*Privy Council Appeal No. 30 of 1966*

**Trustees for the Port of Aden** – – – – – *Appellants*

*v.*

**Hormusji K. Hathadaru and another** – – – – *Respondents*

**(and Cross-Appeal Consolidated)**

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER 1967

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*Present at the Hearing:*

LORD PEARCE

LORD UPJOHN

LORD PEARSON

[*Delivered by* LORD UPJOHN]

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In 1928 in the Port of Aden a plague of smallpox broke out originating with coolies who were living in the Port and earning their living by carrying coals and cargo on to the ships that called in the Port. It appears that some thousands of them lived in bad conditions without any proper housing so that the Government called in conference the shipping and other companies concerned to devise some amelioration of these conditions. It was then arranged as a result of a number of meetings between the Resident and his advisers and these companies that coolie lines should be provided by the companies upon the terms that the Residency or the local public bodies would provide up to 50 per cent of the total cost of buildings and site. This assistance was to be given in the form of (1) a free site (2) abatement from usual house tax (3) latrines and washing places which were to be constructed by the local public bodies and (4) a cash grant. It was also agreed at these meetings that if the site to be granted by the local government was used for any other purpose than coolie lines then it must be paid for, in order to safeguard the public interest. To carry out this general scheme a number of leases were arranged between the Trustees of the Port of Aden (the predecessors of the appellants the latter being incorporated in 1951 by the Port Trust Ordinance to take over their predecessors' property functions and duties) and the various shipping companies who came into the scheme. Their Lordships are concerned with the lease dated 9th January 1932 between the Trustees of the Port of Aden and the predecessors of the respondents. This lease was duly sanctioned by the Governor of Bombay, then responsible for the administration of Aden, as was required by the Aden Port Trust Act, 1888.

The whole question in dispute before their Lordships depends upon the construction of this lease and in particular upon the terms of certain covenants whereby the lessees covenanted with the lessors in the terms following:

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

By sub-clause (2) the lessees covenanted to observe rules for the time being in force relating to the use, occupation and transfer of the land thereby demised and by clause (3) they covenanted that the only buildings to be erected on the plot should be coolies quarters erected in accordance with certain plans. Then a proviso followed which contains the all important question in this case and their Lordships therefore set it out in full.

> " Provided always and it is hereby agreed and declared as follows: —
>
> " (*a*) That the price of land shall be fixed at Rs.2-8-0 per square " yard of the purpose of the grant of indirect contribution " towards the housing schemes of coal and cargo coolies " mentioned in clause (1).
>
> " (*b*) That if the said plot of land is not used for the purpose for " which it is granted within one year from the date of these " presents or if at any time during the term for which this " lease is granted the said plot of land shall cease to be used " for such purpose then the Lessees shall upon being called " upon so to do in writing by the Lessors forthwith purchase " the said plot of land at the price of Rs.5/- per square yard " PROVIDED that if the Lessees are unwilling to do this they " may refuse but upon such refusal this lease shall be deemed " immediately to determine and the land shall be surrendered to " the Lessors."

Proviso (*c*) provided for a right of re-entry by the lessors upon a breach of covenant. Proviso (*d*) provided for a right of re-entry by the lessors if the land was required by the Government for public purposes. There followed a number of further conditions which their Lordships do not think it is necessary to mention.

These arrangements were duly carried out and the coolie lines were built at a total cost of nearly Rs.26,000 the predecessors of the respondents contributing about 50 per cent in cash for building; the Government and Port Trust contributing the remaining 50 per cent partly in cash, partly by provision of the land and abatement of tax and the cost of the latrines, as mentioned earlier.

The coolies continued to occupy these buildings until the year 1957 when more modern accommodation was built and the coolies ceased to occupy the original lines.

