

obvious sentimental objections, I doubt whether a valuing Court situated as an Acquisition Officer is or a Court sitting in appeal upon his decision could make any other calculation or introduce any other factors than those to which the Court below has confined itself. Eliminating all other considerations which might be urged in support of putting an artistic or sentimental value upon any monuments which it was thought desirable to preserve under this special Act, I think that we have no sufficient reason to interfere with the decision arrived at by the lower Court. I would, therefore, confirm the decree of that Court.

The appeal is dismissed with all costs upon the appellant.

HEATON, J. :—I concur.

*Decree confirmed.*

R. R.

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ORIGINAL CIVIL.

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*Before Mr. Justice Kajji.*

LADHABHAI LAKHMSI (PLAINTIFF) *v.* SIR JAMSETJI JIJIBHOY AND OTHERS (DEFENDANTS).\*

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*August 5.*

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*Lease—Lessee given the option of purchasing the land leased within a certain time for a fixed price—Assignment of the lease—Legal assignee of the lessee entitled to the benefit of the option to purchase—Coveyance—Vendor and purchaser—Purchaser to accept such title as the vendor possessed—Recitals about the title—Originating summons—Estoppel.*

By an Indenture dated 1st March 1913, the defendants leased to one B. P. M. a plot of land for a term of ninety-nine years. Under clause 7 of the Indenture the lessee obtained a right to purchase the premises demised at a price named within eighteen years from the date of the lease, the purchaser accepting such title as the vendors had. By an Indenture of Assignment

\* O. C. J. Suit No. 379 of 1917.

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dated 22nd May 1916, the lessee assigned the lease for the then residue of the said term to the plaintiff. The plaintiff intimated to the defendants by a notice in writing his intention of purchasing the said plot under the provisions of clause 7. The defendants called upon the plaintiff to submit for their approval a draft conveyance of the said plot. The draft conveyance forwarded by the plaintiff to the defendants contained certain recitals tracing the title of the vendors from the last purchaser of the property. The defendants objected to the insertion of the said recitals and sought on their part to incorporate certain covenants in the draft. Correspondence between the parties showed that the dispute between them was solely confined to the insertion of the recitals and the covenants. The plaintiff took out an originating summons for the determination of the question whether the recitals and the covenants proposed by the respective parties should be embodied in the conveyance. The summons was adjourned into Court for hearing. At the trial the defendants conceded that they could not at that stage insist on the covenants set out by them. The defendants, however, contended that the plaintiff was not entitled to the benefit of the option to purchase as he was not the original lessee but only an assignee of the lessee, and as the option to purchase was a personal covenant and not a covenant which ran with the land it did not enure to the benefit of the assignee:—

*Held*, (1) that the plaintiff being bound to accept such title as the vendors had the recitals set out by him in the proposed conveyance were unnecessary and should be struck out;

(2) that as the plaintiff was the legal assignee of the residue of the term of lease, he was entitled to the benefit of the option to purchase;

(3) that as the correspondence between the parties proceeded on the assumption that the plaintiff though an assignee of the lessee was entitled to exercise the option of purchase under the lease, the defendants having acquiesced in the same were estopped from disputing it.

*Woodall v. Clifton*<sup>(1)</sup> distinguished,

*Friary Holroyd and Healey's Breweries, Limited v. Singleton*<sup>(2)</sup>, referred to.

#### ORIGINATING SUMMONS.

By an Indenture of Lease dated 1st March 1913 the defendants, the Trustees of the will and codicils of the late Nowroji Maneckji Wadia, C.I.E., leased to one Bomonji Pestonji Vatcha for a term of ninety-nine years a plot of land situated at Tardeo, Bombay,

<sup>(1)</sup> (1904) 92 L. T. 292.

<sup>(2)</sup> [1899] 1 Ch. 86.

consisting of 408 sq. yards or thereabout. By clause 7 of the said Indenture it was provided as follows:—

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“ Provided also and it is hereby agreed and declared that if the lessee shall be desirous of purchasing the reversion in fee simple in the premises hereby demised at the price of rupees seven thousand four hundred and fifty four and shall at any time within eighteen years from the date of this lease give to the lessors or leave for them at their office in Bombay a notice in writing to that effect, then and in such case the person giving or leaving such notice shall be deemed the purchaser of the said reversion at the price of rupees seven thousand four hundred and fifty four as from the date of notice, subject to the following conditions (namely) firstly: The purchase money shall be paid and the purchase shall be completed on the first day of the month following the expiration of two months from the date of such notice and if the said purchase shall not be completed on that day, the purchaser shall pay to the vendors interest on the said purchase money at the rate of nine per cent. per annum computed from that date up to the actual completion of the purchase; secondly: The purchaser shall pay all arrears of rent up to the day appointed for the completion of the purchase; thirdly: Upon payment of the purchase money and all arrears of rent at the time aforesaid the vendors shall execute a proper conveyance of the said premises to the purchaser such conveyance to be prepared by and at the expense of the purchaser including therein all the costs of the vendors of and incidental thereto; and fourthly: The purchaser shall accept such title as the vendors have on the date of these presents.”

