

CALTEX (INDIA) LTD.

v.

BHAGWAN DEVI MARODIA

September 26, 1968

[S. M. SIKRI AND R. S. BACHAWAT, JJ.]

Indian Contract Act (9 of 1872), s. 55—Lease of land—Time as essence of contract—Intention if to be clearly stated.

The respondent leased to the appellant a plot of land for a certain period and stipulated in the lease deed that the appellant would give notice of renewal of the lease within a certain time. The appellant made the request for renewal of the lease 12 days after the time fixed. The respondent asked the appellant to vacate the premises stating, that the request being made out of time, was ineffective. The appellant filed a suit for a declaration that he was entitled to the renewal, and stated that the delay in making the request be excused as (a) it was due to oversight; (b) the respondent had not altered her position for the worse or to her detriment within the space of 12 days; (c) neither party had treated the matter of time as being as the essence of the transaction; (d) the appellant had constructed a service station for petroleum products of immense utility to the public of the locality; and (e) the appellant was in possession of the land. The Court dismissed the suit, and this decision was affirmed in appeal. Dismissing the appeal, this Court,

HELD : The lease fixed a time within which the application for renewal was to be made. The time so fixed was of essence of the bargain. The tenant lost his right unless he made the application within the stipulated time. Equity will not relieve the tenant from the consequences of his own neglect which could well be avoided with reasonable diligence.

At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain, the reason being that a renewal of a lease is a privilege and if the tenant wishes to claim the privilege; he must do so strictly within the time limited for the purpose. [241 D, E]

With regard to equitable relief against a failure of the tenant to give notice of renewal within the stipulated time the relief cannot be given in equity save under special circumstances such as unavoidable accident, fraud, surprise, ignorance, not wilful or inequitable conduct on the part of the lessor precluding him refusing to give the renewal. [241 F]

Grounds (b) and (e) stated for the delay could not be regarded as special circumstances. As to ground (d) it was not shown that the service station was of immense public utility. The fact that the appellant constructed a service station was an irrelevant consideration. Ground (c) was not established and it was not shown that the time was not the essence of the bargain. As to ground (a) there was some evidence to show that the delay in giving the notice of renewal was due to oversight. But it was not shown that the delay was due to any unavoidable

- A accident, excusable ignorance, fraud or surprise. The delay arose from mere neglect on the part of the appellant and could have been avoided by reasonable diligence. [242 E]

- B *Jamshed Khodaram Irani v. Durjorji Dhunjibhai*, L.R. 43 I.A. 26, *Hare v. Nicoll*, [1966] 2 Q.B. 131, 145; *Eaton v. Lyon* 3 Ves Jun. 690, 692; *Reid & Anr. v. Grave & Ors.* 9 L.J.Ch. 245, 248, *Ram Lal Dubey v. Secretary of State for India*, 39 C.L.J. 314 and *Maharani Hemanta Kumari Devi v. Safatulla Biswas & Ors.* 37 C.W.N. 9, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2347 of 1966.

- C Appeal from the judgment and decree, dated June 3, 1966 of the Calcutta High Court in Appeal No. 251 of 1965.

M. C. Chagla and S. N. Mukherjee, for the appellant.

S. V. Gupte, M. G. Poddar and D. N. Mukherjee, for the respondent.

The Judgment of the Court was delivered by

- D **Bachawat, J.** By an indenture of lease, dated February 17, 1954 the respondent leased to the appellant a plot of land at premises No. 22, Jatindra Mohan Avenue, Calcutta, for a term of 10 years commencing from February 1, 1954. Clause 3(c) of the deed provided for a renewal of the lease and was in the following terms :—

- E “3(c). The lessor will on the written request of the lessees made two calendar months before the expiry of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the lessees hereinabove contained grant to it one renewal of
- F 10 years from the expiry of the said term at the same rent and containing the like covenants and provisos as are herein contained except that as regards the clause for renewal for further period the rent shall be as may be agreed between the lessor and the lessees.”

- G On December 1, 1963, the time fixed for applying for the renewal of the lease expired. On December 13, the appellant made a written request for the renewal. On December 23, 1963 the respondent's solicitors replied stating that the request being out of time was ineffective and asking the appellant to vacate the land on the expiry of the lease. The appellant had erected structures on the land for the purpose of running a petrol delivery station and was a Thika tenant within the meaning of the Calcutta Thika Tenancy Act, 1949. In February 1964 the respondent
- H filed an application before the Controller asking for eviction of

the appellant under ss. 3(vi) and 5 of the Calcutta Thika Tenancy Act. The Controller allowed the application. An appeal from this order was dismissed by the appellate Authority. A revision petition against the order was dismissed by the High Court. While dismissing the revision petition, the High Court stayed the execution of the order of eviction for a month and observed that the authorities under the Calcutta Thika Tenancy Act had no power to decide whether the appellant was entitled to a renewal of the lease. Thereafter the appellant filed the present suit on the Original Side of the Calcutta High Court asking for a declaration that it was entitled to a renewal of the lease, specific performance of the covenant for renewal, an injunction restraining execution of the order of eviction passed by the Controller and for other reliefs. In paragraphs 13 and 14 of the plaint the appellant alleged that the delay in giving notice of renewal should be excused in view of the following special circumstances : (a) the delay was due to oversight; (b) the respondent had not altered her position for the worse or to her detriment within the space of 12 days; (c) neither party had treated the matter of time as being as the essence of the transaction; (d) the appellant had constructed a service station for petroleum products of immense utility to the public of the locality; (e) the appellant was in possession of the land. The respondent contended that the application for renewal being made out of time was ineffective and that there was no ground for excusing the delay. S. P. Mitra, J. accepted the respondent's contention and dismissed the suit. An appeal under clause 15 of the Letters Patent was dismissed by a Divisional Bench of the High Court. Both the courts concurrently held that the letter, dated December 13, 1963 was not a proper exercise of the option by the appellant under the lease, dated February 17, 1954 and that there were no special circumstances for excusing the delay in giving the notice. The appellant has filed the present appeal after obtaining a certificate from the High Court under Art. 133 (1)(a) and (b) of the Constitution.

