should be reversed and the suit dismissed with costs, the appellant to have his costs of this appeal and in the Courts below, and they will humbly advise His Majesty to this effect.

Solicitors for the appellant: *Barrow Rogers & Nevill.*

Solicitor for the respondent: *E. Dalgado.*

A. M. T.

APPELLATE CIVIL.

Before Mookerjee and Buckland JJ.

JOGENDRA KRISHNA RAY

v.

KURPAL HARSHI & CO.*

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May 2.

Transfer—Evidence—Evidence of party to suit, if Court can act upon it—Possession obtained in pursuance of oral agreement to lease, without executing necessary legal documents—Relationship of landlord and tenant, if constituted in law—Illegal surrender—Remedy of landlord for unexpired period of lease.—Suit for damages or for arrears of rent.

When a party has deposed in support of his case his testimony must be scrutinised in the same manner as that of any other witness and the Court is free to attach to the evidence that amount of credence which it appears to deserve.

When in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined.

Where, therefore a lessee obtained possession in pursuance of an oral agreement without executing the necessary legal documents:—

Held, that a tenancy was created in law as in fact and the relationship of landlord and tenant between the parties was constituted.

* Appeal from Original Decree, No. 140 of 1920, against the decree of Kumud Nath Ray, Subordinate Judge of Chittagong, dated April 29, 1920.

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Bibi Jawahir v. *Chaterput* (1), *Syamkisor* v. *Dines* (2), *Haripada* v. *Nirod* (3) referred to.

Where a tenancy is surrendered illegally, the remedy of the landlord against the tenant lies in a suit for damages for breach of contract and not in a suit for rent for the unexpired term of the lease.

Manindra Chandra v. *Aswini* (4), *Jamal* v. *Moolla* (5) and other cases referred to.

APPEAL by Jogendra Krishna Ray and another, the plaintiffs.

This appeal arose out of a suit for the rent of a godown taken on lease by the defendants. The plaintiffs alleged that though there was no written document, the lease was for a term of three years and that the defendants after a year and three months illegally surrendered the tenancy in spite of protest by the plaintiffs and that consequently they were entitled to rent for the unexpired period of the lease; the defendants on the other hand asserted that there was neither in law nor in fact a tenancy for three years, but that they were tenants from month to month, and they had determined the tenancy after notice duly served. The Subordinate Judge came to the conclusion that the plaintiffs had failed to establish that there was a tenancy for three years and dismissed the suit. The plaintiffs thereupon appealed to the High Court.

Dr. Dwarka Nath Mitter, *Babu Manindra Nath Banerjee* and *Babu Pramathanath Bandopadhya*, for the appellants.

Babu Jogendra Nath Mookerjee, *Babu Paresh Nath Mookerjee* and *Babu Kanai Dhan Dutt*, for the respondents.

Cur. adv. vult.

(1) (1905) 2 C. L. J. 343.
(2) (1919) 31 C. L. J. 75.
(3) (1920) 33 C. L. J. 437.
(4) (1920) 32 C. L. J. 168, 197; 25 C. W. N. 297.
(5) (1915) I. L. R. 43 Calc 493; L. R. 43 I. A. 6.

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MOOKERJEE J.

MOOKERJEE J. This is an appeal by the plaintiffs in a suit for realisation of rent of a godown taken on lease by the defendant firm. The case for the plaintiffs was that the defendant firm came into occupation in January 1917, under the arrangement that the tenancy would last for a term of three years ending in December 1919, and that the rent payable would be Rs. 250 a month. The defendant remained in occupation till the 31st March 1918, but on the 27th February 1918 the plaintiffs were served with notice of relinquishment. They forthwith protested that the tenancy cannot be surrendered in this manner; but notwithstanding their objection, the defendants vacated the premises, with the result that the plaintiffs re-entered with effect from the 1st April 1918. The plaintiffs accordingly claimed rent for the unexpired period of the lease. The case for the defendants was that there was neither in fact nor in law a tenancy for three years, that the status of the defendants was that of a tenant from month to month, and that the tenancy was terminated by the notice which was duly served. The defendants further contended that the plaintiffs were not entitled to succeed in the suit as framed and that in any event they could not recover the whole sum claimed. The Subordinate Judge came to the conclusion that the plaintiffs had failed to establish that there was a tenancy for a term of three years and accordingly dismissed the suit. On the present appeal, three questions have been argued on behalf of the plaintiffs, namely, first, whether there was in fact an agreement to lease for a term of three years or whether there was a contract of tenancy from month to month; secondly, assuming that there was in fact an agreement to lease for three years whether the relation of landlord and tenant for a term of three years was in law constituted; and, thirdly, if there was in fact and

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in law a tenancy for a term of three years, what are the reliefs which the plaintiffs can claim.

