagor for the amount of the balance.

From that decree the mortgagor has appealed to this Court and the only two matters raised by the appellant which I propose to consider in this judgment are:

- (a) that no right to sell had arisen by reason of the mortgagor's defaults, and

(b) that the suit had been compromised after its institution in the Supreme Court and before judgment.

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Any consideration of the former point must start from the basis of Section 67 of the Indian Transfer of Property Act 1882 as applied to the Colony and Protectorate of Kenya. That section, so far as relevant, reads:

10 "In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be so sold."

20 The question then becomes simply this: had the mortgage-money become payable at the date of institution of the suit, and, if so, is there anything "to the contrary" in the contract which disentitled the first respondent from obtaining the order for sale? I think it is quite impossible, in view of clause (e) of the mortgage deed, to contend that the principal sum and interest did not become due and payable by reason of the appellant's default, although the period for repayment had not elapsed.

30 I did not understand Mr. Khanna to dispute this, but he contended that the clause (e) merely gave the mortgagee liberty to sue for a personal judgment against the mortgagor for the amount owing, without the right to exercise any power of sale. He supported this argument by citing a number of English cases: "Williams v. Moran (1906) L.R.I. Ch. 804; Edwards v. Martin (1856) 25 L.J. Eq. 283; Kidderminster Mutual etc. v. Haddock (1936) W.N.158 and Bolton v. Buckenham (1891) L.R.I Q.B. 278. I have

40 considered all these cases, but do not propose to review them in this judgment because each depends upon the construction of a particular instrument and upon English equitable principles. In the instant case our duty is to apply the statute, which clearly gives the mortgagee the right to an order for sale once it is shown that the mortgage money has become payable.

But Mr. Khanna would I think reply that there is in the contract provision to the contrary. He

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has laid great stress upon the mortgagor's covenant to repay the principal sum and interest "on the 30th June 1968" and on the mortgagee's covenant to re-convey if the principal sum and interest be paid "by the 30th June 1968". He has argued that the conditions contained in clauses (e) and (f) are entirely inconsistent with the former of these two covenants and must be ignored and that, since the latter covenant to re-convey is not made subject to the performance on the part of the mortgagor of these conditions, the obligation to reconvey on the due date is absolute. I am unable to accept this view. It is clear that the deed is not so skilfully drawn as it might have been, but I find no difficulty in reading together the first covenant to repay with clauses (e) (f) and (h) so as to give effect to the intention disclosed by the deed as a whole. This is not a case where clauses in a deed are mutually irreconcilable; the later clauses (e) and (f) do not destroy but only qualify the covenant to repay - as is shewn by the use in the covenant to re-convey of the expression "repay..... as hereinbefore provided by the 30th June 1968" - and therefore the two are to be read together: *Forbes v. Git* 1922 L.R.I.A.C. P.C. 256. This view is in my opinion also consistent with the decision of the Judicial Committee in the case relied on by Mr. Cleasby, *Yeo Htean Sew v. Abu Kaffer Koreeshee* (1900) 27 I.A.98.

The second point argued on the appeal was whether there was a concluded compromise of the suit. For this, Mr. Khanna relied mainly on a document (Ex.E) headed "Terms of settlement" and initialled by the appellant and the first respondent. The document is undated but it is common ground that it was drawn up about the 9th September 1953 after the parties had consulted Mr. C.A. Patel, an advocate, with a view to settling their differences. The learned trial judge rightly held that the onus of establishing this defence was upon the defendant-appellant and, after reviewing the conflicting evidence as to what was and was not agreed to, he accepted the version of the first respondent and of his witness Mr. C.A. Patel and concluded that Ex.E was not intended by either party to be a concluded settlement of the action. In so far as that conclusion was based on the learned Judge's estimate of the credibility of the witnesses, we should be slow to interfere with it, and, indeed, nothing has been said in this appeal which would warrant such interference. But I also agree with the learned Judge that examination of the document Exhibit E

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10 shews that it was not intended to be a concluded agreement. Clause 7 of Exhibit E reads "Letters to be addressed to all tenants if rent not paid within a certain time, terms to be agreed as to what will happen in default." It is clear from the evidence that this clause was not drafted in this form because the parties wished merely to relegate to the future the settlement of an unimportant detail, but that the question left unsettled was the real rock on which the negotiations 10  
foundered.

20 Further, clause (5) reads "Fourth mortgage Sh. 50,000 12% interest to be paid every month, interest on interest if in arrears." A draft of a fourth mortgage deed (Exhibit 10) was drawn up which bears the appellant's signature and one other which is illegible; but it has not been sealed or witnessed, and the original, which we have seen, is interlined with numerous additions and alterations which are not initialled. Moreover the amount to be advanced has been increased to Sh.56,000 and the amount covenanted to be repaid to Sh.68,000; other new terms are included in a Schedule. It cannot therefore be said that this document merely carries out the heads of agreement contained in Exhibit E. The true position is in my opinion disclosed in the recitals of this document where it is stated "And where as the mortgagor being desirous of adjusting and settling all litigation with the said Noorally 30  
Rattanshi Rajan Nanji and paying all sums due under the previous mortgages, etc." In other words, the settlement of the suit was dependent upon the parties executing this fourth mortgage which was never done because, as the learned Judge found, the first respondent grew tired of the appellant's repeated efforts to increase the amount to be secured by this mortgage.

40 For these reasons I am of opinion that this appeal fails on all points and should be dismissed with costs.

N.A. Worley,  
PRESIDENT.

MOMBASA  
27th March 1956

Since the other members of the Court concur

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with this agreement, the appeal is dismissed with costs.

N.A. Worley,  
27th March 1956.

BRIGGS J.A.

I agree.

F.A. Briggs  
JUSTICE OF APPEAL.

BACON J.A.

I also agree.

10

Roger Bacon  
JUSTICE OF APPEAL.

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No. 26.

Order,  
27th March 1956.

No. 26.

O R D E R

In Court this 27th day of March, 1956.

Before the Hon'ble the President (Sir Newnham  
Worley)  
the Hon'ble Mr. Justice Briggs, a  
Justice of Appeal  
and the Hon'ble Mr. Justice Bacon, a  
Justice of Appeal.

20

THIS APPEAL coming on for hearing on the  
19th and 20th days of March, 1956, at Mombasa in  
the presence of D.N. Khanna Esquire and D.D.Doshi  
Esquire Advocates on the part of the Appellant  
and Richard Cleasby Esquire Advocate on the part  
of the first Respondent and A.C. Satchu Esquire  
Advocate on the part of the second and third Res-  
pondents it was ordered on the 20th day of March,  
1956, that this appeal do stand for judgment and

30

upon the same coming for judgment this 27th day of March, 1956 IT IS ORDERED (1) that this appeal be dismissed and (2) that the Appellant do pay to the Respondents the costs of this appeal

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No. 26.

GIVEN under my hand and the Seal of the Court at Nairobi this 27th day of March, 1956

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27th March 1956  
- continued.

F. Harland

REGISTRAR

Issued this 9th day of April 1956

10

I certify that this is a true copy of the original

Sgd. ??

for REGISTRAR

9.4.1956

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No. 27.

ORDER GRANTING FINAL LEAVE TO  
APPEAL TO HER MAJESTY IN COUNCIL

No. 27.

Order granting  
final leave to  
Appeal to Her  
Majesty in  
Council,  
4th March 1957.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN  
AFRICA AT NAIROBI

CIVIL APPLICATION No.1 of 1956 (P.C.)

(In the matter of an Intended Appeal  
to Her Majesty in Council)

B E T W E E N

MOHAMEDALI JAFFER KARACHIWALLA

APPLICANT

10

- and -

1. NOORALLY RATTANSHI RAJAN NANJI
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHIMJI PRADHAN

RESPONDENTS

(Intended Appeal from the final judgment of  
the Court of Appeal for Eastern Africa  
Sessions Holden at Mombasa dated 27th day  
of March, 1956, and the formal order  
thereon of the same date

in

20

Civil Appeal No. 6 of 1955

BETWEEN

MOHAMEDALI JAFFER KARACHIWALLA

Appellant

- and -

1. NOORALLY RATTANSHI RAJAN NANJI
2. ISMAILIA CORPORATION LIMITED
3. KARMALI KHIMJI PRADHAN

Respondents

IN CHAMBERS

this 27th day of February, 1957

BEFORE The Honourable Mr. Justice Briggs, a Justice  
of Appeal.

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O R D E R

UPON the application presented to this Court  
on the 5th day of December, 1956, by Counsel for

10 the above-named Applicant for final leave to appeal to Her Majesty in Council AND UPON READING the affidavit of MOHAMED BAKHSH of Nairobi in the Colony of Kenya Clerk sworn on the 5th day of December, 1956, in support thereof and the exhibits therein referred to and marked "MB1" and "MB2" AND UPON HEARING Counsel for the Applicant and for the Respondents being absent though duly served THIS COURT DOTH ORDER that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOTH DIRECT THAT the Record including this Order be despatched to England within fourteen days from the date of issue of this Order AND DOTH FURTHER ORDER that the costs of this application do abide the result of the appeal.

In the Court  
of Appeal for  
Eastern Africa

                      
No. 27.

Order granting  
final leave to  
Appeal to Her  
Majesty in  
Council,  
4th March 1957  
- continued.

DATED at Nairobi this 27th day of February, 1957

F. HARLAND

REGISTRAR,  
H.M. COURT OF APPEAL FOR  
EASTERN AFRICA

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ISSUED this 4th day of March, 1957

I certify that this is a true  
copy of the original.

R.M. Patel,  
for REGISTRAR.  
4.3.1957

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Exhibits

E X H I B I T S

No. 1.

No. 1.

Lease of Plot  
No. 259 Section  
XVIII,  
19th November  
1951.

Lease of Plot No. 259 Section XVIII

Kenya Revenue  
Ten  
Shillings

DOSHI & AMIN  
ADVOCATES  
MOMBASA

a/1.59676  
of 24/11/51

2323  
28/11/51  
10.20

ST -10  
Dup. 4/- each  
Reg.14/-

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THIS INDENTURE made this 19th day of November, One thousand nine hundred and fifty-one BETWEEN Said bin Seif as Administrator of the Estate of the Late Soud bin Ali of Mombasa in the Colony and Protectorate of Kenya (hereinafter called the Lessor which expression shall where the context so admits include his successors in office and assigns) of the one part AND Mohamed Ali Jaffer Karachiwalla British Indian of Mombasa aforesaid (hereinafter called the Lessee which expression where the context so admits shall include his heirs executors administrators and assigns) of the other part: 20  
WHEREAS by a Certificate of Title dated the 8th day of April, 1930 issued by the Registrar of Titles under the Town Planning (Amendment) Ordinance 1927 and registered in the Mombasa Registry in Day Book No.99 Volume L.T. V Folio 92/1 File 798 Sir Ali bin Salim El-Busaid K.B.E., C.M.G., was registered as the proprietor of ALL THAT piece or parcel of land situated in the District of Mombasa in the Mombasa Municipality (Island and which is demarcated and delineated on the Plan No.29404 attached thereon and shown bordered with red and thereon numbered 237 of Section XVIII and containing 5.33 (Five point three three) acres or thereabouts AND 30  
WHEREAS the said Sir Ali bin Salim during his life time subdivided the said plot No.237 of Section XVIII into several subdivisions including inter-alia subdivision No. 259 of Section XVIII the subject matter of this Indenture AND WHEREAS in the division of the Estate of the said Sir Ali bin 40

Exhibits

No. 1.

