APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

KUMAN DAS

v.

RADHIKA SINGH.*

1929.

April, 29.
May, 6, 29.

Waiver—mere acceptance of reduced rent, whether precludes the landlord from claiming stipulated rent—waiver, when can be presumed—principle to be construed strictly—question as to, whether mixed question of law and fact—second appeal, whether lies to impeach legal conclusions from findings of fact—agreement by tenant to pay higher rent in the event of holding over, whether penal—question, whether can be agitated in second appeal when abandoned in subordinate court—evidence as to act and conduct of parties, how far is admissible—estoppel and waiver, whether evidence of conduct is admissible to prove.

Mere acceptance of a reduced rent by the landlord for a number of years does not deprive him of his right to claim rent at the stipulated rate.

Baijnath Prasad Sahu v. *Raghunath Rai* (1), *Kailash Chandra Saha* v. *Darbari Sheikh* (2), *Munindra Chandra Nandi* v. *Sreemati Durga Sundari Dassya* (3), *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (4), *Mayandi Chetti* v. *Oliver* (5) and *Radha Raman Chowdry* v. *Bhowani Prasad Bhowmik* (6), followed.

Where, however, the conduct of the landlord is less equivocal, as for example, when he sues the tenant on the basis of the reduced rent as if that was the rent payable for the land, it may be presumed that the landlord has waived his right to recover a higher rent.

*Appeal from Appellate Decree no. 209 of 1928, from a decision of Babu Shiva Nandan Prasad, Subordinate Judge of Purnea, dated the 14th November, 1927, modifying a decision of Babu Shyam Narain Lal, Munsif of Katihar, dated the 10th January, 1927.

(1) (1911-12) 16 Cal. W. N. 496.
(2) (1915-16) 20 Cal. W. N. 347.
(3) (1915-16) 20 Cal. W. N. 680.
(4) (1914) I. L. R. 41 Cal. 493.
(5) (1899) I. L. R. 22 Mad. 261.
(6) (1901-02) 6 Cal. W. N. 60.

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Dhakeshwar Prasad Narain Singh v. *Ishwardhari Singh* (1), followed.

But the principle of waiver must be strictly construed and should not be extended to cases where the circumstances are not clear and conclusive.

The question of waiver being a mixed question of law and fact, a second appeal will always lie to impeach legal conclusions from findings of fact.

An agreement by the tenant that if he held over upon the expiry of the term of the lease he would pay rent at a higher rate than he did during the term is valid and enforceable.

Ganpat Singh v. *Jasodhar Singh* (2), *Gobind Mandal* v. *Banarsi Prasad* (3), *Dilan Singh* v. *Ram Sunder Singh* (4), *Garju Mandal* v. *Babu Kuman Das* (5), *Kuman Das* v. *Dhuna Mandal* (6), *Ram Kant Chowdhury* v. *Kuman Das* (7), *Kuman Das* v. *Kachali Mandal* (8) and *Kuman Das* v. *Tilakdhari Singh* (9), followed.

Tejendra Narain Singh v. *Bakai Singh* (10), not followed.

The question as to whether a certain provision is penal or not is a mixed question of law and fact and as a rule it will not be permitted to be raised in second appeal if it is clear that it was abandoned in a subordinate court which was competent to investigate questions of fact as well as of law.

Per CHATTERJI, J : The acts and conduct of parties, so far as they are proof of a contemporaneous oral agreement varying the terms of a registered contract, or proof of a subsequent parol agreement, cannot be legally admissible in evidence.

Radharaman v. *Bhawani* (11) and *Mayandhi Chetti* v. *Oliver* (12), referred to.

(1) (1915) 22 Cal. L. J. 95.
(2) (1913) 17 Cal. L. J. 590.
(3) (1913) 18 Cal. L. J. 74.
(4) S. A. 1135 of 1916.
(5) S. A. 992 of 1917.
(6) S. A. 397 and 398 of 1919.
(7) S. A. 737 of 1919.
(8) S. A. 1602 of 1924.
(9) S. A. 849 of 1925.
(10) (1895) I. L. R. 22 Cal., 658.
(11) (1910) 12 Cal. L. J. 439.
(12) (1899) I. L. R. 22 Mad. 261.

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But the evidence of conduct is admissible to show that as between the landlord and the tenant the term of a kabuliyat for the payment of a particular rate of rent, on the expiration of the term of the lease if the tenant would hold on, was never intended to be acted upon or enforced.

Beni Madhub v. *Lalmati* (1) and *Manindra Chandra Nandi* v. *Srimati Durga Sundari* (2), followed.

