IN THE COURT OF APPEAL FOR EAST AFRICA

NAIROBI

CIVIL APPEAL 79 OF 1963

HORMUSJI K. HATHADARU & OTHERS.....……..APPELLANTS

AND

TRUSTEES FOR THE PORT OF ADEN ……..RESPONDENTS

(Appeal from the Ruling and Order of the Supreme Court, Aden (Goudie,J.) of 3rd June, 1963 in Civil Suit No. 378 of 1961)

JUDGEMENT OF CRABBE. J. A.

This is an appeal from a ruling of the SupremeCourt, Aden, whereby it was ordered and decreed that theplaintiffs' suit be dismissed with costs amounting toShs 315/- (Shillings'three hundred and fifteen).

On 15th July, 1961 the plaintiffs filed a suitagainst the defendants for an order of specific performance..In their plaint the plaintiffs claimed to be successors intitle of lessees and the defendants the lessors under a leasedated 9th January, 1932.' For the purposes of this appeal Ithink it is necessary to set out in extenso the written statement in the plaint. It reads as follows:

1. By an Indenture dated the 9th day of January,1932, made between the Trustees of the Port ofAden as lessors and Sir Hormusjee Cowasjee Dinshaw,Kt., Kaikobad Hormusjee Cowasjee Dinshaw, SerabjeeCowasjee Dinshaw and Rustomjee Dorabjee Dinshaw aslessees of a plot of land measuring 10800 Squarefeet or thereabouts and situated at Hedjuff wasleased under the Lease No. 3101 (hereinafter referredto as the said lease No. 3101) for 99 years commencingfrom 1st day of April, 1930, on the terms and conditionsmentioned therein for the purpose of accommodation ofcoolies employed in the handling of coal or cargo forships.

2. The said lessees and their successors carried onbusiness inter-alia of Stevedores in partnership inthe name and style of Cowasjee Dinshaw & Bros.

3. By a consent decree dated 22nd April, 1955,passed by the High Court of Judicature at Bombay inCivil Suit No. 1501 of 1949 filed by one of the partnersagainst the other partners (of whom the plaintiffherein was one of them) the said firm of CowasjeeDinshaw & Bros. was dissolved and was wound up as from 31st December, 1954.

4. The plaintiff in thi ssuit purchased the business goodwill and propertiesof the said firm including the properties comprisedin the said Lease No. 3101 .According to the terms of the said lease, buildingswere constructed on the land and were used foraccommodating coolies employed in the handling ofcoal for

ships.

5. The Defendants constructed buildings at Maa'laknown as "New Coolie Lines" in or about 1956 andthe defendants compelled the plaintiff to transferthose coolies then in occupation of the buildings onthe plot of land comprised under the said lease 3101to the aforesaid New Coolie Lines.

7. Since then the plot and the buildings thereoncomprised under the said Lease No. 3101 ceased tobe used for accommodating coolies employed in thehandling of coal or gargo for ships.

8.The paras 1, 2, & 3 of the said Lease No. 3101which are relevant to this suit read as under -

(1) The said plot of land shall be usedonly for purpose of accommodation ofcoolies employed in the handling of coal or cargo for ships.

(2) The lessees in the use of the said plotof land will observe all the Rules forthe time being in force relating to theuse, occupation and transfer of landrelating to the construction and alterationof the buildings and additions to and use of the same in the Settlement ofAden so far as they may be applicablein respect of the purpose for which the said plot of land has been grantedunder the foregoing condition, and theprovision of the said rules shall tosuch extent be deemed to be incorporatedin this lease and to the conditionsthereof.

(5) The only buildings to be erected on thesaid plot shall be coolies quarters inaccordance with the plans submitted to andapproved by the Trustees and also by theExecutive Committee of the Aden Settlementas per their Resolution No. 528 dated 14thNovember, 1930; the buildings of the saidCoolie Quarters shall be completed within1 year from the date of the grant of thislease.

PROVIDED ALWAYS and it is hereby agreed anddeclared as follows:

(a)That the price of land shall be fixedat Rs. 2-8-0- per Square Yard for thepurpose of the grant of indirectcontribution towards the housing schemesof coal and cargo coolies mentionedin clause (l).