Lease of Plot  
No. 259 Section  
XVIII,  
19th November  
1951 - continued

Salim under and by virtue of an Indenture of Conveyance dated the 18th day of July 1944 made between Soud bin Ali as Administrator of the Estate of the said Sir Ali bin Salim deceased of the one part and the said Soud bin Ali in his personal capacity of the other part registered in the Mombasa Registry in Day Book No. 1187 Volume L.T. XII Folio 31/1 and File 1649 the said Soud bin Ali was allotted and was registered as the proprietor of several subdivisions including inter-alia Subdivision No.259 of Section XVIII being portion of the said Plot No.237 of Section XVIII AND WHEREAS by a Deed of Trust dated the 9th day of February, 1945 registered in the Mombasa Registry in Day Book No. 211 Volume L.T. XII Folio 21/2 File 1644 the said Soud bin Ali settled certain lands hereditaments and premises including inter-alia the said subdivision No.259 of Section XVIII on the trusts therein set out and appointed himself Trustee of the said Trust AND WHEREAS by an Indenture of Lease dated the 1st day of March 1946 and registered in Day Book No. 334 Volume L.T. XII Folio 151/1 File 1762 the said Soud bin Ali as trustee aforesaid granted to Jethabhai Premji Patel, Tribhovanbhai Hansraj Patel, Gordhanbhai Kalidas Patel (now deceased) and Mohanbhai Valji Patel (hereinafter referred to as Tenants which expression shall where the context so admits include their and each of their personal representatives and assigns) as tenants in common a lease of the said subdivision No.259 (org. No.237/16) of Section XVIII for a term of (99) ninety-nine years commencing from the 1st day of March, 1946 at an annual rent of Shillings Two thousand (Shs.2,000/-) and subject to the stipulations covenants and conditions therein contained and on the Tenants part to be performed and observed AND WHEREAS the said Gordhanbhai Kalidas Patel died at Porbandur in India on the 30th day of October, 1946 having by his Will dated 18th day of April 1946 appointed the said (1) Mohanbhai Valji Patel and (2) Jethabhai Premji Patel to be the executors of his said Will which was duly proved on the 17th day of March 1947 in His Majesty's Supreme Court of Kenya at Nairobi in Probate and Administration Cause No. 187 of 1946 AND WHEREAS by an Indenture of Assignment dated the 1st day of April 1949 registered in the Mombasa Registry in Volume L.T. XII Folio 151/3 File 1762 and made between the Tenants of the one part and the Lessee of the other part the Tenants ASSIGNED and CONFIRMED unto the Lessee all their righttitle and interest in ALL THAT piece or parcel of land

Exhibits

No. 1.

Lease of Plot  
No. 259 Section  
XVIII,  
19th November  
1951 - continued.

containing nought point one nought seven five (0.1075) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No.259 (Orig. No.237/16) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No. 34702 attached to the said Indenture of Conveyance dated the 18th day of July 1944 to hold the same unto the Lessee for all the residue then unexpired of the said term granted by the said Lease subject to the said annual rent of Shs. 2000/- and to the covenants and conditions contained in or implied by the Lease and on the part of the Tenant therein to be performed and observed AND WHEREAS the Lessee is the person entitled to the benefit of and responsible for the obligations incurred by the said Lease AND WHEREAS the said Soud bin Ali died at Mombasa on the 28th day of June 1949 and a Grant of Letters of Administration to his Estate was made by His Majesty's Supreme Court of Kenya at Mombasa in Probate and Administration Cause No.39 of 1949 AND WHEREAS in Civil Case No.210 of 1950 of His Majesty's Supreme Court of Kenya at Mombasa it was held and ordered that the said Trust was void and should be set aside and thereupon the hereditaments and premises comprised in the said Trust including inter-alia the land above described became part and parcel of his intestate Estate AND WHEREAS by the setting aside of the said Trust the title of the Lessee in respect of the Lease created by the Indenture of the 1st day of March 1946 and the subsequent assignment is now defective AND WHEREAS on the application of the Lessor in Civil Case (O.S.) No.96 of 1951 it was ordered by His Majesty's Supreme Court of Kenya at Mombasa that the Lessor as Administrator aforesaid is authorised to accept a surrender of the said Lease granted under the Indenture of the 1st day of March 1946 by the said Soud bin Ali as Trustee aforesaid and to grant in lieu thereof a fresh Lease for the balance of the term hereby created on the same rental and the same terms and conditions NOW THIS INDENTURE WITNESSETH that IN CONSIDERATION of the Lessee having contemporaneously with this Indenture granted a Surrender of the Lease created by the Indenture of the 1st day of March 1946 AND IN CONSIDERATION of the rent hereby reserved which rent the Lessee hereby undertakes to pay also during the pendency of the Lease created by the Indenture dated the 1st day of March, 1946 and of the covenants by the Lessee hereinafter contained the Lessor DOETH HEREBY DEMISE unto the Lessee ALL AND SINGULAR the said hereditaments and premises more particularly hereinbefore described being the said Plot No. 259 of

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Section XVIII TO HOLD the same UNTO the Lessee from the date of these presents up to the 28th day of February two thousand and forty five YIELDING and PAYING therefor the yearly rent of Shs.2000/- (Shillings two thousand) payable in advance on the first day of January in each year (the rent up to 31st December, 1951 having already been paid before the execution of these presents) and the Lessee for himself and his assigns and to the intent that the obligations (except any which shall become discharged by complete performance) may continue throughout the term hereby created hereby covenant with the Lessor as follows:

Exhibits

No. 1.

Lease of Plot  
No. 259 Section  
XVIII,  
19th November  
1951 - continued

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1. To pay the rent reserved without any deduction whatever at the time and in manner aforesaid.

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2. To pay all rates taxes charges duties burdens assessments outgoings and impositions whatever whether governmental Municipal or otherwise which now are or shall at any time hereafter during the said term be charged rated assessed or imposed upon or in respect of the premises hereby demised or any part thereof or on the landlord or tenant or the owner or occupier in respect thereof respectively AND ALSO upon or in respect of the buildings and erections to be constructed on the demised premises by the Lessees in performance of their covenants in that behalf hereinafter following.

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3. Not later than five years from the commencement of this lease PROVIDED building permits could be obtained to erect upon the demised premises at the cost of at least Forty thousand Shillings (Shs. 40,000/-) a building of stone or concrete consisting of business premises and/or dwellings constructed in workmanlike manner and with good materials and to the satisfaction of the Lessor with proper out buildings sewers and drains and boundary walls and fences and in executing such works to conform to the provisions of any statute applicable thereto and the By-laws and Regulations of the local Authorities and to pay all fees and charges payable to such authorities in relation thereto.

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4. At all times during the said terms bear and pay all costs and expenses payable either by the Owner or the tenant in respect of the premises hereby demised of making repairing, maintaining, rebuilding and cleansing all ways roads, pavements, sewers, drains, pipes, water course, party walls, party structures fences or other conveniences which shall

Exhibits

No. 1

Lease of Plot  
 No. 259 Section  
 XVIII,  
 19th November  
 1951 - continued.

belong to or be used for the said premises near or adjoining thereto and will keep the Lessor indemnified against all such costs and expenses as aforesaid

5. Not to sell or dispose of any earth clay gravel sand or stone from the land hereby demised nor make any excavation except so far as the same may be necessary to carry out the said works, buildings or erections PROVIDED that the Lessees may use for the purpose of the said works, buildings or erections any clay gravel sand or stone which it may be necessary to excavate.

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6. Well and substantially to repair and at all times during the said term to keep in complete repair and tenantable condition any buildings that may be erected on the land hereby demised and all sewers and drains and pavements and fences and walls and all other buildings and erections which at any time during the said term may be upon any part of the land hereby demised or appurtenant thereto.

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7. To permit the Lessor and his surveyors or Agents with or without workmen twice in every year during the said term at reasonable times in the day time to enter upon the land hereby demised and the buildings thereon and every part thereof to view the state and condition of the same and of all defects decays and want of repairs therein found to give notice in writing by leaving the same at or on the said demised premises to or for the Lessees to repair all such defects decays and want of repairs.

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8. Within twelve months next after every such notice as aforesaid well and substantially to repair and make good all such defects decays and want of repairs to the said buildings at the cost of the Lessees.

9. Not to transfer or assign under-let or part with the possession of the land hereby demised or any part thereof without the written consent of the Lessor which consent however shall not be unreasonably withheld.

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10. Not to use or permit or suffer the land hereby demised or the buildings or erections to be made thereon or any part thereof for the purpose of any offensive noisome noxious or dangerous manufacture trade business or occupation or for any illegal or

immoral purpose or so as to be a nuisance or annoyance to the owners or occupiers of the same or adjoining premises but to use the same only for the purposes of shops, offices, printing presses, hotels and dwellings and for carrying on occupations or handicrafts of a quiet and inoffensive nature.

Exhibits

No. 1

Lease of Plot  
No. 259 Section  
XVIII,  
19th November  
1951 - continued.

10 11. On the expiry or sooner determination of the  
said term peaceably to surrender up to the Lessor  
the land hereby demised together with the buildings  
and erections thereon in complete tenantable re-  
15 pair and condition in accordance with the covenants  
hereinbefore contained PROVIDED ALWAYS that if the  
said rent hereby reserved or any part thereof shall  
be unpaid for the space of three months next after  
the day hereinbefore appointed for payment thereof  
(whether the same shall have been lawfully demand-  
ed or not) or if default shall be made in the per-  
20 formance or observance of any of the covenants  
conditions or agreements on the part of the Lessees  
herein contained then and in any such case after  
due notice of a period of not less than six months  
it shall be lawful for the Lessor or any person or  
persons duly authorised by the Lessor in that be-  
half into and upon the said demised premises or any  
part thereof in the name of the whole to re-enter  
and the same to have again repossessed and enjoyed  
as in their first and former estate anything here-  
in contained to the contrary notwithstanding and  
30 thereupon the term hereby created shall cease with-  
out prejudice to any right of action or remedy of  
the Lessor in respect of any antecedent breach of  
any of the covenants by the Lessees hereinbefore  
contained. The Lessor hereby covenants with the  
Lessees that they the Lessees paying the rent here-  
inbefore reserved and performing and observing the  
covenants conditions and agreements on the part of  
the Lessees hereinbefore contained shall and may  
40 peaceably and quietly HOLD and ENJOY the said de-  
mised premises for the term hereby granted without  
any interruption from or by the Lessor or any per-  
son lawfully claiming under or through him

IN WITNESS WHEREOF the parties hereto have  
hereunto set their hands the day and year first  
above written.

SIGNED SEALED and DELIVERED by the )  
said SAID BIN SEIF as Administrator ) SAID BIN SEIF  
of the Estate of the Late Soud bin )  
Ali (Lessor) in the presence of: )

50 ADVOCATE, MOMBASA.  
and of:-



Exhibits

No. 1

Lease of Plot  
No. 259 Section  
XVIII,  
19th November  
1951 - continued

SIGNED SEALED and DELIVERED )  
by the said MOHAMEDALI )  
JAFFER KARACHIWALLA (Lessee) )  
in the presence of :- )  
  
ADVOCATE, MOMBASA. )  
and of:- )  
  
LAW CLERK, MOMBASA. )

M.J. KARACHIWALLA

DATED this                      day of                      1951

SAID BIN SEIF as Administrator  
of the Estate of the late Soud  
bin Ali (Lessor)

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TO

MOHAMEDALI JAFFER KARACHIWALLA  
(LESSEE)

L E A S E

Lease in respect of Subdivision  
No.259 Section XVIII, MOMBASA.

