1920.

EMPEROR v. SHAM-SUNDARBAI.

Therefore, apart from the connection between the two occasions on which the girl is said to have stayed with the accused, as regards her going to the accused on the second occasion, if the facts alleged are proved, I do not see any insuperable difficulty in the way of the prosecution on the interpretation of the section. On this ground also there is need for a further inquiry.

I would, therefore, set aside the order of discharge and direct a further inquiry into the case by the Chief Presidency Magistrate or by any Presidency Magistrate other than Mr. Dastur, whom the Chief Presidency Magistrate may appoint.

CRUMP, J. :—I concur.

Order set aside
R. R.

ORIGINAL CIVIL.

Before Mr. Justice Setalvad.

1920. *June 14.*

KASTURBHAI MANIBHAI (PLAINTIFF) *v.* HIRALAL DAHYABHAI (DEFENDANT) * AND KASTURBHAI MANIBHAI (PLAINTIFF) *v.* S. R. DAVAR (DEFENDANT) †.

Bombay Rent (War Restrictions) Act II of 1918, sections 8, 9 and 12—Landlord and tenant—Forfeiture for non-payment of rent—Waiver—Non-payment of rent at stipulated rate is a continuing breach for every recurring month—Right of re-entry for breach of covenant to pay rent is an auxiliary provision—Tenant paying "standard rent" under the Rent Act cannot be ejected in spite of agreement to the contrary—Lease for a fixed period—Lease not forfeited.

In the beginning of 1918, the defendants, in the two suits, respectively, were occupying separate portions of a floor of the house belonging to the plaintiffs and paying Rs. 250 each as monthly rent, and they offered to take a lease of the said premises for three years from 1st February 1918 for a monthly rent

* O. C. J. Suit No. 3671 of 1919. † O. C. J. Suit No. 3672 of 1919.

ILR 5 & 6

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI.

KASTURBHAI MANIBHAI v. DAVAR.

of Rs. 400 to be paid by each of them. The offer was accepted by the plaintiffs, but the leases were not actually executed till 3rd July 1918. During the interval, the Bombay Rent (War Restrictions) Act II of 1918 came into force on 10th April 1918. The defendants had not paid rent between the date of the agreement and the actual execution of the leases. But, soon after the execution of the leases, they sent amounts of rent for five months ending June 1918 at the rate of Rs. 275 a month which was the standard rent payable under the Rent Act. The plaintiffs received the amounts without prejudice to their rights and remedies under the leases. Thereafter, the plaintiffs themselves made out bills at the rate of Rs. 275 a month until the end of August 1919. On 20th September 1919, the plaintiffs' attorneys informed the defendants that by their failure to pay the stipulated rent of Rs. 400 they had committed a breach of the covenant to pay rent and that the plaintiffs had, under the provision in that behalf in the leases, determined the leases and that the plaintiffs became entitled to re-enter upon the premises. No bill was made out by the plaintiffs for September 1919, but after some correspondence rent for that month was accepted by the plaintiffs in the following month without prejudice to their rights and contentions. Rents for October and November 1919 offered by the defendants at the standard rate were refused by the plaintiffs. On 12th December 1919, the plaintiffs sued in ejectment and for damages for wrongful occupation by the defendants. The defendants contended (1) that there was waiver of forfeiture by the plaintiffs who had accepted rents for several months at the standard rate and (2) that in view of sections 9 and 12 of the Rent Act the leases could not be determined by the plaintiffs if the defendants offered to pay the standard rent prescribed by the Act. At the trial, it was urged on behalf of the plaintiffs, that there was nothing in the Rent Act to prevent a tenant from paying the stipulated rent and preventing the determination of the lease and that if the tenant did not choose to do so the lease was determined, the result being that if the land-lord required the premises reasonably and *bona fide* for his own occupation within the meaning of section 9 of the Act, the tenant must either give up the possession or avoid the forfeiture by complying with the provisions of section 114 of the Transfer of Property Act.

