

32 / 1962

IN THE PRIVY COUNCIL

No. 24 of 1961

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O N A P P E A L  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

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B E T W E E N

PREMCHAND NATHU & CO. LIMITED (Defendant) Appellant

- and -

THE LAND OFFICER, TANGANYIKA (Plaintiff) Respondent

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C A S E FOR THE RESPONDENT

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UNIVERSITY OF LONDON  
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30 MAR 1963  
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RECORD

10 1. This is an Appeal, by leave of that Court,  
from a Judgment of the Court of Appeal for Eastern  
Africa dated the 15th day of December 1960 and the  
Order made thereon, affirming a Judgment of the High  
Court of Tanganyika dated the 8th day of June, 1960  
and the Order made thereon. pp.35 & 65  
pp.20 & 32

20 2. The Appellant is a limited company  
registered in Kenya and having its principal place  
of business in Tanganyika at Moshi. On the 12th  
day of September, 1952 the Appellant was granted a  
right of occupancy (L.O. No. 13014) over public land  
known as Plot No. 57 Commercial and Light Industrial  
Plots Moshi Township under the provisions of the Land  
Ordinance (Ch.113). p. 1 1.20.  
p. 1 1.25.

3. The Land Ordinance as amended provided at  
all material times inter alia as follows :-

"3. The whole of the lands of the  
Territory, whether occupied or unoccupied, on  
the date of the commencement of this Ordinance  
are hereby declared to be public lands.

30 Provided that nothing in this Ordinance  
shall be deemed to affect the validity of any  
title to land or any interest therein lawfully  
acquired before the date of the commencement

RECORD

thereof and that all such titles shall have the same effect and validity in all respects as they had before that date.

4. Subject to the foregoing proviso, all public lands, and all rights over the same are hereby declared to be under the control and subject to the disposition of the Governor and shall be held and administered for the use and common benefit, direct or indirect, of the natives of the Territory, and no title to the occupation and use of any such lands shall be valid without the consent of the Governor. 10

6. It shall be lawful for the Governor :-

(a) to grant rights of occupancy to natives and to non-natives;

(b) to demand a rental for the use of any public lands granted to any native or non-native;

(c) to revise the said rental at intervals of not more than thirty-three years. 20

7. Such rights of occupancy shall be for any definite term not exceeding ninety-nine years, and shall be granted subject to the terms of any contract which may be made between the Governor and the occupier not inconsistent with the provisions of this Ordinance.

Provided that the Governor shall not (save in the case of a right granted in connection with a mining lease) grant rights of occupancy to any non-native free of rent or upon any conditions which may preclude him from revising the rent at intervals of not more than thirty-three years. 30

9. (1) It shall be lawful for the Governor when granting a right of occupancy or when any person is in occupation of land under a right of occupancy or is entitled to a right of occupancy, to issue a certificate thereof under his hand and the seal of the Territory and to require the occupier to sign at the foot thereof acceptance of the terms and conditions of such certificate. 40

10. It shall not be lawful for the Governor to revoke a right of occupancy granted as aforesaid save for good cause. Good cause shall include :-

(f) breach of any term or condition contained or to be implied in the certificate of occupancy or in any contract made in accordance with section 7.

10 11. The acceptance by or on behalf of the Governor of any rent shall not be held to operate as a waiver by the Governor of any forfeiture accruing by reason of the breach of any covenant or condition, express or implied, in any contract under section 7 or in any certificate of occupancy granted under this Ordinance.

20 18. Subject to the provisions of the next succeeding section and of any laws relating to prospecting for minerals or mineral oils or to mining and to the terms and conditions of any contract under Section 7, the occupier shall have exclusive rights to the land the subject of the right of occupancy against all persons other than the Governor.

21. The Governor may make regulations for the purpose of carrying this Ordinance into effect and particularly with regard to the following matters :-

(7) The fees or duties to be paid for any matter or thing done under this Ordinance or under any regulations made under this Ordinance.

30 23. (1) If any person shall be found in unlawful occupation of public land, a district court, presided over by a first class magistrate, within whose jurisdiction any part of such land is situate may order such person to surrender such land within such period and upon such terms, if any, as to the removal of buildings, the reaping of growing crops and other matters, as to the Court shall seem just.

40 (3) In any proceedings against any person under this section :-

(a) the proof that his occupation was lawful shall lie upon the defendant and the averment that any land is public land shall be sufficient

RECORD

without proof of such fact, unless the defendant prove the contrary;"

p. 71

4. The Certificate of Occupancy granted to the Appellant granted a Right of Occupancy of the said land for a term of 99 years from the 4th day of April, 1952, according to the true intent and meaning of the said Land Ordinance and was subject (inter alia) to the following special terms and conditions :-

p. 72.  
l. 14.

