ORIGINAL CIVIL.

Before Page J.

SUNDERMULL

v.

LADHURAM KALURAM.*

1923

March 9.

Mesne Profits—Measure of damages for holding over—Damages based on contract or tort—Application of English Common Law—Transfer of Property Act (IV of 1882) s. 108.

In an action for ejectment and mesne profits :—

Held, that the landlord was entitled to special damages caused by the tenant holding over the possession of the premises.

Hadley v. *Baxendale* (1), *The Argentino* (2), *Sharp* v. *Powell* (3), *Jaques* v. *Millar* (4), *Jones* v. *Gardiner* (5), *Hobbs* v. *The London and South-Western Railway* (6), referred to.

Held, further, that a landlord was entitled to claim damages against a tenant holding over either for breach of contract to yield up possession or for trespass.

Robinson v. *Learoyd* (7), *Bramley* v. *Chesterton* (8), referred to.

THIS was an action for ejectment, for recovery of damages at the rate of Rs. 10,890 a month for holding over and other relief.

The plaintiffs were the owners of the premises No. 13, Noormul Lohia's Lane, and the defendant was in occupation of a shop room and a verandah in the said premises as tenants at a rate of Rs. 50 a month. The plaintiffs' case was that they desired to rebuild the premises and to let them out at a higher rent but were prevented from doing so by the defendant

* Original Civil Suit No. 2116 of 1920.

(1) (1854) 9 Ex. 341.
(2) (1888) 13 P. D. 191.
(3) (1872) L. R. 7 C. P. 253.
(4) (1877) 6 Ch. D. 153.
(5) [1902] 1 Ch. 191.
(6) (1875) L. R. 10 Q. B. 111.
(7) (1840) 7 M. & W. 48.
(8) (1857) 2 C. B. N. S. 592.

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wrongfully holding over the possession of portion of the premises, thereby occasioning special damage. During the pendency of the suit possession was made over by the defendant and only the question of damages remained outstanding.

Mr. C. O. Remfry (with him *Mr. J. N. Majumdar*), for the plaintiffs. The plaintiffs are entitled to recover any damages reasonably suffered by them and not merely damages by way of mesne profits. They are entitled to claim damages for breach of the implied contract to deliver possession: *Watson* v. *Lane* (1), *Royal Bristol Permanent Building Society* v. *Bomash* (2), *Jaques* v. *Millar* (3), *Bramley* v. *Chesterton* (4), *Robinson* v. *Learoyd* (5). Further, the defendant is a trespasser and liable as such: *Engell* v. *Fitch* (6).

Mr. B. L. Mitter (with him *Mr. J. W. Langford James* and *Mr. S. M. Bose*), for the defendant. The law on this subject is codified in this country in the Transfer of Property Act (IV of 1882) and the principles of the English common law do not apply. See Transfer of Property Act, s. 108. The plaintiffs cannot claim special damages in this case. See Indian Contract Act (IX of 1872) s. 73.

Cur. adv. vult.

PAGE J. This suit raises interesting and important questions with regard to the principles in accordance with which damages are to be measured against a tenant who holds over after the determination of his lease. For some 6 years prior to 1919 the defendant had been in occupation of a room in 13, Noormal Lohia Lane in Calcutta as a monthly tenant of the plaintiffs. He paid rent at the rate of Rs. 50

(1) (1856) 11 Ex. 769.
(2) (1887) 35 Ch. D. 390.
(3) (1877) 6 Ch. D. 153.
(4) (1857) 2 C. B. N. S. 592.
(5) (1840) 7 M. & W. 48.
(6) (1869) L. R. 4 Q. B. 659.

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a month. On the 19th September 1919 notice to quit on behalf of the plaintiffs was given to him, the notice determining the tenancy as from the 7th November 1919. The defendant did not act upon that notice. He did not give vacant possession, and he remained in occupation of the premises. On the 11th November 1919, therefore, the plaintiffs brought a suit in the Calcutta Court of Small Causes for ejectment, and in answer to that suit the defendant alleged that he was in occupation under a lease for 3 years at a rental of Rs. 100 a month; and he also alleged that he had paid a salami for the lease of Rs. 500. On the 5th January 1920 the defendant commenced proceedings in the High Court for a declaration that he was in occupation of the premises under this lease for 3 years, and he claimed an injunction to prevent the Court of Small Causes from acting further in the matter until the final determination of the proceedings in that suit. On the 23rd August 1920, the plaintiffs through their solicitors wrote a letter to the defendant and three other tenants in the same building, No. 13, Noormal Lohia's Lane, in these terms :—

"To

Messrs. Ladhuram Kaluram.
Jivan Bux & Co.
Ahmedin and Mahomed Ismail,
Tilokechand Daimull.

