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raised any objection to act as the guardian of Lachhman Singh.

In view of what we have said above, we are clearly of opinion that Lachhman Singh was not at all prejudiced by the appointment of Ishri Singh as his guardian *ad litem* and there are no grounds for holding that the decree obtained by Seth Raghubar Dayal was void as against Lachhman Singh.

Srivastava, A.C.J., and Ziaul Hasan, J.

As on the findings recorded above, the appeal must fail, we do not consider it necessary to go into the question as to how far the defendants-mortgagees can claim to be in adverse possession of the property in suit though there is ample evidence on the record to show that the plaintiffs-appellants never contested the mortgagees' right to remain in possession of the property in question by virtue of the sales of 1877 and 1891 before the present suit was filed. Similarly it is not necessary to consider the deeds of further charge relied on by the respondents and about which they have filed cross-objections.

The appeal is dismissed with costs and the lower Court's decree confirmed. We make no order as to costs of the cross-objections which we leave undecided.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice H. G. Smith

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October, 9

JWALA SAHAI AND SONS, MESSRS. (PLAINTIFF-APPELLANTS) *v.* HARI NANDAN DUTT AND OTHERS (DEFENDANTS-RESPONDENTS)*

Contract Act (IX of 1872), sections 60 and 61—Debtor owing several debts to the same creditor—Part payment—No express intimation of circumstances implying that payment was in respect of a particular debt—Creditor, whether has discre-

*First Civil No. 16 of 1932, against the decree of Dr. Ch. Abdul Azim Siddiqi, Subordinate Judge of Lucknow, dated the 21st of September, 1931.

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tion to apply it to any debt—Interest Act (XXXII of 1839)—Claim for interest under Interest Act—Proof of demand and non-payment necessary—Printed notice on bill that on failure to pay bill interest will be charged, whether amounts to demand under Interest Act—Equitable ground for allowing interest to creditor—Reservation of "net rent exclusive of all taxes" in Qabuliat*—Tenants liability to pay taxes—Interpretation—*Qabuliat *ambiguous—Court justified in looking into conduct of parties to determine their intention.*

Where a person who owes several debts to the same creditor makes a payment but fails to establish that he made the payment either with an express intimation or under circumstances implying that it was a payment in respect of a particular debt, the creditor is entitled to apply it at his discretion to any debt due to him.

In order to make the Interest Act applicable, it is necessary for the plaintiff to make out that he had made a clear demand, and in spite of it the payment was not made. A notice printed on the top of each bill that in case of failure to pay the bill interest would be charged is no proof of such demand when no interest was ever inserted in the body of the bills, and no interest was ever specifically demanded.

Where there were short delays in the payment of rent which were always overlooked there is no case for allowing interest on arrears of rent on the ground of equity.

The reservation of a "net rent or a rent free of all outgoings or clear of all taxes, charges and imposition" imposes upon a tenant the burden of all rates and taxes except property tax, if these words are found in a lease emanating from the landlord. But it is not necessarily so if those words are used in the *qabuliat* executed by a tenant in favour of the landlord.

Where the words used in a *qabuliat* are not altogether free from ambiguity, the court for the purposes of interpreting it is justified in looking into the conduct of the parties to determine their real intention

Messrs. *Hyder Husain, Ghulam Hasan* and *Manohar Lal,* for the appellants.

Messrs. *Ali Zaheer* and *A. P. Singh,* for the respondents.

SRIVASTAVA, A. C. J. and SMITH, J.:—This is a first appeal arising out of a suit between a landlord and a tenant. The appellant, who was the plaintiff in the

lower court, is the owner of a shop in Mall Road, and of a flat in Shahnajaf Road in Lucknow. The defendant in the lower court was the proprietor of a firm of jewellers who had taken the aforesaid shop and flat on rent from the plaintiff. The defendant had admittedly vacated the shop as well as flat before the institution of the suit. According to the plaintiff's case, the defendant at the time of vacating the shop had removed the show window glasses, and had also caused some damage to the premises. He claimed that he is entitled to Rs.9,121-13 from the defendant on account of arrears of rent of the shop and the flat, for certain Municipal taxes payable by the defendant in respect of the shop, and for compensation in respect of the show window glasses and damage done to the premises, but confined his claim to a round sum of Rs.9,000.

