**Aziz v Bhatia Brothers Ltd**

**Division:** Court of Appeal of Tanzania at Dar-es-Salaam

**Date of Ruling:** 18 June 1999

**Case Number:** 1/99

**Before:** Nyalali Cj, Mfalila, Lubuva, Samatta and Lugakingira Jja

**Sourced by:** L K Masha

**Summarised by:** H K Mutai

*[1] Contract – Revocation – Unilateral repudiation – Whether agreement of sale had been terminated by mutual consent.*

*[2] Sale of land – Registered land – Agreement to sell – Lack of consent – Whether failure to obtain consent renders agreement void – Occupation of property – Title to property – Whether Respondent entitled to possession of property – Remedies –* Mesne *profits – Whether Appellant in occupation of property illegally – Whether Respondent entitled to payment of* mesne *profits – Land Regulations 3 of*

*1960.*

**Editor’s Summary**

Bhatia Brothers Limited entered into an agreement with Aziz whereby Bhatia Brothers Limited agreed to sell and Aziz agreed to purchase a godown and the plot on which it stood. The sale being subject to a mortgage, DJIT, the mortga-gee, was made a party to the agreement. Under the agreement, Aziz undertook to repay the mortgage instalments to DJIT, an obligation he immediately began to discharge.

Both Bhatia Brothers Limited and Aziz signed the agreement and a deed of transfer of occupancy but

DJIT failed to sign the agreement. Subsequently, both parties sought to negotiate a fresh agreement.

Bhatia Brothers Limited asserted this happened only after both parties had agreed to treat the original agreement as null and void. In another development Bhatia Brothers Limited and Aziz decided to embark, in partnership, on a storage business to be operated out of the godown with Aziz being entrusted with running the business. However, after the business ran into difficulties, Aziz abandoned it and started his own storage business on the site. In June 1974, Bhatia Brothers Limited wrote a letter terminating negotiations relating to the sale of the godown, declaring itself the owner thereof and undertaking to refund to Aziz any money he may have paid to DJIT toward the mortgage. Aziz contested the alleged termination of the agreement and demanded the documents of title to the property in order to process the transfer of title to himself. Bhatia Brothers Limited refused. Aziz then waited for Bhatia Brothers

Limited’s 33-year lease of the property to expire, which it did on 14 March 1992, whereupon he applied for a right of occupancy over the godown. The application was initially granted but, subsequently, it was cancelled when Bhatia Brothers Limited applied for the renewal of its term. Bhatia Brothers Limited then filed suit in the High Court claiming possession of the godown and *mesne* profits for its illegal use from

Aziz. Aziz disputed that the original agreement had been cancelled by mutual consent and counterclaimed seeking specific performance of the sale agreement. He also averred that the partnership venture failed due to Bhatia Brothers Limited’s failure to contribute financially towards its running.

The trial Judge found that Bhatia Brothers Limited had acted unilaterally in purporting to repudiate the contract but that, since the agreement lacked the consent of the Commissioner of Lands, it was unenforceable and the Defendant could repudiate it on that ground. He also ordered Aziz to give vacant possession of the godown to Bhatia Brothers Limited and to pay Bhatia Brothers Limited *mesne* profits for its use. Bhatia Brothers Limited was ordered to refund the sum of TShs 104 569-75 allegedly paid to it under the agreement. Aziz appealed against the trial Judge’s finding that the agreement was unenforceable whereas Bhatia Brothers Limited cross-appealed against the order compelling it to pay Aziz TShs 104 569-75. When the appeal came up for hearing in the Court of Appeal, the question as to the effect on a contract of lack of consent to the sale of land was referred to a full bench for resolution due to the existence of conflicting decisions.

The Full Bench held that such an agreement was not void and that a party who had performed its

obligations under the contract could seek the court’s assistance to enforce the contract against the party

in default. The suit was then remitted for hearing of the appeal.

**Held** – The trial Judge’s findings to the effect that Bhatia Brothers Limited’s unilateral attempt to repudiate the agreement did not in fact cancel or discharge the agreement and that the failure of the partnership was due to Bhatia Brothers Limited’s failure to contribute financially to it were justified by the evidence and there were no grounds on which to disturb them. The inclusion of the mortgagee as a party to the agreement had been intended merely to safeguard that mortgagee’s interests and since it had been found that the mortgage debt had been fully paid off, the mortgagee’s failure to sign was of no consequence and could not affect the validity of the agreement. In the circumstances, the sale agreement constituted a valid contract and was enforceable as between the parties. However, an order for specific performance could not be given as the current ownership of the property could not be established conclusively.

As the sale agreement was valid and enforceable, the order for *mesne* profits would be set aside as there was no question of the illegal use of the godown.

The order for vacant possession in Bhatia Brothers Limited’s favour would also be set aside as its title to the property had expired in 1992 and the order had been predicated upon title to the land being vested in it.

The order of refund would also be set aside as it was not supported by evidence. Repayment of the mortgage had been made to DJIT, not to Bhatia Brothers Limited, and there were no grounds for ordering

Bhatia Brothers Limited to refund the monies.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Alladitta v Salim and others* [1955]

Fazal Kassam (Mills) Ltd v Kassam and another [1960] EA 1042

*Jivraj v Devraj* [1908] EA 263

*Manji v Begum* [1957] EA 101

*Mlay v Phoneas* [1968] EA 563

*Khanbhai and Bro v Mtoo and another* [1953] TLR 433

*Mushunga v Rwekanika* [1974] EA 318

*Nitin Coffee Estates Ltd and others v United Engineering Works Ltd and another* [1988] TLR 203

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*Nyagwaswa v Nyirabu* [1985] TLR 103

*Patel v Lawrenson and another* [1957] EA 249

*Patel v Marealle and another* [1984] TLR 31

*Patterson and another v Kanji and another* [1956] EACA 106

*PHR Poole v R* [1960] EA 62

*Shambwe v National Printing Co Ltd* civil appeal number 19 of 1995