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Case Action:	Judgment
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Advocates:	-
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**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 Supreme Court, Aden, whereby it was ordered and decreed that the plaintiffs' suit be dismissed with costs amounting to Shs 315/- (Shillings three hundred and fifteen).

On 15th July, 1961 the plaintiffs filed a suit against the defendants for an order of specific performance...In their plaint the plaintiffs claimed to be successors in title of lessees and the defendants the lessors under a lease dated 9th January, 1932. For the purposes of this appeal I think 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 of Aden as lessors and Sir Hormusjee Cowasjee Dinshaw, Kt., Kaikobad Hormusjee Cowasjee Dinshaw, Serabjee Cowasjee Dinshaw and Rustomjee Dorabjee Dinshaw as lessees of a plot of land measuring 10800 Square feet or thereabouts and situated at Hedjuff was leased under the Lease No. 3101 (hereinafter referred to as the said lease No. 3101) for 99 years commencing from 1st day of April, 1930, on the terms and conditions mentioned therein for the purpose of accommodation of coolies employed in the handling of coal or cargo for ships.

2. The said lessees and their successors carried on business inter-alia of Stevedores in partnership in the 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 in Civil Suit No. 1501 of 1949 filed by one of the partners against the other partners (of whom the plaintiff herein was one of them) the said firm of Cowasjee Dinshaw & Bros. was dissolved and was wound up as from 31st December, 1954.

4. The plaintiff in this suit purchased the business goodwill and properties of the said firm including the properties comprised in the said Lease No. 3101. According to the terms of the said lease, buildings were constructed on the land and were used for accommodating coolies employed in the handling of coal for ships.

5. The Defendants constructed buildings at Maa'lak known as "New Coolie Lines" in or about 1956 and the defendants compelled the plaintiff to transfer those coolies then in occupation of the buildings on the plot of land comprised under the said lease 3101 to the aforesaid New Coolie Lines.

7. Since then the plot and the buildings thereon comprised under the said Lease No. 3101 ceased to be used for accommodating coolies employed in the handling of coal or cargo for ships.

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

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

(2) The lessees in the use of the said plot of land will observe all the Rules for the time being in force relating to the use, occupation and transfer of land relating to the construction and alteration of the buildings and additions to and use of the same in the Settlement of Aden so far as they may be applicable in respect of the purpose for which the said plot of land has been granted under the foregoing condition, and the provision of the said rules shall to such extent be deemed to be incorporated in this lease and to the conditions thereof.

(5) The only buildings to be erected on the said plot shall be coolies quarters in accordance with the plans submitted to and approved by the Trustees and also by the Executive Committee of the Aden Settlement as per their Resolution No. 528 dated 14th November, 1930; the buildings of the said Coolie Quarters shall be completed within 1 year from the date of the grant of this lease.

PROVIDED ALWAYS and it is hereby agreed and declared as follows:

(a) That the price of land shall be fixed at Rs. 2-8-0- per Square Yard for the purpose of the grant of indirect contribution towards the housing schemes of coal and cargo coolies mentioned in clause (1).

(b) That if the said plot of land is not used for the purpose for which it is granted within one year from the date of these presents or if at any time during the term for which this lease is granted the said plot of land shall cease to be used for such purpose then the Lessees shall upon being called so to do in writing by the Lessors forthwith purchase the said plot of land at the price of Rs. 5/- per square yard PROVIDED that if the Lessees are unwilling to do this they may refuse but upon such refusal this lease shall be deemed immediately to determine and the land shall be surrendered to the Lessors.

(c) Subject to sub-clause (5)(b) above, if any of the conditions of this lease not excepting the provisions of the rules deemed to be conditions of this lease as aforesaid shall not be observed then the Lessors may after three months written notice enter upon the said plot of land freed from all claims and liabilities created by the Lessees or any person claiming through them and this lease shall thereby be determined.

9. According to the para 5(b) (reproduced above) of the said Lease No. 3101 the condition precedent was that the plot of land comprised thereunder should be sold to the Plaintiff as it ceased to be used for the purposes mentioned therein; and that the Defendants were bound to call upon the Plaintiff in writing to buy the said plot of land at the price of Rs. 5/- (equivalent to E. A. Shs. 7.50) per square yard being the price agreed in the said lease between the parties thereto.

10. The Plaintiff offered to buy the plot of land under the said Lease 3101 at the price of Rs. 5/- per square yard agreed as provided therein and was and is willing and prepared as yet to do so.