The defendant admitted that he owed Rs.2,080 to the plaintiff in respect of the rent of the shop. He also admitted that there were arrears amounting to Rs.900 in regard to the rent of the flat, but it was pleaded that the claim in respect of it was time-barred. He denied his liability for the taxes as well as for the compensation in respect of the show window glasses and the alleged damage to the premises. It should also be mentioned that the plaintiff's claim included an item for interest. The liability in respect of it was also denied. There was also a controversy between the parties as regards the dates when the tenancies commenced and the dates when they terminated.

The findings of the learned Subordinate Judge so far as they are material for the purpose of the appeal were that the defendant was not liable for the Municipal taxes or for the compensation claimed in respect of the show window glasses. He held the plaintiff entitled to Rs.36 by way of compensation for the damage done to the shop premises. As regards the arrears of rent for the flat he held that the claim in respect of it was

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barred by time, and that the plaintiff was entitled to Rs.2,540 for arrears in respect of the shop. Lastly as regards interest he held that the plaintiff was entitled to interest by way of damages from 1st April, 1924, to 31st May, 1925, and also further interest under an agreement from 17th November, 1926, up to the date of suit.

Srivastava, A.C.J., and Smith, J.

The main question in the appeal is as regards the appropriation of certain payments admittedly made by the defendant. The defendant's case was that the payments in question had been made with an express intimation that they were to be appropriated towards the arrears of rent due for the shop. He further pleaded that in any case the aforesaid payments had been made under circumstances which clearly implied that they were to be applied in discharge of the arrears due for the shop. The plaintiff denied these allegations and pleaded that he had appropriated the said payments in discharge of the rent due for the flat, and claimed that he was entitled to do so under the provisions of sections 60 and 61 of the Contract Act. The learned Counsel for the appellant has strenuously disputed the correctness of the finding given by the learned Subordinate Judge in favour of the defendant in respect of five such payments.

The first of these payments is a payment of Rs.450 made on 25th of October, 1923. On 1st of October, 1923, the plaintiff sent to the defendant a bill (exhibit A-11) claiming Rs.823 as arrears of rent for the flat. He followed this up with a notice (exhibit 6), dated the 11th of October, 1923, claiming Rs.823 for arrears in respect of the flat, and also requiring him to vacate it by the end of that month, failing which he was to be liable to pay rent at an enhanced rate. Shortly after this notice had been sent, the defendant made the payment in question. The learned Subordinate Judge has found, and this finding has not been disputed before

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us, that the plaintiff credited this amount in his account towards the rent of the flat. We are not prepared to place any reliance upon the general statement of the defendant that whenever he paid any rent he did so with specific instructions whether it was to be credited towards the shop rent or the rent of the flat, unless the statement is corroborated by other reliable evidence. The learned Subordinate Judge has accepted the defendant's contention in respect of this item mainly on the ground that the amount of Rs.450 was a multiple of Rs.150, which was the monthly rent of the shop at that time. He is of opinion that this circumstance clearly implied that the payment was to be applied to the discharge of the arrears due in respect of the shop. He seems to have overlooked the fact that the amount in question was a multiple also of Rs.25, which was the monthly rent of the flat. This circumstance therefore is altogether inconclusive. It should also be pointed out that according to the bill sent by the plaintiff the rent of the shop which was in arrears at the date of the payment in question was only Rs.425. If this was so, it is quite unlikely that the sum of Rs.450 should have been paid in respect of the shop. The learned Subordinate Judge has, however, tried to show that the amount of Rs.425 entered in the bill was incorrect, and that as a matter of fact Rs.450 was due on that account. It is unnecessary for us to embark upon an inquiry into the question whether the correct amount of arrears for the shop rent was Rs.450 or 425. It will be sufficient to show that rightly or wrongly the plaintiff had claimed only Rs.425 for the rent of the shop. It seems under the circumstances more likely that the payment of Rs.450 should have been made towards the arrears of rent for the flat, which amounted to Rs.823. Further, the plaintiff having served the defendant with a notice demanding the rent of the flat and requiring him to vacate it, it is more probable that the defendant would try to placate the plaintiff in respect of his demand for