Re Premises No. 13, Noormal Lohia Lane.

Sirs,

Under instructions from and on behalf of our client Johurmull Sundermull of 9, Chitpore Road, Calcutta, we beg to state that our clients who are the owners of the above premises have repeatedly asked you since

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July last to vacate the said house and premises by giving up possession of the respective portions of the house in the occupation of each of you as my (sic) clients urgently wanted vacant possession of the house for the purpose of demolishing the existing structure and constructing a new building in its place according to a plan in conformity with the building regulations of the Calcutta Corporation; but in spite of that you have neglected to give up vacant possession as aforesaid, and have been wrongfully occupying the same, thereby preventing our said clients from commencing the building operations in respect of the proposed new building which will yield reasonably and fairly a monthly income of Rs. 12,140 to our clients. You are therefore causing by your wrongful act a monthly loss of the aforesaid sum to our clients. We are therefore instructed by our clients to call upon you, which we hereby do, to make good the damage to our said clients from 1st July 1920 up to date at aforesaid rate of Rs. 12,140 per month, and also to deliver vacant possession of the respective portions of the house in the occupation of each of you within 3 days from date hereof failing which our clients will take legal action in the matter.

Yours faithfully,

Sd. Narendra Nath Sen & Co."

On the 9th August the plaint in this suit was filed, and on the 26th April 1921 the defendant's suit in the High Court was dismissed. On the 1st May 1922 the defendant gave up possession of the portion of the premises in his occupation to the plaintiffs. The plaintiffs claim as damages under item (*i*) mesne profits as defined in section 2 of the Civil Procedure Code, sub-section (*12*). Mesne profits are described therein as "those profits which the person in wrongful

possession of such property actually received or might with ordinary diligence have received therefor together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession," and the plaintiffs claim under this head such a sum of money as they might reasonably have expected to receive as rent from the time when the defendant ought to have given up possession on the 7th November 1919 until the 1st May 1922, and interest thereon. Under item (*ii*) they claim a further sum of Rs. 6,100, being the difference between Rs. 900 per month rent for the building, including the defendant's holding, which was received in 1919, and Rs. 7,000 a month which the plaintiffs allege that they would have received as rent for the building after reconstruction, which operation they were prevented, as they allege, from carrying out by reason of the refusal of the defendant to give up possession of the part of the premises of which he was in occupation.

The defendant admits his liability in respect of mesne profits under item (*i*) of the plaintiffs' claim, but he alleges that the plaintiffs' claim under item (*ii*) is ill-founded both in law and in fact. Counsel for the defendant relied on three contentions; *firstly*, that the plaintiffs' claim to damages, if any, under item (*ii*) was founded upon breach of contract; *secondly*, that, having regard to the provisions of the Indian Contract Act (IX of 1872) and the Transfer of Property Act (IV of 1882), the only remedy open to the plaintiffs was under section 73 of the Contract Act, and that the plaintiffs were not entitled to treat their claim under item (*ii*) as being founded in tort, and as damages for trespass; *thirdly*, that neither the failure to rebuild, nor the delay in reconstructing, the premises was caused by the failure of the defendant to give

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up possession of the part of the premises which he occupied.

Now, by section 106 of the Transfer of Property Act it is provided that a lease of immoveable property for any purposes other than agricultural or manufacturing purposes, shall be deemed to be a lease from month to month terminable on the part of either the lessor or the lessee by 15 days' notice expiring at the end of the month of tenancy; and by section 108 it is provided that, in the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property as against each other respectively possess the rights and are subject to the liabilities mentioned in the rules following, or such of them as are applicable to the lease; and by sub-section (*q*) it is provided that on the determination of the lease the lessee is bound to put the lessor in possession of the premises. By section 73 of the Indian Contract Act it is provided that "when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damages caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it, is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract."

It is, in my opinion, quite clear that no claim under item (*ii*) for damages in respect of the defendants,

breach of contract in failing to yield up possession to the plaintiffs on the determination of the tenancy is maintainable, for the scheme for reconstructing the premises was not in the contemplation of the parties when the contract of tenancy was first entered into. It is well settled under the common law of England which, except where it has been abrogated, and in so far as it is not inapplicable to Indian conditions, is part of the law of India, that a landlord is entitled to claim damages against a tenant who holds over, either for breach of his contract to yield up peaceful possession or for trespass—See per Parke B. in *Robinson* v. *Learoyd* (1). In that case an action was brought by a landlord against a tenant under the Statute in that behalf for double value for holding over. A further claim was made by the plaintiff for damages in respect of inability to use certain machinery which was on the premises during the time in which the defendant was holding over after the determination of the tenancy, and it was held that in an action for double value the plaintiff could not claim such further damages, but Parke B. laid it down that if a landlord, by reason of his tenant having held over, is prevented from using his powers beneficially, and is deprived of profit thereby, he has a remedy on his contract with the tenant to give up at the end of the term, or for trespass in continuing to occupy, and may recover compensation for his loss by way of special damage. (See also the case of *Bramley* v. *Chesterton* (2).) It is, in my opinion, also well settled that the measure of damages for trespass, whether the claim be founded on contract or on tort, is not the value of the land, but the real damages sustained, which may be considerable

