

~~Case No. 2~~

Judgment
3, 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 32 of 1964

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

BETWEEN:

- 1. COAST BRICK & TILE WORKS LIMITED)
 - 2. KANJI MEGHJI SHAH)
 - 3. SHARDABEN RATILAL SHAH)
 - 4. KESHAVLAL KANJI SHAH)
 - 5. RATILAL KANJI SHAH)
 - 6. ZAVERCHAND SOJPAL JETHA and)
 - 7. HIRJI RAMJI SHAH)
- APPELLANTS

AND

- 1. PREMCHAND RAICHAND LIMITED and
 - 2. SHAH MEGHJI MULJI LIMITED
- RESPONDENTS

RECORD OF PROCEEDINGS

Goodman Derrick & Co.,
30, Bouverie Street,
London, E.C.4.
Solicitors for the Appellants

Coward Chance & Co.,
St. Swithin's House, Walbrook,
London, E.C.4.
Solicitors for 1st Respondent

ACC. MARK

ACCESSION NUMBER

~~pe.~~

87121

~~614.62~~

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
25 APR 1967
25 RUSSELL SQUARE
LONDON, W.C. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

BETWEEN:-

- 1. COAST BRICK & TILE WORKS LIMITED)
 - 2. KANJI MEGHJI SHAH)
 - 3. SHARBABEN RATILAL SHAH)
 - 4. KESHAVLAL KANJI SHAH)
 - 5. RATILAL KANJI SHAH)
 - 6. ZAVERCHAND SOJPAL JETHA and)
 - 7. HIRJI RAMJI SHAH)
- APPELLANTS

AND

- 1. PREMCHAND RAICHAND LIMITED and
 - 2. SHAH MEGHJI MULJI LIMITED
- RESPONDENTS

RECORD OF PROCEEDINGS

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UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

25 APR 1967

25 RUSSELL SQUARE
LONDON, W.C.1.

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Exhibit "P.19" - Certificate of Ownership No.5420 relating to Plot No.500, Section VI, Mombasa. As P.3	13th September 1923
Exhibit "P.26(e)" - Plaintiff's Credit Note for Shs.16,106/64 to First Defendant - As "P.24"	24th June 1959

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Exhibit "P.36" - Bundle of Invoices and a Credit Note and a list of Invoices	Various

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

No.32 of 1964

ON APPEAL FROM THE COURT OF APPEAL FOR
EASTERN AFRICA AT NAIROBI

BETWEEN :-

1. COAST BRICK & TILE WORKS LIMITED
2. KANJI MEGHJI SHAH
3. SHARDABEN RATILAL SHAH
4. KESHAVLAL KANJI SHAH
- 10 5. RATILAL KANJI SHAH
6. ZAVERCHAND SOJPAL JETHA and
7. HIRJI RAMJI SHAH

Appellants.

and

1. PREMCHAND RAICHAND LIMITED and
2. SHAH MEGHJI MULJI LIMITED

Respondents.

RECORD OF PROCEEDINGS

No. 1

Plaint

In the Supreme
Court of
Kenya, Nairobi

COLONY AND PROTECTORATE OF KENYA

IN HER MAJESTY'S SUPREME COURT AT NAIROBI

CIVIL CASE NO. 1629 OF 1960

No. 1

Plaint

21st September
1960

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

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In the Supreme
Court of
Kenya, Nairobi

P L A I N T

No. 1
Plaint

21st September
1960
continued

The Plaintiff is a limited liability Company having its registered office and carrying on business at Nairobi. Its address for the purpose of service in this suit is care of J.J. & V.M.Patel, Advocates, Bazaar Mansion, Hussein Suleman Road, Nairobi.

2. The First Defendant hereinafter called "the Company" is a limited liability Company having its registered office at Mombasa. Its address for the purpose of service of the summons is Princess Marie Louise Road, Mombasa. 10

3. The Second Defendant is an Asian Male and is a director of the Company. His address for the purpose of service of the summons is care of the Company, Princess Marie Louise Road, Mombasa.

4. The Third Defendant is an Asian married woman, and is a director of the Company. Her address for the purpose of service of the summons is care of the Company Princess Marie Louise Road, Mombasa.

5. The Fourth Defendant is an Asian Male and is a director of the Company. His address for the purpose of service of the summons is care of the Company, Princess Marie Louise Road, Mombasa. 20

6. The Fifth Defendant is an Asian Male and is a director of the Company. His address for the purpose of service of summons is care of the Company, Princess Marie Louise Road, Mombasa.

7. The Sixth Defendant is an Asian Male. Service of the summons will be effected on him through the office of the Plaintiff's Advocates. 30

8. The Seventh Defendant is an Asian Male. His address for the purpose of service of the summons is care of Sojpal Jetha Ltd., Bazaar Street, Nairobi.

9. The Eighth Defendant is an Asian Male. His address for the purpose of service of the summons is care of Sojpal Jetha, Bazaar Road, Nairobi.

10. The Ninth Defendant hereinafter called "the Ninth Defendant" is a limited liability Company having its registered office at Mombasa. Its address for service is Princess Marie Louise Road, Mombasa. 40

11. The Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defendants are hereinafter referred to as "the Sureties".

In the Supreme
Court of
Kenya, Nairobi

No. 1

Plaint

21st September
1960

continued

12. The Company is the registered proprietor of an estate in fee simple (together with the mineral rights) subject to a Grant of Right of Way registered as Number C.R.4226/14 of ALL THAT piece of land situate in the Province of Seyadie at Changamwe Miritini in the Colony and Protectorate of Kenya containing by measurement Seventeen decimal seven four (17.74) acres or thereabouts being the premises comprised in a Certificate of Ownership dated the Thirteenth day of September One thousand nine hundred and twenty three (registered in the Registry of Titles at Mombasa as No. C.R.4226/1) and thereby granted to Liwali Ali Bin Salim (therein described) which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the Plan annexed to the said Certificate of Ownership and more particularly on Land Survey Plan Number 18822 deposited in the office of the Recorder of Titles at Mombasa aforesaid.

13. By an Instrument of Charge (hereinafter called the Charge) dated the 31st day of January 1956 (registered at the Land Titles Registry Colony of Kenya, Coast District, Mombasa - Registered No. C.R.4226/20) and made between the Company, the Plaintiff and the Sureties, the Company in consideration of the sum of Shs. 1,000,000/- (one million shillings) lent and advanced by the Plaintiff to the Company at the request of the Company and of the Sureties, charged all that piece of land hereinbefore described together with the buildings and improvements which were then there or to be erected thereafter in favour of the Plaintiff to secure to the Plaintiff payment of the said sum of Shs.1,000,000/- (one million shillings) paid to the Company and interest thereon at the rate of 16 per centum per annum from the 1st day of February 1956.

14. In terms of the Charge and for the said consideration the Company and the Sureties jointly and severally agreed (inter alia) :-

- (i) To repay to the Plaintiff the said sum of Shs.1,000,000/- with interest at the said

In the Supreme
Court of
Kenya, Nairobi

No. 1

Plaint

21st September
1960
continued

rate of 16 per centum per annum by 10 instalments of Shs.100,000/- each payable on the 31st day of October 1956 and on the 31st day of January, the 30th day of June and the 31st day of October in each of the years 1957, 1958 and 1959;

- (ii) So long as the said sum of Shs.1,000,000/- or any part thereof remained unpaid to pay interest to the Plaintiff at the aforesaid rate of 16 per centum per annum by monthly instalments on the 1st day of each month the first such payment to become due and payable on the 1st day of February 1956 and thereafter on the 1st day of each succeeding month until the said principal sum of Shs.1,000,000/- was paid in full.

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15. By an Instrument of Second Charge dated the 20th day of March 1956 (registered at the Land Titles Registry - Colony of Kenya, Coast District Mombasa - registered No. C.R.4226/21) the Company charged (Subject to the Charge in favour of the Plaintiff and the above mentioned encumbrances) all that said piece of land hereinbefore described together with the buildings and improvements in favour of the Ninth Defendant to secure to it payment of the sum of Shs.200,000/- and interest thereon at the rate of 12 per centum per annum from the 28th day of March 1956.

20

16. The Company and the Sureties have failed:-

- (a) To pay any of the said instalments of Shs. 100,000/- each except the following portions thereof:
- (i) Shs.10,000/- on the 24th day of January, 1957
 - (ii) Shs.10,000/- on the 11th day of February, 1957
 - (iii) Shs.10,000/- on the 15th day of March 1957 and
 - (iv) Shs.10,000/- on the 30th day of October 1957,

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and accordingly the total amount paid in respect of principal amounts to Shs.40,000/- only out of the said sum of Shs.1,000,000/- leaving a sum of Shs.960,000/- due and payable in respect of principal;

(b) To pay any portion of the said interest except the amounts set out hereto in Annexure "A" amounting in the total to a sum of Shillings 538,321.20 as shown in the said Annexure "A".

In the Supreme Court of Kenya, Nairobi

No.1

Plaint

21st September 1960

continued

10

17. The said rate of interest of 16 per centum per annum was reduced to 12 per centum per annum by a verbal agreement made on or about the first day of January One thousand nine hundred and fifty nine and since then interest has been debited to and is claimed from the Company and the Sureties at the reduced rate of 12 per centum per annum.

18. By reason of the aforesaid premises there is now due and payable by the Company and the Sureties jointly and severally to the Plaintiff the sum of Shs.1,076,093/54 being the said balance of principal Shs.960,000/- and the sum of Shs.116,093/34, arrears of interest thereon as at 31st August 1960 as shown by Annexure "A" hereto.

20

19. Despite demand for payment and notice of intention to sue no part of the said sum of Shs.1,076,093/54 has been paid.

20. The Charge was executed and the money was lent and advanced and was payable at Nairobi and that the property charged to the Plaintiff is situate in the Colony and Protectorate of Kenya and this Honourable Court has jurisdiction to try this suit.

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21. The Plaintiff does not seek any relief against the Ninth Defendant but it has been joined in these proceedings as having an interest in the property comprised in the Mortgage.

W H E R E F O R E

the Plaintiff prays that this Honourable Court be pleased to order:-

40

(a) That (in default of agreement) accounts be taken of what is due to the Plaintiff by the Company and the Sureties for principal, interest, Insurance premiums and costs as at a date to be fixed by the Court and that amount shall carry interest at 12 per centum per annum until realisation.

In the Supreme
Court of
Kenya, Nairobi

No. 1

Plaint

21st September
1960
continued

- (b) That in default of payment to the Plaintiff by the said date of the monies mentioned in paragraph (a) hereof the said piece of land containing by measurement seventeen decimal seven four (17.74) acres or thereabouts and more particularly described in paragraph 12 hereof together with the buildings and improvements being thereon be sold and that the proceeds of sale (after defraying the expenses of the sale) be paid into Court and applied in and towards the payment of what is declared due to the Plaintiff as aforesaid together with subsequent interest at the said rate of 12 per cent and subsequent costs and the balance, if any, paid to the Ninth Defendant to the extent of the amount due to the Ninth Defendant, and the Balance, if any, paid to the Company. 10
- (c) That if the net proceeds of the sale are not sufficient to pay in full such amount and such subsequent interest and costs as is due to the Plaintiff then the Company and the Sureties do pay jointly and severally to the Plaintiff the amount of the deficiency with interest thereon at the rate of 12 per centum per annum until realisation and the Plaintiff be at liberty to apply for personal decree against the Company and the Sureties jointly and severally for the balance. 20
- (d) That for all the aforesaid purposes all proper directions be given and accounts be taken by this Honourable Court. 30
- (e) That if the sale of the said hereditaments and premises does take place the Plaintiff be granted leave to bid at the sale and to purchase the property in question.
- (f) That the Plaintiff be granted such further or alternative relief as this Honourable Court may deem fit.

DATED at NAIROBI this 21st day of September 1960.

sd. J.J. Patel.
J.J. & V.M. PATEL,
ADVOCATES FOR THE PLAINTIFF

ANNEXURE "A"
PREMCHAND RAICHAND LIMITED

VERSUS

MESSRS. COAST BRICK & TILE WORKS LIMITED
& OTHERS

In the Supreme
Court of
Kenya, Nairobi

No. 1

Plaint

21st September
1960

continued

		SHS. CTS.	
	Interest on Shs.1,000,000/- at the rate of 16 per cent per annum from 1st February 1956 to 24th January 1957	157,859.44.	
10	Interest on Shs.990,000/- at the rate of 16 per cent per annum from 24th January 1957 to 11th February 1957	7,920.00.	
	Interest on Shs.980,000/- at the rate of 16 per cent per annum from 11th February 1957 to 15th March 1957	14,115.10.	
	Interest on Shs.970,000/- at the rate of 16 per cent per annum from 15th March 1957 to 31st October 1957	99,120.00	
20	Interest on Shs.970,000/- at the rate of 16 per cent per annum from 1st November 1957 to 31st December 1958	183,400.00	
	Interest on Shs.960,000/- at the rate of 12 per cent per annum from 1st January 1959 to 31st August 1960	<u>192,000.00</u>	
	Total interest due up to 31st August 1960	<u><u>654,414.54</u></u>	

In the Supreme
Court of
Kenya, Nairobi

ANNEXURE "A" CONTINUED

SUMS RECEIVED IN RESPECT OF INTEREST

No. 1	<u>DATE</u>	<u>AMOUNT</u>	
Plaint		<u>SHS. CTS.</u>	
21st September	25.10.57	13364.44.	
1960	19.4.56	13777.77.	
continued	23.5.56	13333.33.	
	18.6.56	13777.77.	
	18.7.56	13333.33.	
	18.8.56	13777.77.	10
	28.9.56	13777.77.	
	27.10.56	13333.33.	
	28.11.56	13777.77.	
	29.12.56	13333.33.	
	2.2.57	13777.77.	
	27.2.57	13777.77.	
	30.3.57	12195.55.	
	15.5.57	12995.55.	
	24.6.57	12933.33.	
	24.7.57	13364.44.	20
	24.8.57	12933.33.	
	24.9.57	13364.44.	
	23.11.57	12800.00.	
	14.1.58	26026.66.	
	15.2.58	26453.32.	
	25.3.58	11946.66.	
	25.4.58	13226.66.	
	26.5.58	12800.00.	
	25.6.58	13226.66.	
	25.7.58	12800.00.	30
	25.8.58	13226.66.	
	25.9.58	13226.66.	
	10.10.58	12800.00.	
	28.10.58	12800.00.	
	29.11.58	13379.16.	
	29.12.58	12800.00.	
	29.1.59	13226.66.	
	27.2.59	13226.66.	
	24.6.59	16106.64.	
	3.1.59	9600.00.	40
	28.12.59	9600.00.	
	20.1.60	9600.00.	
	27.2.60	9600.00.	
	27.4.60	9600.00.	
	11.8.60	<u>15000.00</u>	
	Total received in respect of interest	<u>538321.20.</u>	

	<u>SHS.CTS.</u>	In the Supreme Court of Kenya, Nairobi
Balance due in respect of interest calculated up to 31st August 1960.	116093.34.	<u> </u>
Balance due in respect of Principal	<u>960000.00.</u>	No. 1
TOTAL	<u><u>1076093.54.</u></u>	Plaint 21st September 1960 continued

Further interest is accruing on the said sum of Shs.960000/- at the rate of 12 per cent per annum from 1st September 1960.

10 Filed by:-

sd. J.J. Patel.

J.J. & V.M. Patel,
Advocates,
Bazaar Mansion,
Hussein Suleman Road,
P.O. Box 3891,
NAIROBI.

JJP/SGH.

No. 2

No. 2

20

Particulars of Plaintiff

Particulars
of Plaintiff

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

13th February
1961

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

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Particulars delivered by the Plaintiff pursuant to

In the Supreme Court of Kenya, Nairobi

the order of the Honble Mr. Justice MacDuff dated the 2nd day of February 1961 in regard to paragraph 13 of the Plaint.

No. 2
Particulars
of Plaint
13th February
1961
continued

All the payments were made by cheques drawn by the Plaintiff as follows:-

1. For Shs.200,000/- on the Standard Bank of South Africa Ltd., Nairobi in favour of Defendant No. 1, dated 1st December 1955.
2. For Shs.200,000/- on the Standard Bank of South Africa Ltd., Mombasa in favour of Defendant No. 1, dated 5th December 1955. 10
3. For Shs.50,000/- on the Standard Bank of South Africa Ltd., Mombasa in favour of Defendant No. 1, dated 9th December 1955.
4. For Shs.50,000/- on the Bank of Baroda Ltd. Mombasa in favour of Defendant No.1, dated 23rd December 1955.
5. For Shs.50,000/- on the Standard Bank of South Africa Ltd., Mombasa in favour of Defendant No. 1, dated 11th January 1956. 20
6. For Shs.100,000/- on the Standard Bank of South Africa Ltd., Mombasa in favour of Defendant No. 1, dated 16th January 1956.
7. For Shs.300,000/- on the Standard Bank of South Africa Ltd., Nairobi paid to National Bank of India Ltd., on behalf of Defendant No.1 by cheque dated 6th February 1956.
8. For Shs.50,000/- on the Bank of Baroda Ltd., Mombasa in favour of Defendant No.1, dated 24th February 1956. 30

In regard to the last two cheques dated 6th February 1956 and 24th February 1956 the balance of Shs.350,000/- was at the request of the Defendant No.1 made on or before the execution of the said Instrument of Charge dated 31st January 1956 held by the Plaintiff for the Defendant No.1 to be paid to the National Bank of India Ltd., to discharge the Equitable Mortgage made by the Defendant No.1 in favour of the said National Bank of India Ltd., on the Plot described in paragraph 12 of the Plaint

and accordingly the said amount of Shs.300,000/- was paid to the said Bank by the said cheque dated 6th February 1956 and the balance of Shs.50,000/- (the amount secured by the said Equitable Mortgage having been fully discharged by the said cheque of Shs.300,000/- dated 6th February 1956) was paid to the Defendant No.1 by the said cheque dated 24th February 1956.

In the Supreme Court of Kenya, Nairobi

No. 2

Particulars of Plaintiff

13th February 1961
continued

10 DELIVERED the 13th day of February, One thousand nine hundred and sixty one.

sd. J.J. Patel.
By J.J. & V.M. Patel,
Advocates for the Plaintiff,
Ruprani House,
Gulzaar Street,
NAIROBI.

20 Drawn and filed by:
J.J. & V.M. Patel,
Advocates,
NAIROBI.

To:
Messrs. Veljee Devshi & Bakrania,
Advocates,
Bazaar Street,
NAIROBI.

JJP/SGH.

No. 3

Re-Amended Defence of Defendants 1, 3, 4, 5, 7 and 8

30 COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

No. 3

Re-amended Defence of Defendants 1, 3, 4, 5, 7 and 8

28th November 1961

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

40 BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

In the Supreme
Court of
Kenya, Nairobi

No. 3

Re-amended
Defence of
Defendants 1,3,
4,5,7 and 8

28th November
1961
continued

RE-AMENDED WRITTEN STATEMENT OF DEFENCE
of 1st, 3rd, 4th, 5th, 7th and 8th DEFENDANTS

The 1st, 3rd, 4th, 5th, 7th and 8th Defendants above-named state as follows, by way of their Defence:

1. At all material times the Plaintiffs were licensed money-lenders and carried on business as such at Nairobi.
2. The sum of Shs.1,000,000/-, or any part thereof was not lent by the Plaintiffs to the First Defendant either on the 31st day of January 1956, or on any other dates, either in one lump sum, or by instalments, either by cash or by cheques, or at all, and the First Defendant or the other Defendants are not prepared to admit the alleged loan or any part thereof until proved with due particularity.

3 (a) Neither the alleged sum of Shs.1,000,000/- nor any part thereof was lent pursuant to any money lending transaction where the security for repayment of the loan and/or interest thereon was effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge", within the meaning of section 3(1)(b) of the Money-Lenders Ordinance.

3(b) No Mortgage had been executed or was in contemplation when the alleged loans totalling Shs.650,000/- referred to in particulars dated the 13th February 1961, were made. The said loans were made in the course of the Plaintiffs' business of money-lending, and were at all material dates unsecured, unenforceable and not bona fide loans (even after incorporation in the Charge) the security for repayment of which was effected by "the execution of a legal mortgage or charge upon immovable property" within Section 3(1)(b) of the Money-Lenders Ordinance.

3(c) The consideration for the payments, whether on behalf of or to the First Defendants, of the balance of the alleged loan of Shs.350,000/-, mentioned in the Plaintiffs' particulars, was one contrary to the Money-lenders Ordinance in that it was agreed to be as the price for executing a mortgage or a charge to secure unenforceable loans mentioned in Paragraph 3(b) hereof. Accordingly, such payments were never made contemporaneously with or after "execution of a

charge" or intended as bona fide loans to be made immediately upon "execution of the charge" within Section 3(1)(b) of the Money-lenders Ordinance. The charge sued on and the Plaint fails to recite any request for payment to the National Bank of India Limited or any agreement that such loans should be made long after the execution of the Charge. The allegations in the Plaint and the Charge sued on, namely, that the whole of the alleged sum secured by the charge was advanced at the time of and by "the execution of the charge" to the Company is incorrect and contrary to the particulars supplied by the Plaintiffs herein.

In the Supreme
Court of
Kenya, Nairobi

No. 3

Re-amended
Defence of
Defendants 1,
3, 4, 5, 7
and 8

28th November
1961
continued

3(d) These Defendants will if necessary contend that the Plaintiffs cannot rely upon Section 3(1)(b) of the Money-Lenders Ordinance for the following (amongst other) reasons, namely

- (1) The said sub-section only applies to an actual and not to a fictitious loan. The supposed loan of Shs.1,000,000/- on 31st January 1956 was fictitious.
- (2) The said sub-section only applies where the sole security for repayment of the loan and/or interest thereon is of the type specified, but in this case in addition to the security (if any, none being admitted) afforded by the charge over the said land, there were further "securities" within the meaning of the said Ordinance, namely, the personal covenants by the 2nd to 8th Defendants inclusive, and the deposit of shares certificates and blank signed transfers pursuant to Clause 5 of the said Charge.

3(e) Further or in the alternative in addition to the Shs.650,000/- referred to in paragraph 3(b) hereof, a further Shs.300,000/- were loaned prior to 31st January, 1956. For Particulars hereunder the Defendants rely on the Plaintiffs' Invoices No.CBTW/2/P.171 and No.CBTW/3/P/199 dated respectively 28th January and 27th February 1956. Alternatively, the Plaintiffs having charged the First Defendants with interest on the said sum of Shs.300,000/- on the footing that the same was lent on 1st January 1956, are now precluded from asserting that it was lent on some later date.

In the Supreme Court of Kenya, Nairobi

No. 3

Re-amended Defence of Defendants 1, 3, 4, 5, 7 and 8

28th November 1961
continued

4. The charge mentioned in Paragraph 13 of the Plaintiff for reasons hereinafter stated, is an unenforceable security, under Section 11 of the Money-lenders Ordinance.
5. No note or memorandum of the alleged loan or the security, sued upon, was ever made or signed by the First Defendant.
6. No copy of any note or memorandum was given or sent to the First Defendant by the Plaintiff as required by Section 11 of the Money-lenders Ordinance. 10
7. The Plaintiff does not aver or disclose any consideration for the alleged suretyship by the Second to Eighth Defendants, and is without a cause of action against them. **Alternatively, there was no consideration for any such suretyship by the Second to Eighth Defendants.**
8. No money was lent to the Second to the Eighth Defendants, so as to constitute them as principal debtors, as provided in the Charge, which is a sham document. **Alternatively, on the true construction of the Money-lenders Ordinance the Second to Eighth Defendants were "borrowers" and no written note or memorandum complying with section 11 of the said Ordinance was made or signed by such Defendants and no copy was delivered to them or any of them within seven days of 31st January 1956 or at all and in the premises no promise or contract or security given by such Defendants or any of them is enforceable.** 20
9. No request for any alleged loan, in the sum of Shs.1,000,000/-, or any part thereof was made on the 31st day of January 1956, or any other material date, **by the Second to Eighth Defendants,** nor was any money lent, by such Defendants' complicity, or agreed by the terms of the Charge sued upon to be lent in future, either pursuant to the alleged suretyship of the said Defendants or any request or other circumstance constituting a valid consideration for such suretyship as is alleged. 30
- 9A. Further the said contracts and/or securities and each of them were and are unenforceable as there was no note or memorandum which truthfully stated the date of the said loan or loans.** 40

9B. Further or in the alternative, Section 11 of the said Ordinance on its true construction requires that the "note or memorandum in writing" of the contract should be a separate document from any security or purported security created for repayment of the loan.

In the Supreme
Court of
Kenya, Nairobi

No. 3

Re-amended
Defence of
Defendants 1,
3, 4, 5, 7
and 8

28th November
1961
continued

10 10. The charge sued upon is void, for lack of power to lend money in the objects of the Plaintiff Company (the First, third, fourth, fifth, seventh and eighth Defendants do not admit there is such power), or for lack of power to borrow money in the objects of the First Defendant Company (the existence of any such power is not admitted), and as such the alleged suretyship of the Defendants third, fourth, fifth, seventh and eighth was likewise void.

11. The agreement referred to in Paragraph 17 of the Plaint, in regard to the reduction of interest is admitted.

20 12. A further agreement was arrived at by and between the Plaintiff and the Defendants, or some of the Defendants acting on behalf of all (save the Defendant No.9) to the following effect:

(a) The Total sums paid or to be paid, whether for interest or otherwise, would be treated as being in satisfaction of the principal (the amount of which or the lending of which is not admitted for the purposes of this suit).

30 (b) The balance, if any, should not be attended to or give rise to any legal relationship or legal obligations or be legally enforceable or the subject of litigation (as to which the Plaintiffs gave a solemn undertaking that in no circumstances it would attempt to or have right to file proceedings for the recovery of the balance of loan or interest, or at all), but that the transaction should be binding in honour only.

40 By reason of the foregoing there was a complete dispensation or remission, within the meaning of Section 63 of the Indian Contract Act of the obligations and promises evidenced by the Charge or other earlier transactions (if any) of a legal character (if any) sued upon.

In the Supreme
Court of
Kenya, Nairobi

No. 3

Re-amended
Defence of
Defendants 1,
3, 4, 5, 7
and 8

28th November
1961
continued

13. Save in so far as is herein expressly admitted, the Defendants Nos. 1, 3, 4, 5, 7 and 8 make no admission of any of the allegations contained in the Plaint.

WHEREFORE the Defendants above-named pray that the Plaintiff Company's claim be dismissed with costs.

~~DATED AT NAIROBI this 29th day of November 1960.~~

~~DATED AT NAIROBI this 14th day of March 1961.~~

DATED AT NAIROBI this 28th day of November 1961.

sd. Veljee Devshi Shah. 10
for VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE ABOVE-NAMED
DEFENDANTS.

Drawn by:-
D.N. & R.N. KHANNA,
ADVOCATES,
NAIROBI.

Filed by:
VELJEE DEVSHI & BAKRANIA,
ADVOCATES,
NAIROBI.

20

To be served upon:-

Messrs. J.J. & V.M. PATEL,
Advocates for the Plaintiff,
NAIROBI.

/nvp.

No. 4

Re-amended Defence and Counterclaim of
Second Defendant

In the Supreme
Court of
Kenya, Nairobi

No. 4

Re-amended
Defence and
Counterclaim
of Second
Defendant

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI

CIVIL CASE NO. 1629 OF 1960PREMCHAND RAICHAND LIMITEDPLAINTIFF

28th November
1961

versus

10	<u>COAST BRICK & TILE WORKS LIMITED</u>	<u>1ST DEFENDANT</u>
	<u>KANJI MEGHJI SHAH</u>	<u>2ND DEFENDANT</u>
	<u>SHARDABEN RATILAL SHAH</u>	<u>3RD DEFENDANT</u>
	<u>KESHAVLAL KANJI SHAH</u>	<u>4TH DEFENDANT</u>
	<u>RATILAL KANJI SHAH</u>	<u>5TH DEFENDANT</u>
	<u>BHARMAL RAISHI SHAH</u>	<u>6TH DEFENDANT</u>
	<u>ZAVERCHAND SOJPAL JETHA</u>	<u>7TH DEFENDANT</u>
	<u>HIRJI RAMJI SHAH</u>	<u>8TH DEFENDANT</u>
	<u>SHAH MEGHJI MULJI LIMITED</u>	<u>9TH DEFENDANT</u>

RE-AMENDED WRITTEN STATEMENT OF DEFENCE
and COUNTERCLAIM of the Second Defendant.

20 The Second Defendant above-named states, by way
of his Defence, as follows:

1. At all material times the Plaintiffs were
licensed money-lenders and carried on business as
such at Nairobi.

2. The sum of Shs.1,000,000/-, or any part
thereof was not lent by the Plaintiffs to the
First Defendant either on the 31st day of January
1956, or on any other dates, either in one lump
sum, or by instalments, either by cash or by
30 cheques, or at all, and the First Defendant or
the other Defendants are not prepared to admit the
alleged loan or any part thereof until proved with
due particularity.

3 (a) Neither the alleged sum of Shs.1,000,000/-
nor any part thereof was lent pursuant to any
money lending transaction where the security for
repayment of the loan and/or interest thereon was
effected by "execution of a legal or equitable

In the Supreme
Court of
Kenya, Nairobi

No. 4

Re-amended
Defence and
Counterclaim
of Second
Defendant

28th November
1961
continued

mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge", within the meaning of section 3(1)(b) of the Money-Lenders Ordinance.

3(b) No Mortgage had been executed or was in contemplation when the alleged loans totalling Shs.650,000/- referred to in particulars dated the 13th February 1961, were made. The said loans were made in the course of the Plaintiffs' business of money-lending, and were at all material dates unsecured, unenforceable and not bona fide loans (even after incorporation in the Charge) the security for repayment of which was made effected by "the execution of a legal mortgage or charge upon immovable property" within Section 3(1)(b) of the Money-Lenders Ordinance.

3(c) The consideration for the payments, whether on behalf of or to the First Defendants, of the balance of the alleged loan of Shs.350,000/-, mentioned in the Plaintiffs' particulars, was one contrary to the Money-lenders Ordinance in that it was agreed to be as the price for executing a mortgage or a charge to secure unenforceable loans mentioned in Paragraph 3(b) hereof. Accordingly, such payments were never made contemporaneously with or after "execution of a charge" or intended as bona fide loans to be made immediately upon "execution of the charge" within Section 3(1)(b) of the Money-lenders Ordinance. The charge sued on and the Plaintiffs fails to recite any request for payment to the National Bank of India Limited or any agreement that such loans should be made long after the execution of the Charge. The allegations in the Plaintiffs and the Charge sued on, namely, that the whole of the alleged sum secured by the charge was advanced at the time of and by "the execution of the charge" to the Company is incorrect and contrary to the particulars supplied by the Plaintiffs herein.

3(d) This Defendant will if necessary contend that the Plaintiffs cannot rely upon Section 3(1)(b) of the Money-Lenders Ordinance for the following (amongst other) reasons, namely,

- (1) The said sub-section only applies to an actual and not to a fictitious loan. The supposed loan of Shs.1,000,000/- on 31st January 1956 was fictitious.

(2) The said sub-section only applies where the sole security for repayment of the loan and/or interest thereon is of the type specified, but in this case in addition to the security (if any, none being admitted) afforded by the charge over the said land, there were further "securities" within the meaning of the said Ordinance, namely, the personal covenants by the 2nd to 8th Defendants inclusive, and the deposit of shares certificates and blank signed transfers pursuant to Clause 5 of the said Charge.

In the Supreme
Court of
Kenya, Nairobi

No. 4

Re-amended
Defence and
Counterclaim
of Second
Defendant

28th November
1961
continued

3(e) Further or in the alternative in addition to the Shs.650,000/- referred to in paragraph 3(b) hereof, a further Shs.300,000/- were loaned prior to 31st January 1956. For particulars hereunder the Second Defendant relies on the Plaintiffs' Invoices No.CBTW/2/P.171 and No.CBTW/3/P/199 dated respectively 28th January and 27th February 1956. Alternatively, the Plaintiffs having charged the First Defendants with interest on the said sum of Shs.300,000/- on the footing that the same was lent on 1st January 1956, are now precluded from asserting that it was lent on some later date.

4. The charge mentioned in Paragraph 13 of the Plaint for reasons hereinafter stated, is an unenforceable security, under Section 11 of the Money-lenders Ordinance.

5. No note or memorandum of the alleged loan or the security, sued upon, was ever made or signed by the First Defendants.

6. No copy of any note or memorandum was given or sent to the First Defendant by the Plaintiff as required by Section 11 of the Money-lenders Ordinance.

7. The Plaint does not aver or disclose any consideration for the alleged suretyship by the Second to Eighth Defendants, and is without a cause of action against them. Alternatively there was no consideration for any such suretyship by the Second to Eighth Defendants.

8. No money was lent to the Second to the Eighth Defendants, so as to constitute them as principal debtors, as provided in the Charge, which is a sham

In the Supreme
Court of
Kenya, Nairobi

No. 4

Re-amended
Defence and
Counterclaim
of Second
Defendant

28th November
1961
continued

document. Alternatively, on the true construction of the Money-lenders Ordinance the Second to Eighth Defendants were "borrowers" and no written note or memorandum complying with section 11 of the said Ordinance was made or signed by such Defendants and no copy was delivered to them or any of them within seven days of 31st January 1956 or at all and in the premises no promise or contract or security given by such Defendants or any of them is enforceable.

10

9. No request for any alleged loan, in the sum of Shs.1,000,000/-, or any part thereof was made on the 31st day of January, 1956, or any other material date, by the Second to Eighth Defendants, nor was any money lent, by such Defendants' complicity, or agreed by the terms of the Charge sued upon to be lent in future, either pursuant to the alleged suretyship of the said Defendants or any request or other circumstance constituting a valid consideration for such suretyship as is alleged.

20

9A. Further the said contracts and/or securities and each of them were and are unenforceable as there was no note or memorandum which truthfully stated the date of the said loan or loans.

9B. Further or in the alternative, Section 11 of the said Ordinance on its true construction requires that the "note or memorandum in writing" of the contract should be a separate document from any security or purported security created for repayment of the loan.

30

10. The charge sued upon is void, for lack of power to lend money in the objects of the Plaintiff Company, (the Second Defendant does not admit there is such power), or for lack of power to borrow money in the objects of the First Defendant Company (the existence of any such power is not admitted), and as such the alleged suretyship of the Second Defendant was likewise void.

11. The agreement referred to in Paragraph 17 of the Plaint, in regard to the reduction of interest is admitted.

40

12. A further agreement was arrived at by and between the Plaintiff and the Defendants, or some of the Defendants acting on behalf of all (save the Defendant No.9) to the following effect:

(a) The total sums paid or to be paid, whether for interest or otherwise, would be treated as being in satisfaction of the principal (the amount of which or the lending of which is not admitted for the purposes of this suit).

In the Supreme Court of Kenya, Nairobi

No. 4

10 (b) The balance, if any, should not be attended to or give rise to any legal relationship or legal obligations or be legally enforceable or the subject of litigation (as to which the Plaintiffs gave a solemn undertaking that in no circumstances it would attempt to or have right to file proceedings for the recovery of the balance of loan or interest, or at all), but that the transaction should be binding in honour only.

Re-amended Defence and Counterclaim of Second Defendant

28th November 1961

continued

20 By reason of the foregoing there was a complete dispensation or remission, within the meaning of Section 63 of the Indian Contract Act of the obligations and promises evidenced by the Charge or other earlier transactions (if any) of a legal character (if any) sued upon.

13. Save in so far as is herein expressly admitted, the Second Defendant makes no admission of any of the allegations contained in the Plaint.

WHEREFORE the Second Defendant above-named prays that the Plaintiff Company's claim be dismissed with costs.

COUNTER-CLAIM

30 14. The Second Defendant herein, Kanji Meghji Shah, repeats paragraph 3(d)(2) hereof and states that he has deposited 1,500 shares certificates and the blank signed transfers to which the Plaintiffs were not entitled. In the premises the said Second Defendant counterclaims and requires the Plaintiffs to return to him the aforesaid shares certificates and the blank signed transfers.

WHEREFORE the Second Defendant prays for:

40 (a) An order for the delivery up of the said shares certificates and the blank signed transfers.

In the Supreme
Court of
Kenya, Nairobi

No. 4

Re-amended
Defence and
Counterclaim
of Second
Defendant

28th November
1961
continued

(b) An injunction restraining the Plaintiffs
from selling or otherwise disposing of the
said shares certificates.

(c) Costs of the Counterclaim.

~~DATED AT NAIROBI this 3rd day of December 1960.~~

~~DATED AT NAIROBI this 14th day of March 1961.~~

DATED AT NAIROBI this 28th day of November 1961.

sd. Veljee Devshi Shah,
for VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE ABOVE-NAMED
SECOND-DEFENDANT.

10

Drawn by:
D.N. & R.N. KHANNA,
Advocates,
Nairobi.

Filed by:
VELJEE DEVSHI & BAKRANIA,
Advocates,
Nairobi.

20

To be served upon:
Messrs. J.J. & V.M. Patel,
Advocates for the Plaintiffs,
Nairobi.

/nvp.

No. 5

Amended Defence of Ninth Defendant

COLONY AND PROTECTORATE OF KENYA

IN HER MAJESTY'S SUPREME COURT AT NAIROBI

CIVIL CASE NO. 1629 OF 1960

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

10

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

AMENDED WRITTEN STATEMENT OF DEFENCE
OF DEFENDANT NO. 9

20

The Defendant No. 9 Shah Meghji Mulji Limited states as follows:-

1. It admits para 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Plaint.

2. It admits para 12, 13 and 14 of the Plaint.

3. It states that para 15 of the Plaint is correct.

4. The Defendant No.9 is a stranger to the matters and things stated in para 16(a) and (b) of the Plaint.

30

5. The Defendant No.9 is a stranger to the matter and agreement referred to in para 17 of the Plaint.

6. The Defendant No.9 is a stranger to the matters and things set out in para 18 and 19 of the Plaint.

7. As regards para 20 of the Plaint it admits that this Honourable Court has jurisdiction to try this suit.

In the Supreme Court of Kenya, Nairobi

No. 5

Amended Defence of Ninth Defendant

30th January 1962

In the Supreme
Court of
Kenya, Nairobi

No. 5

Amended Defence
of Ninth
Defendant

30th January
1962

continued

8. As regards para 21 of the Plaintiff, the Defendant No.9 states that it is interested in any order that may be made by this Honourable Court in this suit and that the Defendant No.9 is necessary and proper party to this suit.

9. The Defendant No.9 further states that it is the holder of the 2nd Charge (subject to the 1st Charge in favour of the Plaintiff) over the property the subject matter of this suit executed by the Defendant No.1 in its favour and the Defendants Nos. 2, 4 and 5 are the guarantors and the sureties in the said Second Charge. 10

10. The said 2nd charge is registered in Coast Registry, Mombasa as No. C.R.4226/21 and the Defendant No.9 will crave leave to refer to the terms of the said 2nd Charge in its favour at the hearing of this suit.

