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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

ABLAKH RAI AND OTHERS (DEFENDANTS) *v.* SALIM AHMAD KHAN (PLAINTIFF) *

Suit for cancelment of lease—Breach of conditions involving forfeiture—Act XVIII of 1873 (N.-W. P. Rent Act), s. 93, cl. (c)

The plaintiff, the representative in title of a lessor, sued under cl. (*c*), s. 93 of Act XVIII of 1873, for the cancelment of a lease, on three grounds, *viz*., on the ground that the lessees had paid the rent to the Collector, on account of the revenue due in respect of the estate, instead of to him; secondly, on the ground that they had failed to pay certain instalments of rent on the due dates; and thirdly, on the ground that they had planted trees and sunk wells, and allowed their tenants to do the same, without the lessor's consent; thereby committing breaches of the conditions of the lease involving its forfeiture. *Held*, on the construction of the lease, with reference to the first ground, that as the lease was intended to be perpetual, and as the rent had been paid to the Collector for many years under an arrangement effected between the parties to the lease and it was not shown that the plaintiff had repudiated this arrangement (even if he had the power of so doing) or demanded payment of the rent directly to himself, payment of rent by the lessees to the Collector did not amount to a breach of the conditions of the lease: with reference to the second ground, that the lease being intended to be perpetual, and no arrears of rent being due, irregularity and unpunctuality in the payment of the instalments of rent in question were not breaches of the conditions of the lease involving its forfeiture: and, with reference to the third ground, that the condition as to the planting of trees and sinking wells being merely a prohibition, and not a condition the breach of which involved the forfeiture of the lease, the lease could not be cancelled because the lessees had planted trees or sunk wells and allowed their tenants to do the same, without the lessor's consent.

Held also that, assuming that the lessor was entitled, on the third ground, to the cancelment of the lease, cancelment was not to be deemed the invariable penalty for the breach of such a condition as that mentioned in that ground. The Full Bench ruling in *Sheo Churun* v. *Bussunt Singh* (1) followed.

THIS was a suit, under cl. (*c*), s. 93 of Act XVIII of 1873, for the cancelment of a lease dated the 7th December, 1838. The material portion of this lease was as follows: "As the lessee has agreed to take a permanent lease of mauza Darsan from the beginning of 1246 fasli at an annual rent of Rs. 1,111 (*sicca*) and has executed a kabuliyat, therefore this lease is granted to him: he shall now hold possession as *mustajir* and shall consider the fulfilment of the following conditions to be the means of his continu-

* Special Appeal, No. 1029 of 1877, from a decree of J. W. Power, Esq., Judge of Ghâzipur, dated the 8th August, 1877, affirming a decree of A. E. C. Casey, Esq., Assistant Collector of the first class, dated the 26th June, 1877.

(1) H. C. R., N.-W. P., 1871, p. 282.

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ing to be lessee: (i) he shall pay the rent annually, instalment by instalment, from the month of Kuar to the month of Baisakh, at the times fixed by the Government for the payment of instalments of revenue; in case the rent is not so paid, all his property moveable and immoveable shall be sold, and the proceeds of such sale shall be deposited in the Government treasury towards satisfying any arrears: (ii) he shall not allow, without the lessor's permission, any one to plant trees, dig tanks, or sink wells, neither shall he himself do such things: as long as the lessee or his heirs shall continue to pay the rent annually, instalment by instalment, the lease shall remain in force, but if even one instalment falls into arrear the lease shall become null and void, and shall be cancelled". It appeared that for many years, by an arrangement between the parties to the lease, the lessee had paid the rent into the Government treasury on account of revenue instead of to the lessor. The plaintiff who had purchased, on the 20th November 1876, the rights and interests of the lessor, claimed in his plaint the cancelment of the lease on the ground that the defendants had failed to pay instalments of rent due severally on the 15th November, 1876, 15th January, 1877, and 1st May, 1877, on the due dates, and that they had allowed their tenants to plant trees and sink wells, and had themselves planted trees and sunk wells, without the lessor's permission. The Court of first instance held that, as the defendants had failed to pay the instalments of rent in question punctually, a breach of the conditions of the lease involving its forfeiture had taken place, and gave the plaintiff a decree cancelling the lease. On appeal by the defendants the lower appellate Court concurred in the decision of the Court of first instance and affirmed the decree of that Court.

The defendants appealed to the High Court, contending that the lease was intended to be a perpetual lease, and on a proper construction of its terms, a failure to pay an instalment of rent when due did not involve the forfeiture of the lease.

Mr. *Conlan* and Lala *Lalta Prasad*, for the appellants.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondent.

