1911.

MADAPPA HEGDE v. RAMKRISHNA NARAYAN.

As regards costs the appellants are entitled to them here and in the High Court. The costs in the lower Court will abide the event of the further hearing in the High Court.

Solicitors for the appellants : Messrs. *T. L. Wilson and Co.*

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.

September 2.

SIDICK HAJI HOOSEIN, APPELLANT AND DEFENDANT, *v.* BRUEL AND CO., RESPONDENTS AND PLAINTIFFS.*

Landlord and tenant—Sub-lessee—Avoidance of lease—Vacant possession—Holding over—Transfer of Property Act (IV of 1882), section 108.

The plaintiffs were lessees of a godown for one year from 1st April 1908, at a monthly rent. From 1st May 1908 they sublet it on the same terms for the remainder of their lease to the defendant who used it for storing bags of sugar. On 5th December the godown was partially destroyed by fire, and a quantity of sugar therein considerably damaged. The defendant's insurers came in to take charge of the salvage, but soon after sold the remains of the sugar to G. M., and the latter then took possession, and continued in possession, sorting the sugar until 16th February 1909. Meanwhile on 10th December the plaintiffs had written to the landlord advising him of the fire and of their termination of the lease in consequence. The landlord, however, insisted on their liability to pay rent until such time as vacant possession should be given to him. The defendant, in answer to a bill for rent, wrote to the plaintiffs to the effect that he had terminated his lease on account of the fire, and would not pay more than the proportionate rent for the first 5 days of December. As, however, vacant possession was not given until 16th February (on which day G. M. went out of possession) the plaintiffs sued the defendant for rent and for use and occupation.

Held, that the plaintiffs could not exercise their option to terminate the lease until they put the landlord into possession. If the avoidance of the lease under

* Appeal No. 10 of 1910. Suit No. 257 of 1909.

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section 108 (*e*) of the Transfer of Property Act (IV of 1882)(1) was effectual without surrender of vacant possession, the plaintiffs by failing to give vacant possesion were holding over after the termination of their lease and were liable for rent under an implied monthly tenancy on the same terms as before. If the avoidance was ineffectual, the lease continued until put an end to by mutual consent.

Held, further, that the abandonment to the insurers by the defendant was effected for his benefit, and, in the absence of evidence that the insurers and their vendee G. M. kept the sugar in the godown in spite of protests by the defendant, the latter (as between the plaintiffs and the defendant) must be taken to have been in occupation either under his original tenancy or under a similar one resulting from his holding over.

THIS was a suit filed by the plaintiffs to recover from the defendant a sum alleged to be due either as rent or as compensation for use and occupation of a certain godown in Clive Road for the months of December 1908, and January and February 1909. The godown in question was leased to the plaintiffs by one Lakhamsey Napu for 12 months from 1st April 1908 at a monthly rent of Rs. 1,100, and sublet by the plaintiffs to the defendant at the same rent from 1st May 1908 for the remaining period of their lease. The defendant used the godown for the storage of bags of sugar, and paid the rent regularly up to 30th November 1908. On 5th December 1909, however, a fire broke out and the godown was badly damaged, the roof being entirely destroyed and several doors and windows partly burnt. Immediately after the fire the salvage corps of the Insurance Companies, with whom the defendant had insured his sugar, took possession of the godown and the goods in it. After 3 or 4 days, however, they sold the sugar to one Gulam Mahamad Azam, who at once went into possession and began to sort the sugar and to put it into new bags.

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(1) Section 108 (*e*) of the Transfer of Property Act runs as follows:—

108 (*e*). If by fire, tempest or flood, or violence of an army or of a mob or other irresistable force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.

On 10th December the plaintiffs wrote to Lakhamsey Napu :—

"We herewith beg to hand you our cheque for Rs. 1,100 in payment of the November rent of the godown in Clive Road leased by us from you.

As the godown has now been burnt, please note that our agreement ceases until such time as it shall have been thoroughly repaired and made fit for the storage of goods."

Lakhamsey replied on 11th December, the material portion of his letter being :—

"In reply to the second para. of your letter under reply, I beg to say that you will have to pay the rent of the godown as sugar bags and other *kutchra* are still lying therein, and until the godown is cleared and possession given of it to me, please note that you are responsible for it. You will please advise your sub-tenant to remove sugar bags and other *kutchra*."

