the order. Where the order is within the powers of the Chairman of the Council or sanctioned by the rules framed under the Act, it is not open to the Magistrate or the Court to go into the necessity, expediency or the reasonableness of the order. In this case the order of the Chairman was *ultra vires* and, that being so, the licence cannot be said to have been cancelled and the respondent cannot be said to have been trading or carrying on business without a licence. The order of the lower Court is right and the petition is dismissed.

B.C.S.

PRIVY COUNCIL.*

SECRETARY OF STATE FOR INDIA IN COUNCIL,

v.

VOLKART BROTHERS.

1928, July 24.

[On Appeal from the High Court at Madras.]

Landlord and tenant—Lease—Lessor's covenant to renew—Lessee's claim to renew as to part—Construction of covenant.

A lease of land for 99 years granted in 1821 contained a covenant by the lessor that upon the expiration of the lease he would renew it for a further term of 99 years upon such terms as should be judged reasonable. In 1914 the respondents, in whom the lease had vested, sold their right, title and interest in the greater part of the demised land. On the expiration of the lease they claimed a renewal in respect of the land remaining in their possession.

Held that upon the true construction of the covenant the respondents were not entitled to the renewal claimed.

Simpson v. *Clayton*, (1838) 8 L.J.C.P., 59, distinguished.

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* *Present*: LORD SHAW, LORD CARSON, LORD SALVESEN, Sir JOHN WALLIS, and Sir LANCELOT SANDERSON.

SECRETARY OF STATE FOR INDIA v. VOLKART BROTHERS.

CONSOLIDATED APPEAL (No. 22 of 1918) from decrees of the High Court (December 10, 1926) affirming decrees of the District Court of South Malabar in two suits.

The first suit was brought by the appellant against the respondents for possession of a parcel of land of 1·10 acres, part of 4·10 acres comprised in a 99 years lease granted on June 6, 1821. The second suit was brought by the respondents in respect of the said 1·10 acres, also of a further portion of the land leased but no longer in their possession, for specific performance of a covenant to renew contained in the lease.

The trial Judge dismissed the first suit, and in the second made a decree for specific performance as to the land in the possession of the respondents.

Appeals to the High Court were heard together by KRISHNAN and VENKATASUBBA RAO, JJ., who differed on the question whether the present respondents were entitled to a renewal of the lease as to the portion of the demised land in their possession, the former holding that they were not so entitled, and the latter that they were. The appeals were thereupon referred under section 68 of the Code of Civil Procedure, 1908, to another Judge, and were heard by COUTTS TROTTER, C.J., who held that the respondents were entitled to specific performance as to the land in their possession.

Dunne, K.C., and *Kenworthy Brown* for the appellant.—Although the covenant to renew ran with the land it was not upon its true construction a contract which could be split up so as to entitle the lessee, or an assignee, to a renewal as to part of the demised premises. So to construe the covenant would impose on the lessor obligations which cannot have been contemplated. The case does not come within the Specific Relief Act, sections 14, 15 or 16, conseqently section 17 precludes the right

to specific performance: *Graham* v. *Krishna Chunder Dey*(1). The CHIEF JUSTICE erred in holding that because the covenant ran with the land it was apportionable. *Simpson* v. *Clayton*(2) upon which he relied, has no bearing upon the present case.

Hon. Geoffrey Lawrence, K.C., and *Macmullen* for the respondents.—The Specific Relief Act does not interfere with rights existing at common law between the parties to a contract. The lessee was entitled to assign the benefit of the lease as to any part of the demised land: *Grove* v. *Portal*(3), *Roberts* v. *Enlayde Limited*(4), *Simpson* v. *Clayton*(2). The covenant is to be construed as one to renew in respect of any part of the land, whether it is in the hands of the lessee or in the hands of an assignee. The provision that any renewal is to be on such terms as shall be judged reasonable, gives the Court power to impose such conditions as shall be fair to the lessor. Consequently, the obligation to renew as to the land remaining in the hands of the lessee or his representatives stands on a separate and independent footing from the rest of the contract, and section 16 expressly applies. Further, the Government, by acquiring part of the land in 1913, had put it out of their power to fulfil their obligation to renew as to the whole. The respondents claimed a renewal of the whole, and were entitled to specific performance: *Statham* v. *The Liverpool Dock Company*(5).

