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JATTU SHAH-NATHU SHAH
v.
COMMISSIONER OF INCOME TAX.

HARRISON J.

claim to be before he proceeds further with the application."

Our answer to the question, therefore, will be that it is open to the Income Tax Officer to find against the declarations contained in a partnership deed and reiterated by the parties before him that a Hindu joint family still exists. The second question does not arise.

The costs of the respondent will be paid by the petitioner.

N. F. E.

Reference answered in the affirmative on question (1).

APPELLATE CIVIL.

Before Broadway and Bhide JJ.

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Nov. 6.

SUNDER SINGH AND OTHERS (DEFENDANTS) Appellants

versus

RAM SARAN DAS (PLAINTIFF) Respondent.

Civil Appeal No. 374 of 1925.

Transfer of Property Act, IV of 1882, Sections 106, 107 and 111 (a): Leases—oral—legality of—in the Punjab—Lease for fixed term—Notice to vacate—whether necessary—Indian Registration Act, XVI of 1908, Sections 17 and 49: Written 'Memorandum'—of some of the terms orally agreed upon—whether compulsorily registrable—Indian Evidence Act, I of 1872, Section 92: whether applicable—Contumacious holding over—Damages—measure of.

Held, that the Transfer of Property Act not being in force in this Province, an oral agreement of lease can be binding and execution of a formal document or its registration is not essential to its validity, even where it was at first contemplated by the parties that a formal document embodying its terms should be subsequently executed and registered but was not so executed.

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Held further, that a letter embodying the principal terms orally agreed upon in such a case is admissible in evidence and does not attract the provisions either of Section 49 of the Registration Act or of Section 92 of the Indian Evidence Act.

And, that the letter should be read as a whole and the fact that the present tense had been used in it, does not necessarily disprove the lessor's contention that it in fact merely recited what had been agreed upon orally.

Held also, that where such letter definitely stated the terms of the lease was five years, the defendant-lessee could not be heard, for the first time on appeal, to plead that there was an understanding between the parties that the lease should be renewed for another five years unless six months' notice was given earlier; or to rely upon the principle as to notice embodied in Section 106 of the Transfer of Property Act. The oral agreement having been for a fixed term, the defendant-lessee was bound to vacate on the expiry of that term without notice—*vide* Section 111 (*a*).

Held further, that where the lessee holds over after the expiry of the term of his lease contumaciously, the proper measure of damages in a suit by the lessor is double the normal rent, according to English Law and the same has been held to be ordinarily a suitable guide in such cases in this Province.

Ganga Singh v. *Mst. Shib Devi* (1), *Pirbhu Dayal* v. *Ram Chand* (2), *Madan Mohan Lal* v. *Barooah & Co. Delhi* (3), and *Mul Raj* v. *Indar Singh* (4), followed.

Gurushantappa v. *Mallava Ram Sangappa Chandi* (5), and *Sunder Mull* v. *Ladhuram Kaluram* (6), distinguished.

But, that the rule is not inflexible and less or more may be awarded by way of damages according to circumstances.

Narain Das v. *Dharam Das* (7), followed.

First appeal from the decree of Lala *Suraj Narain, Senior Subordinate Judge, Lahore, dated the 12th November, 1924, awarding the plaintiff*

(1) 33 P. R. 1898.
(2) 5 P. R. 1904.
(3) 70 P. R. 1918.
(4) (1928) I. L. R. 9 Lah. 576, 580.
(5) (1921) I. L. R. 45 Bom. 1197.
(6) (1923) I. L. R. 50 Cal. 667.
(7) (1932) I. L. R. 13 Lah. 216.

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possession of the mills, and Rs. 37,000 including arrears of rent up to 31st May, 1922, and damages at Rs. 5,000 per mensem and interest.

DURGA DAS, EDMUNDS, MELA RAM and BHAGWAN DAS, for Appellants.

BADRI DAS, J. N. AGGARWAL, GOVIND DAS and DUNI CHAND GUPTA, for Respondent.

BHIDE J.