By an Indenture of Assignment dated 22nd May 1916, the said Bomonji Pestonji Vatcha assigned the said lease for the then residue of the said term to the plaintiff for the sum of Rs. 39,500.

The plaintiff being anxious to purchase the said plot intimated to the defendants by a notice in writing dated 25th September 1916 his intention of purchasing the said plot under the provisions of the said clause 7.

The defendants by their solicitors' letter dated 29th September 1916 called upon the plaintiff to submit for their approval a draft conveyance of the said plot.

On the 14th November 1916, the plaintiff forwarded to the defendants the draft conveyance called for by them containing *inter alia* the following recitals:—

“ Whereas Jehangir Nusserwanji Wadia died in the year 1843 possessed of and absolutely entitled to the hereditaments and premises described in the

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schedule hereunder written and intended to be hereby granted and leaving behind him a widow named Maneckbai and a daughter named Motlibai and two sons of the said Motlibai named Nusserwanji Maneckji Wadia and Nowroji Maneckji Wadia and whereas the said Jehangir Nusserwanji Wadia left a will dated 30th April 1840 probate whereof was granted to the said Motlibai by the Supreme Court at Bombay on the day of 18 ; and whereas the Testator Jehangir Nusserwanji Wadia *inter alia* directed in his will as regards the residue of his estate as follows :—So long as my wife Maneckbai enjoys her natural life the aforesaid two persons (i. e., she and Motlibai, daughter of the testator) are to agree together and to manage the affairs with unanimity but after the death of my wife Maneckbai I do give the whole power over my estate and property and also over the payments and receipts to my daughter Motlibai and she is to manage all the affairs and so long as Motlibai enjoys her natural life everything is to remain under her. After the death of Motlibai, Motlibai has two sons namely Bhai Nowroji and Bhai Nusserwanji, these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and my daughter Motlibai ; and whereas the said Maneckbai died on the day of 18 ; and whereas the said Motlibai died on the 24th May 1897 and whereas the said Nusserwanji Maneckji Wadia died on the 5th day of May 1897 leaving him surviving his widow Perozbai and leaving a will dated 8th June 1885 whereof he appointed the said Perozbai to be his executrix and whereas on the day of probate was granted by the High Court of Judicature at Bombay of the will of the said Nusserwanji Maneckji Wadia to the said Perozbai ; and whereas the said Perozbai as such executrix as aforesaid filed a suit in the High Court of Judicature at Bombay against the said Nowroji Maneckji Wadia and others being suit No. 611 of 1897 and whereas the following questions *inter alia* were placed before the Court for its decision, namely :

(1) Whether under the said will of Jehangir Nusserwanji Wadia the said Maneckbai and the said Motlibai took an absolute interest or only a life interest in the estate?

(2) Whether under the said will the two sons of Motlibai, viz., Nusserwanji and Nowroji took a joint interest after the death of Motlibai or a tenancy in common?

And whereas the said questions were decided by the said Court in Appeal No. 974 reported in I. L. R. 23 Bom. 80 to the effect that the said Motlibai and the said Maneckbai had a life interest only in the testator's residuary estate and the sons of the said Motlibai, viz., the said Nusserwanji and Nowroji, had during her life a vested interest in the residuary estate to come into possession on her death and that they took such vested interest as joint tenants and not as

tenants in common. And whereas the hereditaments and premises described in the schedule hereunder written and intended to be hereby granted form part of the residuary estate of the said Jehangir Nusserwanji Wadia and therefore after the death of the said Maneckbai and Motlibai and Nusserwanji Maneckji Wadia the same vested in the said Nowroji Maneckji Wadia as the sole and absolute owner thereof."

The defendants on their part sought to incorporate in the said conveyance the following covenants :—

" And the purchaser doth hereby covenant with the vendors as follows :—

That the purchaser shall at his own expense construct walls or fences of such nature, heights and other dimensions and materials as the vendors or their engineers shall require along the boundaries of the land hereby granted if this has not been already done and shall always keep and maintain the same in proper repair.