Drawn by:-  
Messrs. Doshi & Amin,  
Advocates,  
Mombasa.

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COLONY AND PROTECTORATE OF KENYA MOMBASA REGISTRY  
Reg. at 10.20 a.m. 28/11/1951  
Day Book No.2323 Volume L.T.XII Folio 152/19  
File 1762.

Sgd.    ? ?  
REGISTRAR.

No. 5A.

LETTER, Defendant No.1 to District Registrar,  
Mombasa.

Exhibits

No.5A

From:

M.J. Karachiwalla,  
c/o Blue Room,  
Salim Road,  
Mombasa.

Letter,  
Defendant No.1  
to District  
Registrar,  
Mombasa,  
9th September  
1953.

9th September, 1953.

10 The District Registrar,  
Supreme Court,  
Mombasa.

Sir,

Re: Supreme Court C.C. No.48 of 1952  
Noorally R.R. Nanji vs. M.J.  
Karachiwalla and others.

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20 In the above case my bill of costs has been  
taxed at Shs. 7613/50. I have settled the matter  
with the Judgment debtor and shall be obliged if  
you will have the decree marked settled.

Yours faithfully,

M.J. Karachiwalla.

DEFENDANT.

Copy to:-

1. Messrs. Satchu & Satchu,  
Advocates,  
Mombasa.
2. T.J. Inamdar Esq.,  
Advocate,  
Mombasa.

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Exhibits

No. 5B.

No. 5B.

LETTER, Messrs. Satchu & Satchu to District  
Registrar, Mombasa.Letter, Messrs.  
Satchu & Satchu  
to District  
Registrar,  
Mombasa,  
11th September  
1953.

From:

SATCHU & SATCHU,  
Advocates,  
P.O. Box 537,  
Mombasa.

11th September, 1953.

The District Registrar,  
H.M's. Supreme Court,  
Mombasa.

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Dear Sir,

Re: Supreme Court Civil Case No.48 of 1952  
Noorally R.R. Nanji vs. M.J.  
Karachiwalla and 2 others.

We have to refer to the first Defendant's letter of the 9th instant, which he has written directly to you, and in that connection we beg to inform you that the matter of costs which have been awarded to Defendants Nos.2 and 3 is still pending and has not been settled. The necessary bills of costs of Defendants Nos.2 and 3 are in course of preparation and will be lodged for taxation against the Plaintiff in due course.

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We are also claiming a lien upon the amount decreed in respect of our unpaid costs payable to first Defendant from the Plaintiff.

Yours faithfully,  
SATCHU & SATCHU,

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Sgd. A.C. Satchu.

c.c.

1. M.J.Karachiwalla, Esq.
2. Messrs. A.B. Patel & Patel,  
Advocates for the Plaintiff,  
Mombasa.

No. 5C.

Exhibits

LETTER, District Registrar to Messrs. Satchu  
& Satchu.

No. 5C.

1725/53.

Supreme Court of Kenya,  
Mombasa.

14th September, 1953.

Letter, District  
Registrar to  
Messrs. Satchu  
& Satchu,  
14th September  
1953.

Messrs. Satchu & Satchu,  
Advocates,  
Mombasa.

10   Sirs,

Re: Supreme Court Civil Case No.48 of 1952  
Noorally Rattanshi Rajan Nanji vs.  
M.J. Karachiwalla and two others.

20   With reference to your letter dated the 11th  
September, 1953, I have the honour to inform you  
that on receipt of the letter dated the 9th Septem-  
ber, 1953, addressed by the Defendant No.1 to the  
Court, the decree against the Plaintiff as far as  
Defendant No.1 is concerned has been marked as  
satisfied.

With regards to your claiming a lien upon the  
amount decreed in respect of your unpaid costs pay-  
able to the first Defendant from the Plaintiff, I  
regret this Court cannot do anything in that con-  
nection as the decree has been already marked as  
satisfied as far as the Defendant No.1 is concern-  
ed.

I have the honour to be,

Sirs,

30   Your obedient servant,

sgd. A. WYNN JONES.  
AG. DEPUTY REGISTRAR

H.M. SUPREME COURT OF KENYA

Exhibits

No. 7.

No. 7.

THIRD MORTGAGE, between Plaintiff and  
Defendant No. 1.Third Mortgage,  
between Plaintiff  
and Defendant  
No. 1,  
29th October 1951.

THIS INDENTURE made the 29th day of October, BETWEEN  
One thousand nine hundred and fifty-one Mohamedali Jaffer Karachiwalla, British Indian  
Merchant of P.O. Box 511 Mombasa in the Protector-  
ate of Kenya (hereinafter called the Mortgagor  
which expression where the context so admits shall  
include his heirs, executors, administrators and  
assigns) of the one part and Noorally Rattanshi  
Rajan Nanji, British Indian Merchant of P.O. Box  
318 Mombasa aforesaid (hereinafter called the  
Mortgagee which expression where the context so  
admits shall include his heirs, executors, adminis-  
trators and assigns) of the other part WHEREAS all  
those three Leasehold hereditaments described in  
the schedule hereto were for the respective terms  
therein referred to assigned unto the Mortgagor on  
the terms and conditions more particularly set out  
in the respective Indentures of Leases referred to  
therein AND WHEREAS by an Indenture dated the 29th  
day of October One thousand nine hundred and fifty  
one (hereinafter called the first Mortgage) made  
between the Mortgagor (therein described) of the  
one part and the Ismailia Corporation Limited, a  
limited liability Company incorporated in Kenya  
Colony having its registered office at Mombasa  
aforesaid (therein described) of the other part  
and registered in Mombasa Registry in Volume L.T.  
XII Folio 337/20 and inter alia the Mortgagor as-  
signed unto the said Ismailia Corporation Limited  
the hereditaments described in the Schedule here-  
to to secure the repayment of the sum of Shs.  
84,000/- (Shillings Eighty-four thousand) together  
with interest thereon at the rate and in the man-  
ner as therein more particularly set out AND  
WHEREAS by an Indenture dated the 29th day of  
October One thousand nine hundred and fifty-one  
(hereinafter called the Second Mortgage) made be-  
tween the Mortgagor (therein described) of the one  
part and Mohamed Dhanji, British Indian Merchant  
of Mombasa aforesaid (therein described) of the  
other part and registered in the Mombasa Registry  
in Volume L.T. Folio 337/21 and inter alia the  
mortgagor subject to the said First Mortgage as-  
signed unto the said Mohamed Dhanji all the here-  
ditaments described in the schedule hereto to  
secure the repayment of the sum of Shs.21,623/-

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Exhibits

No. 7.

Third Mortgage,  
between Plaintiff  
and Defendant  
No. 1,  
29th October 1951  
- continued.

(Shillings Twenty-one thousand six hundred and twenty three) together with interest thereon at the rate and in the manner therein more particularly set out AND WHEREAS the respective principal sum and interest due thereon under the said First and Second Mortgage respectively still remain unpaid AND WHEREAS the Mortgagor being desirous of erecting or completing buildings on the lands described in the schedule hereto and inter alia for the said purpose requires a loan of Shs.150,000/- (Shillings One hundred and fifty thousand) and has requested the Mortgagee to advance to the Mortgagor the said sum AND the Mortgagee has advanced and lent to the Mortgagor the said sum of Shs.130,000/- (Shillings One hundred and thirty thousand) (the receipt whereof the Mortgagor hereby acknowledges) and has agreed to advance the balance of Shs.20,000/- (Shillings twenty thousand) on 15th November, 1951 for the purpose of buildings NOW THIS INDENTURE WITNESSETH THAT in consideration of the sum of Shs.130,000/- (Shillings one hundred and thirty thousand) lent and advanced by the Mortgagee to the Mortgagor and the sum of Shs.20,000/- (Shillings twenty thousand) to be lent and advanced on the 15th day of November, 1951 for the purpose of buildings the Mortgagor hereby covenants with the Mortgagee to pay to the Mortgagee the said sum of Shs.150,000/- (Shillings one hundred and fifty thousand) on the thirtieth day of June One thousand nine hundred and sixty eight together with interest thereon computed from the time or respective times of the advances of the amounts at the rates following that is to say, on the first Shs.100,000/- (Shillings one hundred thousand) at the rate of four per cent (4%) per annum, on the subsequent sum of Shs.25,000/- (Shillings twenty-five thousand) at the rate of nine per cent (9%) per annum and on the last sum of Shs.25,000/- at the rate of twelve per cent (12%) per annum all such interest to run and to be paid from the dates of advance of the different sums from time to time and will be paid by the Mortgagor to the Mortgagee at the end of every month as it accrues due and becomes payable but the Mortgagee shall be paid by the Mortgagor interest up to 31st December, 1951 on or before 15th November, 1951 and should he fail to do so the Mortgagee shall be entitled to have the same deducted from Shs.20,000/- payable on 15th November, 1951 and in further pursuance of the said agreement and for the same consideration the Mortgagor hereby assigns unto the Mortgagee all the lands and hereditaments described in the schedule hereto together with all the improvements now being thereon and all buildings now in course of erection and to be erected

Exhibits

No. 7.

Third Mortgage,  
between Plaintiff  
and Defendant  
No. 1,  
29th October 1951  
- continued.

thereon TO HOLD the same unto the Mortgagee subject to the said first and second Mortgagees respectively for all the residue now unexpired of the respective terms of years granted by the Indentures referred to in the schedule (except the last two days of each of the respective terms of years granted by the respective Indentures referred to) subject to terms and conditions set forth and contained in the said respective Indentures of Leases

NOW the Mortgagor hereby covenants with the Mortgagee as follows:- 10

(a) That the Mortgagor will forthwith proceed to erect or complete the buildings on the lands described in the schedule hereto in a proper and workmanlike manner as required by the original lease and in accordance with the plans approved by the Municipal Board of Mombasa and complete the same by the 31st day of December one thousand nine hundred and fifty-one

(b) During the term of this mortgage and so long as any moneys remain due and owing under these presents the Mortgagor will pay all the amounts whether for principal interest or otherwise due or to fall due under the First and Second Mortgages hereinafter referred to and will observe and perform and carry out all the terms and conditions contained in the respective Indentures of Leases and on the part of the Mortgagor as Lessee to be observed, performed and carried out and also pay the ground rent and all Municipal rates and taxes and all outgoings in respect thereof regularly 30

(c) During the continuance of this security he the Mortgagor shall not mortgage or otherwise assign or encumber or part with the possession of the lands and buildings to be erected thereon or any part thereof without first obtaining the consent of the Mortgagee in writing which consent shall not be unreasonably withheld

(d) He the Mortgagor will insure and keep insured with the Jubilee Insurance Company Limited all the improvements and buildings now in course of erection and being thereon and henceforth to be erected against loss or damage by fire in such sum or sums of money in keeping with the value of the constructed and completed work such value or values to vary from time to time in accordance with the progress made in respect of the buildings and as soon as the buildings have been erected and completed 40

Exhibits

No. 7.

Third Mortgage,  
between Plaintiff  
and Defendant  
No. 1,  
29th October 1951  
- continued.