BHIDE J.—Civil Appeals Nos. 374, 375 and 376 of 1925 are connected and can be conveniently disposed of together. They arise out of two out of five suits which were lodged by the plaintiff *Rai Bahadur* Ram Saran Das in connection with a dispute which had arisen over the lease of the Mela Ram Cotton Mills, of which he is the proprietor, to the defendants. The material facts relevant for the purposes of these appeals can be briefly stated as follows. The defendants came to an oral agreement with the plaintiff in connection with the lease of the Mills for a period of five years at an annual rent of Rs. 30,000 and on the 20th February, 1917, a letter (Exhibit P/2) was written to the plaintiff by defendant Sundar Singh stating briefly the terms of that oral agreement. The letter recites that a formal document was to be drawn up and registered at the expense of the defendants, embodying the terms given in the letter as well as some others which had been agreed upon but were not mentioned in the letter. The defendants entered into possession of the Mills in pursuance of the agreement shortly thereafter, but the formal agreement was never drawn up or registered.

Later on, it appears, that differences arose between the parties in connection with the management of the Mills and on the 20th July, 1920, the plaintiff sent a notice to the defendants through his

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counsel complaining of damage to the Mills and also of defendants' failure to get a formal lease executed and asking them to vacate the Mills by the 31st August, 1920. Defendants replied that they could not be ejected from the Mills before the expiry of the term of five years for which they had taken the Mills on lease. They denied that any damage had been caused to the Mills and as regards the execution of a formal lease, they stated that the matter had never been pressed by the plaintiff and no lease was drawn up simply because owing to the good relations existing between the parties the 'idea had vanished from the hearts of both the parties.'

The defendants having failed to vacate the Mills in pursuance of the notice served on them, the plaintiff refused to accept rent from them as his tenants and from the 1st September, 1920, the amounts remitted by them were treated by the plaintiff merely as deposits and allowed to remain as such to their credit in the Central Bank of India.

Early in 1921, the plaintiff made unsuccessful attempts to obtain an injunction to restrain the defendants from working the Mills on the ground that they had failed to insure the Mills and that the boiler was in a dangerous condition. On the 8th August, 1921, he instituted his first suit for ejectment and recovery of Rs. 13,411-1-9 as arrears of rent or damages. This suit was based on the allegation that the defendants had stopped payment of rent from June, 1921, owing to disputes between the parties and were liable to ejectment either as trespassers or as tenants who had forfeited the tenancy. Defendants raised certain preliminary objections urging, *inter alia*, that the plaintiff was bound to pay full court fees on the

plaint as he was treating them as trespassers—a position which they accepted in Court (*vide* statement of the counsel for the defendants before the issues dated the 16th December, 1921). The plaintiff, thereafter, paid full court fees. On the merits, the defendants denied that any amount was due to the plaintiff 'on account of rent' and claimed on the contrary that a considerable amount was due to them from the plaintiff. They complained of the plaintiff's failure to supply machinery, godowns and other articles according to the terms of the agreement and claimed a reduction in rent on that account. As regards the alleged failure to pay rent, they also pointed out that the plaintiff himself had refused to accept rent from the 1st September, 1920.

While the above suit was pending, the term of five years which had been originally agreed between the parties expired on the 31st May, 1922, but the defendants failed to vacate the Mills even then. The plaintiff gave telegraphic notice to the defendants on the 24th July, 1922, that he would charge enhanced rent at the rate of Rs. 10,000 per mensem from the date of the expiry of the lease. Defendants, however, still refused to vacate the Mills, claiming that they were entitled to proper and reasonable notice according to law and that as no such notice had been given prior to the expiry of the period of five years the lease stood extended by another year, *i.e.* up to the 31st May, 1923. The plaintiff, thereupon, instituted his second suit for ejectment on the 25th August, 1922. This was based on the allegation that the defendants had failed to vacate the Mills though the term of five years which had been originally agreed upon between the parties had expired and claiming

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Rs. 25,000 on account of arrears of rent up to 31st May, 1922, and Rs. 29,000 for the subsequent period at the enhanced rate of Rs. 10,000 per mensem, with interest at Re. 1 per cent. per mensem. Plaintiff also asked for an injunction immediately restraining the defendants from working the Mills. This injunction was granted by the trial Judge and the order was upheld by this Court. The defendants thereafter vacated the Mills.

