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GREAT INDIAN PENINSULAR RAILWAY COMPANY v. JITAN RAM.

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show that the loss has been caused by the wilful neglect of the defendant. The quantum of evidence required for this purpose must necessarily vary according to the nature of the goods, and it has been observed elsewhere that the loss of an elephant might be difficult to explain except on the hypothesis that there had been wilful neglect; but in the present case our task is simplified because there is clear and apparently reliable evidence that while the goods were lying on the platform at Bombay the plaintiff's agent asked a subordinate in the service of the first party defendants to remove them into the godown but was told in reply that after a railway receipt had been given to the consignor he had no business to make any such request. There is also evidence that after the institution of the suit a goods' clerk informed the plaintiff that one of the bales had not been despatched. There is no rebutting evidence on the side of the defendants and, in my opinion, it has been established that there was wilful neglect on their part and therefore the plaintiff is entitled to a decree.

The application will, therefore, be dismissed with costs.

BUCKNILL, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Adami, J.J.

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Feb., 6.

FORBES

v.

HANUMAN BHAGAT.*

Lease—construction of—bemiadi, *lease—landlord's consent to erection of* pakka *buildings, effect of.*

* Appeal from Appellate Decree No. 363 of 1921, from a decision of Babu Ashutosh Mukherji, Subordinate Judge of Purnea, dated the 3rd September, 1920, confirming a decision of Babu Braj Bilas Prasbad, Munsif of Araria, dated the 31st July, 1919.

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Where, in a lease, no term was fixed, and it was provided that the purpose of the lease was to enable the lessee to erect a *gola* on the demised land in which to carry on his business but that the lessee was not to erect any *pakka* building without the consent of the lessor, *held*, (*i*) that a reasonable construction of the lease was that it was intended to be permanent and not from year to year, and (*ii*), that the plaintiff having subsequently consented to the erection of *pakka* houses on the demised land he was estopped from ejecting the lessee.

Baroda Prasad Barman v. *Prasanna Kumar Das*(1), *Mahim Chandra Sirkar* v. *Anil Bandhu Adhikary*(2), *Mussammat Parshan Kuer* v. *Mussammat Tulshi Kuer*(3) and *Kailashpati Chaudhury* v. *Muneswar Chaudhury*(4), referred to.

Promoda Nath Roy v. *Srigobind Chaudhury*(5), applied.

Beni Ram v. *Kundan Lal*(6), distinguished.

Ramsden v. *Dyson*(7) and *Ralli* v. *A. H. Forbes*(8), referred to.

Appeal by the plaintiff.

The appeal arose out of a suit for ejectment.

The facts of the case material to this report were as follows :—

The plaintiff was the *malik* or proprietor of Forbesganj Bazar where the land in suit was situated. It measured 3 *bighas* odd, or 1·32 acres. The land was formerly held by one Gulab Chand under a lease (*Ex. H*), dated 1892. The defendant-respondent purchased the rights of Gulab Chand. He also took a lease of the land from the plaintiff (*Ex. 8-A*), dated 20th *Aghan*, 1307 (5th December, 1899). The appellant commenced the present action by filing a plaint in the Court of the Munsif of Basantpur on the 22nd of June, 1908. In the plaint he stated that the lease to the defendants was from year to year and that they were given no permanent rights under the lease

(1) (1911-12) 16 Cal. W. N. 564.
(2) (1909) 9 Cal. L. J. 362.
(3) (1917) 2 Pat. L. J. 180.
(4) (1918) 3 Pat. L. J. 576.
(5) (1905) I. L. R. 32 Cal. 648.
(6) (1899) I. L. R. 21 All. 496; L. R. 26 I. A. 58.
(7) (1865) L. R. 1 E. & I. A. 129 (141).
(8) (1922) I. L. R. 1 Pat. 717.