(a) In Clause 2 thereof undertakings by the Appellant :-

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(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, (herein-after called "the said Authority") such plans of the proposed buildings (including block plans showing the position of the buildings) drawings 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.

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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.

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(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.

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(v) At all times after the expiration of

the period mentioned in the last preceding sub-paragraph to have on the said land approved buildings of the type and specifications hereinbefore referred to and to maintain the same in good order and repair to the satisfaction of the said Authority.

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(vi) Not to erect nor commence to erect on the said land any building of any kind whatsoever except in accordance with building plans and specifications which shall have been approved by the said Authority as hereinbefore provided.

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(b) In Clause 5, a condition that "only one main building together with the usual and necessary outbuildings shall be erected on the said land and the said main building shall be used solely for commercial and residential purposes."

p.73 1.20.

(c) In Clause 6, a condition that "failure to comply with any of the terms or conditions herein contained or implied will be deemed to constitute good cause for revocation of the said Right of Occupancy."

p.73.1.25.

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5. The Appellant did not within the period of 24 months or at all erect any buildings on the said land save and except for a "go-down" (i.e. a store) which admittedly cost not less than 60,000/- to erect but which was not a main building. The time for the construction of the main building was from time to time extended by the competent authorities, but the Appellant never finally took advantage of any such extensions.

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6. On the 4th day of May 1957 the Governor of Tanganyika acting under the powers conferred upon him by the said Land Ordinance revoked the said right of occupancy, and under Regulation 5 of the Land (Fees) Regulations, decided that a revocation fee amounting to 435/- should be payable in respect of the said revocation. This Revocation was duly registered in the Land Registry on the 16th day of May 1957 and advertised in the Gazette on the 31st day of May 1957.

p. 96.

RECORD

p. 97.

7. The fact of this revocation was also duly communicated to the Appellant by a letter of the 14th day of May 1957 written on behalf of the Respondent, but the Appellant refused and neglected to deliver up vacant possession of the said land to the Land Officer.

p.1.

8. Accordingly, the present Action was commenced in the Arusha District Registry of the High Court by the Respondent on the 8th day of April 1959 for the following relief, namely :-

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- (i) A finding under Section 23(i) of the Land Ordinance that the Appellant was in illegal occupation of public land and had been in illegal occupation thereof since the 5th May 1957;
- (ii) An Order that the Appellant do surrender to the Respondent the said land within one week of the Judgment therein;
- (iii) An Order that the Appellant do pay to the Respondent on behalf of His Excellency the Governor the sum of Shs. 435/- revocation fee with interest thereon at 9% from the date of filing the plaint until judgment;
- (iv) An Order that the Appellant do pay to the Respondent damages at the rate of Shs. 1,100/- per month and proportionately for each part of a month from the 5th May 1957 until possession is given to the Respondent in accordance with (ii) above;
- (v) Costs.

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9. By its Defence, the Appellant pleaded inter alia :-

p.4.1.7 -  
p.5.1.10.

- (i) That the act of revocation by His Excellency the Governor was without good cause and unlawful;
- (ii) That it was 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;
- (iii) That the land was not Public Land;

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(iv) That it had erected on the land a building of a value not less than that stipulated in the Certificate of Occupancy;

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(v) That the Township Authority had delayed consideration of the plans of the proposed buildings, and that when approval for the erection was given it was conditional on the boundaries of the plot being defined, which the Respondent had omitted to do although the Appellant had paid the cash deposit required for the survey;

(vi) That the Respondent had extended the Appellant's time for erection of the building to the 31st July, 1955, and that the building was completed and an occupation certificate in respect thereof was issued by the Township Authority on the 17th September 1955;

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(vii) That there had been an agreement for the grant of a fresh Certificate of Occupancy between the Appellant and the Respondent on or about the 30th April 1958.

10. The action came on for trial before the High Court of Tanganyika (Mr. Justice Murphy) on the 11th day of May, 1960, when the following issues were framed :-

1. Was the revocation lawful?

p. 8.1.30

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2. Should the Appellant have been given notice of the application for registration of the instrument of revocation?

3. Was the land public land?

4. Was the Respondent estopped from claiming possession?

5. To what damages, if any, was the Respondent entitled?

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11. On the 8th day of June, 1960, the High Court delivered its Judgment. After tracing the history of the matter, the Learned Judge first of all dealt with the Appellant's contention that it had complied with the conditions of the Certificate of Occupancy by erecting the godown. He dismissed