The appellant neglected to make the application for renewal of the lease within the stipulated time. Mr. Chagla has submitted that the time is not of the essence of the contract having regard to sec. 55 of the Indian Contract Act, 1877 as interpreted in the case of *Jamshed Khodaram Irani v. Durjorji Dhunji-bhai*⁽¹⁾. Section 55 of the Indian Contract Act provides that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the

(1) L.R. 43 I.A. 26.

- A parties was that time should be of the essence of the contract." In *Jemshed's case*⁽¹⁾ Viscount Haldane observed that the section did not lay down any principle as regards contracts to sell land in India different from those which obtained under the law of England. It is well known that in the exercise of its jurisdiction to decree specific performance of contracts the Court of Chancery
- B adopted the rule, especially in the case of contracts for the sale of land, that stipulations as to time were not to be regarded as of the essence of the contract unless they were made so by express terms or unless a clear indication of a contrary intention appeared from the nature of the contract or the surrounding circumstances. In his well considered judgment Viscount Haldane carefully
- C refrained from saying that time was not to be regarded as of the essence in all contracts relating to land.

At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain. As stated in Halsbury's Laws of England, 3rd ed., vol. 3, art. 281, p. 165 : "An option for the renewal of a lease, or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse." This passage was quoted with approval by Danckwerts

D L. J. in *Hare v. Nicoll*⁽²⁾. A similar statement of law is to be found in Foa's *General Law of Landlord and Tenant*, 8th ed., Art. 453, p. 310, and in Hill and Redman's *Law of Landlord and Tenant*, 14th ed., p. 54. The reason is that a renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose.

- F With regard to equitable relief against the failure of the tenant to give notice of renewal within the stipulated time, the law is accurately stated in Halsbury's Laws of England, 3rd ed., vol. 23, p. 626, Art. 1329, footnote (u) thus :—"Relief will not be given in equity against failure to give notice in time, save under special circumstances. The decided cases show that in such cases
- G relief is not given in equity save upon the ground of unavoidable accident, fraud, surprise, ignorance not wilful or inequitable conduct on the part of the lessor precluding him from refusing to give the renewal. The limits of the equitable interference in such cases were clearly stated by the Master of the Rolls (Sir R. P. Arden) in *Eaton v. Lyon*.⁽³⁾ He observed :—

- H "At law a covenant must be strictly and literally performed; in equity it must be really and substantially

(1) L. R. 43 I. A. 26.

(2) [1966] 2 Q.B. 131, 145.

(3) 3 Ves. Jun. 690, 692-3, 695-6=30 E.R. 1223, 1224, 1225-6.

performed according to the true intent and meaning of the parties so far as circumstances will admit; but if unavoidable accident, if by fraud, by surprise or ignorance not wilful, parties may have been prevented from executing it literally, a Court of Equity, will interfere; and upon compensation being made, the party having done everything in his power, and being prevented by means, I have alluded to, will give relief . . . I decide this case upon the principles on which, Lord Thurlow decided (*Bayley v. The Corporation of Leominster* 1792, 1 Ves. 476), and I hope now, it will be known, that it is expected, these covenants shall be literally performed where it can be done; and that Equity will interpose, and go beyond the stipulations of the covenant at law, only where a literal performance has been prevented by the means, I have mentioned, and no injury is done to the lessor."

We are of the opinion that the stipulation as to time in clause 3 (c) of the indenture of lease dated February 17, 1954 should be regarded as of the essence of the contract. The appellant not having exercised the option of renewal within the time limited by the clause is not entitled to a renewal.

The appellant claims relief against the consequences of its default on the grounds enumerated in paragraphs 13 and 14 of the plaint. Grounds (b) and (e) cannot be regarded as special circumstances. As to ground (d), it is not shown that the service station is of immense public utility. The fact that the appellant constructed a service station is an irrelevant consideration. Ground (c) is not established and it is not shown that the time is not of the essence of the bargain. As to ground (a) there is some evidence to show that the delay in giving the notice of renewal was due to oversight. But it is not shown that the delay was due to any unavoidable accident, excusable ignorance, fraud or surprise. The delay arose from mere neglect on the part of the appellant and could have been avoided by reasonable diligence. As observed by the Master of the Rolls in *Reid & Anr. v. Grave & Others*⁽¹⁾: "The rule is now well established, that no accident will entitle a party to renew unless it be unavoidable. I am of opinion, that nothing but accident, which, could not have been avoided by reasonable diligence, will entitle the plaintiff to a renewal in this Court."

We may add that where no time is fixed for the purpose, an application for renewal for the lease may be made within a reasonable time before the expiry of the term (see Foa's *General Law of Landlord & Tenant*, 8th ed., article 455, pp. 311-12, *Ram Lal*

(1) 9 L. J. Ch. 245, 248.

- A** *Dubey v. Secretary of State for India* ⁽¹⁾, *Maharani Hemanta Kumari Devi v. Safatulla Biswas & Ors.* ⁽²⁾. In the present case, the lease fixes a time within which the application for renewal is to be made. The time so fixed is of the essence of the bargain. The tenant loses his right unless he makes the application within the stipulated time. Equity will not relieve the tenant from the consequences of his own neglect which could well be avoided with reasonable diligence.
- B**

The appeal is dismissed with costs.

Y.P.

Appeal dismissed.

(1) 39 C.L.J. 314.

(2) 37 C.W.N. 9.