

30 MAR 1963

25 RUSSELL SQUARE
LONDON, W.C.1.

32/1962

IN THE PRIVY COUNCIL

No. 24 of 1961

ON APPEAL 68268

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

PREMCHAND NATHU AND COMPANY LIMITED

(Defendants)

(Appellants)

- and -

THE LAND OFFICER

(Plaintiff)

(Respondent)

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C A S E F O R T H E A P P E L L A N T S

Record

1. This is an Appeal from the Judgment and Order of the Court of Appeal for Eastern Africa dated the 15th December 1960, dismissing an Appeal by the Appellants from an Order and Decree of the High Court of Tanganyika dated the 8th June 1960 ordering the Appellants to deliver up possession of a plot of land at Moshi to the Respondent.

p.65 L.33

p.32 L.1

2. The questions arising in this Appeal are

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(i) whether a breach by the Appellants of a condition of a Certificate of Occupancy granted to them by the Governor of Tanganyika, requiring them to complete certain buildings within a fixed time, entitled the Respondent to exercise a right of forfeiture or whether such right was waived by the subsequent conduct of the Respondent and/or his agents;

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(ii) Whether Section 14(1) of the Conveyancing Act 1881, requiring a notice specifying the breach complained of to be served on a lessee before a right of forfeiture can be exercised, applies in Tanganyika to the termination by the Crown of Rights of Occupancy for a breach of condition.

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p.71 L.8

3. The Appellants were the Occupiers of a plot of land in Moshi, Tanganyika under a Certificate of Occupancy signed by both parties for a term of 99 years, from the 4th April 1952. The conditions of Occupancy were inter alia:-

p.72 LL.14-
p.73 L.9

"2. The Occupier undertakes:-

(i) To erect buildings on the said land of a value of not less than Shillings Sixty thousand (Shs. 60,000/-).

(ii) Within a period of six months from the date of commencement of the said Right of Occupancy to submit to the Township Authority, Moshi, (hereinafter called "the said Authority") such plans of the proposed buildings (including block plans showing the position of the buildings) drawing elevations and specifications thereof as will satisfy the said Authority and as will ensure compliance with the building covenant contained in sub-paragraph (i) supra. Such plans and specifications shall be submitted in triplicate. 10
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(iii) To commence building operations within a period of three months from the date of notification in writing by the said Authority of approval of the plans and specifications, such buildings to conform to a building line decided upon and notified by the said Authority. 30

(iv) To complete the buildings according to the said plans and specifications so that the said buildings are ready for use and occupation within a period of twenty-four months from the date of commencement of the said Right of Occupancy."

p.1 L.9
p.2 L. 32-
p.3 L. 10

4. By a Plaint filed on the 8th April 1959 the Respondent asked the High Court of Tanganyika inter alia to record a finding under Section 23(1) of the Land Ordinance that the Appellants were in illegal occupation of public land since the 5th May 1957, on the grounds that the Governor had on the 4th May 40

1957 revoked the Appellants' Right of Occupancy; to order the Appellants to surrender the said land to the Respondent; to order the Appellants to pay a sum of Shs. 435/- revocation fee and further claiming damages and costs.

10 In their defence the Appellants contended inter alia that they were not given any notice of the application for registration of the Instrument of Revocation or any opportunity to show cause why registration should not be effected; that they erected on the land a building of a value not less than the minimum stipulated in Clause 2(1) of the Certificate of Occupancy; that approval for erection of the building when given by the Township Authority, Moshi, was conditional on the boundaries of the plot being clearly defined, which had not been done by the Respondent; that the building was completed after an extension of time by the Respondent and an Occupation Certificate issued; and that the Respondent
20 had agreed to allow the Appellants to remain in possession of the land in exchange for the surrender by a director of the Appellants of another plot.

p.4 L.1 -
5 L.43

30 5. The issues agreed between the parties at the trial were (i) Was the revocation lawful? (ii) Should the Appellants have been given notice of application for registration of the Instrument of Revocation? (iii) Was the land public land? (iv) Was the Respondent estopped from claiming possession? (v) To what damages, if any, was the Respondent entitled.

p.8 L1.30-
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6. The facts were found by the learned trial Judge as follows (the Appellants being referred to as Defendants and the Respondent as Plaintiff):-

40 "On the 5th March, 1953, the first plans were submitted by the Defendants to the Township Authority. The principal feature of these plans consisted of shops and offices at the front of the site. The plans were approved in principle on the 24th September, 1953. The reason for the delay was that the Town Planning Officer requested that a decision on the plans be deferred pending consideration of a project for making a new road junction which might affect the boundaries of the plot.

