1962

*May 16
June 11

CANADIAN PETROFINA LIMITED ...APPELLANT;

AND

SAMUEL BERGER .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Landlord and tenant—Lease—Option to purchase—Landlord's application for possession—Whether option validly exercised—The Landlord and Tenant Act, R.S.O. 1950, c. 199, s. 75.

Certain lands were leased to the appellant company for a term of 10 years to be computed from July 15, 1954. The lessee was given the option of purchasing the premises for a specified sum at any time during the first 5 years of the term, a condition of the option being that the lessee would give to the lessor 30 days' prior notice in writing of its intention so to purchase. On July 8, 1959, the lessee gave notice of its intention to purchase the leased premises pursuant to the option, and on the same day the lessor sent a letter to the lessee terminating the lease. This letter recited a failure to rectify what the lessor regarded was a breach of covenant. The landlord did not reply to the tenant's letter exercising the option but on July 23 served notice of an application for possession under s. 75 of *The Landlord and Tenant Act*, R.S.O. 1950, c. 199. The county judge made an order directing the issue of a writ of possession. The Court of Appeal dismissed an appeal from this order, and, subsequently, leave to appeal was granted by this Court.

Held: The appeal should be allowed, the judgments below set aside and the application of the respondent for possession of the lands dismissed.

The first 5 years of the lease expired at mid-night on July 14, 1959. The tenant's letter exercising the option was sent on July 8, 1959, and received on the following day. The option clause provided for a right exercisable *at any time*, within the first 5 years, which meant up to July 14, 1959. The provision for 30 day's prior notice in writing of the lessee's intention to purchase had reference to the lessor's obligation to deliver deeds and documents in his possession; it did not limit the right of the lessee to giving its notice 30 days prior to July 14, 1959. Accordingly, the option was validly exercised. At the time when the application was made before the county judge, the landlord and tenant relationship had ended and there was nothing for the county judge to decide. In assuming the subsistence of landlord and tenant relation, he was acting without jurisdiction.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from an order made by a Judge of the County Court of the County of Carleton directing the issue of a writ of possession. Appeal allowed.

W. B. Williston, Q.C., and *J. Sopinka*, for the appellant.

B. J. MacKinnon, Q.C., and *B. A. Kelsey*, for the respondent.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

The judgment of the Court was delivered by

JUDSON J.:—On July 15, 1954, Berger leased to Petrofina the lands in question for a term of 10 years to be computed from July 15, 1954. Clause 9 of the lease provided:

> 9. That it will operate or cause to be operated upon the leased premises a motor vehicle service station according to good accepted practice and will maintain the premises in safe, clean and sanitary conditions in accordance with the nature of its use.

In 1958, Petrofina sublet the premises to one Ouimet. Approximately 6 months after taking possession, Ouimet extended his business to include body work, spray painting and temporary storage of vehicles, in addition to the sale of gasoline and oil.

By letters dated May 14, 1959, and June 26, 1959, Berger notified Petrofina that he regarded this use of the premises as a breach of the covenant and demanded remedy of the specified breach before July 6, 1959. Following the receipt of these letters, Petrofina says that the matters complained of were remedied and other improvements to the building, such as painting, and levelling and paving of the station lot, were completed.

On July 8, 1959, Petrofina gave notice of its intention to purchase the leased premises pursuant to the option contained in clause 4 of the lease. On the same day, Berger sent a letter to Petrofina terminating the lease. This letter recites a failure to rectify the breach of covenant set out in the two previous letters.

Berger did not reply to Petrofina's letter exercising the option but on July 23, served notice of an application for possession under s. 75 of *The Landlord and Tenant Act*, R.S.O. 1950, c. 199. The county judge made an order directing the issue of a writ of possession. The Court of Appeal dismissed an appeal from this order. This Court granted leave to appeal on June 26, 1961.