Dunne, K.C., in reply.—Both Courts in India held that the respondent could not renew as to the whole, and there is no cross appeal. The respondents assigned all the rights as to the 3·70 acres to the Cochin Club, which is not a party to suit. The acquisition of a small

(1) (1925) I.L.R., 52 Calc., 335; 52 I.A., 90.
(2) (1838) 8 L.J.C.P., 59.
(3) [1902] 1 Ch., 727.
(4) [1924] 1 K.B., 535.
(5) (1830) 3 Y. & J., 565, 575; 148 E.R., 1304.

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portion of the land by the Government has no bearing upon the case.

The JUDGMENT of their Lordships was delivered by Lord CARSON:—

By an indenture of lease executed on the 6th June 1821, and made between the United Company of Merchants of England, trading to the East Indies, of the one part, and one Francis Schuler of the other part, the said United Company demised a piece of land lying between the town of Cochin and the river in the Province of Malabar, containing 253,700 square feet (acres 4·10), unto the said Francis Schuler from the date thereof for the term of 99 years, at the yearly rent of Pagodas 6, F. 27, C. 25. Amongst other covenants the lease contained one in the following terms:—

"That he the said Francis Schuler, his heirs, executors, administrators or assigns fulfilling the covenants and agreements hereinbefore contained and on his part to be performed and yielding and paying at the end and expiration of the aforesaid term of ninety-nine years unto the said United Company, their successors or assigns, the full and just sum of 100 pagodas current money of Fort St. George, then this lease shall and may be renewed for a further term of ninety-nine years upon such terms and conditions as shall be judged reasonable."

The appellant is the successor in title of the said United Company, and by virtue of an assignment by the said Francis Schuler and divers subsequent assignments and acts in law the whole of the property comprised in the lease became vested in the respondents in the year 1907. Subsequently, in the year 1914, the respondents as vendors granted to the Cochin Club the right, title and interest of the vendors in a portion of the said lands demised by the said lease, amounting to 3 acres and 34 cents, for a sum of Rs. 18·461. The said lease expired by efflux of time on the 6th June 1920, and at that date the respondents were in possession of

acres 1·10 only of the lands demised, and the Cochin Club having previously surrendered to the appellant their interest, purchased as aforesaid from the respondents, are in occupation of the said 3 acres and 34 cents, as tenants at will to the plaintiff.

On the termination of the said lease the appellant claimed possession from the respondents of the part of the property then remaining in their occupation, and containing the 1 acre 10 cents already mentioned, and as such possession was refused commenced his suit on the 24th February 1921, claiming possession of the same and mesne profits.

On the other hand, the respondents commenced their suit on the 31st October 1921, claiming a declaration that they were entitled to a renewal for 99 years of the term granted by the said lease as regards the whole of the property demised by the said lease (save a small portion which had been acquired by the Government of Madras) or, alternatively, as regards the part retained by the respondents and specific performance of the covenant for renewal.

By a decree of the 2nd September 1922, the appellant's suit was dismissed with costs by the District Judge of South Malabar, who decided that the respondents were entitled to claim a renewal in respect of the part of the property retained by them and not in respect of any other part. On the hearing, therefore, of the respondents' suit on the 1st February, 1923, a decree was made that the appellant should execute a renewal of the lease on the terms mentioned in the decree in respect of the part of the leasehold premises in the occupation of the respondents.