The High Court (STUART, C. J. and SPANKIE, J.) remanded the case to the lower appellate Court for the trial of the issues stated in the following

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ORDER OF REMAND.—We are of opinion that the pleas in special appeal must be maintained. The lower appellate Court remarks that some years ago Nawal Kishore, representative of the deceased Babu Ram Ratan Singh, one of the original lessors in 1838 of the village in suit, fell into difficulties, and on the 20th November, 1876, his zamindari rights were sold at auction to the present plaintiff, respondent. The auction-purchaser found that the conditions of the lease, as regards the payment of rent, had not been complied with. He therefore sues to cancel the lease in accordance with the terms of the agreement recorded therein. The Judge considers that any private arrangement by which the lessees have been in the habit of paying the rent direct to the Government treasury, instead of to the lessor, has no bearing upon the case, and questions as to what might happen to respondent if appellant failed to pay his instalments. The question was whether or not appellant had by his failure caused a breach in the conditions of the lease. If the lessees paid direct to the Government treasury they should have paid before the instalment fell due, and this they had not done. He concludes that it has been proved that there has been a breach in fulfilment of the conditions as regards the regular and punctual payment of the instalments on the part of the lessees, and therefore the lease was liable to cancelment. He dismisses the appeal and affirms the decree of the first Court cancelling the lease. On examination of the lease we must hold from its terms that it was intended to be perpetual. The original lessors reserved no profits for themselves. The lessees were to pay as rent Rs. 1,111 *sicca* rupees. The Government demand was or is Rs. 1,103-5-2, and there is no satisfactory evidence to shew what became of the difference between these Rs. 1,111 and the equivalent in Queen's coin, Rs. 1,180-7-0, after payment of the Government revenue. According to the terms of the lease, the Rs. 1,111 Moorshedabad rupees were to be paid to the lessor. The first condition as to payment of rent is that it is to be paid, instalment by instalment, when the Government revenue is paid. In case of its non-payment all the property of the lessees, both moveable and immoveable, may be sold, and the proceeds applied to the liquidation of arrears. The second and fourth conditions impose upon the lessees all the responsibilities and duties of a full

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proprietor and declare that the lessors have no concern with the yearly rent as specified above. The lessees are to pay for roads, dák and police expenses, and patwáris' fees. The final condition is that the lease shall be held valid as long as the lessees shall pay the lessors regularly at every instalment the rent of the estate. If even a single instalment in any way falls into arrears the lease shall be deemed null and void and shall be cancelled, the lessors having the right of making other arrangements with any one, as they pleased. It is not denied that, for convenience's sake or for some other reason, the lessor and lessees in times past arranged that the rent should be paid direct to the Collector, and not to the lessor, and the lease has now held good from 1838 to May, 1877, when the suit was instituted, a period of nearly 39 years. It is not shown that the plaintiff, after his auction-purchase in 1876, repudiated this arrangement, even if he had the power of doing so, or demanded the payment of rent directly to himself. We are not therefore disposed to hold that, in paying the rent to the Government treasury, there was any breach of the conditions of the lease that would entitle the plaintiff to claim its forfeiture. The money paid to and received by the Collector in accordance with the custom of past years must be regarded as money paid on account of the lessor and for him. We have seen that in addition to the alleged breach of conditions in paying directly to the Government treasury, the Judge finds that the payments have been made with irregularity and want of punctuality. This may be the case, but we do not see in the lease itself any provisions which would justify the forfeiture of the lease on this account. Looking at the wording of the first condition, we should hold that a suit for rent was contemplated in the first instance on the failure to pay with regularity, and a decree to bring to sale the moveable and immoveable property of the lessees in satisfaction of any arrears. We are disposed to regard the last condition as a provisional clause for the security of regular payments, but not as one intended to enable the lessor to take advantage of any remediable lapse on the part of the lessees to pay their rent, and we think that the fact that the lease has held good for 39 years, and that its terms have been, in the matter of payment to the lessor, modified is a proof that the lease was perpetual and not to be cancelled at all as long as the rent was paid. It is worthy

of note that there are other conditions in the lease not affecting the question of the payment of rent which has been raised in this suit, and which appear to be framed with the view of maintaining some evidence of the lessor's proprietary rights, though the lease was intended to be perpetual. It seems to us that the suit in so far as it has been brought to cancel the lease because the rent was not paid to the representative of the lessor, but to the Government, must fail, for the reasons assigned, and that it must also fail as brought on the ground taken by the Judge, irregularity in payment and want of punctuality, there being no proof of any existing arrears.

But there are allegations in the plaint which neither of the Courts below have taken notice of in their judgments. The plaintiff states that the lease is liable to cancelment because the lessees have allowed others to plant trees, and have themselves dug, and caused others to dig, wells on the land, and their doing so is an infringement of the lease. We have no judgment of the Court below on these allegations; doubtless the plaintiff is entitled to a judgment on them. Before we decide the appeal we must remand the case, under s. 354, Act VIII of 1859, to the lower appellate Court to determine whether or not the lessees have allowed others to plant trees, and have themselves done so, without the permission of the lessor; whether they have allowed others to dig wells, and have done so themselves, without the permission of the lessor; and though doubtless we ourselves might determine the point, we direct the lower appellate Court to say whether, in the event of it being shown that the lessees have exercised these proprietary rights, they have thereby incurred the forfeiture of their lease.