(1) (1840) 7 M. & W. 48, 54. (2) (1857) 2 C. B. N. S. 592.

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or merely nominal. [See per Martin B in *Watson* v. *Lane* (1)].

Now, although it is an established principle of law that a Code is exhaustive with respect to all matters therein specifically provided for, it is equally well settled, as was pointed out by Bowen L. J. in *In re Cuno, Mansfield* v. *Mansfield* (2), that "in the construction of Statutes you must not construe the words "so as to take away the rights which already existed "before the Statute was passed, unless you have "plain words which indicate that such was the intention of the Legislature," and Lord Selborne L. C., in *Steward* v. *Vera Cruz* (3), expresses the view that "if anything be certain it is this, that where there are "general words in a later Act capable of reasonable "and sensible application without extending them to "subjects specially dealt with by earlier legislation, "you are not to hold that earlier and special legislation "indirectly repealed, altered or derogated from merely "by force of such general words, without any indication of a particular intention to do so." The same principle of construction, in my opinion, applies to existing common law rights as it does to existing statutory rights.

The principle is well illustrated in the case of *Irrawaddy Flotilla Company, Limited* v. *Bhugwandass* (4). In that case the Judicial Committee of the Privy Council held that, although section 151 of the Indian Contract Act sets out the degree of care which is required of a bailee in all cases of bailment, the effect of that provision of the Statute was not to prevent the recovery of damages to which a common carrier was liable by reason of a breach

(1) (1856) 11 Ex. 769, 774.
(2) (1889) 43 C. D. 12, 17.
(3) (1884) 10 A. C. 59, 68.
(4) (1891) 18 I. A. 121, I. L. R. 18 Calc. 620.

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of the obligation imposed upon him as a common carrier by the common law. At page 629, Lord Macnaughten, who delivered the judgment of the Committee, expressed the view that "at the date of the Act of "1872 the law relating to common carriers was partly "written, partly unwritten law. The written law is "untouched by the Act of 1872. The unwritten law "was hardly within the scope of an Act intended to "define and amend the law relating to contracts. The "obligation imposed by law on common carriers has "nothing to do with contracts in its origin. It is a "duty, cast upon common carriers by reason of their "exercising a public employment for reward. 'A "breach of this duty' says Dallas, C. J. (*Bretherton* v. "*Wood*(1)), 'is a breach of the law, and for this breach "an action lies, founded on the common law, which "action wants not the aid of a contract to support it.' "If in codifying the law of contract the Legislature "had found occasion to deal with tort or with a branch "of the law common to both contract and tort, there "was all the more reason for making its meaning "clear."

In my view, according to the principles of construction which I have enunciated, notwithstanding the Indian Contract Act and the Transfer of Property Act, the plaintiffs are entitled to sue the defendant in these proceedings for damages for trespass. It was suggested, although the plaint was wide enough to cover such a cause of action, that a cause of action in tort could not be joined with a cause of action for ejectment, and I was referred to Order II, rule 4. Under that rule it is provided that "no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except—(*a*) claims for mesne profits or arrears of rent

(1) (1821) 3 Brod. & B. 54, 62.

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in respect of the property claimed or any part thereof, (*b*) claims for damages for breach of any contract under which the property or any part thereof is held; and (*c*) claims in which the relief sought is based on the same cause of action.

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property."

Now, I have given leave, so far as it was necessary, for the plaintiff to join a cause of action for trespass with a claim for ejectment and for mesne profits. Therefore, the next question which I have to consider, having regard to the fact that the plaintiff has no cause of action under item (*ii*) which is founded on breach of contract, is whether there is any difference in the principles by which the measure of damage for a tort and for a breach of contract is to be determined. In *The Notting Hill* (1), the Master of the Rolls laid it down that "the rule with regard to the remoteness "of damage is precisely the same whether the damages "are claimed in actions of contract or of tort and it has "been laid down many times both in *Hadley* v. *Baxen-*"*dale* (2), and other cases." Again, in the case of *The Argentino* (3), Bowen, L. J. giving the judgment of himself and Lindley, L. J. and differing from the judgment of Lord Esher, M. R. lays down the principle in this manner: "The damages recoverable from "a wrongdoer in case of collision at sea must be "measured according to the ordinary principles of the "common law. Courts of Admiralty have no power to "give more, they ought not to award less. Speaking "generally as to all wrongful acts whatever arising out "of tort or breach of contract, the English law only

(1) (1884) 9 P. D. 113. (2) (1854) 9 Ex. 341.