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and that as the value of land of Forbesganj Bazar had increased and other tenants there, under the plaintiff, were paying rent at a higher rate, the defendants were served with notices to take a fresh settlement of the land as their existing rent was low, or to quit the same; but the defendants neither took any fresh settlement nor gave up the land. The plaintiff claimed *khas* possession of the land by ejecting the defendants from 1st *Baisakh*, 1326, *M.S.*, and also for arrears of rent amounting to Rs. 162-4-3.

The Courts below gave the plaintiff a decree for arrears of rent and with regard to this portion of the decree there was no appeal to the High Court.

Therefore the appeal before the High Court was only against the decree refusing the plaintiff's relief for ejecting the defendants.

The defendants in resisting the plaintiff's claim asserted that the lease granted to them created a *bemiadi* or permanent tenancy and not one from year to year; that in terms of the lease the defendants had constructed *pakka* buildings on the land at immense cost with the permission of the plaintiff and on payment of *nazrana* to him, and, therefore, the plaintiff was estopped from bringing the suit for ejectment. In the alternative the defendants pleaded that in case they were found liable to be ejected, they should be awarded Rs. 32,000 as compensation for the *pakka* buildings erected by them.

P. K. Sen (with him *Chandra Sekhar Banerji* and *Lal Mohan Ganguli*), for the appellant.

C. C. Das (with him *Nawal Kishore Prasad*), for the respondents.

JWALA PRASAD, J., (after stating the facts as set out above, proceeded as follows) :—

Two questions were agitated in the Court below, namely—

(*1*) whether the lease in favour of the defendants was a permanent lease in its inception, and

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(2) whether the subsequent acts and conduct of the lessor and the lessees converted the lease into a permanent one; and if so, whether the plaintiff lessor is thereby estopped from bringing a suit for *khas* possession of the land in suit.

The Court below has decided both the issues against the plaintiff. Mr. *Sen* on behalf of the appellant, impugns the finding of the Court below on both the issues.

Now, the plaintiff's suit will fail if any of the aforesaid issues is decided against him. The first issue depends upon the construction of the document in question. It is conceded that no definite term was fixed in the lease. That in itself will not show either that the lease was of a permanent character or that it was for a term of years. As to whether this indefinite term was intended to be perpetual or permanent depends upon the intention of the parties as gathered from the covenants in the lease. The learned Subordinate Judge has in his judgment summarized the terms. It is not necessary to refer to all of them for the purposes of this appeal. We may, however, refer to the following terms only :—

(1) The purpose of the lease was to enable the lessee to erect *gola* house and to purchase and sell all sorts of commodities therein, or, in other words to open his business therein;

(2) The lease was not limited for any definite period but that it was a *bemiadi* lease, or a lease without any term;

(3) That the lessee shall not have the power to construct any *pakka* building without the express and written permission of the lessor, and, if that stipulation be violated, and *pakka* building be raised by the lessee without such permission of the lessor, he, the lessee shall be liable to be evicted; and

(4) In case the lessee wants to erect *pakka* building and to have a *pakka* well or *indara* he shall have to do so according to the advice of the lessor.

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Now it is clear from the aforesaid terms that the lease was for the purpose of *gola* business and for building houses. It is also clear that the erection of *pukka* buildings for the business as well as for the purpose of residence was in the contemplation of the parties with the condition that permission for erecting *pakka* structures will have to be taken from the lessor. Under these circumstances the inference is not unreasonable that the lease in question was meant to be of a permanent character and not from year to year. No doubt, as observed above, a *bemiadi* lease or a lease without any term may in the circumstances of a particular case be shown not to confer any permanent grant as was held in the cases relied upon by the learned Counsel on behalf of the appellant [*Baroda Prasad Barman* v. *Prasanna Kumar Das* (1), *Mahim Chandra Sirkar* v. *Anil Bandhu Adhikary* (2), *Mussammat Parshan Kuer* v. *Mussammat Tulshi Kuer* (3) and *Kailashpati Chaudhury* v. *Muneshwar Chaudhury* (4)]. The decisions in those cases were applicable to the particular facts decided and the leases concerned. The present case is very near the case of *Promoda Nath Roy* v. *Srigobind Choudhury* (5). Upon the facts in the present case and the lease in question we are not prepared to differ from the view of the Court that at its inception the lease was a permanent lease, and not one from year to year.