10 then for the full value of the same and will pay  
all the premia necessary for such purpose (and  
will also assign to the Mortgagee the policy or  
policies of such insurance as aforesaid by way of  
collateral security if the same has not been as-  
signed to the Ismailia Corporation Limited or to  
Mohamed Dhanji under the two previous mortgages)  
and should he the Mortgagor fail to do so, the Mort-  
gagor shall be at liberty to insure and keep insured  
the said improvements and buildings for the  
proportionate or full values as the case may be  
of the buildings comprised herein against loss or  
damage by fire or otherwise and debit the Mortgagor  
with such insurance premium or premia and all  
moneys so paid and expended by the Mortgagee shall  
be repayable by the Mortgagor to the Mortgagee on  
demand and should the Mortgagor fail to pay the  
same and until such payment such amount or amounts  
shall be a charge against the lands and buildings  
20 hereby mortgaged and interest shall run thereon at  
the rate of 12% per annum and shall be paid at the  
end of every month as it accrues due and becomes  
payable and the Mortgagor hereby charges the lands  
and buildings now thereon and to be erected there-  
on with such sum or sums which shall be paid by the  
Mortgagee for such insurance together with inter-  
est thereon at the rate and in the manner aforesaid  
from the respective dates the same shall be paid  
by the Mortgagee

30 (e) Should the Mortgagor make any default in pay-  
ment of the ground rents, Municipal rates and taxes  
insurance and payments of premium or premia in res-  
pect thereof or should he fail to pay interest  
regularly and punctually to the Mortgagee under the  
First and Second Mortgages or should he fail to  
pay the interest due on the principal sum or sums  
advanced regularly as hereinbefore provided or  
should he fail to carry out any of the covenants  
and conditions and agreements herein contained then  
40 in any one of such cases the Mortgagee shall be at  
liberty to demand the repayment of the principal  
sum together with all interest due thereon notwith-  
standing the time for repayment thereof hereinbefore  
provided and shall be entitled to recover the same  
through a Court of law Provided Always that the  
Mortgagee shall not enforce his right to claim and  
recover the whole principal sum in event of any of  
the above defaults until after 1st January 1952,  
and even after the said date until after a five  
50 week previous written notice is first given by the  
Mortgagee to the Mortgagor demanding the compliance



Exhibits

No. 7.

Third Mortgage,  
between Plaintiff  
and Defendant  
No. 1,  
29th October 1951  
- continued.

of any default or breach as aforesaid AND PROVIDED ALWAYS THAT the Mortgagor shall not permit any increase of amount under either or both of the two previous mortgagees in respect of interest, premium ground rents Municipal rates or in any other way whatsoever AND should the Mortgagor permit such an increase after the first January, 1952 the Mortgagee shall also be entitled if after a notice in writing of five weeks any of such amounts are not paid up to claim the whole amount of loan and interest forthwith notwithstanding the period of repayment.

10

(f) He the Mortgagor agrees that he will repay the sum of Shs.150,000/- (Shillings one hundred and fifty thousand) to be advanced hereunder by twenty five half yearly instalments of Shs.5,000/- (Shillings five thousand) the first of such half yearly instalments to be paid on the 30th day of June One thousand nine hundred and fifty-two and the remaining twenty four at the end of every six months and thereafter the balance by eight half yearly instalments the first seven instalments of Shs.3,000/- (Shillings three thousand) each and the eighth instalment of Shs.4,000/- (Shillings four thousand) thus paying off the whole amount by the 30th day of June One thousand nine hundred and sixty-eight as hereinbefore provided and from such half yearly payments the Mortgagee shall accept Shs.3,000/- (Shillings three thousand) towards the reduction of the sum of Shs.100,000/- and Shs.2,000/- towards the reduction of the first Shs.25,000/- and after the first Shs.25,000/- has been paid of the subsequent payment of Shs.2,000/- towards the reduction of the second Shs.25,000/- and after such payments interest will run on the balance or balances due in respect of the respective sums Provided Always and it is hereby agreed that the Mortgagee shall appropriate the first payment or payments towards the amount or amounts expended by him the mortgagee for insurance, interest due and other outgoings and only after satisfaction in full of all such payments the payments will be applied towards the reduction of the principal sum or sums

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(g) The Mortgagor shall be entitled to make payment of any amount but not less than Shs.5,000/- at any time other than the instalments hereinabove stated towards the amount due under this mortgage and the same shall be appropriated by the mortgagee as stated in Clause (f) hereof

(h) The Mortgagee hereby covenants with the Mortgagor that if the Mortgagor shall repay the total principal sum advanced under these presents together with interest thereon due as hereinbefore provided by the 30th day of June One thousand nine hundred and sixty-eight the Mortgagee will at any time thereafter after the expiry of the stipulated date at the request and cost of the Mortgagor re-assign and surrender the lands and all buildings to the Mortgagor as he the Mortgagor may direct.

Exhibits

No.7.

Third Mortgage,  
between Plaintiff  
and Defendant,  
No. 1,  
29th October 1951  
- continued.

PROVIDED ALWAYS that if during the continuance of this mortgage the Mortgagor sells, transfers or assigns his right, title and interest in the said lands or any part thereof the Mortgagor shall forthwith repay all the amounts due by the Mortgagor under this mortgage to the Mortgagee

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and month and year first before written

20                   The Schedule within referred to

1. ALL THAT piece or parcel of land containing nought point one nought seven five (0.1075) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Sub-division No.259 (orig. No.237/16) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34702 attached to the Indenture dated the 18th day of July, 1944 was conveyed unto the Mortgagor by an Indenture dated the 1st day of April, 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and Jethabhai Premji Patel as Executors of the estate of Gordhanbhai Kalidas Patel deceased and (4) Mohanbhai Valji Patel (all therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XI Folio 151/3 for the term of ninety-nine years created by the Indenture of Lease dated the 1st day of March 1946 from the 1st day of March 1946 at the yearly rental of Shs. 2,000/- and to perform and observe the covenants conditions and stipulations in the said Indenture of Lease reserved and contained which said Lease has been surrendered by an Indenture dated the 19th day of November One thousand nine hundred and fifty one and registered in the Mombasa Registry in Volume L.T. XII Folio 152/17 and a fresh lease has

Exhibits

No. 7.

Third Mortgage,  
between Plaintiff  
and Defendant,  
No. 1,  
29th October 1951  
- continued.

been granted to the Mortgagor up to the 28th day of February, Two thousand and forty-five by an Indenture dated the 19th day of November One thousand nine hundred and fifty-one and registered in the Mombasa Registry in Volume L.T. XII Folio 152/19 on the terms and conditions therein contained at the yearly rental of Shs.2,000/- (Shillings two thousand) payable in advance on the first day of January on each year.

2. ALL THAT piece or parcel of land containing nought point nought eight eight one (0.0881) of an acre or thereabouts situate on the Island of Mombasa in the district of Mombasa known as Subdivision No. 260 (org. No.237/17) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34703 attached to the Indenture dated the 18th day of July 1944 was conveyed unto the Mortgagor by an Indenture dated the 1st day of April 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and Jethabhai Premji Patel as Executors of the estate of Gordhanbhai Kalidas Patel deceased and (4) Mohanbhai Valji Patel (all therein described) of the one part and the Mortgagor (therein described) of the other part registered in the Mombasa Registry in Volume L.T. XII Folio 153/3 for the term of ninety-nine years created by the Indenture of Lease dated the 1st day of March 1946 from the 1st day of March 1946 at the yearly rental of Shs.15,00/- and to perform and observe the covenants, conditions and stipulations in the said Indenture of Lease reserved and contained. 10  
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3. ALL THAT piece or parcel of land containing nought point nought eight eight one (0.0881) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No.261 (orig. No. 237/18) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34704 attached to the Indenture dated the 18th day of July, 1944 was conveyed unto the Mortgagor by an Indenture dated the 1st day of April 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and (4) Mrs. Premkunwar Walji (all therein described) of the one part and the Mortgagor (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 228/2 for the term of ninety-nine years created by the Indenture of Lease dated the 10th day of March 1947 from the 1st day of March 1947 at the yearly rental of Shs.1800/- and to perform and observe the covenants conditions and 40  
50

stipulations in the said Indenture of Lease reserved and contained.

Exhibits

No. 7.

SIGNED SEALED AND DELIVERED )  
by the Mortgagor in the  
presence of :-

sgd. Chimanlal Patel  
Advocate  
Mombasa.

sgd. C.R. Shah  
Law Clerk  
Mombasa.

) sgd. M.J.Karachiwalla

Third Mortgage,  
between Plaintiff  
and Defendant  
No. 1,  
29th October 1951  
- continued.

10

SIGNED SEALED AND DELIVERED )  
by the Mortgagee in the  
presence of :

sgd. Chimanlal Patel  
Advocate  
Mombasa.

sgd. C.R. Shah  
Law Clerk  
Mombasa

) sgd. Noorally R.R.  
Nanjee

20

We hereby consent to the above Mortgage

sgd. Said bin Seif

Witness to Signatures: for Bibi Zawana binti Ali  
for Doshi & Amin  
sgd. C.D. Amin, R.M. Doshi  
Advocate,  
Mombasa

for Bibi Sheikha binti Ali  
for Doshi & Amin  
R.M. Doshi

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COLONY & PROTECTORATE OF KENYA

Mombasa Registry.

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Exhibits

No. 8.

No. 8.

NOTICE, Plaintiff's Advocate to Defendant  
No. 1.Notice, Plaintiff's  
Advocate to  
Defendant No.1,  
2nd July 1953

From:

A.B. PATEL & PATEL,  
Advocates,  
P.O. box 274,  
MOMBASA.

2nd July, 1953.

Mr. Mohamedali Jaffer Karachiwalla,  
Mombasa.

10

Dear Sir,

re: Mortgage dated 29th day of October, 1951

Under instructions from our client Mr. Noorally Rattanshi Rajan Nanji, we have to write to you as under:-

That you have committed breach of the following covenants in the above mortgage:

(a) You have failed to pay to the Ismailia Corporation Limited the principal sum of Shs.84,000/- long overdue and you have also failed to pay interest on this principal sum which interest amounts to Shs.8,615/40 as arrears. 20

(b) You have also failed to pay to Karmali Khimji Pradhan the principal sum and interest thereon under the Second Mortgage now held by him.

(c) You have also failed to pay ground rent for the year 1953, in respect of the three pieces of land described in the above Mortgage.

(d) You have also failed to pay Municipal Rates in respect of the said three pieces of land for the year 1953. 30

(e) You have also failed to pay insurance premium to the Jubilee Insurance Company Limited in respect of the policy of premises as required by the mortgage in respect of the year beginning from 1st

July 1952, to 1st July 1953, and you have also failed to renew the said Insurance Policy for the year 1st July 1953, to 1st July 1954.

Exhibits

No. 8.

(f) You have also failed to pay the three instalments of Shs.5,000/- each payable by you to our client under the above mortgage and have also failed to pay interest to him from 1st February, 1952, to 30th June, 1953.

Notice,  
Plaintiff's  
Advocate to  
Defendant No.1,  
2nd July 1953 -  
continued.

10 In view of the breach of covenants set out hereinbefore, our client hereby demands the repayment of the principal sum namely Shs.150,000/- and interest thereon as from 1st February, 1952, which has become due and payable notwithstanding the time for repayment provided under the above mortgage.