(b)That if the said plot of land is notused for the purpose for which it isgranted within one year from the dateof these presents or if at any timeduring the term for which this leaseis granted the said plot of land shallcease to be used for such purpose thenthe Lessees shall upon being called so todo in writing by the Lessors forthwithpurchase the said plot of land at theprice of Rs. 5/- per square yard PROVIDEDthat if the Lessees are unwilling todo this they may refuse but upon suchrefusal this lease shall be deemedimmediately to determine and the landshall be surrendered to the Lessors.

(c)Subject to sub-clause (5)(b) above, ifany of the conditions of this lease notexcepting the provisions of the rulesdeemed to be conditions of this lease asaforesaid shall not be observed then theLessors may after three months writtennotice enter upon the said plot of landfreed from all claims and liabilitiescreated by the Lessees or any personclaiming through them and this leaseshall thereby be determined.

9. According to the para 5(b) (reproduced above) ofthe said Lease No. 3101 the condition precedent wasthat the plot of land comprised thereunder should besold to the Plaintiff as it ceased to be used for thepurposes mentioned therein; and that the Defendantswere bound to call upon the Plaintiff in writing tobuy the said plot of land at the price of Rs. 5/- (equivalent to E. A. Shs. 7.50) per square yardbeing the price agreed in the said lease betweenthe parties thereto.

10. The Plaintiff offered to buy the plot of landunder the said Lease 3101 at the price of Rs. *5/-*per square

agreed as provided therein and was andis willing and prepared as yet to do so.

11. The Defendants, however, after protractedcorrespondence ending with their letter No. FWD/5/13778dated 27th of March 1961 finally refused to sell at Rs. 5/- per Square yard the plot of land comprisedin the said lease No. 5101 and ceased to be used forthe purpose mentioned in the said lease.

12. The Defendants failed to comply with the termsof the said Lease No. 3101 by their refusal to sellthe plot of land thereunder at the price mentioned therein and have thereby committed the Breach thereof.

13. The Plaintiff has applied to the Defendantsspecifically to perform the Agreement made in thesaid Lease No. 3101 (Para 3 (b))on his part but theDefendants have not done so.

14. The Plaintiff has been and still is, ready andwilling specifically to perform the Agreement made inthe said Lease No. 3101 on his part, in that to buythe plot of land demised under the said Lease No. 3101at the agreed price of Rupees Five equivalent to Shs.E. A. 7.50 per Square Yard, of which the Defendantshave had notice.

15. The cause of action arose at Aden on 27th March,1961 when the defendants finally refused to sell atRs. 5/- per Square.Yard.

16. The suit is valued for the purpose of Court Feeand Jurisdiction at E: A Shs. 9,000/- being the amountof consideration at Shs. 7.50 (Rs. 5/-) per Square Yardfor 1200 Square Yards.

The Plaintiff claims:

(a) that the Court will be pleased to orderthe Defendants specifically to performthe Agreement (Para 3(b)) under theLease No. 3101 by selling the land demisedthereunder at E. A. Shs. 7.50 per SquareYard, and to do all acts necessary tocomplete the sale of the said property.

(b) That costs and incidental charges for this suit.

(c) And such other relief as the Court may allowin the circumstances of the case.

(SD) - DINSHAW H.C. DINSHAWPlaintiff.

After service of the plaint on the defendants they filed certain Preliminary Objections together with their written statement of defence. The objections were:

"1. The Plaintiff has got no cause of action.in that the Defendant is not obliged under theterms of the lease or otherwise to make a callupon the Plaintiff as stated in para 9 of the plaint.

2. The Plaintiff's suit is liable to be dismissedwith costs as the Plaint does not contain or plead'plea of material facts sufficient to entitlethe Plaintiff to a judgment for specific performance.The Defendant's powers and duties are laid down by statute, and as such the Defendant has no powerto effect a sale or to give a lease for a periodexceeding 21 years under the terms of Sec. 21 ofthe Port Trust Ordinance.

3. The Plaintiff's claim is barred by Limitation as the Defendant Corporation repudiated the Plaintiff'sclaim in writing by its letter dated 15th January,1958, and previous thereto the Plaintiff was advisedverbally to that effect."

These objections were taken before the suit had proceeded to hearing. It would appear, however, that the first ground was not argued, and in this appeal we ruled that it was not open to counsel for the respondents to argue it here since he must be deemed to have abandoned that ground as a preliminary objection at the court below.

