A

**SHAMBHU PRASAD**

*v.*

**ALI HUSSEIN**

B

[SUPREME COURT, 1967 (Hammett J.), 4th, 28th April]

Civil Jurisdiction

*Vendor and purchaser—protected Crown Lease—consent of Director of Lands to agreement for sale—application for consent—whether signature of application by purchaser necessary.*

C

*Vendor and purchaser—contract for sale of leasehold—written instructions to solicitor to prepare agreement—some material matters not specified—insufficient memorandum.*

*Contract—some terms of contractual nature agreed—instructions in writing to solicitor to prepare agreement for sale—agreement to make agreement.*

*Crown land—protected Crown Lease—consent of Director of Lands to sale—whether application must be signed by purchaser.*

D

The plaintiff and defendant signed a document instructing a solicitor to prepare an agreement for sale and purchase of a protected Crown Lease belonging to the plaintiff. The consent of the Director of Lands, requisite to such an agreement, was not obtained. At a mortgagee's sale of the land in question the defendant became the purchaser at a price £400 less than that specified in the instructions to the solicitor. In an action by the plaintiff for damages the defendant contended that the consent of the Director of Lands was a condition precedent to any obligation on his part, to which the plaintiff said that the absence of the consent was due to the refusal of the defendant to sign the application therefor.

E

*Held*: 1. There being no provision in law requiring a purchaser as well as the vendor to sign such an application the court was not satisfied that the defendant's failure to sign was the reason for the consent not having been obtained.

F

2. In any event on the evidence the dealings between the parties did not amount to a completed contract but only to an agreement to make an agreement the complete terms of which had not been settled.

Case referred to: *Masters v. Cameron* (1954) 91 C.L.R.353.

Action against purchaser for failure to complete.

G

*K. C. Ramrakha* for the plaintiff.

*R. I. Kapadia* for the defendant.

The facts sufficiently appear from the judgment.

HAMMETT J. : [28th April, 1967]—

H

The Plaintiff was the owner of a protected Crown Lease No. 2862 in Samabula North, Suva on which he had built his house. The property was under mortgage to the Bank of New Zealand and in 1961 the Plaintiff fell into financial difficulties.

He arranged to sell the property to the Defendant and on 16th August, 1961, they both went to see Mr. Dhaliwal a solicitor then in private practice. Two alternative arrangements were made. Firstly, if the Bank would agree, the Plaintiff was to sell the house for £2,600 to be paid by a deposit of £300 and the balance to be provided by the Bank on a further mortgage. Under this arrangement the Plaintiff was to remain in possession for three years. The second arrangement was for a sale, with vacant possession for £3,300 of which £1,000 was to be paid by way of a deposit and the balance to be provided by the Bank on mortgage.

Quite apart from any covenants under the mortgage, it was clear that neither of these arrangements could be carried out without the Bank's agreement, and the Plaintiff gave Mr. Dhaliwal written instructions dated 15th August, 1961, to see the Bank Manager about the matter. Following the visit to the Bank the Plaintiff and Defendant agreed with the consent of the Bank that the sale was to take place for £3,300 with vacant possession on the basis of the second alternative arrangement.

The same day the parties both signed joint instructions to Mr. Dhaliwal on the matter in the following terms:—

"Suva.

M. S. Dhaliwal,
Solicitor, Suva.

We the undersigned ALI HUSSEN and S. SHAMBHU PRASAD hereby instruct you to prepare a Sale and Purchase agreement as follows:—

*PROPERTY*: S. PRASAD'S house at Lakemba Street.
*PRICE*: £3,300.0.0.
*DEPOSIT*: £1,000.
*BALANCE*: Under New Zealand Bank.
We undertake to pay £82.0.0 re costs and disbursements.

X
Left thumb of Ali Hussein

Sgd. Shambhu Prasad
Witness: Sgd. Muni Deo."

It is agreed that this being a protected Crown Lease, the sale could not take place without the consent of the Director of Lands. This consent was never obtained. No Sale and Purchase Agreement was ever signed by the Defendant or the Plaintiff and the sale did not take place.

On 1st November, 1961, the Bank of New Zealand in exercise of its powers of sale under its Mortgage sold the property by public auction. Both the Plaintiff and the Defendant attended the auction where the Defendant was the highest bidder and bought the property for £2,900.

It is the case for the Plaintiff that the Defendant is in breach of contract in failing to complete the purchase of the property from him as agreed on 8th August, 1961, for £3,300 and he claims damages.

The Defendant does not dispute the facts. He does, however, contend that the agreement between the parties was subject to a condition precedent that no obligations were to arise until the consent of both the Bank of New Zealand and the Director of Lands to the agreement had been obtained. He contends that neither of these consents were, or have ever been, given to their agreement which did not therefore create any legal obligations.

The only evidence before me is that of the Plaintiff and the documents admitted by consent. The Plaintiff conceded that the consent of the Director of Lands had not been obtained but that the Bank of New Zealand did consent to the sale to the Defendant for £3,300. I have no reason to disbelieve the Plaintiff's evidence on these issues and I accept it.