2. That the purchaser shall forthwith fill up and level and pave with broken stone and cement and sand in front of the premises hereby conveyed and abutting on the Wadia Street a strip of land 6 ft. 6 inches in width and up to the kerb stone put in by the vendors so that the same may serve as a foot-path.

3. The purchaser will not build or erect any structure whatsoever upon any portions of the strip of land  $7\frac{1}{2}$  ft. in width along the whole of the North and South boundaries of the premises hereby conveyed which are shown on the plan A annexed to the said indenture of lease and thereon marked ' open space ' and will keep such portions as open spaces excepting only as may be otherwise permitted by the vendors.

4. That the purchaser will use the building or buildings erected on the premises hereby conveyed for residential purposes or for offices or shops or godowns for non-hazardous goods and will not use the premises or any part thereof or permit or suffer the same to be used as a chawl or other structure for the housing of labouring classes or as single room tenements or as a public house or liquor shop nor for any offensive, noisy or dangerous trade business, pursuit or occupation, or purpose which shall or may be or grow to be in any way a nuisance, damage, grievance or annoyance to the vendors or their tenants or purchasers from them or the owners or tenants of any of the adjoining properties of the neighbourhood or which may tend to depreciate or lessen the value of the property of the vendors or any part thereof as a residential property.

Provided always and it is hereby agreed and declared that the vendors shall at all times hereafter be at liberty as they may think fit to build upon or permit to be built upon or otherwise to deal with any of the land for the

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time being belonging to or vested in the vendors or any one claiming through them or now or hereafter acquired or reclaimed by them or the buildings thereon near adjoining or opposite to the premises hereby conveyed notwithstanding that the light or air or any amenities or incidental advantages now or hereafter to be enjoyed by the purchaser in respect of the said premises or the buildings for the time being thereon may be thereby affected ”

The plaintiff submitted that the recitals proposed by him should be inserted in the conveyance of the said plot in order to trace the title of the defendants from the late Jehangir Nusserwanji Wadia who was in fact the last purchaser of the property of which the said plot formed part, and that on a true construction of clause 7 of the said Indenture of Lease the defendants were not entitled to insert in the said conveyance the covenants proposed by them. The defendants objected to the plaintiff's recitals on the ground that the same were unnecessary, the plaintiff being bound to accept such title as the vendors had at the date of the lease. The defendants however insisted upon their covenants being embodied in the proposed conveyance.

The plaintiff obtained an originating summons calling upon the defendants to attend before the Sitting Judge in chamber for determining whether the recitals proposed by the plaintiff and the covenants set forth by the defendants should be inserted in the said conveyance. The summons was adjourned into Court for hearing.

*Weldon*, for the plaintiff.

*Kanga*, for the defendant.

KAJIJI, J.:—By an indenture dated 1st March 1913 the defendants leased to one Bomonji Pestonji Vatcha for a term of ninety-nine years a plot of land situated at Tardeo. By an Indenture of Assignment dated 22nd May 1916 the lessee assigned the lease for the then residue of the said term to the plaintiff, Ladhahoy

Lakhamsey, for the sum of Rs. 39,500. By cl. 7 of the Indenture of Lease dated 1st March 1913 it is provided as follows [The clause is set out above] :—

The plaintiff being anxious to purchase the said plot intimated to the defendants by a notice in writing dated 25th September 1916 his intention of purchasing the said plot under the provisions of the said cl. 7 and the defendants by their solicitors' letter, dated 29th September 1916, called upon the plaintiff to submit for their approval a draft conveyance of the said plot. On or about 14th November 1916, the plaintiff forwarded to the defendants the draft conveyance called for by them. The draft conveyance contained recitals which are particularly set forth in the 6th paragraph of the plaint. The plaintiff contended that such recitals should be inserted in the proposed conveyance for the purpose of tracing the title of the vendors; but the defendants object to the insertion of the said recitals. The defendants, however, seek to incorporate in the said conveyance the covenants set forth in the 8th paragraph of the plaint while the plaintiff contends that on a true construction of cl. 7 of the Indenture of 1st March 1913 the defendants are not entitled to insert the said covenants or any of them. The following two questions were submitted for the determination of the Court :—

1. Whether the recitals set forth in paragraph 6 of the plaint should be struck out of the proposed conveyance?
2. Whether the covenants set forth in paragraph 8 of the plaint or any and if so which of them should be inserted in the said conveyance?