The learned trial judge after hearing arguments upheld the second ground of objection, but he overruled the third. The defendants have cross-appealed against the judge's ruling on the third ground and I shall deal with that aspect of the appeal later in this judgment.

The argument put forward by the defendants insupport of the second ground of objection was summarized bythe learned judge thus:

"That in effect the defendants are saying in thisground is that, quite irrespective of the meritsor the equities, this Court could not, even if itwished, grant specific performance because thedefendants have no power to sell without the consentof the Governor. Since they have not shown that theyhave obtained this consent, or that it would be forth-coming, or that it is not necessary a conditionprecedent implied in every suit for specific performance,namely that the onus lies on the plaintiffs to show that the defendants are in a position to grantspecific performance if so ordered has not been complied with."

The core of the defendant's second objection, itseems to me, was that the Governors consent which was a conditioncondition precedent to the enforceability of the agreement of 9thJanuary, 1952 had not "been pleaded by the plaintiff. Accordingto the defendants consent was a material averment which wasof the essence of the plaintiffs' cause of action, and itmust "be specifically pleaded and that non-averment by theplaintiffs in their written statement that the defendants hadapproval to sell the land, the subject-matter of the suit,rendered the plaint bad *on* the face of it and liable to bedismissed.

The two grounds on which the learned trial judge dismissed the suit are found in the following passage from his ruling:

"As I see it, however, it is for the plaintiffsto satisfy me that they have a right to exercisean option which has become a liability exercisableagainst the present trustees because they are thesuccessors in office or assigns of the originaltrustee lessors. In the same way it is for theplaintiffs to satisfy me that there is no impedimentto granting specific performance and to do so theywould have to prove affirmatively that the Governorhas given his consent to the present sale for whichthey are praying, or that the Court has power todispense with such consent or that no consent isnecessary. They have failed to satisfy me on anyof these alternatives.

With all due respect to the learned judge I think he fell into error by his approach to the question that was raised by the second ground of the preliminary objection. The Objection was to the pleadings only, and there was no need for the learned judge to embark upon an investigation at that stage of the proceedings into whether the plaintiff had evidence to prove that the necessary consent had been obtained or would be granted. It is a fundamental rule in pleading that evidence shall never be plead. As Lord Denman, C. J. pointed out in Williams v Wilcox (1938), 8 A *&* E at p. 531 :

"It is an elementary rule in pleading that when astate of facts is relied on it is enough to allegeit simply without setting out the subordinate factswhich are the means of producing it, or the evidencesustaining the allegation."

Upon an application to strike out a suit on the ground that it discloses no cause of action the judge can look only at the pleadings and particulars, and not even at affidavits.

The principle upon which the Court acts in such a case was stated by Lindley, M.R. in Hubbuck & Sons v Wilkinson, Heywood and Clark 1899.97 1 Q.B. 86. In his judgment the Master of the Rolls pointed out that there were two methods of raising points of law, one by raising the question under Order 25, rule 2, and the other by applying to strike out the statement of claim under Order 25 rule 4. He then made the following observations (at page 91):

"The first method is appropriate to casesrequiring argument and careful consideration.The second and more summary procedure is onlyappropriate to cases which are plain and obvious,so that any master or judge can say at oncethat the statement of claim as it stands isinsufficient, even if proved, to entitle theplaintiff to what he asks."

In Worthington and Co. Ltd., v Belton & Ors (1902),

18 T.. L. R. 438 the principle stated by Lindley, M. R. was applied, and there Romer L. J. said:

"But in dealing with these applications the statement of claim must not be construed sostrictly as under the old procedure bydemurrer. That was pointed out by Mr. JusticeChitty in 'Republic of Peru v Peruvian GuanoCompany (36 Ch. D., 489, at p. 496), wherehe said:-

'Having regard to the terms of Order25, rule 4, and to the decisions onit, I think that this rule is morefavourable to the pleading objected tothan the old procedure by demurrer.Under the new rule the pleading willnot be struck out unless it isdemurrable and something worse thandemurrable. If notwithstandingdefects in the pleading, which wouldhave been fatal on a demurrer, the Courtsees that a substantial case is presented,the Court should, I think, decline to strikeout that pleading.'"