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the rent of the flat. We are therefore, of opinion that the defendant has failed to establish that he made this payment either with an express intimation or under circumstances implying that it was a payment in respect of the arrears due for the shop. It follows, therefore, that the plaintiff was entitled to apply it at his discretion to any debt due to him. As he has admittedly appropriated it towards the rent of the flat, we are unable to accept the Subordinate Judge's finding in favour of the defendant in respect of this item.

The remaining four items of payment which are in dispute in the appeal are as follows:

Rs.150 paid on 22nd September, 1926.

Rs.50 paid on 5th of April, 1928.

Rs.270 paid on 25th April, 1928.

Rs.80 paid on 21st September, 1928.

All these items can conveniently be dealt with together. Exhibit 81 is a letter dated the 7th of February, 1925, sent by the defendant to the plaintiff advising his sending a cheque for Rs.300 towards the bill of the rent of the flat, and saying that "regarding the balance we shall settle same when our dispute about the rent is cleared." It is admitted that at the time when this letter was written there was a dispute between the parties as regards the rate at which rent was payable in respect of the flat. It is also the common case for the parties that this dispute was never settled. We agree with the learned Subordinate Judge that the sentence of this letter which we have quoted above is a strong circumstance implying that all subsequent payments until settlement of the dispute regarding the rent of the flat were to be credited towards the shop rent. Another circumstance relied upon in the connection with these payments is that the first item of Rs.150 was the full rent for one month of the shop. The next two payments of Rs.50 and Rs.270, which were both made in the course of the same month, make

a total of Rs.320, which was the full rent of the shop for two months at the rate of Rs.160 per month, which was the rent payable at that period. The last item of Rs.80 was followed by a cheque dated 29th of October, for Rs.240. These two consecutive payments taken together make up the full rent for another two months. We agree with the learned Subordinate Judge that the series of payments extending over a period of more than ten years show that the defendant was in the habit of making payments in multiples of the monthly rents. Thus, taking all the circumstances into consideration, we think that they clearly implied that the payments in question were intended to be made towards the arrears of shop rent. We accordingly uphold the finding of the learned Subordinate Judge in respect of these items.

Next it was argued for the appellant that he is entitled to interest also for the period intervening between the 1st of June, 1925, and 31st October, 1926. The learned Counsel for the appellant argued that he is entitled to this interest both under the provisions of the Interest Act and on equitable grounds. It is admitted that in order to make the Interest Act applicable it is necessary for the plaintiff to make out that he had made a clear demand, and in spite of it the payment was not made. In proof of demand reliance has been placed upon a notice printed on the top of each bill that in case of failure to pay the bill interest would be charged. It is, however, admitted that no interest was ever inserted in the body of the bills, and no interest was ever specifically demanded. Under the circumstances we agree with the lower court that the printed notice was a mere matter of form, and it cannot be said that any demand for interest was made which could entitle the plaintiff to claim it under the Interest Act. In this connection it might also be noted that no interest for this period was charged by the plaintiff even in his books of account. As regards equitable

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grounds, the scrutiny of the account shows that though the shop rent was not paid regularly, yet there was never any long delay. The plaintiff's accounts also show that he always overlooked these short delays. We think that under the circumstances the plaintiff has failed to make out any case for allowing him interest on the ground of equity. It was also contended that the plaintiff should be allowed future interest from the date of suit. We understand that the bulk of decretal amount had been paid to the plaintiff soon after the decree was passed by the lower court. Taking this and all the other circumstances of the case into consideration, we are not prepared to exercise our discretion in allowing future interest which has not been allowed by the lower court.

