APPELLATE CIVIL.

Before B. B. Ghose and S. K. Ghose JJ.

KUMARCHANDRA GAIN

v.

NARENDRANATH MITRA.*

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Aug. 16.

Lease—Covenant running with the land—Clause in mourasi mokarrâri *lease providing payment to lessor of a fourth share of proper price as* chauth selâmi *on sale of any portion of tenure—Whether a purchaser from lessee liable to pay the* chauth*—Whether the* chauth, *a charge on the land—Restrictive covenants—Whether for restrictive covenants, expressions negative in form, absolutely essential—Discretion of court to allow interest where no stipulation exists.*

A *mourasi mokarrâri* lease, granted by the plaintiff to defendants Nos. 1, 2 and 3, in 1906, provided "If it be necessary to sell any portion of the *pâttâi* land or the trees, one-fourth share of the proper value shall be deposited in my *sheristâ* as *chauth selâmi*, otherwise I shall not be bound by the said sale or purchase and the said sale shall not be valid. If you do not conform to the terms of this *pâttâ* and, by your negligence, I suffer any loss, you will be liable to compensate the said loss. Observing all the aforesaid terms, you do enjoy the *pâttâi* land with great felicity down to sons, grandsons and successors-in-interest, being entitled to make a gift and sale of the *pâttâi* land on payment of rent, *etc.*, to me or my sons, grandsons, etc., and successors-in-interest." The defendants Nos. 4 and 5 purchased that tenure from defendants Nos. 1, 2 and 3 for Rs. 8,675 in 1923. The plaintiff then claimed a fourth share of what, according to him, was the proper price, together with interest.

Held that this was a covenant running with the land within the authority of *Spencer's case* (1) and defendants Nos. 4 and 5 were liable, along with the other defendants, to pay the *chauth* and the *chauth* was a charge on the land.

Parbhu Narain Singh v. *Ramzan* (2) and *Saradakripa Lala* v. *Bepinchandra Pal* (3) followed.

Lambert v. *Norris* (4) and *Flight* v. *Glossopp* (5) distinguished.

Held, however, that the liability of defendants Nos. 4 and 5 does not rest on the doctrine of *Tulk* v. *Moxhay* (6), which cannot be extended to other than restrictive covenants.

In re Nisbet and Potts' Contract (7) and *Haywood* v. *Brunswick Permanent Benefit Building Society* (8) referred to.

*Appeal from Appellate Decree, No. 1161 of 1928, against the decree of T. B. Jameson, Additional District Judge of 24-Parganas, dated Feb. 7, 1928, modifying the decree of Kiran Chandra Mitter, Subordinate Judge of 24-Parganas, dated March 23, 1927.

(1) 1 Smith's Leading Cases (13th edition) 51.
(2) (1919) I. L. R. 41 All. 417.
(3) (1922) 37 C. L. J. 538.
(4) (1837) 2 M. & W. 333; 150 E. R. 784.
(5) (1835) 2 Bing. N. C. 125; 132 E. R. 50.
(6) (1848) 2 Ph. 774; 41 E. R. 1143.
(7) [1906] 1 Ch. 386.
(8) (1881) 8 Q. B. D. 403.

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Held, also, that, for determining whether a covenant is of a negative character, in order to attract the operation of the law relating to restrictive covenants, the substance and not the form should be looked to.

Wolverhampton and Walsall Railway Company v. *London and North Western Railway Company* (1), *Lord Strathcona Steamship Company, Limited* v. *Dominion Coal Company, Limited* (2) and *Burn and Co.* v. *McDonald* (3) referred to.

Held, further, that interest, by way of damages, can be allowed, even when there is no stipulation to pay interest when money due has not been paid in proper time.

SECOND APPEAL by defendants Nos. 4 and 5.

The facts and dates material for this report are set out in the judgment of Mr. Justice B. B. Ghose.

Mr. Sharatchandra Ray Chaudhuri (with him *Mr. Jatindranath Sanyal*), for the appellants. Here the transfer was of the whole, whereas the *pâttâ* provided *chauth selâmi*, in the case of the transfer of a part. See *Grove* v. *Portal* (4). Therefore, the plaintiff was not entitled to get any *selâmi*.