The Plaintiff contends that the reason why the Director of Lands did not give his consent to the sale to the Defendant, was that the Defendant refused to sign the form of application for such consent.

I know of no provision in the law that requires the purchaser as well as the vendor to sign an application to the Director of Lands for his consent to the sale of a Crown Lease. There is no evidence that the Plaintiff or the Solicitor acting for both parties ever forwarded to the Director of Lands the document, already set out in this Judgment, which is now relied upon either as a contract for the sale of land or as a note or memorandum of such a contract, and sought his consent to such a sale. It has not been proved or suggested that an application for the Director's consent signed by the solicitor acting for both parties coupled with this document would not have been accepted by him as a sufficient application for his consent. In fact the letter dated 7th November, 1961, by the Director of Lands to the Plaintiff's Solicitor (which was put in in evidence with the consent of the Plaintiff) appears to indicate that this was all the Director of Lands had required.

I am not therefore satisfied that any failure by the Defendant to sign an application to the Director of Lands for his consent was the reason why his consent was not obtained. It has not been shown to my satisfaction that it was not within the power of the Plaintiff to have applied for and obtained that consent notwithstanding any omission on the part of the Defendant.

But there is another, and in my view a more substantial reason why the Plaintiff's claim in this case must fail. The Plaintiff relies on a verbal contract of sale of which he submits that the document signed by both parties on 8th August, 1961, already set out in this judgment, is a note or memorandum, sufficient to satisfy the requirements of the law in this respect. It is on this note or memorandum that the Plaintiff relies to prove his oral contract with the Defendant. This note clearly shows that the parties had agreed to the sale and purchase on terms to be set out in a Sale and Purchase Agreement which, by this note or memorandum, they jointly instructed Mr. Dhaliwal to prepare. In this note there is no reference to a number of material matters upon which agreement was necessary and which it would have been necessary to insert in the Sale and Purchase Agreement, for example the date upon which the transfer was to be completed and possession given.

The arrangements made verbally between the parties as evidenced by this note or memorandum were clearly made "subject to contract". There are many cases on the point of what is meant by such expressions as "subject to contract".

My attention has been drawn to the Judgment of Dixon C.J. in *Masters v. Cameron* (1954) 91 C.L.R. 353 at page 360 where he said:—

> "Where parties who have been in negotiation reach agreement upon terms of a contractural nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

He went on to say that in the first two of these classes there was a binding contract whereas in the third there was none.

I am, with respect, of the opinion that the three classes referred to in Masters' case are not exhaustive, and the facts of this case do not fall within any of these three classes of case.

In this case the parties had been in negotiation and certainly reached some terms of a contractural nature. They had also agreed that the matter of their negotiation should be dealt with by a formal contract, but they had not arranged all the necessary terms of their bargain.

On the question of the date of completion it is of interest to note that according to the terms of the Sale and Purchase Agreement, (which was admitted by consent as Ex. D) which was prepared for their signature but not in fact signed by either the Plaintiff or the Defendant, the date of completion by the handing over a transfer signed by the Plaintiff might not have taken place until over six years, i.e., after the payment by the Defendant to the Bank of New Zealand of £30 a month unless the Bank should earlier demand payment in full. The Plaintiff never suggested that this was agreed orally and no mention of this appears in the document relied upon as a note or memorandum of a contract for sale.

On the Plaintiff's testimony and the documents produced in evidence before me I am satisfied that the negotiations or dealings between the parties did not amount to a completed contract but only to an agreement to make an agreement, the complete terms of which had not yet been settled. In reaching this conclusion I have given careful consideration to what effect should be given to the admissions made in paragraph 4 of the defence but I do not consider this is inconsistent with my findings on the effect of the Plaintiff's evidence. Further, I have not been satisfied that any failure on the part of the Defendant to co-operate with the Plaintiff to obtain the consent of the Director of Lands to the transaction was necessarily fatal to the failure to obtain such consent.

For these reasons there will be Judgment for the Defendant on the claim.

The Defendant has counter-claimed for mesne profits in respect of the whole of the land and dwelling house from the 14th November, 1961, until 29th May, 1962, and for the use of and occupation by the Plaintiff of the top flat from 29th May to 30th June, 1962. The only evidence before me on this issue is that of the Plaintiff himself who stated that he only occupied two rooms in the house throughout this period. There is no evidence of what would be a proper charge for this or that as a result any loss was occasioned to the Defendant. In my view, on the evidence before me, the Defendant is however entitled to a nominal award in this respect. The total period was approximately 7½ months and I shall assess the Defendant's claim on the counter-claim at the rate of £1 per room per month, i.e., a total of £15.

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There will therefore be Judgment for the Defendant on the counter-claim for £15.

I would like to hear Counsel further before making any orders for costs in this case.

C

*Judgment for defendant on claim and counter-claim.*