Semble, that evidence of conduct is admissible to prove an estoppel or waiver.

Lakshman v. *Gobind* (3), referred to.

Appeal by the plaintiffs.

This was an appeal on behalf of the plaintiffs in a suit for the recovery of rent for the years 1330 to 1332 Fasli and for the 12-annas kist of the year 1333 Fasli. The lands in respect of which the rent was claimed were 36 bighas and 1 katha in area situated in Mauza Gobindpur in the district of Purnea. The plaintiffs were the patnidars of mauza Govindpur, the plaintiff no. 1 having 12-annas and the plaintiff no. 2 having 4-annas patni right in the mauza. On the 11th August, 1899, one Kuldip Singh, father of the defendants, obtained a settlement of 33 bighas and 7 kathas of land (which has now been found to be 36 bighas and 1 katha) from the 12-annas patnidars and executed a registered kabuliyat in his favour. It was stated in the kabuliyat that the lands had been settled with Kuldip Singh for a term of five years, that is to say, from 1307 to 1311 Fasli and the annual jama payable to the 12-annas patnidar was fixed at Rs. 25-4-0. There was a further stipulation in the kabuliyat that after the expiry of the term of the lease Kuldip Singh would give up possession of the said land and in the event of his retaining possession he would pay rent at the rate of Rs. 7 per bigha. The plaintiffs' case was that Kuldip Singh

(1) (1901-02) 6 Cal. W. N. 242. (2) (1915-16) 20 Cal. W. N. 680.
(3) (1880) I. L. R. 4 Bom. 594.

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took oral settlement of the land in suit from the 4-annas co-sharer also on the same terms as those mentioned in the kabuliyat; and the plaintiffs brought this suit to recover rent at the rate of Rs. 7 per bigha, as the lessee continued in possession of the land after the expiry of the terms of the lease.

The suit was resisted by the defendants on a number of grounds, their main pleas being (1) that the contract to pay rent at the rate of Rs. 7 per bigha in the event of the lessee not giving up possession was by way of penalty and (2) that the said contract had been waived by the plaintiffs and, therefore, could not be enforced by them.

The Court of first instance held that the clause in the lease which provided for the payment of an enhanced rent in the event of the lessee not giving up possession at the end of 1311 Fasli was not by way of penalty and this finding was not challenged by the defendants in the lower appellate Court. The two Courts below, however, concurrently found that the contract for the payment of the enhanced rental had been waived and they accordingly gave a decree only for the original rent agreed upon.

The plaintiffs appealed.

Hasan Imam (with him *Sambhu Saran*), for the appellants.

H. L. Nandkeolyar (with him *D. L. Nandkeolyar* and *J. Ghosh*), for the respondents.

FAZL ALI, J., (after stating the facts set out above proceeded as follows):

Now, the main question which arises in this appeal is as to whether the appellants can successfully assail the finding of the Courts below that the contract for the payment of the enhanced rent must be presumed to have been waived by them. The contention of the appellants is that evidence of conduct is

wholly inadmissible to prove waiver of a contract which has been registered according to law and reliance is placed upon proviso (4) of section 92 of the Evidence Act which runs as follows—

"The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents".

It is contended by Mr. Hasan Imam who appears for the appellant that the expression "oral agreement" as used in this proviso is wide enough to include all unwritten agreements whether they are oral or they are implied from acts and conduct of the parties. There is no doubt that this view is fully supported by the decision in the case of *Mayandi Chetti* v. *Oliver* (1) which was followed in *Radharaman* v. *Bhowani Prasad* (2). It must, however, be remembered that proviso (4) refers to the existence of a *distinct subsequent agreement to rescind or modify a contract registered according to law*, and it is a point to be considered whether this proviso can override the provision of section 115 of the Evidence Act which deals with estoppels whether they be by words or by conduct or otherwise. The law of waiver is really a branch of the law of estoppel and, as Melville, J., pointed out in *Lakshman* v. *Gobind Dokanji* (3), "It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. The conduct is no doubt evidence of the agreement out of which it arises but it may be very much more. In many cases it may amount to estoppel. In such a case it is clear that evidence of conduct would be strictly admissible under section 115 of the Evidence Act and, even when

(1) (1899) I. L. R. 22 Mad. 261. (2) (1901-02) 6 Cal. W. N. 60.
(3) (1880) I. L. R. 4 Bom. 594.

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conduct falls short of legal estoppel, there is nothing in the Evidence Act which prevents it from being proved or, when proved, from being taken into consideration ".