p.22 L1.1-
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The plans submitted in March, 1953, were for approval in principle only and it was still necessary for the Defendants to submit detailed plans and specifications such as would satisfy the Township Authority in accordance with paragraph 2(ii) of the Certificate of Occupancy. On the 24th February, 1954, the Plaintiff wrote to the Defendants pointing out that this had not been done and requiring it to be done by the 30th March. In the meantime, however, on the 20th February, 1954, the Defendants submitted to the Township Authority revised plans, which again were for approval in principle only. These plans included shops and flats at the front of the site and a godown at the rear. They were approved in principle on the 4th March, 1954. On the 11th March, 1954, the plaintiff again wrote to the Defendants extending the time for the submission of detailed plans to the 30th April, 1954, and saying that if this was not done the right of occupancy would be revoked. The Defendants complied with the requirements of this letter by submitting detailed plans for the godown on the 11th April, 1954, and detailed plans for the whole plot on the 29th April, 1954. These two sets of plans were approved on the 3rd May and 20th May, 1954, respectively.

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p.23 Ll.3-9

On the 26th January, 1955, the Land Officer wrote to the Defendants extending the time for completion to the 31st July, 1955, and indicating that the right of occupancy would be revoked if the building was not completed by that date. This represented an extension of nearly 16 months beyond the original date for completion.

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p.23 Ll.12-25

By September, 1955, the godown at the back of the site had been completed and the Defendants had received permission from the Township Authority to occupy it. But the building of the shops and flats had not been commenced and on the 21st November, 1955, the Plaintiff granted a further extension of time to the 31st January, 1956, for completion of this building. The Defendants then submitted altered plans, which were subsequently approved by the Township

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Authority on the 15th February, 1956. The Defendants also asked the Plaintiff, through their architects, for an extension of six months in which to erect the building."

10 The Plaintiff in a letter dated January 1956, p.23 Ll.25
replied that this was not approved and laid down - 24 L.30
other conditions granting the Defendants an extension
up to the 29th February 1956 to have their plans
approved and commence building operations stating
that he would call for a further report during the
first week of March following and unless building
operations were by then under way would recommend
to the Governor that the Right of Occupancy should
be revoked. If the report revealed that building
was proceeding satisfactorily a further short
extension of time would be granted to complete the
erection of the building. The Defendants replied
in a letter dated 8th February 1956 pointing out
20 that they had already built a store costing Shs.
60,000/-, but had not yet received approval from
the Township Authority for shops; that they would
require further time for inviting tenders; that it
would not appear economical to build shops at that
minimum because there were many empty shops in the
vicinity, and asking for another six months to
arrive at a final decision.

30 "On the 31st May 1956 the Plaintiff wrote to p.24 Ll.42-
the Defendants giving them 30 days in which to 48
inform him of the reasons why construction of the
main building had still not been put in hand. On
the 4th May 1957 the Right of Occupancy had been
revoked. I have no evidence of any further
correspondence between these two dates.

It is not disputed that no building other than the godown has ever been commenced on the plot".

7. The conclusions of the learned trial Judge were as follows:-

40 (i) The Appellants were obliged by the con- p.26 Ll.20-
ditions of the Right of Occupancy to erect 23
shops and flats and had not complied with the
conditions by erecting a godown.

(ii) It was clear from the correspondence that p.27 Ll.6-11
there was never any waiver of the Appellants'
breach of the covenant to build. The grants
of extensions of time were at the most under-
takings not to exercise the right of revocation

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provided certain further conditions were fulfilled.

p.27 Ll.27-31

(iii) The Appellants could not rely on the extensions of time given by the Respondent as conduct inducing them to believe that the performance of the covenant to build within a stipulated time would not be insisted upon.

p.28 L.5

(iv) While it was conceded by counsel for the Respondent that the Appellants were not served with a notice of the kind prescribed by Section 14(1) of the Conveyancing Act 1881, that Section

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p.28 Ll.44-45
30 Ll.13-22

did not apply to the termination of a Right of Occupancy for breach of a condition, since it was not consistent with the special provisions which the Land Ordinance made for Rights of Occupancy and it differed from the law relating to leases between subject and subject. He did not find it necessary to decide the other point relied upon by the Respondent, namely, that the 1881 Act did not bind the Crown. On the question

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p.30 L.22

p.30 L.25-31

of whether it was in any event equitable that a notice should have been given he found that the Appellants did receive ample notice that in certain circumstances the Right of Occupancy would be revoked.

The reasons given by the learned trial Judge for holding that the 1881 Act did not apply were as follows:-

p.28 Ll.7-45

"The Act is applicable to leases in this country by virtue of Section 2(1) of the Land (Law of Property and Conveyancing) Ordinance (Cap.114) which, as I have already said, applies the law in force in England on the 1st January, 1922. This, however, is qualified by Sub-sections (2) and (3) as follows :-

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(2) Such English law and practice shall be in force so far only as the circumstances of the Territory and its inhabitants, and the limits of Her Majesty's jurisdiction permit.

