[PRIVY COUNCIL.] 1918.

*Present:* Earl Loreburn, Lord Atkinson, Lord Scott Dickson, and Sir Arthur Channell.

## COLOMBO HOTELS CO., LTD. *v.* MOTOOMULL *et al.*

*Agreement to enter into a lease when new buildings are completed—Outside evidence led to show what was meant by new buildings—Evidence Ordinance, s. 92.*

The plaintiffs entered into an agreement with the defendants by which the defendants agreed to accept a lease of a shop. The period of lease was to commence "from the date when the new buildings are completed and the shop is occupied." The plaintiffs resolved to rebuild the hotel in three sections, and the shop in question was in section No. 2. The defendants entered into occupation of the shop some time after it was completed, but thereafter the plaintiffs intimated that they had definitely abandoned the erection of section No. 3. The defendants when called upon to enter into the lease refused to do so as the new buildings had not been completed.

The plaintiffs sued for damages. The Court allowed evidence to be led to explain what was meant by "new buildings," and on the evidence it was held that the words "new buildings" meant the entire buildings, and not only section No. 2.

THE facts appear from the judgment.

June 10, 1918. Delivered by LORD SCOTT DICKSON:—

The plaintiffs (respondents) in this case are the owners of the Grand Oriental Hotel, Colombo. The defendants (appellants) are shopkeepers in Colombo, who for many years before the present dispute arose occupied as tenants business premises in the said hotel.

In 1910 the respondents resolved to rebuild their whole hotel, and they approached the appellants with the view of their taking a lease of premises in the new hotel buildings about to be erected.

After somewhat protracted negotiations the parties signed an agreement dated March 3, 1913, by which the appellants agreed to accept a lease of the shop therein described on the terms and for the period therein set forth.

By that agreement the period of the lease (12½ years) was to commence "from the date when the new buildings are completed and the shop is occupied" by the appellants, two events being thus stipulated for as conditions of the commencement of the lease.

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The solution of the controversy between the parties depends on the interpretation which is to be put on the words " the new buildings."

The respondents resolved to proceed with the re-erection of their hotel in three sections, the shop in question being in section No. 2. When that section was completed, the respondents called upon the appellants to enter into occupation of the said shop, and ultimately the appellants did so in December, 1913.

The parties are at issue as to the terms upon which such possession was taken. The respondents maintain that it was because " the new buildings " in the sense of the agreement had been completed, and when the appellants, therefore, were bound to take possession, and did take possession, in terms of that agreement. The appellants, on the other hand, maintain that they took possession before they were bound to do so in terms of a special arrangement between them and the respondents.

Thereafter the respondents intimated that they were not going to proceed with the erection of section No. 3 of the proposed new buildings and the rebuilding of that section has been definitely abandoned. In the plaint the respondents sued the appellants for damages in respect of their refusal to enter into a lease in terms of the said agreement. In their answer the appellants maintained that they were not bound to enter into such a lease, as the new buildings had never been completed.

The District Court Judge dismissed the action, with costs. On appeal the Supreme Court reversed the decision of the District Court Judge, and gave decree against the appellants for damages and expenses. The present appeal has been taken to set aside the judgment of the Supreme Court and to restore that of the District Court.

The first and main question is what is the meaning of " new buildings " in the said agreement.

Issues having been framed, evidence was led, and both the District Court and the Supreme Court were of opinion that outside evidence was admissible.

From the evidence it appears that when the negotiations were opened in 1910, Mr. Moore, the respondents' then secretary, told the appellants that the whole hotel was to be pulled down and rebuilt, and he showed them the photograph D 1, which contained a picture of the whole of the proposed new building, the whole of the old buildings having substituted for them to new building. Nothing was then said or appeared to the appellants to the effect that the new building was to be erected in sections; and the appellants never heard of these sections till after the parties were in Court. The respondents only produced the plan P 1 showing the three sections in the course of the proceedings in the action.

What, then, is the proper interpretation of the words " the new buildings " occurring in the agreement?

The agreement recites that the landlord is erecting certain buildings on the said premises (*i.e.*, the premises called and known as the " Grand Oriental Hotel "), including a row of shops in the ground floor thereof.

To the appellants, who knew the existing hotel premises and the picture D 1, which was submitted to them as representing the new buildings as a whole without any indication of sections, this must have been understood as referring to the whole of the new buildings so pictorially represented, and could not have been regarded as referring only to the portion or section which was then actually in course of erection, apart from what was to be proceeded with in order to finish the rebuilding.