As regards the first point, it may be stated at the outset that there is no written lease nor is there correspondence between the parties to show that there was a contract of tenancy for a term of three years. One of the plaintiffs has pledged his oath that there was an agreement that the tenancy would continue for three years from January 1917 to December 1919 and that this agreement was made with one Arjun Babu who was the temporary manager of the defendant firm when the tenancy was created. The Subordinate Judge has not believed this statement, and has stated his reasons in the following passage of his judgment. "Nil Krishna Babu," the second plaintiff, "is certainly a very big man, but he is still a party, and unless his evidence is undoubtedly satisfactory and conclusive on the point, the Court cannot pass a decree for a fairly large amount on his testimony." The reasons thus assigned by the Subordinate Judge for disbelieving the plaintiff are neither adequate nor convincing. There is no inflexible rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit. Such a rule, if adopted, would nullify the provisions of section 120 of the Indian Evidence Act, which provides that in all Civil Proceedings, the parties to the suit shall be competent witnesses. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness and the Court is free to attach to the evidence that amount of credence which it appears to deserve, from his demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, power of memory, and other tests, by which the value of a statement of a witness can be ascertained,

if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. Now, if we consider the evidence of the plaintiff from this point of view, we have to examine the conduct of the parties as also the surrounding circumstances. The defendant company came into occupation in the middle of January 1917. The plaintiffs assert that on the 27th July 1917 they wrote to the defendant company asking them to take a written lease for three years. As no reply was received from the defendants, on the 24th August 1917 the draft of the lease was forwarded with a covering letter. To this also no reply was received. The plaintiffs have produced their peon books and proved the entries made in due course of business to indicate that the letters were sent out to the office of the defendants. The entries are initialled, apparently by the persons to whom the letters were delivered, but the initials have not been identified. The defendants urged in the Court below that these letters did not reach them. If this be true, it can be explained only on the theory that the plaintiffs never intended to send genuine letters to the defendants but were in July and August 1917 fabricating evidence for use on a suitable occasion. There is no evidence on the record to lend support to such an hypothesis. On the other hand, we find that as soon as the plaintiffs received the notice of relinquishment, dated the 27th February 1918, they forthwith protested and asserted that the tenancy which had been taken for three years could not be surrendered earlier. In the course of the correspondence which then ensued, it was stated by the defendant company that they ignored the undertaking given by Arjun Babu. The plaintiffs however adhered to the position they had taken up, and yet the defendant company vacated the

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premises on the 31st March 1918. It is worthy of note that Arjun Babu has not been called as a witness nor has any satisfactory reasons been assigned for his absence. The present manager, Lalji Babu, also has not been called. The conduct of the parties thus points to the conclusion that the story told by the plaintiffs is trustworthy. We have then the surrounding circumstances to consider. It cannot be disputed on the evidence that the godown if not reconstructed, was thoroughly repaired at a considerable cost by the plaintiffs at the time when the tenancy was created in favour of the defendants. It is improbable that so much money would have been spent by the plaintiffs if there had not been an agreement for a lease for a substantial term of years. On the other hand, we must also bear in mind that the defendant company were engaged in a flourishing business and it is improbable that they would take a godown on a precarious tenancy liable to be terminated on fifteen days' notice. The evidence further indicates that the business did not continue to flourish; this may be the true reason why the defendant company resiled from the original agreement and set up a tenancy from month to month. On the direct oral evidence, and the evidence of the conduct of the parties and the surrounding circumstances, I feel no doubt that the agreement was in fact for a tenancy for a term of three years commencing from January 1917 and terminating in December 1919.

As regards the second point, we have to determine whether the relation of landlord and tenant for a term of three years was in law constituted. The answer must be in the affirmative. It is now well established by a long series of decisions in this Court from *Bibi Jawahir* v. *Chaterput* (1), *Syamkisor* v. *Dines* (2),

(1) (1905) 2 C. L. J. 343. (2) (1919) 31 C. L. J. 75.

and *Haripada* v. *Nirod* (1), that when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. We must then take it there was in law as in fact a tenancy for a term of three years and that the defendant company were not entitled to terminate it by the notice of surrender dated the 27th February 1918.