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(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act

or Indian Act for the time being in force in the Territory, such last mentioned provision shall prevail'.

10 Rights of occupancy are granted under the Land Ordinance (Cap.113). An examination of this Ordinance shows that the law relating to them differs in certain respects from the law which governs ordinary leases. The granting and revocation of rights of
20 occupancy are governed partly by considerations of public policy which would not be applicable to leases between subject and subject. This is shown by the preamble to the Ordinance and by the list in Section 10 of grounds which constitute good cause for revocation. (The latter includes requirement of the land by the Government for public purposes and requirement of the land for mining purposes). Under Section 4 public lands and all rights
over them are to be held and administered by the Governor "for the use and common benefit, direct or indirect, of the natives of the Territory". In these circumstances cases must arise in which a breach of a condition in a right of occupancy cannot be the subject of monetary compensation and a notice under Section 14(1) of the Act would therefore be inapplicable."

30 (v) He also rejected the defences that the approval of the plans given by the Township Authority were conditional on the boundaries of the plot being defined and that this had not been done by the Respondent; and that the Respondent was estopped from claiming possession because of an agreement entered into with the Appellants after the revocation.

p.30 L.42-
p.31 L.7

40 He gave judgment to the Respondent for possession of the land within two weeks from the date of judgment, for Shs. 435/- revocation fee and interest at 6% from the date of filing the Plaintiff until judgment and for costs, but disallowed the claim for damages.

p.31 L.26
p.31 LL.21-
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8. The Appellants' appealed to the East African Court of Appeal on the following grounds:-

(i) that the survey and final demarcation of the plot was the duty of the Respondent;

p.33 L.22
- 34 L.12

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(ii) that the erection of a godown was adequate compliance with the building covenant;

(iii) that the delay in erecting a building in time was substantially due to the conduct and acts of the Respondent and could not justify a revocation;

(iv) that failure to erect a building in time was a single and complete, and not a continuing breach and that any right of forfeiture was waived by subsequent conduct on the part of the Respondent in treating the tenancy as continuing; 10

(v) that Section 14 (1) of the Conveyancing Act, 1881 applied in Tanganyika to termination of Rights of Occupancy for breach of a condition.

In this present Appeal the Appellants will be relying only on grounds (iv) and (v) above.

p.65 L.34 9. The East African Court of Appeal dismissed the Appellants' Appeal with costs by an Order dated the 15th December 1960.

Dealing with the two grounds of appeal now relied upon the reasons given by Gould, J.A. were as follows:- 20

p.43 Ll.7-10 He stated that the Respondent's letters to the Appellants dated the 24th February 1954 and the 11th March 1954 implied an undertaking to extend the time for compliance with paragraph 2(iv) of the Certificate of Occupancy to a reasonable extent. These letters and the subsequent correspondence amounted to no more than a series of implied or express agreements

p.50 Ll.20-25 to extend the time limit for the building condition, some voluntarily offered by the Respondent and some entered into at the express request of the Appellants. 30

p.50 Ll.25-51 "It would be a hard rule, and particularly hard upon building lessees, if agreements of that nature necessarily involved waiver of a right of forfeiture. Landlords would be driven to insistence upon their strict legal rights. Such agreements, if made with due formality may amount to actual variations of the terms of a lease; otherwise, in my opinion, if acted upon, they would bind the landlord at least by quasi-estoppel. It may be that a right of forfeiture arose in the present case when the extension granted up to the 31st July, 1955, expired without completion of the buildings, though the Appellant, had the question 40

10 then arisen, might have argued that the extension specified was not the reasonable extension that he had been impliedly promised. But even if there was a breach of the building condition at that date, I do not think that the subsequent extensions amounted to waiver of the right of forfeiture, but as mere agreements not to exercise the option to forfeit, provided certain conditions were fulfilled. The right was in fact suspended. I think that the giving of time to remedy a breach which would give rise to a forfeiture, is not an act (such as distraining for rent) dependant upon the continued existence of the lease but an agreement with relation to the right of forfeiture which has arisen."

20 He also relied on the case of Doe d. Rankin v. Brindley 4 B. & Ad. 84. In the present case he did not think that it was of any consequence that agreements might have been made both before and after the accrual of the right to re-enter. Dealing with the Appellants' contention that there was waiver because the Respondent had permitted the Appellants to erect a godown upon the land in the belief that there would be no forfeiture, he said:-

p.51 L.1
p.52 Ll.7-
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30 "It is one thing to stand by while a lessee expends money upon a property which you have allowed or caused him to think will not be forfeited; it is quite another to inform him that there will be no forfeiture provided he remedies a breach of covenant by a certain date. That was the present case. For these reasons, in my judgment there was no waiver of a right of forfeiture in the present case, but rather a waiver of strict compliance with the requirements of a condition with regard to time."

p.53 LL.7-
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After referring to words of Denning, L.J. in Rickards v. Oppenheim (1950) 1 K.B. at p.623 he went on

40 "The Respondent in the present case led the Appellant to believe that he would not insist upon the stipulation as to time, but only within limit which he specified. In law there is nothing which will imply waiver of a forfeiture from the fact that a landlord merely stands by after a breach of covenant; a positive act is required. I know of no authority which

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indicates that he may not, without waiving the forfeiture, state that he would stand by and not exercise his option to forfeit provided the lessee did certain things by a certain time."

