ORIGINAL CIVIL.

Before Page J.

1927

Feb. 25.

DEBENDRA LAL KHAN
v.
F. M. A. COHEN.*

Landlord and Tenant—Ejectment—Covenant to pay rent and covenant to repair—Relief against forfeiture, whether Court is bound to grant relief—English practice, whether to be followed—Transfer of Property Act (IV of 1882), s. 114.

Where a lessee who had broken a covenant to pay rent and also a covenant to repair the demised premises, sought relief against forfeiture under section 114 of the Transfer of Property Act and deposited in Court the sum fixed under the section :—

Held, that in these circumstances the Court normally would grant relief against forfeiture for non-payment of rent under section 114 of the Transfer of Property Act, but having regard to the breach of the covenant to repair the Court passed a decree for ejectment.

The discretion with which Indian Courts are invested under section 114 of the Transfer of Property Act is unfettered, but in the absence of special circumstances an Indian Court will follow the rule laid down in the English Courts of equity.

The general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses", unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections.

Doe d. Worcester Trustees v. *Rowlands* (1), *Cornish* v. *Cleife* (2), *Smith* v. *Mills* (3) referred to.

This was a suit for possession for breach of covenants to pay rent and to keep the premises in repair.

* Original Civil Suit No. 1673 of 1925.

(1) (1840) 9 C. & P. 734. (2) (1864) 3 H. & C. 446.

(3) (1899) 16 T. L. R. 59.

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The defendant-tenant deposited money in Court, and sought relief against forfeiture under section 114 of the Transfer of Property Act.

Mr. A. N. Chaudhuri and *Mr. Sudhis Ray*, for the plaintiff.

Mr. A. K. Ray and *Mr. B. C. Ghose*, for the defendant.

PAGE J. This is a suit brought to recover possession of a block of buildings lying at the corner of Wellington Street and Dhurrumtolla Street in Calcutta. I shall refer to the buildings generally as No. 149-1, Dhurrumtolla Street, the parcels being set out in the lease in suit.

On the 3rd August 1906 the predecessor of the plaintiff let the said premises to one Sassoon Ezra Cohen (through whom the defendant claims title) for a term of 50 years. The rent reserved was Rs. 416-10-8, payable on the 25th day of each month succeeding the month for which it became due. The lessee covenanted *inter alia* that he "will at all times "during the said term keep the said premises in good "and substantial repair, and the same in good and "substantial repair deliver up to the lessor his heirs or "assigns at the expiration or sooner determination of "the said term". The lessee further covenanted that he would repair the said premises within two months after a notice in writing of the necessary repairs was served upon him by the landlord. No such notice was given, but it was conceded by the defendant that the covenant to carry out specific repairs after notice was an independent covenant, and did not restrict or affect the defendant's liability under the general covenant to repair. It was further provided that

"If the said monthly rent, Rs. 416-10-8 or any part thereof, shall be "in arrear for the space of three months next after any of the days

"whenever the same ought to be paid as aforesaid, whether the same shall "or shall not have been legally demanded, or if there shall be any breach "or non-observance by the said lessee, his executors, administrators, or "assigns, of any of the covenants hereinbefore on his or their part "contained, or the lessee becoming insolvent, then, and in any of the said "cases, it shall be lawful for the said lessor, his heirs or assigns, at any "time thereafter, into or upon the said demised premises or any part "thereof, in the name of the whole to re-enter and the same to have "repossess and enjoy as in his or their former estate, and to hold the same "free and discharged from the covenants and agreements herein contained "and to hold the said lessee liable for all loss and damages that may be "sustained by the said lessor for such breach of covenant on the part of "the said lessee".

The plaintiff based his cause of action in ejectment upon a breach of (i) the covenant to pay rent, (ii) the general covenant to repair.

It was conceded by the defendant that before action brought he had committed a breach of the covenant to pay rent, and that, although on the 16th June 1925 the Official Receiver of the High Court (who was then in possession of the premises pursuant to a decree which had been obtained in a mortgage suit against the defendant) sent to the solicitor of the plaintiff a cheque for Rs. 2,500 in payment of arrears of rent from August 1924 to January 1925, the full rent that was in arrear prior to the filing of the suit on the 17th June 1925 was not tendered until the 23rd June 1925. The plaintiff refused to accept the rent tendered on the 16th June 1925, and also that tendered on the 23rd June 1925, upon the ground that he had given notice to the defendant on the 15th June 1925 that the tenancy stood determined, and that he required possession of the premises to be delivered to him.