20 Please note that unless you will comply with the covenants in the above mortgage in respect of which you have committed breach and made default as aforesaid within five weeks from the date of the receipt of this letter, our client will file an action to recover the said principal sum of Shs. 150,000/- and arrears of interest thereon now repayable by you holding you liable for all costs thereof.

30 Please note that by non-payment of the principal sum and interest due under the first and second mortgage as aforesaid and by non-payment of premium under the insurance policy, ground rents and Municipal Rate of the said three pieces of land you have also become liable to repay the said sum of Shs. 150,000/- and interest thereon under the above mortgage by virtue of the later part of covenant (e) of the above mortgage. Unless therefore, you will pay these sums to the respective parties to whom the same are due within five weeks from the date of the receipt of this letter, our client will also be entitled to proceed and will proceed to recover the principal sum and interest due under the above mortgage, holding you liable for all costs thereof.

40

Yours faithfully,

for A.B. PATEL & PATEL

sgd. A.B. Patel

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Exhibits

No. 10.

No. 10.

DRAFT DEED OF FOURTH MORTGAGEDraft Deed of  
Fourth Mortgage  
(undated).

THIS INDENTURE made this                    day of  
 One thousand nine hundred and fifty-three BETWEEN  
 MOHAMEDALI JAFFER KARACHIWALLA of Mombasa in the  
 Protectorate of Kenya (hereinafter called the Mort-  
 gagor which expression where the context so admits  
 shall include his heirs executors, administrators  
 and assigns) of the one part AND MRS. KHATIJABAI  
 w/o NOORALLY RATTANSHI RAJAN NANJI of Mombasa                    10  
 aforesaid (hereinafter called the Mortgagee which  
 expression where the context so admits shall in-  
 clude her heirs, executors, administrators and as-  
 signs) of the other part WHEREAS ALL THOSE three  
 leasehold hereditaments and premises described in  
 the schedule hereto were for the respective terms  
 therein referred to assigned unto the Mortgagor on  
 the terms and conditions more particularly set out  
 in the respective Indentures of Leases referred to  
 therein AND WHEREAS by an Indenture dated the                    20  
 29th day of October, 1951 (hereinafter called the  
 First Mortgage) made between the Mortgagor (therein  
 described) of the one part and The Ismailia Corpor-  
 ation Limited, a limited liability company incor-  
 porated in Kenya Colony having its registered office  
 at Mombasa aforesaid (therein described) of the  
 other part and registered in the Mombasa Regis-  
 try in Volume L.T. XII Folio 337/20 and inter alia  
 the Mortgagor assigned unto the said Ismailia Cor-  
 poration Limited the hereditaments and premises                    30  
 described in the schedule hereto to secure the re-  
 payment of the sum of Shs.84,000/- (Shillings eighty  
 four thousand) together with interest thereon at  
 the rate and in the manner as therein more particu-  
 larly set out AND WHEREAS by an Indenture dated  
 the 29th day of October, 1951 registered in the  
 Mombasa Registry in Volume L.T. XII Folio 337/21  
 and inter alia (hereinafter called the Second Mort-  
 gage) made between the Mortgagor (therein described)  
 of the one part and Mohamed Dhanji, merchant of                    40  
 Mombasa aforesaid (therein described) of the other  
 part the Mortgagor subject to the said First Mort-  
 gage assigned unto the said Mohamed Dhanji all the  
 hereditaments and premises described in the  
 schedule hereto to secure the repayment of the sum  
 of Shs.21,623/- together with interest thereon at  
 the rate and in the manner therein more particular-  
 ly set out AND WHEREAS by an Indenture of Assign-  
 ment dated the 20th day of November, 1951 registered

Exhibits

No. 10.

Draft Deed of  
Fourth Mortgage  
(undated) -  
continued.

in Mombasa Registry in Volume L.T. XII Folio 337/22 the said Mohamed Dhanji assigned all his right, title and interest in the said Second Mortgage to Karmali Khimji Pradhan of Mombasa aforesaid AND WHEREAS by an Indenture dated the 29th day of October, 1951 (hereinafter called the Third Mortgage) made between the Mortgagor (therein described) of the one part and Noorally Rattanshi Rajan Nanji of Mombasa aforesaid (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 337/22 and inter alia the Mortgagor subject to the said First and Second Mortgage assigned unto the said Noorally Rattanshi Rajan Nanji all the hereditaments and premises described in the schedule hereto to secure the repayment of the sum of Shs.150,000/- together with interest thereon at the rate and in the manner therein more particularly set out subject to such variation thereof as is affected by an Indenture of even date and presented herewith for registration AND WHEREAS the Mortgagor being desirous of adjusting and settling all litigation with the said Noorally Rattanshi Rajan Nanji and paying all sums due under the previous mortgages (except the principal amounts) AND WHEREAS the Mortgagor has requested the Mortgagee to pay all sums due to Noorally Rattanshi Rajan Nanji and other sums due under the said first and second mortgages and to pay such other sums as are agreed to be paid by the Mortgagees as hereinafter provided (except the principal amounts) amounting to Shs.68,000/- (Shillings sixty eight thousand) correctness whereof and payments whereof to the several parties the Mortgagor hereby acknowledges and the Mortgagee has agreed to do so on having the repayment thereof secured in the manner hereinafter appearing NOW THIS INDENTURE WITNESSETH as follows:-

1. In pursuance of the said agreement and in consideration of the sum of Shs.56,000/- (Shillings fifty six thousand) paid by the mortgagee to Noorally Rattanshi Rajan Nanji and others for and on behalf of the Mortgagor and at his request and instance on or before the execution of these presents (correctness and payments whereof the Mortgagor hereby acknowledges) and Shs.12,000/- to be paid as hereinafter provided the Mortgagor hereby covenants with the Mortgagee that he, the Mortgagor shall repay to the Mortgagee the said sum of Shs.68,000/- (Shillings sixty-eight thousand) on the 30th day of September One thousand nine hundred and fifty-six.



Exhibits

No. 10.

Draft Deed of  
Fourth Mortgage  
(undated) -  
continued.

2. That during the continuance of these presents and so long as any principal sum remains unpaid the Mortgagor hereby covenants with the Mortgagee that he, the Mortgagor shall pay to the Mortgagee interest on the principal amount of Shs.56,000/- at the rate of 12% per annum and on the sum of Shs.12,000/- or any part thereof paid by the Mortgagee as hereinafter provided 15% per annum such interest to be paid at the end of every month as it accrues due and becomes payable and that the Mortgagor shall also pay interest at the same rate on all arrears of interest payable by him to the Mortgagee under this mortgage from the day on which the same becomes due and payable and is not paid by him to the Mortgagee.

10

3. That in further pursuance of the said agreement and for the same consideration the Mortgagor hereby assigns unto the Mortgagee all the lands and hereditaments described in the schedule hereto together with the improvements thereon To Hold the same unto the Mortgagee subject to the said first, second and third mortgages respectively for all the residue now unexpired of the respective terms of years granted by the respective Indentures referred to in the schedule hereto (except the last one day of each of the respective terms of years granted by the respective Indentures referred to) subject to the terms and conditions set forth and contained in the said respective Indentures of Leases.

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4. During the continuance of these presents and so long as any moneys remain due and owing under these presents the Mortgagor will pay all the amounts whether for principal interest or otherwise due or to fall due under the First, Second and Third Mortgages hereinafter referred to and will observe and perform and carry out all the terms and conditions contained in the respective Indentures of Leases and on the part of the Mortgagor as Lessee to be observed performed and carried out and also pay the ground rent and all Municipal rates and taxes and all outgoings in respect thereof regularly.

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5. During the continuance of this security he, the Mortgagor shall not mortgage or otherwise assign or encumber or part with the possession of the lands and buildings now existing thereon or any part thereof without first obtaining the consent of the Mortgagee in writing which consent shall not be unreasonably withheld, provided however that the Mortgagor would be at liberty to sell at the best price the two unimproved plots described in

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the schedule hereto on releasing in any event the first and second mortgage and on paying the surplus if any towards the amount of third mortgage.

Exhibits

No. 10.

6. He, the Mortgagor will insure and keep insured with the Jubilee Insurance Company Limited all the buildings standing on the said plot No.259 of Section XVIII described in the schedule hereto against loss or damage by fire in the full value thereof and will pay all premiums necessary for such purpose (and will also assign to the Mortgagee the policy or policies of such insurance by way of collateral security if the same has not been assigned to the Ismailia Corporation Limited, or to Mohamed Dhanji or his transferee or to Noorally R.R. Nanji under the three previous mortgages) and should he the Mortgagor fail to do so, the Mortgagee shall be at liberty to insure and keep insured the said improvements and buildings for the proportionate or full value thereof as the case may be and debit the Mortgagor with such insurance premium or premia and all moneys so paid and expended by the Mortgagee shall be repayable by the Mortgagor to the Mortgagee on demand and should the Mortgagor fail to pay the same and until such payment such amount or amounts shall be a charge against the lands and buildings hereby mortgaged and interest shall run thereon at the rate of 12% per annum and shall be paid at the end of every month as it accrues due and becomes payable and the Mortgagor hereby charges the lands and buildings now thereon with such sum or sums which shall be paid by the Mortgagee for such insurance together with interest thereon at the rate and in the manner aforesaid from the respective dates the same shall be paid by the Mortgagee.

Draft Deed of Fourth Mortgage (undated) - continued.

The Mortgagee shall be entitled to collect all rents of the buildings now erected or on the premises hereby mortgaged and shall pay the interest of the first, second, third and this mortgage out of the rents so received and that for such purpose the Mortgagor shall pay to the Mortgagee a sum of Shs.125/- per month which sum the Mortgagee shall be entitled to retain out of the rents so received. To enable the Mortgagee to collect all rents the Mortgagor shall notify all tenants to pay rent to the Mortgagee as from 1st October, 1953 upto and during the subsistence of this mortgage.

Should the Mortgagor pay all amounts (except the principal amount under this mortgage in time and on due dates and perform and observe all the

Exhibits

No. 10.

Draft Deed of  
Fourth Mortgage  
(undated) -  
continued.

terms, conditions, covenants and stipulations as provided herein and on his part to be observed and performed the Mortgagee shall allow the Mortgagor to repay the principal amount on or before 30th September, 1958.

Should the mortgagor make any default in payment of the ground rent Municipal rates and taxes, insurance premiums in respect thereof or should he fail to pay interest regularly and punctually to the Mortgagees under the First, Second and third mortgages or should he fail to pay interest due on the principal amount regularly as hereinbefore provided or should he fail to carry out any of the covenants and conditions and agreements herein contained the Mortgagee shall be at liberty to demand the repayment of the principal amount together with all interest due thereon notwithstanding the time for repayment hereinbefore provided and shall be entitled to recover the same through a court of law. Same notice as in third mortgage of five weeks.

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20

The Mortgagee hereby covenants with the Mortgagor that if the Mortgagor shall repay the total principal sum secured under these presents together with interest thereon due as hereinbefore provided by the 30th day of September 1956 the Mortgagee will at any time thereafter re-assign the lands and buildings to the Mortgagor at his costs as he may direct

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day month and year first before written

30

Signed, sealed and delivered )  
by the Mortgagor in the )  
presence of :- )

Signed, sealed and delivered )  
by the Mortgagee in the )  
presence of :- )

THE SCHEDULE WITHIN REFERRED TOExhibits

No. 10.