The appellant submits that the Courts below were in error

(*a*) in failing to hold that the appellant had validly exercised its option to purchase the leased premises before the respondent's application for possession was commenced and that the learned trial judge was without jurisdiction to hear the application;

(*b*) in holding that the appellant was in breach of clause 9 of the lease in question.

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CANADIAN PETROFINA LTD. v. BERGER

Judson J.

Clause 4 reads:

> 4. That the Lessee shall have the irrevocable right at any time during the first five (5) years of the term hereof to purchase the leased premises in fee simple for the sum of Thirteen Thousand Dollars ($13,000.00). And that immediately upon the Lessee giving to the Lessor thirty (30) days' prior notice in writing of its intention so to purchase, the Lessor shall deliver to the Lessee such deeds and documents as he may have in his possession or under his control and relating to the leased premises. Upon delivery by the Lessee to the Lessor of said notice, there shall be concluded a valid and binding agreement for sale of the leased premises (together with all buildings, improvements, fixtures, facilities and equipment now or hereafter located thereon) the terms of which shall immediately be embodied in a deed of sale. It is understood and agreed between the parties hereto that this right of purchase for a fixed sum shall, if necessary, be exercisable notwithstanding the covenant of the Lessor contained in the immediately preceding paragraph.

The first 5 years of the lease expired at midnight on July 14, 1959. Petrofina's letter exercising the option was sent on July 8, 1959. It was received the following day.

The first sentence in the option gives an irrevocable right during the first 5 years to purchase in fee for $13,000. It says *at any time* during the first five years. Then follows the clause which has given rise to so much difficulty:

> And that immediately upon the Lessee giving to the Lessor thirty (30) days' prior notice in writing of its intention so to purchase, the Lessor shall deliver to the Lessee such deeds and documents as he may have in his possession or under his control and relating to the leased premises.

What is the meaning of giving 30 days' prior notice in writing of its intention so to purchase? The Courts below have construed this as meaning 30 days before the expiration of the first 5 years. The clause does not say that in express terms. Counsel for Berger also contends that the purchase must be completed within the first 5 years and on 30 days' prior notice. On the other hand, counsel for Petrofina says that the provision for 30 days' prior notice in writing has reference to the respondent's obligation to deliver deeds and documents in his possession and that it was inserted for the respondent's benefit to give him time to prepare and deliver the said documents. The submission is that it was merely a matter of conveyancing and that Petrofina was not obliged to give notice of intention 30 days prior to the expiry of the first 5 years because this would be inconsistent with its irrevocable right to purchase at any time during the 5 years.

Parts 1 and 2 of the option clause must be read together and given some meaning. They must also be read along with the third part of the option clause, which reads:

> Upon delivery by the Lessee to the Lessor of said notice, there shall be concluded a valid and binding agreement for sale of the leased premises . . .

There is no difficulty about this last-mentioned clause. The parties do not wait for the expiry of thirty days to have a binding agreement of sale and purchase. If the notice was valid, according to this clause, on July 9, 1959, Petrofina became the owner in equity. The contract could have been enforced on either side in an action for specific performance.

There are, therefore, 3 parts of the option clause. The first provides for a right exercisable at any time within the first 5 years. That means up to July 14, 1959. The second provides for the notice. I do not think that this limits the right of Petrofina to giving its notice 30 days prior to July 14, 1959. I think that Petrofina's submission is correct on this point and I am strengthened in this conclusion by the third part of the clause, which provides for a binding agreement coming into force on July 9, 1959, not thirty days after the giving of notice.

I would allow the appeal on this ground. The option was validly exercised. At the time when the application was made before the county judge, the landlord and tenant relationship had ended and there was nothing for the county judge to decide. In assuming the subsistence of landlord and tenant relation, he was acting without jurisdiction.

This makes an opinion unnecessary on the second branch of the appeal.

The appeal should be allowed. The judgments of the Court of Appeal for Ontario and of His Honour Judge P. J. MacDonald set aside and the application of the respondent for possession of the lands in question dismissed. The appellant is entitled to its costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the respondent: Wright & McTaggart, Toronto.