The above mentioned two suits for ejectment and rent were disposed of together in one judgment by the trial Court as many of the questions of fact and law which arose were common to both the suits. The learned Senior Subordinate Judge, who tried the suits, has granted a decree for possession of the Mills in the second suit together with a sum of Rs. 37,000 including arrears of rent up to 31st May, 1922, and damages at the enhanced rate of Rs. 5,000 per mensem for the subsequent period. He also allowed interest at six *per cent. per annum* on the amount decreed with proportionate costs. In view of the decision in the second suit he considered it unnecessary to pass another decree for possession in the first suit. He decreed the claim for Rs. 13,411-1-9 on account of arrears of rent in that suit but disallowed costs on the ground that the plaintiff had acted with " unseemly haste " in instituting suits one after another and that but for the ill-advised defence set up by the defendants as trespassers, this suit for possession had every chance of being thrown out.

From this decision the present appeals have been preferred. The defendants alone have appealed from the decree in the first suit (*vide* Civil Appeal No. 375 of 1925), while both the parties have

appealed from the decree in the second suit (Civil Appeals Nos. 374 and 376 of 1925).

As regards the decree in the first suit only three points were urged by the learned counsel for the defendants, *viz.* :—

(*i*) There was a mutual, continuous, running account between the parties, and, therefore, the plaintiff could not sue for rent alone;

(*ii*) That the plaintiff having failed to supply machinery and other articles according to the terms of the lease, the defendants were entitled to a reduction of the rent:

(*iii*) That the plaintiff's claim for possession having been held to be frivolous and premature, the defendants should have been allowed costs.

As regards the first point, the learned counsel had to admit that no such plea was raised or put in issue. The contention was apparently raised in the Court below at the stage of arguments and was rightly disallowed by the learned Subordinate Judge. It was urged that the fact that there was a continuous running account is patent on the record. This contention seems to have no force. The question is one of fact and the plaintiff was certainly entitled to have notice of the plea at the proper time if the defendants intended to rely on it. The mere fact that the items of rent are not entered in a separate account book cannot be held sufficient to show that there was a 'mutual, open and current account' between the parties as urged on behalf of the defendants.

The second contention seems equally untenable. The learned counsel for the defendants has drawn our attention to certain letters on the record in which the

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defendants complained that certain articles had not been supplied by the plaintiff but there is no evidence to show whether these articles were eventually supplied or not and what damage, if any, was caused by the delay or failure to supply these articles. In the absence of such evidence the defendants' claim for reduction of rent, which is based on this contention, must clearly fail.

As regards the question of costs, it is to be remembered that the learned counsel for the defendants accepted the position as trespassers in his statement dated the 16th December, 1921, with the result that the plaintiff had to pay heavy court fees. In the circumstances, it was scarcely open to the defendants to rely on any lease. Further, on the question of the arrears of rent, the defendants pleaded that no rent was due at all—a plea which they entirely failed to substantiate. It is true that the plaintiff had refused to accept rent from the defendants after June, 1920, but the defendants had continued to send it for some time and the amount was being duly credited to them, —though as a deposit. If the defendants had frankly admitted and deposited in Court the amount due from them and had said that they had discontinued remitting rent only on account of plaintiff's failure to accept it, the matter would have been different; but they took up instead the frivolous plea that nothing was due from them and made a counterclaim. In view of these facts, the defendants have, in my opinion, no justification for asking for their costs in this suit.

On the above findings I would dismiss appeal No. 375 of 1925 with costs.

As regards the second suit, the dispute between the parties centred chiefly round the question of the

necessity of notice before the expiry of five years and the enhanced rent claimed by the plaintiff after that period. The amount claimed on account of arrears of rent up to the expiry of five years is not now disputed.

As to the first point, the defendants' position was that as no lease was executed and registered, as originally contemplated, the defendants became 'tenants from year to year' and were entitled to six months' notice terminating with the end of the year on the principle laid down in section 106 of the Transfer of Property Act and as no such notice was given prior to June 1922 they were entitled to retain possession at any rate for another year, *i.e.* up to 31st May, 1923. They contended that the letter dated the 20th February, 1917, relied upon by the plaintiff in which the terms of the oral agreement were recited was inadmissible in evidence owing to want of registration. They disputed their liability to pay enhanced rent on the ground that the plaintiff had failed to prove any loss sustained by him.