1. 67000/- Principal sum
2. 55000/- Cash
3. 2000/- to be deposited with advocates A.B. Patel for bill of costs of 2nd and 3rd defendants in both civil cases.
4. Letters to be written by Mortgagor to pay rent to Mortgagee from 1st October, 1953.
- 10 5. 12000/- to be paid by Mortgagee towards ground rent and Municipal rates when due provided all sums except principal sum under all four mortgages paid before such dates. Interest 15% per annum on such amount from dates of payments.
- 20 6. Rent for Blue Room to be paid by Mortgagor -- not to be in arrears for more than one month i.e. rent for October, 1953 must be paid on or before 10th December, 1953. Blue Room premises consist of present shop premises and on adjoining shop on the Station Road and consist in all 3 shops. Rent agreed at Shs.1,500/-.

Draft Deed of Fourth Mortgage (undated) - continued.

Sgd. ? ?

Sgd. M.J. KARACHIWALLA

7/10/53

In Her Majesty's Supreme Court at Mombasa.  
 S.C.C.C. No. 213 of 1953  
 Put in by Plaintiff this 23 day  
 of August, 1954.

sgd. ? ?  
 JUDGE, SUPREME COURT OF KENYA.

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Exhibits

No. 11.

No. 11.

LETTER, Defendant No. 1 to Messrs. Satchu  
& Satchu.

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Letter,  
Defendant No.1  
to Messrs.  
Satchu & Satchu,  
9th September  
1953.

From:  
M.J. Karachiwalla,  
c/o Blue Room,  
Mombasa.

9th September, 1953.

Messrs. Satchu & Satchu,  
Advocates,  
Mombasa.

10

Dear Sirs,

Re: Supreme Court Civil Case No.48 of 1953  
Noorally R.R. Nanji vs. M.J. Karachi-  
walla and others.

---

I have settled the new case filed by Mr.  
Noorally R.R. Nanji against me on certain terms  
which will be recorded in due course on all for-  
malities being complied with. A term of the said  
settlement is that I should pay to you the costs  
allowed to you in the above case for defendants  
No.2 and 3 herein. I accordingly hereby undertake  
to pay your said costs and shall be obliged if you  
will kindly confirm to Messrs. A.B. Patel & Patel,  
Advocates that you will not claim the said costs  
from Mr. Noorally R.R. Nanji.

20

Yours faithfully,

sgd. M.J. Karachiwalla.

Copy to:-

Messrs. A.B. Patel & Patel,  
Advocates,  
Mombasa.

30

No. 12.

Exhibits

LETTER, Messrs. Inamdar &amp; Inamdar to Plaintiff's Advocate.

No. 12.

From:  
Inamdar & Inamdar,  
Advocates,  
P.O. Box 483,  
Mombasa.

Letter, Messrs.  
Inamdar &  
Inamdar to  
Plaintiff's  
Advocate,  
1st July 1954.

Ref. No.270/7/54.

1st July, 1954.

10 Messrs. A.B. Patel & Patel,  
Advocates,  
Mombasa.

Dear Sirs,

Re: S.C.C.C. No. 48 of 1952  
Noorali R.R. Nanji vs. M.J.  
Karachiwalla and others.

Under instructions from Mr. M.J. Karachiwalla we have to write as follows:-

20 In the above suit the Bill of Costs had been taxed at Shs.7613/50.

His Honour Mr. Justice Windham had awarded the Defendant No.1 one-half the taxed costs exclusive of the costs incurred on two applications. Items Nos.23 to 44 inclusive are the costs allowed to Defendant No.1 for the two applications re: joinder of parties and temporary injunction total whereof amounts to Shs. 815/50.

30 Your client has therefore to pay Shs.3,399/- being one-half the taxed costs together with Shs. 815/50 being the exclusive costs awarded to the Defendant No. 1.

We hereby call upon your client to pay us the sum of Shs.4,214/50 within 48 hours of the receipt hereof. On your client's failure to pay the same execution will have to be taken out. It may be noted that our Mr. T.J. Inamdar has a lien thereon for work done.

Yours faithfully,  
for INAMDAR & INAMDAR  
sgd. I.T. Inamdar.

40

COLONY & PROTECTORATE OF KENYA  
In His Majesty's Supreme Court at Mombasa  
S.C.C.C. No.213 Ex.12

23/8/54  
Sgd. JUDGE, SUPREME COURT OF KENYA.

Exhibits

No. 13.

No. 13.

LETTER, Defendant No.1 to Defendant No.2.

Letter,  
Defendant No. 1  
to Defendant  
No. 2,  
9th September  
1953.

From:

M.J. KARACHIWALLA,  
c/o Blue Room,  
Mombasa.

9th September, 1953.

Messrs. Ismailia Corporation Ltd.,  
Jubilee Insurance Building,  
Mombasa.

10

Dear Sirs,

Re: Your Mortgage on Plot Nos.259, 260  
& 261 of Section XVIII, Mombasa.

I shall be very much obliged if you will  
agree to the following:-

1. Give me an extension of time to pay the mortgage amount for two years on payment of all outstanding interest.
2. That I be allowed to raise a fourth mortgage from Mr. Noorally R.R. Nanji in the sum of Shs.50,000/- or thereabouts.
3. That under the fourth mortgage I be allowed to permit Mr.Noorally R.R. Nanji to collect all rents of the premises on his personal undertaking to pay your interest, ground rent and Municipal rates on due dates.

20

As the matter is urgent I trust that you will oblige me by your early confirmation of the above.

Yours faithfully,

M.J. KARACHIWALLA.

30

Copy to:

Messrs. A.B. Patel & Patel,  
Advocates,  
Mombasa.

COLONY & PROTECTORATE OF KENYA  
IN HIS MAJESTY'S SUPREME COURT AT MOMBASA  
S.C.C.C. Case No. 213 of 1953

Ex.13  
23/8/1954

sgd. JUDGE,  
SUPREME COURT OF KENYA.

40

No. 14.

Exhibits

LETTER, Defendant No. 1 to Defendant No. 3.

No. 14.

From:

M.J. KARACHIWALLA,  
c/o Blue Room,  
Mombasa.

9th September, 1953.

Letter,  
Defendant No.1  
to Defendant  
No.3,  
9th September  
1953.Mr. Karmali Khimji Pradhan,  
Mombasa.

10 Dear Sir,

Re: Your Mortgage on Plots Nos.259, 260  
and 261 of Section XVIII, Mombasa.I shall be very much obliged if you will agree  
to the following:-

1. Give me an extension of time to pay the mortgage amount for two years on payment of all outstanding interest.
- 20 2. That I be allowed to raise a fourth mortgage from Mr. Noorally R.R. Nanji in the sum of Shs.50,000/- or thereabouts.
3. That under the fourth mortgage I be allowed to permit Mr. Noorally R.R. Nanji to collect all rents on his personal undertaking to pay your interest, ground rent and Municipal rates on due dates.

As the matter is urgent I trust you will oblige me by your early confirmation of the above.

Yours faithfully,

sgd. M.J. Karchiwalla.

30 Copy to:-

Mr. Mohamed Dhanji,  
c/o Kurmaly's Ltd.,  
Mombasa.Messrs. A.B. Patel & Patel,  
Advocates,  
Mombasa.

COLONY &amp; PROTECTORATE OF KENYA

IN HIS MAJESTY'S SUPREME COURT AT MOMBASA  
S.C.C.C. No. 213 of 1953

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Ex.14 Dated 23/8/54.



Exhibits

No. 15.

No. 15.

LETTER, Defendant No.1 to Plaintiff.

Letter, Defendant  
No.1 to Plaintiff  
29th October,  
1951.

KENYA REVENUE

FOUR  
SHILLINGS

Mombasa,

29th October, 1951.

Noorali R.R. Nanji,  
Mombasa.

I, Mohamedali J. Karachiwalla, hereby agree that I will sign a fresh Mortgage or any other document with a view to give you a proper and valid Third Mortgage over my three leasehold plots on Station Road, together with all improvements thereon.

10

My undertaking will continue until the Mortgage is duly registered.

Yours faithfully,

sgd. M.J. Karachiwalla.

RGG. Fees	Shs.
-----------	------

Stamp Duty	Shs.4/- (Sec.5)
Penalty	Shs.5/-

20

The Stamp Ordinance (Cap.57) Section 42

A penalty of Shs.5/- for late stamping has been imposed.

KENYA REVENUE

FIVE  
SHILLINGS

Sgd. ? ?

COLLECTOR OF STAMP DUTIES

C.

ExhibitsLETTER, Defendant No.1 to Defendant No.2

C.

From:  
M.J. KARACHIWALLA,  
c/o Blue Room,  
Mombasa.

Letter,  
Defendant No.1  
to Defendant  
No.2,  
9th September  
1953.

9th September, 1953.

Messrs. Ismailia Corporation Ltd.,  
Jubilee Insurance Building,  
10 Mombasa.

Dear Sir,

Re: Your Mortgage on Plot Nos.259, 260  
and 261 of Section XVIII, Mombasa.

I shall be very much obliged if you will agree  
to the following:-

1. Give me an extension of time to pay the mortgage amount for two years on payment of all outstanding interest.
- 20 2. That I be allowed to raise a fourth mortgage from Mr. Noorally R.R. Nanji in the sum of Shs.50,000/- or thereabouts.
3. That under the fourth mortgage I be allowed to permit Mr. Noorally R.R. Nanji to collect all rents of the premises on his personal undertaking to pay your interest, ground rent and Municipal rates on due dates.

As the matter is urgent I trust that you will oblige me by your early confirmation of the above.

Yours faithfully,

sgd. M.J. Karachiwalla.

30

Copy to:-

Messrs. A.B. Patel & Patel,  
Advocates,  
Mombasa.

COLONY & PROTECTORATE OF KENYA  
IN HIS MAJESTY'S SUPREME COURT AT MOMBASA

S.C.C.C. No. 213 of 1953

Ex. C.

Exhibits

D.

D.

LETTER, Defendant No.2 to Defendant No.1

Letter,  
Defendant No.2  
to Defendant  
No.1,  
12th September  
1953.

From:

THE ISMAILIA CORPORATION LTD.,  
P.O. Box 501,  
Mombasa,  
Kenya Protectorate.

Ref. No.141/53.

12th September, 1953.

Mr. Mahomedali Jaffer Karachiwalla,  
Mombasa.

10

Dear Sir,

Re: Our Loan No.6 for Shs.84,000/- on  
Your Plots Nos. 259, 260 and 261,  
Section XVIII, Mombasa.

With reference to your letter of the 9th instant, we hereby give our consent to you to create a fourth mortgage on above plots in favour of Mr. Noorally R.R. Nanji for Shs.50,000/- SUBJECT TO:-

(i) Your paying us immediately Shs.9621/50 being interest due to us upto 31.8.53.

20

(ii) Your also paying us further Shs.506/10 being interest for the month of September, 1953.

(iii) Your paying immediately to the Jubilee Insurance Company Shs.1053/- being fire insurance premiums due on these properties for a cover upto 1.7.54. You must show us their receipt for above payment.

(iv) Your also paying all ground rent and Municipal rates due for the year 1953, and show us the receipts.

30

Our Corporation is also willing to show indulgence to you by not calling upon you to repay the principal amount of their loan until 30.9.1955 PROVIDED -

(a) You pay them interest due at the end of every month regularly.

(b) You pay insurance, ground rent, Municipal rates etc. immediately when they are due.

Exhibits

D.