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

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

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

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

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

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

The Plaintiff claims:

(a) that the Court will be pleased to order the Defendants specifically to perform the Agreement (Para 3(b)) under the Lease No. 3101 by selling the land demised thereunder at E. A. Shs. 7.50 per Square Yard, and to do all acts necessary to complete the sale of the said property.

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

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

(SD) - DINSHAW H.C. DINSHAW Plaintiff.

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 the terms of the lease or otherwise to make a call upon the Plaintiff as stated in para 9 of the plaint.

2. The Plaintiff's suit is liable to be dismissed with costs as the Plaintiff does not contain or plead a plea of material facts sufficient to entitle the 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 power to effect a sale or to give a lease for a period exceeding 21 years under the terms of Sec. 21 of the Port Trust Ordinance.

3. The Plaintiff's claim is barred by Limitation as the Defendant Corporation repudiated the Plaintiff's claim in writing by its letter dated 15th January, 1958, and previous thereto the Plaintiff was advised verbally 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 in support of the second ground of objection was summarized by the learned judge thus:

"That in effect the defendants are saying in this ground is that, quite irrespective of the merits or the equities, this Court could not, even if it wished, grant specific performance because the defendants have no power to sell without the consent of the Governor. Since they have not shown that they have obtained this consent, or that it would be forth-coming, or that it is not necessary a condition precedent 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 grant specific performance if so ordered has not been complied with."

The core of the defendant's second objection, it seems to me, was that the Governor's consent which was a condition precedent to the enforceability of the agreement of 9th January, 1952 had not "been pleaded by the plaintiff. According to the defendants consent was a material averment which was of the essence of the plaintiffs' cause of action, and it must "be specifically pleaded and that non-averment by the plaintiffs in their written statement that the defendants had approval to sell the land, the subject-matter of the suit, rendered the plaint bad on the face of it and liable to be dismissed.

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 plaintiffs to satisfy me that they have a right to exercise an option which has become a liability exercisable against the present trustees because they are the successors in office or assigns of the original trustee lessors. In the same way it is for the plaintiffs to satisfy me that there is no impediment to granting specific performance and to do so they would have to prove affirmatively that the Governor has given his consent to the present sale for which they are praying, or that the Court has power to dispense with such consent or that no consent is necessary. They have failed to satisfy me on any of 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 pleaded. 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 a state of facts is relied on it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining 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 cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff 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 so strictly as under the old procedure by demurrer. That was pointed out by Mr. Justice Chitty in 'Republic of Peru v Peruvian Guano Company (36 Ch. D., 489, at p. 496), where he said:-

'Having regard to the terms of Order 25, rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented, the Court should, I think, decline to strike out that pleading.'

Looking at the Plaintiffs' plaint as it stands it contains an allegation that the plaintiffs are the successors in title of lessees of a lease which gave them the option to purchase the demised land, when it ceased to be used for the purpose for which it was demised. It is alleged that the plot of land has ceased to be used for the purpose contemplated by the parties, and that the defendants failed to perform their obligation under the lease by their refusal to sell the land to the plaintiffs at the price agreed upon. It is further alleged that the plaintiffs have been and still are, ready and willing to buy the plot of land demised at the agreed price. There was annexed to the plaint a copy of the Lease No. 5101 dated 9th January, 1952, and a letter dated 27th March, 1961 written "by the defendants and addressed to the plaintiffs. In this." letter the Chairman of the Defendants Authority discussed the price at which the land should be sold to the plaintiffs.

In my opinion the plaint discloses at least some question fit to be determined by the judge, and it ought not to have been struck out merely on the ground that the plaintiff 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 consent of the Governor which in their reckoning is a condition precedent renders the pleadings bad.

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

"Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the Performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

It is plain on consideration of this section that the plaintiffs in this case need not have specifically pleaded the Governor's consent, because being a condition precedent it would be implied in their pleadings. It would then be for the defendants to raise the point in their own pleadings if they thought that the plaintiffs had not complied with all the conditions in section 21 of the Port Trust Ordinance, 1957 (Cap. 112, Laws of Aden). It is only when the defendants had raised non-compliance with section 21 that the burden would

then be thrown on the plaintiffs to prove due compliance. The performance of any condition precedent need not be specifically pleaded, except when a party desires to put the performance or occurrence of any condition 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 of the defendants' second preliminary objection. In that case the plaintiffs issued a writ against the defendants to recover possession of certain premises for breaches of covenant and for damages. The statement of claim gave particulars of material breaches of covenant, but there was an omission to allege that the statutory notice of breaches required by section 14 of the Conveyancing Act 1881, had been served on the defendants and had not been complied with. The defendants moved that the state of claim should be struck out as disclosing no reasonable cause of action.