Looking at the Plaintiffs' plaint as it standsit contains an allegation that the plaintiffs are thesuccessors in title of lessees of a lease which gave themthe option to purchase the demised land, when it ceased tobe used for the purpose for which it was demised. It isalleged that the plot of land has ceased to he used for thepurpose contemplated by the parties, and that the defendantsfailed to perform their obligation under the lease by theirrefusal to sell the land to the plaintiffs at the priceagreed upon. It is further alleged that the plaintiffs havebeen and still are, ready and willing to buy the plot ofland demised at the agreed price. There was annexed tothe plaint a copy of the Lease No. 5101 dated 9th January,1952, and a letter dated 27th March, 1961 written "by thedefendants and addressed to the plaintiffs. In this." letterthe Chairman of the Defendants Authority discussed the priceat which the land should he sold to the plaintiffs.

In my opinion the plaint discloses at least somequestion fit to be determined by the judge, and it ought -not to have been struck out merely on the ground that theplaintiff was not likely to succeed on it: see Boaler v Holder(1886), 54 L. T. 298.

Despite the material facts averred by the plaintiffs,which in my view are sufficient to formulate a cause of action,the defendants contend that the omission to plead the consentof the Governor which in their reckoning is a conditionprecedent renders the pleadings bad.

Rule 57 of the Rules of Court (Cap. 25 of Aden)reads as follows:

"Any condition precedent, the performance oroccurrence of which is intended to be contested,shall he distinctly specified in his pleadingby the plaintiff or defendant, as the case maybe; and, subject thereto, an averment of the Performance or occurrence of all conditionsprecedent necessary for the case of theplaintiff or defendant shall be implied inhis pleading."

It is plain on consideration of this section thatthe plaintiffs in this case need not have specifically pleaded theGovernor's consent, because being a condition precedentit would be implied in their pleadings. It would thenbe for the defendants to raise the point in their ownpleadings if they thought that the plaintiffs had notcomplied with all the conditions in section 21 of the PortTrust Ordinance, 1957 (Cap. 112, Laws of Aden). It isonly when the defendants had raised non-compliance withsection 21 that the burden would then be thrown on theplaintiffs to prove due compliance. The performance of anycondition precedent need not be specifically pleaded, exceptwhen a party desires to put the performance or occurrence of anycondition precedent in issue.

In my view the decision in Gates v W. A.. and R. J.Jacobs Ltd. [1920] 1 Ch. D. 567 sufficiently disposes ofthe defendants' second preliminary objection. In thatcase the plaintiffs issued a writ against the defendants torecover possession of certain premises for breaches, ofcovenant and for damages. The statement of claim gaveparticulars of material breaches of covenant, but there wasan omission to allege that the statutory notice of breachesrequired by section 14 of the Conveyancing Act 1881, hadbeen served on the defendants and had not been compliedwith. The defendants moved that the state of claim shouldbe struck out as disclosing no reasonable cause of action.

It therefore became necessary for the Court to construerule 14 of Order XIX of the English Rules which is identicalwith Rule 57 of the Rules of Court (Cap. 25, Laws of Aden).In his judgment P. 0. Lawrence, J., said at pages 569, 570:-

"This is an application which raises aquestion of practice of some importance.The action is by landlords to recover possessionof demised premises by reason of the breaches ofcovenant alleged to have been committed by thelessees. Under s. 14 of the Conveyancing Act,1881 a notice has to be served on the lesseespecifying the particular "breaches of covenantcomplained of, and unless and until such anotice is served and the lessee fails within areasonable time to remedy the breaches and to makereasonable compensation, the lessor cannot enforcehis right of re-entry. Therefore there is unders. 14 a condition precedent to be performed beforean action for recovery of possession will lie.Mr. Liversidge has argued that under r. 14 ofOrder XIX an averment of the performance of thatcondition is implied in his statement of claim andneed not be specifically alleged. On the otherhand Mr. Beaumont has urged that the non-avermentin the statement of claim of the performance ofthe condition renders the pleading demurrable, andfor that he relies on a passage in the speech ofLord Buckmaster in Foxy_ Jolly (I916) 1 A. C. 1, 8where after quoting. 14 he says: If such conditionwere not satisfied and entry were attempted atcommon law, such entry would be a trespass; ifproceedings were instituted to obtain possessionthey would be instantly demurrable I do notthink that Lord Buckmaster had r. 14 of Order XLXin his mind; what he meant in making that statementwas that if no such notice had been given the actionwould not be maintainable. That is a differentthing from saying that the notice must be specifically pleaded In my judgment the concluding words ofr. 14 of Order XIX mean that an averment that thenotice was given, although not specifically pleaded,must be implied. In other words the statement ofclaim must be read as if it contained an allegationthat the plaintiffs had given the necessary noticeunder s. 14 of the Act before the commencement ofthe action. It is said that the absence of the pleais embarrassing, but I fail to see how that can beso because the defendants can obtain particulars ofthe notice by discovery in the action. I cannot there-fore say that the plaintiff's pleading disclosesno reasonable cause of action or that it is frivolousor vexatious or even embarrassing."