(3) (1888) 13 P. D. 191, 200.

"adopts the principle of *restitutio in integrum*, subject "to the qualification or restriction that the damages "must not be too remote, that they must be, in other "words, such damages as flow directly and in the usual "course of things from the wrongful act. To these the "law superadds in the case of a breach of contract (or "to speak according to the view taken by some jurists, "the law includes under the head of these very dama- "ges, where the case is one of breach of contract) such "damages as may reasonably be supposed to have been "in the contemplation of both parties at the time they "made the contract as the probable result of its breach. "With this single modification or exception, which is "one that applies only to cases of breach of contract, "the English law only permits the recovery of such "damages as are produced immediately and naturally "by the act complained of." In the House of Lords the decision of Bowen, L. J. and Lindley, L. J. was affirmed and Lord Herschell in *The Argentino* (1) stated the principle in these words "I think the damages which flow directly and naturally, or in "the ordinary course of things, from the wrongful "act of a wrongdoer cannot be regarded as too "remote. The loss of the use of a vessel and the "advantages which would ordinarily be derived "from its use during the time it is under repairs "and therefore not available for the plaintiffs, is "certainly damages which directly and naturally "flow from the collision."

Now, the general principles thus enunciated require, in my opinion, explanation or amplification, for, as in contracts special damages which the parties, at the time when the contract was first entered into, contemplated might result if a breach of the contract was committed, become reasonable and natural in the

(1) (1889) L. R. 14 A. C. 519, 523.

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circumstances relating to that particular contract, so in the case of tort, if, at the time when it is committed the tort-feasor knows, or as a reasonable person in the circumstances ought to have known, that the commission of the tort may reasonably cause damages which would not usually result from the commission of the wrongful act, these damages become, and are deemed to be, the reasonable and natural consequences of the tort which has been committed. [See *Sharp* v. *Powell* (1), *Clark* v. *Chambers* (2), *Bodley* v. *Reynolds* (3), *France* v. *Gaudet* (4), *The London* (5). See also *Engell* v. *Fitch* (6), *Jaques* v. *Millar* (7), and *Jones* v. *Gardiner* (8)].

Now, if the principles which I have propounded are sound, the plaintiff is entitled to recover as damages for trespass under item (*ii*), the trespass being a continuing wrong, a sum equivalent to the increased rent which he would have received during the period in which the defendant was in wrongful possession of the premises, but which he has lost by reason of the failure of the defendant to give up possession, if the defendant knew or ought to have known before he committed the tort that such loss would probably result through his refusal to give up possession, and yet deliberately remained in occupation of the premises. Now, while these principles are, in my view, not difficult to ascertain, the application of them to any particular case is often a task of considerable difficulty. As Blackburn J. said in *Hobbs* v. *The London and South Western Railway* (9) "on the principle of what is too remote, it is clear

(1) (1872) L. R. 7 C. P. 253.
(2) (1878) 3 Q. B. D. 327.
(3) (1846) 8 Q B 779.
(4) (1871) L. R. 6 Q B 199.
(5) [1914] P. 72.
(6) (1869) L. R. 4 Q. B. 659.
(7) (1877) 6 Ch. D. 153.
(8) [1902] 1 Ch. 191.
(9) (1875) L. R. 10 Q. B. 111, 121.

"enough that a person is to recover in the case of a "breach of contract, the damages directly proceeding "from that breach of contract and not too remotely. "Although Lord Bacon had, long ago, referred to this "question of remoteness, it has been left in very "great vagueness as to what constitutes the limita- "tion; and therefore I agree with what my Lord has "said to-day, that you make it a little more definite "by saying that such damages are recoverable as a "man when making the contract would contemplate "would flow from a breach of it. For my own part "I do not feel that I can go further than that. It is "a vague rule and as Bramwell B. said, it is some- "thing like having to draw a line between night and "day; there is a great duration of twilight when it is "neither night nor day."

[Thereafter his Lordship discussed the facts of the case, and gave judgment for the plaintiff for Rs. 2,280 with interest and costs.]

Attorneys for the plaintiffs: *Morgan & Co.*

Attorney for the defendant: *C. C. Bose.*

N. G.