As regards the third point, we have to consider, what are the reliefs which the plaintiffs may be granted. The suit was described in the plaint as one for arrears of rent and has been throughout treated as a suit of that character; but, plainly the claim cannot be deemed as in the nature of a demand for arrears of rent. The tenancy was surrendered with effect from 1st April 1918 and the landlords re-entered on the premises: thereupon the tenancy must be regarded as extinguished. There was in essence a breach of contract and the plaintiffs are entitled only to damages. If this view were not adopted the anomaly would arise that in a suit instituted on the 12th September 1918, the plaintiffs would recover rent from 1918 to December 1919, that is, for a period subsequent to the date when the plaint was lodged in Court. What happened in substance was that there was an "anticipatory breach" of the contract, an expression which is felicitous but not perhaps logical, as was pointed out by Lord Wrenbury in *Bradley* v. *Newsome Sons & Co.* (2) whose luminous observations were quoted with approval in *Manindra*

(1) (1920) 33 C. L. J. 437. (2) [1919] App. Cas. 16, 53.

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Chandra v. *Aswini* (1). *See* also the decision of the Judicial Committee in *Jamal* v. *Moolla* (2). The true nature of such a suit where a contract of tenancy, under which rent is payable periodically is unlawfully brought to a premature termination, was also explained in the case of *Gray* v. *Owen* (3). There the tenancy was illegally brought to an end by the defendant before the termination of the lease. The question arose, whether the plaintiff was entitled to rent for the unexpired term of the lease or to damages. The answer was given by the King's Bench that the plaintiff was entitled only to damages. Acceptance of the surrender did not preclude the plaintiff from suing for damages for the breach by the defendant of the contract. It did not destroy the existing cause of action. If the plaintiff succeeded in letting the house at the same or higher rent, he would have been entitled only to nominal damages, but as he did not succeed in letting out, he was entitled to recover the amount of rent which he had lost. In the case before us, it thus becomes necessary to determine what sum, if any, the plaintiffs have realized from the godown since the date when the defendants vacated it. We have heard the parties on this point and we do not find it necessary to remand the case for further enquiry. We have come to the conclusion that the plaintiffs should have a decree for Rs. 2,500; that we assess as the measure of damages which they have suffered by reason of the breach of contract by the defendants.

The result is that this appeal is allowed; the decree of dismissal made by the Subordinate Judge is set aside and the suit is decreed for Rs. 2,500 with

(1) (1920) 32 C. L. J. 168, 197; 25 C. W. N. 297.

(2) (1915) I. L. R. 43 Calc. 493; L. R. 43 I. A. 6.

(3) [1910] 1 K. B. 622.

interest from date of suit till realization. There will be no order for costs either here or in the Court below.

BUCKLAND J. This is practically an undefended case. The initial error committed by the learned Subordinate Judge is to be found in the extract quoted from his judgment, that "Nil Krishna Babu is certainly a very big man, but he is still a party." There is a presumption in favour of truth and a party who gives evidence is not necessarily a suspect. The same tests have to be applied to him as to every other witness. This error resulted in the learned Subordinate Judge holding in effect that the defendant had no case to meet. In such a view he may possibly have been right in saying that the defendant's failure to examine Arjun and Lalji is immaterial. But in the view which we take the omission to examine these witnesses is most significant. The learned Subordinate Judge says that since Arjun is not now in the defendant's service and since there is no sufficient evidence on plaintiffs' side to prove the alleged contract, defendant's failure to examine him is not very material. So far the learned Subordinate Judge relies upon the fact that Arjun is not in the defendant's service, that is no excuse at all. The only evidence as to the omission is that enquiries were made at the Bombay office. If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called, he should exhaust to the utmost of his power every means to bring that witness before the Court. It appears from the evidence in the case that Lalji was the manager of the defendant firm and that he was succeeded by Arjun. Consequently, both these persons would have been in a position to give material evidence had there been any substance in the defence.

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The Subordinate Judge has overlooked the additional weight given to the plaintiffs' evidence by the omission to call these witnesses, for though he seems to think there was no case for the defendants to meet that clearly was not the view taken by their legal advisers at the trial, and had he taken that circumstance into consideration he might possibly have come to a different conclusion with regard to the evidence given on behalf of the appellant. I agree that this appeal should be allowed as ordered.

A. S. M. A.

Appeal allowed.