11. The Defendant No.9 further states that the Defendant No. 1, 2, 4 and 5 have **made defaults in payment of interest** and have also failed to pay the Principal sum of Shs.200,000/- due under the Second Charge. That the said interest at the rate of 12% per annum is payable monthly in advance and at present a sum of Shs. **222,105/80** is due and owing by the Defendants No.1, 2, 4 and 5 to the Defendant No.9 for **Principal amount and interest calculated up to 28.2.1961, and further interest from 1.3.1961.** 20

12. It further states that the accounts of the amounts owing by the Defendants No.1 to 8 (both inclusive) to the Plaintiff Company and Defendants No.1, 2, 4 and 5 to Defendant No.9 for the principal amount, interest and other charges or dues under the aforesaid 1st and 2nd Charges and for costs payable by the Defendants No.1 to 8 (both inclusive) to the Plaintiff Company and Defendant No.9 be taken, that in case the Defendants No.1 to 8 (both inclusive) fail to pay to the Plaintiff Company and Defendants No.1, 2, 4 and 5 fail to pay to Defendant No.9 by the time that may be fixed by this Honourable Court, the amounts which may be respectively found due to them on taking the said accounts the property subject to the said First and Second Charges be sold and the net sale proceeds realised by such sale be applied in payment of the amounts respectively found due to the Plaintiff Company and the Defendant No.9 and of further interest and costs respectively payable to them and that a decree for the balance or balance 30 40

if any, which may still remain unpaid be made personally against the said Defendants No.1 to 8 (both inclusive) in favour of the Plaintiff and against Defendants No. 1, 2, 4 and 5 in favour of the Defendant No.9.

In the Supreme Court of Kenya, Nairobi

No. 5

Amended Defence of Ninth Defendant

30th January 1962
continued

Mombasa, dated this 30th day of January, 1962.

sd. V.K. Doshi,
U. K. DOSHI & DOSHI
ADVOCATES FOR THE DEFENDANT NO.9

10 To,
Messrs. J.J. & V.M. Patel,
Advocates for the Plaintiff,
Advocates,
P.O.Box No.3891,
NAIROBI.

We, J.J. & V.M. Patel Advocates for the Plaintiff Do hereby consent to this **Amended** Written Statement of Defence being filed out of time.

20 Nairobi, dated this 1st day of Feb. 1962.

sd. J.J. Patel
For J.J. & V.M. PATEL
ADVOCATES FOR THE PLAINTIFF.

Drawn &
Filed by:-
U. K. Doshi & Doshi,
Advocates for the Defendant No.9,
Advocates,
MOMBASA.

30 VKD/AAD.

In the Supreme
Court of
Kenya, Nairobi

No. 6

Reply to
Defence of
Defendants 1,
2, 3, 4, 5, 7
and 8

23rd December
1960

No. 6

Reply to Defence of Defendants 1, 2, 3, 4,
5, 7 and 8

COLONY AND PROTECTORATE OF KENYA

IN HER MAJESTY'S SUPREME COURT AT NAIROBI

CIVIL CASE NO. 1629 OF 1960

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

10

REPLY

To the Written Statements of Defence
of the 1st, 2nd, 3rd, 4th, 5th, 7th
and the 8th Defendants

20

1. Save as hereinafter expressly admitted and save and in so far as the above Written Statement of Defence admits the allegations contained in the Plaintiff joins issue with the above-named seven Defendants on their Written Statements of Defence.

2. Further, in addition to joinder of issue as aforesaid, or in the alternative:

As regards paragraphs 2 to 6 (inclusive) of the said Written Statements of Defence, the Plaintiff states that the security for repayment of the loan and interest thereon was effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property, and further or in the alternative that the transaction was a bona fide transaction of money-lending upon such mortgage or Charge. The said mortgage or charge is the Charge referred to in paragraph 13 of the Plaintiff.

30

Accordingly the provisions of the Money Lenders Ordinance never did, and do not, apply by virtue of Section 3 of the said Ordinance, the said Charge is not rendered unenforceable by Section 11 or any other Section of the said Ordinance, nor was any note or memorandum required to be made or signed by the First Defendant nor was the Plaintiff required by Section 11 or any other Section of the said Ordinance to give or send to the First Defendant any copy of any such note or memorandum.

In the Supreme Court of Kenya, Nairobi

No. 6

Reply to Defence of Defendants 1, 2, 3, 4, 5, 7 and 8

23rd December 1960
continued

3. As regards paragraph 12 of the said Written Statements of Defence the Plaintiff, while joining issue thereon under paragraph 1 above, and while denying that oral evidence to vary the said Instrument of Charge dated 31st January 1956 is admissible, says further or in the alternative (without prejudice to the aforesaid joinder of issue and denial) (i) that all the Plaintiff agreed was that if and so long as the Defendants paid regularly each month the sum of Shs.15,000/-, the first of such payment to be made on the 1st day of August, 1960 and thereafter on the 1st day of such subsequent month, such amounts to be credited or appropriated first towards interest due and the balance, if any, towards principal, the Plaintiff would not take court proceedings for recovery of the moneys owing or due to it, but that if there was any default in respect of any of such payments the Plaintiff would be at liberty to do so; (ii) that the Defendants failed to pay the said sum or instalment of Shs.15,000/- to be paid on the 1st day of August 1960 and did not pay it until 11th August 1960 and they failed to pay the said sum or instalment of Shs.15,000/- payable on 1st September 1960 on that day or at all and accordingly the Plaintiff was at liberty to sue for recovery of the moneys due and to enforce the security and the said Instrument of Charge.

The Plaintiff denies that the Defendants or any of them are or ever became entitled to dispensation or remission as alleged or at all.

WHEREFORE the Plaintiff Company prays for orders as prayed in the Plaint.

DATED AT NAIROBI this 23rd day of December 1960.

sd. J. J. Patel.
J.J. & V.M. PATEL,
ADVOCATES FOR THE PLAINTIFF

In the Supreme Court of Kenya, Nairobi

No. 6

Reply to Defence of Defendants 1, 2, 3, 4, 5, 7 and 8

23rd December 1960 continued

We consent to this Reply to the Written Statements of Defence of the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th Defendants.

sd. Veljee Devshi Shah, VELJEE DEVSHI & BAKRANIA, ADVOCATES FOR THE SAID DEFENDANTS.

Drawn & Filed by:-

sd. J. J. Patel.

J.J. & V.M. Patel,

Advocates, Ruprani House, Gulzaar Street, P.O. Box 3891, NAIROBI.

To be served upon:-

Messrs. Veljee Devshi & Bakrania, Advocates, Market Mansion, Bazaar Street, NAIROBI.

JJP/SGH.

No. 7

Defence to Counterclaim of the Second Defendant

20th December 1961

No. 7

Defence to Counterclaim of Second Defendant

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

PREMCHAND RAICHAND LIMITED

versus

PLAINTIFF

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

1. The plaintiffs rely on their Reply and
Plaint and deny each and every allegations made in
the Counter-claim except that they admit that
pursuant to the said charge dated 31st January 1956
the second defendant deposited with them one blank
share transfer signed by him but did not deposit any
share certificate and they say that no action has
been taken by the plaintiffs on such blank transfer.

In the Supreme
Court of
Kenya, Nairobi

No. 7

Defence to
Counterclaim
of the Second
Defendant

20th December
1961

continued

WHEREFORE the plaintiffs pray that the counter-
claim be dismissed with costs.

10

DATED AT NAIROBI this 20th day of December 1961.

sd. J. J. Patel.
J.J. & V.M. PATEL,
ADVOCATES FOR THE PLAINTIFF

Drawn & Filed by:-

sd. J.J. Patel,
J.J. & V.M. Patel,
Advocates,
Ruprani House,
Gulzaar Street,
P.O. Box 3891,
NAIROBI.
JJP/SGH.

To be served upon:-

Messrs. Veljee Devshi &
Bakrania,
Advocates,
NAIROBI.

20

No. 8

Notice to Admit Facts

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

No. 8

Notice to
Admit Facts

12th January
1962

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED
KANJI MEGHJI SHAH
SHARDABEN RATILAL SHAH
KESHAVLAL KANJI SHAH
RATILAL KANJI SHAH
BHARMAL RAISHI SHAH
ZAVERCHAND SOJPAL JETHA
HIRJI RAMJI SHAH
SHAH MEGHJI MULJI LIMITED

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT
7TH DEFENDANT
8TH DEFENDANT
9TH DEFENDANT

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NOTICE TO ADMIT FACTS
(Order XII - Rule 4)

In the Supreme
Court of
Kenya, Nairobi

No. 8

Notice to
Admit Facts

12th January
1962

continued

TAKE NOTICE that the First, Second, Third, Fourth, Fifth, Seventh and Eighth Defendants in this suit require the Plaintiffs to admit, for the purpose of this suit only the several facts respectively hereunder specified; and the Plaintiffs are hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

DATED AT NAIROBI this 12th day of January 1962. 10

sd. Veljee Devshi Shah
for VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE SAID DEFENDANTS.

To,
Messrs. J.J. & V.M. Patel,
Advocates for the Plaintiffs,
Nairobi.

The Facts, the admission of which is required, are:

1. That the Plaintiffs were licensed money-lenders under the Money-Lenders Ordinance 1932, for the years 1955 to 1960. 20

2. That the numbers, dates and the fees paid for the money-lender's licences held by the Plaintiffs are as follows:-

1955	-	Money Lender Licence	No.1026	of	4.1.55	-	Shs.300.00	
1956	-	"	"	"	6.1.56	-	Shs.300.00	
1957	-	"	"	"	4.1.57	-	Shs.300.00	
1958	-	"	"	"	7.1.58	-	Shs.300.00	
1959	-	"	"	"	6.1.59	-	Shs.300.00	
1960	-	"	"	"	13.1.60	-		30
							Shs.1000.00	

3. That the Plaintiffs, as registered money-lenders, made or renewed loans (as indicated), on dates specified, of amounts mentioned, and under money-lending contracts numbered below, to the firm of Kanji Meghji Shah of Mombasa in the years 1955 and 1956, and the said firm of Kanji Meghji Shah made and delivered as security for the following promissory notes in favour of the Plaintiffs:-

""

To, Premchand Raichand Limited.

40

In Account with: KANJI MEGHJI SHAH.

<u>Date</u>	<u>Particulars</u>	<u>Dr.</u> Shs.Cts.	<u>Cr.</u> Shs.Cts.	In the Supreme Court of Kenya, Nairobi
<u>1955</u>				
Jan:	1. To, Balance	9,072.50		
	5. By, Cheque		9,072.50	
	18. By, Cheque		18,117.10	No. 8
	18. To, Bill 31856	18,117.10		Notice to
March:	7. By, Bill 9820		6,248.40	Admit Facts
	19. By, Bill		100,000.00	12th January
April:	26. By, Bill		80,000.00	1962
10	26. To, Bill 32269	86,250.00		continued
	28. By, Bill		6,000.00	
	30. To, Bill 32288	30.00		
May:	3. By, Bill		27.40	
	3. By, Bill		8.89	
April:	30. By, Payment (?) 2263		241.11	
May:	9. By, Cheque		19,361.10	
	9. To, Bill 32327	19,361.10		
	10. By, Payment (?) 2267		2.60	
	16. To, Cheque	6,248.40		
20	June: 20. By, Cheque		100,000.00	
	20. By, Bill PR.61(Inv.)		4,291.83	
	20. To, Bill (Hundi)	104,291.83		
Sept:	7. By, Cheque		100,000.00	
	21. To, Bill	104,291.83		
	22. By, Cheque		50,000.00	
	22. By, Cheque		50,000.00	
Nov:	9. By, Cheque		50,000.00	
	9. By, Cheque		1,890.50	
	9. To, Bill	51,890.50		
30	23. By, Cheque		50,000.00	
	23. To, Bill	51,890.50		
Dec:	9. To, Bill	52,147.17		
	23. To, Bill	52,147.17		
	31. To, Balance c/d	89,523.33		
		<u>645,261.43</u>	<u>645,261.43</u>	
<u>1956</u>				
Jan:	1. By, Balance b/d		89,523.33.	
	11. To, Cheque	51,890.50		
Feb:	24. To, Cheque	52,147.50		
40	March: 27. To, Bill 33481	33,901.88		
	28. By, Cheque		33,901.88.	
Dec:	30. By, Balance		14,514.67.	
		<u>137,939.88</u>	<u>137,939.88.</u>	

4. That at the date of the execution of the alleged Charge sued upon, the said firm of Kanji Meghji Shah,

In the Supreme
Court of
Kenya, Nairobi

No. 8

Notice to
Admit Facts

12th January
1962
continued

owed the Plaintiffs in respect of the aforesaid money-lending transactions, the sum of Shs.89,523/33.

5. That out of the alleged loan sued upon the First Defendant paid to the Second Defendant, Kanji Meghji Shah, who in turn paid to the Plaintiffs, among others, the following sums to discharge his (second Defendant's) money-lending debts:

(a) On 9th December 1955, the Second Defendant, Kanji Meghji Shah, paid to the Plaintiffs the money-lending debt secured by promissory notes for Shs. 52,147/17 under the Money-lending Contract No.PR/94 of 7th September 1955. 10

(b) On 23rd December 1955, the Second Defendant paid to the Plaintiffs the money-lending debt secured by promissory notes for Shs.52,147/17 under the Money-lending Contract No.PR/103 dated 21st September 1955.

(c) On 11th January 1956, the Second Defendant paid to the Plaintiffs the money-lending debt secured by promissory notes for Shs.51,890/50 under the Money-lending Contract No.PR/117 of 9th November 1955. 20

(d) On 24th February 1956 the Second Defendant paid to the Plaintiffs the money-lending debt secured by promissory notes for Shs.52,147/50 under the Money-lending Contract No.PR/121 of 23rd November 1955.

6.(a) That the total of the receipt of interest by the Plaintiffs as shown in the Annexure "A" attached with the Plaint in the sum of Shs.538,321/20 is erroneous.

(b) That the correct said total is Shs.554,001/19.

(c) Therefore, the Plaintiffs are under an obligation to give credit of Shs.15,679/99.

7. That the Plaintiffs have omitted to give credit 30 for the following interest payments:-

(a) Plaintiffs' receipt No.433 of 16.1.1956 =
Sh. 5,866.00.

(b) " " " 442 " 8.2.1956 =
Sh.12,222.21.

(c) " " " 465 " 26.3.1956 =
Sh.10,477.77.

Total:- Sh.28,566.64.

8. That the omission of the total credit amounts to Shs.44,246/63, i.e. Shs.15,679/99 (as shown in No.6(c) 40 above) plus Shs.28,566/64 (as shown in No.7 above).

9. That the said firm of Kanji Meghji Shah signed

Memoranda of Contracts for the said money-lending loans, which were required under the Money-lenders Ordinance, Chapter 307 of the Laws of Kenya, 1948.

In the Supreme Court of Kenya, Nairobi

No. 8

Notice to Admit Facts

12th January 1962

continued

10. That no written Note or Memorandum complying with Section 11 of the Money-lenders Ordinance of Kenya was made or signed by the Defendants herein for the alleged loan of this suit.

11. That no copy of Note or Memorandum specified in paragraph 10 hereof was delivered to the Defendants or any of them within 7 days from 31st January 1956.

10

.

N.B.:— The original of this has been filed in Court. Your Original Admissions likewise must be filed in Court. Failure to answer this, will be used on the question of costs, as also a basis for issuing interrogatories to the same effect.

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Drawn and filed by:

VELJEE DEVSHI & BAKRANIA,
Advocates,
Nairobi.

20

/nvp.

No. 9

Admission of Facts

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

No. 9

Admission of Facts

18th January 1962

PREMCHAND RAICHAND LIMITED

PLAINTIFF

versus

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

30

ADMISSION OF FACTS PURSUANT TO NOTICE (O.XII R.5)

The plaintiff in this suit, for the purposes of this suit only, hereby admits the several facts

In the Supreme Court of Kenya, Nairobi

No. 9

Admission of Facts

18th January 1962
continued

respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit.

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the plaintiff on any other occasion or by any one other than the defendants 1,2,3,4,5,7 and 8.

10

DATED AT NAIROBI this 18th day of January 1962.

sd. J.J. Patel,
J.J. & V.M. PATEL,
ADVOCATES FOR THE PLAINTIFF.

To:
Messrs. Veljee Devshi & Bakrania,
Advocates for the defendants 1,2,3,4,5,7 & 8.
NAIROBI.

Facts admitted	Qualifications or limitations, if any, subject to which they are admitted	20
1. Yes.		
2. Yes.		
3. No.		
4. No.		
5.		
(a) No.		
(b) No.		
(c) No.		
(d) No.		
6.		
(a) No admission is made.		
(b) No admission is made.		
(c) No admission is made.		
7.		
(a) No admission is made.		
(b) No admission is made.		
(c) No admission is made.		
8. No admission is made.		
9. No admission is made.		

30

Facts admitted	Qualifications or limitations, if any, subject to which they are admitted
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10. Yes.

11. Yes.

In the Supreme Court of Kenya, Nairobi

No. 9

Admission of Facts

18th January 1962

continued

Drawn and filed by:-

J.J. & V.M. Patel,
Advocates for the Plaintiff,
Ruprani House,
Gulzaar Street,
P.O. Box 3891,
NAIROBI.

10

JJP/SGH.

No.10

JUDGE'S NOTES

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

No.10

Judge's Notes

6th February 1962

Plaintiff's Opening

PREMCHAND RAICHAND LIMITED

versus

PLAINTIFF

COAST BRICK & TILE WORKS LIMITED

1ST DEFENDANT

KANJI MEGHJI SHAH

2ND DEFENDANT

SHARDABEN RATILAL SHAH

3RD DEFENDANT

KESHAVLAL KANJI SHAH

4TH DEFENDANT

RATILAL KANJI SHAH

5TH DEFENDANT

BHARMAL RAISHI SHAH

6TH DEFENDANT

ZAVERCHAND SOJPAL JETHA

7TH DEFENDANT

HIRJI RAMJI SHAH

8TH DEFENDANT

SHAH MEGHJI MULJI LIMITED

9TH DEFENDANT

20

30

6.2.62

Nazareth Q.C. with J.J. Patel for plaintiffs.

D.N. Khanna and Devshi for defendants 1,2,3,4,5,7 and 8.

B.K.Doshi for defendant 9.

Nazareth: Defendant 6, not served and no judgment sought against him as such.

Khanna: We are not at suit with defendant 9. No relief claimed against him. Right stage to come in is at taking of accounts. RULES OF COURT MORTGAGE SUITS Volume 5. R.20 at p.509. R.21.

40

We should not have costs against us. O.l. r.21.

In the Supreme
Court of
Kenya, Nairobi

No.10

Judge's Notes
Plaintiff's
Opening

6th February
1962
continued

Nazareth: 2nd charge has not been admitted in the pleadings.

Khanna: He is a proper and necessary party- but is not in suit.

RULING: I think the question of costs in this matter can be postponed to a later stage. The 9th defendant is an interested party because, if plaint succeeds and your account will have to be taken so that the distinction of any surplus, or part thereof, can be ascertained and for that his rights have to be established.

10

Nazareth: Amount advanced is 1,000,000/-. Amount advanced by defendant 9 is 200,000/- according to our information. Main question is whether exemption applies under Cap.307 section 3(1)(b) "to any moneylending transaction etc.

If the transaction is exempt then I submit there is no substantial defence.

If the transaction is not exempt then we admit that no attempt has been made to comply with Money-lenders Ordinance. We do not dispute that we were moneylenders at period in question i.e. up to 1958. Particulars by plaint p.10.

20

Defendants particulars put in Ex.1 and plaintiff's notice therefor.

Khanna: Issue of further agreement will not be proved i.e. subsequent agreement.

Submit no issue with defendant 9.

Admit defendant company could borrow.

E.A.C.A. Damodar Jamnadas.v.Shah Mohamed
C.App.16 p.1961. Guarantor not a borrower. This point of relatively little importance.

30

As to consideration to sureties - see 127 Indian Contract Act. Pollock & Mulla 8th Edn. 516 and 517.

Khanna: Not raising issue whether plaintiffs are entitled to carry on business of moneylending and to lend money.

G.B.R.

3rd Edn. HALSBURY vol.18 p.420 para 782

421 last sentence need not appear in writing.

40

434 para 801.

See 126 Indian Contract Act. Guarantee need not be in writing.

Vallubhai Patel. v.C.A.C. Agency (1959) E.A.903.
A.C. consideration readily inferred.

In the Supreme
Court of
Kenya, Nairobi

Consideration pleaded in para. 13 of plaint.

No.10

Sect.62 Indian Contract Act. p.366 - 370.

Khanna: Provocation not pleaded.

Nazareth: As to payment. Lyle v.Chappell (1932)

1 KB 691 at 700 Scrutton L.J. 705 four plaintiffs.

1916 2 ch. 530 Parsons.v.Equitable Investment Co.Ltd.

Judge's Notes
Plaintiff's
Opening

6th February
1962

continued

10

Most important reference is that if additional security is given sect. 3(1)(b) has no application. This is settled by S.N. Shah.v.C.M. PATEL (1961) E.A.397.

Meaning of "Transaction. Krehl.v.Great Central Gas Co. 1869/70 L.R. 5 Ex.289 at 294/295.

Cleasby B.

1855 Brewin and Others v.Short and Others 119 E.R.

469 at p.235 Original report.

1895 1 Ch.325 at 330. Lord Halsbury.

1953 Ch.218 Re. Devonshire's Settled Estates at 252.

20

Official Assignee.v.Ek Liang Hin Ltd. 1960 1 All. E.R.440.

PLAINTIFF'S EVIDENCE

No.11

I. S. Patel

Plaintiff's
Evidence

No.11

I. S. Patel
Examination

I. P.W.

ISHWARBHAI SHAMALBHAI PATEL, sworn:

Advocate practising in Mombasa. I know defendants 2 to 6 inclusive. My signature is on this document as an attesting witness.

It was executed by defendants 2,3,4 and 5. I know them. They signed in my presence.

6th February
1963

Ex.2.

30

Cross-examined: I did not draw up Ex.2. I think I probably charged a fee for attesting the document. I did not put the date. Defendants, 2,3,4,5 brought it to my office. I cannot say if the signatures shown there were there already. I did not consider myself as to whether it should be executed in presence of 2 witnesses. They signed in my presence. I signed in their presence. It is

Cross-
examination

In the Supreme
Court of
Kenya, Nairobi

Plaintiff's
Evidence

No.11

I. S. Patel

Cross-
examination
6th February
1962

continued

not my practice to sign first. It is not my practice to call in a member of my staff.

If a 2nd witness is required I call in my clerk or my partner.

I do not know why I attested as a Commissioner for Oaths.

Ratilal was not the only one who came with it. He did not instruct me to sign as attesting for all.

Defendant 2 came to my office. I have seen him.

The signatures were not already there - also I cannot say if Mohanlal's signature was already there. It looks as if he signed before me. His signature is above mine. 10

I do not know if Mohanlal came to my office. It may be that they acknowledged their signatures to me. It is an unusual form of attestation and that is why I put my initials there which is unusual. I did not read the document.

If Mohanlal says he was never at my office he may be right. 20

Kanji Meghji Shah is certainly wrong if he says he never came to my office.

Ratilal did not ask me to attest without the others. He might have asked but I would have refused.

I do not swear that the signatures were not there when document shown to me. My initials might indicate that I asked the people to acknowledge their signatures. The fact that I have written "and in the presence of" a 2nd time might indicate that they acknowledged their signatures. I did not see any money paid. I do not remember if it was already dated. I do not know the date I attested it. I saw Shardaben without her head being covered. 30

I have known Ratilal for last 13 years. He did not know me well enough to induce me to put my stamp as Commissioner of Oaths. I insist that they come or that I go to their house.

I was not told what evidence was required of me. J.J. Patel showed me the document this morning and asked me to identify my signature. 40

On receipt of my summons my clerk reminded me that these people had come. At that time he was clerk for my present partner. He mentioned Ratilal

and his father. He was across the window in another advocate's office.

He said they had come to his office and gone across to me.

Re-examination: Jains do not keep purdah but they draw the sari across the face halfway in presence of elders.

They attend all functions.

10 I don't see them covering their heads at all. To Court: When my clerk reminded me I recollected that these people had come to my office but I have no vivid recollection.

No.12

L. Pereira

2.P.W.

Luis PEREIRA, sworn:-

Employed by Lands Dept., as Registration Officer.

20 I have file of Certificate of Title No. C.R.4226/1 relating to Plot No.500 sect.6, Mombasa.

I have true copy of the Certificate of Ownership. It shows registration of mortgage in favour of Premchand Raichand Ltd. There was a registration for equitable mortgage in favour of N.B.I., discharged 27.2.56. There is further charge in favour of Shah Meghji Mulji Ltd. subject to charge in favour of Premchand Raichand Ltd. I produce copy of Certificate of Ownership, - Ex.3.

30 Cross-examination: It is a copy of the abstract of title. On 12.9.53 defendant 1, was registered as proprietor. On 8.6.55 there was charge in favour of N.B.I. Discharge registered 27.2.56. On same day charge in favour of plaintiff was registered. Ch.20 could not have been registered till Ch.18 discharged. Ch.20 was properly attested. I was not present at attestations. It is my duty to enquire into attestations. This is a title under Land Titles Ordinance. I am not familiar with Land Titles Ordinance. These documents were forwarded to me by Registrar of Titles, Mombasa for production.

40

In the Supreme Court of Kenya, Nairobi

Plaintiff's Evidence

No.11

I. S. Patel

Cross-examination
6th February
1962

continued

Re-examination

No.12

L. Pereira

Examination

6th February
1962

In the Supreme Court of Kenya, Nairobi

Plaintiff's Evidence

No.12

L. Pereira

Re-examination

6th February 1962

No.13

J. R. Pavagadhi

Examination

6th February 1962

Re-examination: I could register a charge subject to another charge. We see that it is properly attested. If it appears to be properly attested we accept it.

No.13

J. R. Pavagadhi

3.P.W.

JAGJIWAN RANCHHOD PAVAGADHI, sworn:-

Sales Manager in Wali Travel Burea. I know defendant 6, and defendant 7, and defendant 8. Ex.2 bears my signature as witness to signatures of defendants, 6, 7 and 8. They signed in my presence.

10

Cross-examination

Cross-examination: I was once working for Pure Food Products Ltd., of which defendant 6 was director.

Before that I was director of Regal Press. I was in financial difficulties. I had to take a job. I was broke in 1957 not in 1956. I had to file bankruptcy petition.

I was sales manager for Pure Food Products Ltd., at about £60 a month.

20

Pure Food Products Ltd., were in bazaar opposite Sojpal Jetha's shop. Defendant used to sit in a cubicle in Pure Food Products. I used to sit outside.

I know Manubhai is Premchand Raichand. I attested the document in J.J. Patel's office. D.6,7 and 8 signed in J.J.Patel's office. All three were there when I signed it in their presence. J.J.Patel signed first and then I signed. I signed once only and once on a copy. J.J.Patel signed it 2 or 3 times. Someone told me that one signature by me was quite sufficient. I was in J.J.Patel's office on other business. I did not go with defendants, 6, 7 and 8. When I went there they were all there. It was in 1956 on corner Bazaar St. and Sadler St. 1st floor.

30

I put my signature after J.J. Patel signed.
I had not already signed at Pure Food Products Ltd.

In the Supreme Court of Kenya, Nairobi

I first knew I would be required as witness when I got summons last week. There was no one in J.J.'s private office except defendants 6, 7 and 8, and myself and himself.

Plaintiff's Evidence

No.13

10 The document was in J.J.Patel's office that day. I did not know what it was or who had drawn it up. Defendants 6, 7 and 8 signed first then J.J. signed 3 times and I signed once.

J.R.Pavagadhi Examination

6th February 1962

continued

I am telling the truth. The defendants did not sign in cubicle in Pure Food Products. I was not asked to sign on it being brought outside the cubicle.

Re-examination: None.

No.14

No.14

A. W. Robson

A. W. Robson

20 4.P.W.

Examination

ALLAN WILLIAM ROBSON, sworn:-

6th February 1962

Practising advocate Nairobi since July 1955. I know plaintiff company. In 1959 we received instructions from Manubhai Patel to send letters of demand to 7 persons - same names as defendants 2 - 8. They were sent by registered post.

30 This is copy of letter sent - Ex.4 - signed by my father. We sent notice to defendant 1, same day. Similar letter with copies to Defendants 2 - 8.
Ex.5.

Ex.4.

Ex.5.

We received reply on 27.10.59 from defendants 7 and 8. This letter purports to have been written on 26.9.59 - Ex.6. We replied and I produce copy of reply - Ex.7. There is no reply to that on the file.

Ex.6.

Ex.7.

40 Cross-examination: Manubhai Patel used to give us instructions on behalf of plaintiff. He gave us all the instructions. We had a copy of Ex.2 and the documents were proved on that plus Manubhai's instructions. We did not advance 1,000,000/-.

Cross-examination

Signature on Ex.6 is all written by one person.

In the Supreme
Court of
Kenya, Nairobi

Plaintiff's
Evidence

No.14

A.W.Robson

Cross-
examination

6th February
1962
continued

No.15

R. D. Patel

Examination

6th February
1962

Ex.8.

Cross-
examination

I think we were instructed not to take action if interest paid. At sometime Manubhai Patel told me to leave the matter. I think Manubhai came to see my father on Ex.6, but what took place I do not know.

Ex.7 was dealt with by my father.

Our instructions were to hold the matter over.

Re-examination: None.

No.15

R. D. Patel

5.P.W.

RAJNIKANT DAHYABHAI PATEL, sworn:-

Advocate in practice in Nairobi since December 1955. Partner in Patel & Patel.

I know plaintiff company. I have their file. In June 1960 I was acting for plaintiff. I sent notices of demand on 2.6.60 to defendants 1 - 8. It was sent by registered post. This is a copy - Ex.8. My partner N.M. Patel signed this. No reply received as far as I can see from the file.

As far as I recollect instruction came from Hemraj Shah, director of plaintiff firm.

Cross-examination: Manubhai Patel was not holding prominent capacity at that time. He was there. Instructions were given to N.M. Patel. I have no personal knowledge. I was told by N.M. that Hemrajbhai gave instructions.

We took no action. I do not know the reasons.

Re-examination: None.

No. 16
H. N. Shah

In the Supreme
Court of
Kenya, Nairobi

6.P.W.

HEMRAJ NATHUBHAI SHAH, sworn:-

Plaintiff's
Evidence

Director of plaintiff company. Normally live in Nairobi. We have a branch in Mombasa.

We had moneylenders licence from 1951 to 1960 inclusive. We stopped moneylending after 1959, and on that part of the premises we have since then restricted ourselves to getting in outstandings.

10

Plaintiff has factory at Mombasa.

Defendant 2 is director of defendant 1, and was in 1955 and 1956.

Defendant 2 is a share holder in defendant 1.

Defendant 2 is director and share holder in Defendant 1 and son of defendant 2.

Defendant 3 is son of defendant 2.

Defendant 3 is wife of defendant 5.

Defendant 6 is a Nairobi business man.

20

Defendant 7 is a business man at Nairobi.

Defendant 8 is a business man at Nairobi.

Defendants 7 and 8 are related to defendants.

Defendant 5 is director and share holder in defendant 1.

In November 1955 I was in Mombasa. Defendant came to see me. He was in need of finance. He said company was in need of money very badly. He told me he required 1,000,000/- for defendant 1. He took me to the factory to show me the work and how much expenses they had made. The factory is at Changamwe on Plot 500. Plot is about $17\frac{3}{4}$ acres. The said plot was worth about 3,000,000/-, including factory building.

30

That was quite reasonable at that time. I asked for security. I said if you can give security I will think it over. Kind of security was mentioned. He was to give a mortgage and blank transfer of 1,500 shares in the Company and personal guarantee of share holder and directors of the brick factory and security of some good business people.

40

Mortgage was the land and factory, Plot 500 and factory. The defendant I was a family concern. We

No.16

H. N. Shah

Examination

6th February
1962

In the Supreme
Court of
Kenya, Nairobi

Plaintiff's
Evidence

No.16'

H. N. Shah

Examination
6th February
1962
continued

did not come to agreement. I told him to write me a letter. He wrote this letter dated 29.11.55 - Ex.9. It is signed by defendant 2 and defendant 6. It is defendant 6's ordinary signature.

While I was at Mombasa I met defendant 2 and defendant 5.

After I got Ex.9, defendant 2 saw me at Nairobi and handed over this guarantee form - 10. He handed me Ex.10 dated 1.12.55. It was given to me either on 30th November or on 1st December. It is signed by defendant 2, Defendant 5, defendant 3, defendant 4, defendant 6, defendant 7, defendant 8, and by one Harilal Kanji. 10

I know all their signatures except defendant 3's signature. I know defendant 3 but not his signature.

When defendant 2 brought Ex.10 I agreed to give him a loan of 1,000,000/- at 16% interest p.a. As security they gave Ex.10, and they were to give a mortgage on the Changamwe property Plot 500 buildings and the 1,500 shares belonging to defendant 2. 20

Ex.11. Terms of repayment by instalments were agreed and are mentioned in the mortgage. I kept Ex.10. On 1.12.55 I gave a cheque for 200,000/- in favour of defendant 1. This Ex.11 is the cheque. It is signed by me on behalf of the plaintiff's Nairobi account and it has been paid and debited by bank to my account.

Stand Over 7.2.62.

7th February
1962

Appearances as before.

6.P.W. continued:- 30

At the same time I instructed my man to have the mortgage drawn by Cumming & Miller, advocates.

Ex.12 On 5.12.55 plaintiff gave another cheque for 200,000/- (Ex.12) on our Mombasa branch. It has been paid and debited to our account.

Ex.13 On 9.12.55 a further cheque was given for 50,000/- (Ex.13). It has been paid and debited to our account.

Ex.14 On 23.12.55 a further cheque for 50,000/- was given by our Mombasa branch on Bank of Baroda - Ex.14. It has been paid and debited to us. 40

Ex.15 On 11.1.56 (Ex.15) a further cheque for 50,000/- was given. It was paid and has been debited to us.

- Ex.16 On 16.1.56 Mombasa branch gave cheque for 100,000/-- (Ex.16). It was paid and debited to our account. In the Supreme Court of Kenya, Nairobi
- The total of these cheques came to Shs.650,000/-. Plaintiff's Evidence
- When I met defendant 2 in Mombasa in November 1955 he told me that his company was subject to mortgage to N.B.I. for about 300,000/-.
- On 6.2.56 we paid a cheque and the mortgage was released. No.16
- 10 Up to 16.1.56 we had advanced 650,000/-. H. N. Shah
- Ex.17 On 28.1.56 my company sent defendant invoice, of which this is copy - Ex.17. Examination
- We charged interest on more than we had paid by about 300,000/-. 7th February 1962 continued
- We left 300,000/-- at credit of defendant 1, at bank for payment to N.B.I. We could not use it. We kept it on credit because we had to pay it at any time to release the documents for mortgage.
- 20 On 6.2.56 we paid cheque to N.B.I. for 300,000/-- to transfer mortgage in our favour. Defendant 1 had made the mortgage in favour of N.B.I. It was to be released. We kept 300,000/- in credit at Nairobi for payment to N.B.I. on foot of the mortgage.
- This is the cheque for 300,000/- in favour of N.B.I. Ex.18. It has been paid and debited to our account. Ex.18
- Ex.2 was prepared by Cumming & Miller. I do not remember who gave it to us. I identify signatures of Defendants 2, 4, 5, 6, 7 and 8.
- 30 This is the certificate of title to the plot of land No. Cr.4226. Ex.19. Ex.19
- This Ex.20 is invoice which we sent to defendant 1, dated 27.2.56. Ex.20
- I produce certificate of registration in the register of companies of the mortgage - Ex.21 - dated 13.3.56. Ex.21
- No share certificates were handed to me or to my company. I was given a blank transfer form signed by defendant 2. I produce it. Ex.22. I have not filled it up or done anything to it. Ex.22
- 40 On 24.2.56 we gave defendant 1, cheque for 50,000/- on Bank of Baroda - Ex.23. This has been paid and debited to our company's account. Ex.23

In the Supreme
Court of
Kenya, Nairobi

Plaintiff's
Evidence

No.16

H. N. Shah
Examination
7th February
1962
continued

Between 1.12.55 and 31.1.56 I met defendants 6, 7 and 8 many times in my office and in the bazaar. I met them before and after execution of Ex.2. They told me before execution of Ex.2 that they were satisfied and that I had done well and they were very thankful for my help. They signed because they had guaranteed. If they had not signed Ex.10, I would not have advanced the money.

Ex.19 was sent to Joshi & Joshi for 2nd mortgage in favour of defendant 9. The defendants paid 40,000/-10 in 1957 in respect of principal. That is the total we received in repayment of principal. Defendants paid interest regularly for 1st two months and after that they did not pay regularly.

Ex.24 This is copy for credit dated 24.6.59 from plaintiff to defendant 1. Ex.24.

We there reduced interest from 16% to 12% from January 1959. We gave credit for 5 months difference of interest from January to May.

Up to May 1959 we rendered invoices for interest 20 at 16%. In April or May 1959 we agreed to reduce interest from 1.1.59 to 12% which was to be the rate thereafter.

M.P. Shah may have been here in January 1959. He was not in Kenya after January 1959.

He was here in 1958 for about 2 months. He came for personal reasons because his brother died in Mombasa. From 1957 he had no authority to act for plaintiff company.

Ex.25 In 1960 defendant defaulted in paying interest. 30 I got this account from defendant 1. It shows statement of assets as at 30.12.60 - Ex.25. It shows amount due to my company as being 960,000/- loan and interest 125,693/54.

Ex.26. I produce bundle of 9 letters exchanged between plaintiff and defendant 1. Ex.26 (A-J).

Cross-
examination

Cross-examination:- Plaintiff company was incorporated in 1951. Our principal business was moneylending as well as general business. We had a branch in Mombasa. There also we did moneylending business. We took out 40 licences at Nairobi and Mombasa. In Nairobi for 1955/1960 inclusive and at Mombasa. I do not remember if we had licences only for 1957/8. After 1960 we have not taken out licence for Nairobi. I was authorised, at Nairobi, to carry on business only at Plot 2617, Bazaar St. I was not present when any of the signatures were put on Ex.2.

Manubhai Patel was working for us up to October 1960, for over 20 years. He was an important employee and very literate. I am not very literate. All questions of instructions to advocates and matters of legal documents were left to him.

In 1956 defendant 6's premises of Pure Food Products were in Bazaar St. Later Stewart St. and Sadler St. Sokpal Jetha was directly opposite; defendant 7 and defendant 8 were normally there.

The sureties did not give me any instructions. They knew very well what it was about. I discovered who the sureties were to be from defendant 2.

Manji asked for the loan for the defendant 1. He was the chief person and manager. I told him I would advance the money if he brought the document to me with the signatories.

I told Kanjibhai my requirements and left it to him to fulfil my requirements.

29.11.55 was first time a loan for 1,000,000/- was applied for to me. It was made at Mombasa to me by Kanji and Ratilal only. At that time I did not know who the independent sureties would be.

I made first payment of part of the loan on 1.12.55.