The position taken up by the defendants on the question of notice seems to my mind clearly untenable. It is common ground that there was at the outset an oral agreement between the parties as regards the lease of the Mills. It is also not disputed that the Transfer of Property Act not being in force in this Province, even an oral agreement of lease can be binding and that the execution of a formal document or its registration is not essential to its validity. In the present instance it was, no doubt, at first contemplated that a formal document should be executed and registered; but it does not appear that the lease was in any way dependent on the execution of such a docu-

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ment. The defendants were in fact let into possession at once and neither party apparently troubled about the matter for about three years. It was in the notice given on the 20th July, 1920, that the plaintiff apparently complained for the first time about the defendants' failure to execute a lease. The defendants themselves then stated in their reply to this notice that owing to the friendly relations which existed between the parties at first the idea had been abandoned. The position now taken up by the defendants is obviously inconsistent with this reply. If the execution of a document were considered essential, the plaintiff could not have been expected to wait for three years and I see no reason to doubt that the defendants' reply represented the correct position.

The letter Exhibit P/2 relied upon by the plaintiff seems to be clearly in the nature of a memorandum. A perusal of the letter will suffice to show that it did not include all the terms and that a lease embodying all the terms was to be executed later. This letter cannot, therefore, attract the provisions either of section 92 of the Indian Evidence Act or of section 49 of the Indian Registration Act. It was urged that the present tense is used in the letter and that it does not merely recite what had happened in the past. But the letter must be read as a whole and it seems to my mind quite clear on such perusal that the letter is nothing more than a memorandum reciting the more important terms orally agreed upon.

The letter, Exhibit P/2, shows that the term of the lease was five years. A feeble attempt was made by the defendants in the course of the evidence to prove that there was an understanding between the parties that the lease should be renewed for an-

other five years unless six months' notice was given earlier. But no plea of this nature was put forward in the written statement and no mention of any such understanding is to be found in the memorandum, Exhibit P/2. It was urged that the defendants Hira Singh and Sundar Singh have deposed to this fact in the course of their evidence in Court, while the plaintiff has not ventured to go into the witness box to rebut their statements. But as no plea of this nature was put forward in the written statements and the plaintiff had already closed his case, there was no occasion for him to go into the witness box.

In view of the above finding no question of a 'year to year' tenancy arises and it is unnecessary to discuss the principle as to notice embodied in section 106 of the Transfer of Property Act on which the defendants have sought to rely. The idea of the execution and registration of a formal lease having been abandoned, the oral agreement arrived at between the parties stood and the term of the lease according to that agreement was five years. The lease being for a fixed term the defendants were clearly bound to vacate the Mills on the expiry of the term without any notice (*cf.* section 111 (*a*) of the Transfer of Property Act).

The next question for decision is that of damages. The learned Senior Subordinate Judge has found that the defendants' conduct in refusing to vacate the premises even on the expiry of the period of five years was 'contumacious,' and I have no hesitation in agreeing with this finding. Long before the expiry of the terms the relations between the parties had become strained and litigation had commenced since March, 1921. Two suits for ejectment had already

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been instituted and defendants must have been fully aware that there could be no question of any renewal of the lease in the circumstances. The plea as to renewal of the lease raised by the defendants, therefore, seems to be frivolous. I have already held above that the defendants were bound to vacate on the expiry of the fixed term without notice; but even if any notice had been necessary they had ample notice ever since the commencement of the litigation in 1921.

The defendants' having 'held over' contumaciously the plaintiff was clearly entitled to damages. The learned counsel for the defendants has urged that section 73 of the Indian Contract Act lays down the only rule for assessing compensation for the breach of a contract and as the plaintiff has failed to prove any actual loss he is not entitled to any damages over and above the rent originally agreed upon. As regards this contention, it must be said that the plaintiff has failed to produce any satisfactory evidence as to the actual loss to which he was put. The evidence of Mani Ram (P. W. 1) and Mr. Gokhale (P. W. 2), on which the learned counsel for the plaintiff has mainly relied appears to be interested and unconvincing. Mani Ram is a Secretary of the plaintiff. His estimate of Rs. 25,000 or Rs. 30,000 per mensem as the profits likely to be derived from working the Mills is unsupported by any reliable data and seems to be clearly an exaggeration. Mr. Gokhale was also in the pay of the plaintiff. He admits that he was a stranger to the Punjab and had no experience of the Punjab Mills. His experience is confined to Bombay Mills, but no reliable documentary evidence even as regards the profits of those mills has been produced. In these circumstances, no reliance can be placed on

the conjectural estimates of profits of either of these witnesses. In the absence of any satisfactory evidence to prove actual loss, the plaintiff's claim for damages at the rate of Rs. 10,000 per mensem was, I think, rightly disallowed.