It is, however, unnecessary in the present case to go further into this aspect of the question because in our opinion the finding of the lower appellate Court that the contract for the payment of the enhanced rent must be presumed to have been waived in the present case cannot be supported on other grounds. It will appear that in paragraph 13 of the written statement the defendant set up a definite case to the following effect—

" After the expiry of the term of the kabuliyat the *plaintiffs having waived their claim for enhancement in the presence of witnesses allowed these defendants' ancestor to hold over* in accordance with the terms of the settlement, i.e., on payment of Rs. 25-4-0 as jama for the 12-annas share and Rs. 8-7-0 for the 4-annas share."

Thus the case of the defendants in the written statement was that the contract had been expressly waived in the presence of witnesses. This the defendants evidently failed to prove, and the lower appellate Court consequently based its decision as to waiver mainly upon the acts and conduct of the parties. It was found by the lower appellate Court that the defendants paid rent at the original rate from 1312 to 1314 and also for subsequent years. Now, the finding of the lower appellate Court that the defendants paid rent for the years 1312 to 1314 at the original rate cannot be assailed because it is based upon some evidence, namely, the rent receipts granted for the period. The finding, however, so far as it relates to the subsequent years cannot be supported because it has been arrived at in spite of the case put forward by the defendants in their written statement in paragraph 13. The defendants have stated clearly in this paragraph that the plaintiffs realised rent at the original rate till the 7th Baisakh, 1314

Fasli. It is true that in paragraph 15 the defendants say that the

> "plaintiffs' amlas have realised the rent according to the khatian entry for the years in suit but they have not granted any receipts."

This statement, however, merely amounts to a plea of payment which has been rejected by both the Courts below. We do not think, therefore, that it was permissible for the lower appellate Court to go behind the pleading of the defendants and make out a case which is materially inconsistent with the written statement.

The question then is whether the mere fact that the patwari of the plaintiffs accepted rent at the original rate from the defendants for the years 1312 to 1314 Fasli (that is to say, for the three years immediately after the expiry of the term of the lease) is sufficient to raise the presumption that the contract for enhanced rent had been waived by the plaintiffs. It may be observed that there is nothing in the judgment of the lower appellate Court to show that the rents were accepted by the patwari to the knowledge of the plaintiffs. It has also been found that the rent receipts themselves do not show what was the *total jama payable* for the land in suit, the column for that entry having been left blank. Assuming, however, that the finding of the lower appellate Court as to the acceptance of rent by the plaintiffs from 1312 to 1314 and even in subsequent years cannot be assailed, there is ample authority for the proposition that mere acceptance of a reduced rent by the landlord for a number of years does not deprive him of his right to claim rent at the stipulated rate [See *Baijnath Prasad Sahu* v. *Raghunath Rai* (1); *Kailash Chandra Saha* v. *Darbari Sheikh* (2); *Manindra Chandra Nandi* v. *Sreemati Durga Sundari Dassya*(3); *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (4);

(1) (1911-12) 16 Cal. W. N. 496. (3) (1915-16) 20 Cal. W. N. 680.
(2) (1915-16) 20 Cal. W. N. 347. (4) (1914) I. L. R. 41 Cal. 493.

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Mayandi Chetti v. *Oliver* (1) and *Radha Raman Chowdhry* v. *Bhowani Prasad Bhowmik* (2).

It is true that where the conduct of the landlord is less equivocal, as for example, when he sues the tenant on the basis of the reduced rent as if that was the rent payable for the land, it may be presumed that the landlord has waived his right to recover a higher rent [see *Dhakeshwar Prasad Narain Singh* v. *Ishwardhari Singh*(3)]. But the principle of waiver must be strictly construed and should not be extended to cases where the circumstances are not clear and conclusive.

Now, the question of waiver being a mixed question of law and fact, a second appeal will always lie to impeach legal conclusions from findings of fact. In this particular case we are of opinion that the finding of the lower appellate Court that the contract as to the payment of rent at the rate of Rs. 7 per bigha had been waived, is based upon wholly inconclu sive circumstances, and must be set aside and, as the decree of the lower appellate Court is based on this finding, it must also be set aside.

The question, however, arises as to the terms of the decree to be passed by this Court. It was represented to us, and we felt that there was some force in the representation, that the defendants might find it somewhat hard to pay rent at the rate of Rs. 7 per bigha. The learned Advocate for the appellants, however, has taken a remarkably fair attitude in this case and states on behalf of the plaintiffs that the latter will accept rent at the rate of Rs. 5 instead of Rs. 7 from the defendants and allow them to cultivate the land on these terms. He is also willing to take a decree at the rate of Rs. 5 per bigha for the years in suit and to abandon the rest of the claim made in this suit. In these circumstances the order that

(1) (1899) I. L. R. 22 Mad. 261. (2) (1901-02) 6 Cal. W. N. 60.
(3) (1915) 22 Cal. L. J. 95.

we propose to pass is that we will set aside the judgment and the decree of the Courts below and pass a modified decree in favour of the plaintiffs at the rate of Rs. 5 per bigha for the years in suit.