Held, that at the date of the suits against the defendants the plaintiffs could not be held to have waived their right of forfeiture, inasmuch as non-payment of rent at a stipulated rate month after month being a continuing breach the plaintiffs waiving their right to forfeit for any particular month or months were not precluded from asserting that right for similar breaches in subsequent months.

Penton v. *Barnett* (1), followed.

(1) [1898] 1 Q. B. 276.

Held, however, (dismissing the plaintiffs' suits) that the right of re-entry on failure to pay the stipulated rent was an auxiliary provision to secure the payment of rent, and that the Legislature having by the Rent Act cut down the stipulated rent and enacted that the standard rent was the only rent that the tenant was bound to pay under the Act, the plaintiffs were not entitled to determine the lease if the defendants paid the standard rent prescribed by the Act.

Durell v. *Gread* [1], referred to.

SUITS in ejectment.

The plaintiffs were owners of a building situate at Esplanade Road in Bombay.

Prior to 1918, the plaintiffs had, for a number of years, let to the defendant in each of the two suits a separate portion of the second floor of their building at a monthly rent of Rs. 250.

About the beginning of 1918, each of the defendants in the two suits offered to take a lease in respect of the premises already occupied, from 1st February 1918 for a term of three years at a monthly rent of Rs. 400. The offer was accepted by the plaintiffs.

The leases were, however, not executed till the 3rd July 1918. The leases, *inter alia*, provided as follows:—

"It is hereby agreed that in case the lessee shall be guilty of breach, neglect or non-performance of any of the stipulations, restrictions and agreements contained herein and on the part of the lessee to be observed and performed then and thenceforth and in such cases it shall be lawful for the lessors upon the said demised premises or any part thereof in the name of the whole to re-enter and thereupon the said term hereby granted shall be absolutely determined".

The plaintiffs alleged that after the execution of the said leases they called upon each of the defendants in the two suits to pay the arrears of rent from February to June 1918; that on 13th July 1918 the defendants wrote to the plaintiffs' solicitors that the plaintiffs

[1] (1914) 84 L. J. K. B. 130.

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI

KASTURBHAI MANIBHAI v. DAVAR.

were not entitled to claim the rent at the rate of Rs. 400 per month on account of the provisions of the Rent Act; that along with the said letter each of the defendants sent a cheque for Rs. 1,375 being the amount of standard rent for five months at the rate of Rs. 275 per month; that the defendants were since paying the sum of Rs. 275 as standard rent of the said premises and the last payment received under protest by the plaintiffs was for the month of September 1919; that, by reason of the non-performance of the covenant to pay rent at the rate of Rs. 400 per month, the leases had become determined by virtue of the proviso in that behalf contained therein; that on 20th September 1919 the plaintiffs' solicitors informed the defendants accordingly and required the defendants to allow the plaintiffs' agent to re-enter upon the said premises but the defendants refused to do so; and, lastly, that on 25th September 1919 the plaintiffs by their solicitors' letter called upon the defendants to give vacant and peaceful possession of the premises on or before 1st November 1919, to which the defendants replied that the plaintiffs were not entitled to eject during the unexpired period of the leases. The plaintiffs submitted (i) that the said leases having become forfeited and determined the defendants thereupon became at the most monthly tenants of the plaintiffs, (ii) that such monthly tenancy had been duly determined, and (iii) that by reason of the provisions of section 9 of the Bombay Rent (War Restrictions) Act II of 1918 the plaintiffs had become entitled to recover possession of the premises from the defendants as they required the same reasonably and *bona fide* for their own occupation, they having been obliged to quit their office in a building situate in Church Gate Street which was acquired by the Bombay Municipality in connection with a scheme to widen the Church Gate Street.