- p.54 Ll.16-21
p.59 L.48
p.60 Ll.42-61 L.18
- Dealing with the Appellants' reliance on Section 14(1) of the Conveyancing Act, 1881 Gould J.A. preferred to express no opinion on the view of the trial Judge that the Section did not apply as not being consistent with the special provisions of the Tanganyika Land Ordinance. He held that the Crown was not bound by the Section and distinguished the case of Bashir v. Commissioner of Lands 1960 A.C. 44 on the grounds that the question in that case depended entirely on the interpretation of Section 85 of the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya), in the context of an Ordinance dealing specifically with Crown leases. Whereas the intention of Section 83 of the Kenya Ordinance was to import the English law as between subject and subject into the law of Kenya relating to Crown leases, the Land (Law of Property and Conveyancing) Ordinance of Tanganyika relied upon by the Appellants was in perfectly general terms Section 2 of the Tanganyika Ordinance imported a body of law which includes the law that the Crown is not bound by Section 14 of the Conveyancing Act, 1881. It followed that the Respondent was not bound to give the notice required by Section 14(1) of that Act.
- p.64 Ll.30-37
p.65 Ll.5-19
p.67 L.2
- Forbes V.P. also held that the Respondent's letters were not an unequivocal act recognising the continued existence of the Right of Occupancy. The mere promise to stand by and not enforce the forfeiture for a limited time was not such an unequivocal act as would amount to a waiver of the breach.
- Crawshaw, J.A. added that the right of forfeiture was not lost by the Respondent allowing the Appellants to build the godown. At the time the godown was constructed there was no question of forfeiture provided the buildings as a whole were put up within the time allowed of which the Appellants were well aware.
10. Final Leave to Appeal was granted to the Appellants on the 14th June 1961.

11. It is respectfully submitted that the two Courts below erred in failing to hold that the right of forfeiture for breach of condition 2(iv) of the Right of Occupancy was waived. The Respondent's letters of the 24th February and 11th March 1954 clearly implied that the Respondent did not intend to enforce forfeiture for breach of condition 2(iv). The approval by the Township Authority, who were the Respondent's agents for that purpose, of the final plans submitted by the Appellants after the time stipulated in condition 2(iv) had expired, was an act recognising the continued existence of the Right of Occupancy. So were the continued extensions of time granted by the Respondent after the time stipulated in condition 2(iv) had expired, and also after the extension granted up to the 31st July 1955 had expired. Further the right of forfeiture was lost by the Respondent or his agents allowing the Appellants to build the godown.

12. It is also respectfully submitted that the Courts below erred in holding that Section 14(1) of the Conveyancing Act, 1881 did not apply.

The learned trial Judge erred in thinking that the Section was inapplicable because in certain cases breaches of conditions in a Right of Occupancy could not be the subject of monetary compensation. Firstly a notice under Section 14 does not require a claim for compensation (Lock v. Pearce 1893 2 Ch. 271). Secondly the provisions of Section 3 of the Land (Law of Property and Conveyancing) Ordinance (Cap.114) provided that a Tanganyika Court may apply the English law with such modifications as may be necessary for the circumstances of the Territory.

It is further submitted that Gould J.A. erred in distinguishing the case of Bashir v. Commissioner of Lands (supra). In the context to which the 1881 Act is to be applied, namely the Land Ordinance (Cap.113) there is, it is submitted, a necessary implication that the Crown is bound.

13. The Appellants submit that the Order and Decree of the Tanganyika High Court and the Order of the Court of Appeal for Eastern Africa are wrong, and that the Respondent's suit should be dismissed with costs throughout for the following amongst other

R E A S O N S

1. BECAUSE the Respondent waived his right of forfeiture for breach by the Appellants of condition 2(iv) of the Right of Occupancy.
2. BECAUSE the Respondent failed to serve on the Appellants a notice complying with Section 14(1) of the Conveyancing Act, 1881 and this Section was applicable to the exercise by the Governor of a right of forfeiture under the Lands Ordinance.

DINGLE FOOT

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DICK TAVERNE

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN
AFRICA

B E T W E E N:

PREMCHAND NATHU AND COMPANY LIMITED
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- and -

THE LAND OFFICER
(Plaintiff
Respondent)

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