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

"This is an application which raises a question of practice of some importance. The action is by landlords to recover possession of demised premises by reason of the breaches of covenant alleged to have been committed by the lessees. Under s. 14 of the Conveyancing Act, 1881 a notice has to be served on the lessees specifying the particular "breaches of covenant complained of, and unless and until such a notice is served and the lessee fails within a reasonable time to remedy the breaches and to make reasonable compensation, the lessor cannot enforce his right of re-entry. Therefore there is under s. 14 a condition precedent to be performed before an action for recovery of possession will lie. Mr. Liversidge has argued that under r. 14 of Order XIX an averment of the performance of that condition is implied in his statement of claim and need not be specifically alleged. On the other hand Mr. Beaumont has urged that the non-averment in the statement of claim of the performance of the condition renders the pleading demurrable, and for that he relies on a passage in the speech of Lord Buckmaster in Foxy\_ Jolly (1916) 1 A. C. 1, 8 where after quoting s. 14 he says: If such condition were not satisfied and entry were attempted at common law, such entry would be a trespass; if proceedings were instituted to obtain possession they would be instantly demurrable I do not think that Lord Buckmaster had r. 14 of Order XIX in his mind; what he meant in making that statement was that if no such notice had been given the action would not be maintainable. That is a different thing from saying that the notice must be specifically pleaded. In my judgment the concluding words of r. 14 of Order XIX mean that an averment that the notice was given, although not specifically pleaded, must be implied. In other words the statement of claim must be read as if it contained an allegation that the plaintiffs had given the necessary notice under s. 14 of the Act before the commencement of the action. It is said that the absence of the plea is embarrassing, but I fail to see how that can be so because the defendants can obtain particulars of the notice by discovery in the action. I cannot therefore say that the plaintiff's pleading discloses no reasonable cause of action or that it is frivolous or 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 ought to have held that the Respondents' letter dated 15th January, 1958 was an unequivocal denial of the Appellants' claims.

2. The Learned trial Judge ought to have further held - that the Plaintiff did not disclose any cause of action."

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

"The plaintiff shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so;

(c) where the relief claimed is properly valued but the proper fee has not been paid, and the plaintiff, on being required by the Court to pay the proper fee within a time stated fails to do so;

(d) where the suit appears from the statement in the plaintiff to be barred by 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 a suit is barred by statute or by any law the Court can only look at the plaintiff. The Court cannot look behind the plaintiff if it discloses ex facie a good cause of action.

There are two paragraphs in the plaintiffs' plaintiff which in my view, are material to the determination of the first ground of the cross-appeal. These are paragraphs 11 and 15.

In paragraph 11 it is averred as follows: "The Defendants, however, after protracted correspondence 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 plot of land comprised in the said lease No. 3101 and ceased to 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 sell at Rs. 5/- per square yard." It was contended by Mr. Sanghani, counsel for Respondents, that notice of refusal to sell the plot of land was communicated to the plaintiffs in a letter dated 15th January, 1958, and therefore time began to run as from that date. He submitted therefore that the suit was barred by statute when it was filed on 15th July, 1961. I think that Mr. Sanghani's argument that time began to run against the plaintiff from 13th January 1958 was an invitation to the Court to look behind the statement in the plaintiff, and in my view this must be declined. The plaintiff itself contains a good prima facie case, and it is impossible to see any objection to it as regards the accrual of the cause of action. Since I take the view that by rule 80(d) of the Rules of Court the objection on the third ground can be considered by reference only to the plaintiff itself I do not consider it necessary to examine further in this appeal the learned judge's reasons for dismissing the defendant's third preliminary objection. I venture to say, however, that he arrived at the right conclusion. On the whole I think the cross-appeal is clearly misconceived. Accordingly I would allow the appeal with costs and dismiss the cross-appeal also with costs, and would enter that the decree be set aside and the suit be remitted to the Supreme Court, Aden, to be heard and decided by a judge. The costs of and relating to the hearing of the preliminary objections in the court below I would order to be paid by the appellants in any event, and that the costs of the hearing in the Supreme Court following

the remission be in the discretion of the judge hearing the case.

Dated at Aden this 12th day of March 1964.

**A S.A. CRABBE**

**JUSTICE OF APPEAL ...**



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