None of the sureties came between 29.11.55 and 1.12.55 to ask me to make the advance but I had received the guarantee. I do not know if Ex.9 was prepared in my office in Nairobi. Defendant 2 does not know English. Defendant 6 does not know English. I do not know how Ex.9 came to us.

I agree that 1,000,000/- was never lent in one sum on 31.1.56.

I did not pay 1,000,000/- on 31.1.56. When first 200,000/- was advanced on 1.12.55 it was agreed to be part of advance of 1,000,000/- to be repaid by instalments which were later incorporated in charge. It was not to be repayable until 31.10.56. None of the money advanced was repayable on 30.1.56 or on 31.1.56.

Advances on first six cheques are interest in books, and are not shown as repaid.

In 1954/5 we had associated company called Guarantee Co. of E.A. It was there in 1956. I did moneylending business. The firm Kanji Meghji Shah of Mombasa is a family firm. Guarantee Co. had

In the Supreme Court of Kenya, Nairobi

Plaintiff's Evidence

No.16

H. N. Shah

Cross-examination

7th February 1962

continued

In the Supreme
Court of
Kenya, Nairobi

Plaintiff's
Evidence

No.16

H. N. Shah

Cross-
examination
7th February
1962
continued

moneylending with firm of Kanji Meghji Shah at Mombasa in 1954.

Plaintiff also lent money to firm of Kanji Meghji Shah on moneylending contracts.

Plaintiff may have been advanced money by firm of K.M.Shah on 29.11.55. Mombasa office would know that.

On 29.11.55 I studied contents of Ex.9 I knew what was in it. I was satisfied with contents. I knew there was already a mortgage in favour of the bank.

10

Nazareth asks leave to interpose witness from N.B.I. Mombasa.

Khanna: I don't like it. I am in middle of cross-examination.

ORDER: Application refused.

At Mombasa defendant 2 asked me for a loan. I said I would consider it. I mentioned only conditions on which I could consider it. Next move was with him.

Letter of 29th November was the next move in the matter. I had given him a guarantee form. I only was prepared to accept if he brought the guarantee form duly signed. I knew there was a charge in favour of the bank. I knew until it was discharged, I could not lend on a charge.

20

I have lent money when there was a previous mortgage on the land.

Kanjibhai and defendant 1, needed the money very quickly. I was prepared to lend on the strength of guarantee and on the understanding we had. I was prepared to lend on the guarantee. I had nothing else but he had made a promise to mortgage. He received the money after he had promised, otherwise he would not have got it.

30

We had not agreed finally at Mombasa. I can't remember if we received letter of 29.11.55 by post or by hand. I do not remember if I wrote back accepting. Signature of defendant 6, on that letter and on the guarantee look the same to me.

I cannot remember any meeting between 29.11.55 and 1.12.55.

40

I did not take a debenture. I had said bank's mortgage had to be cleared. Title deeds were to be transferred to me. I was satisfied with Ex.10, and

that is why I made a loan of 200,000/-.

The first 5 signatories to Ex.10 are at Mombasa. There is a bracket against the first 5 signatures. No bracket against the last 3 names.

I issued first cheque after I received Ex.10. There was no stamp on the guarantee when I paid first cheque. I had transfer in blank before mortgage was executed.

10 I got Ex.10 stamped on 1.2.62 - long after its date. I paid penalty of 40/-.

Exhibit 2 was stamped on 20.2.56. I charged interest on 300,000/- which ultimately went to the bank for 1st January 1956. We had already deposited the sum in our bank for their bank for them. We provided a fund which we could not use and it was for the purpose of paying off their mortgage to the N.B.I. We charged interest on it.

20 This is one of our invoices - Ex.A. - dated 31.12.55. It is not signed by anyone from my company. This is our receipt dated 16.1.56 - Ex.B. for 5,866/66. We charged interest on 500,000/- before date of mortgage.

This invoice No.171 dated 28.1.56 claims interest for January 1956 on 800,000/- for whole of January - Ex.B.

30 This receipt of 8.2.56 is ours - Ex.C. - credit for it does not appear in annexure A to plaint. Nazareth explains interest account attached to plaint, was for 1st February 1956 and so does not charge interest for January or show payment of that interest. Entries are, however, in the books.

This is our invoice No.20 - Ex.D. - dated 27.2.56 and this is our receipt - Ex.E. - dated 26.2.56. This is not in annexure A.

Nazareth admits credit must be given for this - says revised account handed to Khanna yesterday morning.

At date of execution of Ex.2, 650,000/- had been already lent.

40 On 31.1.61 no request to lend 650,000/- was made by sureties. We were to lend 1,000,000/- and the documents were getting ready. Mohanbhai Patel instructed the advocates.

In the Supreme Court of Kenya, Nairobi

Plaintiff's Evidence

No.16

H. N. Shah

Cross-examination

7th February 1962
continued

Ex.A.

Ex.B.

Ex.B.

Ex.C.

Ex.D.

Ex.E.

In the Supreme
Court of
Kenya, Nairobi

I did go personally in 1960, September I think,
with Ex.2 to J.J.Patel's office. I went there at
the time of filing the suit.

Plaintiff's
Evidence

I did not take a debenture.

No.16

There was a guarantee incorporated in Ex.2.
I did not get shares but I got a transfer form signed
in blank by defendant 2.

H. N. Shah

Stand over 8.2.62.

Cross-
examination

7th February
1962
continued

8th February
1962

Appearances as before.

6.P.W. continued:

10

In the ordinary way I do not have first hand
knowledge of what happens in my Mombasa office and
I do not know the circumstances of what happens in
Mombasa office except what I am told. Ex.12 is a
Mombasa cheque signed by my director A.D. Shah. It
was given according to the terms agreed upon. We
were to give 1,000,000/- as and when they required
money. We went on giving. I have been told later.
They required cheques for Mombasa, that is why they
were issued.

20

In 1956 my relations with defendants were very
good and they still are. If the necessary documents
were not signed naturally I would not have advanced
the money.

They were not isolated loans by Mombasa office
for which I later obtained security in form of Ex.2.
We did not specially ask for letter - Ex.26 - dated
23.2.56. It is only a form of receipt. It may have
been dated according to the routine of the office.
I don't know anything about it being taken to cover
up absence of licence for Mombasa office.

30

Re-examination

Re-examination: I see Ex.9. It does not set out how
the 1,000,000/- was to be repaid to us.

Q. When were the terms as to repayment agreed?

Khanna objects - not arising in re-examination.
Objection overruled.

A. The terms of repayment were agreed on 1.12.55 when I received Ex.10. They were agreed on that date with defendant 2. There were discussions about repayment which took place after receipt of Ex.9.

When I was taken over the place, when I visited Mombasa, I was made aware of the mortgage to the Bank. Question of security for repayment of my loan by us was discussed in a general way. If I gave the loan the Plot at Changanwe of $17\frac{3}{4}$ acres and factory premises was to be mortgaged. The guarantee form - Ex.10 - was to be signed and there had to be some very good guarantors.

I knew that he would go to an advocate and that it would take time to get the mortgage.

I was never prepared to lend the money if there was not to be a mortgage over the land and factory.

Before it was mortgaged I had only the guarantee. The main security was the land and factory, the guarantors and the 1,500 shares.

Of course I attached importance to the mortgage of land and factory.

I am familiar with signature of defendant 6.

The form of Ex.9 is the form that I am familiar with.

The signature of Bharmal Raishi Shah on Ex.2, seems similar to me.

Signature on Ex.9 is B.R. Shah. They are different. I am sure the signature on Ex.9 is the signature of defendant 6. I am sure the signature on Ex.2 is that of defendant 6.

I got Ex.10 stamped. I did not personally go to the Land Office. The stamping was dealt with by Manobhai. Not the man who had been with us 20 years I do not know who got it stamped. I had nothing personally to do with the stamps.

The debit of 300,000/- against account of Coast Bricks Ltd., to pay off the bank's mortgage was made on 3rd February, 1956. There was no previous debit before 3rd February, 1956 in the account of Coast Bricks.

This is an account prepared in my office under my instructions showing sums received in respect of interest for 24.3.56 - Ex.27.

In the Supreme Court of Kenya, Nairobi

Plaintiff's Evidence

No.16

H.N. Shah.

Re-examination

8th February 1962

continued

Ex.27.

In the Supreme
Court of
Kenya, Nairobi

Plaintiff's
Evidence

No.16

H. N. Shah

Re-
examination
continued

Further Re-
examination

8th February 1962

No.17

R. Sinclair

Examination

8th February
1962

Some cheques were issued to defendant 1, by our Mombasa office. They had been given instructions. Mombasa office paid the cheques because they had been instructed by our Nairobi office and defendant 1 wanted the money. These cheques were given against the mortgage. They were given in part of the loan of 1,000,000/-.

Further Re-examination by leave:- I did not speak to my lawyers during cross-examination. The instructions to the Mombasa office were by telephone. 10 Each time a cheque was to be issued they received instructions from me.

No.17

R. Sinclair

7.P.W.

ROBERT SINCLAIR, sworn:-

I am employed at Mombasa branch of National & Grindlays. Successors of N.B.I. Same bank. Change of name and amalgamation.

Ex.28. I have copy of letter dated 19.9.55 from our Mombasa branch to defendant 1. This is photostat copy - Ex.28. 20

Ex.29. I have copy of letter dated 10.12.55 from our Mombasa branch to defendant confirming that Cumming & Miller, for plaintiffs, had asked for the title deeds. This is the original (produced for plaintiffs - Ex.29).

Q. Have you a letter dated 10.12.55 from Coast Bricks addressed to Mombasa branch of the bank asking bank to hand title deeds of Plot 500 to Cumming & Miller? 30

A. I have not brought the file that would contain such a letter.

Q. Have you a letter in file dated 10.2.56 from Mombasa branch to Cumming & Miller?

Ex.30. A. I have not brought the appropriate file with me. Nazareth calls for document 58 of their affidavit - Ex.30 produced. It bears the initial of the other manager of the bank. It would have been sent from bank to Defendant 1, as copy of original sent to 40

Cumming & Miller.

Nazareth calls for 59 in defendants affidavit to documents.

In the Supreme Court of Kenya, Nairobi

Ex.31 Ex.31 produced. It is signed by the other manager of the bank.

Plaintiff's Evidence

Ex.32 Nazareth calls for document 60 in the affidavit. Ex.32 produced.

I recognise signature of the other manager of the bank.

No.17

10 On 10.2.56 300,000/- was paid in by Cumming & Miller and credited to the account of defendant 1. It was received through our Nairobi branch as per Ex.33.

R. Sinclair
Examination
8th February
1962

Ex.34 I swore this affidavit - Ex.34. The annexure is correct and the affidavit is true.

continued

20 Cross-examination: I have personally inspected the ledger account from which extract was taken. The sum due to the bank on 10.2.56 - amount due to the bank was 290,263/62 to best of my knowledge from correspondence. From inspection of the ledger I know it was something less than 300,000/- but I cannot from recollection say the account amount as shown by the books which I inspected then.

Cross-examination

Re-examination: None.

No.18

Judge's Notes

Ex.35 Invoices from 31.12.52 to 19.12.57 excluding those already exhibited put in by consent as Ex.35(23 invoices and 1 credit note).

No.18
Judge's Notes

30 Invoices from 27.1.58 to 23.8.60 (32 invoices and 1 credit note and list of invoices) put in by Ex.36 consent as Ex.36.

Defendants
Opening
8th February
1962

DEFENDANTS CASE

Khanna:- Sec.3(1)(b) Moneylenders Ordinance.

40 Loan and security not enforceable if exemption under 3(1)(b) does not apply. Authorised place of business was a Plot in Nairobi and a Plot in Mombasa. Advances not made at authorised place of business.

S.11 not satisfied.

In the Supreme
Court of
Kenya, Nairobi

No.18

Judge's Notes

Defendants

Opening

8th February

1962

continued

650,000/- already lent in December '55 and
January '56 prior to signature for charge.

See closing phrase of section 11(1).

Note or memo must be signed before security
signed.

Charge does not truly state date of loan.

Charge refers to 1,000,000/- now paid, i.e. on
1.1.56.

Ex.2 contains joint and several promises to
repay at p.2.

10

Sureties as principal debtors. Sureties become
subject to Ordinance. Damodar Jammadas and Shah
Mohamed is distinguishable. Guarantor not treated
as borrower. Eldridge & Morris. v. Taylor & Wife
(1931) 2 K.B. 416. Lyle. v. Chappell (1932) 1 K.B.691.
"as effected by execution of" in sec.3 cannot apply.
They cover case where first there is an executed
charge or an advance contemporaneous with a charge.
Cannot cover loans effected without execution of a
charge.

20

S.N.Shah v. C.M.Patel distinguishable (1961) E.A.397.
Moneylending transaction must be secured. Security
there must mean contemporaneous security. Section
only applies where only security is a charge on land.
Trivediv.v.Wadia (1959) E.A.C.A. 619 and 623, 624.
Temperance Loan Fund Ltd. v.Rose (1932) 2 K.B. 522
and 533.

Central Advance and Discount Corpn. Ltd. v.Marshall
(1939) 2 K.B. 781 and 789.

Shah.v.Patel only means if after covering outstanding
provisions of the Ordinance you are not brought back
by taking further security later.

30

Jamal Sunderji Mitha.v.Alois John (1936) 17 K.L.R.34.

Victoria Printing Press.v.Puran Chand Many (1938)
18 K.L.R. 82 and 84.

Parkfield Trust Ltd. v. Curtis (1934) 1 K.B. pages
685 and 689.

Stand Over 9.2.62.

G.B.Rudd

Appearances as before.

In the Supreme
Court of
Kenya, Nairobi

No.18

Khanna:-First phrase of section 3(1)(b).

There must be a separate collateral binding transaction with repayment secured by a charge. It is meant to secure original moneylending transaction.

Judge's Notes

Defendants
Opening

9th February
1962

Transaction means a single contract inclusive of terms of payment and of security.

Krehl.v.Great Central Gas Co. L.R. 5 Ex.289.

10 Brewin.v.Short (1855) 5E & B227.

Courage.v.O'Shea (1895) 1 Ch.325.

Marquess of Devonshire.v.Royal Bank of Scotland (1953) Ch.218 at pp.252 - 3.

Official Assignee.v.Ek Liong Hin Ltd., (1960)
1 All E.R. 440.

18 HALSBURY 3rd Edn.420. Consideration must be pleaded and proved as pleaded. S.127 Land Contract Act 1877 1 All E.R. 487 and 497. No consideration as far as surety Insurance Co. for the charge though there may have been for the guarantee. Sec.59 Transfer of Property Act as applied only incorporates amendment to 1907. Sec.3. "attestation".

20

Nazareth:- Attestation not received as pleading.

Khanna:- Attestation need not be pleaded. Plaintiff has to have due attestation.

Section 59 Transfer of Property Act. General traverse L.R. 39 Indian Appeals 218.

30

Nazareth:- Attestation not same as execution. I object to this point being taken in view of the pleadings.

O.VI.r.5. Attestation is a question of fact.

O.6. r.5. c/o 19 r.15 R.S.C. 1962 AP p.478.
Non est factum must be pleaded. Defence.

This point should not have been kept back.

Defendants funds kept concealed.

Refusal to procure issues before trial.

No hint in pleadings that question of attestation would be raised.

40

I do not feel I really know full details of the defendants' case.

In the Supreme
Court of
Kenya, Nairobi

No.18

Judge's Notes

Defendants
Opening

9th February
1962
continued

Khanna continues with opening.

No evidence of any attestation by company.

Document requires attestation by two witnesses.

You have not got a proper mortgage. Admission of signature not enough.

52 Indian App. 362.

Sec.100 Transfer of Property Act. Question is whether charge amounts to a mortgage.

Sec.58(b) makes it a mortgage.

Under Land Titles Ordinance Cap.159 Sec.3.
This is a mortgage.

10

Even execution by a company requires execution in accordance with the articles plus two outside witnesses.

Defendants'
Evidence

No.19

M. M. Shah

Examination

9th February
1962

DEFENDANTS' EVIDENCE

No.19

M. M. Shah

I.D.W.

MOHANLAL MEGHJI SHAH, sworn,

I am a merchant at the moment of Arusha. I am retired. My son carries on the business. I know defendant 2. He is a relation. I know defendant 5 and defendant 4. I was in Mombasa during 1956.

20

I see Ex.2. I signed as witness on page 5. It was at my brother's house.

Nazareth:- I object to evidence to show lack of proper attestation.

Khanna:- If mortgage is not proved to be properly attested I must succeed.

He alleges execution. We have not admitted it. He must prove. We don't require to plead it.

30

0.6 r.5 refers to matters to defeat a claim. Here no claim if no execution. Sec.68 Evidence Act.

RULING:

I think it would have been better if the defendants pleaded lack of attestation but as at present advised I confess that I am not at all sure that he must so plead. For it seems to me that the matter is in issue under Sec.68 of the Evidence Act.

Due execution is not admitted. Even if pleading were necessary I would allow an amendment and I overrule the objection.

In the Supreme Court of Kenya, Nairobi

G. B. Rudd.

Defendants' Evidence

I put my signature on page 5 at my brother's house. Defendant 2 signed in my presence. I signed in his presence. Defendant 4 signed in my presence. He was present when I signed.

10 I know of defendant 3. She does not appear before me. I am Ratilal's uncle so out of respect she does not appear before me. She covers her face before me. On this occasion I did not see her at all. She was in next room. She did not see me sign. I never saw I.S. Patel, advocate of Mombasa. He was not there when his signatures were put. I never went to his office.

No.19

M. M. Shah

Examination

9th February 1962

continued

I see on last page of Ex.2 signature of defendant 5. I signed as witness at defendant 2's office. Rubber stamp was there when I signed.

20 I.S. Patel was not there and I do not know when he signed.

Cross-examination:- I am brother of defendant 2 - full brother. I was staying in Makupa Road in Jan Mohamed Contractor's house. J. Mohamed is the contractor - separate house from my brother's house.

Cross-examination

30 I was called to my brother's house to attest signatures. I received telephone call at Arusha the day before yesterday. I set out for Nairobi next day and arrived on Tuesday. Defendant 2 telephoned me from Nairobi. He said the case was going on and my presence was required. He spoke for 2 to 3 minutes. I got the call on Monday and on Tuesday I started for Nairobi.

On occasion when I signed as witness to Ratilal's signature I went to the shop. I do not know why Ratilal did not sign when defendant 2 and 4 signed.

I was called to sign.

40 I cannot read English. I cannot read "signed by the sureties in the presence of". I have never written a single English word except my signature and something like "P.4" or "5".

I cannot write but I understand English a little bit.

In the Supreme
Court of
Kenya, Nairobi

Defendants'
Evidence

No.19

M. M. Shah

Cross-
examination

9th February
1962
continued

12th February
1962

In Nairobi I am putting up with defendant 6. Defendant 2 sometimes stays with defendant 6, and sometimes with Harilal. At present he is staying with D.6. I attested Ratilal's signature on same day as I signed on page 5. It was in the morning I signed on page 5. I attested defendant 5's on same day - two or three hours later. Defendant 5 said would show witness my signature. His signature was already there. It was not put in my presence.

Stand Over 12.2.62.

10

Appearances as before.

I.D.W. continued:

Cross-examination continued.

I came to town on the day defendant 2 signed. I did not come to the office of I.S.Patel. I had some work to do. I came to town alone in my car which I drove. At the time the document was signed defendant 2, defendant 4 and myself were in the room. No one else was in the room. I was in the house for 25 to 30 minutes. Defendant 2 signed first. Then defendant 4, then I signed. I was the last person to sign it. The document was signed by Shardaben and then brought to me. After defendant 2 and 4 signed defendant 5 took it in to be signed by Shardaben. He was away for a little while, 5 to 10 minutes. Then defendant 5 brought it back and asked me to sign it. He just brought Shardaben's signature. He said "Shardaben has signed it, would you please witness it". Shardaben was in the adjoining room. She was in the next room. I could not see her signing, out of respect she covered her face so I could not go in. The door was open. I could not see her at all.

20

30

Ratilal was all the time in the room where Shardaben was. There was a noise in my room so I do not know if they were talking. My attention was not directed to them. Defendant 4 and defendant 2 and I were in the other room. We were talking.

I recognise the signatures of defendant 2 on Ex.2. They are both his signatures. The lower signature was put in my presence. I do not know when his other signature was placed. I know

40

defendant 4's signature well. Two of his signatures are on Ex.2. I don't remember if his upper signature was put on before I signed.

Ratilal's signature was not placed in my presence. I don't know why he did not sign that day in my presence. He was there all the time I was there. I left the house before he did.

10 I see defendant 5's signature (as secretary). I don't know who wrote Merchant, Mombasa, under my signature. It is not in my writing. I was not living in that house which was at Changamwe, Port Reitz, and about 6 miles from the house where I was living.

20 The office was 6 to 7 miles from defendant 2's house. The defendants 4 and 5 also lived in defendant 2's house. The office is in town. My house is about $\frac{1}{2}$ mile from the office. I was specially brought six miles to attest the signatures. No other witness was present with me. I did not realise that I was certifying that they signed in my presence. I was not explained those words. That was the first time I attested a document.

Shardaben goes about. If she saw me she would conceal her face, otherwise she would go with her face open. She goes to weddings etc., where men are present. According to our custom she must respect her elders by concealing her face. She is able to sign her name if she wants to in the presence of a stranger.

30 I went to town from defendant 2's house. I was in town up to 12, then I went to my house for lunch. I went to defendant 1's office in the morning. I do not remember the time. It was after 2 or 3 hours that I met defendant 5 in the office. I was just passing the office and I popped in. No one asked me to go there. Ratilal was alone in the office. He showed me Ex.2 again.

40 I saw the Commissioner of Oath's stamp for first time in the office. I do not remember about the company's seal. When I signed Ex.2 I did not know what kind of document it was. I did not know that defendant 1 was borrowing money on this document. I had never seen Shardaben's signature before except that defendant 5 told me that Shardaben had signed there.

When I saw defendant 5 in the office I asked why I had to sign again. He said "my signature has

In the Supreme
Court of
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Defendant's
Evidence

No.19

M. M. Shah

Cross-
examination

12th February
1962.

continued

In the Supreme Court of Kenya, Nairobi

Defendant's Evidence

No.19

M. M. Shah

Cross-examination

12th February 1962

continued

Re-examination

12th February 1962

No.20

Shardaben

Examination

12th February 1962

been put there and you sign now". I was there for about 10 to 15 minutes. Neither defendant 2 nor defendant 4 were there then. I have heard that the company was in great difficulties. I have never been to the office of I. S. Patel. When I was in Mombasa I was carrying on business there. I stopped doing business in Mombasa in 1956 - about. My sons were studying and I could not do all the work.

Defendant 2 telephoned me and I came here. He told me that I was required to show that the document had been signed.

10

Re-examination:-- I used to pop in to the office of defendant 1 off and on. In 1956 I had heard about an advocate called I.S. Patel. I had no dealings with him. Never went to his office. Don't know where it is. Defendant 6's sister is my wife. When I come to Nairobi I always stay with defendant 6.

No.20

Shardaben

20

D.W.2.

SHARDABEN, sworn:--

I am wife of defendant 5. 19 years married to him. I do not attend to my business. I have children of school age. I have busy time running the household. I had little schooling; educated at Gujerati, I do not remember how long I was at school. I learnt a little English at school, one English book. I can recognise letters of the alphabet and can sign my name in English. I cannot read all signatures of other people. I can read a little English. I know the company, defendant 1. I hold shares in it. I do not know how many. Defendant 2 and defendant 5 keep them. I never interested myself in the running of the company. I do not know what the director of a company is. Defendant 5 never discusses the affairs of the company with me. I see Ex.2 - this is my signature (indicated). I do not remember in what year I put it. I put it in my house at Port Reitz. Defendant 5 brought it to me for signature. I was in the kitchen. The house has four rooms as well as the kitchen and a store. When I signed it defendant 5 was there. No one else was in the kitchen when I signed it. After I signed it defendant 5 took it away. Defendant 2 is my father-in-law. I do not

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appear before him. If he passes by me I would cover my face as a mark of respect. I would not talk to him. He would not come into the same room as I. I have never heard of I.S. Patel, advocate, Mombasa. I do not know where his offices are. I have never been to his office either alone or with defendant 6 or with defendant 2, defendant 4 and defendant 5. I did not sign before I.S. Patel. I did not tell him it was my signature.

In the Supreme
Court of
Kenya, Nairobi

Defendant's
Evidence

No.20

Shardaben

Examination

12th February
1962
continued

Cross-
examination

10 Cross-examination:- I was alone in the kitchen. The men were in the sitting room. I do not know who was there. The sitting room is a little far from the kitchen. There are no rooms in between but the kitchen is outside. The kitchen is in the same building. There is a big door and immediately after passing the big door we are in the kitchen. You can't see anyone in the kitchen - from the kitchen through the door. Defendant 5 asked me to sign. I signed it once. He went
20 back at once. He did not wait to talk to me. I do not remember if I have signed documents before. I was asked to give evidence in this case for the first time the day before yesterday. I do not know I.S. Patel. Defendant 5 asked me to give evidence. He came to collect me from Mombasa. I do not know how many came to the house. I do not remember if defendant 2 was there or if defendant 4 was there or if I.D.W. came there. We
30 had no visitor that day before I signed the document. If someone came to the house I would not know. I do not remember the time of day when I signed it or whether it was in morning or afternoon. I would know when Ratilal is in the house. I do not know how long he remained in the house after I signed Ex.2. I would have heard a car coming to the house. I can't remember how many signatures were on the document or if there were any on it when I signed. I did not know what Ex.2 was about. I go out with any one from the family.
40 Defendant 5 did not take me to the office of I.S. Patel. I did not sign Ex.2 there. If he says I came there he is telling lies. I came into court with my face uncovered.

Re-examination:- I cover my face when defendant 2 passes by. If elders are present I cover my face, otherwise I go uncovered as to the face but with my sari over my head. There is no yard between the living room and kitchen. Two cars belong to

Re-examination

In the Supreme
Court of
Kenya, Nairobi

Defendant's
Evidence

No.20

Shardaben

Re-examination
12th February 1962
continued

No.21

B. R. Shah

Examination

12th February
1962

the family. One is for the family and one is for the company. I don't take note of the sound of the different cars. I cannot say if I remember the sound of any car arriving on that day. I have never seen I.S. Patel.

No.21

B. R. Shah

3.D.W.

BHARMAL RAISHI SHAH, sworn:-

At one time I was director of plaintiff company. I was also director of Pure Food Products. I received a witness summons to attend this court. I see Ex.2. My signature is on page 6. I signed it at Pure Food Products' office in Bazaar Street. I know Jagjiwan Pavaghadi (3.P.W.). I was sitting in my own cabin. The frame was made of wood and the windows clear glass. 3 P.W. was sitting at a table in the office. Manubhai Patel brought the document for signature. He was working for plaintiff company. Manubhai entered my cabin. He told me that these were guarantee documents and that he had brought Ex.2 to me for signature. No one else was in the cabin. Defendant 7 and defendant 8 came into the cabin later. I came out of my office and called them from their shop across the street. We all went into the cabin. When I signed there was one man in the cabin - Manubhai Patel. Defendants 7 and 8 were not there when I signed. Defendant 7 signed in presence of Manubhai, defendant 8 and myself. D.8 signed after D.7 in presence of D.7, Manubhai and myself. 3 P.W. was sitting on his table all this time. He did not see any of us sign. I know J.J.Patel, advocate. He was not there when we signed. We did not put our signature in his presence. I never went to his office to sign Ex.2. I did not see J.J. Patel sign as witness. I never went to J.J. Patel's office to acknowledge my signature. I never asked him to attest my signature - none of these 3 signatures in Ex.2 were put in my presence. After we had signed we called 3 P.W. I called him and

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asked him to witness the signatures. He signed in the presence of Manubhai, Zaverchand, Hirjibhai and myself. Manubhai Patel suggested he should be called as a witness. 3 P.W. worked for Pure Food Products for four years. First he worked in 1950 - worked for 2 years and started his own business. Then he returned in about 1956. When 3 P.W. signed Manubhai took the document away with him. I have not seen it since till now. J.J. Patel's signatures were not on it when it left my office. I saw them today for the first time. J.J. Patel was my personal lawyer as well as my company's lawyer. I used to go to him and my accountant Premchand used to go to him. I do not remember having sent 3 P.W. to J.J. Patel's.

In the Supreme Court of Kenya, Nairobi

Defendant's Evidence

No.21

B. R. Shah
Examination

12th February
1962
continued

I see Ex.9 - it has my signature. I cannot remember the date I signed it. Defendant 2 brought it to me for me to sign. I had nothing to do with defendant 1 at the time. Defendant 2 told me he was getting financial assistance and so I should sign. I don't remember significance of "authorised in that behalf". I see Ex.10. It has my signature. I put it in Nairobi. No one witnessed it that time.

Cross-examination:- There is no decree pending against me at the moment. Pure Food Products is in liquidation. At present I am doing business as insurance and land broker. I think Pure Food Products went into liquidation in 1958. I was not the principal shareholder. When the company went into liquidation I was ordinary director. In 1958 I was a director of 4 concerns:- Pure Food Products; Bharmal Bros. Ltd.; Leo's Auction Mart Ltd.; Noble Industries Limited. I was principal director and shareholder for Bharmal Bros. and Noble Industries. Leo's Auction Mart is still running. We have not closed the other businesses, but we don't deal anymore.

Cross-examination

Noble Industries ceased business 1955/6. Bharmal Bros. closed in 1958. Bharmal Bros. have gone into liquidation. Sojpal Jetha is K.J. Bharmal Bros. Defendant 7 is director of S. Jetha. Amount was 70,000/-, I was not paying instalments. I am not in bad financial difficulty. I was first asked to give evidence in this case last Wednesday. I received the summons on Wednesday. I have often had occasion to sign documents. Pure Food Products' office was 200 yards to 500 yards away. They are in same street. Defendants 7 and 8 had offices in

In the Supreme
Court of
Kenya, Nairobi

Defendant's
Evidence

No.21

B. R. Shah

Cross-
examination
12th February
1962

continued

Re-examination

same street. In 1955/6 we often met. There is difficulty in all 3 of us going together to J.J. Patel's office. In 1955/6 and even now my relations with plaintiff were and are good.

I did not go with defendants 7 and 8 to J.J. Patel's office and execute Ex.2 in his presence. Both Ex.9 and Ex.10 contain my signature. When I signed Ex.10 I was told I was guaranteeing loan of 1,000,000/- to defendant 1. I realised I was signing a guarantee: £50,000. I gave Ex.10 to defendant 2. I knew he was going to take it to plaintiff to get money. 10

Re-examination: Manubhai did not suggest that any of the signatures required to be attested by an advocate.

No.22

H. Ramji

Examination
12th February
1962

No.22

H. Ramji

4 D.W.

HIRJI RAMJI, sworn:

I have interests in:- (1) Sojpal Jetha Ltd. (2) Knuti Industries Ltd. (3) Pure Food Products (Tanganyika) Ltd. I have shares in Maida Ltd. My total investment in (1), (2), (3) was 1,600,000/- to 1,700,000/- full paid up at present. 20

I have been in business 30 years. I know plaintiff company, and their director H.N. Shah. I never approached that company to lend money to defendant 1.

Defendant 8 is my partner in all my business. To my knowledge defendant 8 never in my presence approached plaintiff to lend money to defendant 1. I signed Ex.10. Defendant 8 signed in my presence at the same time as I did. This guarantee form was brought to me by 3 P.W. as far as I remember. 30

I don't know if any of the £50,000 referred to in Ex.10 was paid to defendant 1. I signed Ex.2 in Pure Food Products' office of 3 D.W. It is in front of my premises. 3 D.W. called me and defendant 8. We went to Pure Food Products' office and signed inside the office. There is an office 8 x 12 about, inside the shop made of wood and glass. When I signed defendant 8, 3 D.W. and Manubhai were present. 3 D.W. had signed before we went there. Defendant 8 signed before me, then I signed. 40

I know J.J. Patel, advocate. He was not in the premises that day. He did not see either of us sign. I never went to his office to acknowledge any signature. He never signed as a witness to attest my signature in my presence. When we signed, 3 D.W. called 3 P.W. who was sitting at a table 3 to 4 feet from that office. 3 P.W. came in. 3 D.W. asked 3 P.W. to witness. 3 P.W. signed in our presence. No other signature was added to 3 P.W.'s. 3 D.W. gave it to Manubhai after the signature. Manubhai took it away. I never saw Ex.2 since then until today. The 1,000,000/- was never lent to me personally or any part of it in my presence to defendant 8.

10

Cross-examination:- Ex.10 bears my signature. It says if plaintiff lends £50,000 to defendant 1, I will guarantee repayment. I signed it to induce plaintiff to lend £50,000 to defendant 1. I am related to the family of defendant 2. Defendant 8 is not related to them. He is related to me. Two or three days ago I told my advocates, Veljee Devshi & Bakrania what my evidence would be. Defendant 8 was with me. I gave statement only. At that time my place of business was near to 3 D.W.'s. 3 D.W., defendant 8 and I did not go to J.J. Patel's office and there sign Ex.2.

20

Re-examination:- On that day no one suggested that the document needed to be signed before an advocate.

In the Supreme Court of Kenya, Nairobi

Defendant's Evidence

No.22

H. Ramji

Examination

12th February 1962

continued

Cross-examination

Re-examination

No.23

Judge's Notes of Counsels' Addresses

30

Khanna:- As regards defendant 2, we do not require proof. We admit his mortgage for purposes of this suit and dispense with any kind of proof - attestation admitted. It will only operate in the event of a sale - he can come in for the surplus. Not at suit with him.

No.23

Judge's Notes of Counsels' Addresses

12th February 1962

Mr. Doshi puts in:-

- (1) 2nd charge.
- (2) Copy thereof registered with Registrar of Companies.
- (3) Copy of Resolution by defendant 1.
- (4) Certificate of Registrar of Companies.

40

In the Supreme
Court of
Kenya, Nairobi

No.23

Judge's Notes
of Counsels'
Addresses

12th February
1962
continued

They all go in by consent as Exs. S.M.M.

Nazareth asks that Memorandum and Articles of Defendant 1 be put in.

Khanna objects - too late.

Order

Mr. Nazareth wanted this in at an early stage but with consent of the court did not do so, only Mr. Khanna admitted that defendant 1 had power to borrow. Mr. Nazareth says I told him he could have them in later if he wanted them. I do not know that I intended that to be taken in its widest sense but I think I did say something to that effect.

10

After the close of plaintiff's case I think everyone except possibly Mr. Khanna and Mr. Devshi, were taken by surprise on the precise nature of the point as to attestation.

I will allow Mr. Nazareth to call for these documents but not to examine on them if Defence does not wish to adduce evidence. On the other hand, I will allow Defence to re-open their evidence if they wish, confined to matters arising from Articles and Memorandum.

20

Articles and Memorandum produced as Ex.37.

Nazareth:- I apply to Mr. J. J. Patel.

Khanna objects.

Nazareth does not press application.

Khanna:- no valid mortgage or charge.

1. no evidence that seal is the common seal of the company;

2. or that it was affixed in accordance with articles: 2 or more directors being present at same time. 30

3. In Kenya no provision corresponds to Transfer of Property Act 1925 section 74(1).

No presumption can be made.

Sec.59 of Transfer of Property Act (Indian) made no exception in case of companies.

In sec.58(1) Cap.160 - Registration of Titles Ordinance. Special provision had to be made for companies.

Signature of sureties not witnessed in accordance with sec.59, Indian Transfer of Property Act. MULLA 2nd edition 1937 - Transfer of Property Act, p.360 - attesting witnesses must sign in presence of executant.

39 Indian Appeals 218 at 223.

Land Titles Ordinance sec.20. Form of Certificate to be prescribed, Form C Certificate of Mortgage: sec. 59: sec.58(b) Transfer of Property Act.

10 Stand over 13.2.62.

Appearances as before.

Khanna: (continued) - section 106 Indian Evidence Act has no application.

MUNIR 4th edition p.654 - is applicable to fact with special knowledge of a witness. Company could not have special knowledge.

Estoppel not pleaded. No material on which estoppel could be proved.

20 Mortgage: all law requires is transfer of interest in land as security. It is enough if land is made security for debt.

Sir Hari Sankar Paul & another.v.Kedar Nath Saha (1939)2. All.E.R.737, P.C.

Lord MacMillan at 742.

Interpretation and General Provisions Ordinance 1956.

In case of company requirements for signature includes mark. Person includes company. Article 114.

Veerappa.v.Chinna Muthu (1907) 30 (Madras) 251.

30 Hira Bibi.v. Ram Harilal, 52 Indian Appeals 362.

Submit sureties here are mortgagors. No consideration for sureties. If Moneylenders Ordinance applies neither 1st D. nor sureties liable.

Ex.2 purports to secure a loan of 1,000,000/- on 31.1.56. No loan on 31.1.56.

Ex.2 does not purport to secure previous or future advances.

Sec.3 Moneylenders Ordinance does not exempt

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No.23

Judge's Notes of Counsels' Addresses

12th February 1962

continued

13th February 1962

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Judge's Notes
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1962
continued

where other security is taken. Mere security was not only the charge on land - deposit of 1,500 shares - deposit of blank transfer other sureties. Plaintiff bound by particulars - separate illegal loans.

Nazareth:- Transaction began about 1st December and extended over the whole period.

Under Registration of Titles Ordinance, registration of the charge is conclusive. Govindji Poptlal.v. Nathoo Visanji. Attestation - only mortgagor is the company, only owner of land was the company. Mortgage recites company's title. Only the company charges the land. 10

I do not concede that sec.59 applies to a company but it was complied with. Signatures of directors and secretary proved. Their representation estoppes the company. Articles complied with. Section 73 of Indian Evidence Act - court can look at 2nd charge which has been admitted. People have not denied signatures. 20

Section 114 of Indian Evidence Act presumptuous. Seal is not a signature. Sec.59 does not apply to a company respecting a document under its common seal: sec.59 only applies to a document that is signed. Seal is not a mark. Company cannot sign. 9 HALSBURY 3rd edn. p.82. It contracts under seal.

Wright and Son v. Romford Corporation (1956) 3 All E.R.785.

9 HALSBURY, p.82 B. Sec.30 Companies Ordinance Cap.288. p.3645; sec.15(2) seal; sec.93(1)(b) seal to be in legible Roman characters - directors do not sign as witnesses. 30

6 HALSBURY 3rd edn. p.427, note (i).

Deffel.v.White (1866) L.R.2.C.P. 144.

Moises.v.Thornton (1799) 101 E.R. 1402; Lawrence J, at 1404.

Directorship not properly denied in pleadings. Re British Games Ltd. (1938) 1 All E.R.230, at 233 - provision of Company's Act, read into Moneylenders Act.

Submit sufficient evidence of due attestation by Patel and 3 P.W. but attestation not necessary in case of sureties. 40

WOODRUFFE 9th edn. p.550 referring to Moises.v. Thornton, footnote.

Patel wrote, signed in the presence of. Para.12 - Amended defence. Agreement pleaded, particulars given. This matter then abandoned.