The learned Subordinate Judge has assessed the damages at double the rent on the authority of *Ganga Singh & another* v. *Mst. Shib Devi* (1) and *Pirbhu Dayal* v. *Ram Chand &c.* (2). But the learned counsel for the defendants has urged that these authorities do not lay down correct law, and that the plaintiff having failed to prove any further loss sustained by him on account of defendants' failure to vacate the premises, the proper measure of damages was the rent agreed upon between the parties and nothing more. In support of this contention the learned counsel has chiefly relied upon *Gurushantappa & others* v. *Mallava Ram Sangappa Chandi* (3) and *Sunder Mull* v. *Ladhuram Kaluram* (4). The former ruling has no bearing on the present case, as no question of any damages for 'contumacious' holding over of a tenancy arose in that case. In *Sunder Mull* v. *Ladhuram Kaluram* (4), the plaintiff claimed from a tenant, who had 'held over' for a certain period after notice, damages under two heads *viz.*: (*i*) mesne profits, (*ii*) rent at a higher rate which he had expected to derive from the new buildings which he intended to construct on the premises occupied by the tenant. The claim under (*i*) was not disputed. As regards (*ii*), it was held that no claim for damages on the basis of a breach of contract was maintainable, but that the claim could be treated as one in tort. It was held further that the measure

(1) 33 P. R. 1898.
(2) 5 P. R. 1904.
(3) (1921) I. L. R. 45 Bom. 1197
(4) (1923) I. L. R. 50 Cal. 667.

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of damages even in cases of tort is the loss which flows directly and in the usual course of things from the wrongful act. It may, however, be pointed out that the tenant in that case had refused to vacate on the ground that he was a lessee for a period of three years and though that claim failed there was no definite finding that he had held over ' wilfully and contumaciously ' as in the present case. Consequently the question as to what is the proper measure of damages in cases where a tenant holds over ' contumaciously ' did not arise and was not discussed in that case. The rulings on which the learned Subordinate Judge has relied are, on the other hand, directly in point and the law as laid down therein has been consistently followed in this Province for a number of years [see in addition to the rulings relied upon by the learned Subordinate Judge, *Madan Mohan Lal &c.* v. *Barooah & Co. Delhi* (1) and *Mul Raj* v. *Indar Singh &c.* (2)]. The rule according to which double the normal rent is taken as a suitable measure of damages in such cases is taken from English Law. The matter is, no doubt, regulated by Statute in England (see 4 Geo. 2, Cap. 28), but the rule has been taken to be ordinarily a suitable guide in such cases in this Province. The rule is, of course, not inflexible and less or more may be awarded by way of damages according to circumstances [*cf. Mul Raj* v. *Indar Singh* (2); also *Narain Das* v. *Dharm Dass* (3)], if there is evidence to justify such a course. There is no doubt that the defendants were making good profit and the contumacious manner in which they refused to vacate the premises even after the expiry of five years and resisted the present suit as long as they could by setting up frivolous pleas, such as that of a

(1) 70 P. R. 1918. (2) (1928) I. L. R. 9 Lah. 576, 580.
(3) (1932) I. L. R. 13 Lah. 216.

yearly tenancy, appears to have been due to this fact. Although the plaintiff failed to produce satisfactory evidence to prove the profit he could have made by working the mill, it may be fairly assumed in the circumstances that the profit would have been substantial. There had been already litigation between the parties before the expiry of the term of five years and the defendants must have foreseen the possibility of heavy damages being demanded from them; yet they chose to continue to occupy the premises and even a notice from the plaintiff threatening to charge rent at the rate of Rs. 10,000 per mensem failed to have any effect. In view of all the circumstances of this case I see no good reason to hold that the amount of damages awarded by the Subordinate Judge is excessive.

No other points have been pressed. I would accordingly dismiss these appeals (Civil Appeals Nos. 374 and 376 of 1925) with costs.

BROADWAY J.—I concur.

BROADWAY J.

N. F. E.

Appeals dismissed.