

MAKSUDAN AND ANOTHER

v.

DULIA

[SUPREME COURT, 1972 (Goudie J.), 16th February, 3rd March]

Civil Jurisdiction

Landlord and tenant—native leasehold—expiry of sublease of part—action for possession—claim to right of renewal based on earlier agreement but not expressed in sublease — whether agreement and sublease interdependent — if so, agreement merged in sublease—question of consent of Commissioner of Lands—Native Land Trust Ordinance (Cap. 115) s.12.

Native land—native leasehold—sublease—consent of Commissioner of Lands given to sublease—no right of renewal expressed in sublease—earlier agreement alleged containing right of renewal—question of consent—native Land Trust Ordinance (Cap. 115) s.12.

An action was brought by the headlessees of a native lease for possession of part of the land leased, which part had been the subject of a sublease to the defendant which had expired. The defendant claimed a right to the renewal of the sublease contained, not in the sublease itself, but in an agreement to sublease executed prior to the sublease by the plaintiffs' predecessors in title in favour of the defendant and her brother: it was claimed that the brother had assigned his interest in the agreement to the defendant and that the sublease was executed pursuant to the agreement.

Held: 1. On the balance of probabilities the sublease was not granted pursuant to the earlier agreement and the documents were not interdependent.

2. Even if this conclusion were wrong the agreement was merged in the sublease itself and it was not possible to graft onto the sublease a right of renewal which it did not contain.

3. The sublease contained the consent of the Commissioner of Lands, which the earlier agreement did not: consent to a right of renewal would be necessary and if the consent given to the sublease operated as a waiver in respect of the agreement the waiver would be confined to the rights and liabilities of the parties as expressed in the sublease.

4. The defendant had become a trespasser.

Cases referred to :

Barrow v. Isaacs & Son [1891] 1 Q.B.417; 64 L.T.686.

Jai Kissun Singh v. Sumintra (1970) 16 F.L.R. 165.

Action in the Supreme Court for possession of land on expiry of sublease.

M. T. Khan for the plaintiffs.

A *S. Prasad* for the defendant.

The facts sufficiently appear from the judgment.

3rd March 1972

B GOUDIE J. :

In this Action the two plaintiffs, who are registered lessees of Native Lease No. 974, are suing the defendants, as registered sub-lessee of part of the said lease, claiming an order for possession. It is common ground that the defendant's sub-lease expired on 1st August, 1966 and that the plaintiffs informed the defendant that there was no intention to renew and gave notice in 1964 of intention to determine the sub-lease when it expired in 1966. The defendant says that she is entitled to a renewal of the sub-lease and for a declaration accordingly.

C At the commencement of the hearing of this Action, Counsel for the plaintiffs and the defendant put in by consent a Statement of Agreed Facts. For ease of reference, and to clarify what this Action is about, it will be convenient to set out these Agreed Facts, which are as follows :—

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- “1. Plaintiffs are the registered Lessees of Native Lease No. 974.
 2. The defendant was registered sub-lessee of part of the Native Lease — the area of sub-lease being 11 acres 2 roods.
 - E 3. The sub-lease expired on 1st August, 1966.
 4. On 24th July, 1964 the plaintiffs served a notice on the defendant informing her that the sub-lease will not be renewed upon its expiry.
 - F 5. Prior to, and also subsequent to, the expiry of the sub-lease the defendant orally requested the plaintiffs to renew the sub-lease but the plaintiffs have stated that they require the land for their own use and benefit.
 - G 6. On 19th August, 1937, the original Lessors, Sakina and Ashraf Shah, entered into an agreement with the defendant and her brother Salamat Khan.
 - H 7. One of the terms of the agreement was “The tenants shall have the right of renewing the sub-lease at the expiry of the term hereby demised on agreed rental and conditions at the time of renewal.”
 8. That on the 17th day of February, 1938, Sakina and Ashraf Shah executed sub-lease No. 17799 in favour of the defendant. A copy of which is exhibited.

9. The land comprised in Native Lease No. 974 was transferred by the executor of Ashraf Shah to the present owners, the plaintiffs, on 21st February, 1963, by way of Administration and not by way of Sale (in terms of Probate No. 7218 and in terms of a Deed of Settlement dated 15th March, 1963, which documents are exhibited).

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10. The defendant was at the date of the expiry of lease, and still is in occupation of the land.

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The sole issue of fact on which learned Counsel were not agreed was as follows :—

“Whether or not Salamat Khan was proved to have assigned his interest in the agreement of 19th August, 1937, to the defendant.”

By consent evidence was permitted, restricted to this issue alone.