S.N.Shah.v.Patel clear on point where there was additional security. It is exempt if there is a mortgage. Sec.1961 E.A.397, p.404 D. Sec.3(1)(b) Moneylenders Ordinance should be read by eliminating "of".

CRAES, p.101, 5th edition.

HALSBURY 2nd edition Vol.31 pp.497/8.

This is under Registration of Titles Ordinance. Secs.23 and 32, but if under Land Titles Ordinance sec.21 p.2134 conclusive. Registration of Titles Cap.160 p.2167 sec.3, but title dated 13.9.23 after Cap.160.

Section 19 - closure of other registrations.

Section 4 - Registration Districts.

Volume VI p.2398 - two districts, coast and inland.

This is registered CR and is coast registry under Registration of Titles Ordinance.

Farrar.v.Y.A.Adamji (1934) 16 K.O.R. 40; Registration of Titles Ordinance applies. Sec.58(1) and (3) - attestation not required in case of companies. Sec.46 - charge takes effect as English Mortgage.

Govindji Popatlal.v.Visanjee (1960) E.A.361 - registration conclusive. Documents given up.

Premchand Ltd.v.Govindji Poptalal S.C.C.C.1978/60.

Falls under sec.100 Transfer of Property Act. Stand over 14.2.62.

Appearance as before.

Nazareth (continued):- 1961 E.A.396 at 403, H-I. Shah.v.Patel. President quotes last clause omitting "of".

It should go on record that Ratilal was in court from the beginning of the case until the time 2 D.W. began to give his evidence and I asked that witnesses should leave the court. He then left the court and came back after Sharadben gave her evidence at which time defence case closed. Defendant 2 was in court or in building throughout.

Whether they were here or not, why were they not called?

Mortgage requires transfer for interest. They are not mortgagors. Directors' signatures have been proved. Clear representation that the seal is the company's seal - action taken on that undertaking, 350,000 advanced subsequently. Company cannot deny that the seal is theirs. Directors are company's agents and company's executants - agents' obligation to plead estoppel is based on opportunity to plead

In the Supreme Court of Kenya, Nairobi

No.23

Judge's Notes of Counsels' Addresses

13th February 1962 continued

14th February 1962

In the Supreme
Court of
Kenya, Nairobi

No.23

Judge's Notes
of Counsels'
Addresses

14th February
1962

continued

estoppel - same allegation in Defence. Nothing of this kind in Defence - mere general denial. I objected to that evidence. Estoppel constantly applied without pleading. Compare Hernam Singh.v.Jamal Pirbhai (1951) A.C.688 at 699.

In Hirabibi.v.Ram Harilal (1929), 52 Indian Appeals, 362, it was held that this executant admitted execution, it was proved that attestation had not taken place - held no mortgage. This mortgage not made by signing but by sealing. As result of guarantee plaintiff agreed to lend. 10

Khanna (by leave) Wright.v.Romford merely suffices - seal of company when applied is equivalent to signature - no authority for dispensing with attestation.

Deffel.v.White - signature of directors to affixing of seal part of execution, does not dispense with attestation. At 146 Erle J, distinguishes attestation from execution. 147, Willis J. Requirement of attestation as well as execution had been abolished. Moises.v.Thornton - suit should be proved aliunde.

Moneylenders Act only requires signing. Re British Games - no question of attestation. 20

Submit this is a suit brought under Land Titles Ordinance. Govindji Popatlal's case, sec.68 only applies if attestation is challenged. Farod and Adamji is a peculiar case. C.A.V.

16th March 1962

Judgment delivered.

J.J.Patel for plaintiff and Defendant 9.

Velji Shah for other defendants.

Patel:- Order should be made in terms of prayer(a), (b) - date should be fixed. Asks for redemption date to be within 4 weeks. 30

ORDER. Accounts to be taken up to 30.4.62. Redemption date 1st May - 1.5.62. If money due not paid usual orders for sale. Leave to bid to plaintiff and defendant 9. Personal decrees against defendants 2-8. Costs - I certify the case as fit for Q.C. and junior counsel.

G. B. Rudd.

J.J.Patel:- asks for costs against defendant 1 for defendant 9 should be on higher scale.

Velji:- We were never at issue with defendant 9, he is not entitled to costs. 40

ORDER. Defendant 9 to have his costs against defendant 1 but I don't certify or allow them on the higher scale.

G. B. Rudd.

No.24

In the Supreme
Court of Kenya
NairobiJ U D G M E N T

No.24

Judgment
16th March 1962

10 This is a mortgage suit brought by the plaintiff, a limited company, which carried on business as a money lender, against the first defendant, another limited company, as mortgagor, against the defendants 2 to 8 inclusive as sureties for the first defendant and against the 9th defendant as second mortgagee.

None of the requirements of the Moneylenders Ordinance were complied with but under section 3 (1)(b) of that Ordinance the provisions of the Ordinance shall not apply,

20 "to any moneylending transaction where the security for repayment of the loan and or interest thereon is effected by execution of a legal or equitable mortgage upon immoveable property or of any bona fide transaction of moneylending upon such mortgage or charge."

If the plaintiff company is entitled to the exemption provided in section 3(1)(b) then I think it is clearly entitled to a preliminary decree. On the other hand if the plaintiff is not so entitled then the action must fail not only as against the first defendant but also as against the other defendants as well for non-compliance with the Moneylenders Ordinance.

30 The suit is founded upon a formal instrument which purports to be executed by the first eight defendants and which was produced as Exhibit 2 in the suit. This document is dated 31st January, 1956 and it can be summarised as follows :

40 It purports to provide that in consideration of the advance by the plaintiff of one million shillings to the first defendant the receipt whereof is acknowledged the first eight defendants jointly and severally promised to repay the said sum with interest thereon at 16% per annum, from 1st January 1956, the interest being payable from month to month and the principal by quarterly

In the Supreme
Court of Kenya
Nairobi

No.24

Judgment
16th March 1962
continued

instalments of 100,000/- each commencing on the 31st, October, 1956. As between themselves and the plaintiff the defendants 2 to 8 were to be treated as principal debtors together with the first defendant, but as between these defendants themselves the defendants 2 to 8 were to be treated as sureties for the first defendant.

For the better securing of repayment of the principal and interest to the plaintiffs the first defendant charged certain lands belonging to it and the buildings thereon in favour of the plaintiff with such principal sum and interest. There was provision that if the interest were paid punctually the principal money or any part thereof would not be called in before the 31st October, 1959. There was further provision that the second defendant should deposit with the plaintiffs 1,500 shares in the first defendant company together with the duly executed blank transfers.

10

20

There are further provisions in the document which I do not consider it necessary to mention in this judgment. The rate of interest was reduced to 12% per annum as from 1st January 1959 by subsequent agreement.

It was argued that this instrument could not exempt the transaction from the provisions of the Moneylenders Ordinance because the security did not consist solely of a mortgage or charge on immoveable property. I think this argument is disposed of against the defendant by the decision in S.M. Shah. v. C.M. Patel and Others (1961) E.A.397 for although that case is not entirely upon all fours on the facts I think the principle of the decision applies in this case. Indeed Sir Kenneth O'Connor made this clear in his judgment in Buganda Timber Company Limited v. Mulji Kanji Mehta (1961) E.A.477 at F on p.479. He said, referring to Shah v. Patel (supra)

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40

"We there held that the security in section 3(1)(b) of the Kenya Moneylenders Ordinance ... did not mean 'the only security' and that the paragraph applied to a case where promissory notes were described as

the security for a money lending transaction with a charge on land as additional security."

In the Supreme
Court of Kenya
Nairobi

No.24

Judgment
16th March 1962
continued

10 I have not found it easy to construe part
of paragraph (b) of section 3(1) of the Money-
lenders Ordinance. I refer particularly to
the words "to any moneylending transaction
where the security for repayment of the loan
and or interest thereon is effected by execu-
tion ... of any bona fide transaction of money-
lending upon such mortgage or charge." In
S.N. Shah v. C.M. Patel (supra) the learned
President of the Court of Appeal appears to have
applied a construction omitting the word "of"
preceding the words "any bona fide transaction".
If that be so I think, with respect, he was
right and that where the security for repayment
of the loan is effected by a bona fide tran-
20 saction on a mortgage or a charge of immoveable
property the Moneylenders Ordinance does not
apply.

In this case if the instrument is valid the
repayment of the loan and interest is certainly
secured by a mortgage or charge of immoveable
property and the fact that there was other
security incorporated in the instrument creat-
ing or confirming the mortgage or a charge does
not, in my opinion, take the matter out of the
exemption from the provisions of the Ordinance.

30 It was argued that the instrument did not
correctly set out the agreement or facts. What
happened was that at the end of November or the
beginning of December 1955 it was agreed that a
million shillings would be advanced by the
plaintiff on the personal security of the defen-
dants 2 to 8 inclusive plus a first mortgage on
the first defendant's land plus deposit of
shares and blank transfer. The title deeds
were surrendered and upon that agreement certain
40 moneys were advanced in December and the inter-
est on this money was paid for that month.
Other moneys were advanced in January 1956 and
the balance of the million shillings was paid
in February 1957. Some of this money was paid
direct into a bank to discharge a previous mort-
gage, so that the plaintiff could obtain a first
mortgage. I find that this all formed one

In the Supreme
Court of Kenya
Nairobi

No.24

Judgment
16th March 1962
continued

transaction flowing from the original agreement to lend a million shillings in all and that Exhibit 2 was the formal expression of that agreement and that the execution of such an instrument was a term of that agreement.

I find that this complete transaction was a moneylending transaction whereby the repayment of the money advanced with interest was secured by a mortgage or charge on immoveable property and that the whole transaction was a bona fide transaction of moneylending upon a mortgage of immoveable property. On this finding I hold that, subject to the mortgage being proved to be valid and effective, the transaction is exempt from the provisions of the Moneylenders Ordinance.

10

It was argued that the mortgage was not proved and that it was not valid and effective for want of due attestation. This was not properly pleaded in my opinion. It should have been specifically pleaded, but as the matter was of substantial importance and could be put right by amendment, I allowed this matter to be raised in defence indicating that if the plaintiff wanted an adjournment I was prepared to grant one. On the point of pleading it has been held that it is permissible to plead a traverse denying each and every allegation of fact contained in the plaint in the same manner as if every such allegation of fact had been specifically set out seriatim and specifically denied. I doubt that a plea in the form "save as in so far as herein expressly admitted the defendant makes no admission of any of the allegations contained in the plaint" is good pleading. In my opinion it is much too general, but however that may be I want to sound a note of caution as far as I am concerned in connection with both these forms of pleading; that is to say that where they are used the court has power to deal with the matter of costs and in a suitable case I should have no hesitation in doing so. The question of attestation arises only by implication from the plaint and a defence on the basis of failure of proper attestation or due execution is not in my opinion proved by a bare traverse without further specification.

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The question of due execution should have been much more clearly and specifically raised in the defendants pleading, however, fortunately the plaintiffs did not require any adjournment to meet the new defence and, as I have said already, I allowed the issue to be raised since it was an important issue and I considered that justice required that it should not be shut out.

In the Supreme
Court of Kenya
Nairobi

—————
No.24

Judgment
16th March 1962
continued

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Now the point as regards attestation and proof thereof was argued on these lines: the instrument (Ex.2) contains a simple mortgage as defined in section 58(a) of the Transfer of Property Act and according to section 59 of the same Act it was argued that it could only be created by a registered instrument signed by the mortgagor and attested by two witnesses. Further it was an instrument which required to be attested with the result that under section 20 68 of the Indian Evidence Act it could not be proved in evidence unless at least one of the attesting witnesses was called as a witness in the suit.

20

The facts are that the party to the instrument who created the mortgage is the first defendant, a limited company, whose Articles provide

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"The seal of the company shall not be affixed to any instrument except in the presence of two directors or such other person as the directors may in writing appoint for the purpose and the two directors or other person aforesaid shall sign every instrument to which the seal of the company is so affixed in their or his presence."

40

The instrument purports to be executed by and for the first defendant under its common seal affixed in the presence of the second and fourth defendants as directors and of the 5th defendant as secretary under their signatures to that effect. I am satisfied that the seal is the common seal of the company. It purports so to be and is the same seal as the seal on the charge in favour of the 9th defendant which is admitted to have been validly executed. The signatures of the 2nd, 4th and 5th defendants

In the Supreme
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Nairobi

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Judgment
16th March 1962
continued

have been proved but none of them was called as a witness. I find that the instrument was executed by the first defendant in accordance with its Articles. The signatures of the defendants 2 to 8 inclusive in their personal capacities have also been proved though there is some doubt as to whether the defendants 2 to 5 inclusive signed in the presence of both attesting witnesses. There is evidence for the defence that they did not. The advocate, Mr. Patel, who attested their signatures cannot remember but he was adamant that these defendants were present when he purported to attest their signatures. He is not sure whether they actually wrote their signatures in his presence or whether they merely acknowledged their signatures in his presence. The defence witness says he signed in the absence of Mr. Patel but I was not inclined to believe him. As regards the 5th defendant examination of the document will show that Mr. Patel must have affixed his stamp as Commissioner for Oaths before the defence witness signed. This is consistent with the evidence, but it seems to me unlikely if this witness's evidence is true, that the defendant Ratilal who, he says, was present when the defendants 2 to 4 signed, should not also have signed at that time. I think it is probable that these four defendants with the defence witness all attested and signed before Mr. Patel. The matter is however uncertain. In my opinion these signatures in a personal capacity do not require attestation as a matter of law. They have been proved and I think that that is sufficient to bind them.

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As regards the defendants 6, 7 and 8 there is similar conflict as to whether they signed in the presence of both Mr. J.J. Patel and the attesting witness. I believe the attesting witness, but here again once their signatures have been proved I think attestation was not necessary as a matter of law.

40

As regards the mortgage, it is the execution of the instrument by the first defendant that is material. Reverting to the facts again the instrument was registered as a charge under the Companies Ordinance and also in the Coast Registry of Title. There was argument as to

whether the latter registration was under the Land Titles Ordinance (Cap.159) or under the Registration of Titles Ordinance (Cap.160). I have no doubt but that this registration was under the Registration of Titles Ordinance. The title starts with a certificate of ownership issued under the Land Titles Ordinance and dated 13th September, 1923 which is after the commencement of the Registration of Title Ordinance and it is a certificate of title other than a certificate of interest under section 20 of the Land Titles Ordinance. Further, by virtue of section 3 of the Registration of Titles Ordinance the registration provisions of the Land Titles Ordinance ceased to apply in respect of the lands comprised in the certificate of ownership. Under section 2 of the Registration of Titles Ordinance the certificate of ownership is a grant within the meaning of that Ordinance and under section 19 of the same Ordinance the land comprised in the certificate as a grant became subject to the Registration of Titles Ordinance.

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Judgment
16th March 1962
continued

The Registration of Titles Ordinance contains special provisions in section 58 thereof for the attestation of documents requiring to be registered. In my opinion this section overrides section 59 of the Transfer of Property Act in respect of such documents. Ordinarily such instruments within the Colony must be attested before an advocate of the Supreme Court or a person holding one of a number of specified offices or a Notary Public, but this provision does not apply to an instrument executed by any duly registered company by means of its common seal affixed in accordance with the memorandum and articles of association. That was the legal position at the time when Exhibit 2 was executed. Since then the section has been amended to include a provision to the effect that an instrument executed by a company within the meaning of the Companies Ordinance shall be executed by means of the company's common seal affixed in accordance with the memorandum and articles of association. In my opinion this amendment does not apply in terms in this suit. However the original section in my opinion clearly envisaged that a duly registered company could execute an instrument requiring registration by means of its common seal affixed in accordance with its

In the Supreme
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Judgment
16th March 1962
continued

memorandum and articles. I think this impliedly authorises such a mode of execution and to that extent overrides section 59 of the Law of Property Act. It would be most extraordinary if section 59 of the Law of Property Act was intended to require that a company could only create a mortgage by way of signature of an authorised agent and not under its common seal. I doubt that this section applies at all in such a case. Execution under seal is not, in my opinion, precisely equivalent to execution by signature though for many purposes it has a like effect. It is to be noted that in both the Interpretation and General Clauses Ordinance and its replacement the Interpretation and General Provisions Ordinance 1956, the word "sign" is defined in effect as including "mark" with reference to a person who is unable to write his name but "seal" is not included or mentioned. It is clear to me that when the common seal of a company is affixed in execution of an instrument it is not affixed as a mark but as the ordinary and proper mode of execution in most solemn form by the company in accordance with the Companies Ordinance and its articles. The common seal of a company is not a mere mark which can take several forms, it is a single specific seal. If the common seal were to be treated as a signature by way of mark then directors signing to the effect that the seal was affixed in their presence would be attesting witnesses, but this is not so; see Deffel v. White (1866) L.R. 2 C.P. 144. In my opinion the instrument was duly executed by the defendant company and did not require attesting witnesses other than those required by the articles who in fact signed as executing witnesses and not as attesting witnesses.

In Govindji Popatlal v. Nathoo Visandjee (1960) E.A.361, it was held that in the case of an instrument registered under the Registration of Title Ordinance sections 1 sub-section (2), 23 and 32 of that Ordinance override section 68 of the Indian Evidence Act 1872 and that whilst registration did not afford irrebuttable proof of due execution it raised a presumption thereof which could only be rebutted by pleading and proving lack of execution within the framework

of the Ordinance. In my opinion that decision applies here. I do not think it was proved that the instrument was not duly executed as a valid mortgage. It has been registered under the Registration of Titles Ordinance and the mortgage or charge is endorsed on the certificate of title. I think that that is good enough and the defence, which is entirely technical, fails. Money is due on the agreement and has not been paid. The plaintiff is entitled to the usual preliminary mortgage decree with costs. Credit will, of course, be given for such of the money as has been paid when the account is taken.

In the Supreme
Court of Kenya
Nairobi

No.24

Judgment
16th March 1962
continued

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G. B. RUDD

ACTING CHIEF JUSTICE.

Delivered in open court in presence of J.J. Patel for plaintiff and Defendant 9. Velji Shah for other defendants.

20

No.25

PRELIMINARY DECREE FOR SALE

No.25

Preliminary
Decree for Sale
16th March 1962

THIS SUIT coming on the 6th, 7th, 8th, 9th, 12th, 13th and 14th days of February 1962, for hearing, and on the 16th day of March, 1962, for judgment, before the Honourable Mr. Acting Chief Justice Rudd, in the presence of Counsel for the Plaintiff and the Ninth Defendant, and Counsel for the First, Second, Third, Fourth, Fifth, Seventh and Eighth Defendants, IT IS HEREBY ORDERED that the Accounts be taken up to 30th day of April, 1962, and it is hereby declared that at the accounts taken before the Deputy Registrar, on the 3rd day of May 1962, the amount due to the Plaintiff on account of principal, interest and costs calculated up to the 1st day of May 1962, is Shs. 1,302,641/02, as appears by the Deputy Registrar's Certificate in the First Schedule hereto, and that the sum of Shs. 960,000/- shall carry interest at the rate of 12 per centum per annum from the 2nd day of May

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In the Supreme
Court of Kenya
Nairobi

No.25

Preliminary
Decree for Sale
16th March 1962
continued

1962, until realization, and it is decreed as follows :-

1. That if the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Defendants or any one or more of them pay into the Court the amount so declared due, that is Shillings 1,302,641/02, on or before the 1st day of May 1962, the Plaintiff shall deliver up to the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Defendants or to such person as they shall appoint, all documents in its (Plaintiff's) possession or power relating to the mortgaged property, specified in the Second Schedule hereto, and shall, if so required, re-transfer the property to the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Defendants or to such person as they shall appoint free from the mortgage and from all incumbrances created by the Plaintiff or any person claiming under the Plaintiff, at the cost of the said First, Second, Third, Fourth, Fifth, Seventh, Eighth or Ninth Defendants so paying.

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2. That in case the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Defendants or any of them shall pay the sum of Shillings 1,302,641/02, as aforesaid, together with subsequent interest and subsequent costs, if any, he or they shall be at liberty to apply to the Court that the Plaintiff Company's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

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3. That if such payment is not made on or before the said 1st day of May 1962, the mortgaged property, specified in the Second Schedule, or a sufficient part thereof, shall on application, be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied to payment of what is declared due to the Plaintiff as aforesaid, together with subsequent interest and subsequent costs as may be allowed by the Court, and that the balance, if any, be paid to the Ninth Defendant towards the amount declared due to the Ninth Defendant, and the balance, if any, be paid to the First Defendant.

40

4. That the Plaintiff and the Ninth Defendant shall have liberty to bid at the said sale of the property.

In the Supreme
Court of Kenya
Nairobi

5. That the First Defendant do pay to the Ninth Defendant its costs of this suit, to be taxed and certified by the Taxing Master of this Court.

No.25

10 6. That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the Plaintiff shall be at liberty to apply for personal decrees for the amount of the balance against the Second, Third, Fourth, Fifth, Seventh and Eighth Defendants jointly and severally.

Preliminary
Decree for Sale
16th March 1962
continued

GIVEN under my hand and the Seal of the Court at Nairobi this 16th day of March 1962.

ISSUED on this 17th day of May 1962.

sd. G.B. Rudd,

20 ACTING CHIEF JUSTICE,
H.M. SUPREME COURT OF KENYA,
AT NAIROBI.

THE FIRST SCHEDULE

Principal (Shs.960,000/-) and interest up to 31st August, 1960	Shs.1,066,582.52
Interest on Shs.960,000/- at 12% p.a. from 1.9.60 to 1.5.1962	Shs. 192,000.00
Costs taxed	Shs. 43,944.50
30 Drawing and filing Accounts	Shs. 26.00
Court fee upon Accounts	Shs. 46.00
Advocates costs for attend- ance at the passing of accounts	Shs. 42.00
	<hr/>
	<u>Shs.1,302,641.02</u>

In the Supreme
Court of Kenya
Nairobi

THE SECOND SCHEDULE

No.25

Preliminary
Decree for Sale
16th March 1962
continued

ALL THAT freehold piece of land situate in the Province of Seyidie at Changamwe Miritini in the Colony and Protectorate of Kenya containing by measurement Seventeen decimal seven four (17.74) acres or thereabouts being the premises comprised in a Certificate of Ownership dated the 13th day of September 1923 (registered in the Registry of Titles at Mombasa as No. C.R. 4226/1) which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the said Certificate of Ownership and more particularly on Land Survey Plan Number 18822 deposited in the office of the Recorder of Titles at Mombasa aforesaid, TOGETHER with the buildings and improvements erected and being thereon, now held by the First Defendant, Coast Brick & Tile Works Limited, subject to a grant of Right of Way registered as Number C.R. 4226/14.

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sd. D.J. Devine;
DEPUTY REGISTRAR,
H.M. SUPREME COURT OF KENYA,
AT NAIROBI.

No.26

Notice of
Appeal
24th March 1962

No.26

NOTICE OF APPEAL

TAKE NOTICE that the First, Second, Third, Fourth, Fifth, Seventh and Eighth Defendants above-named being dissatisfied with the decision of the Honourable Mr. Acting Chief Justice Rudd given herein at Nairobi on the 16th day of March 1962, intend to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision.

30

DATED AT NAIROBI this 24th day of March 1962.

sd. Veljee Devshi Shah,
for VELJEE DEVSHI & BAKRANIA,
ADVOCATES FOR THE APPELLANTS.

40

To,
The Registrar,
Supreme Court of Kenya,
Nairobi.

In the Supreme
Court of Kenya
Nairobi

and to:

No.26

Messrs. J.J. & V.M. Patel,
Advocates for the Plaintiff/Respondent,
Gulzaar Street,
NAIROBI.

Notice of
Appeal
24th March 1962
continued

10 The address for service
of the Appellants is:

C/O VELJEE DEVSHI & BAKRANIA,
Advocates, Market Mansion,
Bazaar Street,
P.O. Box 5087,
NAIROBI

20 Note:- A Respondent served with this Notice
is required within fourteen days after
such service to file in these proceed-
ings and serve on the Appellants a
notice of his address for service for
the purposes of the intended appeal,
and within a further Fourteen days to
serve a copy thereof on every other
respondent named in this notice who has
filed notice of an address for service.
In the event of non-compliance, the
Appellants may proceed ex-parte.

FILED the 24th day of March 1962, at Nairobi.

30 sd. D.J. Devine,
DEPUTY REGISTRAR,
SUPREME COURT OF KENYA.

Drawn and filed by:
VELJEE DEVSHI & BAKRANIA,
Advocates,
Nairobi.

nvp.

In the Court
of Appeal for
Eastern Africa

No.27

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA

No.27

AT NAIROBI

Memorandum of
Appeal
19th May 1962

CIVIL APPEAL NUMBER 37 OF 1962

BETWEEN

- | | | | |
|--------------------------------------|---|-------------|----|
| 1. COAST BRICK & TILE WORKS LIMITED, | } | APPELLANTS. | 10 |
| 2. KANJI MEGHJI SHAH, | | | |
| 3. SHARDABEN RATILAL SHAH, | | | |
| 4. KESHAVLAL KANJI SHAH, | | | |
| 5. RATILAL KANJI SHAH, | | | |
| 6. ZAVERCHAND SOJPAL JETHA and | | | |
| 7. HIRJI RAMJI SHAH | | | |

AND

- | | | |
|------------------------------------|---|-------------|
| 1. PREMCHAND RAICHAND LIMITED and) | } | RESPONDENTS |
| 2. SHAH MEGHJI MULJI LIMITED | | |

(An Appeal from Judgment and Decree of the Supreme Court of Kenya at Nairobi (Mr. Acting Chief Justice Rudd) dated the 16th day of March 1962

20

in

Civil Case Number 1629 of 1960

Between

Premchand Raichand Limited Plaintiff

and

- | | | | |
|--------------------------------------|---|------------|----|
| 1. Coast Brick & Tile Works Limited, | } | Defendants | 30 |
| 2. Kanji Meghi Shah, | | | |
| 3. Shardaben Ratilal Shah, | | | |
| 4. Keshavlal Kanji Shah, | | | |
| 5. Ratilal Kanji Shah, | | | |
| 6. Bharmal Raishi Shah, | | | |
| 7. Zaverchand Sojpal Jetha, | | | |
| 8. Hirji Ramji Shah, and | | | |
| 9. Shah Meghji Mulji Limited. | | | |

MEMORANDUM OF APPEAL

The Appellants, (1) Coast Brick and Tile

Works Limited (hereinafter called "the Company"), (2) Kanji Meghi Shah, (3) Shardaben Ratilal Shah, (4) Keshavlal Kanji Shah, (5) Ratilal Kanji Shah (6) Zaverchand Sojpal Jetha, and (7) Hirji Ramji Shah, (hereinafter called "the Sureties"), Appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision above mentioned on the following principal grounds of appeal, namely :-

In the Court
of Appeal for
Eastern Africa

No.27

Memorandum of
Appeal
19th May 1962
continued

- 10 1. Due execution of the Charge sued on by the Company was not proved.
2. It was not proved that the seal was the Company's seal.
3. It was not proved that two directors and a secretary of the Company were in fact present when the said seal was affixed, or saw the seal affixed.
4. It was not proved that the persons purporting to sign as such directors or secretary in
20 fact held the said respective offices at the relevant time.
5. The Memorandum and Articles of the Company were not proved, and their admission informally at a stage it was done was irregular, a nullity, and did not constitute proper proof.
- 30 6. The First Respondent was the sole plaintiff in the action, and there was no issue as between the First Respondent on the one hand and the Second Respondent (Originally Ninth Defendant) on the other hand, calling for a defence or participation in the case as against the plaintiff, nor was there any issue as between the first eight defendants, or any of them, calling for the eight defendants, or any of them, filing points of claim (which was not done) as against the Second Respondent (Ninth Defendant), and the latter filing points of defence (which was not done) as against the first eight defendants, or attempting to prove anything in the suit, or recovering costs of the suit as against the first
40 eight defendants or any of them.
7. The Charge of the Second Respondent (Ninth Defendant) was wrongly admitted in evidence, or

In the Court
of Appeal for
Eastern Africa

No.27

Memorandum of
Appeal
19th May 1962
continued

treated as part of the evidence either in the suit or adduced for the First Respondent (Plaintiff).

8. The comparison with the Second Respondent's Charge was improper, irregular, not permissible, and could not and did not prove anything.

9. Due attestation of such execution (if any) by the Company, did not exist, was incapable of proof and was not proved.

10. Signature under Section 59(9) of the Transfer of Property Act was equivalent to execution by the Company, and the two alleged directors and a secretary signed as execution witnesses, hence there were no attesting witnesses as such to the execution by the said Company. 10

11. It was not proved, if there were any attesting witnesses, they in fact saw the seal of the Company put in the presence of any directors and a secretary, or that they in fact saw such directors and a secretary signing or witnessing the affixing of the seal of the said Company. 20

12. The decision that no attestation of execution of the Charge by the Defendants Numbers 2 to 8 in so far as they were constituted mortgagors, was not required, was erroneous.

13. Due attestation of execution by the Sureties (Appellants 2 to 7) was not established, and conclusions of the learned judge to the contrary are erroneous.

14. The decision that the question of attestation of the execution by the Company was governed by the Registration of Titles Ordinance and not by the Land Titles Ordinance and the Indian Transfer of Property Act 1882, Section 59, was both erroneous, and based on assumptions supported by no evidence. 30

15. There was no consideration for the Sureties joining in the Charge or assuming liabilities thereunder, and no request by the Sureties to make the loan secured by the Charge was proved, and there was no evidence to prove such request or consideration in the face of the loans 40

preceding the Charge being on the strength and under cover of a guarantee, never revoked, and stamped after a number of years.

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10 16. There was no continuity or identity as regards the personnel, as between Exhibit 9, the letter of proposal of 29th November 1955, and Exhibit 10, the guarantee dated 1st December 1955, on the one hand and the ultimate Charge (Exhibit 2) on the other hand; nor was the specific Charge, Exhibit 2, either mentioned in Exhibit 9 or Exhibit 10; nor was there any certain definite or ascertainable unbroken link, continuity, or indivisibility between the first six loans and the ultimate Charge, so as to be part of one composite dealing or a single transaction.

17. The Appellants 2 to 7 never borrowed or received any part of the loan, and were never borrowers.

20 18. The only relief claimed against defendants 2 to 8, on the suit as framed, was a personal judgment for deficiency, if any, after sale, and as such there was no jurisdiction to award any larger or earlier relief.

30 19. The loans were eight in number and were separate and distinct, six of which preceded the execution of the Charge, and were unsecured thereby, and two of which were subsequent thereto, and the decision that there was one transaction of moneylending secured by the Charge, was erroneous.

20. The decision that in law or in fact there was a single loan of Shs.1,000,000/-, or that the same was made on 31st January 1956, was an impossible one and erroneous.

40 21. The loans totalling Shs.650,000/- were not due or repayable on 31st January 1956 or before and could not notionally have become part of a new loan under the Charge on 31st January 1956 of Shs.1,000,000/-.

22. Section 3(1)(b) of the Moneylenders Ordinance does not and is not intended to protect loans anterior to and only fictionally under a charge, but actual loans under one.

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23. Seven sureties and a deposit of share certificates with blank transfers were all "securities" under the Moneylenders Ordinance and the said Ordinance is incapable of being construed to protect a transaction of money-lending, supported by more than one security, or a case of a single security where it is not one of charge or mortgage. This aspect is not covered by S.N. Shah v. C.M. Patel (1961) E.A. p.397, and the Uganda decision of Buganda Timber Co. Ltd. v. Mulji Kanji Mehta (1961) E.A.p.477, was not binding, as regards this Court or the Court below, upon the Kenya Ordinance.

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24. The protection under Section 3(1)(b) of the Moneylenders Ordinance does not extend even in the case of the only security of a charge, where the contract and the security by charge are not evidenced by separate documents.

25. There is or was no warrant in transform-
ing the expression "of any bona fide transaction
of moneylending" into "to any bona fide tran-
saction of moneylending."

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26. There cannot be a "bona fide transaction
of moneylending upon..." a "charge upon immove-
able property", unless the money is substanti-
ally upon and parted with against the execution
of a charge intended to be and immediately
perfected by registration within the time re-
quisite normally therefor.

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27. A moneylending transaction cannot be said
to be "effected" "by execution of a charge upon
immoveable property", if either no execution
takes place or is intended to take place at
some distant future.

28. The exemption under Section 3(1)(b) of the
Moneylenders Ordinance cannot be so construed as
to render the whole object of the main enacting
prohibitions nugatory in regard to unsecured
loans, merely because they happen to be or are
later covered by a charge as the only or one of
many securities; the assistance of the Court,
in such circumstances, cannot be given so as to
make loans recoverable which in law were and are
unenforceable, or might be illegal as by an
unlicensed moneylender.

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FILED BY:-

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FILED this 19th day of May 1962, at Nairobi.

Sd. R. Patel.

for Registrar,
Court of Appeal for Eastern Africa
Nairobi.

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JUDGMENT OF GOULD V.P.

The first respondent company in this appeal (hereinafter referred to as "the mortgagee") held a mortgage over land in Kenya, the registered proprietor of which was the first of the appellants named above (hereinafter referred to as "the Company"). The mortgagee brought an action in the Supreme Court of Kenya against the Company as Mortgagor of the said land joining therein as defendants appellants 2-7 (inclusive) who, together with one other, were described in the mortgage as sureties. The other was also described as a surety, and was made the sixth defendant in the action, but, as he was not served, the action did not proceed against him and he is not an appellant. There was a second mortgage over the land in favour of the second respondent company, which was joined in the action as the ninth defendant. The mortgagee's

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claim, in consequence of default in payment of moneys due under the mortgage, was for the usual preliminary decree for sale of the land and in the event of deficiency, for liberty to apply for a personal decree against the Company and the sureties jointly and severally for the amount thereof. In the Supreme Court the mortgagee succeeded and the learned Acting Chief Justice made the preliminary decree as claimed, together with liberty to apply for personal decrees against all but the sixth defendant. Against that judgment and decree the appellants now bring this appeal.

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There are certain matters which are common ground. One is that, among other businesses, the mortgagee at the relevant time carried on the business of moneylending. Another is that in respect of the transaction for which the mortgage is relied upon as security, the requirements of section 11 of the Money-lenders Ordinance (Cap. 528 Laws of Kenya) were not complied with. As a result, unless the provisions of that Ordinance do not apply to the transaction by virtue of the operation of section 3(1)(b) thereof, the action by the mortgagee must fail. Finally, on the fourth day of the hearing of the appeal in this court it was conceded by counsel for the appellants that the transaction in question fell to be considered on the basis of registration of the mortgage under the Registration of Titles Ordinance (Cap. 281 Laws of Kenya) and not the Land Titles Ordinance (Cap. 282) - that, then, became common ground for the first time.

The substance of the attack by counsel for the appellants upon the validity and enforceability of the mortgage (as modified by the concession above referred to) can, I think, be considered under three very general heads. It is claimed -

(a) That the moneylending transaction was not taken out of the scope of the Money-Lenders Ordinance by section 3 and is therefore unenforceable. This is concomitant with an attack upon the finding of the Acting Chief Justice that the dealings between the parties concerned all formed one complete moneylending transaction secured by a mortgage or charge on immoveable

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property and involves reference to previous decisions of this court, and to legislation touching land and chattels.

(b) That the mortgage was invalid for lack of attestation of its execution by the Company and defective attestation of its execution by the sureties. This involves consideration of the question whether, if attestation was necessary under the law and was in fact lacking or defective, the mortgage was nevertheless valid by reason of the provisions of the Registration of Titles Ordinance pointing to what has been called "the sanctity of the register."

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(c) That there was no consideration in the cases of some, if not all, of the sureties who joined in the mortgage.

It will now be convenient to deal with the history of the events preceding and surrounding the execution of the mortgage which was dated the 31st January, 1956, and registered by the Registrar of Titles on the 27th February, 1956. A memorial of its registration appears on the Certificate of Ownership of the land which shows the Company as owner by transfer, and which now falls to be considered as a certificate of title under the Registration of Titles Ordinance.

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The main evidence of the sequence of events came from Hemraj Nathubhai Shah (hereinafter referred to as "Hemraj"), a director of the mortgagee, and it is not without significance that the Company failed to call any witness on this aspect of the matter, confining its evidence to questions of attestation and consideration. In November, 1955, Kanji Maghji Shah (hereinafter referred to as "Kanji"), a director and manager of the Company, approached Hemraj for a loan of Shs. 1,000,000/- for the Company, which was badly in need of money. Hemraj was taken by Kanji to see the Company's factory which was on the land subsequently mortgaged, and considered the land and factory to be worth, at that time, about Shs. 3,000,000/- Kanji agreed to give as security "a mortgage and blank transfer of 1,500 shares in the company and personal guarantees of shareholder and directors of the brick factory and security of

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some good business people".

The arrangement was confirmed by a letter signed by Kanji and one B.R. Shah, (the sixth defendant, dated the 29th November, 1955, which is in the following terms :-

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"At my request, you have considered to advance to Coast Brick & Tile Works Ltd., of Mombasa, a sum not exceeding Shs. 1,000,000/- (Shillings One Million only), and in consideration of this I hereby undertake to get executed in the proper manner by the Company all the papers, such as a Debenture on the assets of the above Company, Deposition of the Title Deeds free from all incumbrances of the properties belonging to the said Company, joint and several guarantees of each and every shareholder both present and future of the said Company and the Deposition of the Share-Certificates of all the Share-holders together with the Blank transfers thereof together with a resolution passed in the Directors meeting that they will not object the transfer of the shares when it is required to do so and such other papers which are necessary to secure the above loan.

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I hereby authorise you to instruct your Advocates to prepare all the necessary documents required by you to give effect to the above and any further papers or documents not enumerated in the above which are necessary and hereby confirm all the legal costs and incidental expenses will be borne by the said Borrowing Company."

Clearly the loan contemplated from the outset was one of Shs. 1,000,000/-. The letter speaks of "deposition" of the title deeds free of encumbrances: there was already a registered charge by deposit of title deeds on the property in favour of the National Bank of India Ltd., and according to Hemraj's evidence it was agreed that this was to be released. On or about the 1st December, 1955, Kanji handed to Hemraj a guarantee bearing that date on a form used by the mortgagee. It is made in consideration of "certain business or credit facilities" being allowed

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to the Company, and is limited to "£50,000/- East African" which rather contradictory expression, I take it to be common ground; is intended to mean £50,000, or Shs.1,000,000/-: the date for repayment and rate of interest are not mentioned. The guarantee was signed by all the sureties joined in the action and also by one Harilal Kanji, who was not joined as a party to the mortgage subsequently executed.

When the guarantee of the 1st December, 1955, was handed over, an advance of Shs. 200,000/- was made: then there were further advances of Shs. 200,000/- on the 5th December, Shs. 50,000/- on the 9th and Shs. 50,000/- on the 23rd December, Shs. 50,000/- on the 11th January, 1956, and Shs. 100,000/- on the 16th January, 1956. Then, after the mortgage was signed, Shs. 300,000/- was paid on the 6th February to the credit of the Company with the National Bank of India Ltd. to discharge its prior encumbrance and the balance of Shs. 50,000/- was paid on the 24th February, 1956. At some date not specified, Hemraj was handed a blank share transfer form bearing the signature of Kanji and that of a witness, but unaccompanied by any share certificates. The discharge of the security of the National Bank of India was duly registered against the title on the same day as the new mortgage. In his evidence Hemraj said that he gave instructions to Messrs. Cumming & Miller, Advocates, to have the mortgage drawn. As I have said, his evidence was not contradicted by any witness for the appellants, and receives confirmation from a letter in evidence, which I need not set out, indicating that before the 10th December, 1955, Messrs. Cumming & Miller had asked the National Bank of India for the title deeds, undertaking to hold them in trust for the bank. The only reasonable inference is that they wanted the deeds to enable them to prepare an appropriate security.