The appellant appealed to the High Court of Madras against both the said decrees, which were heard together on the 19th March 1926, by KRISHNAN and

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VENKATASUBBA RAO, JJ. There were two main points argued upon the appeals: (1) that the covenant was unenforceable for uncertainty, and (2) that the respondents not being in possession of or entitled to the premises demised by the lease could not claim specific performance either for the whole of the premises included in the lease or in respect of the acres 1·10 in their possession on the ground that there could not be specific performance of a part of the contract.

The learned judges who delivered their judgments on the 10th December 1926, were divided in their opinions. VENKATASUBBA RAO, J., agreed on both points with the District Judge, but KRISHNAN, J., was of opinion that the covenant of renewal was indivisible and could not be enforced. In view of this difference of opinion an order of reference of both appeals was made to the Chief Justice, who gave his opinion on both points in favour of the respondents, and decrees were made in both suits dismissing the appeals with costs, and against such decrees the present consolidated appeals have been preferred. The real point to be considered upon this appeal is whether the respondents can, under the circumstances, claim a renewal of the lease in respect of the small plot in their possession, the owners of the remainder of the demised premises not being parties to the suit or making any claim to such renewal. It is true that the respondents claimed in the alternative to get a renewal of the whole plot, but all the judges in both Courts were of opinion, and in that opinion their Lordships concur, that any such claim was, under the circumstances existing at the termination of the lease, untenable, and, indeed, Mr. Justice KRISHNAN states that the respondents' counsel conceded that his clients could not enforce a renewal of the whole plot. There is no cross appeal against the judgment on this point, and

although the learned counsel for the respondents at the hearing before this Board suggested that he might even then be permitted to present such an appeal, it is manifest that any such application could not be acceded to. Now the sole question of the claim for renewal of the lease in respect of a part is one that depends on the construction of the covenant already quoted from the lease. What was the covenant? It was clearly a covenant to renew the lease in question: "then this lease shall and may be renewed, etc." That must mean the lease as a whole, including the subject-matter of the demise, which is the parcels as set out in the lease. Moreover, the lease is to be renewed "upon such terms and conditions as shall be judged reasonable"—a provision which is plainly applicable to the premises as a whole and might easily vary if applied to specific portions held under varying conditions and circumstances. It was strenuously argued by the learned counsel for the respondents that as the lessees under the lease were entitled to assign portions of the premises the covenant for renewal would attach to each assignee holding his part in physical severalty, but no authority for such a proposition in a claim for specific performance has been cited before this Board. This argument was mainly attempted to be supported by a reference to covenants which run with the land, but, as observed by KRISHNAN, J.:—

"Cases bearing upon the apportionment of rent or referring to covenants for repairs are not, in my opinion, in point, as they are not *pari materia* with covenants to renew, which are covenants to create new rights."

The case mainly relied upon in the argument before us and dealt with in the Courts below was *Simpson* v. *Clayton*(1), but that case does not appear to their

(1) (1838) 8 L.J.C.P., 59.

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Lordships to have any bearing. It was merely a suit by one assignee of a share of a sub-lease against the lessor, the mesne landlord, for damages for the breach of the latter's covenant to obtain a renewal without joining the owner of the other share. Their Lordships were referred in the course of the argument for the appellant to section 17 of the Specific Relief Act as showing that such Act forbids the enforcement by specific performance of a part of the contract to renew unless the case can be brought within sections 14, 15 or 16. Their Lordships, however, do not think that, in the view they have taken of the construction of the covenant for renewal, it is necessary to consider these sections. If, as their Lordships think, there is no contract to renew the lease for a part of the premises, it is quite clear that there is nothing in the Act referred to which can in any way assist the respondents, and, on the other hand, if the contract was for a renewal of a part, the Act could have no application.

Under the circumstances, their Lordships are of opinion that the appeals should be allowed, that the orders appealed from should be set aside, and that judgment for possession of the premises in question should be entered for the appellant with mesne profits from the 6th June 1920, up to the date of the delivery of possession. The respondents must also pay the costs of the appeals and of the actions to the appellant. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents: *William A. Crump & Son.*

A.M.T.