As there was dispute as to facts the Originating Summons was adjourned into Court for hearing. The conclusion I have come to is that the recitals if inserted in the conveyance would certainly amount to representations by the defendants which would be binding on them but as the plaintiff under the 4th condition above referred to is bound to accept such title as the

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vendors have, I consider these recitals unnecessary and direct that the recitals set forth in paragraph 6 of the plaint should be struck out of the proposed conveyance. Mr. Kanga for the defendants in the course of argument very fairly conceded that on the authorities he could not at this stage insist on the covenants set forth in paragraph 8 of the plaint being inserted in the proposed conveyance and that they could only be asked for by the owners of the neighbouring plots in a separate suit. I, therefore, direct that the covenants set forth in paragraph 8 of the plaint should be struck out. But Mr. Kanga for the defendants contends that the plaintiff is not entitled to the benefits of the option to purchase as he is not the original lessee but only an assignee of the lessee and as the option to purchase is a personal covenant and not a covenant which runs with the land it does not enure to the benefit of the assignee. In other words he contends that a covenant which is merely personal or collateral to the thing demised does not run with the land or the reversion and therefore assignees are not bound even though they be expressly named and a covenant to give the lessee the option to purchase the land demised is a personal covenant and relies on *Woodall v. Clifton*<sup>(1)</sup>. But in my opinion it has no application to the facts of the present case. It must be borne in mind that this contention has been for the first time taken by the defendants at the hearing and that the plaintiff is not an under-lessee but is an assignee for the full term who has perfected his title by a legal document and thus stands in the shoes of the original lessee. Further, cl. 7 of the original lease, one relating to option to purchase, is recited in the Indenture of Assignment which further recites that the original lessors have signified their consent to the assignment intended to be made by a writing dated

(1) (1904) 92 L. T. 292.



8th March 1916 and the assignment has been registered with the lessors. From the passage at the end of p. 587 of Vol. XVIII of Halsbury's Laws of England, we find that the benefit of stipulations in the lease in favour of the lessee and his assignees, such as an option to purchase, passes only to the legal assignees of the whole term: see *Friary Holroyd and Healey's Breweries, Limited v. Singleton*<sup>(1)</sup> the head note of which is:—

“The equitable assignee of a lease who has omitted to perfect his title by a legal assignment, although in possession of the premises and paying the rent reserved..., is not entitled to the benefit of an option to purchase given to the lessee, his executors, administrators, and assigns.”

This part of the judgment has been affirmed by the Court of Appeal in *Friary Holroyd and Healey's Breweries, Limited v. Singleton*.<sup>(2)</sup> In the present case the plaintiff is a legal assignee and in my opinion he is entitled to the benefit of the option to purchase. The correspondence between the parties to my mind clearly shows that the parties proceeded on the assumption that the plaintiff though an assignee of the lessee was entitled to exercise the option of purchase under the lease and that the defendants had acquiesced in it and are now bound to sell it; therefore it is not now open to the defendants to contend that the covenant being a personal covenant the benefit thereunder does not pass to the assignee. The plaintiff's attorneys by their letter of 25th September 1916 gave the necessary notice to the attorneys for the defendants who by their letter dated 29th September 1916 ask for a cheque for Rs. 200 on account of their client's cost which are payable under cl. 7 of the lease by the plaintiff. By a letter of the 4th October 1916 plaintiff's attorneys agree to pay the costs. From this it seems to me quite clear that the defendants never intended to take up the attitude which they now do; and I think that it would not only

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(1) [1899] 1 Ch. 86.

(2) [1899] 2 Ch. 261.

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be unfair and unjust but inequitable to allow them to do so now. I, therefore, hold that even if in law the plaintiff is not entitled to exercise the option the defendants are now estopped from disputing it. The result is that the plaintiff is entitled in the circumstances of this case to exercise the option to purchase and as the defendants have failed in this most important defence to this suit they must pay plaintiff's costs of this suit.

Solicitors for the plaintiff: *Messrs. Jehangir & Seervai.*

Solicitors for the defendants: *Messrs. Wadia, Gandhi & Co.*

*Order accordingly.*

G. G. N.

## APPELLATE CIVIL.

*Before Mr. Justice Beaman.*

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September 10

PANDU *bin* BALA JAGATAP (ORIGINAL DEFENDANT), APPELLANT v. RAM-CHANDRA GANESH DESHIPANDE (ORIGINAL PLAINTIFF) RESPONDENT.\*

*Kadim Inamdar—Grantee of soil—Introduction of summary settlement into the alienated village—Mirasdars holding lands in the village long before the alienation—Inamdar's right to enhance the rent—Bombay Land Revenue Code (Bombay Act V of 1879), section 217.†*

\* Second Appeal No. 272 of 1916.

† The section runs as follows :—

217. When a survey settlement has been introduced, under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by, under the provisions of this Act, and all the provisions of this Act relating to occupants and registered occupants shall be applicable, so far as may be, to them.