The covenant to pay *chauth selâmi* is not a covenant running with the land. It did not directly affect the demised premises, nor was it something which was to be done on the land. See *Spencer's case* (5). Such a covenant cannot be said to touch and concern the land demised. See Halsbury's "Laws of England," Vol. 18, paragraph 1122, *Lambert* v. *Norris* (6) and *Flight* v. *Glossopp* (7). The case of *Saradakripa Lala* v. *Bepinchandra Pal* (8) can be distinguished, because that was a suit for rent and not for *chauth*. In *Parbhu Narain Singh's case* (9), Piggott J. based his decision on the pleadings of the parties and Walsh J.'s decision is a mere *obiter dictum*. *Tulk* v. *Moxhay* (10) is applicable only in cases of restrictive covenants. At any rate, defendants Nos. 4 and 5 were not personally liable for the money. See *Saradakripa Lala* v. *Bepin Chandra Pal* (8).

(1) (1873) L. R. 16 Eq. 433.
(2) [1926] A. C. 108.
(3) (1908) I. L. R. 36 Calc. 354.
(4) [1902] 1 Ch. 727.
(5) Smith's Leading Cases (13th Ed.) 51.
(6) (1837) 2 M. & W. 333; 150 E. R. 784.
(7) (1835) 2 Bing. N. C. 125; 132 E. R. 50.
(8) (1922) 37 C. L. J. 538.
(9) (1919) I. L. R. 41 All. 417.
(10) (1848) 2 Ph. 774; 41 E. R. 1143.

Mr. Narendrachandra Bose (with him *Mr. Satyendrakumar Mitra*), for the respondents. This covenant runs with land. I rely on *Parbhu Narain Singh* v. *Ramzan* (1) and *Provash Chandra Bosu* v. *Prativabala Debi* (2). The right to sell is subject to the condition of payment of *chauth selâmi*. The substance has to be looked at and not the particular terms. Though the covenant is in form a positive covenant, it includes the negative. See *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (3).

Mr. Ray Chaudhuri, in reply, referred to *London County Council* v. *Allen* (4).

B. B. GHOSE J. This is an appeal by the defendants Nos. 4 and 5, against the judgment and decree of the Additional District Judge of the 24-Parganas, partly decreeing the plaintiff's suit for the recovery of a sum of money under the following circumstances. The plaintiff created a *mourâsi mokarrâri* tenure in favour of defendants Nos. 1, 2 and 3 in January, 1906. The defendants Nos. 4 and 5 purchased that tenure from the other defendants for a sum of Rs. 8,675 on the 13th December, 1923. A dispute arose with reference to a provision in the *pâttâ* granted by the plaintiff to his tenants, which runs thus: "If it be necessary to sell any portion of "the *pâttâi* land or the trees, one-fourth share of the "proper value shall be deposited in my *sheristâ* as "*chauth selâmi*, otherwise I shall not be bound by "the said sale or purchase and the said sale shall not "be valid. If you do not conform to the terms of this "*pâttâ* and by your negligence I suffer any loss, you "will be liable to compensate the said loss. Observing "all the aforesaid terms, you do enjoy the *pâttâi* "land with great felicity down to sons, grandsons "and successors-in-interest, being entitled to make "a gift and sale of the *pâttâi* land on payment of rent, "*etc.*, to me or my sons, grandsons, *etc.*, and

(1) (1919) I. L. R. 41 All. 417.
(2) (1921) 63 Ind. Cas. 337.
(3) (1873) L. R. 16 Eq. 433.
(4) [1914] 3 K. B. 642, 653.