On these facts and this evidence I have no doubt whatever that there was ample justification for the finding of the Acting Chief Justice that the events in question all formed one transaction flowing from the original agreement to lend a million shillings in all. By this I understand him to mean that the mortgage over

the land and factory was always intended to be included in the security and the loan from the first was to be Shs. 1,000,000/-.

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Counsel for the appellants submitted that there was no evidence of a binding agreement to that effect and only vague evidence of an oral agreement. It appears to me immaterial whether the agreement was binding; the question is what was the transaction which the parties arranged or agreed to carry out. As I have indicated, I consider the evidence as to that to be clear and uncontroverted. An advance of a million shillings does not necessarily have to be made in one lump sum. Counsel for the appellants relied upon passages in Hemraj's evidence to the effect that he was prepared to lend on the guarantee of the 1st December, 1955, as indicating that the mortgage might have been an afterthought. I do not accept that the passages, read in the context of the whole of Hemraj's evidence, bear any such import, and no witness for the appellants was called to support the suggestion. Again, counsel relied upon the fact that Harilal Kanji, who signed the guarantee, did not become a party to the mortgage. Harilal Kanji was not called as a witness and the reason for the change is unknown but the argument is in my view quite insufficient to negative or weaken the evidence that the whole of the moneys advanced were in fact secured by the mortgage and were always intended so to be. The principal parties were the Company and the mortgagee, as borrower and lender - I am unable to see that it is of any materiality that one surety was permitted to drop out, nor do I consider to be relevant to present issues the question whether any liability existed or survived in Harilal Kanji. A further argument advanced for the appellants was that the mortgage, in which the phrase, "... in consideration of the sum of SHILLINGS ONE MILLION now paid to the Company by the Chargee" was used was inaccurate and misleading in that the moneys were not "now paid" but advanced by instalments. I am unable to see that this argument assists the appellants. If the transaction evidenced by the mortgage is within the Money-Lenders Ordinance it is unenforceable for other reasons. If it is not within the prohibitions of that

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Ordinance there is no legal requirement that the consideration for a mortgage of land must be expressed with complete particularity, and in my view the method adopted in the mortgage, as between the parties to it, was adequate to cover the actual method of advance. I think I might mention at this stage that this difference between the mode of expressing the consideration in the mortgage and the actual method of advance was made the subject of a submission by counsel for the appellants in relation to section 3 of the Money-lenders Ordinance (set out below). The argument was that in order to qualify for exemption under that section a moneylending transaction must be bona fide. I do not quarrel with this, though the expression is not used in the opening words of section 3(1)(b). The argument then proceeded that because under section 11, as construed by court decision, great accuracy was required in setting out in the memorandum the details of the contract and the date of the advance, a moneylending transaction would not qualify for exemption under section 3 unless the same particularly was observed in setting out the consideration in the mortgage deed which secures the loan. With respect, I think this is a non sequitur: section 3 deals with what is without and not within the Ordinance and in my opinion a moneylending transaction upon the security of immoveable property is bona fide if it is genuine, as opposed to sham or colourable, and is made in compliance with the Law applicable to such mortgages generally.

In approaching the questions arising under the Money-Lenders Ordinance, therefore, I do so on the basis that the transaction under consideration was a bona fide transaction of money-lending; that security was given over immoveable property though there was also other security; and that it was always the intention of the parties that the loan should be Shs. 1,000,000/- though the actual advance was made in instalments, some of which were before and some after the execution of the security upon the immoveable property.

Section 3 of the Money-Lenders Ordinance reads as follows :-

"3. (1) The provisions of this Ordinance shall not apply -

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(a) to any money-lending transaction where the security for repayment of the loan or of interest thereon is effected by execution of a chattels transfer in which the interest provided for is not in excess of nine per centum per annum;

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10 (b) to any money-lending transaction where the security for repayment of the loan or of interest thereon is effected by execution of a legal or equitable mortgage upon immoveable property or of a charge upon immoveable property or of any bona fide transaction of money-lending upon such mortgage or charge.

20 (2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a money-lender or not."

30 Counsel for the appellants called attention to the scope of the money-lending legislation at the various stages since its inception in Kenya by the Money-Lenders Ordinance, 1932 (No. 45 of 1932). In that Ordinance the scope was defined in relation to occupation, "money-lender", including all persons whose business was money-lending, but excluding those whose business was pawnbroking, banking, insurance or "lending money on mortgage"; and any business not having the primary object of lending money. That Ordinance came into operation on the 1st January, 1933, but by Ordinance No.44 of 1933 the excluded business of "lending money on mortgage" was replaced by that of lending money on "chattels transfer, or on mortgage or charge of immoveable property". Thus the exclusion of those who lent money on securities was limited to some extent but the definition still related to the
40 business and not the transaction.

A major change was brought about three years later. By Ordinance No. 37 of 1936, all the excluded businesses, except that of pawnbroker, were deleted from the definition of "money-lender"

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and a new section, identical for all material purposes with the present section 3 was enacted, placing emphasis for the first time on the transaction instead of the business. In 1959, by Ordinance No.36 of that year, the legislature again enacted that a number of persons carrying on certain types of business should be excluded from the definition of "money-lender" and the definition so enacted was deemed to have come into operation on the 1st January, 1933. The businesses exempted were those carried on by pawnbrokers, building societies, banking companies, insurance, or those of persons whose primary object was not money-lending. This amendment made the definition of money-lender substantially the same as that in equivalent English legislation, but the present section 3, which has no counterpart in English legislation, was not repealed, with the result that in Kenya exemption may be available under the definition by reference to the nature of the business, or, under section 3, by reference to the nature of the transaction. 10 20

I am afraid I do not derive any assistance from consideration of the history of the legislation in the problems of construction of section 3 in relation to the facts of this case. Counsel for the appellants suggests that the reason for the exemptions contained in the section is that such transactions are sufficiently protected from the point of view of public interest by the requirements of the Chattels Transfer Ordinance (Cap. 28 Laws of Kenya) and the Registration of Titles Ordinance, and as I understand him, seeks to intensify on this account the requirements as to form contained in the latter - a process of induction. Counsel for the mortgagee suggests that the policy was to render transactions registered under land systems in which there was some form of guarantee of title, immune from being "wrecked" by the type of mis-statement, accidental or otherwise, which would fall within section 11 of the Money-Lenders Ordinance. Neither suggestion appears to take full account of the wide range of mortgage transactions which may be effected under the Land Titles Ordinance and the Crown Lands Ordinance, in which there are no requirements as to the form 30 40

of mortgages and little or no guarantee of title. As to chattels, moreover, section 11 of the Money-Lenders Ordinance applies with full effect, despite registration and the strict terms of the Chattels Transfer Ordinance, provided the interest exceeds 9% per annum.

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10 I agree with counsel for the mortgagee that there is nothing in the history of the legislation which ought to be treated as showing that section 3 means anything but what it says. In it I find a clear statement of intention that moneylending transactions upon the security of mortgages of immovable property are taken out of the Ordinance with the result that they must be looked at as if the Ordinance did not exist. In the case of Shah v. Patel [1961] E.A.397 this court held that the exemption provided by the section was not affected by the fact that there might be other security for the loan in addition to the immovable property. That finding is binding on this court and it follows that it is not material in the present case that a blank share-transfer form was handed to the mortgagee or that there were guarantors. That point being eliminated and the transaction being bona fide what remains? As I see it there is only the fact that a number of instalments of the advance were paid over prior to the execution of the mortgage.

30 Counsel for the appellants submitted that prior to such execution the amounts advanced after the signing of the guarantee of the 1st December, 1955, would have been irrecoverable - that the contract to repay them would have been unenforceable by virtue of section 11 of the Money-Lenders Ordinance. That would, of course, be the position if there never had been any question of a mortgage but that was not the case. I do not have to consider whether, if some supervening occurrence had resulted in the mortgage not being executed, the oral agreement that there should be one would have been sufficient to invoke section 3(1)(b), for that did not happen - the decision of this court in Buganda Timber Co. Ltd. v. Mulji Kanji Mehta, [1961] E.A. 477 makes it probable that such an agreement would be held insufficient. These considerations are not relevant to the present

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facts in which the mortgage of immovable property was a part of the bargain from the beginning, and no more than normal delay took place before the mortgage was executed. Accepting that the other securities were irrelevant I do not think it can be doubted that the transaction fell directly within the wording and intent of section 3(1)(b) as a normal transaction of lending money on the security of a mortgage upon immovable property.

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An argument that the word "is" in section 3(1)(b) made it necessary that the loan be contemporaneous with the execution of the security was rejected in Shah v. Patel (supra). Even had it not been it would not have availed the appellants here, for counsel in Shah's case could only put his argument as high as "at or about the time the loan was made" which is a reasonably apt description of what occurred here. In that case the learned President said, at pages 403-4 :-

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"If the time for payment is extended in reliance on the security of an existing charge, there is, in my opinion, a 'transaction of money-lending upon suchcharge'. The learned judge found that the material transactions in this case were made bona fide, and I see no reason to differ from that finding. Even if the previous loan would have been unenforceable because of some provision of the 'Money-lenders' Ordinance, I see nothing to prevent the borrower agreeing, if he wished, to renew the contract in consideration of a promise of further advances and to secure it by a charge on land which would oust the provisions of that Ordinance. The presence in the Ordinance of s.3(1)(b) would distinguish such a case from Dunn Trust v. Feetham, (4) [1936] 1 K.B. 22."

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Counsel for the appellants has rightly pointed out that Shah's case related to a subsequent advance upon an existing security and not to a security given subsequently to the advance - that is that the contest related to the

concluding words of section 3(1)(b) and not the earlier part. I think the opinion expressed in the passage quoted would nevertheless--- embrace the provision of immovable security upon the renewal of an existing loan; that does not arise here, nor does any question of the position which would arise if immovable security, not part of the original bargain, were provided during the currency of a loan not yet due for payment. For the purpose of the present case all I would gather from the passage quoted is that in the meaning of the word "is" in section 3(1)(b) there is no emphasis on time so as to require that security and loan be rigidly contemporaneous. On the view of the transaction formed by the learned judge, which I have endorsed above, loan and security are so wedded in time and in the contemplation of the parties as to bring the transaction naturally and inevitably within the terms of section 3(1)(b). The grounds of appeal relating to this aspect of the case, in my opinion, fail.

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I pass now to the questions relating to the attestation of the signatures to the mortgage. The Acting Chief Justice found that the common seal of the Company was affixed to the document in the presence of three defendants and in accordance with the Articles. That is now common ground and it is not claimed by counsel for the mortgagee that the three defendants signed otherwise than as part of the execution, i.e. they were not attesting witnesses. The signatures of the sureties (divided into two groups) all purport to have been witnessed by two persons - there were controversial matters touching the attestation of these signatures which counsel for the appellants submits were left unresolved by the Acting Chief Justice, but which counsel for the mortgagee claimed were resolved at least by implication.

I will take first the case of the Company, the registered proprietor of the land and the borrower of the money. Section 46(1) of the Registration of Titles Ordinance provides that whenever any land is intended to be charged or made security "the proprietor shall execute a charge which must be registered". Part XII of the Ordinance contains one section

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only and is headed "Attestation of Instruments".
Omitting subsections (1)(b) and (1)(c) which
enumerate persons who may attest instruments
executed outside Kenya, section 58 reads as
follows :-

"58. (1) Every signature to an instru-
ment requiring to be registered and to a
power of attorney whereof a duplicate or
an attested copy is required to be deposit-
ed with the registrar shall be attested by
one of the following persons -

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(a) within Kenya -

- (i) a judge or magistrate;
- (ii) a registrar of titles;
- (iii) a notary public;
- (iv) an advocate;
- (v) a justice of the peace;
- (vi) the Registrar or Deputy Registrar
of the Supreme Court;
- (vii) an administrative officer;

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(2) In all cases where an official
holding a seal of office shall attest any
instrument he shall authenticate his signa-
ture by his official seal.

(3) The provisions of this section
shall not apply to any instrument executed
by the Governor, nor to any instrument
executed under its common seal by a company
within the meaning of the Companies Ordin-
ance nor to any instrument duly executed by
a company to which Part X of that Ordinance
applies.

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(4) An instrument executed by a
company within the meaning of the Companies
Ordinance shall be executed by means of the
company's common seal affixed in accordance
with the memorandum and articles of
association."

Subsection (4) was enacted after the registra-
tion of the mortgage and has no direct bearing
on the issue. Section 1(2) of the same
Ordinance reads :-

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"1. (2) Except so far as is expressly enacted to the contrary, no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Ordinance."

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10 I think it is abundantly clear that section 58 provides a code in relation to attestation of instruments requiring to be registered under the Ordinance. The Privy Council in Govindji Popatlal v. Nathoo Visandi /1962/ E.A. 372 upheld the decision of this court that section 68 of the Indian Evidence Act, 1872 (requiring proof of a registered document by the evidence of an attesting witness) was over ridden by the provisions of the Registration of Titles Ordinance. Similarly, the sections of the Ordinance which I have referred to must super-
20 sede, in relation to land under the Ordinance, the requirements of section 59 of the Indian Transfer of Property Act that a mortgage be signed by the mortgagor and attested by at least two witnesses. The Registration of Titles Ordinance requires that a charge be executed by the registered proprietor and that every signature be attested by one person falling within certain categories.

30 Subsection (3) of section 58 states that the provisions of the section shall not apply to any instrument executed under its common seal by a company. Counsel for the appellants submitted that by reason of this exemption section 59 of the Transfer of Property Act filled the gap and applied to companies and that two attesting witnesses were required. I do not accept this. As I have stated, I believe section 58 to contain a complete code in relation to attestation. It is inappropriate to speak of a company
40 "signing" a document and it is to be noted that the word used in the Registration of Titles Ordinance in relation to transfers, leases and charges is "execute". The intention to my mind is quite clear - an instrument executed by a Company under its common seal is valid without the attestation required by section 58(1). There is a passage in REGISTRATION OF TITLE TO LAND THROUGHOUT THE EMPIRE by Hogg, at page 226, which is of interest :-

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"In Saskatchewan, Alberta, and North-West Territories instruments under the seal of a corporation are expressly excepted from the ordinary requirement as to attestation; but in Saskatchewan (as in New Zealand) indemnity cannot be recovered for loss through improper use of the seal. In all these jurisdictions - South Australia to Saskatchewan - where no special mode of execution is required by the registration statutes, the seal must of course be affixed in accordance with the corporation's own regulations, and as to this the registrar would be entitled to information; if not duly affixed, registration could apparently be refused."

10

In Kenya the company is expressly excepted and it is implied that the seal shall be affixed in accordance with the company's regulations, as was done, it is common ground, in the present case. Whether the new subsection (4) of section 58 is designed to make explicit what was originally implied, or to exclude execution on behalf of a company by an attorney or agent, I do not need to decide. I agree, therefore, with the Acting Chief Justice that the Mortgage was properly executed by the Company and no attestation was needed; accordingly a valid charge was created.

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30

I turn to the question of the sureties and the finding of the Acting Chief Justice that "these signatures in a personal capacity do not require attestation as a matter of law. They have been proved and I think that is sufficient to bind them." It is necessary to look more closely at the details of the mortgage document. It contains a recital of the mortgagee's agreement to lend the Company Shs.1,000,000/- a recital that the sureties had agreed to join in as sureties for the Company, a joint and several agreement by the Company and the sureties to repay, a charge of the land by the Company and an agreement that although as between the Company and the sureties the latter are only sureties yet as between the mortgagee and the sureties the latter are considered principal debtors so as not to be released by the giving

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of time or variation of the agreement.

In the Court
of Appeal for
Eastern Africa

No.28

Judgment
5th March 1964
continued

10 The words used in section 58(1) of the
Registration of Titles Ordinance, set out
above, indicate that every signature to an
instrument "requiring to be registered" must
be attested by a person of one of the classes
mentioned. The mortgage was an instrument
which required to be registered because only
"when registered" does it have the effect of a
legal mortgage (section 46(2)) and because it
is ineffectual to render the land liable as
security until registered (section 32). There
is, however, nothing in the Ordinance which
requires a personal covenant to repay money or
a guarantee of payment to be registered. The
Ordinance concerns itself with land and the
contract entered into by the sureties in the
present case does not touch the land, in which
they had no rights. It is only the security
20 over the land which requires to be registered
and I think the Registrar of Titles would be
justified in not insisting upon attestation of
the sureties' signatures in terms of section
58. A hint of this conception of severabil-
ity is to be gathered from the following pass-
age from the textbook by Hogg above referred
to, at page 214 :-

30 "Covenants to pay life insurance
premiums, and covenants for payment of
principal or interest by guarantors who
are not the owners of the mortgaged
property, may be inserted without render-
ing the mortgage unregistrable."

The cases mentioned are not available here but
the footnote indicates that in one of them the
guarantee was contained in a separate deed,
which I would presume was unregistered.

40 I think that the signatures of the sure-
ties did not require attestation under section
58 of the Ordinance: if that is not so, if
the proper meaning of the section is that all
signatures to any instrument which, as a docu-
ment, requires to be registered for any reason,
must be attested, what is the result? It would
mean that a matter wholly immaterial to the
object of the Registration of Titles Ordinance

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No.28

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5th March 1964
continued

and affecting in no way whatever the basic validity of the charge by the registered proprietor over the land, would then preclude the registration of an instrument validly executed so far as the charge is concerned, or, if the instrument did get on the register, would then destroy the validity of the registration. I am unable to accept that as the position in law but consider that any deficiency in attestation of the sureties' signatures could not affect the validity of the registration of the charge on the land, the Company's execution being valid. Even if the sureties could claim that registration was bad as against them, that would not affect their liability on their covenant as there is nothing in the Registration of Titles Ordinance or anywhere else that says either that such a covenant must be registered or is invalid as a contract for want of registration. That applies to the covenant by the Company also. Section 59 of the Transfer of Property Act provides something of a parallel, for a deed invalidly attested in relation to that section may be used as evidence of the personal covenant though not of the mortgage or charge - see the authorities quoted in footnote (p) page 373 of the TRANSFER OF PROPERTY ACT by Mulla (4th edn.). For these reasons, the signatures of the sureties having been proved, the sureties cannot in my opinion evade liability on grounds relating to the attestation. 10
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30

In case I am wrong in this and the sureties ought not to be held liable on the basis indicated, I think that there is merit in the argument put forward by counsel for the mortgagee as to the result of the Acting Chief Justice's findings of fact. On the mortgage the signatures of the first four sureties purport to be witnessed by Mr. I.S. Patel, Advocate and Commissioner for Oaths, and by Mohanlal Meghji Shah, Merchant, a brother of Kanji. Mr. Patel gave evidence for the mortgagee and Mr. M.M. Shah for the appellants - they were in conflict. Shardaben (3rd defendant and wife of the 5th defendant) gave evidence supporting M.M. Shah. She knew nothing about the transaction and the second, fourth and fifth defendants gave no evidence. 40

In his judgment the Acting Chief Justice said:-

In the Court
of Appeal for
Eastern Africa

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Judgment
5th March 1964
continued

10 "The advocate, Mr. Patel, who attested their signatures cannot remember but he was adamant that these defendants were present when he purported to attest their signatures. He is not sure whether they actually wrote their signatures in his presence or whether they merely acknowledged their signatures in his presence. The defence witness says he signed in the absence of Mr. Patel but I was not inclined to believe him. As regards the 5th defendant examination of the document will show that Mr. Patel must have affixed his stamp as Commissioner for Oaths before the defence witness signed. This is consistent with the evidence, but it seems to me unlikely if this witness's evidence is true, that the defendant Ratilal who, he says, was present when the defendants 2 to 4 signed, should not also have signed at that time. I think it is probable that these four defendants with the defence witness all attested and signed before Mr. Patel. The matter is however uncertain. In my opinion these signatures in a personal capacity do not require attestation as a matter of law. They have been proved and I think that that is sufficient to bind them."

30 The "defence witness" referred to there is Mr. M.M. Shah mentioned above.

40 The signatures of the three other sureties were purportedly witnessed by another advocate, Mr. J.J. Patel, and my Mr. J.R. Pavagadhi, described on the document as "clerk". Mr. Pavagadhi gave evidence for the mortgagee and said (inter alia) that Mr. J.J. Patel also signed as an attesting witness in his presence. His evidence was contradicted (as to Mr. J.J. Patel's presence and participation) by two of the sureties concerned. The Acting Chief Justice said :-

"As regards the defendants 6, 7 and 8 there is similar conflict as to whether they signed in the presence of both Mr. J.J. Patel and the attesting witness. I

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5th March 1964
continued

believe the attesting witness, but here again once their signatures have been proved I think attestation was not necessary as a matter of law".

The "attesting witness" mentioned there is quite plainly Mr. Pavagadhi, who gave in evidence that Mr. J.J. Patel did attest the relevant signatures on the mortgage.

As the Acting Chief Justice, on the view he took of the law, found it unnecessary to rely on the opinions he expressed in the passages quoted, it might be thought that he may not have applied his mind to the factual problem as strongly as he would have done had his whole decision depended on it. Nevertheless he has expressed his opinion, in one case as a matter of probability and in the other, as a matter of belief, that all the signatures were witnessed by an advocate, which would fulfil the requirements of the Registration of Titles Ordinance. His opinion was expressed merely as a matter of assessment of the evidence and without regard to onus, and while it might in some circumstances be unsafe to rely on findings which a learned judge considered non-essential I am satisfied that in the present case the onus lay heavily upon the appellants, and that, holding the opinions he so expressed, the Acting Chief Justice could not possibly have held that onus to have been discharged.

My view that there was a heavy onus on the appellants arises from two considerations. The first is the terms of the Registration of Titles Ordinance. By section 31 the Registrar must endorse on every registered instrument a certificate of the time it was presented for registration and sign and seal the certificate which then becomes conclusive evidence that the instrument was "duly registered". That was done in the instant case. By section 32 upon registration the land specified becomes liable as security. In view of these provisions I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus. The second

reason for my opinion that the onus is a heavy one is based upon the particular facts of this case. The mortgage was duly registered on the 27th February, 1956, and the plaint in the action is dated 21st September, 1960; no hint of any alleged invalidity was given during those 4½ years. There was no hint of any such allegation in the defence in the action and no claim or application that the register should be rectified. Only after the mortgagee's case was closed was the argument for the appellants developed on an allegation of invalidity for want of proper attestation. As the learned judge remarked at one stage, everyone was taken by surprise except the advocates for the appellants. However, with some doubt, he allowed the argument, on the basis that the matter could have been put right by amendment. It seems to me a matter for regret that that course was not insisted upon. At the close of the appellants' case counsel for the mortgagee applied to call Mr. J.J. Patel, the second advocate-witness; it was an application which, in the circumstances, should have met with no objection, but it was objected to and, unfortunately, the application was not pressed. A case so presented cannot inspire confidence and, I consider, added to the weight of the onus already on the appellants. Having regard to what I have said on this matter of onus I would have no hesitation in accepting the opinions of the Acting Chief Justice on the facts, expressed as they were, as a sufficient indication that he did not find that onus discharged. This provides an additional reason for holding that the appeal, on this aspect of the case, cannot succeed. There is another matter to which I will make brief reference. I have already mentioned that in the case of Govindji Popatlal v. Nathoo Visandjee (supra) the Privy Council endorsed the view of this court that the provisions of the Registration of Titles Ordinance rendered compliance with section 68 of the Indian Evidence Act unnecessary. That decision related to the mode of proof and is not therefore precisely in point here, but a passage from the Privy Council's judgment has been relied upon for the mortgagee. When the case was decided in this court Windham J.A. (with whom the other two members of the court agreed) having set out sections 1(2), 23 and 32 of the Registration of Titles Ordinance, said ([1960] E.A. 361 at 365 :-

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Eastern Africa

—————
No.28

Judgment
5th March 1964
continued

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In the Court
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No.28

Judgment
5th March 1964
continued

"The effect of these two sections of the Registration of Titles Ordinance, as I see it, is that, subject to the provisions regarding the rectifications or setting aside of registration contained in Parts XIII and XIV of the Ordinance, and to the exception of fraud or misrepresentation as set out in s.23 itself, the registration under the Ordinance of a mortgage or charge on land, if duly proved, shall be accepted by the courts as conclusive of the validity of the document effecting it, including that which is a pre-requisite of its validity, namely its due execution; and such proof of execution dispenses, to my mind, with the conflicting and more general requirements regarding proof of execution of certain documents laid down by s.68 of the Indian Evidence Act. While registration does not afford irrebutable proof of due execution, it raises a presumption which can only be rebutted if lack of due execution is specifically pleaded and proved within the framework of the Ordinance. Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is, upon the Torrens system of registration."

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In the judgment of the Privy Council (Supra, at pages 375-6 of the report) is the following passage :-

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"In the present case the original of the charge and a certificate of title endorsed with a memorial of the charge were produced in evidence by the respondent. The certificate of title was in terms of s.23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under s. 32 has by s. 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor. Upon the production of the charge and the certificate of title with the memorial of the charge endorsed thereon it became unnecessary for the respondent to comply with the terms of s. 68 of the Evidence

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Act. In the view of their lordships s.23 and s. 32 of the Registration of Titles Ordinance superseded s. 68 of the Evidence Act in regard to any requirement as to proof of the charge. Their lordships are able to adopt without qualification this observation of WINDHAM, J.A., in the Court of Appeal.

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Eastern Africa

No.28

Judgment
5th March 1964
continued

10 'Any other conclusion would violate the
general principle of the sanctity of the
register, which is the foundation of all
legislation based, as the Registration of
Titles Ordinance is, upon the Torrens
system of registration'."

20 It will be seen that the reference to a
rebuttable presumption in the judgment of Wind-
ham, J.A. (while not dissented from) was not re-
peated by the Privy Council. The facts of the
case in relation to parties were that the
respondent was the original mortgagee and the
appellant one of three original mortgagors who
had in the meantime acquired the shares of both
the others so as to become sole registered pro-
prietor. In the present case counsel for the
appellants sought to distinguish the case on the
ground that the principle of the sanctity of the
register does not apply to any issue between the
parties to the registered instrument, while
counsel for the mortgagee relied upon the deci-
30 sion as conclusively disposing of the attesta-
tion point in his favour.

40 The matter is not essential to my judgment
in this appeal and I prefer to leave it open.
Generally speaking, in relation to systems of
registration of title, I would say that as be-
tween the original parties to an instrument and
before any question of the rights of others
arises, it is open to the courts to put right
all questions of substance, either by rectifica-
tion of the register or under its powers to
order instruments to be executed, to make vest-
ing orders and the like. Whether attestation
is such a question may depend on circumstances
but that it may be, received some support from a
sentence in the well-known, but unfortunately
not recent, textbook, AUSTRALIAN TORRENS SYSTEM
by Hogg, at page 915 :-

In the Court
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Eastern Africa

No.28

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5th March 1964
continued

"A deed does not, under ordinary circumstances, require attestation as a condition of its validity. The express provisions of the Torrens Statutes appear to make attestation by at least one witness essential to the validity of a statutory instrument; and, as between the parties, invalidity for want of attestation would not be cured by registration".

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The authority for the last part of that statement (Bank of Victoria v. McMichael, (1882) 8 V.L.R.L. 11) is not available here and no comparison can be made of the relevant legislation. I am content in the present case to rely upon the provisions of the Registration of Titles Ordinance in the matter of onus only - the rebuttable presumption mentioned by Windham, J.A.

The last question is that of consideration in relation to the sureties. Counsel for the appellants submitted that there was no evidence of a request by the sureties in relation to the advance on the mortgage - and that much of the money had been advanced before they signed the mortgage. Counsel for the mortgagee contends that the mortgage on the face of it contains mutual covenants by the Company and sureties on the one hand and the mortgagee on the other. For the mortgagee's covenant he relied upon paragraph 1 of the express agreements between the parties, to the effect that if the interest was punctually paid and the covenants observed other than that for payment of the principal sum by instalments, the mortgagee would not call in the principal sum or any part thereof before a specified date. The mortgagee did not execute the mortgage but could not very well rely upon it without submitting to be bound by all of its terms. Counsel for the appellants did not in his reply answer this submission and it appears to be a valid one in law. Apart from that, the sureties, all of whom signed the original guarantee of the 1st December, 1955, must have known the position and their signatures on the mortgage would imply a request for payment of at least the remainder of the agreed advance, providing consideration for their covenant. I think this ground of appeal also fails.

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For the reasons I have given, I would dismiss the appeal and order the appellants to pay the costs of the mortgagee, certified for two counsel.

In the Court
of Appeal for
Eastern Africa

No.28

Judgment
5th March 1964
continued

10 I would not disturb the orders made for costs in the Supreme Court. Counsel for the appellants has complained of having been ordered to pay the costs there of the second mortgagee (the second respondent to this appeal). It is not disputed that he was properly joined in the action and his mortgage was only admitted on behalf of the appellants to be valid at a late stage in the action. His costs were in the discretion of the Acting Chief Justice and I am not satisfied that any case has been made out for interference with his order. The position in this court in relation to the second respondent is different. He was served with the proceedings as a party affected and appeared by counsel throughout. This was unnecessary, as study of the grounds of appeal should have made it clear that there was no attack upon his security - the attack upon his order for costs did not necessitate his attendance for 4½ days. I would order that the appellants pay the second respondent's costs of the appeal with a direction that his instructions fee be limited to Shs. 500/- and his fee for attendance at the appeal be limited to that for one day.

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Dated at Nairobi this 5th day of March 1964.

Sgd. T. J. GOULD
VICE-PRESIDENT.

I agree.

Dated at Nairobi this 5th day of March 1964.

Sgd. C. D. NEWBOLD
JUSTICE OF APPEAL.

I also agree, and have nothing to add to the reasons given by Gould V-P., with which I

In the Court
of Appeal for
Eastern Africa

No.28
Judgment
5th March 1964
continued

No.29
Order
5th March 1964

entirely concur.

Dated at Nairobi this 5th day of March
1964.

Sgd. S. A. CRABBE
JUSTICE OF APPEAL.

No.29

IN COURT THIS 5TH DAY OF MARCH 1964
Before the Honourable the Vice President (Sir
Trevor Gould)
the Honourable Mr. Justice Newbold, a
Justice of Appeal.
the Honourable Mr. Justice Crabbe, a
Justice of Appeal.

ORDER

THIS APPEAL coming for hearing on the 27th, 10
28th, 29th, 30th and 31st days of January, 1964
AND UPON HEARING Muir Hunter, Esq., D.N.
Khanna, Esq., and Veljee Devshi Shah, Esq.,
of - Counsel for Appellants and R.J.Parker,
Esqre, J.M. Nazareth, Esqr., both of Her
Majesty's Counsel and J.J.Patel, Esq., of
Counsel for the First Respondent and V.K.Doshi,
Esq., of Counsel for the second Respondent IT
WAS ORDERED on the 31st day of January, 1964, 20
that this Appeal do stand for judgment and
upon the same coming for judgment this day IT
IS ORDERED:

1. That this appeal be and is hereby dis-
missed.
2. That the first Respondent do have the
costs of this appeal certified for two
counsel.
3. That the Appellants do pay the Second
Respondent costs of the appeal limited 30
to the instructions fee of Shillings 500/-
and the fee for attendance at the appeal
for one day.

GIVEN under my hand and the Seal of the Court
at Nairobi this 5th day of March, 1964.

M.D. DESAI
AG: REGISTRAR
COURT OF APPEAL FOR EASTERN AFRICA.

ISSUED at Nairobi this 31st day of March 1964.

In the Court
of Appeal for
Eastern Africa

Trevor Gould).

O R D E R

No.30

Order granting
Final Leave to
Appeal to Her
Majesty in
Council
3rd July 1964
continued

UPON the Application presented to this Court on the 23rd day of June 1964, by Counsel for the above-named Applicants for final leave to appeal to the Judicial Committee of the Privy Council, AND UPON READING the affidavit of NARSHI VALJI PARMAR of Nairobi in Kenya, Law Clerk, sworn on the 23rd day of June 1964, in support thereof, and the exhibits therein referred to and marked "NVP 1" and "NVP 2", AND UPON HEARING Counsel for the Applicants and Counsel for the First Respondent, and in the absence of Counsel for the Second Respondent, duly served, who intimated in writing that he did not object to the application THIS COURT DOTH ORDER that the application for final leave to appeal to the Judicial Committee of the Privy Council be and is hereby granted AND DOTH DIRECT that the Record including this Order be despatched to England within fourteen days from the date of issue of this Order AND DOTH FURTHER ORDER that the costs of this application do abide the result of the appeal, and be awarded to the Respondents in case the appeal is dismissed for want of prosecution.

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GIVEN under my hand and the Seal of the Court at Nairobi this 3rd day of July 1964.

(SGD) M.D. DESAI

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AG. REGISTRAR,
COURT OF APPEAL FOR
EASTERN AFRICA
NAIROBI.

ISSUED this 3rd day of July 1964.

E X H I B I T S

"P.1"

Plaintiff's
Exhibits

"P.1"

J.J. & V.M. PATEL
Advocates.

P.O. Box 3891,
NAIROBI.

12th October 1961.

Plaintiff's
Request for
Particulars
12th October
1961

Messrs. Veljee Devshi & Bakrania,
Advocates,
NAIROBI.

Dear Sirs,

10

S.C.C.C. No. 1629 of 1960.
Premchand Raichand Ltd. vs. Coast
Brick & Tile Works Ltd., and
8 others.

We are advised that the plaintiffs are entitled to the following further and better particulars of the Amended Written Statement of Defence of the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th defendants namely:-

Under paragraph 12:-

20

(i) The date, place where and the actual or specific persons between whom the agreement was made;

(ii) Whether such agreement was made in writing. Identify the documents and if orally the particulars thereof stating precisely the terms of such alleged agreement;

(iii) The total sums paid, stating the dates of each payment and the manner in which each of the payments were made;

30

(iv) Whether each of the payments were made for interest or otherwise;

(v) If payments were made for interest give the particulars thereof;

(vi) If made otherwise give the particulars thereof;

Plaintiff's
Exhibits

"P.1"

(vii) The name of the person who gave solemn undertaking that under no circumstances the plaintiff would file court proceedings;

Plaintiff's
Request for
Particulars
12th October
1961
continued

(viii) The name of the person to whom solemn undertaking was given;

(ix) The date and place where such undertaking was given.

Please let us have the aforesaid particulars within seven days from the date of receipt of this letter failing which our instructions are to make necessary application to the Court for the same.

10

Yours faithfully,
J.J. & V.M. PATEL
sd. J.J. Patel.

JJP/SGH.

"P.1(a)"

"P.1(a)"

Defendants
Particulars
21st October
1961

VELJEE DEBSHI & BAKRANIA,
Advocates.

P.O. Box 5087
NAIROBI.

21st October 1961.

20

Our Ref. No.D/5871/VDS/NTD.

Messrs. J.J. & V.M. Patel,
Advocates,
Ruprani House,
Gulzaar Street,
NAIROBI.

Dear Sirs,

re. H.M.'s S.C.Civil Case No.1629
of 1960.

Premchand Raichand Ltd. v. Coast
Brick & Tile Works Ltd. & Others.

30

With reference to your letter of the 12th instant, we give hereunder the particulars you require;

1.(a) In 1958 at the 1st Defendant's Tile Factory at Mombasa between M.P.Shah, Esqr. and Kanji Meghji Shah, Esqr., when M.P. Shah, Esqr., visited Factory and had lunch.

(b) Thereabouts at Nairobi again between H.N. Shah Esqr., and Kanji Meghji Shah, Esqr. Plaintiff's Exhibits

"P.1(a)"

(ii) Oral

Defendants .
Particulars
21st October
1961
continued

(iii) Particulars of payment are indicated on annexure "A" attached with the plaint.

(iv,v,vi) In view of the remission agreement all payments were for principal debt. Plaintiffs have omitted to supply receipt for last payment of Shs.15,000/-. Now request is made to supply original thereof to this office.

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(vii,viii,ix) Answers are as per answer in (a) and (b) of (i).

Yours faithfully,
for VEIJEE DEVSHI & BAKRANIA.
sd. Veljee Devshi Shah.

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"P.27"

"P.27"

ANNEXURE "A" CONTINUED
SUMS RECEIVED IN RESPECT OF INTEREST

Amended
Annexure "A"
of the Plaint.

<u>DATE</u>	<u>AMOUNT</u>
	<u>Shs.Cts.</u>
---- 24.3.56.	10477.77
19.4.56.	13777.77
23.5.56.	13333.33
18.6.56.	13777.77
18.7.56.	13333.33
30 28.9.56.	13777.77
18.8.56.	13777.77
27.10.56.	13333.33
28.11.56	13777.77
29.12.56.	13333.33
2.2.57.	13777.77
27.2.57.	13777.77
30.3.57	12195.55
---- 8.4.57	12195.55
15.5.57.	12995.54

30

<u>Plaintiff's Exhibits</u>	<u>DATE</u>	<u>AMOUNT</u> <u>Shs.Cts.</u>	
"P.27"	24.6.57	12933.33	
Amended	24.7.57	13364.44	
Annexure "A"	24.8.57	12933.33	
of the Plaint	24.9.57	13364.44	
continued	----- 18.10.57	133.33	
	----- 25.10.57	13364.44	
	23.11.57	12800.00	
	14.1.58	26026.66	10
	15.2.58	26453.32	
	25.3.58	11946.66	
	25.4.58	13226.66	
	26.5.58	12800.00	
	25.6.58	13226.66	
	25.7.58	12800.00	
	25.8.58	13226.66	
	<u>25.9.58</u>	<u>13226.66</u>	
	----- 10.10.58	13226.66	
	28.10.58	12800.00	20
	29.11.58	13379.16	
	29.12.58	12800.00	
	----- 3.11.59	9600.00	
	29.1.59	13226.66	
	27.2.59	13226.66	
	24.6.59	16106.64	
	28.12.59	9600.00	
	20.1.60	9600.00	
	27.2.60	9600.00	
	27.4.60	9600.00	30
	11.8.60	<u>15000.00</u>	
Total received in respect of interest		<u>577234.50</u>	
----- Balance due in respect of interest calculated up to 31st August 1960		77180.04	
Balance due in respect of Principal		<u>960000.00</u>	
<u>TOTAL</u>		<u>1037180.04</u>	

Further interest is accruing on the said sum of Shs.960000/- at the rate of 12 per cent per annum from 1st September 1960.