The defendants stated, in their respective written statements, that they were in occupation of the said premises since 1908 originally as sub-tenants until 1911, when they became tenants of the plaintiffs without any lease until the end of 1913 when a lease was taken from the plaintiffs which expired by the end of 1916 and they continued thereafter as tenants of the plaintiffs; that in November and December 1917 the plaintiffs wanted to raise the rents and gave notice to them to vacate the said premises but that it was ultimately agreed that each of the defendants should execute a lease for a term of three years from 1st February 1918 at a monthly rent of Rs. 400; that between the date of the agreement to lease which was arrived at between the parties and the date of the execution of the leases which occurred on 3rd July 1918 the Bombay Rent (War Restrictions) Act came into force; that the defendants availed themselves of the privileges and advantages conferred on tenants by the said Act and pointed out to the plaintiffs that the standard rent for the premises occupied by each of the defendants was Rs. 275 per month; that the defendants paid rent accordingly; and that the plaintiffs accepting the contentions of the defendants made out bills from July 1918 to September 1919 at the standard rent of Rs. 275 per month. The defendants further contended (1) that although a notice, dated 25th September 1919, was served upon them, no demand had been made by the plaintiffs for rent at Rs. 400 a month, (2) that the plaintiffs had, from the time the defendants pointed out that the standard rent only was payable under the Act, accepted the same and acted in such a manner as showing an intention of treating the lease as subsisting on that footing and had waived the forfeiture (if any), (3) that by reason of the provisions of the Bombay Rent Act the plaintiffs were not entitled to determine the

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI

KASTURBHAI MANIBHAI v. DAVAR.

leases and (4) that if it be held that the defendants were each of them bound to pay Rs. 400 a month as rent or incur a forfeiture by not so doing the defendants would be immediately entitled under the Act to recover from the plaintiffs the difference between Rs. 400 and Rs. 275 which the defendants counter-claimed from the plaintiffs.

Lastly, the defendants denied that the premises were reasonably and *bona fide* required by the plaintiffs for their own use and offered to accommodate the plaintiffs in their own premises. The defendants also prayed, if necessary, to be relieved against forfeiture for non-payment of rent under the provisions of section 114 of the Transfer of Property Act.

Campbell and *M. C. Setalvad*, for the plaintiffs.

Strangman, Advocate-General, and *Jinnah*, for the defendants.

SETALVAD, J:—The plaintiffs who are merchants and mill agents doing extensive business have their office in a building situated in Church Gate Street in the City of Bombay which building has been acquired by the Municipality for the purpose of widening the said Street and the Municipality have asked the plaintiffs to vacate the said building. On the correspondence between the plaintiffs and the Municipality, the situation appears to be that the plaintiffs are in their present office on sufferance and are under an obligation to vacate on a fortnight's notice from the Municipality. The plaintiffs are owners of a building situated at Esplanade Road in the City of Bombay. A portion of the second floor of this building is occupied by the defendant in Suit No. 3671 of 1919 who is an attorney of this Court, for the purposes of his office, and the rest of the said floor is occupied by the defendant in

Suit No. 3672 of 1919 for the purposes of his College of Commerce. The defendants have been tenants of the plaintiffs for many years. In the beginning of the year 1918, the defendants who were then paying Rs. 250 each as monthly rent, offered to take a lease for three years from the beginning of February 1918, of the portions of the said premises occupied respectively by them for a monthly rent of Rs. 400 to be paid by each of them and the said offer was accepted by the plaintiffs. The leases were, however, not actually executed till the 3rd of July 1918. During the interval, the Bombay Rent (War Restrictions) Act II of 1918 came into force on the 10th of April 1918. The defendants did not pay any rent between the date of the agreement to lease and the actual execution of the leases. Although they had each offered to pay Rs. 400 as the monthly rent and had induced the plaintiffs to agree to give them a lease on that footing, they decided to take advantage of the provisions of the Rent Act but kept discreetly quiet from February to July and did not manifest their intention to do so, because they evidently apprehended that if the plaintiffs realised that the defendants were not going to pay the rent agreed upon, they might in some way decline to give the defendants the leases. But soon after the leases were executed on the 3rd of July and they were secure in their tenancy for three years, the defendants on the 23rd of July 1918 sent to the plaintiffs the amount of the rent for February to June 1918 inclusive calculated at the rate of Rs. 275 in each case, being the standard rent payable under the Rent Act. The plaintiffs received the amounts so sent by the defendants without prejudice to their rights and remedies under the respective leases. After that, for the rent for the months from July 1918 to August 1919, the plaintiffs themselves made out bills at the rate of Rs. 275 in each case and on presentation the same were