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"successors-in-interest." The present suit was brought against all the defendants by the plaintiff, for recovery of one-fourth of what he considered to be the proper value of the tenure at the time of the sale. His case was that the proper value was Rs. 12,000, and he claimed Rs. 3,000 plus interest, making up Rs. 3,385. The learned Subordinate Judge made a decree in favour of the plaintiff only against defendants Nos. 1, 2, and 3 for one-fourth of the purchase money paid by the defendants Nos. 4 and 5, (the appellants here) to the other defendants, with interest at the rate of 12 per cent. from the 13th December, 1923, up to the date of the suit. The suit was dismissed against the appellants. There was a prayer for declaration of a charge on the property for the money due to the plaintiff. This declaration was disallowed by the trial court. Defendants Nos. 1, 2 and 3 did not appear in the trial court, nor do they appear in this Court. The plaintiff appealed against the decree of the Subordinate Judge, dismissing his suit against the appellants here. The learned District Judge has made a decree also against them for one-fourth of the purchase-money with interest. He has also made a declaration that this money was a charge on the tenure. Against that decree, defendants Nos. 4 and 5 have appealed, and their contention is that according to the terms of the lease the covenant contained in it was not enforceable against the appellants. The learned District Judge relied upon a case decided by the Allahabad High Court: *Parbhu Narain Singh* v. *Ramzan* (1). There, the agreement between the owner of the land and the lessee amongst other stipulations, was that if, at any time, the lessee were to vacate any land and to sell any house or houses which she had built thereon, she would, according to the custom of the locality, pay to the plaintiff one-fourth of the purchase-money. The heirs of the lessee sold two houses built by the original lessee to one of the defendants in the case. The plaintiff brought a suit against the surviving heir of

(1) (1919) I. L. R. 41 All. 417.

the original lessee and the purchaser for recovery of one-fourth of the purchase-money. In that case, the trial court gave a decree to the plaintiff jointly and severally against both the defendants. The purchaser appealed against the decree to the District Judge, and the District Judge dismissed the suit as against him, holding that, under the agreement, only the heir of the original lessee was liable for the plaintiff's claim. From that decree, the plaintiff appealed. One of the learned Judges, Mr. Justice Piggot, decided the case against the purchaser, mainly basing his judgment on the pleadings, Mr. Justice Walsh, while agreeing with that decision, made the following observations in his judgment :—

"There is an undertaking in the *sarkhat* under "which the tenant enjoyed her holding binding her "in the most absolute form (and alleging further that "it was in accordance with a custom prevailing in "that locality) not to part with her interest by "transfer without the *zemindâr* receiving his right of "one-fourth of the purchase-money, and it cannot be "contended that there is any legal or equitable ground "which would justify a purchaser who had read that "document in paying the tenant the purchase-money "without seeing that the *zemindâr* received his one-"fourth share; or, in other words, that the "restriction which the tenant had imposed upon "herself was not broken when the transfer took place. "To my mind, if that is a correct view of the legal "position, it is no more than the expression applied "to this case of the old English rule in *Tulk* v. "*Moxhay* (1)."

The learned District Judge, in this case, relied upon those observations, in decreeing the appeal, as against defendants Nos. 4 and 5. The above case is said to have been followed in another case, decided by a single Judge in this Court. The trial court cited the case of *Saradakripa Lala* v. *Bepinchandra Pal* (2) and it seems to have held, on the strength of

(1) (1848) 2 Ph. 774; 41 E.R. 1143. (2) (1922) 37 C. L. J. 538.

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that case, that the purchaser is not bound to pay the *chauth* in terms of the *pâttâ*. In that case there was this covenant, that the tenant would, if he transferred the property, pay the landlord out of the purchase-money in his hands one-fourth as *nazar* and would obtain registration in the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. The words in the present *pâttâ* in question in this appeal, I have already quoted, are wider than the terms in the lease of the above case. What happened in that case was that the defendant No. 1 had purchased the tenure in execution of his mortgage decree and then subsequently sold the property to defendant No. 2; the landlord brought his suit against both the defendants for recovery of the fourth share of the purchase money. The learned Judges held that that was a covenant running with the land and they cited some cases in support of the conclusion. Mr. Ray Chaudhuri, for the appellants, argued that this decision is erroneous, on the ground that the agreement did not directly affect the demised premises, and that it was not something which was to be done on the land. He further argued that the cases cited do not support the conclusion of the learned Judges. I do not think that that contention can be supported. The cases which were cited were apparently taken from the notes in *Spencer's case* in Smith's Leading cases, and I find the cases noted at page 76 of Smith's Leading Cases (12th Edition) in the order in which they have been referred to in the judgment. The learned editors gave a summary of what was the covenant in each case, that is, to repair; to renew and replace the tenant's fixtures, *etc.*; not to assign without the consent of the lessor, the assignee being named, and so forth. It is true that, in order to hold that a covenant runs with the land, it must be a covenant which relates to or touches and concerns the land or to have reference to the subject matter of the lease. But as