The plaintiffs, being unable to give vacant possession to Lakhamsey, in fact paid rent to him for the month of December.

The defendant, in response to a bill from the plaintiffs for the rent for December, wrote the following letter to them on 9th January 1909 :—

"With reference to the rent bill for the month of December last in respect of the godown in Clive Road ... sent to me, you are aware that the godown in question having been destroyed by fire on the evening of the 5th December, I exercised my option to terminate the tenancy, and the same is at an end. I am not therefore liable to pay rent for the month, beyond the 5 days that the godown was fit for use and I am ready and willing and hereby offer to pay you proportionate rent for the said 5 days. The same will be paid on your sending an amended bill."

In answer to this the plaintiffs wrote (*inter alia*) :—

"We beg to inform you that we find the godown is full of your salvage and therefore it is still in your occupation. We must insist upon your paying us the rent in full, and return you our bill herein enclosed."

Vacant possession was not given to Lakhamsey Napu till 16th February 1909.

The suit was filed on 23rd March 1909, and came on for hearing before Davar, J., who passed a decree in favour of the plaintiffs for rent from 1st to 5th December 1908, and for compensation for use and occupation thereafter till 15th February 1909.

The defendant appealed.

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Weldon, with *Jinnah*, for the appellant:—Relationship is implied in a suit for use and occupation. If there was no relationship between the parties, the suit must fail: for damages have not been claimed. There was in fact no relationship after the respondents' notice to Lakhamsey on 10th December. After that notice, if a right existed in anyone to claim against the appellant, it must have been in Lakhamsey alone. More probably the only right existing was that of Lakhamsey to sue the purchaser of the sugar as a trespasser. It is noteworthy that the word used in section 108 (*e*) of the Transfer of Property Act is 'void'. The lease does not merely determine: it is void. With regard to the sufficiency of notice given by the appellant, see *Kunhayen Haji* v. *Mayan*[1] and *Baliaramgiri* v. *Vasudev*[2].

Setalwad, with him *Jardine*, Acting Advocate General, for the respondents:—The lease by Lakhamsey to the respondents was not in fact terminated by the letter of 10th December. The correspondence and the facts show that clearly. The letter itself is not such an avoidance of the lease as is contemplated by section 108 (*e*) of the Transfer of Property Act. The respondents paid the rent for December, and Lakhamsey accepted it. Finally, they did not give him vacant possession. They were obviously still his lessees Further, the appellant's notice of avoidance was not given within reasonable time. He had continued in possession as if nothing had happened. In any case the notice could not make the lease void '*ab initio*', but at the most only from the date of the notice: *Dhuramsey* v. *Ahmedbhai*[3]. But even after that date, he failed to give vacant possession, and thus continued liable.

Weldon, in reply:—The letter from the respondents' solicitor to Lakhamsey on 20th January states clearly that they are exercising their option. The rent for December may possibly have been paid under a misapprehension as to their rights. The appellant was not using the godown. He had no concern with the purchaser of the sugar. In *Dhuramsey* v. *Ahmedbhai*[3] there was no question of sub-tenancy.

(1) (1893) 17 Mad. 98. (2) (1896) 22 Bom. 348.
(3) (1898) 23 Bom. 15 at p. 19.

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SCOTT, C. J. :—The plaintiffs rented from one Lakhamsey Napu a godown in Clive Road from the 1st April 1908 to the 31st March 1909 at a rent of Rs. 1,100 per mensem with liberty to sublet it or relet it and the landlord agreed to keep the godown in good order and repair.

On the 17th April 1908 the plaintiffs relet the godown to the defendant for the remainder of their term, *i. e.*, from the 1st May 1908 to the 31st March 1909 at the same rent and agreed to execute every kind of repairs.

The defendant occupied the godown and used it for the storage of bags of sugar. On the 5th December 1908 the godown was much damaged by fire, the roof and some doors and windows and the plastering of the walls being destroyed. On the 10th of December 1908 the plaintiffs sent to Lakhamsey a cheque for the November rent and wrote that as the godown had now been burnt their agreement ceased until it should have been thoroughly repaired and made fit for the storage of goods.