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"P.2"

Plaintiff's
Exhibits

STAMP
£125

"P.2"

COLONY AND PROTECTORATE OF KENYA

REGISTRY OF TITLES

COAST DISTRICT

TITLE NO. 4226

The Charge
Sued Upon
31st January
1956

C H A R G E

10 W H E R E A S COAST BRICK AND TILE WORKS
LIMITED a limited liability company having its
registered office at Mombasa in the Colony and
Protectorate of Kenya (hereinafter called "the
Company" which expression shall include its
successors and assigns where the context so
admits) is registered as the proprietor of an
estate in fee simple (together with the mineral
rights) (subject to such charges leases and
encumbrances as are notified by memorandum
written hereon) of ALL THAT piece of land
20 situate in the Province of Seyidie at Changamwe
Miritini in the Colony and Protectorate of Kenya
containing by measurement Seventeen decimal
seven four acres or thereabouts being the
premises comprised in a Certificate of Ownership
dated the Thirteenth day of September One
thousand nine hundred and twenty three (regis-
tered in the Registry of Title at Mombasa as
No. C.R. 4226/1) and thereby granted to Liwali
Ali bin Salim (therein described) which said
30 piece of land with the dimensions abuttals and
boundaries thereof is delineated on the plan
annexed to the said Certificate of Ownership
and more particularly on Land Survey Plan Number
18822 deposited in the Office of the Recorder of
Titles at Mombasa aforesaid AND WHEREAS PREM-
CHAND RAICHAND LIMITED a limited liability
company having its registered office at Nairobi
in the said Colony and Protectorate (herein-
after called "the Chargee" which expression
40 shall include its successors and assigns where
the context so admits) has at the request of the
Company agreed to lend to it the sum of Shill-
ings One Million and upon having repayment there-
of with interest thereon at the rate hereinafter

Plaintiff's
Exhibits

"P.2"

The Charge
Sued Upon
31st January
1956
continued

mentioned secured in manner hereinafter appearing AND WHEREAS KANJI MEGHJI SHAH SHARDABEN RATILAL SHAH KESHAVLAL KANJI SHAH and RATILAL KANJI SHAH all merchants of Mombasa aforesaid and BHARMAL RAISHI SHAH ZAVERCHAND SOJPAL SHAH and HIRJI RAMJI SHAH all merchants of Nairobi aforesaid (hereinafter called "the Sureties" which expression shall include their respective heirs executors and administrators where the context so admits) have agreed to join in these presents as Sureties for the Company in manner hereinafter appearing NOW THESE PRESENTS WITNESS that in pursuance of the said respective agreements and in consideration of the sum of SHILLINGS ONE MILLION now paid to the Company by the Chargee (the receipt whereof the Company doth hereby acknowledge) the Company and the Sureties HEREBY JOINTLY AND SEVERALLY AGREE :-

10

FIRSTLY that the Company and/or the Sureties will repay to the Chargee the sum of Shillings One Million together with interest thereon at the rate of Sixteen per centum per annum from the First day of January One thousand nine hundred and fifty six in manner following :-

20

(1) On the Thirty first day of October One thousand nine hundred and fifty six the sum of Shillings One Hundred Thousand.

(2) On the Thirty first day of January One thousand nine hundred and fifty seven the sum of Shillings One Hundred Thousand.

30

(3) On the Thirtieth day of June One thousand nine hundred and fifty seven the sum of Shillings One Hundred Thousand.

(4) On the Thirty first day of October One thousand nine hundred and fifty seven the sum of Shillings One Hundred Thousand.

(5) On the Thirty first day of January One thousand nine hundred and fifty eight the sum of Shillings One Hundred Thousand.

40

(6) On the Thirtieth day of June One thousand nine hundred and fifty eight the sum of Shillings One Hundred Thousand.

(7) On the Thirty first day of October One thousand nine hundred and fifty eight the sum of Shillings One Hundred Thousand.

Plaintiff's
Exhibits

"P.2"

(8) On the Thirty first day of January One thousand nine hundred and fifty nine the sum of Shillings One Hundred Thousand.

The Charge
Sued Upon
31st January
1956
continued

(9) On the Thirtieth day of June One thousand nine hundred and fifty nine the sum of Shillings One Hundred Thousand.

10 (10) On the Thirty first day of October One thousand nine hundred and fifty nine the sum of Shillings One Hundred Thousand.

20 SECONDLY so long as the said sum of Shillings One Million or any part thereof shall remain unpaid the Company and/or the Sureties shall pay to the Chargee interest on the same at the rate aforesaid by equal monthly instalments on the First day of each month the first such payment to become due and payable on the First day of February One thousand nine hundred and fifty six and thereafter on the First day of each succeeding month until the principal sum shall have been repaid in full.

30 THIRDLY that the Company and/or the Sureties will during the continuance of this present security keep the buildings comprised in or subject to this security and all buildings which may from time to time be so comprised or subject in good and substantial repair and fully and adequately insured against loss or damage by fire in an Insurance Company of good repute in the joint names of the Company and the Chargee AND WILL immediately after every such policy shall have been effected or after the execution of these presents if the same shall have been previously effected deposit the said policy with the Chargee AND WILL duly and punctually pay all premiums and moneys necessary for effecting and keeping up such insurance when the same shall become due
40 AND WILL forthwith deliver the receipt for every such payment to the Chargee AND THAT if default shall at any time be made by the Company or the Sureties in effecting or keeping up such insurance as aforesaid or in keeping such premises or any part thereof in good and substantial repair

Plaintiff's
Exhibits

"P.2"

The Charge
Sued Upon
31st January
1956
continued

or in depositing any such policy or in delivering any such receipt as aforesaid it shall be lawful but not obligatory on the Chargee to insure and keep insured the said premises or any part thereof in any sum not exceeding Shillings One Million or (as the case may require) to repair and keep in repair the same and to enter upon the said premises for that purpose AND THAT all moneys expended by the Chargee for such purpose together with interest thereon at the rate of Sixteen per centum per annum shall on demand be repaid by the Company and/or the Sureties to the Chargee and until such payment shall be a charge upon all the said premises.

10

FOURTHLY that the Company will not sell transfer lease or otherwise part with the possession of the said premises or any part thereof without the consent in writing of the Chargee first had and obtained.

FIFTHLY that the Company will not issue further shares without the consent in writing of the Chargee first had and obtained.

20

SIXTHLY that the Company without the consent of the Chargee in writing being first had and obtained will not increase the present number of its Directors or appoint others to take the place of those Directors who may die become bankrupt or through illness or other causes become incapacitated from holding office.

SEVENTHLY that the Company will during the continuance of this security perform and observe the conditions under which the said piece of land is held AND WILL keep indemnified the Chargee and its estates and effects from and against all actions claims and demands on account of the same.

30

EIGHTLY that the Company and/or the Sureties will pay to the Chargee on demand all expenses costs and damages sustained by it by reason of the breach of the said conditions with interest thereon at the rate of Sixteen per centum per annum and that in the meantime the same shall be a charge upon the said piece of land AND for the better securing to the Chargee the repayment of the said principal sum of Shillings One Million

40

together with interest thereon the Company DOTH
HEREBY CHARGE the piece of land hereinbefore
described together with the buildings and
improvements which now are or may hereafter be
erected or be thereon in favour of the Chargee
with such principal sum and interest. IT IS
HEREBY EXPRESSLY AGREED AND PROVIDED by and
between the parties hereto as follows :-

Plaintiff's
Exhibits

"P.2"

The Charge
Sued Upon
31st January
1956

continued

- 10 1. That if the Company and/or the Sureties shall on every monthly day on which interest is hereinbefore made payable under this security until the Thirty first day of October One thousand nine hundred and fifty nine or within seven days after each of such days respectively pay to the Chargee interest for the principal sum for the time being owing on this security at the rate aforesaid and if the Company and/or the Sureties shall at all times perform and observe all 20 the covenants and agreements herein contained or implied and on its or their part to be performed and observed other than the covenants for payment of such principal sum then the Chargee shall not before the said Thirty first day of ~~October~~ One thousand nine hundred and fifty nine call in the said principal sum or any part thereof.
- 30 2. That as between the Company and the said mortgaged premises on the one part and the Sureties on the other part the Company and the said mortgaged premises shall be primarily liable for the payment of the moneys intended to be hereby secured.
- 40 3. That the provision hereinbefore contained in respect to the primary liability for the payment of the moneys hereby secured shall not affect the Chargee or the person or persons for the time being entitled to the said moneys or as much thereof as shall remain unpaid or in anywise preclude it or them from enforcing or having recourse to all or any remedies or means for recovering thereof which may be available under these presents or otherwise at such time and in such order and manner as it or they shall think fit.
4. That although as between the Company and the

Plaintiff's
Exhibits

"P.2"

The Charge
Sued Upon
31st January
1956
continued

Suretias the Sureties are only Sureties for the Company yet as between the Sureties and the Chargee the Sureties shall be considered as the principal debtors for all the principal moneys and interest intended to be hereby secured so that the Sureties shall not be released by time being given to the Company or by any other variation in the provisions of these presents or any other thing whatsoever whereby the Sureties as such sureties only would have been released.

10

- 5. That KANJI MEGHJI SHAH the first named Surety aforesaid will on the signing of these presents deposit with the Chargee the Certificates of One Thousand Five Hundred (1,500) shares in the Company together with the transfers thereof in blank duly executed by him PROVIDED that if the Company shall in the manner hereinbefore provided repay to the Chargee the aforesaid sum of Shillings One Million with interest thereon as is hereinbefore provided the Chargee will at the request and cost of the said first named Surety re-deliver the Certificates and Transfers so deposited as aforesaid to the said Surety or as he shall direct

20

PROVIDED ALWAYS that if the Company shall go into liquidation or any of the Sureties shall become bankrupt or have a Receiving Order made against him or them or if either the Company or any of the Sureties shall enter into any arrangement or composition for the benefit of its his or their creditors or if a Receiver shall be appointed of the premises hereby charged or if the said premises or any part thereof or any chattels thereon belonging to the Company shall be taken in execution or if any covenant or agreement herein expressed or implied and on the part of the Company or the Sureties to be performed and observed shall not have been performed and observed then and in any such case the principal moneys hereby secured or any part thereof together with interest thereon shall become repayable to the Chargee on demand.

30

40

I N W I T N E S S W H E R E O F the Company has caused its Common Seal to be hereunto affixed and the Sureties have hereunto set their hands

the thirty first day of January One thousand nine hundred and fifty six.

Plaintiff's Exhibits

The Common Seal of COAST BRICK AND TILE WORKS LIMITED was hereunto affixed in the presence of :-

"P.2"

The Charge Sued Upon 31st January 1956 continued

KANJI MEGHJI SHAH Director
KESHAVLAL KANJI SHAH Director
10 RATILAL KANJI SHAH Secretary

SIGNED by the Sureties in the presence of :-

KANJI MEGHJI SHAH
SHARDABEN RATILAL SHAH
KESHAVLAL KANJI SHAH

MOHANLAL MEGHJI SHAH Merchant of Mombasa

and in the presence of:-

I. S. PATEL COMMISSIONER FOR OATHS.

I. S. PATEL COMMISSIONER FOR OATHS.

20 MOHANLAL MEGHJI SHAH) RATILAL KANJI SHAH
J.R.PAVAGADHI Clerk Nairobi) BHARMAL RAISHI SHAH
J.J.PATEL (Advocate, Nairobi)) ZAVERCHAND SOJPAL SHAH
J.J.PATEL (Advocate, Nairobi)) HIRJI RAMJI SHAH
J.J.PATEL (Advocate, Nairobi)

MEMORANDUM OF CHARGES LEASES AND ENCUMBRANCES

Grant of Right of Way registered as No.CR. 4226/14.

LAND TITLES REGISTRY - COLONY OF KENYA

30 COAST DISTRICT, MOMBASA - REGISTERED No. C.R. 4226/20.

Presented: 27.2.1956.
Time: 11.30 a.m.

?
REGISTRAR OF TITLES

REGISTERED COMPANIES
Presented: 13.3.1956.
Date of Registration: 13.3.1956.

?
REGISTRAR

Plaintiff's
Exhibits

"P.3"

No.5420

"P.3"

To be inserted in Register Book.

Certificate
of Ownership
No.5420
Relating to
Plot No.500
Section VI,
Mombasa.
13th September
1923

THE COLONY AND PROTECTORATE OF KENYA

LAND TITLES ORDINANCE, 1908

SCHEDULE I - FORM B.

CERTIFICATE OF OWNERSHIP

I, PHINEAS ERNEST WOLFFE, Ag.Recorder of
Titles do hereby certify that Liwali Ali bin
Salim, Administrator of the estate of late
Liwali Salim bin Khalfan is the proprietor of
an estate in fee (together with the mineral
Rights) in that piece of land situate in the
Province of Seyidie at Changanwe - Miritini and
which is demarcated and delineated on the plan
No.18822 deposited in the Office of the Recorder
of Titles at Mombasa and thereon numbered 500
Sec. VI and containing Seventeen point seven
four acres or thereabouts and subject to such
mortgages and other interests (if any) as here-
under written. 10 20

IN WITNESS whereof I have hereunto set my
hand and seal this 13th day of September 1923.
Certificate Fees Shs.288/-.
Survey " Shs. 50/-

sd. P.E.Wolffe. L.S.
Ag.RECORDER OF TITLES.

FEES PAID
50% remitted.
sd. ??
Ag.Recorder of Titles.
Date. 2.12.24.

30

Mortgages and other interests
above referred to:

1. DEPT. OF LANDS, E.A.P.
Land Registration Division - Coast Registry,
Mombasa.
Presented: 17/9/1923. Registered No. C.R.
4226/1.

Time: 8 a.m. sd. ???
Registrar of titles. 40

2. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED

AGAINST THIS TITLE:-

No.C.R. 4226/2. Date of Registration 11th January 1927.

Transfer:- To James Albert Conception Barke and Sydney Blackhurst as tenants in common in equal shares. Mombasa The 11th day of January 1927.

Plaintiff's
Exhibits

"P.3"

Certificate
of Ownership
No.5420

Relating to
Plot No.500
Section VI,
Mombasa.
13th September
1923

continued

sd. ???
REGISTRAR OF TITLES.

- 10 3. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
C.R. 4226/3. DATE OF REGISTRATION. 11th April 1929.
Lease to Mombasa Brick and Tile Works Limited.
Term 19 years from 1st January 1928.
MOMBASA THE 11th DAY OF APRIL, 1929.

sd. ???
REGISTRAR OF TITLES.

- 20 4. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
No. C.R.4226/4. DATE OF REGISTRATION, 14th August 1930.
Transfer:- To James Albert Conception Burke, Advocate. Mombasa, of the undivided share of Sydney Blackhurst, Subject to Lease Registered as No. C.R. 4226/3.
MOMBASA THE 14th DAY OF AUGUST 1930.

sd. ???
REGISTRAR OF TITLES.

- 30 5. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
C.R. 4226/5. DATE OF REGISTRATION, 20th June 1932.
Memo of Charge by Deposit of Title:- By Khamis bin Mohamed Bin Juma.
MOMBASA THE 20th DAY OF JUNE, 1932.

sd. ???
REGISTRAR OF TITLES.

- 40 6. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
C.R. 4226/6 DATE OF REGISTRATION, 31st August 1932.
Sub-Lease :- The Mombasa Brick and Tile Works

Plaintiff's
Exhibits

"P.3"

Certificate
of Ownership
No.5420
Relating to
Plot No.500
Section VI,
Mombasa
13th September
1923
continued

Limited to Changamwe Brick and Tiles Agency
Limited. Term 5 years from 1st day of June
1932, Subject to the Memorandum of Charge
by Deposit of Title, entry No.C.R.4226/5.
MOMBASA THE 31st DAY OF AUGUST 1932.

sd. ???
REGISTRAR OF TITLES.

- 7. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED
AGAINST THIS TITLE. 10
C.R. 4226/7. DATE OF REGISTRATION, 10th
November 1932.
Charge:- In favour of Mohamed bin Ali Liwali
of Mombasa Subject to the encumbrances
registered as No.C.R. 4226/3, 4226/5 and
4226/6.
MOMBASA THE 10th DAY OF NOVEMBER 1932.

sd. ???
REGISTRAR OF TITLES.

- 8. THE FOLLOWING DOCUMENT HAS BEEN REGISTERED
AGAINST THIS TITLE. 20
No. C.R. 4226/8. Date of Registration, 13th
April 1935.
Transfer:- James Albert Conception Burke to
Khamis bin Mohamed bin Juma and Discharge of
the Charge by Mohamed bin Ali in respect of
the Charge Entry Number C.R.4226/7 above but
subject to the Lease entry No.4226/3 and the
Memorandum of Charge by Deposit of Title
entry No. 4226/5 above.
MOMBASA THE 13th DAY OF APRIL 1935. 30

sd. ???
REGISTRAR OF TITLES.

- 9. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED
AGAINST THIS TITLE.
C.R. 4226/9.
Grant of Right of Way by Khamis bin Mohamed
bin Juma in favour of Mrs. Doris Jessie Beath
the registered proprietor of Plot 818 of Sec.
VI, Changamwe Miritini. Presentation No.
360/38. Date of Registration 2/5/38. 40

sd. ???
REGISTRAR OF TITLES.

10. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE :-
C.R. 4226/10.
Memo of Discharge of Charge of No.5 above.
Presentation No. 761/43. Date of Registration 12/6/43.

sd. ???
REGISTRAR OF TITLES.

Plaintiff's
Exhibits

"P.3"

Certificate
of Ownership
No. 5420
Relating to
Plot No.500
Section VI,
Mombasa
13th September
1923
continued

10 11. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE :-
C.R. 4226/11.
Declaration to the effect that the Landlord has re-entered upon the land and lease No.3 above is determined.
Presentation No. 762/43. Date of Registration 12/6/43.

sd. ???
REGISTRAR OF TITLES.

20 12. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE :-
C.R. 4226/12.
Cancellation of Right of Way terminating easement granted in No.9 above.
Presentation No. 763/43 Date of Registration 12/6/43.

sd. ???
REGISTRAR OF TITLES.

30 13. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE :-
C.R. 4226/13.
Transfer to Coast Brick and Tile Works Limited.
Presentation No.1226/43. Date of Registration 29/9/43.

sd. ???
REGISTRAR OF TITLES

40 14. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE :-
No.C.R. 4226/14.
Grant of Right of Way By Coast Brick and Tile Works Limited in favour of Khamis bin Mohamed bin Juma over the above plot to

Plaintiff's
Exhibits

"P.3"

Certificate
of Ownership
No. 5420

Relating to
Plot No.500
Section VI,
Mombasa.
13th September
1923
continued

serve Plots Nos. 946 and 947 Sec.VI
Changamwe.
Presentation No.1227/43. Date of Registra-
tion, 29/9/43.

sd. ???

REGISTRAR OF TITLES.

15. THE FOLLOWING INSTRUMENT HAS BEEN REGISTER-
ED AGAINST THIS TITLE :-

C.R. 4226/15.

Transfer Khamis bin Mohamed bin Juma to
Jiwibai d/o Dharamshi. Transferring the
Right of Way No.14 above.
Presentation No. 1174/46. Date of Regis-
tration 19/10/46.

10

sd. ???

REGISTRAR OF TITLES.

16. THE FOLLOWING INSTRUMENT HAS BEEN REGISTER-
ED AGAINST THIS TITLE :-

C.R. 4226/16. Memo of Charge: "In favour of
(1) Shah Popatlal Karman (2) Shah Kanji Megh-
hji and (3) Shah Somchand Meghji, Trustees
of Oswal Education and Relief Board.
Presentation No. 630/50. Date of Registra-
tion 11/5/50.

20

sd. ???

REGISTRAR OF TITLES.

17. THE FOLLOWING INSTRUMENT HAS BEEN REGISTER-
ED AGAINST THIS TITLE.

Memo of Discharge of Charge of No.16 above.
Presentation No. 322. Date of Registration
7/2/55.

30

sd. ???

REGISTRAR OF TITLES.

18. THE FOLLOWING INSTRUMENT HAS BEEN REGISTER-
ED AGAINST THIS TITLE.

Memo of Charge: With NATIONAL BANK OF INDIA
LTD.
Presentation No.1421. Date of Registration
8/6/55.

sd. ???

REGISTRAR OF TITLES

40

19. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
Memo of Discharge of Charge of No.18 above.
Presentation No.592 Date of Registration 27/2/56.

Plaintiff's
Exhibits

"P.3"

sd. ???
REGISTRAR OF TITLES.

Certificate
of Ownership
No. 5420

Relating to
Plot No.500
Section VI,
Mombasa.
13th September
1923
continued

10 20. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
Charge: To PREMCHAND RAICHAND LIMITED Subject to Right of Way No. 14 above.
Presentation No. 593. Date of Registration 27/2/56.

sd. ???
REGISTRAR OF TITLES

20 21. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
Charge: To SHAH MEGHJI MULJI LIMITED Subject to Charge No.20 and Right of Way No.14 above.
Presentation No.1298. Date of Registration 8/5/56.

sd. ???
REGISTRAR OF TITLES

30 22. THE FOLLOWING INSTRUMENT HAS BEEN REGISTERED AGAINST THIS TITLE.
Easement by Jivibai Dharamshi wife of Kanji Meghji Shah, Granting Right of Way over plots Nos. 1024 (Orig. No.948/2) Sec. VI M.N. 947 (Orig. No. 547/2) Sec. VI M.N. and 946 (Orig. No. 547/1) Sec. VI M.N. C.R. 9206/1 8642/1 and 8372/1.
Presentation No. 1626. Date of Registration 13-7-59.

sd. ???
REGISTRAR OF TITLES.

Plaintiff's
Exhibits

"P.19"

"P.19"

As "P.3" - Not Reproduced.

As P3 above
Not Reproduced

"P.28"

"P.28"

Letter from
National Bank
of India Ltd.,
Mombasa to
1st Defendant
19th September
1955

NATIONAL BANK OF INDIA LIMITED,
P.O. Box 257,
MOMBASA, 19th September 1955.

Private and Confidential

The Coast Brick and Tile Works Ltd.,
P.O. Box 357,
MOMBASA

10

Dear Sirs,

Overdraft Facility

With reference to your letter of the 25th ultimo wherein you applied for a continuation of the overdraft facility in your account to the extent of Shs.300,000/- until 31st July 1956, we are pleased to advise that our Head Office have sanctioned continuation for that limit but up to 28th February next only, when the position will

again be reviewed after you have been in full production for a period of six months.

Interest will at present be charged at 1% over Bank of England rate, with a minimum of 7% per annum.

Yours faithfully,

sd. ???

Manager.

JSB/SLB.

Plaintiff's
Exhibits

"P.28"

Letter from
National Bank
of India Ltd.,
Mombasa to
1st Defendant
19th September
1955
continued

10

"P.9"

COAST BRICK & TILE WORKS LIMITED

Nairobi.

29th November 1955.

"P.9"

Application
for Loan from
1st Defendant
to Plaintiff
29th November
1955

To:

Messrs.Premchand Raichand Ltd.,
P.O. Box 52,
NAIROBI.

Dear Sirs,

20

At my request, you have considered to advance to Coast Brick & Tile Works Ltd., of Mombasa, a sum not exceeding Shs.1,000,000/- (Shillings One Million only), and in consideration of this I hereby undertake to get executed in the proper manner by the Company all the papers, such as a Debenture on the

Plaintiff's
Exhibits

"P.9"

Application
for Loan from
1st Defendant
to Plaintiff
29th November
1955
continued

assets of the above Company, Deposition of the Title Deeds free from all incumbrances of the properties belonging to the said Company, joint and several guarantees of each and every shareholder both present and future of the said Company and the Deposition of the Shāre-Cērtificates of all the Shareholders together with the Blank transfers thereof together with a resolution passed in the Directors meeting that they will not object the transfer of the shares when it is required to do so and such other papers which are necessary to secure the above loan.

10

I hereby authorise you to instruct your Advocates to prepare all the necessary documents required by you to give effect to the above and any further papers or documents not enumerated in the above which are necessary and hereby confirm all the legal costs and incidental expenses will be borne by the said Borrowing Company.

Yours faithfully,

20

COAST BRICK & TILE WORKS LTD.

sd. Kanji Meghji

Kanji Meghji
Chairman.

sd. B.R. Shah

(Duly Authorised in this behalf).

"P.10"

Guarantee
made between
the Plaintiff
and 2nd to
8th Defend-
ants and one
Harilal Kanji
1st December
1955

"P.10"

In consideration of PREMCHAND RAICHAND LIMITED (hereinafter called the Company) allowing COAST BRICK & TILES WORKS LIMITED

30

of Mombasa carrying on business at Mombasa under the style or firm of COAST BRICK & TILES WORKS LIMITED (who hereinafter called "the said Debtor or Debtors") certain business or credit facilities subject to the conditions hereinafter mentioned. I/We

the undersigned (1) Mr. Kanji Meghji (2) Rati-
 lal Kanji. (3) Mrs. Sharda Ratilal (4) Keshav-
 lal Kanji (5) Harilal Kanji (6) Bharmal Raj-
 shi Shah. (7) Zaverchand Sojpal Shah and (8)
 Hirji Ramji do hereby guarantee and bind my-
 self/ourselves jointly and severally, for the
 repayment on demand of all sum or sums of money
 which the said Debtor or Debtors or his or
 their representatives, may now or from time to
 time hereinafter owe or be indebted to the
 said Company their successors or assigns wheth-
 er such indebtedness be incurred by the said
 Debtor or Debtors in his/their own name or in
 the name of any firm in which he/they may be
 trading and either solely or jointly with others
 in partnership or otherwise, and whether such
 indebtedness arises from guarantees given or
 money already advanced or hereafter to be ad-
 vanced, or from promissory notes or bills of
 exchange already or hereafter to be made accept-
 ed or endorsed, or otherwise howsoever, includ-
 ing interest discount commission law costs
 stamps and all other necessary or usual charges
 and expenses Provided nevertheless that the
 total amount to be recovered from me/us here-
 under shall not exceed in the whole, the sum of
 50,000/- East African pounds together with such
 further sum for interest charges and costs in-
 curred in respect of the premises or of this
 guarantee as shall accrue up to date of payment.

It is agreed and declared that it shall
 always be in the discretion of the said Company
 as to the extent nature and duration of the
 facilities to be allowed the said Debtor or
 Debtors that all admissions or acknowledgements
 of indebtedness by the said Debtor or Debtors
 shall be binding on me/us that the Company shall
 be at liberty without affecting its rights here-
 under to release securities and to give time to
 or compound or make any other arrangements with
 the said Debtor or Debtors and that in the event
 of insolvency or compromise no dividends or pay-
 ments which the Company may receive from the
 said Debtor or Debtors or others shall prejudice
 its right to recover from me/us to the full
 extent of this guarantee any sum which after the
 receipt of such dividend or payments may remain
 owing by the said Debtor or Debtors.

Plaintiff's
Exhibits

"P.10"

Guarantee
 made between
 the Plaintiff
 and 2nd to
 8th Defend-
 ants and one
 Harilal Kanji
 1st December
 1955
 continued

)	Sgd. Sharda Ratilal	Plaintiff's
)	" Keshavlal Kanji	<u>Exhibits</u>
Sgd. ?)	" Harilal Kanji	"P.10"
		" B.R. Shah	Guarantee
P.O.Box No.357		" Z.S. Jetha	made between
Mombasa.		" Hirji Ramji	the Plaintiff
			and 2nd to
			8th Defend-
			ants and one
			Harilal Kanji
			1st December
			1955
			continued

"P.11"

			206
No. HG60019		December 1st 1955.	"P.11"
10	THE STANDARD BANK of SOUTH AFRICA LIMITED		Plaintiff's
	DELAMERE AVENUE, NAIROBI.		Nairobi Office's
	Pay Coast Brick & Tile Works Ltd or Order		Cheque for
	Shillings Two hundred thousand only		Shs.200,000/-
			1st December
			1955
	Shs 200,000/=		
	For and on behalf of		
	PREMCHAND RAICHAND LIMITED		
	sgd. ? Managing Director.		
	Stamp National Bank of India Ltd.		
	Mombasa 1891.		

"P.12"

			"P.12"
20	TREASURY SQUARE BRANCH		Plaintiff's
	No. AR 53718	5th Dec.1955.	Mombasa Office's
	THE STANDARD BANK OF SOUTH AFRICA LIMITED		Cheque for
	MOMBASA		Shs.200,000/-
	Pay The Coast Brick & Tile Works Ltd. or		5th December
	Order Shillings Two hundred thousand only		1955
	Shgs 200,000/=		
	For and on behalf of		
	PREMCHAND RAICHAND LIMITED		
	sgd. ? Director.		

Plaintiff's
Exhibits

"P.13"

TREASURY SQUARE BRANCH.

"P.13"

No.A 53722

9th December 1955.

Plaintiff's
Mombasa
Office's
Cheque for
Shs.50,000/-
9th December
1955

THE STANDARD BANK OF SOUTH AFRICA LIMITED
MOMBASA

Pay The Coast Brick & Tile Works
Ltd. or Order Shillings Fifty Thousand only.

Shgs 50,000/=

For and on behalf of
PREMCHAND RAICHAND LIMITED
sgd. ? Director.

10

"P.29"

"P.29"

Letter from
National Bank
of India,
Mombasa, to
1st Defendant
10th December
1955

NATIONAL BANK OF INDIA LIMITED
P.O. Box 257,
MOMBASA, 10th December 1955.

The Coast Brick & Tile Works Ltd.,
MOMBASA.

Dear Sirs,

Re: Certificate of Ownership No.5420
for Plot No. 500 Section VI
Changamwe-Miritini, Mombasa in the
name of Coast Brick & Tile Works
Limited.

20

We have been instructed by Messrs.Cumming
& Miller, Advocates, Nairobi, acting for Messrs.
Premchand Raichand Limited, Nairobi, to forward
to them title deeds for any immoveable property
that we may hold on your behalf, and which they
undertake to hold in trust for this Bank.

We shall be glad if you will advise us in
the matter.

30

Yours faithfully,

sd. ???

MANAGER.

JSB/CY.

"P.14"

Entd.....Folio.....8/40 3069

23rd December 1955.

No. EA
M 0089223

THE BANK OF BARODA LIMITED
MOMBASA, KENYA, EAST AFRICA

Pay Coast Brick & Tile Works Ltd., or Bearer
Shillings Fifty thousand only

Plaintiff's
Exhibits-

"P.14"

Plaintiff's
Mombasa Office's
Cheque for
Shs.50,000/-
23rd December
1955

10 Shs. 50,000/=

For and on behalf of:
PREMCHAND RAICHAND LIMITED
sgd ? Director

"D.A"

INVOICE NO. CBTW/1/P.150
P.O. Box 52,
NAIROBI, 31st December 1955.

M/s.Coast Brick & Tiles Works Ltd.,
P.O. Box 357, Mombasa.

Exhibits of
Defendants Nos.
1,3,4,5,7 & 8.

"D.A"

Plaintiff's
Invoice for Shs.
5,866/66 to 1st
Defendant
31st December
1955

20 Dr. to: PREMCHAND RAICHAND LIMITED.

To:

16% Interest on Shs. 200000.00
being outstanding amount for the
month of December 1955. Shs.2755.55.

16% Interest on Shs.200000.00
being outstanding amount from
5th December 1955 to 31st
December 1955. Shs.2400.00.

30 16% Interest on Shs.50000.00 be-
ing outstanding amount from 9th
December 1955 to 31st December
1955. Shs. 311.11.

16% Interest on Shs.50000.00 be-
ing outstanding amount from 23rd
December 1955 to 31st December
1955. Shs. 200.00.
Shs.5866.66

Shillings Five thousand eight hundred
sixty six and cents sixty six only ..

Plaintiff's
Exhibits

"P.15"

TREASURY SQUARE BRANCH

"P.15"

No. AN 51764

11th January 1956

Plaintiff's
Mombasa
Office's
Cheque for
Shs.50,000/-
11th January
1956

THE STANDARD BANK OF SOUTH AFRICA LIMITED
MOMBASA

Pay The Coast Brick & Tile Works Ltd.
Shillings Fifty thousand only.

Shgs 50000/= For and on behalf of
PREMCHAND RAICHAND LIMITED
sgd. ? Director.

10

"P.16"

"P.16"

TREASURY SQUARE BRANCH

Plaintiff's
Mombasa
Office's
Cheque for
Shs.100,000/-
16th January
1956

No. A 5 ?

16.1.1956

THE STANDARD BANK OF SOUTH AFRICA LIMITED
MOMBASA

Pay Coast Brick & Tile Works Ltd or Bearer
Shillings One hundred thousand only

Shgs 100000/= For and on behalf of
PREMCHAND RAICHAND LIMITED
sgd.

Director.

20

Exhibits of
Defendants
Nos.1,3,4,5,
7 & 8.

"D.B"

PREMCHAND RAICHAND LIMITED
PRODUCE AND GENERAL MERCHANTS

"D.B"

Plaintiff's
Receipt for
Shs.5,866/66
to 1st
Defendant
16th January
1956

NAIROBI	MOMBASA	THIKA
P.O.Box No.52 and 1189	P.O.Box No.426 Telephone No. 3901 and 3021	P.O.Box No.1 Telephone No.9
Telephone No. 2734 and 3049		

No. A 433

NAIROBI 16th January, 1956.

RECEIVED from M/s. Coast Brick & Tile Works Ltd.
the sum of Shillings Five Thousand eight hundred
sixty six and cents sixty six only.

30

in payment of Cheque No. T736762.

With Thanks
For: PREMCHAND RAICHAND LTD.

Shs. 5866.66.

"P.17"INVOICE No. CBTW/2/P.171

P.O. Box 52,

NAIROBI, 28th January 1956.

M/s. Coast Brick & Tile Works Ltd.,
P.O. Box 357, Mombasa.Dr. to: PREMCHAND RAICHAND LIMITED

To:

10	16% Interest on Shs.800000.00 being outstanding amount for the month of January 1956...	Shs. 11022.22.
	16% Interest on Shs.50000.00 being outstanding amount from 10th January 1956 to 31st January 1956 ...	Shs. 488.88
	16% Interest on Shs.100000.00 being outstanding amount from 16th January 1956 to 31st January 1956 ...	<u>Shs. 711.11.</u>
20		<u>Shs.12222.21</u>

Shillings. Twelve thousand two hundred
twenty two and cents twenty one only...

"P.22"TRANSFER OF SHARE OR STOCK."P.22"Signed Blank
Transfer Form.

in consideration of the sum of
paid by
hereinafter called the said Transferee.

DO hereby bargain, sell, assign and
transfer to the said transferee:-

30 of and in the undertaking called
the

TO HOLD unto the said Transferee,
executors, administrators and
Assigns, subject to the several
conditions on which hold

Plaintiff's
Exhibits

"P.22"

Signed Blank
Transfer Form
continued

the same immediately before the
execution thereof; and
the said Transferee do hereby agree
to accept and take the said
subject to the
conditions aforesaid

AS WITNESS our hands and Seals this day
of in the year of our Lord One Thousand Nine
Hundred and
Signed, Sealed, and delivered by the above-named 10
? in the Presence of)
Witness { Signature) KANJI
{ Address) MEGHI
{ Occupation) SHAH

"P.18"

Plaintiff's
Nairobi
Office's
Cheque for
Shs.300,000/-
6th February
1956

No. HH 52713

"P.18"

206
February 6th 1956.

THE STANDARD BANK OF SOUTH AFRICA LIMITED
DELAMERE AVENUE, NAIROBI.

Pay National Bank of India Ltd. or Order
Shillings Three hundred thousand only 20
Shs.300000/-

For and on behalf of
PREMCHAND RAICHAND LIMITED
sgd. ? Managing Director.

Exhibits of
Defendants
Nos.1,3,4,5,
7 & 8.

"D.C"

Plaintiff's
Receipt for
Shs.12,222/21
to 1st
Defendant
8th February
1956

"D.C."

PREMCHAND RAICHAND LIMITED
PRODUCE AND GENERAL MERCHANTS

NAIROBI	MOMBASA	THIKA	
P.O.Box No.52 and 1189	P.O.Box No.426 Telephone No. 3901 and 3021	P.O.Box No.1 Telephone No.9	30
Telephone No. 2734 and 3049			
No. A 442	NAIROBI	8th February, 1956.	

RECEIVED from M/s. Coast Brick and Tile Works Ltd.
the sum of Shillings Twelve Thousand two hundred
twenty two and cents twenty one only.

in payment of Cheque No. T.736806.

With Thanks

For: PREMCHAND RAICHAND LTD.

Shs. 12222/21.

KENYA
REVENUE.

40

"P.30"

NATIONAL BANK OF INDIA
LIMITED,
P.O. Box 257,
MOMBASA, 10th February
1956.

Messrs. Cumming & Miller,
P.O. Box 607,
NAIROBI.

Plaintiff's
Exhibits

"P.30"

Letter from
N.B.I. Mombasa
to Cumming &
Miller, Nairobi
10th February
1956

10 Dear Sirs,

Coast Brick & Tile Works Limited
Certificate of Ownership No.C.R.
5420 for Plot No.500 Section VI,
Mombasa.

Our Nairobi Office under date of 7th idem
inform us that they have received from you a
remittance of Sh.300,000 - on account of the
above Company and for which we thank you.

20 Since our last advice the indebtedness of
this Company in our books has been reduced to
Sh.290,263/62, inclusive of interest and
exchange, and after passing the above entry
their account reflects a credit balance.

We have today forwarded to our Nairobi
Office, Memorandum of Discharge of Charge by
Deposit of Title in respect of C.R. 4226, Plot
No.500, Section VI, Mombasa, duly signed by us,
with instructions to hand it to you.

Yours faithfully,

30

sd. ???

MANAGER.

IHA/CY.

c.c. The Coast Brick & Tile Works Ltd.,
Mombasa.

Plaintiff's
Exhibits

"P.31"

NATIONAL BANK OF INDIA LIMITED,
P.O. BOX 257,

"P.31"

MOMBASA, 10th February 1956.

Letter from
N.B.I. Mombasa
to 1st
Defendant
10th February
1956

The Coast Brick & Tile Works Ltd.,
MOMBASA.

Dear Sirs,

Certificate of Ownership No.5420 for
Plot No.500, Section VI, Mombasa.

With reference to our letter of 8th instant we have received from Messrs. Cumming & Miller, through the medium of our Nairobi Office, a remittance of Sh.300,000 - on your account, and it now reflects a credit balance of Sh.9,736/38 made up as follows:- 10

Your balance with us at
the close of business on
9.2.1956 Dr. Sh. 289,508.12

Debited to your account
today:- 20

Interest on your debit
balances up to 9.2.1956 568.00

1/16% Exchange on remittance
of Sh.300,000 - from our
Nairobi Office. 187.50

Sh. 290,263.62

Credited to your account
today :-

Remittance from our Nairobi
Office. Sh. 300,000.00 30

Your account with us at Cr. Sh. 9,736.38

We enclose a copy of our letter of date to Messrs. Cumming & Miller, Nairobi, which is self explanatory.

Yours faithfully,
sd. ???
MANAGER.

IHA/CY.

"P 33"

Plaintiff's Exhibits

TRANSFER

"P 33"

For Cheques Paid in only National Bank of India Limited
(Incorporated in the United Kingdom)
(To be used only for Current Accounts)

National Bank of India Ltd's Transfer Form for Shs. 300,000/-

MOMBASA ...10th Feb...1956.....