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In addition to the Agreed Facts (Exhibit 1) the following documents were put in by consent :—

Native Lease No. 974	Exhibit 2
Sub-lease No. 17799	Exhibit 3
Copy Agreement of 18. 8. 37	Exhibit 4
Photostat Probate	Exhibit 5
Transfer of Native Lease No. 974	Exhibit 6
Deed	Exhibit 7

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Before making any comment on the validity or effect of these documents I propose to describe them briefly.

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Exhibit 2 — is a Lease granted, under Ordinance No. 1 of 1905 by the Commissioner of Lands to Senirusi Kavoa Rauqe of 151 acres 1 rood 20 perches of land, situate at Tavua, for a term of 99 years commencing on 19th December, 1924. I shall hereinafter refer to this Lease as “the Head Lease”. It bears numerous endorsements but I need only refer to the following :—

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Endorsement A:

“Transfer No. 83634. Registered 4 June 1963, to Maksudan and Rasulan, (the two plaintiffs), subject to N.S.L. Numbers 7921, 17799, 17800, 17802, 45861, 45862.” All these sub-leases have expired including :

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Endorsement B:

Sub-lease No. 17799. Registered 1st March 1938, to Dulia, the defendant, which expired on 1st August, 1966, and

Endorsement C:

“Sub-lease No. 17800. Registered 1st March, 1938 to Abdul Khan”, the defendant’s father, which expired on 1st August, 1966.

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Endorsement D:

“Transmission by death. No. 80493. Registered 26th June 1962 to Bahadur Ali as Executor and Trustee.

A *Exhibit 3* — Sub-lease No. 17799 (see Endorsement B above) from Ashraf Shah and Sakina to Dulia (the defendant) over 11 acres 2 roods and 7 perches of land situate at Tavua, and comprising part of the Head lease, for a term of 30 years from 1st August, 1936.

B *Exhibit 4* — Agreement for Sub-lease dated 19th August, 1937, between Ashraf Shah and Sakina and Dulia, the defendant, of 10 acres of land at Tavua, comprising part of the Head Lease, for a term of 30 years from 1st August, 1936.

Exhibit 5 — Photostat copy of Probate of Ashraf Shah, with Will annexed, (see Endorsement D above).

C *Exhibit 6* — Transfer by the Executor of the Estate of Ashraf Shah of the Head Lease to Maksudan and Rasulan (the plaintiffs) "by way of administration and not by way of sale", (by virtue of Probate No. 7218 (Exhibit 5) and by virtue of Deed of Settlement (Exhibit 7) of 15th March, 1963).

D *Exhibit 7* — Deed of Settlement dated 15th March, 1963, between the Executor of the Estate of Ashraf Shah and the Beneficiaries in the estate, including the two plaintiffs, whereby, in consideration of the Head Lease being transferred into their names in equal shares, the two plaintiffs agreed to forego all their rights, titles and interests in the Estate of their deceased father, Ashraf Shah.

E The crux of the defendant's case whereby she says she is entitled to a renewal of the sub-lease is as follows:— She says that the sub-lease in her favour dated 17th of February, 1938, (Exhibit 3) was made pursuant to the agreement for sub-lease dated 19th of August 1937 (Exhibit 4). She further says that the proviso contained in Clause 4(b) of Exhibit 4 entitles her to the renewal of the sub-lease in accordance with Paragraph 7 of the Agreed Facts.

F Evidence was adduced with the object of showing that Salamat Khan assigned his interests in the Agreement of 19th August 1937, (Exhibit 4) to the defendant. The first and preliminary issue for decision is whether or not such assignment was possible in law and was proved in fact.

Clause 2(d) of Exhibit 4 provides that the tenants agreed not to assign or sub-let the premises or any part thereof without the consent in writing of the landlords first had and obtained.

G The Agreement, Exhibit 4, provides that the landlords agreed to grant and the tenants agreed to accept a sub-lease of ten acres of the Head Lease. Thus Salamat and his sister, the defendant, became joint tenants. As a matter of law, I do not consider that Salamat Khan could surrender his interests in the agreement to his sister "without the consent in writing of the landlord first had and obtained." It might be possible, as between the joint tenants, to sever their joint tenancy, and convert it into a tenancy in common and for one tenant to surrender his interest to the other. But

H if the interest of the landlords was to be affected their written consent was first necessary. I was not particularly impressed with the evidence of the intention of Salamat Khan to surrender his interest in the agreement to his sister and I would not be prepared to accept his evidence alone on

this issue. Even, however, if I were to accept his evidence, at the most, it could only be said to have shown that the landlords orally expressed their willingness to his proposal to assign his interest to his sister, the defendant. The object of requiring a *written* consent is to make it clear beyond peradventure that a consent was in fact, first obtained. I do not, therefore, consider it would be proper to allow the substitution of an alleged oral consent for a written consent which was specifically required under the written agreement. I am, therefore, of the opinion, that even under the Agreement, the defendant alone could have no right to renewal. It might well be that the landlords would be willing to agree to sub-lease to the woman defendant and her brother, and to grant them the renewal, but would not be prepared to grant the balance of sub-lease, or the right to renewal, to the woman defendant alone.