The respondents are on firmer ground upon issue No. 2. Now it is undisputed that on the 29th of November, 1907, the defendants applied for permission to erect *pakka* buildings on the land in question in terms of clause (*3*) of the lease, and the permission was expressly granted on acceptance of *nazrana* of Rs. 21. The plaintiff has filed *parwanais* issued to the defendants in 1909 (*Exhibit 18* and *18-A*). These *parwanais* confirm the permission already granted stating that the permanent structures standing on the land were erected with the permission and sanction of

(1) (1911-12) 16 Cal. W. N. 564.
(2) (1909) 9 Cal. L. J. 362.
(3) (1907) 2 Pat. L. J. 180.
(4) (1918) 3 Pat. L. J. 576.
(5) (1905) I. L. R. 32 Cal. 648.

the lessor. Now, before the foundation was laid the defendants applied for permission in 1907 and they were given that permission. The *parwangis* referred to above, which were granted two years after, indicate that the buildings had already been completed and the construction thereof was confirmed by the plaintiff. In none of these documents is there any indication of the plaintiff having demanded a higher rent as a condition for the erection of the *pakka* buildings on the land in question; nor is there any suggestion that the erection of such buildings would not confer upon the defendants the right to remain on the land permanently or that the construction of the buildings was to be at the risk of the defendant's liability to be ejected on the ground of the lease being only of a limited duration. The plaintiff in this case did not only acquiesce in the construction of the buildings in question by merely abstaining from interference, but he actually granted permission for erecting the buildings. Therefore, even if the lease was of a temporary duration limited by terms, or a lease from year to year, reserving the right of re-entry in the lessor, I am afraid the plaintiff would have been estopped from claiming the right of *khas* occupation by ejecting the defendants. The lease, even if originally for a limited term, would then have been construed to have been made permanent in the sense that the plaintiff would not have been entitled to re-enter. The original terms of the lease would then have been supplemented by a fresh contract by the conduct of the parties whereby the defendants would have acquired a right of occupation over the land in question. The learned Counsel on behalf of the appellant relies upon *Beni Ram* v. *Kundan Lal* (1). In that case the term of the lease was defined and no express permission for building was given by the lessor. Under these circumstances, the observation of the Lord Chancellor in *Ramsden* v. *Dyson and Thornton* (2), was applicable to the facts of that case, to the effect that if a tenant builds on the land which he holds under a

(1) (1899) I. L. R. 21 All. 496; L. R. 26 I. A. 52.

(2) (1865) L. R. 1 E. & I. A. 129(141).

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term he cannot acquire any right to prevent the lessor from taking possession of the land and building when the lease determines; he knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end. On the other hand, Lord Watson in delivering the judgment of their Lordships of the Judicial Committee observed: "In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain indication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

In the present case the Courts below have held that the plaintiff in the present case had actually given express permission to the defendants to construct buildings on the land in question and thereby he contracted that the right of tenancy would continue principally so as to confer upon the defendant the right of permanent occupation.

The case of *L. E. Ralli* v. *A. H. Forbes* (1), decided in this Court, does not seem to help the appellant. In that case the lease was from year to year, whereas in the present case the lease is without any term. On the other hand, the principle laid down in the above case as to the doctrine of estoppel seems to apply to the present case. Upon the circumstances not very dissimilar to those of the present one, the learned Chief Justice applied the doctrine of estoppel against the claim of Mr. Forbes to eject the defendants from the land leased to them.

We agree with the view taken by the Court below on both the issues and dismiss the appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1922) I. L. R. 1 Pat. 717.