In these circumstances the defendant admitted that a forfeiture of the lease for non-payment of rent had occurred. He seeks relief from the forfeiture, however, under section 114 of the Transfer of Property Act of 1882, and he has deposited in Court the amount of the

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rent due up to the date of the written statement which was filed on the 4th August 1925, and has offered to pay interest upon the rent in arrear, and the full costs of this suit. The defendant has not paid or tendered formally to the lessor "at the hearing of the suit" the sum fixed under section 114, but I will assume for the purpose of my judgment that he has brought himself within section 114, and that the Court is at liberty to grant the defendant relief according to the terms of that section.

Now, it is to be observed that under section 114 the Court is invested with a discretionary power to grant relief which it may or may not exercise in favour of the tenant. Learned counsel for the defendant has urged that if the sum required under the section has been paid or tendered to the lessor at the hearing of the suit the Court has no discretion in the matter, and must grant relief to the tenant. The old rule in equity is stated concisely by Lord Esher, Master of the Rolls, and Rigby L. J. in *Newbolt* v. *Bingham* (1). Lord Esher in that case observed that:

"If, at the time relief is asked for, the position has been altered, so "that relief could not be given without causing injury to third parties, I "think that the case that was cited to us [*Stanhope* v. *Haworth* (2)] applies. "But if at the time of the application, the position is not altered, so that "no injustice will be done, I think, if the conditions mentioned in the "section are complied with, that, according to the settled practice in "equity, there is no longer a discretion in the Judge, but that he ought to "make the order. It does not matter whether it is called discretionary or "not, if the discretion ought always to be exercised in one way. If the "conditions are complied with, and no interests of third parties have "intervened, there is no longer any real discretion in the matter".

And Lord Justice Rigby added that:—

"It was the settled practice of a Court of Equity to grant relief "against forfeiture for non-payment of rent on payment of all rent in "arrear and costs. Of course, the Court was not absolutely bound by its "practice where it would not do justice, and if some new interest had been

(1) (1895) 72 L. T. 852, 853. (2) (1886) 3 T. L. R. 34.

"created before the application, the Court would refuse to interfere. "That was not done to put the landlord in a better position, but because "rights of third parties had intervened".

Now, in exercising the discretion with which it is invested under section 114 a Court in India is not bound by the practice of a Court of Chancery in England, and I am not disposed to limit the discretion that it possesses. "Those who seek equity must do equity", and I do not think merely because a tenant complies with the conditions laid down in section 114 that he becomes entitled as of right to relief. But, in my opinion, the Courts in India in exercising the discretion intrusted to them under section 114, in the absence of any special circumstances should adopt the rule that prevailed in the old Courts of Chancery, and, subject to any equities that may have arisen between the date of the forfeiture and the application for relief, *e.g.*, where the landlord during that period has re-let the premises to other persons, or otherwise has dealt with them, or where the conduct of the tenant *quâ* tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, the Court, provided the tenant complies with the conditions laid down in section 114, ought to exercise its discretion in the tenant's favour, and grant him relief.

I now proceed to consider the position of the tenant under the general covenant to repair into which he has entered. At the time when the premises in suit were demised to Sassoon Cohen the premises consisted of—

"All that upper room brickbuilt house and messuage together with the "piece or parcel of land thereunto belonging containing by estimation rent "free one bigha be the same a little, more or less, and situate between the "boundaries thereafter set out in the lease".

After Sassoon Cohen had obtained possession under the lease he proceeded to erect the buildings in respect

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of which it is now contended that a breach of the covenant to repair has been committed upon the parcel of land adjoining the two-storied brick house. The new buildings that were erected facing Durrumtolla Street were one-storied structures contiguous and joined to the original house, and I am satisfied from the evidence of Sassoon Cohen that the effect of the additional work of construction that he carried out on the premises was merely to increase the area of the two-storied building that was upon the premises at the time when the lease was granted. With reference to the additional structures that he erected Mr. Cohen was asked certain questions in the course of his examination:

How long did it take you to construct this building?—6, 7 or 8 months.

The new rooms which you allege you built they were all made part of the premises of the two-storied building?—Joined to it.

And made part of the same premises?—Yes.