Folio.....

P.O. BOX 257

10th February, 1956.

Paid to the Credit of Coast Brick & Tile Works Ltd

10 the sum of Shillings Three hundred thousand only.
as per particulars overleaf

By Cumming & Miller

Checked by Nairobi Agency

300,000/.....

"P 32"

"P 32"

NATIONAL BANK OF INDIA LIMITED
P.O. BOX 257.
MOMBASA. 14th February 1956.

Letter from N.B.I. Mombasa to 1st Defendant

20 The Coast Brick and Tile Works Ltd.,
MOMBASA.

14th February, 1956.

Dear Sirs,

Certificate of Ownership No.5420
in respect of Plot No. 500, Section
VI, Mombasa.

30 We enclose Company form No. 20 and shall be glad if you will return it to us duly completed and signed by you in the presence of a Commissioner of Oaths, to enable us to register satisfaction of the Charge created by you in our favour on 15th April, 1955.

Yours faithfully,

sd. ???
Manager.

Encl:
IHA/SLE.

148.

Plaintiff's
Exhibits

"P 26(a)"

"P 26(a)"
Letter from
1st Defendant
to Plaintiff

COAST BRICK & TILE WORKS LIMITED
MOMBASA.

23rd Feb. 1956.

23rd February,
1956.

Messrs. Premchand Raichand Ltd.,
Mombasa.

Dear Sirs,

Re Cheque No. EA/M 0099205 of Bank
of Baroda Ltd for Shs.50,000/-
drawn by you in our favour.

10

We have duly received the above cheque from
you on behalf of your Nairobi office.

Yours faithfully,
for COAST BRICK & TILE WORKS LIMITED.

sd. Kanji

R.K. Shah,
Director.

/HM.

"P 23"

"P 23"

Plaintiff's
Mombasa
Office's
Cheque for
Shs.50,000/-
24th February,
1956.

Entd..... Folio..... 30 cents
DUTY PAID
EA
M 0094205 24th February, 1956

20

THE BANK OF BARODA LIMITED
MOMBASA
Kenya, East Africa.

Pay
Coast Brick & Tile Works Ltd. or Bearer
Shillings Fifty thousand only
for and on behalf of
PREMCHAND RAICHAND LIMITED
Shs.50000/-

30

?
Director

149.

"P 20"

INVOICE No. CBTW/3/P.199

P.O. Box 52,
NAIROBI, 27th February,
1956.

M/s. Coast Brick & Tile Works Ltd.,
P.O. Box 357, Mombasa.

Dr. to: PREMCHAND RAICHAND LIMITED

Plaintiff's
Exhibits

"P20"

Plaintiff's
Invoice for
Shs.10,477/77
to 1st
Defendant

27th February,
1956.

10

TO: 16% Interest on Shs.950000.00
being outstanding amount for
the month of February 1956 .. Shs.12244.44

16% Interest on Shs.50000.00
being outstanding amount from
24th February 1956 to 29th
February 1956 ... Shs. 133.33
Shs.12377.77.

Less Interest paid by you to
Bank from 1st January 1956 to
7th February 1956... Shs. 1900.00.
10477.77.

20

"P 21"

CERTIFICATE OF THE REGISTRATION OF A MORTGAGE OR
CHARGE

PURSUANT TO SECTION 82(2) OF THE COMPANIES
ORDINANCE (CHAPTER 288)

I HEREBY CERTIFY that a Charge dated the
Thirtyfirst day of January One thousand nine
hundred and fifty-six and created by Coast Brick
and Tile Works Limited for securing the sum of
30 Shillings One Million only (Shs.1,000,000/-) was
this day REGISTERED pursuant to Section 79 of the
Companies Ordinance.

Given under my hand at Nairobi, this
Thirteenth day of March One thousand nine hundred
and fifty-six.

sd. ???
Acting Registrar of Companies.

"P 21"

Certificate of
Registration of
the Charge at
the Companies
Registry

13th March,
1956.

Exhibits of
Defendants
Nos. 1,3,4,
5,7, & 8.

"D D"

PREMCHAND RAICHAND LIMITED

PRODUCE AND GENERAL
MERCHANTS

"D D "

Plaintiff's
Receipt for
Shs.10,477/77
to 1st
Defendant.

NAIROBI	MOMBASA	THIKA
P.O.Box No.52 and 1189	P.O.Box No.426	P.O. Box No.1.
Telephone No. 2734 and 3049	Telephone No. 3901 and 3021	Telephone No.9.

26th March,
1956.

No. A 465 NAIROBI 26th March, 1956. 10

RECEIVED from Coast Brick & Tile Works Ltd. the
sum of Shillings Ten thousand four hundred seventy-
seven and cents seventy-seven only ...
in payment of Cheque No. T.736845.

With Thanks
For: PREMCHAND RAICHAND LTD.

Shs.10477/77

KENYA
REVENUE

Plaintiffs
Exhibits
"P 26(c)"

"P 26(c)"

Letter from
1st Defendant
to Plaintiff.

COAST BRICK & TILE WORKS LIMITED
MOMBASA

20

20th May,
1958

20th May, 1958.

Messrs. Premchand Raichand Ltd.,
P.O. Box 52,
NAIROBI

Dear Sir,

INTEREST ACCOUNT FOR APRIL, 1958.
SHS, 12800/00 CHEQUE NO.T469187
OF NATIONAL OVERSEAS GRINDLAYS
BANK LIMITED. DATED 25th MAY 1958.

30

We most regretfully have to write that the
above cheque of the Interest Account not to be
presented on 25th instant but on 15th June 1958,
due to the funds which has not been received from
the Ministry of Works, due to the ending of the
Financial year which we hope to receive in next
month.

Yours faithfully,

sd. ???
COAST BRICK & TILE WORKS LTD.

40

151.

"P 26(d)"

PREMCHAND RAICHAND LIMITED

P.O. Box 52,

NAIROBI, 21st May, 1958.

Messrs. Coast Brick & Tile Works Ltd.,
P.O. Box 357,
MOMBASA.

Dear Sirs,

10 We refer to your letter dated 20th May
enclosing therewith a cheque for Shs.12800/-
being interest for the month ending 30th April,
1958.

20 Interest is due on the fifth of the
following month and due to your request we have
accepted to receive the same on 25th of the
following month and now you ask us to present
the April interest cheque on 15th June. We have
to inform you that your cheque for April interest
shall be presented on 25th May 1958, and you
shall have to make your arrangements to meet
same.

We have to inform you that we shall not
give you any further time in payment of the
interest and please do not write to us in this
regard.

Yours faithfully,

PREMCHAND RAICHAND LIMITED

Sd. M. Patel.

Manager.

Plaintiff's
Exhibits

"P 26(d)"

Letter from
Plaintiffs to
1st Defendant

21st May,
1958.

152.

Plaintiff's
Exhibits

"P 26(b)"

"P 26(b)"

COAST BRICK & TILE WORKS LTD.

Letter from
1st Defendant
to Plaintiff.

MOMBASA.

2nd February, 1959.

2nd February,
1959.

Messrs. Premchand Raichand Ltd.,
P.O. Box 52,
NAIROBI.

Dear Sir,

COAST REGISTRY MOMBASA AS NO.C.R.4226/20
MORTGAGED IN YOUR FAVOUR FOR SHILLINGS
ONE MILLION ONLY

10

We refer to the above registry and we are highly favoured by your goodselves in giving your sincere assistance at a point.

We request you in the same sincerety and favour owing to the late general business affairs, the slack and the general building programme which has hampered a lot to our industry, so much so that the general labour and other expenses becomes very very difficult to meet all the ends. At this junction, we approach you to consider our request with great delicacy and favour to change the Interest Rate from 1st January 1959 at the rate of 8 percent per annum so as to bring us in a better footing to establish curselves and to fulfil our wishes.

20

We hope this favour will be of great assistance to us and your sincerity will be very much appreciated by considering our request and thus helping us in our venture.

30

Our very most kindness and sincere feelings.

Yours faithfully,

FOR COAST BRICK & TILE WORKS LTD.

sd. ???

153.

"P 24"

CREDIT NOTE

P.O. Box 52,
Nairobi .. 24th June
1959.

To. Messrs. Coast Brick & Tile Works Ltd.,

P.O. Box 357, Mombasa.

PREMCHAND RAICHAND LIMITED

Plaintiff's
Exhibits

"P 24"

Plaintiff's
Credit Note
for Shs.
16,106/64 to
1st Defendant

24th June 1959

To:

10

Refund of Interest at 4% p.a. on our
Invoice No. 38/P. 1556 28/1
39/P. 1583 20/2
40/P. 1605 25/3
41/P. 1618 23/4
42/P. 1637 26/5 Shs. 16106.64.

Shillings, Sixteen thousand one hundred
six and cents sixty four only

"P 26(e)"

As "P 24"

Not Reproduced.

"P 26(e)"

As P 24 above
Not Reproduced

20

154.

Plaintiff's
Exhibits

"P 26(f)"

"P 26(f)"

PREMCHAND RAICHAND LIMITED

Letter from
Plaintiff to
1st Defendant

P.O. Box 52,

NAIROBI, 3rd July 1959.

3rd July,
1959.

REGISTERED

Messrs. Coast Brick & Tile Works Ltd.,
P.O. Box 357,
MOMBASA.

Dear Sirs,

It is indeed a great surprise to us that you have stopped payment of mortgage interest since the month of February, 1959. You will appreciate that we have been generous in giving you terms but as you have stopped paying interest, we have no alternative but to demand from you all the accrued interest within seven days from receipt of this letter failing which we shall hand over the matter to our advocates to enforce the security.

10

We observe from the beginning that you are absolutely negligent in making payments. This is the final notice and do not make any correspondence nor try to telephone us on this subject.

20

It is in your own interest to make interest payments punctually.

Yours faithfully,

PREMCHAND RAICHAND LIMITED.

sd. M. Patel.

Manager.

155.

"P 4"

Plaintiff's
Exhibits

ROBSON HARRIS & CO.
Advocates

P.O. BOX 5305
NAIROBI

"P 4"

Our Ref: P/54/6.

10th September, 1959.

Letter from
Robson Harris
& Co.,
Advocates,
Nairobi, to
the Sureties
(2 to 8
Defendants)

Kanji Meghji Shah,
P.O. Box 357,
MOMBASA.

Shardaben Ratilal Shah,
P.O. Box 357,
MOMBASA.

10 Keshavlal Kanji Shah,
P.O. Box 357,
MOMBASA.

Ratilal Kanji Shah,
P.O. Box 357,
MOMBASA.

Bharmal Raishi Shah,
P.O. Box 5839,
NAIROBI.

Zaverchand Sojpal Shah,
P.O. Box 772,
NAIROBI

10th September
1959.

Hirji Ramji Shah,
P.O. Box 772,
NAIROBI.

Registered Post/Advise
Receipt.

Dear Sir,

PREMCHAND RAICHAND LIMITED

20 Upon the instructions of our above-named
Client Company, we refer to the Charge over Title
Number 4226, Mombasa, given by Coast Brick & Tile
Works Limited to our Client Company dated the 31st
January 1956, to secure the repayment of the loan
and interest thereon as in the said Charge set
forth.

30 You will recall that you are a Surety and
executed the said Charge in such capacity. You
will also recall that the said Charge provides
that as between yourself and our Client Company,
you are to be considered as a principal debtor
for all the principal monies and interest intended
to be secured by the said Charge.

We are instructed that Coast Brick & Tile
Works Limited has not complied with its covenants
for repayment of principal and interest and in
this regard we enclose a copy of a letter of even
date herewith addressed to Coast Brick & Tile
Works Limited. From this last-mentioned letter
you will observe that an amount of Shs.90,453/30

Plaintiff's Exhibits

"P 4"

Letter from Robson Harris & Co., Advocates, Nairobi, to the Sureties (2 to 8 Defendants)

10th September, 1959.
Continued.

is overdue in respect of interest, that further interest accrues in September as to Shs.12,800/- and in October as to Shs.13,226/66, and that the principal monies remaining outstanding total Shs. 960,000/-.

We hereby give you formal notice that the principal monies and interest secured by the said Charge have become repayable to our Client Company on demand, and we call upon you as such Surety as aforesaid, both severally and jointly with your co-Sureties and with Coast Brick & Tile Works Limited, forthwith to pay to our Client Company the balance of principal monies and interest outstanding and together with all expenses, costs and damages sustained by reason of the breach of the conditions contained in the said Charge, together with interest thereon as therein stipulated.

10

If this demand has not been satisfied in seven days from the date of this letter, our Client Company will, without further notice, take such action for recovery as it may be advised.

20

Yours faithfully,

BJR/dan.

sd. Robson Harris & Co.

"P 5"

Letter from Robson, Harris & Co. to the Chargor (1st Defendant)

10th September, 1959.

"P 5"

ROBSON HARRIS & CO.
Advocates.

P.O. BOX 5305,
NAIROBI.

Our ref: p/54/6

10th September 1959.

Coast Brick & Tile Works Limited,
P.O. Box 357,
MOMBASA.

Registered Post/Advise Receipt

30

Dear Sirs,

PREMCHAND RAICHAND LIMITED

Upon the instructions of our above-named Client Company we refer to the Charge over Title Number 4226, Mombasa, given by you in favour of our Client Company and dated the 31st January

1956, securing the loan of Shs. 1,000,000/- with repayment and interest thereon as in the said Charge set forth.

Plaintiff's
Exhibits

"P 5"

10 We are further instructed that the interest payable is in arrear and overdue as at the 31st August last to the extent of Shs. 90,453/30 and that accordingly you have failed in the performance of your covenants in that behalf contained in the said Charge. We are therefore formally to demand, as we hereby do, the repayment to our Client Company forthwith of the balance of the principal monies secured by the said Charge together with interest thereon and together with all expenses, costs and damages sustained by reason of the breach of the conditions contained in the said Charge, together with interest thereon as therein stipulated.

Letter from
Robson Harris
& Co. to the
Chargor (1st
Defendant)

10th September,
1959.
Continued.

20 For your information, we are instructed that the principal monies outstanding are Shs. 960,000/- with interest accruing due in respect of September 1959 of Shs. 12,800/- and that the interest accruing due in respect of October 1959 is Shs. 13,226/66.

If the demand herein contained is not fulfilled within seven days of the date hereof our Client Company will take such action for enforcement as it may be advised.

Yours faithfully,

BJR/dan.

sd. Robson Harris & Co.

30 Copies to:

Kanji Meghji Shah,
P.O. Box 357,
MOMBASA.

Shardaben Ratilal Shah,
P.O. Box 357,
MOMBASA.

Keshavlal Kanji Shah,
P.O. Box 357,
MOMBASA.

Ratilal Kanji Shah,
P.O. Box 357,
MOMBASA.

Bharmal Raishi Shah,
P.O. Box 5839,
NAIROBI.

Zaverchand Sojpal Shah,
P.O. Box 772,
NAIROBI.

40

Hirji Ramji Shah,
P.O. Box 772,
NAIROBI.

158.

Plaintiff's
Exhibits

"P 6"

"P 6"
Letter from
7th & 8th
Defendants
to Robson,
Harris & Co.

26th September,
1959.

Zaverchand Sojpal Jetha,
Hirji Ramji Shah,
Nairobi.

26th September, 1959.

Messrs. Robson Harris & Co.,
P.O. Box 5305,
NAIROBI.

Dear Sirs,

COAST BRICK OF TILE WORKS LTD.

10

We thank you for your letter No. P/54/6 of
10th September 1959.

We are glad to confirm your clients does
not intend to proceed further provided interest
is paid regularly to them.

We suggest your clients should forthwith
appoints a Receiver as a manager to manage the
affairs of the above company.

By non-payment of the instalments and the
interest the liability of the company to your
clients increases and we, hereby, refuses to be
responsible for the additional or the original
liability under the guarantee.

20

Your letter is the first time when your
clients have disclosed to us of the non-payment
of instalments and the interest.

Yours faithfully,

sd. Z.S. Jetha.

ZAVERCHAND SOJPAL JETHA and
HIRJI RAMJI SHAH.

30

159.

"P 7"

ROBSON HARRIS & CO.
Advocate.

P.O. BOX 5305,
NAIROBI.

9th November 1959.

Zaverchand Sojpal Jetha & Hirji Ramji Shah,
P.O. Box 772,
NAIROBI.

Dear Sirs,

COAST BRICK & TILE WORKS LIMITED.

10

We are in receipt of your letter which is dated the 26th September, but which was received on the 27th October.

We must give you notice, as we hereby do, that our client company holds you to your guarantees and we regret that it is not possible for you to evade your responsibilities merely by the means of writing a letter such as that under reply. If in fact you wish to comply with your undertakings then this is most simply effected by making payment to our client company of the full amount of principal and interest owing.

20

Yours faithfully,

BJR/dan.

sd. Robson Harris & Co.

"P 26(g)"

COAST BRICK & TILE WORKS LIMITED
MOMBASA.

12th January, 1960.

Messrs. Premchand Raichand Ltd,
P.O. Box 52,
NAIROBI.

30

Dear Sir,

Enclosed cheque of N.G.B. Ltd. No.T 483416 of Shs. 9600/00 for the interest account.

Regret the delay and henceforth we shall endeavour to send your cheque regularly every month.

Thanking you for your cooperation.

Yours faithfully,

sd. ???

for Coast Brick & Tile Works Ltd.

Plaintiff's Exhibits

"P 7"

Letter from Robson Harris & Co. to 7th and 8th Defendants

9th November, 1959.

"P 26(g)"

Letter from 1st Defendant to Plaintiff.

12th January, 1960.

160.

Plaintiff's
Exhibits

"P 26 (h)"

"P 26(h)"

COAST BRICK & TILE WORKS LTD.
MOMBASA

Letter from
1st Defendant
to Plaintiff.

8th February, 1960.

8th February,
1960.

Messrs. Premchand Raichand Ltd,
P.O. Box 52,
NAIROBI.

Dear Sir,

INTEREST ACCOUNT

Enclose our Cheque of Shs.9600/00 of
National & Grindlays Bank Limited No. T483450 re
above dated 28th instant.

10

Thanking you for your kind cooperation.

Yours faithfully,

sd. ???

for Coast Brick & Tile Works Ltd.

"P 26(i)"

"P 26(i)"

Letter from
1st Defendant
to Plaintiff

COAST BRICK & TILE WORKS LTD.
MOMBASA.

25th April, 1960.

25th April,
1960.

Messrs. Premchand Raichand Limited,
P.O.Box, 52,
NAIROBI.

20

Dear Sir,

Enclosed cheque No. T499347 of National
& Grindlays Bank Limited for Shs, 9600.00 the
interest account and acknowledge receipt.

Thanking you.

Yours faithfully,

sd. ???

for Coast Brick & Tile Works Ltd.

30

161.

"P 8"

BATEL & PATELS,
Advocates.

P.O. BOX 9811
NAIROBI.

2nd June 1960.

Plaintiff's
Exhibits

"P 8"

Messrs. Coast Brick & Tile Works Ltd.,
P.O.Box 357,
MOMBASA.

Letter from
Batel & Patels
Advocates,
Nairobi to
1st to 8th
Defendants

2. Mr. Kanji Meghji Shah,
P.O. Box 357,
MOMBASA.

5. Mr. Hirji Ramji Shah
P.O. Box 772,
NAIROBI.

3. Mr. Keshavlal Kanji Shah,
P.O. Box 357,
Mombasa.

6. Shardaben R. Shah,
P.O. Box 357,
MOMBASA.

4. Mr. Bharmal Raishi Shah,
P.O. Box 5839,
NAIROBI.

7. Mr. Ratilal Kanji Shah,
P.O.Box 357,
MOMBASA.

8. Mr. Zaverchand Sojpal Jetha,
P.O. Box 772.
NAIROBI.

2nd June 1960

20 Dear Sirs,

re: PREMCHAND RAICHAND LIMITED

Under instructions from our above named client Company, we refer to the Charge over Title number 4226, Mombasa given by Coast Brick & Tile Works Ltd., to our client Company dated the 31st January 1956, to secure the repayment of the loan and interest thereon as in the said Charge set forth.

30 We are informed by our clients that the sum of Shs.1062293/34 is due and payable to them under the said Charge towards capital and interest as at 31st May 1960.

Despite repeated requests and written notices you have not paid the amount that became due and payable from time to time under the said Charge.

40 We have not been instructed to call upon you to pay the said sum of Shs.1062293/34 to our clients within seven days of the receipt of this letter by you failing which a court action will be filed, jointly and severally, against you for the recovery of the same without any further reference to you.

Yours faithfully,
for BATEL & PATELS.
sd. N.M.Patel.

c.c. M/s Premchand Raichand Ltd;
NAIROBI.

NMP/SGH.

Plaintiff's
Exhibits

"P 25"

Defendant's
Balance
Sheet as at
30th
September,
1960.
(PART)

"P 25" (PART)

COAST BRICK & TILE WORKS LTD.
MOMBASA.

PART OF STATEMENT SHOWING DETAILS OF ASSETS AND
LIABILITIES AS AT 30TH SEPTEMBER 1960.

L I A B I L I T I E S:

SHARE CAPITAL:

5550 shares of Shs.100/- each 555,000.00.

NATIONAL & GRINDLAYS BANK LTD: 14,211.24.

SUNDRY CREDITORS: 99,801.78. 10

DIRECTORS' AND SHAREHOLDERS' ACCOUNTS:

Kanji Meghji Shah	56,703.16.	
Ratilal Kanji Shah	54,920.00.	
Keshavlal Kanji Shah	37,987.32.	
Harilal Kanji.	29,052.00.	
Mrs. Sharaben Ratilal.	2,250.00.	
Prabhulal Kanji.	<u>8,470.00.</u>	189,382.48.

LOANS:

Sojpal Jetha	9,680.70.	
Shah Meghji Mulji Ltd. (with interest).	231,317.39.	20
Popatlal Karman & Co.	40,460.00.	
Bhagwanji & Co. Ltd.	60,293.42.	
Motichand Pethraj.	19,977.64.	
Nanak Lime Works.	18,079.67.	
Credit Finance Corporation Ltd.	15,780.80.	
Premchand Raichand Ltd. (Interest Ac.).	125,693.54.	
Premchand Raichand Ltd. (Loan Ac.).	<u>960,000.00.</u>	1,481,283.16. 30

DEPRECIATION RESERVE: 1,003,509.53.

Total Shs. 3,343,188.19.

11th November 1960.

163.

"P 37"

Plaintiff's
Exhibits

"P 37"

THE COMPANIES ORDINANCE, 1933
and
THE COMPANIES (AMENDMENT) ORDINANCES,
1933 and 1934

Memorandum &
Articles of
Association
of 1st
Defendant
Company

COMPANY LIMITED BY SHARES

M E M O R A N D U M

and

A R T I C L E S of A S S O C I A T I O N

of

COAST BRICK & TILE WORKS LIMITED.
(A PRIVATE COMPANY)

10

Incorporated the 13th day of August, 1943.

A.B. PATEL & PATEL,
ADVOCATES,
P.O. Box No. 274,
Jinja House,
Mombasa,
Kenya Protectorate.

THE COMPANIES ORDINANCE, 1933

and

THE COMPANIES (AMENDMENT)
ORDINANCES, 1933 and 1934

COMPANY LIMITED BY SHARES

MEMORANDUM OF ASSOCIATION
of
COAST BRICK & TILE WORKS LIMITED.
(A PRIVATE COMPANY)

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

- 10 1. The name of the Company is "COAST BRICK
AND TILE WORKS LIMITED".
2. The Registered Office of the Company will
be situate in the Colony and Protectorate of Kenya.
3. The objects for which the Company is
established are:-
- 20 (a) To carry on the business of brick-makers,
tile-makers, potters, quarriers, lime
burners, builders, masons, bricklayers,
contractors, plasterers, lumbermen, saw-
millers, flourmillers, carpenters, joiners,
cabinetmakers, wagon-builders, coach-
builders, road-makers, bridge-builders,
glass manufacturers, aluminiums, brassware,
copperware, ironware and other metal manu-
factures, general pottery and crockery
manufacturers, miners, colliers, smelters,
founders, metal workers, smiths, railway
contractors, engineers, plumbers, gas-
fitters, electric fitters, glaziers,
30 ironmongers, storekeepers, importers,
exporters, carriers, wharfingers, ship-
owners, planters, merchants, commission
agents or any other business which can
be conveniently carried on in connection
therewith.
- (b) To acquire by purchase, exchange or
otherwise either for an estate in fee

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company.
Continued.

simple or for any less estate whether in possession or reversion and whether vested or contingent any lands, houses, buildings, tenements and hereditaments of any tenure, whether subject or not to any charges or incumbrances and to hold or to sell, let, alienate, mortgage, charge or otherwise to deal with all or any of such lands, tenements or hereditaments and to construct, use, work and carry on or cause to be constructed, used, worked and carried on, railways, tramways, wharves, piers, saw mills, steam mills, water works, gas works, telegraphs, telephones or other electrical works, factories, roads, canals, drains and undertakings of any kind upon or in connection with the lands, estates or properties of the Company or in which it has, has had or intends to acquire an interest.

10

20

- (c) To deal in and carry on the business of Buyers, and Sellers of Produce either locally or elsewhere, Agents and Representatives of foreign firms, Manufacturers, Bankers, Money-Lenders, Cotton Ginners and Spinners, Financiers, Sewage Works, Dairy Producers, Foreign concession, Clearing and Forwarding Agents, Petrol, Petroleum Products and Oil Dealers, Oil Refiners, dealers in all kinds of wares and goods and Manufacturers and Industrialists in all lines.
- (d) To carry on and transact all or any kind of agency business and to act as representatives of any person, firm, company or corporation, manufacturing or dealing in any sort of merchandise, commodities, goods, wares and other materials and things.
- (e) To acquire the goodwill of any business within the objects of the company and any lands, privileges, rights, contracts, property or effects held or used in connection therewith and upon any such purchase to undertake the liabilities of any company, association, partnership or person.
- (f) To undertake, construct, acquire and carry on works of all kinds relating to any

30

40

business of the Company.

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association of 1st
Defendant
Company
Continued.

- 10 (g) To erect, build, construct, alter, improve, enlarge, maintain and work wharves, stores, buildings, shops, factories, works, plants, or machinery for the company's business.
- (h) To apply for or acquire privileges, monopolies, licences, concessions, secret processes and the like which may seem advantageous to the purposes of the Company.
- (j) To carry on any other business of a similar nature or any business which in the opinion of the Directors can be conveniently carried on by the Company.
- (k) To acquire and deal with the following or any one or more of them:
- 20 (1) The business, property and liabilities of any company, firm, society, corporation or person carrying on any business within the objects of the Company.
- (2) Lands, Buildings, easements or other interests in real estate.
- (3) Plant, machinery, personal estate and effects.
- (4) Patents, patent rights, inventions, copy rights, designs, trade marks or secret processes.
- 30 (5) Shares, stocks or securities in or of any company or undertaking the acquisition of which may promote or advance the interests of the Company.
- (1) To pay all costs, charges and expenses incurred or sustained in or about the promotion and establishment of the Company or which the Company may consider to be preliminary.
- 40 (m) To sell, let, dispose of or grant any rights over all or any of the property of the Company.

Plaintiff's Exhibits

"P 37"

Memorandum
and Articles
of Association of 1st
Defendant
Company
Continued.

- (n) To grant licences to use patents or secret processes of the Company.
- (o) To manufacture plant, machinery, tools, goods or things for any of the purposes of the Company's business.
- (p) To draw, accept, endorse and negotiate all bills of exchange, promissory notes and other negotiable instruments for the purposes of the Company's business.
- (q) To borrow money or receive money on deposit either with security or secured by debentures, debenture-stock, mortgage or other securities charged on the undertaking or on all or any of its assets including its uncalled capital. 10
- (r) To lend money with or without security and to invest money of the Company in such manner other than in the shares of the Company as the Directors may from time to time decide. 20
- (s) To enter into arrangements for joint working of business or for sharing of profits or for amalgamation with any other company, firm or person carrying on business within the objects of the Company.
- (t) To promote or assist in the promotion of any other company for the purpose of acquiring or undertaking all or any of the assets and liabilities of this company or for any other purpose which may seem directly or indirectly to benefit the Company. 30
- (u) To sell the undertaking and all or any of the property of the Company for cash or for stock, shares or securities of any other company or for any other consideration.
- (v) To procure the Company to be registered, incorporated or otherwise constituted if necessary or advisable according to the law of the United Kingdom or of any Colony or Dependency or Mandated Territory thereof or any other Republic or country in the world. 40

- 10 (w) To provide for the welfare of the persons in the employment of the Company or formerly in the employment of the Company's predecessors in business and the wives, widows and families of such persons by grants of money, pensions and other payments and by providing or subscribing towards the places of instruction and recreation and hospitals, dispensaries, medical and other attendances and other assistance as the Company shall think fit and to form, subscribe to or otherwise aid benevolent, religious, scientific, national or other institutions or objects which shall have any moral or other claim to support or aid by the Company by reason of the locality of its operations or otherwise.
- 20 (x) From time to time to subscribe or contribute to any charitable, benevolent or useful object of a public character the support of which will in the opinion of the Directors tend to increase its repute or popularity among its employees, its customers or the Public.
- 30 (y) To distribute in specie or otherwise as may be resolved as assets of the Company among its members and particularly the shares, debentures or other securities of any other company formed to take over the whole or any part of the assets and liabilities of this Company.
- (z) To do all or any of the matters and things hereby authorised in any part of the words either alone or in conjunction with or as factors, trustees or agents for any other companies, corporations, firms or persons or by or through any factors, trustees or agents.
- 40 (aa) GENERALLY to do all such other things as may appear to the Directors to be incidental or conducive to the attainment of the above objects or any of them.

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

AND it is hereby declared that in the interpretation of this clause the powers conferred on the Company by any paragraph shall not be restricted by reference to any other paragraph or to the name of the Company or by the juxtaposition of two or more objects and

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

that in the event of any ambiguity this clause and every paragraph thereof shall be construed in such a way as to widen and not to restrict the powers of the Company.

4. The liability of the members is limited in accordance with the numbers of shares subscribed by each of them.

5. The capital of the Company is Shs.300,000/- (Shillings Three Hundred Thousand) divided into Three Thousand shares of Shs.100/- (Shillings One Hundred) each. 10

(5)

"The Authorised Capital of the Company be increased to Shillings One Million (Shs.1,000,000/-) by creation of 7,000 shares of Shs. 100/- each, and that such new shares shall rank pari passu with the existing shares in the Capital of the Company.

1.12.55.

6. The Company shall have power to consolidate the capital of the Company into shares of larger amount or to subdivide the same or any part thereof into shares of a lesser amount to issue any shares either at par or at a premium or (if and so far as the law for the time being shall permit) at a discount or to divide the same into different classes, with any such guaranteed, preference or other special privileges or advantages over any shares previously issued or to be thereafter issued or with deferred or qualified rights or subject to any restrictions or limitations as may be prescribed by the Company's Articles of Association or determined by resolution but so that the special rights or privileges belonging to the holders of any shares that may be issued with preferred or any special rights shall not be varied, abrogated or affected except by such sanction as is provided by the Articles of Association of the Company for the time being. 20 30

7. We the several persons whose names and addresses are subscribed below are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree 40

to take the number of shares in the Capital of the Company set opposite our respective names.

Plaintiff's Exhibits

"P 37"

	Names, address and Descriptions of Subscribers	Number of shares taken by each	Names, address and Descriptions of Witnesses.	Memorandum and Articles of Association of 1st Defendant Company Continued.
10	Kanji Hirji Shah, Merchant, P.O. Box 360, Mombasa.	One	Chimanlal Patel, Advocate, P.O.Box 274, Mombasa	
	Amritlal Raishi, Merchant, P.O. Box 22, Nairobi.	One	Chimanlal Patel, Advocate, P.O. Box 274, Mombasa.	
	Amritlal Bharmal Shah, Merchant, P.O. Box 1007, Nairobi.	One	Chimanlal Patel, Advocate, P.O. Box 274, Mombasa.	

MOMBASA, Dated this 6th day of August, 1943.

20

 THE COMPANIES ORDINANCE, 1933
 and
 THE COMPANIES (AMENDMENT)
 ORDINANCES, 1933 and 1934

 COMPANY LIMITED BY SHARES

 ARTICLES OF ASSOCIATION
 of

COAST BRICK & TILE WORKS LIMITED.
 (A PRIVATE COMPANY)

 TABLE "A" EXCLUDED.

30

1. The Regulations contained in Table "A" in the First Schedule to the Companies Ordinance 1933

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

shall not apply to the Company save and except where the same are repeated or contained in these Articles.

INTERPRETATION.

2. In these Articles :-

"The Companies Ordinance" means the Companies Ordinance 1933 and every other Ordinance for the time being in force concerning and affecting companies. 10

"These Articles" mean these Articles as originally framed or as altered from time to time by resolution.

Words importing the singular number include the plural number and vice versa.

Provided always that when any provision of the Companies Ordinance is referred to the reference is to that provision as modified by any law for the time being in force and unless the context otherwise requires, expressions defined in the Companies Ordinance or any statutory modifications thereof shall have the meaning so defined. 20

PRIVATE COMPANY

3. The Company is to be a private Company and accordingly :-

(1) The number of members for the time being of the Company (exclusive of persons in the employment of the Company while in such employment and have continued after such employment to be members of the Company) is not to exceed fifty but where two or more persons hold one or more shares in the Company jointly, they shall for the purpose of this paragraph be treated as a single member. 30

(2) Any invitation to the public to subscribe for any shares or debentures or debenture-stocks of the Company is hereby prohibited. 40

(3) The right to transfer its shares is

restricted as hereinafter provided.

Plaintiff's
Exhibits

SHARES.

"P 37"

4. The shares of the Company shall be under the control of the Directors who may allot or otherwise dispose of the same to such persons on such terms and conditions as they may think fit.

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

SHARE CERTIFICATES.

10

5. Share Certificates shall be issued under the seal of the Company and signed by a Director and counter-signed by the Secretary or some other person appointed by the Directors for the purpose.

6. Every member shall be entitled to one certificate for all shares registered in his name.

7. Every share certificate shall specify the number and the denoting number of the shares in respect of which it is issued and the amount paid up thereon.

20

8. If any certificate be worn out or defaced then upon production thereof to the Directors they may order the same to be cancelled and may issue a new certificate in lieu thereof and if any certificate be lost or destroyed then upon proof thereof to the satisfaction of the Directors and on such indemnity as the Directors deem adequate being given a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate under this clause.

30

9. The certificate of shares registered in the name of one or two or more persons shall be delivered to the person first named on the register.

CALLS ON SHARES.

10. The Directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares in such manner and at such time as the Directors may determine.

11. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

12. If a sum called in respect of a share is not paid before or on the day appointed for the

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

payment thereof the person from whom the sum is due shall pay such interest thereon as the Directors may determine but the Directors shall be at liberty to waive the payment of such interest wholly or in part.

13. The provisions of these regulations as to the liability of joint-holders and as to the payment of interest shall apply in the case of non-payment of any sum which by the terms of issue of a share becomes payable at a fixed time whether on account of the amount of the share or by way of premium as if the same has become payable by virtue of a call duly made and notified.

10

14. The Directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

15. A call shall be deemed to have been made when the resolution of the Directors authorising such call was passed.

20

LIEN.

16. The Company shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share and the Company shall also have a lien on all shares (other than paid up shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the Company but the Directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The Company's lien, if any, on a share shall extend to all dividends payable thereon.

30

17. The Company may sell in such manner as the Directors think fit any shares on which the Company has a lien but no sale shall be made unless some such sum in respect of which the lien exists is presently payable nor until the expiration of fourteen days after a notice in writing stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable has been given to the registered holder for the time being of the share or the person entitled thereto by reason of his death or bankruptcy.

40

18. For giving effect to any such sale the

Directors may authorise some person to transfer the shares sold to the Purchaser thereof. The Purchaser shall be registered as the holder of the shares comprised in any such transfer and he shall not bound to see to the application of the purchase money nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

10 19. The proceeds of the sale shall be received by the Company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale.

FORFEITURE OF SHARES.

20 20. If a member fails to pay call or instalment of a call on the day appointed for the payment thereof the Directors may at any time thereafter during the time as any part of such call or instalment remains unpaid serve a notice on him requiring payment of so much of the call or instalment as is unpaid together with any interest which may have accrued.

30 21. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the said call was made will be liable to be forfeited.

22. If the requirements of any such notice as aforesaid are not complied with any share in respect of which the notice has been given may at any time thereafter before the payment required by the notice has been made be forfeited by a resolution of the Directors to that effect.

40 23. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the Directors think fit.

24. A person whose shares have been forfeited

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association of 1st
Defendant
Company
Continued.

shall cease to be a member in respect of the forfeited shares but shall notwithstanding remain liable to pay to the Company all the moneys which at the date of the forfeiture were presently payable by him to the Company in respect of the shares but his liability shall cease if and when the Company receive payment in full of the nominal amount of the shares.

25. A Statutory declaration in writing that the declarant is a Director of the Company and that a share in the Company has been duly forfeited on a date stated in the declaration shall be conclusive evidence of the facts stated therein as against all persons claiming to be entitled to the share. The Company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

10

20

26. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which by the terms of issue of a share become payable at a fixed time whether on account of the amount of the share or by way of premium as if the same had been payable by virtue of a call duly made and notified.

30

27. A share may be transferred by a member or other person entitled to transfer the same to any member or to the son or sons, brother or brothers of any member selected by the Transferor but save as aforesaid and save as provided by Article No. 34 hereof no shares shall be transferred to a person who is not a member so long as any member or any person selected by the Directors as one to whom it is desirable to admit to membership is willing to purchase the same at a fair value.

40

28. Except where the transfer is made pursuant to Articles Nos. 27 and 34 hereof the member proposing to transfer any shares shall give notice in writing to the Company that he desires to transfer the same. Such notice shall

specify the sum he fixed as the fair value and shall constitute the Company his agent for the sale to any member of the Company or persons selected as aforesaid at the price so fixed or at the option of the Purchaser at the fair value to be fixed by arbitration in accordance with these Articles. The transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each share. The transfer notice shall not be revocable except with the sanction of the Directors.

Plaintiff's
Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

29. If the Company shall within the space of twenty-eight days after being served with such notice find a person willing to purchase the shares and shall give notice thereof to the proposing transferor he shall be bound upon payment of the fair value to transfer the shares to the Purchaser.

30. In case of difference between the purchasing member or other purchaser selected as aforesaid and the proposing transferor as to the fair value of the shares or share such value shall be decided upon by arbitrators one to be appointed by each party or a single arbitrator if the parties can agree to one name.

31. If in any case the proposing transferor after having become bound as aforesaid makes default in transferring the shares the Company may receive the purchase money and shall thereupon cause the name of the purchasing member to be entered in the Register as the holder of the shares and shall hold the purchase money in trust for the proposing Transferor.

32. If the Company shall not within the space of twenty-eight days after being served with the notice of transfer find a member or other person selected as aforesaid willing to buy the shares and give notice in manner aforesaid the proposing transferor shall at any time within three months afterwards be at liberty subject to Article No.35 hereof to sell and transfer the shares to any person whatever at any price.