The lower appellate Court found that the lessees had planted trees and sunk wells, and allowed their tenants to do so, without the permission of the lessors, thus breaking the conditions of the lease, and that such breach of the conditions of the lease involved, under the terms thereof, its forfeiture. On the return of this finding the High Court delivered its judgment, the material portion of which was as follows;

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JUDGMENT.—The main point on which the plaintiff relied was default in the payment of revenue, according to the Government instalments, the cause of action accruing on the 16th November, 1876, 16th January, and 2nd May, 1877. At the end of the plaint, and as it were an after-thought, it is stated that the lease is also liable to forfeiture because the lessees have dug wells and caused wells to be dug by others, but no instances are specified and no detail given. (After determining that the lessor had acquiesced in the construction of wells and gardens by the lessees and their tenants, the judgment continued:) We have already disposed of that portion of the appeal which relates to the alleged unpunctuality in payment of the revenue. We have held that there is nothing in the lease to justify forfeiture of the lease in regard to the mode in which the revenue was paid, or the regularity or irregularity with which it was paid. In payment of the revenue the lessees followed an arrangement between the lessor and themselves which held good from 1838 to 1877, and we also held that there was no proof that after the purchase the plaintiff repudiated the arrangement; we also held that the lease would not justify forfeiture on the ground of any irregularity in the punctual payment of rent; our reasons are given in our judgment of the 13th February of this year; they need not be repeated here. We now hold regarding the issue remanded to the Judge that the sixth clause of the lease contains no provision that, if the lessees should build wells without the consent of the lessor, they should be liable to forfeiture of the lease. There is no such condition in this clause; on the contrary the concluding part of it provides that as long as the said leaseholders or their heirs shall continue to pay the Government revenue annually, instalment by instalment, the lease shall remain in force, but if they fall into arrears for a pice even the lease shall become null and void, and the lease shall be cancelled. It is clear that the lease contemplates as the main condition that there shall be no default in payment of the Government revenue, there is nothing more than a prohibition regarding wells and planting trees. Even where the right of the zamindar to claim forfeiture in such a case is proved, according to a Full Bench ruling in *Sheo Churun* v. *Busaunt Singh* (1) forfeiture is not to be

(1) H. C. R., N.-W. P., 1871, p. 282.

deemed the invariable penalty for breach of contract occasioned by the construction of a well or improvement of a tenant's holding. With this view of the case we decree the appeal and reverse the judgment of the Court below with costs, thus dismissing the suit as brought.

Appeal allowed.

Before Mr. Justice Spankie and Mr. Justice Straight.

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SHIB DAT (JUDGMENT-DEBTOR) *v.* KALKA PRASAD (DECREE-HOLDER)*

Decree for money payable by Instalments—Execution of Decree—Act XV of 1877 (Limitation Act), s. 19—Acknowledgment—Limitation.

Held, in the case of a decree for money payable by instalments, with a proviso that in the event of default the decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and not having applied for execution within three years from the date of the first default, the decree was barred.

Held also, the judgment-debtor having, three years after the first default, acknowledged in writing his liability under the decree, and signed such acknowledgment, that the decree being already barred, such acknowledgment did not create a new period of limitation.

THE decree in this case was dated the 14th July, 1873, and directed the payment of Rs. 700, together with interest at twelve annas per cent., in instalments, the first instalment being Rs. 200 payable in Pus 1281 fasli (5th December, 1873—2nd January, 1874), the second being the same amount payable in Pus 1282 fasli (24th December, 1874—21st January, 1875), and the third being Rs. 300 payable in Asarh 1282 fasli (20th June, 1875—18th July, 1875). The decree further directed as follows:—"In the event of default the decree shall be executed for the whole amount." On the 4th January, 1875, the first instalment having become due on the 2nd January, 1874, the judgment-debtor paid Rs. 200. On the 22nd January, 1875, or after the date that the second instalment became due, he paid Rs. 150. On the 11th July, 1876, or after the date the third instalment became due, he paid Rs. 100. On the 6th November, 1876, he paid Rs. 300. On the 28th June, 1877, he acknowledged in writing on the decree that up to that date a balance of Rs. 124-1-0 was due thereunder, and signed this

* Second Appeal, No. 63 of 1879, from an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 4th April, 1879, reversing an order of Muhammad Nizam Ali Khan, Munsif of Pilibhit, dated the 20th December, 1878.