Lakhamsey replied on the 11th December that plaintiffs would have to pay the rent of the godown as sugar bags and other *kutchra* were still lying therein and that until the godown was cleared and possession given to Lakhamsey the plaintiffs were responsible for it.

These letters are consistent with complete ignorance on the part of the writers of the provisions of section 108 (*e*) of the Transfer of Property Act under which the plaintiffs had the option of electing to treat the lease as void. The letter of the 10th of December rather indicates that the plaintiffs wished to have the godown repaired by Lakhamsey for their benefit and that rent should be suspended during the repairs.

At any rate owing to the conduct of the defendant and his assignees in not vacating the godown the plaintiffs were unable to let Lakhamsey into possession and accordingly paid rent for the month of December.

On the 16th January 1909 Lakhamsey recommenced the correspondence by threatening to charge Rs. 2,000 from the 1st February if the possession was not given on the 31st January in consequence of the plaintiffs holding over.

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The plaintiffs then resorted to solicitors and on the 20th January wrote that the godown having been destroyed by fire, on the 5th of December 1908, they exercised their option to terminate the lease and denied liability for rent after the 1st of January.

On the same date the landlord Lakhamsey replied that the plaintiffs could not exercise their option to terminate the lease until they put him into possession of the godown. To this position Lakhamsey adhered, and in this position the plaintiffs appear to have acquiesced until Lakhamsey was, owing to the removal of the sugar stored by the defendant, able to take possession of the godown.

The position taken up by Lakhamsey was, in our judgment, perfectly correct, and was in accordance with the provisions of section 108 (*m*) of the Transfer of Property Act. If the avoidance of the lease under section 108 (*e*) was effectual without surrender of vacant possession, the plaintiffs by failing to give vacant possession were holding over after the termination of their lease and were liable for rent under an implied monthly tenancy on the same terms as before. If the avoidance was ineffectual the lease continued until put an end to by mutual consent.

The defendant's position from the time of the fire was that he abandoned his sugar to his insurers who sold it to Gulam Mahamad Azam. The defendant did not make any arrangement to empty the godown on abandoning to the insurers but says he gave notice to the plaintiffs immediately the fire took place that he avoided his lease. This story was, we think rightly, disbelieved by the learned Judge. Gulam Mahamad, the purchaser of the sugar, utilized the godown as a place in which to put the sugar into different bags. Until this was done the sugar was not removed. The godown was vacated finally on or about the 16th of February.

The defendant on the 9th of January 1909 gave written notice to the plaintiffs that he had exercised his option to terminate the tenancy. The plaintiffs replied that as the godown was full of his salvage it was in his occupation and he was therefore liable for rent.

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In our judgment this contention was correct. The abandonment to the insurers by the defendant was effected for his benefit and, in the absence of evidence that the insurers and their vendee Gulam Mahamad kept the sugar in the godown in spite of protests by the defendant, we think that as between the plaintiffs and defendant, the latter must be taken to have been in occupation, either under his original tenancy or under a similar one resulting from his holding over.

In our judgment the respective tenancies of the plaintiffs and the defendant terminated upon Lakhamsey entering into possession on the 16th of February by the consent of all parties interested. The defendant is, therefore, liable for the rent to plaintiffs up to that date.

We accordingly affirm the decree of the lower Court and dismiss the appeal with costs.

Attorneys for the appellant: Messrs. *Thakurdas and Co.*

Attorneys for the respondents: Messrs. *Pestonji, Rustomji and Colah.*

Decree affirmed.

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Robertson.

1910. *September* 10.

BHAISHANKER AMBASHANKER, PLAINTIFF, *v.* MULJI ASHARAM AND OTHERS, DEFENDANTS.*

Practice—Security for costs—Infant plaintiff—Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1.

It is not desirable to run any risk of stopping a suit filed on behalf of an infant, which may be a proper suit to bring, merely because of some inability on the part of the next friend to give security for costs.

PROCEEDINGS in Chambers.

The plaintiff was a minor, and sued by his next friend (*inter alia*) for an injunction restraining the defendants from per-

* Suit No. 401 of 1910.