The only other plan which was shown to the appellants is that referred to in the agreement. That, however, was only a ground plan of the shop, and does not assist in interpreting the phrase " the new buildings."

On the evidence their Lordships are of opinion that the District Court Judge was right when he found that the words " when the new buildings are completed " meant the entire buildings, and not only section No. 2.

If that finding be accepted as correct, the other findings of the learned Judge as to the plaintiffs' contentions necessarily follow.

The Judges in the Supreme Court do not proceed on any direct or immediate interpretation of the agreement itself, but on reasoning derived from certain letters, and particularly the letter of January 17, 1913, P 9, and on the subsequent conduct of the parties. Many of these letters were prior in date to the signing of the agreement. They related, primarily at least, not to the commencement of the lease, but to the terms on which, as a temporary arrangement, the appellants were to enter into immediate possession of the shop or part thereof. The proposal as to this, as originally made by the respondents on August 30, 1912, was that the appellants should occupy a part of the shop which was expected to be ready in April, 1913. This was referred to by Mr. Moore, the respondents' secretary, as " temporary accommodation until construction of shops is completed."

The appellant and the first respondent are the heirs at law of one portion of the shop referred to, saying that they did not " require the same until the whole building be completed. " P 6. The respondents replied to this that they would arrange to give the appellants the occupation of the whole shop from the end of May, 1913, but that they could not agree to the appellants " not occupying the shop until the whole building was completed." P 7. The appellants still adhered to their position that they should not be asked to occupy the shop " until the whole buildings be completed." P 8.

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Then followed the letter founded on specially by Mr. Justice Shaw, dated January 17, 1913, in which the respondents insisted that they could not comply with the suggestion that the appellants should not occupy " their new shop or a portion thereof until the whole complete extensions are ready," and intimated that, unless the appellants were " prepared to sign the agreement and take occupation of the shop or the portion thereof allotted to " them, the existing arrangements would be cancelled and another tenant got. P 9.

The agreement was thereafter signed on March 3, 1913. In it the two conditions for the commencement of the lease were set forth, viz., completion of the new buildings and occupation of the shop. Further correspondence followed, in which the terms on which the appellants were to enter into occupation were further discussed. In the course of that correspondence the appellants on December 13, 1913, P 21, wrote: " We have to pay the rent in full for the shop we would occupy when the new buildings are completed." Both parties are agreed in the evidence that this expression " the new buildings " meant the whole " of the new buildings " record, p. 15, line 6, and p. 19, line 27. Ultimately the appellants entered into possession of the shop on December 6, 1913. At that time, however, even section No. 2 of the new buildings had not been completed, and it was agreed that the appellants should not pay the full rent stipulated for in the agreement, but 20 per cent. less, and the full rent was never paid by the appellants.

This correspondence had, it thus appears, relation to the terms on which the appellants were to enter into occupation of the shop at a time when admittedly even section No. 2 had not been completed. It regulated, in their Lordships' opinion, only the terms on which that occupation was to be enjoyed, and it provided for a reduced rent just because the buildings were not completed. In their Lordships' opinion it was not intended to alter, and ought not to be accepted as altering, the interpretation of the phrase " the new buildings " occurring in the agreement, and accordingly that interpretation was left as the District Judge found it to be, viz., the whole buildings as shown on the picture D 1.

In the argument before the Board great weight was attached to the word " is " in the sentence in the preamble of the agreement: " and whereas the said landlord *is* erecting certain buildings," &c., and it was contended that as at that time, viz., the date of the agreement, the only section then actually in course of construction was section No. 2, the words " the new buildings " must be understood as confined to section No 2. In the opinion of their Lordships this argument seeks to attach a significance to the word " is " which it will not bear. The use of the word " is " seems to their Lordships quite insufficient to displace the other evidence as to what " the new buildings " referred to in the agreement really were.

Upon the whole, their Lordships are of opinion that the proper construction of the words "the new buildings," occurring in the agreement, is that adopted by the learned District Judge. They will, therefore, humbly advise His Majesty to reverse the decision of the Supreme Court and to restore the judgment of the District Judge.

The respondents must pay the costs of the appeal to the Supreme Court and also the costs of this appeal.

*Set aside.*