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MOTIBHAI & COMPANY LTD.

v.

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SHANTILAL HARGOVIND AND OTHERS

[SUPREME COURT, 1970 (Knox-Mawer P.J.), 4th March, 17th July]

Appellate Jurisdiction

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Land—agreement to lease—floor of building on land subject to the land transfer system—re-entry by lessors for breach of covenant—necessity of giving notice under section 50 (1) of Land (Transfer and Registration) Ordinance—Real Property Act 1900 (New South Wales) s. 3 (a)—Land (Transfer and Registration) Ordinance (Cap. 136—1955) ss. 2, 50 (1), 50 (5) (a).

Landlord and tenant—land subject to the Land (Transfer and Registration) Ordinance (Cap. 136—1955)—agreement to lease ground floor of building thereon—applicability of section 50 (1) of Ordinance.

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Lessors brought an action in the Magistrate's Court for possession of premises comprising the ground floor of a building on land subject to the Land (Transfer and Registration) Ordinance, on the ground that the lessees had broken two of the covenants of their agreement to lease. The Magistrate found that the covenants in question had been broken but dismissed the action because the lessors had not given the notice required by section 50 (1) of that Ordinance. On appeal the argument for the lessors was confined to a submission that section 50 (1) did not apply to the agreement in question.

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Held: By virtue of the definition of "lease" in section 50 (5) (a) of the Ordinance, and of "land" in section 2 thereof, the submission on behalf of the lessors failed.

Appeal from a judgment of the Magistrate's Court.

R. G. Kermode for the appellant company.

D. N. Sahai and *A. Katonivualiku* for the respondents.

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KNOX-MAWER P.J.: [17th July, 1970]—

This is an appeal against a decision of the Magistrates' Court of the First Class, Suva, in its civil jurisdiction.

On 16th March, 1962, the appellant entered into the following Agreement with the respondents:—

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Land (Transfer and Registration) Ordinance s. 50 (1):—

"A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach,

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and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

" AGREEMENT made the 16th day of March one thousand nine hundred and sixty-two BETWEEN MOTIBHAI PATEL, PRABHUDAS PATEL and PARSHOTAM PATEL (all sons of Becharbhai Patel) of Ba in the Colony of Fiji, Merchants trading as " Motibhai & Company " (hereinafter called " the Lessors ") of the one part AND SHANTILAL HARGOVIND (f/n Hargovind), HARGOVIND DAMODAR (f/n Damodar), MADANLAL HARGOVIND (f/n Hargovind) and HASMUKHLAL HARGOVIND (f/n Hargovind) all of Suva in the Colony of Fiji, trading as " Shantilal Brothers " (hereinafter called " the lessees ") of the other part WHEREBY IT IS AGREED AS FOLLOWS:—

1. THE lessors shall grant and the lessees shall accept a lease for a term of 10 (ten) years from the 1st day of April, 1962 at a monthly rental of £27.10.0 (Twenty seven pounds ten shillings) payable in advance on the first day of each and every month during the term of the tenancy hereby created of ALL THAT the Bulk Store measuring 29' x 26' on the ground floor of the building presently occupied by the lessees and comprised in C.T. No. 7981 in Cumming Street in the City of Suva and more particularly described in the rough sketch plan annexed hereto and edged red, on the following covenants, conditions and stipulations—

- (a) The lessees will pay the rents hereby reserved at the times herein mentioned during the continuance of this Agreement PROVIDED HOWEVER that in case the demised premises or any part thereof shall at any time during the continuance of this agreement be destroyed or damaged by fire, flood, lightning, storm or tempest or any other act of God, so as to render the same unfit for the occupation and use of the Lessees then and so often as the same shall happen the rent hereby reserved or a proportionate part thereof shall be suspended until the demised premises have been re-built or made fit for occupation and use of the lessees and in the case of any dispute arising under this proviso any party interested may refer the matter to a competent Court by Originating Summons and the Court shall make such Order in the premises as the Justice of the case may require.
- (b) The lessees will keep the demised premises in a good and tenable repair fair wear and tear and damage by fire, storm, tempest or other inevitable accident duly excepted.
- (c) The lessees will not transfer assign or sub-let or part with the possession of the demised premises or any part thereof without the consent in writing of the lessors first had and obtained.
- (d) The lessees will not make any alterations in or addition to the demised premises without the consent in writing of the lessors first had and obtained.
- (e) The lessees will pay all water rates and electricity charges which are now charged in respect of the demised premises or which may hereafter be charged or levied in respect of the said premises.
- (f) The lessors will not be liable or obliged to take over any improvements which may be effected on the premises hereby demised nor shall it be liable for compensation therefore.
- (g) The lessees will use the premises hereby demised as bulk store only and for no other purposes AND will duly and punctually comply with and carry out at their own expense all and every the lawful