The last point urged in the appeal is as regards the Municipal taxes. This claim is based on the terms of two *kabuliats* (exhibits 1 and 3). In the first of these it is said that the defendant agreed to take the shop "at the net monthly rental of Rs.130 clear of all existing taxes, rates and outgoings to be payable, etc." The words in the second *kabuliat* are "on a monthly rental of Rs.160, exclusive of all taxes." Reliance has been placed on Redman's Law of Landlord and Tenant, 8th Edition, page 411, and on Woodfall's Law of Landlord and Tenant, 21st Edition, page 674, for the contention that the reservation of a "net rent or a rent free of all outgoings or clear of all taxes, charges and impositions" imposes upon a tenant the burden of all rates and taxes except property tax. If these words are found in a lease emanating from the landlord, they would certainly bear the interpretation contended for by the appellant. But in the present case we find that those words have been used in the *kabuliat* which was executed by the tenant in favour of the landlord. It has been argued that when the tenant undertook to pay a certain sum of net rent, clear of taxes, those words emanating from the tenant should be interpreted

to mean that he was under no liability to pay the taxes. The argument is not without force. We think that the interpretation of those words as used in the *kabuliat* is not altogether free from ambiguity. In the circumstances, the lower court was justified in looking into the conduct of the parties to determine the real intention. It is admitted by the plaintiff that for a period of ten years the defendant never paid the taxes even once. It is also admitted that the taxes were never demanded from the defendant during this period. The accounts of the plaintiff show that the taxes were paid by him, and that after payment of the taxes the balance was entered by him in his accounts as his net savings. Taking this conduct of the parties extending over such a long period into consideration, we agree with the lower court that there was no agreement about taxes being paid by the defendant, and that the defendant is not liable for them.

The defendant has also filed cross-objections. The only point urged in support of them was that the defendant was not liable for the rent of the shop for June, 1930, inasmuch as he had given the plaintiff a legal notice for vacating the shop by the end of May, 1930. The alleged notice was denied by the plaintiff. There is no legal evidence to prove it. The learned Subordinate Judge was right in refusing to accept the postal receipt which was sought to be produced at a late stage of the case. Even if the postal receipt were admitted in evidence, it could at best prove only the fact of a notice being sent. But there is no evidence as regards the contents of the alleged notice. The cross-objections therefore, have no substance and must fail.

The result, therefore, is that we allow the appeal in part and modify the decree of the lower court by allowing the plaintiff a sum of Rs.450 in addition to the amount decreed by the lower court. In all other respects the decree of the lower court is maintained.

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The parties will pay and receive costs in this Court proportionate to their success and failure. The cross-objections are dismissed with costs.

Appeal partly allowed.

REVISIONAL CIVIL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava

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SHEIKH KALLOO (APPLICANT) *v.* MUSAMMAT NOOR JAHAN (OPPOSITE PARTY)*

Indian Succession Act (XXXIX of 1925), sections 265, 272 and 286—Oudh Courts Act (IV of 1925), section 31—Oudh Civil Rules 239 and 240—Probate—Contentious cases—District Judge transferring contentious probate case to Subordinate Judge—Subordinate Judge being District Delegate, effect of.

There is nothing in the Indian Succession Act which renders the Subordinate Judge, as such, incompetent to dispose of contentious proceedings under that Act. The fact that one and the same officer is both a Subordinate Judge and a District Delegate is immaterial. Although as District Delegate he cannot dispose of a contentious proceeding nevertheless he can do so as Subordinate Judge, if the proceeding is transferred to him by order of the District Judge.

Mr. *Naim Ullah,* for the applicant.

Mr. *Faiyaz Ali,* for the opposite party.

KING, C. J. and SRIVASTAVA, J.:—This is an application in revision against an order passed by the learned District Judge of Fyzabad, dated the 31st of May, 1933, empowering the Subordinate Judge of Fyzabad to dispose of certain probate proceedings.

The order arose out of an application for grant of probate. The application was opposed by Musammat Noor Jahan who lodged a *caveat.* The proceedings thus became "contentious" and the learned Subordinate Judge (in whose court the proceedings had been instituted as District Delegate under the Indian Succession Act) referred the case to the District Judge stating that he had no power to try the case after

*Section 115 Application No. 92 of 1933, against the order of Mr. K. N. Wanchoo, I.C.S., District Judge of Fyzabad, dated the 31st of May, 1933.