It may be mentioned that the learned Counsel for the respondents attempted to argue before us that the stipulation for the payment of rent at the rate of Rs. 7 made in the kabuliyat was penal and could not be enforced. It is true that a somewhat similar provision in a kabuliyat executed by a tenant in favour of his landlord was held to be penal in the case of *Tejendra Narain Singh* v. *Bakai Singh* (1) but Rampini, J., who was one of the members of the Bench before which that case came up for decision, gave a dissenting judgment in the case and in a later case, the facts of which were very similar to the facts of the present case [*Ganpat Singh* v *Jasodhar Singh* (2)], it was definitely held that a stipulation for the payment of higher rent "was not a penalty incurred by reason of the non-execution of the fresh kabuliyats". This last case was followed in *Gobind Mandal* v. *Banarsi Prasad* (3) where it was held that an agreement by the defendant that, if he held over upon the expiry of the term of the lease, he would pay rent at a higher rate than he did during the term was valid and enforceable. This is also the view that has been consistently held in a series of decisions of this Court [see *Dilan Singh* v. *Ram Sunder Singh*(4), decided by Jwala Prasad, J.; *Garju Mandal* v. *Babu Kuman Das* (5), decided by the same Judge; *Kuman Das* v. *Dhupa Mandal* (6), decided by Adami, J.; *Ram Kant Chowdhry* v. *Kuman Das* (7), decided by Adami and Bucknill, JJ.; *Kuman Das* v. *Kachali Mandal* (8), decided by Wort, J., and *Kuman Das* v. *Tilakdhari*(9), decided by Sir Dawson Miller, C.J. and Mullick, J.]. It was clearly pointed out in these cases that the clause

(1) (1895) I. L. R. 22 Cal. 658.
(2) (1913) 17 Cal. L. J. 590.
(3) (1913) 18 Cal. L. J. 74.
(4) S. A. 1135 of 1916.
(5) S. A. 992 of 1917.
(6) S. A. 397 and 398 of 1919.
(7) S. A. 737 of 1919.
(8) S. A. 1602 of 1924.
(9) S. A. 849 of 1925.

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for the payment of the enhanced rent is not penal, because apparently it was not introduced into the lease to compel the performance of an act stipulated in the contract but was merely an option given to the lessee which he may accept or reject as he chooses; and, as was pointed out by Jwala Prasad, J., a stipulation to pay a higher rent for what is in effect giving to the defendant the valuable right of occupancy in the land is neither penal nor an unreasonable one. Besides, as was pointed out by Frere and Holloway, JJ., in *Adanky Ramchandra Row* v. *Indukuri Appalaraju Garu*(1), " the tendency of the Courts of equity as well as the Courts of law at the present day is to interfere as little as possible with the express intention of the contracting parties ", the same learned Judges further observing " we have sufficiently indicated our opinion as to the policy of relieving parties from the effects of their own stipulation. That policy has been condemned by nearly every eminent Judge who has had occasion to consider the subject, and arose at a period in which the views of the Legislature were very different to what they now are ".

I have dealt with this question at some length here because the learned Counsel for the respondents laid considerable stress upon it, although in our opinion it would have been sufficient to say that the point having been abandoned by the respondents in the Courts below, as is sufficiently clear from the judgment of the lower appellate Court, it could not be agitated again in this Court. The question as to whether a certain provision is penal or not is a mixed question of law and fact and as a rule it will not be permitted to be raised in second appeal if it is clear that it was abandoned in a subordinate Court which was competent to investigate questions of fact as well as of law. In any case the conclusion which we have arrived at is that, even if the provision for the payment of Rs. 7 per bigha could by any chance be

(1) (1865) 2 Mad. H. C. R. 451.

construed to be a penal provision within the terms of section 74 of the Contract Act, the plaintiff is according to that section itself entitled to a reasonable compensation not exceeding the amount named in the kabuliyat as the amount payable in the event of the breach of the contract; and in our opinion Rs. 5 per bigha which the plaintiffs are now willing to take as rent for the land cannot in any circumstances be considered to be either too high or unreasonable even if we treat it as a compensation to be awarded under section 74 of the Contract Act.