See also Lane v Glenny (1837), 7 A. *&* E. 83.'

In my judgment the learned trial judge erred in upholding the secondary preliminary objection and consequently he was wrong in dismissing the plaintiff's suit on that ground.

I will now deal with the cross-appeal. The notice filed on behalf of the respondents contains two grounds as

follows:

"1. The Learned Judge ought to have held that the claim was barred by limitation, and oughtto have held that the Respondents letterdated 15th January, 1958 was an unequivocaldenial of the Appellants claims.

2. The Learned trial Judge ought to have furtherheld- that the Plaint did not disclose any causeof action."

The Rules of Court (Cap. 25) contain rules under which a plaint may "be rejected. Rule 80 states inter alia as follows:

"The plaint shall be rejected in the followingcases:-

(a) where it does not disclose a causeof action;

(b) where the relief claimed is under-valued, and the plaintiff, on beingrequired by the Court to correctthe valuation within a time to befixed by the Court fails to do so;

(c) where the relief claimed is properlyvalued but the proper fee has not beenpaid, and the plaintiff, on beingrequired by the Court to pay theproper fee within a time stated failsto do so;

(d) where the suit appears from thestatement in the plaint to be barredby any law."

Article 99 of the Limitation Ordinance (Cap. 86 Laws of Aden) specifies the limitation period as "three years from the date fixed for performance or the plaintiff has notice that performance refused."

It seems clear to me that in deciding whether asuit is barred by statute or by any law the Court can onlylook at the plaint. The Court cannot look behind the plaintif it discloses ex facie a good cause of action.

There are two paragraphs in the plaintiffs' plaintwhich in my view, are material to the determination ofthe first ground of the cross-appeal. These are paragraphs11 and 15.

In paragraph 11 it is averred as follows: "The Defendants, however, after protractedcorrespondence ending with their letter No.FWD/3/13778 dated the 27th of March, 1961 finally-refused to sell at Rs. 5/- per square yard the plotof land comprised in the said lease No. 3101 and ceasedto be used for the purpose mentioned in the said lease." And in paragraph 15 it is also averred: "The cause of action arose at Aden on 27th March,1961 when the Defendants finally refused to sellat Rs. 5/- per square yard." It was contended by Mr. Sanghani, counsel forRespondents, that notice of refusal to sell the plot of landwas communicated to the plaintiffs in a letter dated 15thJanuary, 1958, and therefore time began to run as from thatdate. He submitted therefore that the suit was barred bystatute when it was filed on 15th July, 1961. I think that Mr. Sanghani's argument that timebegan to run against the plaintiff from 13 th January 1958 wasan invitation to the Court to look behind the statement inthe plaint, and in my view this must be declined. The plaintin itself contains a good prima facie case, and it is impossibleto see any objection to it as regards the accrual of the causeof action Since I take the view that by rule 80(d) of theRules of Court the objection on the third ground can be consideredby reference only to the plaint itself I do not consider itnecessary to examine further in this appeal the learned judge'sreasons for dismissing the defendant's third preliminaryobjection. I venture to say, however, that he arrived at theright

conclusion. On the whole I think the cross-appeal is clearlymisconceived. Accordingly I would allow the appeal with costsand dismiss the cross-appeal also with costs, and would enterthat the decree be set aside and the suit be remitted to theSupreme Court, Aden, to be heard and decided by a judge. Thecosts of and relating to the hearing of the preliminary objections in the court below I would order to be paid by the appellantsin any event, and that the costs of the hearing in theSupreme Court following the remission be in the discretionof the judge hearing the case.

Dated at Aden this 12th day of March 1964.

A S.A. CRABBE

JUSTICE OF APPEAL ..