On your failing to comply with in respect of any of the above stipulations, the Corporation reserves the right to recall the entire loan which, as you know, has fallen due for repayment long ago.

Letter,  
Defendant No.2  
to Defendant  
No.1,  
12th September  
1953 -  
continued.

Yours faithfully,

sgd. ? ?

MANAGING DIRECTOR.

10 Copy to:-

Messrs. A.B. Patel & Patel,  
Advocates,  
Mombasa.

E.

E.

TERMS OF SETTLEMENT, between Plaintiff and  
Defendant No.1.

Terms of  
Settlement,  
between  
Plaintiff and  
Defendant  
No.1  
(undated)

PARTIES: Noorali R.R. Nanji and  
M.J. Karachiwalla

- 20 TERMS: (1) Third mortgage to remain in force subject to variation as to payment of interest on the whole of Shs.150,000/- at 12% per annum. There would interest at 12% per annum on interest on arrears.
- (2) All amounts in excess of Shs. 150,000/- to be paid to Mortgagee or to be accounted in the fourth mortgage.
- (3) Two years instalments not to be paid.
- (4) Allowed to sell two unimproved plots if 1st and 2nd mortgages released.
- 30 (5) Fourth mortgage Shs.50,000/- 12% interest to be paid every month, interest on interest if in arrears.
- (6) Mortgagee in possession and rent to be

Exhibits

E.

Terms of Settlement, between Plaintiff and Defendant No.1, (undated) - continued.

collected by Mortgagee who shall pay interest to first, second, third and fourth mortgage and shall be paid Shs.125/- for all troubles.

Int. N.R. Int. M.J.K.

- (7) Letters to be addressed to all tenants. If rent not paid within certain time, terms to be agreed as to what will happen in default.
- (8) Rent from 1st October, 1953, to be collected.
- (9) Three years, and two years option if terms carried out. 10
- (10) All costs of 2nd and 3rd defendants in both cases to be paid M.J. Karachiwalla.
- (11) 50,000/- includes arrears of interest, costs of action other arrears due and costs of mortgage etc.
- (12) Mortgage may be drawn in favour of Mrs. Noorali R.R. Nanji.

Int. N.R. Int. M.J.K.

F.

F.

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Letter, Plaintiff's Advocate to Messrs. Inamdar & Inamdar, 2nd July, 1954.

LETTER, Plaintiff's Advocate to Messrs. Inamdar & Inamdar.

From:

A.B. Patel & Patel,  
Advocates,  
P.O. Box 274,  
Mombasa.

2nd July, 1954.

Messrs. Inamdar & Inamdar,  
Advocates,  
Mombasa.

Dear Sirs,

Re: Supreme Court Civil Case No.48 of 1952  
Noorali R.R. Nanji vs. M.J.  
Karachiwalla and others.

We are in receipt of your letter of 1st instant No.270/7/54 which ought to have been addressed

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to our client. Our client is now going to call at our office on 3rd instant when it will be placed before him.

Exhibits

F.

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However, we have to state that Mr. M.J. Karachiwalla has already got the decree marked as satisfied. If this had not been done, our client had intended to have reference from the said taxation to the Judge. As far as we can recollect, the satisfaction of the decree was pre-requisite and necessary condition of the settlement of subsequent case against your client and that it was your client who ultimately declined to complete the bargain.

Letter,  
Plaintiff's  
Advocate to  
Messrs. Inamdar  
& Inamdar,  
2nd July, 1954  
- continued.

Your client had agreed to pay our fees for all the work and several drafts were prepared and brought to Mr. T.J. Inamdar for approval. Will you please ask your client to settle our claim for the same at his earliest?

20

Yours faithfully,  
for A.B. PATEL & PATEL.  
sgd. ? ?

COLONY & PROTECTORATE OF KENYA  
IN HIS MAJESTY'S SUPREME COURT AT MOMBASA  
S.C.C.C. No. 213 of 1953.

Exh. F.

Put in by Defendant.

this 23rd day of August, 1954.

sgd. ? ?  
JUDGE, SUPREME COURT OF KENYA.

30

X.

X

FIRST MORTGAGE DEED

First Mortgage  
Deed,  
23rd October  
1951.

THIS INDENTURE made the 23rd day of October, One thousand nine hundred and fifty-one B E T W E E N MOHAMEDALI JAFFER KARACHIWALLA British Indian of Mombasa in the Colony and Protectorate of Kenya (hereinafter called the Borrower which expression where the context so admits shall be deemed to include his heirs executors administrators and assigns) of the one part and THE ISMAILIA CORPORATION

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

LIMITED a limited liability company incorporated in Kenya and having its registered office at Mombasa in the Colony and Protectorate of Kenya (hereinafter called the Company which expression where the context so admits shall be deemed to include its successors and assigns) of the other part WHEREAS the Borrower is registered owner of ALL THOSE three leasehold plots of land more particularly described in the Schedule hereunder.

AND WHEREAS the Borrower requested the Company on the 23rd day of November, 1950 to lend to him the sum of Shs.84,000/- (Shillings eighty-four thousand) which the Company has already advanced to the Borrower on the said date. 10

AND WHEREAS it was a condition of the said loan that the repayment of the same with interest thereon should be secured upon the hereditaments hereinafter appearing that is to say:

1. ALL THAT piece or parcel of land containing nought point one nought seven five (0.1075) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No. 259 (Orig. No. 237/16) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No. 34702 attached to the Indenture dated the 18th day of July 1944 and registered in the Mombasa Registry in Volume L.T. XII Folio 31/1 AND ASSIGNED unto the Borrower by an Indenture dated the 1st day of April, 1949, made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel, (3) Mohanbhai Valji Patel and Jethabhai Premji Patel as Executors of the estate of Gordhanbhai Kalidas Patel deceased and (4) Mohanbhai Valji Patel (all therein described) of the one part and the Borrower herein (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 151/3 for the term of ninety-nine years created by an Indenture of Lease dated the 1st day of March 1946 and made between Soud bin Ali bin Salim as Trustee as therein described of the one part and (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Gordhanbhai Kalidas Patel and (4) Mohanbhai Valji Patel of the other part and registered in the aforesaid Registry in Volume L.T. 12 Folio 151/1 at the yearly rental of Shs. 2,000/- and subject to the covenants conditions and stipulations in the said Indenture of Lease reserved and contained 20 30 40

2. ALL THAT piece or parcel of land containing nought point nought eight eight one (0.0881) of an 50

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

10 acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No. 260 (Orig. No.237/17 of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34703 attached to the Indenture dated the 18th day of July 1944 and registered in the Mombasa Registry in Volume L.T. XII Folio 35/1 AND assigned unto the Borrower by an Indenture dated the 1st day of April 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and Jethabhai Premji Patel as executors of the estate of Gordhanbhai Kalidas Patel deceased and (4) Mohanbhai Valji Patel (all therein described) of the one part and the borrower herein/therein described of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 153/3 for the term of ninety-nine years created by an Indenture of Lease dated the 1st day of March 1946 and made between Bibi Zawana binti Ali therein described of the one part and (1) Jethabhai Premji Patel 20 (2) Tribhovanbhai Hansraj Patel (3) Gordhanbhai Kalidas Patel and (4) Mohanbhai Valji Patel of the other part and registered in the aforesaid Registry in Volume L.T. 12 Folio 153/1 at the yearly rental of Shs.1500/- and subject to the covenants conditions and stipulations in the said Indenture of Lease reserved and contained.

30 3. ALL THAT piece or parcel of land containing nought point nought eight eight one (0.0881) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No. 261 (Orig. No.237/18) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34704 attached to the Indenture dated the 18th day of July 1944 and registered in the Mombasa Registry in Volume L.T. XII Folio 33/1 AND assigned unto the Borrower by an Indenture dated the 1st day of April 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel 40 (3) Mohanbhai Valji Patel and (4) Mrs. Premkunwar Walji (all therein described) of the one part and the Borrower herein (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 228/2 for the term of ninety-nine years created by an Indenture of Lease dated the 10th day of March 1947 and made between Sheikha Binti Ali therein described of the one part and (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and (4) Mrs. 50 Premkunwar Walji of the other part and registered in the aforesaid Registry in Volume L.T. XII Folio 228/1 at the yearly rental of Shs.1800/- and subject to the covenants conditions and stipulations



Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

in the said Indenture of Lease reserved and contained.

AND WHEREAS by an Indenture dated the 23rd day of November, 1950 made between the Borrower of the one part and the Company of the other part the Borrower demised by way of mortgage the said hereditaments as security for the said loan and interest thereon on the terms and conditions therein appearing but the said Indenture could not be registered for the reason that in Civil Case No. 210 of 1950 of His Majesty's Supreme Court of Kenya at Mombasa it was held and ordered that the Deed of Trust dated the 9th day of February, 1945 registered in the Mombasa Registry in Day Book No. 211 Volume L.T. XII Folio 21/2 File 1644 under which inter alia the lease in respect of the land comprised in Subdivision No. 259 Section XVIII Mombasa (being item No. 1 of the hereditaments hereinbefore described) was void and should be set aside and thereupon the hereditaments and premises comprised in the said Trust including inter alia the land comprised in Subdivision No. 259 of Section XVIII Mombasa became part and parcel of the intestate estate of Soud bin Ali deceased.

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AND WHEREAS by the setting aside of the said Trust the title of the Borrower in respect of the said Subdivision No. 259 of Section XVIII Mombasa became defective.

AND WHEREAS in Civil Case (O.S.) No. 96 of 1951 it was ordered by His Majesty's Supreme Court of Kenya at Mombasa that Said bin Seif as administrator of the estate of the said Soud bin Ali deceased of Mombasa be authorised to accept surrender inter alia of the lease in respect of the said Subdivision No. 259 of Section XVIII, Mombasa and to grant in lieu thereof a fresh lease for the balance of the term on the same rental and on the same terms and conditions

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AND WHEREAS by an Indenture dated 19th day of November 1951 made between Said bin Seif as Administrator of the estate of the said late Soud bin Ali of Mombasa (therein described as Lessor) of the one part and the Borrower (therein described as Lessee) of the other part registered in Mombasa Registry in Volume No. L.T. XII Folio No. 152/19 on 28th November, 1951 the land comprised in the said Subdivision No. 259 of Section XVIII Mombasa has been demised to the Borrower for all the residue unexpired of the term of 99 years commencing from

40

1st March 1946 on the terms and conditions as therein set out.

Exhibits

X.

AND WHEREAS the Borrower is now in a position to grant to the Company a mortgage on all the hereditaments described in the Schedule hereto and the Company has asked and the Borrower has agreed to secure the repayment of the said principal amount and interest thereon in the manner hereinafter appearing :-

First Mortgage Deed,  
23rd October 1951 -  
continued.