The learned Counsel for the respondents also contended that what the Courts below had virtually found was that there was a fresh contract between the parties after the expiry of the lease whereby the defendants' ancestors were allowed to hold over on payment of the original rent. Now, in the first place, as far as I can see, there is no definite finding to this effect in the judgment of the lower appellate Court which is the final Court of fact; and in the second place, paragraph 10 of the written statement is almost fatal to this argument, because it is distinctly stated there that

> "no fresh settlement was made after the expiry of the term of the kabuliyat."

It is true that in paragraph 13 the defendants set up a wholly different case and say that the plaintiffs waived their claim for an enhanced rent in the presence of witnesses and allowed the defendants' ancestor to hold over on payment of the old jama: but here the defendants' case comes directly within the mischief of proviso (4) of section 92 of the Evidence Act and, in any event, neither of the Courts below seems to have accepted the case of a subsequent oral agreement between the parties which was attempted to be set up in this paragraph of the written statement.

The result is that the contentions of the respondents fail and the appeal is decreed in the terms mentioned above. The appellants will be entitled to proportionate cess and damages as also costs in

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proportion to their success from the respondents in all the Courts.

CHATTERJI, J.—I agree. The case of the defendants as made out in paragraph 13 of the written statement seems to be that there was a fresh agreement, after the expiry of the term of the kabuliyat, that the defendants would hold over on payment of the initial jama of Rs. 33 and odd. The original lease having been by a registered document reduced into writing, no subsequent oral agreement to vary the terms thereof is admissible in evidence under section 92 of the Evidence Act. The kabuliyat provides that if the tenant holds on after the expiration of his lease he will have to pay rent at Rs. 7 a bigha as mentioned therein. The oral evidence to vary this part of the contract is undoubtedly excluded by the Evidence Act. But the question is whether any evidence of conduct is admissible in the present case. The case on the point, as stated in paragraph 13 of the written statement, is that the plaintiff realized rent at the initial amount of Rs. 33 and odd from the expiration of the term of the lease till the 7th Bysack, 1314 Fasli, that is from 1312-1314. The acts and conduct of the parties, so far as they are proof of a contemporaneous oral agreement varying the terms of the registered contract, or proof of a subsequent parol agreement, cannot be legally admissible in evidence. When evidence of an oral agreement is excluded it necessarily follows that proof to be implied from the acts and conduct of the parties must be similarly excluded. [See *Radharaman* v. *Bhowani* (1) and *Mayandi Chetti* v. *Oliver*(2).] But evidence of conduct is admissible to show that as between the landlord and the tenant the term in the kabuliyat for the payment of a particular rate of rent, on the expiration of the term of the lease if the tenant would hold on, was never intended to be acted upon

(1) (1910) 12 Cal. L. J. 439. (2) (1899) I. L. R. 22 Mad. 261.

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or enforced. [See *Beni Madhab* v. *Lalmati* (1) and *Manindra Chandra Nandi* v. *Srimati Durga Sundari* (2)]. Evidence of conduct is also admissible to prove an estoppel or waiver [*Lakshman* v. *Gobind*(3)]. Now in the present case it appears that the plaintiff's gomashta accepted rent at the lower rate for two or three years and granted receipts for the same but without specifying the amount of jama in the appropriate column in the printed rent receipts. All that the receipts would show is that the plaintiff's gomashta realized rent which works at the lower rate. This cannot by any stretch be taken as amounting to a legal estoppel or waiver of the plaintiff's rights. The facts that the amount of rental was not mentioned in the printed receipts and no rent has since been realized contra-indicate the theory that this particular term in the kabuliyat was not intended to be acted upon. Then, the landlord is not deprived of his right to claim rent at the rate stipulated in the kabuliyat by a mere acceptance of rent at the reduced rate [see *Baidyanath* v. *Raghu Nath* (4) and *Kailash* v. *Darbaria* (5)]. I do not think I can profitably add anything else to the elaborate judgment of my learned brother.

Decree varied.

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Before Wort and Rowland, JJ.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 22, *proviso*—"*last order against the party*",

*Appeal from Appellate Order no. 258 of 1928, from an order of Babu Radha Krishna Prasad, Additional Subordinate Judge of Patna, dated the 9th July, 1928, affirming an order of Maulvi Md. Khalil, Munsif of Patna, dated the 13th August, 1927.

(1) (1901-02) 6 Cal. W. N. 242. (3) (1880) I. L. R. 4 Bom. 594.
(2) (1915-16) 20 Cal. W. N. 680. (4) (1911-12) 16 Cal. W. N. 496.
(5) (1915-16) 20 Cal. W. N. 347.