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI

KASTURBHAI MANIBHAI v. DAVAR.

paid by the defendants. The plaintiffs by their attorney's letter of 20th September 1919 informed the defendants that by their failure to pay Rs. 400, the rent reserved under the leases, they had committed a breach of their covenant to pay the said rent and that the plaintiffs had, by virtue of the provision in that behalf in the said leases, determined the said leases and were therefore entitled to re-enter upon the premises which, it was stated, they required for their own use and occupation and called upon the defendants to vacate the said premises. Further correspondence ensued between the parties, in which the plaintiffs maintained their right to determine the leases and the defendants denied such right. No bills were made out and presented by the plaintiffs for the rent for the month of September 1919, but in the course of the correspondence above referred to, the defendants offered rent at the rate of Rs. 275 each for September and the same was accepted by the plaintiffs without prejudice to their rights and contentions on the 8th October 1919. Rent for the months of October and November 1919 was offered by the defendants at the rate of Rs. 275 but the plaintiff declined to accept the same, saying that they had already determined the leases. On the 12th of December 1919, the present suits were filed by the plaintiffs praying for possession of the premises and for damages for wrongful occupation by the defendants. It appears from the above facts, which are undisputed, that the plaintiffs by their act in making out the rent bills for the months from July 1918 to August 1919 at the rate of Rs. 275 per month and accepting the said rent waived their right to forfeit the leases by reason of non-payment of the stipulated rent. But that does not preclude them from treating the non-payment by the defendants of the rent for September at the stipulated rate as a breach of the covenant of the lease in that behalf as the

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI

KASTURBHAI MANIBHAI v. DAVAR.

non-payment of rent at the stipulated rate month after month was a continuing breach. Their having waived their right to forfeit on such a breach for any particular month or months does not destroy their right to forfeit on similar breaches in subsequent months. The rent for September 1919 at the rate of Rs. 275 was, as already stated, accepted without prejudice. The rent for October and November 1919 tendered by the defendants was not accepted by the plaintiffs. In para. 5 of the plaint the facts about the payment of rent from July 1918 to September 1919 are set out and in para. 6 it is stated that by reason of the failure of the defendants to pay the stipulated rent the plaintiffs had become entitled to re-enter. Para. 10 refers to the plaintiffs' letter of the 20th September 1919 determining the lease and para. 11 says that the lease had become forfeited and determined. The failure to pay the stipulated rent for October and ovember 1919 has not been specifically set out in the plaints but such failure is admitted. And I think it is open to the plaintiffs to rely on such failure to establish their claim to determine the lease as claimed in para. 6 of the plaints (*Penton* v. *Barnett* [1]). An application was made at the hearing by the plaintiffs for leave to amend the plaint by setting out at the end of para. 5 of the plaint the failure to pay the stipulated rent for the months of October and November 1919. I do not think in view of the admitted facts of the case it is necessary to amend the plaint. But if I had considered it necessary I would have allowed the amendment. The additional facts sought to be pleaded by the proposed amendment are admitted and do not come as a surprise on the defendants. It was contended that even if the plaintiffs are allowed to rely upon the failure by the defendants to pay the stipulated rent for October and November 1919, that would not avail them as they had

[1] [1898] 1 Q. B. 276.