the learned editors of Smith's Leading Cases say whether a particular *express* covenant sufficiently "touches and concerns the thing demised" to be capable of running with the land is not unfrequently a question of difficulty. The learned advocate for the appellants argued, relying upon 18 Halsbury, paragraph 1122, that such a covenant as this does not run with the land; and he particularly referred to two cases in the foot-note. One of them is *Lambert* v. *Norris* (1). There, the landlord gave a lease of certain premises. After the lease had been executed the lessee asked the landlord to enlarge the building. The landlord consented to do so on an agreement by the lessee to pay an additional rent of 10 per cent. on the outlay. The lessee became bankrupt. The question was whether the assignees were bound to pay the additional rent. It was argued, on behalf of the landlord, that, under the circumstances, it should be held that there was, in fact, a surrender of the old lease and the grant of a new lease on an increased rent, and so the assignees should be liable. This argument was repelled. It was apparently held, relying on an older case, that the new agreement was to have the effect of a lease at will. It will be noticed that the Statute of Frauds was referred to in the course of the argument. This case, to my mind, has no bearing upon the facts of the present case.

The other case referred to in the foot-note in 18 Halsbury was *Flight* v. *Glossopp* (2). There some persons borrowed money from the plaintiff, promising to repay at a certain date, and stipulated that between the date of loan and the date of payment the plaintiff should have the use of two boxes at the Victoria Theatre. This was held to be a covenant not running with the land, as it was a mere personal covenant to pay the money borrowed and no interest passed under the agreement to any specific part of the theatre. The stipulation for the use of two

(1) (1837) 2 M. & W. 333; 150 E. R. 784.

(2) (1835) 2 Bing. N. C. 125; 130 E. R. 50.

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boxes was stated by one of the learned Judges to be a sort of bonus. Under these circumstances, as no interest in any part of the land was concerned, it could not be said that the covenant was one running with the land.

These being disposed of, there is no doubt that under the authority of the case of *Saradakripa Lala* v. *Bepinchandra Pal* (1), which lays down that such an agreement as this is a covenant running with the land, it should be held that this is a covenant running with the land. At one time, in the course of his argument, Mr. Ray Chaudhuri admitted that if it was a covenant running with the land, then the appellants would be bound to pay. But at a subsequent stage he seems to have reconsidered his argument and said that even if it was a convenant running with the land, then defendants Nos. 1, 2 and 3 were only liable to pay (which, to my mind, it is superfluous to say, because they were the original contractors), but that the appellants would not be bound to pay, as there is no term in the document which would affect these defendants; and he relied upon some observations in the above case in support of his proposition. In that case, however, the learned Judges refrained from considering the question whether the conveyance by the defendant No. 1 had created a valid title in favour of the second defendant as against the plaintiff. In that case a decree was made in the lower court against both the defendants; but the second defendant, that is the last purchaser, did not appeal against the decree. So it was not necessary for the learned Judges to consider whether the second defendant in that case was liable for the money or not. That case, in my opinion, does not support the contention of the appellants.

The present case appears to be exactly similar to *Parbhu Narain Singh* v. *Ramzan* (2). Mr. Ray

(1) (1922) 37 C. L. J. 538.

(2) (1919) I. L. R. 41 All. 417.