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The next issue is whether the Court can be satisfied that the sub-lease (Exhibit 3) was entered into pursuant of Exhibit 4. I do not see how it can possibly be so satisfied, and, in fact, the balance of probabilities favours the view that these two documents were not in any way interdependent.

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I have already dealt with the question of the assignment, so need not comment further on the fact that Exhibit 4 is made in favour of the defendant and her brother whereas Exhibit 3 is in favour of the defendant alone. I must, however, point out a number of other important differences between the two exhibits. Exhibit 4 relates to 10 acres out of Native Lease No. 974 whereas Exhibit 3 relates to 11 acres 2 rood and 7 perches out of Native Lease No. 974. Exhibit 3 refers to the payment of a premium "on the execution of this agreement and the balance of £32/10/- to be paid on or before the 19th day of August 1938." Exhibit 3 makes no mention of any premium having been paid nor does it provide for the payment of any balance, which balance would have fallen due after the date of the execution of Exhibit 3. Exhibit 4 provides for a rental of £5.0.0. per annum whereas Exhibit 3 provides for a rental of £5/15/- per annum.

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It has been suggested that these differences were capable of explanation on the basis that after the Agreement, Exhibit 4 had been entered into, the land might have been more accurately surveyed and been found to have been larger than was at first thought and this might account for the increase in rent. These are indeed possibilities, but there is no evidence whatsoever to justify the Court making any such assumption. Moreover, these explanations do not account for the failure to make any mention of the premium in Exhibit 3, particularly to provide for the balance or acknowledge anything at all having already been paid. Finally, the right to renewal contained in Exhibit 4 was an extremely valuable right. I regard it as extremely improbable that it would have been included in the Agreement for the sub-lease, but left out altogether from the Sub-lease itself.

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The fact that both documents contain the "usual clauses", against sub-letting and for the payment of rates and taxes, I do not regard as carrying much weight in establishing that the two exhibits are connected in any way.

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A Even if I am wrong in this conclusion, I do not consider that a right of renewal in favour of the defendant and her brother contained in the Agreement (Exhibit 4) can give the defendant alone any right of renewal either under the provisions of Exhibit 4 or under Exhibit 3. If the contention of the defendant is correct, and Exhibit 3 was made pursuant to Exhibit 4, then the Agreement for the sub-lease became merged in the sub-lease itself. One cannot, therefore, graft on to the Sub-lease (Exhibit 3) a right of renewal which it does not contain, but which is only contained in the Agreement for lease (Exhibit 4).

B It is also necessary to point out that the Sub-lease Exhibit 3 contains the consent of the acting Commissioner of Lands whereas the Agreement for the sub-lease (Exhibit 4) contains no such consent. Since the consent in Exhibit 3 presupposes that a consent was necessary, it must follow that any such consent would have been necessary for a right to renewal as contained in Exhibit 4. It has been submitted that the consent to the Sub-lease by the Commissioner of Lands in Exhibit 3 amounts to a waiver of any previous failure to obtain such consent, but it is in my view, quite obvious even if there were any such waiver, it would be confined to the rights and liabilities of the parties as contained in the document for which the consent was given and it could not possibly amount to a waiver of a consent to renewal absent from such document.

C This view is reinforced by Section 12 of the Native Land Trust Ordinance and the decision in *Jai Kissun Singh s/o Gajadhar Singh v. Sumintra d/o Matadin* (1970) 16 F.R.R. 165. I have also noted that I ought not to grant relief against forfeiture for lack of consent, on the principles expounded in *Barrow v. Isaacs & Son* [1891] 1 Q.B. 417.

D Inasmuch as it was accepted by all parties in the Agreed Facts that the sub-lease expired on the 1st of August, 1966 and that on the 24th of July, 1964, the plaintiffs served a notice on the defendant informing her that the sub-lease would not be renewed upon its expiry, the defendant is, in my opinion, presently, a trespasser on the land. Counsel agreed that, in the event of my so finding, the plaintiffs were entitled to an order for possession, and, in my view, it is clearly right that they should be granted such an order. There will, therefore, be an order for immediate possession of the land of which the defendant was formerly the sub-lessee.

The defendant must bear the costs of these proceedings.

Judgment for the plaintiffs.