p.20

p.25 1.26



RECORD

- P.26. 1.20 this defence on the grounds that under Paragraphs 2 (iii) and (iv) of the said Certificate the Appellant was bound to commence and complete buildings in accordance with the plans and specifications approved by the Township Authority, and that these included the shops and flats. Moreover, he decided that the godown could only be classified as a necessary outbuilding, and that the "main building" referred to in paragraph 5 of the said Certificate was the block of shops and flats. 10
- p.27.1.12. 12. The Learned Judge next disposed of the argument that the Respondent had by his conduct induced the Appellant to believe that the performance of its obligations would not be insisted upon by finding as a matter of fact that the Appellant was never induced to believe any such thing.
- p.27.1.32. 13. He then considered the Appellant's main argument, namely, that there was no difference in law between a Right of Occupancy and a Lease; that Section 14(1) of the Conveyancing and Law of Property Act, 1881, (which requires a Notice calling the attention of the tenant to the alleged breaches of covenant and requiring him to put them right to be given before a Lease is forfeited for breach of covenant or condition) applied in Tanganyika; that no such notice had been given; and that consequently it was not competent for His Excellency the Governor to revoke the Certificate of Occupancy. 20
- p.28.1.7. 14. The Learned Judge pointed out that the Conveyancing and Law of Property Act, 1881, only applied to Tanganyika by virtue of Section 2(1) of the Land (Law of Property and Conveyancing) Ordinance (Cap.114) and that such application was qualified by subsection (2) and (3) of that Section as follows :- 30
- "(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. 40
- (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."

15. He then concluded that Section 14(1) of the Conveyancing and Law of Property Act, 1881, did not apply to the termination of occupancy for a breach of covenant or condition, since it was not consistent with the special provisions which the Land Ordinance makes for rights of occupancy.

p.30.1.14

10 16. The Learned Judge rejected the defence based on the non-definition of the boundaries of the Plot on the ground that the evidence made it clear that the Township Authority required the Appellant to demarcate the boundary; and the defence based on a subsequent agreement by holding that the same was unsupported by the evidence and had indeed not been pursued before him.

p.30.1.43 -  
p.31.1.7.

20 17. By implication the Learned Judge decided the issues in the summons (1) Yes, (2) No, (3) Yes, (4) No; and accordingly gave Judgment for the Respondent for possession of the land within two weeks from the date of Judgment, for Shs. 435/- with interest at 6% per annum from the date of filing the plaint until judgment, and for costs. Having regard to the fact that the Appellant had continued to pay a sum equal to the rent to the Respondent, and that on giving up possession the Appellant would have to yield up the godown, the Learned Judge did not think fit to award the Respondent any damages.

p.31.1.26

p.31.1.21

18. From this Judgment and the Decree of the 8th day of June 1960 entered in pursuance thereof, which Ordered and Decreed

p.32.

- 30 "(1) that the Certificate of Title No. 8555 was lawfully revoked for good cause
- (2) that the Defendant do deliver up possession of the said Plot No. 57 to the Plaintiff within fourteen days from this date and
- (3) that the Defendant do pay to the Plaintiff the sum of Shs. 435/- and the taxed costs of the suit"

40 the Appellant appealed to the Court of Appeal for Eastern Africa by Notice of Appeal filed on the 18th day of August, 1960, on the following grounds :-

p.33

"1. The learned Judge erred in accepting oral evidence that the demarcation of the plot was to be done by the Appellant and should have

RECORD

held that, under Clauses 2 and 3 of the Respondent's Offer dated 18th March 1954, the survey and final demarcation of the plot was the duty of the Respondent.

2. The learned trial Judge erred in holding that the Appellant was obliged to erect shops and flats and should have held that the erection of a godown, of the required minimum value and duly approved by the Township Authority, was adequate compliance with the building covenant. 10

3. The learned Judge erred in failing to direct himself that the delay in erecting a building within the stipulated period was substantially, if not wholly, due to conduct and acts, on the part of the Respondent or third parties nominated by him, beyond the control of the Appellant and that such delay was not a "failure" which could justify revocation of the right of occupancy. 20

4. The learned Judge erred in failing to direct himself that failure to erect a building within the stipulated period was a single and complete, and not a continuing, breach and should have held that any right of forfeiture that may have accrued was waived by subsequent conduct on the part of the Respondent in receiving rents and otherwise treating the tenancy as continuing. 30

5. The learned Judge erred in holding that Section 14(1) of the Conveyancing Act 1881 was not applicable in Tanganyika to termination of rights of occupancy for breach of a covenant or condition."

p.35.

19. The Court of Appeal for Eastern Africa (Sir Alastair Forbes, Vice President; Gould and Crawshaw JJ.A.) by its Judgment of the 15th day of December 1960 dismissed the Appellant's Appeal. Gould J.A. (who delivered the leading Judgment) dealt with the first three grounds of Appeal as set out in the Notice of the 18th day of August 1960 as follows :- 40

p.40.1.31-  
p.41.1.22.