Sassoon Cohen further stated:—

Did you have to bond these new buildings on to the old buildings?—Yes.

You made them part of the old building?—I joined them together.

After you completed the building, the buildings became one whole building?—Yes, the front portion.

Now, the general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specific property that is demised, such as "the said buildings" or "the said houses", unless the

additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections: *Doe d. Worcester Trustees* v. *Rowlands* (1), *Cornish* v. *Cleife* (2), *Smith* v. *Mills* (3).

Upon the evidence in this case I am clearly of opinion that the new buildings fall within the ambit of the covenant to repair, both because of the general terms in which the covenant is couched, and also because, even if the covenant to repair was restricted to the upper room brickbuilt house, the new structures were an addition to and became part of the building that was specifically demised, and to which the covenant to repair attached. Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration. Notwithstanding the general terms of the covenant to repair learned counsel for the defendant has contended, however, that upon a true construction of the lease the additional erections were not within the covenant to repair; and in support of his argument he relied upon the provisions in the lease that gave permission to the tenant to make such additions and alterations to the demised premises.

In my opinion, the provisions in the lease to which he refers were not introduced for the purpose for which he cited them. If a tenant makes additions or improvements upon the premises it is provided under section 108 of the Transfer of Property Act that he is entitled to remove them during the currency of the term. In my opinion, the special provisions introduced into this lease with respect to the additions and alterations which the tenant was at liberty to make to the

(1) (1840) 9 C. & P. 734. (2) (1864) 3 H. & C. 446.
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premises were inserted for two purposes: (i) in order to avoid the provisions of section 108 of the Transfer of Property Act, and (ii) in order that it should not be open to the defendant, in the event of some part of any additional premises that he might erect being destroyed in the manner set out in the lease, to escape a proportionate payment of rent so long as the additional structures were not rebuilt or repaired. In my opinion, therefore, the general covenant to repair extended to the whole of the block including the additions thereto carried out by Sassoon Cohen.

The issue, therefore, that remains to be considered is one of fact: did the defendants at all times during the term keep the premises in good and substantial repair? Now, the test as to whether any particular renovation amounts to repair or not, in my opinion, is "whether the act to be done is one which in sub-"stance is the renewal or replacement of defective "parts, or the renewal or replacement of substan-"tially the whole" *per* Buckley L. J. in *Lurcott* v. *Wakely* (1). See also *Anstruther-Gough-Calthorpe* v. *McOscar* (2).

[His Lordship then discussed the evidence adduced by the plaintiff and proceeded as follows:—] The defendant elected to call no evidence in rebuttal, and as the result of the evidence I am disposed to accept the somewhat picturesque phrase in which Mr. Shrosbree depicted the state of the premises by saying that "they were starved", by which he meant, and I find, that for years they have not been kept in such repair as would comply with the conditions of the covenant to repair contained in the lease.

Under these circumstances, in my opinion, there was such a breach of the general covenant to repair as

(1) [1911] 1 K. B. 905, 925.

(2) [1924] 1 K. B. 716.

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entitled the plaintiff to the relief which he claims and there will be a decree in his favour. There will be a declaration that the lease has been determined. There will be a decree for possession. There will be a decree for arrears of rent up to the date when the lease was determined, that is the 15th June 1925; and thereafter until possession is given a decree for mesne profits at the rate at which rent is payable, and costs on Scale No. 2.

Attorney for the plaintiff: *J. K. Sarkar.*

Attorneys for the defendant: *Dutt & Sen.*

B. M. S.

APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J., and C. C. Ghose J.

SATINDRA NARAIN SINHA

v.

CHUNILAL JAMADAR AND OTHERS.*

1927

Jan. 4.

Limitation—Sale by Registrar, High Court—Application to set aside sale.

In an application for setting aside a sale by the Registrar, High Court, on the ground of insufficient identification of the property, made by a purchaser after 30 days from such sale :—

Held, that neither the High Court Rules requiring the sale report to be excepted to within 14 days nor Article 166 of the Limitation Act (IX of 1908) applied to the case.

APPEAL from an order of Greaves, J.

The applicant Rai Saheb Braja Madhab Bose was the auction purchaser of No. 5 Ahiripukur 1st Lane within the municipal area of Calcutta, at a sale held

* Appeal from Original Civil No. 127 of 1926 in suit No. 2376 of 1922.