33. The shares specified in any notice served on the Company pursuant to Article No. 29 hereof shall be offered to the members willing to purchase the same in proportion to the existing shares held by them.

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34. A share may be transferred by a member to his son or sons, brother or brothers, and any share of a deceased member may be transferred by his legal representatives to the son or sons, brother or brothers of such deceased member or to the Guardian or Guardians if such son or sons, brother or brothers be minor and the shares standing in the name of a Trustee or Trustees of the estate of a deceased member or in the name or names of a Guardian or Guardians of the minor or minors of any member may be transferred to a new Trustee or Trustees, Guardian or Guardians acting for the time being as the case may be and the restrictions laid down in Article No. 27 hereof apply to any transfer authorised by this Article.

10

35. The Directors may refuse to register any transfer of a share:-

- (a) Where they are not satisfied that the proposed transferee is a responsible person, or
- (b) Where the Company has a lien on the share, or
- (c) Where they consider that the proposed transferee not being a member is not a desirable person to admit to membership.

20

Provisos (a) and (c) contained herein shall not apply where the proposed transferee is already a member or to a transfer made pursuant to Article No. 34 hereof.

36. If the Directors refuse to register a transfer of any shares they shall within two months after the date on which the transfer was lodged with the Company send to the Transferee notice to the refusal.

30

37. The instrument of transfer of any share shall be executed by or on behalf of the Transferor and Transferee and the Transferor shall be deemed to remain a holder of the share until the name of the Transferee is entitled in the register of members in respect thereof.

40

38. Shares shall be transferred in the following form or in any usual or common form which the Directors shall approve :

FORM OF TRANSFER OF SHARES

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"I, A B..... in
 consideration of the sum of Shs.
 paid to me by C D
 of (hereinafter called the said
 Transferee) do hereby transfer to the said Trans-
 feree the share (shares) numbered in
 the undertaking called Coast Brick and Tile Works
 Limited to hold unto the said Transferee subject
 to the several conditions on which I hold the same;
 and I the said Transferee, do hereby agree to take
 the said share (shares) subject to the conditions
 aforesaid.

10

As Witness our hands the day of 19

Signatures."

CONVERSION OF SHARES INTO STOCKS

39. The Company by ordinary resolution may
 convert any paid up shares into stock and re-
 convert any stock into paid up shares of any
 denomination.

20

40. The holders of stock may transfer the
 same or any part thereof in the same manner and
 subject to the same regulations and subject to
 which the shares from which the stock arose might
 previously to conversion have been transferred or
 as near thereto as circumstances admit; but the
 Directors may from time to time fix the minimum
 amount of stock transferable and restrict or
 forbid the transfer of fractions of that minimum
 shall not exceed the nominal amount of the shares
 from which the stock arose.

30

41. The holders of stock according to the
 amount of the stock held by them have the same
 rights, privileges and advantages as regards
 dividends, voting at meetings of the Company and
 other matter as if they held the shares from which
 the stock arose but no such privileges or privilege
 (except participation in the dividends and profits
 of the Company) shall be conferred by any such

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aliquot part of stock as would not, if existing in shares, conferred that privileges or advantage.

42. Such of the regulations of the Company as are applicable to paid up shares shall apply to stock and the words "share" and "Shareholder" therein shall include "stock and Stock-holder".

ALTERATION OF CAPITAL.

43. The Company may from time to time by ordinary resolution increase the share capital by such sum to be divided into shares or such amount as the resolution shall prescribe. 10

44. Subject to any direction to the contrary that may be given by the Company in general meeting all new shares shall before issue be offered to such persons as at the date of the offer are entitled to receive notices from the Company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered and limiting a time within which the offer if not accepted will be deemed to be declined and after the expiration of that time or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered the Directors may dispose of those shares in such manner as they think most beneficial to the Company. The Directors may likewise so dispose of any shares which (by reason of the ratio which the new shares bear to the shares held by the persons entitled to an offer of new shares) cannot in the opinion of the Directors be conveniently offered under this article. 20 30

45. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

46. The Company may by ordinary resolution:- 40

(a) Consolidate and divide all or any of the share capital into shares larger amount than its existing shares;

(b) Sub-divide its existing shares or any

of them into shares of similar amount than is fixed by the Memorandum of Association subject nevertheless to the provisions of Section No. 51 of the Companies Ordinance;

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- (c) Cancel any share which at the date of the passing of the resolution has not been taken or agreed to be taken by any person.

Memorandum and Articles of Association of 1st Defendant Company Continued.

- 10 47. The Company may by special resolution reduce its share capital and any capital redemption reserve fund in any manner and with and subject to any incident authorised and consent required by law.

MODIFYING RIGHTS.

- 20 48. If at any time the capital by reason of the issue of preference shares or otherwise is divided into different classes of shares all or any of the rights, privileges attached to such class may (subject to the provisions of Section No. 62 of the Companies Ordinance) be annulled or modified by agreement between the Company and any person purporting to contract on behalf of the holders of that class of shares provided such agreement is ratified in writing by the holders of at least three-fourths of the nominal amount of the issued shares of that class. Every such agreement shall bind all holders of shares of that class.

30 BORROWING POWERS.

49. The Directors may from time to time at their discretion borrow and secure the payment of any sum or sums of money for the purposes of the Company.

- 40 50. The Directors may secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit and in particular subject to Article No. 3 hereof by the issue of debentures or debenture stock of the Company charged upon all or any part of the property of the Company (both present and future) including its uncalled capital for the time being.

51. The Directors shall not utilise the money raised as provided in articles Nos. 49 and

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50 hereof for favouring or for providing accommodation to someone.

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GENERAL MEETINGS.

Memorandum
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52. A general meeting shall be held once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the Company in general meeting or in default in such time in the third month following that in which the anniversary of the Company's incorporation occurs and at such place as the Directors shall appoint. In default of a general meeting being so called a general meeting shall be held in the next month following and may be convened by any two members in the same manner as nearly as possible as in which meeting are to be convened by the Directors.

10

53. The above-mentioned general meetings shall be called ordinary general meetings; all other general meetings shall be called extraordinary general meetings.

20

54. The Directors may whenever they think fit convene an extraordinary general meeting and extraordinary general meetings shall also be convened on such requisition or in default may be convened by such requisitionists as provided by Section No. 114 of the Companies Ordinance. If at any time there are not within the Colony and Protectorate of Kenya sufficient Directors capable of acting to form a quorum any Director or any two members of the Company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the Directors.

30

NOTICE OF GENERAL MEETINGS.

55. Subject to the provisions of Section No. 117 (2) of the Companies Ordinance relating to special resolutions seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served but inclusive of the day for which notice is given) specifying the place, the day and the hour of the meeting and in the case of special business the general nature of the business shall be given in the manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the Company in general meeting to

40

such persons as are under the regulations of the Company entitled to receive such notices from the Company; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such notice and in such manner as those members may think fit.

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10 56. The accidental omission to give notice of a meeting to or the non-receipt of notice of a meeting by any member shall not invalidate the proceedings at any time.

PROCEEDINGS AT GENERAL MEETINGS.

20 57. All business shall be deemed special that is transacted at an extraordinary meeting and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets and the ordinary report of the Directors and auditors, the election of Directors and other Officers in the place of those retiring by retiring by rotation and the fixing of the remuneration of the auditors.

58. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein provided two members present either personally or by proxy shall be a quorum.

30 59. If within half an hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

60. The chairman, if any, of the Board of Directors shall preside as chairman at every general meeting of the Company.

40 61. If there is no such chairman or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman the members present shall choose some one of their number to be chairman.

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62. The Chairman may with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

10

63. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members present in person or by proxy entitled to vote or by one member or two members so present and entitled, if that member or those two members together hold not less than fifteen percent, of the paid up capital of the Company and unless a poll is so demanded a declaration by the Chairman that a resolution has on a show of hands been carried unanimously or by a particular majority or lost and an entry to that effect in the book of the proceedings of the Company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against that resolution.

20

30

64. If a Poll is duly demanded it shall be taken in such manner as the Chairman directs and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

65. In the case of an equality of votes whether on a show of hands or on a poll the Chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

40

66. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the Chairman of the meeting directs.

VOTES OF MEMBERS.

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67. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

10 68. In the case of joint holders the vote of the senior who tenders a vote whether in person or by proxy shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of the members.

20 69. A member of unsound mind or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll by his committee, curator bonis or other person in the nature of a committee or curator bonis appointed by that Court and any such committee, curator bonis or other person may on a poll vote by proxy.

70. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the Company have been paid.

71. On a poll votes may be given either personally or by proxy.

30 72. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing or if the appointor is a corporation either under seal or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the Company.

40 73. The instrument appointing the proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power of attorney or authority shall be deposited at the registered office of the Company not less than forty-eight hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote and in default the instrument of proxy shall not be treated as valid.

74. An instrument appointing a proxy may be

Plaintiff's Exhibits in the following form or any other form which the Directors shall approve :-

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COAST BRICK & TILE WORKS LIMITED.

Memorandum and Articles of Association of 1st Defendant Company Continued.

I, A of in the district of being a member of Coast Brick & Tile Works Limited hereby appoint of Mombasa as my proxy to act for me and on my behalf at the (ordinary or extraordinary as the case may be) general meeting of the Company to be held on the day of 19..... and at any adjournment thereof. Signed this day of 19.....

10

75. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

CORPORATION ACTING BY REPRESENTATIVES AT MEETINGS.

76. Any corporation which is a member of the Company may by resolution of its Directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of the Company or of any class of members of the Company and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual member of the Company.

20

77. The number of Directors shall not be more than four and less than three as the Company may decide from time to time at its annual meeting.

30

- 78. The first Directors shall be :- (1) KANJI MEGHJI SHAH, (2) KANJI HIRJI SHAH, (3) AMRITLAL BHARMAL SHAH, and (4) AMRITLAL RAISHI.

And so long as they remain qualified to act as Directors they shall not be bound to retire and shall not be replaced by other Directors.

79. The qualification of a Director shall be the holding of at least one hundred shares in the Company.

80. The remuneration of each of the Directors shall be determined by the Company in the general meeting from time to time. The Directors shall also be entitled to be repaid all travelling expenses incurred by them respectively in or about the performance of their duties as Directors including their expenses of travelling to or from Board meetings. If by arrangement with other Directors any Director shall perform or render any special duty or service outside his ordinary duties as a Director, the Directors may pay him special remuneration which may be by way of salary, commission, participation in profits or otherwise as may be arranged.

POWERS AND DUTIES OF DIRECTORS.

81. The business of the Company shall be managed by the Directors who may pay all expenses incurred in getting up registering the Company and may exercise all such powers of the Company as are not by the Companies Ordinance or by these articles required to be exercised by the Company in general meeting subject nevertheless to any regulation of these articles, to the provisions of the Companies Ordinance and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the Directors which would have been valid if that regulation had not been made.

82. No Director shall make, accept, or endorse any accommodation bill of exchange, cheque or promissory note.

83. The Directors shall cause the minutes to be kept in books provided for the purpose :-

(a) of all appointments of officers made by the Directors.

(b) of the names of the Directors present at each meeting of the Directors and of any committee of the Directors.

(c) of all resolutions and proceedings at all meetings of the Company of the Directors and of committees of Directors and every Director present at any meeting of the Directors or committees of

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Directors shall sign his name in a book to be kept for that purpose.

ALTERNATE DIRECTORS.

84. Any Director may with the approval of other Directors nominate any person to act or attend as Alternate Director in his place during his absence from Eastern Africa and on such appointment being made the Alternate Director shall (except as regards the share qualification) be subject in all respects to the terms and conditions existing with reference to the other Directors and such Alternate Director while acting in the place of any Director shall exercise and discharge all the duties of the Director whom he represents. The Alternate Director shall ipso facto vacate office if and when his appointor vacates office as a Director and the remuneration of the Alternate Director shall be provided by the Director by whom the Alternate Director was appointed. 10

DISQUALIFICATION OF DIRECTORS. 20

85. The Office of a Director shall ipso facto be vacated :-

- (a) If he ceases to hold the required amount of shares to qualify him for Office.
- (b) If by notice in writing he resigns his office.
- (c) If he be found lunatic or become of unsound mind.
- (d) If he becomes bankrupt in this Colony or in any territory under Section No. 147 of the Bankruptcy Ordinance 1930 or insolvent or suspend payment or compound with his Creditors. 30
- (e) If he commit an offence punishable under Criminal law for the time being in force in Kenya and being under that law non-bailable.
- (f) If he be removed from office by a resolution of the Board of Directors or by an Extraordinary resolution of the Company. 40
- (g) If he become prohibited from being a

Director by reason of an order made under Sections No. 213 and 269 of the Companies Ordinance.

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10 Provided however that any act done in good faith by a Director whose office is vacated as aforesaid shall be valid unless prior to the doing of such act written notice shall have been made in the Directors' Minute Book stating that such Director has ceased to be a Director of the Company.

Memorandum
and Articles
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ROTATION OF DIRECTORS.

86. Subject to Article No. 78 hereof one-third of the Directors for the time being if any or the number nearest to one-third retire from Office at the ordinary general meeting every year.

20 87. The Directors to retire in every year shall be those who have been longest in office since their last election but as between persons who become Directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

88. A Retiring Director shall be eligible for re-election.

89. The Company at a general meeting at which a Director retires in manner aforesaid may fill up the vacated office by electing a person thereto and in default the retiring Director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill up such vacated office.

30 90. The Company may from time to time in general meeting increase or reduce the number of Directors and may also determine in what rotation the increased or reduced number is to go out office.

40 91. Any casual vacancy occurring in the Board of Directors may be filled up by the Directors but the person so chosen shall be subject to retirement at the same time as if he had become a Director on the day on which the Director in whose place he is appointed was last elected a Director.

92. The Directors shall have power at any time and from time to time to appoint a person as an additional Director who shall retire from Office

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at the next following ordinary general meeting but shall be eligible for election by the Company at that meeting as an additional Director.

93. The Company may by extraordinary resolution remove any Director before the expiration of his period of office and may by an ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a Director on the day on which the Director in whose place he is appointed was last elected a Director.

10

PROCEEDINGS OF DIRECTORS.

94. The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meeting as they think fit. Questions arising at any meeting shall be decided by the majority of votes. A Director may and the Secretary on the requisition of the Directors shall at any time summon a meeting of the Directors.

95. The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors and unless so fixed shall be two Directors personally or by proxy present but in case of vacancy work can be carried on by one Director until appointment of new Directors is made.

20

96. The Directors may elect a chairman of their meetings. If no such chairman is elected or if at any meeting the Chairman is not present within the five minutes after the time appointed for holding the same the Directors may choose one of the members to be the chairman of the meeting.

30

97. All acts done by any meeting of the Directors or a committee of Directors or by any person acting as a Director shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such Director or persons acting as aforesaid or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a Director.

40

98. A resolution determined on without any meeting of the Directors and evidenced in writing under the hands of all the majority of the Directors shall be as valid and effectual as a resolution duly

passed at a meeting of the Directors provided that the resolution shall have been submitted to each Director present in town or city at which the registered office of the Company is situated for his approval or dissent.

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DIVIDEND AND RESERVE.

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10 99. No member shall be entitled to receive any dividend or to exercise any privilege as a member until he shall have paid all calls for the time being due and payable on every share held by him whether alone or jointly with any other person together with interest and expenses if any.

100. The Company in general meeting may declare dividends but no dividend shall exceed the amount recommended by the Directors.

101. The Directors may from time to time pay the members such interim dividends as appear to the Directors to be justified by the profits of the Company.

20 102. No dividend shall be paid otherwise than out of profits.

30 103. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares but if and so long as nothing is paid up on any of the shares of the Company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall while carrying interest be treated for the purpose of this article as paid on the share.

104. If several persons are registered as joint holders of any shares any one of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share.

40 105. Any dividend may be paid by cheque or warrant sent through the post to the registered address of the members or person entitled thereto or in the case of joint holders to any one of such joint holders at his registered address or to such person and such address as the member or person entitled or such joint holders as the case may be may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it

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is sent or to the order of such other person as the member or person entitled or such joint holders as the case may be may direct.

106. No dividend shall bear interest against the Company.

ACCOUNTS.

107. The Directors shall cause proper books of accounts to be kept with respect to :-

(a) All sums of money received and expended by the Company and the matters in respect of which receipt and expenditure takes place. 10

(b) All sales and purchase of goods made by the Company.

(c) The assets and liabilities of the Company.

108. The books of account shall be kept at the registered office of the Company or at such other place or places as the Directors think fit and shall always be open to the inspection of the Directors. 20

109. The Directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the account books of the Company or any of them shall be open to the inspection of members not being Directors and no member (not being a Director) shall have any right of inspecting any account or book or documents of the Company except as aforesaid by law or authorised by the Directors or by the Company in general meeting. 30

110. The Directors shall from time to time in accordance with Section No. 123 of the Companies Ordinance cause to be prepared and to be laid before the Company in general meeting such profit and loss account, balance sheet and reports as are referred to in that section.

111. A copy of every Balance Sheet (including every document required by law to be annexed thereto) which is to be laid before the Company in general meeting together with a copy of the auditor's report shall, not less than seven days 40

before the date of the meeting, be sent to all persons entitled to receive notices of general meetings of the Company.

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10 112. The Company shall operate its account with a bank or banks as may be determined by the Board of Directors and all cheques, promissory notes and bills of exchange and all instruments negotiable by endorsement shall be signed by such Director and the Secretary or by such other persons as may be appointed by the Directors from time to time.

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AUDIT.

113. An auditor shall be appointed and his duties regulated in accordance with Sections Nos. 132, 133 and 134 of the Companies Ordinance.

SEAL.

20 114. The Seal of the Company shall not be affixed to any instrument except in the presence of two Directors or such other person as the Directors may in writing appoint for the purpose and that the two Directors or other person aforesaid shall sign every instrument to which the seal of the Company is so affixed in their or his presence.

NOTICES.

30 115. A notice may be given by the Company to any member either personally or by sending it by post to him or to his registered address or (if he has no registered address within the Colony and Protectorate of Kenya) to the address if any within the Colony and Protectorate of Kenya supplied by him to the Company for the giving of notices to him.

40 116. When a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

117. If a member has no registered address within the Colony and Protectorate of Kenya and has not supplied to the Company an address within

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the Colony and Protectorate of Kenya for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the Company shall be deemed to be duly given to him at noon on the day on which the advertisement appears.

118. A notice may be given by the Company to the joint holders of a share by giving the notice to the joint holder named first in the register of members in respect of the share.

10

119. A notice may be given by the Company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name or by the title of representatives of the deceased or receiver of the bankrupt or by any like description at the address if any within the Colony and Protectorate of Kenya supplied for the purpose by the persons claiming to be so entitled or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

20

120. Notice of every general meeting shall be given in the same manner hereinbefore authorised to every member except those members who (having no registered address within the Colony and Protectorate of Kenya) have not supplied to the Company an address within the Colony and Protectorate of Kenya for the giving of notices to them and also to every person entitled to a share in consequence of the death or bankruptcy of a member who but for his death or bankruptcy would be entitled to receive notice of the meeting. No other person shall be entitled to receive notices of general meetings.

30

DISCOVERY OF SECRETS.

121. No member shall be entitled to receive any information concerning the business trading or customers of the Company or any trade secret or secret process of or used by the Company beyond such information as to the accounts and business of the Company as is by these articles or by the Companies Ordinance directed to be laid before the Company in general meeting and no member shall be entitled to inspection of any of the books, papers, correspondence or documents of the Company except so far as such information is authorised by these

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articles or by the Companies Ordinance.

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ARBITRATION.

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122. If and whenever any differences shall arise between the Company and any of the members or their respective representatives touching the construction of any of these articles herein contained or any act or thing made or done or omitted or in regard to the liabilities and rights arising out of the relation existing between the parties by reason of these articles or of the Companies Ordinance such differences shall forthwith be referred to two arbitrators one to be appointed by each party in difference or to an Umpire to be chosen by the arbitrators before entering on the consideration of the matters referred to them and every such reference shall be conducted in accordance with the provisions of the law of Arbitration for the time being in force in the Colony and Protectorate of Kenya.

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

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INDEMNITY.

123. The Directors, the Auditors, Secretary and other officers of the Company for the time being and Trustees for the time being acting in relation to any of the affairs of the Company and their heirs, executors and administrators respectively shall be indemnified out of the assets of the Company from and against all suits, proceedings, costs, charges, losses, damages and expenses which they or any of them shall or may incur or sustain by reason of any act done or omitted to be done in or about the execution of their duties in their respective office or trusts except such (if any) as they shall incur or sustain through their own wilful neglect or default respectively. If any Director or any other Officer or servant of the Company is guilty of fraud or dishonesty whereby the Company incurs any loss or damage, such Director, Officer or servant shall be liable to recoup the same to the Company.

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ALTERATION OF ARTICLES.

124. Subject to the provisions of the Companies Ordinance and to those contained in the Memorandum of Association the Company by a special resolution may make alteration or addition to these articles of Association and any such alteration or addition so made shall be as valid and effectual

Plaintiff's Exhibits

"P 37"

Memorandum
and Articles
of Association
of 1st
Defendant
Company
Continued.

as if originally contained in these articles and be subject in like manner to alteration by special resolution.

WINDING UP.

125. If the Company shall be wound up the assets remaining after payments of the debts and liabilities of the Company and the costs of liquidation shall be applied in the first instance in repaying to the members the amounts paid up on the shares held by them respectively and the balance (if any) shall be distributed among the members in proportion to the number of shares held by them respectively; provided always that the provisions hereof shall be subject to the rights of holders of the shares (if any) issued on special conditions.

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126. In a winding up any part of the assets of the Company including any shares in or securities of other companies may with the sanction of an Extraordinary Resolution of the Company be divided among the members of the Company in specie or may be vested in trustees for the benefit of such members and the liquidation of the Company may be closed and the Company dissolved but so that no member shall be compelled to accept any shares whereon there is any liability.

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REMINDERS.

127. The Company shall comply with the following provisions of the Companies Ordinance :-

- (1) Sending in proper return of allotment (Section No.43).
- (2) Sending to the Registrar, Notice of Consolidation and Subdivision of shares (Section No.52).
- (3) Sending Notice of Increase of Share Capital (Section No. 53).
- (4) Having certificates of shares ready for delivery (Section No.68).
- (5) Keeping register of Mortgages, charges and allowing inspection (Sections Nos. 74, 77, 88 and 89).
- (6) Keeping Register of Members (Section No.96).

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- (7) Making annual list and summary (Section No. 108). Plaintiff's Exhibits
- (8) Sending to the Registrar an annual certificate that the Company has not invited the Public to subscribe for shares, debentures or debenture-stock of the Company (Section No.111). "P 37"
- (9) If the number of members at any time exceed fifty sending to the Registrar an annual certificate that such excess consists wholly of persons allowed to be so included in excess under Article No. 3 hereof (Section No. 111). Memorandum and Articles of Association of 1st Defendant Company Continued.
- (10) Calling a general meeting every calendar year within proper time (Section No.112).
- (11) Calling Extraordinary Meeting on request (Section No. 114).
- (12) Sending to the Registrar copies of Special and Extraordinary Resolutions (Section No. 118).
- (13) Keeping proper Books of Accounts (Section No. 122).
- (14) Making out Balance Sheet and having it audited (Section No. 123) by auditor appointed under Section No. 132.
- (15) Keeping Register of Directors and notifying names and nationality and changes in the Board of Directors (Section No. 145).

30	Names, address and Descriptions of Subscribers	Number of shares taken by each	Names, address and Descriptions of Witnesses
	Amritlal Raishi, Merchant, P.O.Box 22, Nairobi	One	Chimanlal Patel, Advocate, P.O. Box 274, Mombasa.
	Kanji Hirji Shah, Merchant, P.O. Box 360, Nairobi.	One	Chimanlal Patel, Advocate, P.O. Box 274, Mombasa.
40	Amritlal Bharmal Shah, Merchant, P.O. Box 1007, Mombasa.	One	Chimanlal Patel, Advocate, P.O. Box 274, Mombasa.

Mombasa, dated this 6th day of August, 1943.

Plaintiff's
Exhibits

"P 34"

"P 34"
Affidavit
of Robert
Sinclair
Sworn on 6th
February,
1962.

COLONY AND PROTECTORATE OF KENYA
IN HER MAJESTY'S SUPREME COURT AT NAIROBI
CIVIL CASE NO. 1629 OF 1960

PREMCHAND RAICHAND LIMITEDPLAINTIFFS.

- versus -

- 1. COAST BRICK & TILE WORKS LIMITED.
- 2. KANJI MEGHJI SHAH.
- 3. SHARDABEN RATILAL SHAH.
- 4. KESHAVLAL KANJI SHAH.
- 5. RATILAL KANJI SHAH.
- 6. BHARMAL RAISHI SHAH.
- 7. ZAVERCHAND SOJPAL JETHA.
- 8. HIRJI RAMJI SHAH.
- 9. SHAH MEGHJI MULJI LIMITEDDEFENDANTS.

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A F F I D A V I T

I, ROBERT SINCLAIR, of Mombasa Assistant Accountant with the Mombasa Branch National and Grindlays Bank Limited (formerly The National Bank of India Limited) make oath and say as follows:-

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(1) The document now produced and shown to me and marked "A" is a true copy of an entry in the ledger of the Mombasa Branch of the said bank relating to the current account of Defendant Number 1 with the said bank.

(2) I am duly authorised by the said Bank to make this affidavit.

(3) The said ledger was at the time of making the said entry therein one of the ordinary books of the said Bank and the said entry was made in the said ledger in the usual and ordinary course of business and the said ledger is now in the custody of the said Bank.

30

(4) I have examined the said copy with the original

entry in the said ledger and the said copy is correct.

Plaintiff's Exhibits

"P 34"

SWORN by the above-named)
ROBERT SINCLAIR at Mombasa)
the sixth day of February,) sd. R. Sinclair
1962 before me:-

Affidavit of Robert Sinclair Sworn on 6th February, 1962 Continued.

Sd. H.V. Anderson,
NOTARY PUBLIC,
Mombasa.

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"A"

Document "A" referred to in Sinclair's Affidavit of 6th February 1962.

A COPY OF AN ENTRY APPEARING IN THE LEDGER OF THE NATIONAL BANK OF INDIA LIMITED (NOW NATIONAL AND GRINDLAYS BANK LIMITED) RELATING TO THE CURRENT ACCOUNT OF COAST BRICK AND TILE WORKS LIMITED WITH THE SAID BANK

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<u>DATE</u>	<u>PARTICULARS</u>	<u>CREDIT</u>
10 Feb 56	Cumming & Miller Debited Nairobi Agency.	Shs.300,000.00

THIS IS EXHIBIT "A" REFERRED TO IN THE AFFIDAVIT OF ROBERT SINCLAIR ANNEXED HERETO DATED AT MOMBASA THE SIXTH DAY OF FEBRUARY 1962.

Signed H.V. Anderson
Notary Public.

9th Defendant's
Exhibits

"D 1" & "D 2" Combined.

S.D. £25.
R. £1.
c. 10/-
D. 4/-
T. 4/-
Q. 4/-
11/4.

"D 1" & "D 2"
Combined.

1. Original 2nd
Charge in favour
of the 9th Defend-
ant Registered at
the Land Office
28th March 1956.

COLONY AND PROTECTORATE OF KENYA

COAST REGISTRATION DISTRICT

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TITLE NUMBER C.R. 4226/1

2. Copy of the
said Second
Charge,
Registered at
the Companies
Registry.

WHEREAS COAST BRICK & TILE WORKS LIMITED
a limited liability company incorporated in
Kenya and having its registered office and
place of Business at Mombasa in the Kenya
Protectorate (hereinafter called the "COMPANY"
which expression where the context so admits
shall be deemed to include its successors and
assigns) is registered as the Proprietor
(subject however to such charges leases and
encumbrances as are notified by Memorandum
written hereon) of ALL THAT piece of land
containing 17.74 acres or thereabouts known as
Subdivision Number 500 of Section No. VI
Mainland North situate at Changanwe Miritini
in the District of Mombasa in the Seyidie
Province of the Kenya Protectorate which said
piece of land with the dimensions abuttals and
boundaries thereof is delineated and described
on Plan No.18822 attached to the Certificate
of Ownership Number 5420 dated the Thirteenth
day of September One thousand nine hundred and
twenty three and registered in the Coast
Registry, Nairobi as Title Number C. R.4226/1
AND WHEREAS the Company has requested SHAH
MEGHJI MULJI LIMITED, a limited liability
Company incorporated in Kenya and having its
registered office at Mombasa aforesaid (herein-
after called the "LENDER" which expression
where the context so admits shall be deemed to
include its successors and assigns) to advance
a loan of Shs. 200,000/- (Shillings Two hundred
thousand only) for a period of two years on the
security of the Second Charge over the above
piece or parcel of land which the Lender has
agreed to do so on the conditions that (1) SHAH

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KANJI MEGHJI (2) SHAH RATILAL KANJI and (3) SHAH KESHAVLAL KANJI - the present Directors of the Company and all of Mombasa (hereinafter called "the GUARANTORS" which expression shall where the context so admits be deemed to include their respective heirs executors administrators and assigns) shall give their personal guarantee for the repayment of the said sum of Shs.200,000/- (Shillings Two hundred thousand only) together with interest at the rate of Twelve per centum (12%) per annum and for performance of the terms hereof in the manner hereinafter stated for the said term. AND WHEREAS the said GUARANTORS have also agreed to join in these presents for the purpose of guaranteeing the said payments of Principal amount and interest as aforesaid and for the performance and observance of all the covenants and conditions hereinafter expressed NOW COAST BRICK & TILE WORKS LIMITED, being registered as the Proprietor of the piece of land above described and comprised in the said Certificate of Ownership Number 5420 IN CONSIDERATION of the sum of Shs. 200,000/- (Shillings Two hundred thousand only) lent to it by the Lender (the receipt of which sum it does hereby acknowledge) DOth hereby agree with the Lender as follows:-

FIRSTLY, that the Company will repay to the Lender the said sum of Shs. 200,000/- (Shillings Two hundred thousand only) free of Exchange at Mombasa on the 28th day of March One thousand nine hundred and fifty-eight.

SECONDLY, that the Company will in the meantime and so long as the aforesaid sum of Shs.200,000/- (Shillings Two hundred thousand only) or any part thereof shall remain owing pay to the Lender on the Principal sum interest at the rate of Twelve per centum (12%) per annum computed from the 28th day of March One thousand nine hundred and fifty-six payable monthly in arrears the interest for the first month to be paid on 28th April One thousand nine hundred and fifty six and thereafter on the 28th day of each succeeding month in each year.

THIRDLY, that the Company will also pay interest at the rate of Twelve per centum (12%) per annum on all arrears of interest remaining unpaid after due date.

FOURTHLY, that notwithstanding the term hereby

9th Defendant's
Exhibits

"D 1" & "D 2"
Combined.

1. Original 2nd
Charge in
favour of the
9th Defendant
Registered at
the Land Office
28th March 1956

2. Copy of the
said Second
Charge,
Registered at
the Companies
Registry.

Continued.

9th Defendant's
Exhibits

"D 1" & "D 2"
Combined.

1. Original 2nd
Charge in favour
of the 9th Defend-
ant Registered at
the Land Office
28th March 1956

2. Copy of the
said Second
Charge,
Registered at
the Companies
Registry.

Continued.

granted, in the event of interest being in arrear and unpaid for the space of 15 days after the same shall have become due and payable the Lender will at any time thereafter be at liberty to call in the said Principal sum and arrears of interest accrued due, and in such an event the Principal sum and interest shall become due forthwith.

FIFTHLY, that the Company will duly pay all rates, taxes, assessments and impositions levied in respect of the mortgaged premises and will keep the same in good and proper repairs. 10

SIXTHLY, that the Company will pay to the Lender on demand all expenses costs and damages sustained by the Lender by reason of the breach of the said conditions or any of them with interest thereon at the rate aforesaid and that in the meantime the same shall be a charge upon all the premises hereby charged. 20

SEVENTHLY, that the Company will not during the continuance of this security sell, transfer, convey, assign, lease (monthly tenancy excepted) or otherwise alienate the said piece of land or any part thereof without the consent in writing of the Lender first had and obtained but such consent however shall not be unreasonably withheld.

EIGHTHLY, that the Company will duly perform and observe all covenants and conditions of the First Mortgage referred to in the Schedule hereto. 30

AND for the better securing to the Lender the repayment of the said Principal sum of Shs. 200,000/- (Shillings Two hundred thousand only) and interest and other costs (if any) the Company DOETH hereby CHARGE all its rights, title and interest in ALL THAT piece or parcel of land above described together with all improvements standing or being thereon or that may hereafter be erected thereon in favour of the Lender with the said Principal sum, interest and other costs and dues under these presents subject however to the First Charge referred to in the Schedule hereto. 40

AND the Guarantors at the request of the Company and for the consideration aforesaid

DO and each of them Doth hereby covenant with the Lender that the Company shall pay the Principal sum and interest and duly perform and observe all the covenants and conditions herein contained and on the part of the Company to be performed and observed and that they the Guarantors and each of them will pay all amounts due under this instrument and make good to the Lender on demand all losses costs damages and expenses occasioned to the Lender by the non-payment of the said Principal sum, interest and other charges or any part thereof or through the breach non-observance or non-performance of any of the said covenants and conditions on the part of the Company herein contained and to be observed and performed by the Company AND FURTHER that any neglect or forbearance on the part of the Lender in enforcing or the giving time by it to the Company for payment of the said Principal sum and interest or any part thereof or the observance and performance of any of the said covenants and conditions shall not in anywise release the Guarantors or any of them in respect of their or his liability under the covenant or guarantee on their part hereinbefore contained and it is declared that their obligations under the Guarantee herein contained shall be joint and several.

IN WITNESS WHEREOF the Company has caused its Common Seal to be hereunder affixed and the Guarantors hereto have hereunto subscribed their respective names, this 28th day of March One thousand nine hundred and fifty six.

COMMON SEAL OF COAST BRICK & TILE WORKS LIMITED was hereunto affixed in the presence of:-

sd. Kanji Meghji,
DIRECTOR

sd. K.K. Shah
DIRECTOR

sd. Ratilal Kanji
SECRETARY.

Execution witnessed by:-

sd. V.K. Doshi
Advocate,
Mombasa.

)
Common Seal of
COAST BRICK & TILE
WORKS LIMITED

9th Defendant's Exhibits

"D 1" & "D 2"
Combined.

1. Original 2nd Charge in favour of the 9th Defendant Registered at the Land Office 28th March 1956

2. Copy of the said Second Charge, Registered at the Companies Registry.

Continued.

9th Defendant's Exhibits

"D 1" & "D 2" Combined.

1. Original 2nd Charge in favour of the 9th Defendant Registered at the Land Office 28th March 1956

2. Copy of the said Second Charge, Registered at the Companies Registry.

Continued.

SIGNED by the said GUARANTORS in the presence of:-

- 1. sd. V.K. Dochi, Advocate, Mombasa.
- 2. Sd. Motilal M. Malde, Merchant, Box 458 Mombasa.

- 1. sd. Kanji Meghji
- 2. sd. Ratilal Kanji.
- 3. sd. K.K. Shah.

MEMORANDUM OF CHARGES, LEASES AND ENCUMBRANCES ABOVE REFERRED TO :

Subject to the CHARGE in favour of Premchand Raichand Limited registered in Coast Registry, Mombasa as No. C.R.4226/20 to secure repayment of Shillings One Million and also subject to the Right of Way registered in Coast Registry Mombasa as No. C.R.4226/14. 10

Registry of Companies

Presented: 7/5/1956.

Date of Registration 7/5/1956.

sd. ???

AG. REGISTRAR.

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LAND TITLES REGISTRY - COLONY OF KENYA

COAST DISTRICT, MOMBASA - REGISTERED No. C.R. 4226/21.

Presented: 8/5/1956.

Time: 10.50 a.m.

sd. ???

REGISTRAR OF TITLES.

Drawn by:
I. K. DOSHI & DOSHI,
Advocates,
MOMBASA.
UDK.GHN.

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205.

"D 3"

9th Defendant's
Exhibits

"D 3"

CERTIFICATE OF THE REGISTRATION OF A MORTGAGE
OR CHARGE

Pursuant to Section 82(2) of the
Companies Ordinance (Chapter
288)

Certificate of
Registration of
2nd Charge at
the Companies
Registry 7th
May 1956.

I HEREBY CERTIFY that a Second Charge
dated the Twentyeighth day of March One thousand
nine hundred and fifty-six and created by Coast
10 Brick and Tile Works Limited for securing the
sum of Shillings Two hundred thousand only
(Shs.200,000/-) was this day REGISTERED pursuant
to Section 79 of the Companies Ordinance.

Given under my hand at Nairobi, this
Seventh day of May One thousand nine hundred and
fifty six.

Sd. ???

Acting Registrar of Companies.

9th Defendant's
Exhibits

"D 4"

"D 4"

COAST BRICK & TILE WORKS LTD.

Resolution of
1st Defendant
Company in
connection with
2nd Charge.

MINUTES OF THE MEETING OF DIRECTORS HELD
ON 28TH MARCH 1956.

28th March,
1956.

The Directors unanimously adopted the
following resolution:-

That the Directors are hereby authorised
to create a Second Charge in favour of
Shah Meghji Mulji Ltd over Plot No. 500
Section VI, M.N. Changamwe - Miritini to
secure repayment of the total amount of
Shs.200,000/- (Shillings Two hundred
thousand only) advanced to this Company
by the said Shah Meghji Mulji Limited
and the Directors be and hereby are
authorised to affix the seal of the
Company to such Charge and to execute
all necessary documents in connection
with the creation and registration of
such Charge in appropriate Registries
and the Directors be and are hereby
authorised to take all necessary steps
to carry out the terms under which the
Loan has been advanced by the said
Shah Meghji Mulji Limited of Mombasa.

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MOMBASA DATED THIS 28th DAY OF MARCH 1956.

1. Sd. Kanji Meghji.
2. Sd. Ratilal Kanji.
3. Sd. K.K. Shah.

DIRECTORS.

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Confirmed that above is true and correct.

Sd. Kanji Meghji.
CHAIRMAN OF THE COMPANY &
THE BOARD OF DIRECTORS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

BETWEEN:

- 1. COAST BRICK & TILE WORKS LIMITED)
 - 2. KANJI MEGHJI SHAH)
 - 3. SHARDABEN RATILAL SHAH)
 - 4. KESHAVLAL KANJI SHAH)
 - 5. RATILAL KANJI SHAH)
 - 6. ZAVERCHAND SOJPAL JETHA and)
 - 7. HIRJI RAMJI SHAH)
- APPELLANTS

AND

- 1. PREMCHAND RAICHAND LIMITED and
 - 2. SHAH MEGHJI MULJI LIMITED
- RESPONDENTS

RECORD OF PROCEEDINGS

Goodman Derrick & Co.,
 30, Bouverie Street,
 London, E.C.4.
 Solicitors for the Appellants

Coward Chance & Co.,
 St. Swithin's House, Walbrook,
 London, E.C.4.
 Solicitors for 1st Respondent