The sole question which has been argued upon this appeal is whether in these circumstances having regard to the terms of proviso (*b*) the lessors are bound to call upon the lessees to elect whether they will purchase the land at the price of Rs.5/- per square yard or exercise their right to refuse so to do whereupon it is common ground that the lease will immediately be determined. The Court of Appeal reversing the judgment of Mr. Justice Blandford held that the lessors were so entitled. De Lestang Acting Vice-President expressed their reason for reaching this decision in this way: —

> " In my view it was clearly the intention of the parties that the lease should come to an end on the fortuitous cesser of user for which neither lessors nor lessees were to blame and that in such an event in order to give efficacy to the clause in question it must be understood as imposing an obligation on the lessors to call upon the lessees to elect whether to purchase or not."

Blandford J. had reached the opposite conclusion. He said this: —

> " In my view the meaning of the proviso is quite clear. It contains two conditions precedent. First there must have been the particular breach of condition on the lessees' part. Secondly, the lessor must have given a written notice, which it was not bound to do. On the

happening of both these events the lessee was bound to purchase at the fixed price and, if he failed, the lease was deemed to be surrendered. In other words the option was to be the lessors and not the lessees. The initiative rested with the lessor under proviso (*b*) just as much as it did under the provisos for re-entry contained in clauses (*c*) and (*d*)."

It is true that Blandford J. considered that the cesser of the user by the respondents of the demised premises for coolie lines amounted to a breach of covenant (1) while the Court of Appeal took a contrary view. Their Lordships prefer the view of the Court of Appeal but it is not necessary to express a final view thereon for they are of opinion that this question cannot affect clear words of proviso (*b*).

Counsel for the appellants did not base any argument in reliance on an alleged breach of covenant by the respondents but he stressed that it would be most unlikely of the lessors to give an option to the lessees to purchase at Rs.5/- for as he rightly pointed out it was in effect only an option to purchase at an under value: for if the land was worth less than Rs.5/- per square yard they need not purchase the land. While this is quite true their Lordships do not think that in the times of depression in the 1930s the parties would necessarily contemplate the possibility of a very large rise in the value of the land due to inflationary and other causes and their Lordships cannot give any weight to this circumstance.

It seems to their Lordships purely a question of construction of proviso (*b*) and although the lease as a whole has been criticised both by Counsel for the appellants and for the respondents their Lordships think notwithstanding Mr. Montague Solomon's able argument that the relevant provision is quite clear and unambiguous and as the learned trial judge said it seems to their Lordships that if the land ceased to be used for coolie quarters the initiative to bring the lease to an end is to rest with the lessors. No right in the lessee to purchase the land arises until two events have happened. First, that the land shall cease to be used for coolie lines and secondly, that the lessors shall call upon the lessees by a notice in writing to purchase the land. Their Lordships can see nothing in the proviso which compels, as the Court of Appeal held, the lessors to give such a notice. It seems to their Lordships that the option is with the lessors and if the construction adopted by the Court of Appeal were correct the words "upon being called upon so to do in writing" would be completely redundant. In their Lordships' opinion this proviso would have been drafted in a very different manner had it been intended by the parties that the lessees should have an option to purchase on the cesser of user by the coolies and a perfectly simple clause could have been drafted to this end. It seems to their Lordships on these short grounds that the construction adopted by Blandford J. is clearly right.

In these circumstances it has not been necessary to consider and their Lordships have heard no argument upon the cross-appeal namely whether had the lessees been entitled to exercise the option the consent of the Government of Aden was necessary under the Port Trust Ordinance.

The result no doubt is deadlock unless the appellants give a notice which seems unlikely; while the demised premises remain empty it may be that the respondents cannot be ousted so long as they continue to pay this very small rent but it can scarcely be doubted that such a situation will lead to compromise.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed and the cross-appeal dismissed and the judgment of Blandford J. dismissing the suit with costs restored. The respondents must pay the appellants' costs of this appeal and cross-appeal and in the Court of Appeal for Eastern Africa.

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**In the Privy Council**

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**TRUSTEES FOR THE PORT OF ADEN**

*v.*

**HORMUSJI K. HATHADARU AND ANOTHER**

**(AND CROSS-APPEAL CONSOLIDATED)**

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DELIVERED BY

LORD UPJOHN

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