"I deem it necessary to say very little with regard to these grounds; the arguments upon which they are based have been expressly or impliedly dealt with by the learned trial

10 judge in his judgment and I see no reason to differ from his conclusions. As to Ground 1 he accepted that the boundary was sufficiently defined in the plan annexed to the Certificates of Occupancy and that the further demarcation requested by the Township Authority was for the assistance of their own building inspector. One argument presented to this court but not touched upon in the judgment was that the Moshi Township Authority, which originally requested delay in view of the possibility of the formation of a new road junction, at no time notified the building line decided upon, as required of them by paragraph 2 (iii) of the Certificate of Occupancy. I think this is sufficiently answered by the fact that the Township Authority, by approving plans showing the proposed buildings and their relationship to the boundaries of the plot, in effect agreed that the buildings were within their building-line requirements. Nothing turned on this point in any of the negotiations between the parties after the initial delay requested by the Town Planning Officer.

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30 As to Ground 2 the learned judge held, upon sufficient evidence, that the appellant was obliged by the conditions of the Certificate of Occupancy to erect the shops and flats. I agree and do not propose to add anything upon this topic.

As to the argument under Ground 3, the learned judge pointed out that the delay in approving the first plans for which the Township Authority was responsible amounted to only 6½ months, whereas extensions up to the 31st July, 1955 (nearly 16 months) were granted. In fact there was at least one subsequent extension. I am satisfied there is no merit in this ground of appeal."

40 With regard to the fourth Ground, after a detailed examination of the evidence, he concluded:-

p.41.1.23

"All this amounts to no more, in my opinion, than a series of implied or express agreements 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 appellant. It would be a hard rule, and particularly hard

p.50.  
l. 20-51

RECORD

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 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."

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p.54.1.16.

21. As to the fifth Ground, the learned Judge of Appeal preferred to express no opinion as to whether Section 14(1) of the Conveyancing and Law of Property Act, 1881, applied to the termination of a right of occupancy for breach of a covenant or condition as not being consistent with the special provisions of the Land Ordinance, but based his rejection of the Appellant's submission on this point on the ground that the Crown was not bound by the 1881 Act.

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p.61.1.39.

22. The learned Vice President (Sir Alastair Forbes) concurred, but delivered a separate judgment as he had found it more difficult than Gould J.A. to reach a decision upon the fourth ground of appeal. His final conclusion on this point was as follows :-

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p.64.  
11.16-45.

"On 4th April, 1954, the Appellant was in breach of condition 2 (iv). On 26th January, 1955, 23rd August, 1955, and 21st November, 1955, letters (the full text of which are set out in the judgment of Gould J.A.) were written by the

10 Respondent promising, in effect, not to enforce forfeiture of the right of occupancy if the buildings were completed within further specified periods. Was the sending of any of such letters an unequivocal act recognising the continued existence of the right of occupancy? In my opinion it was not. Each of those letters appears to me to be no more than a promise (which may well have been legally enforceable) to stand by and not take action to enforce forfeiture for a limited time. Since the continued acceptance of rent does not operate as a waiver of the breach, I cannot see that the mere promise to stand by and not enforce the forfeiture for a limited time is such an unequivocal act of recognition of the continued existence of the right of occupancy as would amount to a waiver of the breach".

20 23. Crawshaw, Judge of Appeal, concurred with the Judgment of Gould J.A.

p.65

24. The formal Order drawn up in pursuance of the said Judgments dismissed the appeal and ordered that the Respondent's costs thereof should be paid by the Appellant.

p.65-66.

25. Against the said Order this Appeal is now preferred, leave to do so having been granted to the Appellant by the said Court on the 14th day of June, 1961.

p.67

30 26. The Respondent humbly submits that the Appeal should be dismissed for the following among other

R E A S O N S

- (1) BECAUSE the said Certificate of Occupancy was properly revoked pursuant to the provisions of the Land Ordinance.
- (2) BECAUSE the provisions of Section 14(1) of the Conveyancing and Law of Property Act, 1881, do not apply to the revocation of a Certificate of Occupancy.
- 40 (3) BECAUSE the provisions of Section 14(1) of the Conveyancing and Law of Property Act, 1881, do

not bind the Crown.

- (4) BECAUSE the Appellant had failed to comply with the terms and conditions contained in the said Certificate of Occupancy by its failure to erect shops and flats or other main building thereon to a minimum value of Shs. 60,000/- or at all.
- (5) BECAUSE such failure was due to the Appellant's own acts and not those of the Respondent or any third parties. 10
- (6) BECAUSE the Respondent did not at any stage waive any right of forfeiture which may have arisen by reason of the Appellant's failure to observe the terms and conditions of the said Certificate of Occupancy.
- (7) BECAUSE for the reasons so stated therein, the Judgment of the Court of Appeal for Eastern Africa was right.
- (8) BECAUSE of the reasons stated therein the Judgment of the High Court of Tanganyika was right. 20

RAYMOND WALTON.

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