- A requirements of any medical, sanitary or any Government or Statutory Authorities relating to the demised premises save and except that all structural alterations or repairs to the said premises shall be carried out by the lessors unless such structural alterations or repairs shall have been caused by the negligence of the lessees their servants visitors or customers.
- B (h) The lessees will not at any time during the said term use the said premises or exercise or carry on or permit or suffer to be exercised or carried on in or upon the demised premises or any part thereof any noxious noisome or offensive act, trade, business, occupation or calling and no act matter or thing whatsoever shall at any time during the said term be done in or upon the premises or any part thereof which shall or may grow to the annoyance, nuisance, grievance, damage or disturbance of the occupiers or owners of the adjoining lands and properties.
- C (i) The lessees will permit the lessors or their agents at all reasonable times during the currency of the said term to enter upon the demised premises to inspect the state and condition thereof.
- D (j) The lessors hereby covenant with the lessees that the lessees paying the rent hereby reserved and observing and performing the covenants and conditions herein on their part to be observed and performed shall peaceably and quietly hold and enjoy the premises hereby demised for the term hereby granted without any lawful interruptions from or by the lessors or any person rightfully claiming for and under it.
- E (k) It is hereby covenanted and expressly declared that if and whenever any rent shall be in arrears for 14 days (whether the same shall have been legally demanded or not) or if and whenever there shall be a non-observance or any of the covenants or conditions herein expressed or implied upon the part of the lessees or if and whenever the lessees shall be adjudged bankrupt to have a receiving order made against them or compound with or execute an assignment for the benefit of their Creditors or any execution shall be levied upon their goods or chattels then and in any of these events the lessors may re-enter upon the demised premises or any part thereof in the name of the whole and take possession of the demised premises and thereupon this Agreement shall determine but without prejudice to any of the rights or powers of the lessors hereunder in respect of any rents or other moneys due to the lessors.
- F (l) The lessors will promptly pay all rates and other assessments levied or imposed on the demised premises or which may hereafter become leviable in respect of the said premises.

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

SIGNED by the said MOTIBHAI PATEL,
PRABHUDAS PATEL and PARSHOTAM
PATEL (all sons of Becharbhai Patel) after
the same had been read over and explained } (sgd.) M.B. Patel
to them in the Hindustani language and } (sgd.) P. B. Patel
they appeared fully to understand the } (sgd.) P. B. Patel
meaning and effect thereof in the presence
of—

H (sgd.) V. R. Sharma
Solicitor, Ba.

SIGNED by the said SHANTILAL HARGOVIND (f/n Hargovind), HARGOVIND DAMODAR (f/n Damodar), MADANLAL HARGOVIND (f/n Hargovind) and HASMUKHLAL HARGOVIND (f/n Hargovind) after the same had been read over and explained to them in the Hindustani language and they appeared fully to understand the meaning and effect thereof in the presence of—

(sgd.) Shantilal
(sgd.) Damodar
(sgd.) Hasmukhlal
(sgd.) Madanlal

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(sgd.) Vishnu Deo
Clerk, Suva.

In the court below, the appellant sought, *inter alia*, an order for possession (pursuant to the re-entry clause (*k*) above) upon the ground that the respondents were in breach of covenants (*d*) and (*j*) of the Agreement. The learned trial Magistrate found these alleged breaches of covenant established. However, since the appellant has not complied with the provisions of section 50 (1) of the Land (Transfer and Registration) Ordinance, the learned trial Magistrate was constrained to dismiss the suit.

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Learned Counsel for the appellant has confined his argument before this Court to the submission that section 50 does not apply to the Agreement set out above.

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Section 50 (5) (*a*) of the Ordinance however provides:—

“ “ lease ” includes an original or derivative sublease; also an agreement for a lease where the lessee has become entitled to have his lease granted; ”

Moreover in section 2 of the Ordinance “ land ” is defined:—

“ “ land ” means land, messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description, or any estate or interest therein, together with all paths, passages, ways, water-courses, liberties, privileges, easements, plantations, gardens, mines, minerals and quarries and all trees and timber thereon or thereunder lying or being unless any such are specially excepted; ”

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This corresponds to the definition of land in section 3 (*a*) of the New South Wales Real Property Act, 1900. In the Torrens System in New South Wales, (1951), Mr. John Baalman, the learned author comments at page 14:—

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“ A person can be registered as the proprietor of a stratum of land, whether below the surface as in the case of a mineral-bearing stratum, or above the surface as in the case of a storey of a building.

These then is the short answer to this case, although I have of course given very careful consideration to everything submitted by learned Counsel for the appellant. With respect, I am not persuaded by his argument. In the result this appeal is dismissed, with costs in favour of the respondents.

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Appeal dismissed.