Chaudhuri attempted at first to distinguish that case from the present. But as a matter of fact it was not possible to find any distinction between the position of the purchaser in that case and in this. Finding that to be so, he next contended that the observations of Mr. Justice Walsh were made in that case as there was a negative covenant for the lessee not to part with her interest except under certain conditions. The doctrine of *Tulk* v. *Moxhay* (1) might, therefore, be applicable in that case. In the statement of the facts of the case, however, there is no such negative word to be found. The broad principle as regards the use of the word "not" in such cases seems to me to have been laid down in the case of *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Company* (2). Lord Selborne there said "The "technical distinction being made, that if you find "the word 'not' in an agreement—'I will not do a "'thing'—as well as the words 'I will,' even although "the negative term might have been implied from the "positive, yet the court, refusing to act on the "implication of the negative, will act on the "expression of it. I can only say, that I should think "it was the safer and the better rule, if it should "eventually be adopted by this court, to look in all "such cases to the substance and not to the form. If "the substance of the agreement is such that it would "be violated by doing the thing sought to be prevented, "then the question will arise whether this is the court "to come to for a remedy. If it is, I cannot think that "ought to depend on the use of a negative rather than "an affirmative form of expression." These observations were cited and followed in the case of *Lord Strathcona Steamship Company, Limited* v. *Dominion Coal Company, Limited* (3). See also *Burn & Co.* v. *McDonald* (4). It seems to me, therefore, that the observations of Mr. Justice Walsh

(1) (1848) 2 Ph. 774; 41 E. R. 1143.
(2) (1873) L. R. 16 Eq. 433, 440.
(3) [1926] A. C. 108.
(4) (1908) I. L. R. 36 Calc. 354, 363.

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in the case referred to cannot be said to be inapplicable here on the ground that the negative word has not been used in the lease.

But although I am unable to accept the contention that *Parbhu Narain's case* (1) does not apply to this on the ground of absence of a negative covenant, I do not think that the appellants can be held liable to pay the amount claimed by the application of the doctrine of *Tulk* v. *Moxhay* (2). The equitable doctrine of that case cannot be extended to other than restrictive covenants. The rule is, that any one coming to the land with notice, actual or constructive, of a covenant entered into by a previous owner of the land restricting the use to be made of that land will be *prohibited* from doing anything in breach of the covenant. [*In re Nisbet and Potts' Contract* (3).] The grantees and assignees would be restrained from doing anything in breach of the restrictive covenant, if they came with notice of it and this would be regardless of the question whether the covenant runs with the land. The contemplated breach of the negative covenant would be restrained by an injunction. But the covenant to do anything (in this case to pay a sum of money on assignment) cannot, in my opinion, be enforced by applying the equitable doctrine of *Tulk* v. *Moxhay* (2). [*See Haywood* v. *Brunswick Permanent Benefit Building Society* (4).]

The appellants, however, are liable to pay the amount claimed by the plaintiff, as, in my opinion, the covenant is one running with the land being a benefit reserved for the landlord with reference to the land demised. It is stipulated that on breach of the covenant the grantee as well as his successors-in-interest—which includes assignees—would be liable to compensate the landlord. This case, therefore, falls within the authority of *Spencer's case* (5). The covenant in the present case, as I have said, is wider

(1) (1919) I. L. R. 41 All. 417.
(2) (1848) 2 Ph. 774; 41 E. R. 1143.
(3) [1906] 1 Ch. 386.
(4) (1881) 8 Q. B. D. 403.
(5) 1 Smith's Leading Cases (13th Ed.) 51.

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than the covenant in *Saradakripa Lala* v. *Bepinchandra Pal* (1). The compensation awarded in this case is a fourth share of the purchase money with interest as stated above.

The only other argument advanced was with regard to the interest awarded. It is urged that there is no stipulation for interest to be paid on the fourth share of the price, and the court below ought not to have allowed it. But where money is due to the plaintiff but has not been paid in proper time, the court may allow interest by way of damages and that is what both the courts below did. The rate at which such damages were allowed does not seem to be excessive being only 12 per cent. simple interest.

The result, therefore, is that the appeal stands dismissed with costs.

S. K. GHOSE J. I agree.

Appeal dismissed.

R. K. C.

(1) (1922) 37 C. L. J. 538.