- 10 1. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the said sum of Shs. 84,000/- (Shillings eighty-four thousand) already paid by the Company to the Borrower on the 23rd day of November 1950 (the receipt of which sum the Borrower doth hereby acknowledge) the Borrower DOTH HEREBY covenant to repay to the Company at Mombasa free of exchange the said sum of Shs.84,000/- (Shillings eighty-four thousand) on the 31st day of December, 1951 AND ALSO
- 20 to pay interest thereon from the 23rd day of November, 1950 at the rate of  $6\frac{1}{2}\%$  per annum free of exchange regularly at the end of every calendar month at the office of the company at Mombasa on the principal money or any part thereof remaining due and unpaid under these presents and shall also pay interest at the rate of  $6\frac{1}{2}\%$  per annum free of exchange on all arrears of such interest from the day on which the same become due and payable and is not paid by the Borrower to the Company.
- 30 2. IN FURTHER PURSUANCE of the said agreement and for the consideration aforesaid the Borrower hereby demises unto the Company all and singular the hereditaments and premises described in the Schedule hereunder TOGETHER with all buildings and improvements now existing or hereafter to be erected thereon TO HOLD the same unto the company for all the unexpired residue of the term of 99 years respectively created by the Leases except the last seven days thereof subject to the proviso for redemption hereinafter contained
- 40 3. THE Borrower hereby further covenants with the Company as follows:-
- (a) That so long as any money remains owing on the security of these presents the Borrower will pay on the due dates all the land rents, house and municipal assessments rates and taxes and other outgoings which may become due and payable in respect

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

of the properties hereby mortgaged or any part thereof. It shall be lawful but not obligatory for the company to pay the said land rents, house and municipal assessments rates and taxes and other outgoings and debit the Borrower with the same and all moneys so paid together with interest thereon at the rate of  $6\frac{1}{2}\%$  per annum from the date the same having been paid shall on demand be repaid by the Borrower to the company and until such repayment shall be a charge on the lands and buildings hereby mortgaged in addition to the said principal sum hereby secured and interest thereon as aforesaid and the Borrower hereby further charges the said lands together with all the buildings now existing or hereafter to be erected thereon with payment to the company of all moneys which shall have been paid by the Company for the purposes aforesaid together with interest thereon at the rate of  $6\frac{1}{2}\%$  per annum from the time the same having been paid as aforesaid until its repayment by the Borrower.

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(b) That during the continuance of this security and for as long as any money remains owing on the security of these presents the Borrower will not mortgage, charge or otherwise part with possession of the properties hereby mortgaged or any part thereof without first obtaining the consent of the company in writing.

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(c) The Borrower will insure with the Jubilee Insurance Company Limited of Mombasa and for as long as any money remains owing on the security of these presents keep insured all or any buildings that may be erected on the lands hereby mortgaged against loss or damage caused by fire for the full value of the buildings and for the loss of the rental of the said buildings when erected owing to any damage or loss which may be caused by fire or otherwise and will pay punctually all premiums necessary for such purpose and will also assign to the company the policy of such insurance as aforesaid by way of collateral security. It shall be lawful but not obligatory for the company to insure and keep insured the said buildings when

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Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

erected for the full value of the said buildings against loss or damage by fire or otherwise and also for loss of rent as aforesaid and to pay themselves and debit the Borrower with insurance premiums for insuring and keeping insured the said buildings against loss or damage by fire or for loss of rent as aforesaid and all moneys so paid as aforesaid for such insurance premiums together with interest thereon at the rate of  $6\frac{1}{2}\%$  per annum from the date the same having been paid or debited as aforesaid shall on demand be repaid by the Borrower to the company and until such repayment shall be a charge on the lands and the buildings hereby mortgaged in addition to the said principal sum hereby secured and interest thereon as aforesaid and the Borrower hereby further charges the said lands together with all the buildings now existing or hereafter to be erected thereon with payment to the company of all moneys which shall be paid by the company for the aforesaid insurance premiums together with interest thereon at the rate of six and a half per centum per annum from the time the same having been paid as aforesaid until its repayment by the Borrower.

(d) That so long as any money remains owing on the security of these presents the Borrower will keep the buildings for the time being comprised herein in good repair and condition and if the Borrower shall fail to do so the company may thereupon enter thereon and execute such repairs as may be necessary to comply with the above obligation and it is hereby declared that the company shall be entitled to do so without thereby becoming liable as Mortgagees in possession and the Borrower will on demand repay to the company all the expenses thereby incurred by the company together with interest thereon at the rate of  $6\frac{1}{2}\%$  per annum from the date the same having been paid or debited to the Borrower by the company and until such repayment shall be a charge upon the lands and buildings comprised in this security and the Borrower hereby further charges the said lands together with the buildings erected thereon with the said moneys and interest as aforesaid

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

- (e) That the respective leases creating the said terms are now good valid and effectual leases of the said several hereditaments and all the rents reserved by and all the covenants conditions and agreements contained in the said leases and on the part of the lessees and the persons deriving title under them to be paid observed and performed have been paid observed and performed upto the date of these presents 10
- (f) That the Borrower or the persons deriving title under him will at all times so long as money remains due on this security pay observe and perform or cause to be paid observed and performed all the rents reserved by and all the covenants conditions and agreements contained in the said leases and on the part of the lessees and the persons deriving title under them to be paid observed and performed and will keep the company and those deriving title under it indemnified against all actions proceedings costs charges damages claims and demands if any to be incurred or sustained by it or them by reason of the non-payment of such rent or the non-observance of such covenants conditions and agreements or any of them 20
- (g) That if the Borrower shall make any default in payment on the due date of the principal sum or any interest as provided hereinabove or in the observance or performance of any of the covenants and conditions herein expressed or implied and on the part of the Borrower to be observed and performed the company may forthwith demand repayment of all the moneys hereby secured together with all arrears of interest including costs or legal charges whatsoever incurred by the company towards the enforcement of the security and to recover the principal and interest or otherwise or any part thereof then remaining due under this Mortgage any clause or provision to the contrary herein notwithstanding 30 40

IT IS FURTHER AGREED that if the Borrower shall pay the said sum of Shs.84,000/- or such portion thereof as shall then remain unpaid together with interest in the meantime at the rate stipulated aforesaid and all other dues and costs thereon the company will at any time after the 50

expiry of the aforesaid stipulated term at the request and cost of the Borrower discharge or reassign the properties mortgaged to the Borrower or as he may direct

IN WITNESS WHEREOF the Borrower has hereunto set his hand and seal and the company has hereunto caused its Common Seal to be affixed on the day and the year first above written

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

THE SCHEDULE above referred to

- 10 1. ALL THAT piece or parcel of land containing nought point one nought seven five (0.1075) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No. 259 (Original No.237/16) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34702 attached to the Indenture dated the 18th day of July 1944 and registered in the Mombasa Registry in Volume L.T. XII Folio 31/1 AND demised
- 20 unto the Borrower by an Indenture dated the 19th day of November, 1951 made between Said bin Seif as administrator of the estate of the late Soud bin Ali (therein described) of the one part and the Borrower herein (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 152/19 for the term ending on 28.2.2045 at the yearly rental of Shs.2,000/- and subject to the covenants conditions and stipulations in the said Indenture of Lease reserved and contained.
- 30 2. ALL THAT piece or parcel of land containing nought point nought eight eight one (0.0881) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No. 260 (Orig. 237/17) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34703 attached to the Indenture dated the 18th day of July 1944 and registered in the Mombasa Registry in Volume L.T. XII Folio 35/1 AND assigned
- 40 unto the Borrower by an Indenture dated the 1st day of April 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel, (3) Mohanbhai Valji Patel and Jethabhai Premji Patel as Executors of the estate of Gordhanbhai Kalidas Patel deceased and (4) Mohanbhai Valji Patel (all therein described) of the one part and the Borrower herein (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued

Folio 153/3 for the term of ninety-nine years created by an Indenture of Lease dated the 1st day of March 1946 and made between Bibi Zawana binti Ali therein described of the one part and (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Gordhanbhai Kalidas Patel and (4) Mohanbhai Valji Patel of the other part and registered in the aforesaid Registry in Volume L.T. 12 Folio 153/1 at the yearly rental of Shs.1500/- and subject to the covenants conditions and stipulations in the said Indenture of Lease reserved and contained.

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3. ALL THAT piece or parcel of land containing nought point nought eight eight one (0.0881) of an acre or thereabouts situate on the Island of Mombasa in the District of Mombasa known as Subdivision No. 261 (Orig. No. 237/18) of Section XVIII which is more particularly demarcated and delineated on Deed Plan No.34704 attached to the Indenture dated the 18th day of July 1944 and registered in the Mombasa Registry in Volume L.T. XII Folio 33/1 AND assigned unto the Borrower by an Indenture dated the 1st day of April 1949 made between (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and (4) Mrs.Premkunwar Walji (all therein described) of the one part and the Borrower herein (therein described) of the other part and registered in the Mombasa Registry in Volume L.T. XII Folio 228/2 for the term of ninety-nine years created by an Indenture of Lease dated the 10th day of March 1947 and made between Sheikha Binti Ali therein described of the one part and (1) Jethabhai Premji Patel (2) Tribhovanbhai Hansraj Patel (3) Mohanbhai Valji Patel and (4) Mrs. Premkunwar Walji of the other part and registered in the aforesaid Registry in Volume L.T. XII Folio 228/1 at the yearly rental of Shs.1800/- and subject to the covenants conditions and stipulations in the said Indenture of Lease reserved and contained

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SIGNED SEALED AND DELIVERED )  
by the said Borrower in the )  
presence of :- ) Sgd. M.J. KARACHIWALLA

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Sgd. ? ?  
Advocate, Mombasa

and

Sgd. ? ?  
Law Clerk,  
Mombasa.

THE COMMON SEAL of the SAID COMPANY was here-  
unto affixed in the presence of :-

Sgd. ? ?  
DIRECTOR

Sgd. ? ?  
DIRECTOR

Sgd. ? ?  
Secretary

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SEAL  
THE ISMAILIA CORPORATION  
LIMITED  
MOMBASA

Exhibits

X.

First Mortgage  
Deed,  
23rd October  
1951 -  
continued.

We, (1) Said bin Seif, Administrator of the estate of the late Soud bin Ali deceased, (2) Bibi Zawana binti Ali and (3) Sheikha binti Ali hereby consent to the foregoing mortgage.

Dated this 19th day of November, 1951.

SIGNED in the presence of:-

R.M. DOSHI  
ADVOCATE  
MOMBASA.

sgd. SAID BIN SEIF

for BIBI ZAWANA BINTI ALI  
for DOSHI & AMIN  
R.M. DOSHI

for SHEIKHA BINTI ALI  
for DOSHI & AMIN  
R.M. DOSHI

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COLONY AND PROTECTORATE OF KENYA  
MOMBASA REGISTRY

REGISTERED at 10.20 a.m. 28.11.1951

STAMP DUTY Shs. 210/- Day Book No.2324 -do- -do-  
Registration fees 26/- Volume L.T. XII -do- -do-  
Folio 337/20,154/18,229/17  
236/- File 1762, 1763, 1825

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Sgd. ? ?  
REGISTRAR

Drawn by :-  
SATCHU & SATCHU,  
ADVOCATES,  
MOMBASA.



IN THE PRIVY COUNCIL

No. 6 of 1957

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI

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B E T W E E N :

MOHAMEDALI JAFFER KARACHIWALLA  
(First Defendant) Appellant

- and -

1. NOORALLY RATTANSHI RAJAN NANJI  
(Plaintiff)
  2. ISMAILIA CORPORATION LIMITED  
(Second Defendant)
  3. KARMALI KHIMJI PRADHAN  
(Third Defendant) Respondents
- 

RECORD OF PROCEEDINGS

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HERBERT OPPENHEIMER, NATHAN & VANDYK,  
20, Copthall Avenue,  
London Wall, E.C.2.  
Solicitors for the Appellant.

WALTONS & CO.,  
101, Leadenhall Street,  
London, E.C.3.  
Solicitors for the Respondents.