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI

KASTURBHAI MANIBHAI v. DAVAR.

not declared their intention to determine the lease by reason of such failure, but the presentation of the plaints is, I think, a conclusive declaration of intention to determine the leases (*Serjeant* v. *Nash, Field & Co.*[1]).

But the real and substantial question in these suits is whether the payment by each of the defendants of Rs. 275 being the standard rent under the Rent Act instead of Rs. 400, the stipulated rent, is a breach of the covenant in the leases to pay the said stipulated rent. Section 2 of the Act defines the expression "standard rent" and section 3 enacts that when the rent of any premises has been or is increased above the standard rent, the excess of the rent payable over the standard rent shall be irrecoverable, notwithstanding any agreement to the contrary. Section 12 enacts that where any sum has been paid on account of rent, being a sum irrecoverable as aforesaid, such sum shall, under certain restrictions as to time, be recoverable by the tenant from the landlord and may be deducted by the tenant from future rent payable by him. It is true that the Act does not make the payment by the tenant of the stipulated rent, being in excess of the standard rent, illegal and does not purport to affect the contract between the parties contained in the lease regarding the right of the lessor to determine the lease on failure to pay the stipulated rent, although a landlord seeking possession of the premises on such determination will, under section 9, be not decreed possession unless he brings himself within the proviso to that section. There is nothing in the Act to prevent the tenant from paying the stipulated rent and thus preventing the determination of the lease. And it is contended that if he does not choose to do so, he cannot prevent the determination of the lease but that he can claim only the limited protection that section 9 affords to a tenant

(1) [1903] 2 K. B. 304.

whose tenancy has expired and that, therefore, if the landlord requires the premises reasonably and *bona fide* for his own occupation the tenant, who has failed to pay the stipulated rent and thereby brought about the forfeiture of the lease, must give up the premises or avoid the forfeiture by complying with the provisions of section 114 of the Transfer of Property Act by payment of the stipulated rent, interest and costs. If this were the correct legal position, it will enable the landlord to determine the lease for the failure of the tenant to pay the excess rent which the Rent Act makes irrecoverable and which the tenant is not bound to pay and thus ultimately compel the tenant to pay the said excess in order to avoid forfeiture of the lease by availing himself of the provisions of section 114 of the Transfer of Property Act ; and it is extremely doubtful whether a tenant under these circumstances paying the excess rent through the intervention of the Court can recover it back under section 12 of the Rent Act. This would wholly defeat the object of the Rent Act. Moreover, it would be open to the tenant to pay to the landlord the rent stipulated under the lease and thus fulfil the covenant to pay that rent and then under section 12 of the Rent Act recover back the excess so paid. If it is open to him to do so, it is difficult to say that he commits a breach of the covenant by paying the standard rent in the first instance. The right of re-entry on failure to pay the stipulated rent is an auxiliary provision to secure the payment of rent (*Howard* v. *Fanshawe* [1]). The Legislature by the Rent Act has cut down the stipulated rent and enacted that the standard rent is the only rent that the tenant is bound to pay. When, therefore, the principal obligation is thus modified by reducing the stipulated rent, it is difficult to hold that the auxiliary provision to secure

(1) [1895] 2 Ch. 581 at p. 588.

1920.

KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI

KASTURBHAI MANIBHAI v. DAVAR.

the payment of the whole amount of the stipulated rent is still left unaffected. In my opinion this auxiliary right is, after the passing of the Rent Act, available only for the purpose of securing the payment of the rent which is payable under the law, viz., the standard rent. I am fortified in the view I have taken by the judgment of Scrutton J. in *Durell* v. *Gread* [1] where that learned Judge held that the right of re-entry consequent on the failure of the tenant to pay rent by reason of his taking advantage of the provisions of the Postponement of Payments Act, 1914, was destroyed by the postponement of the due date of payment of the rent.

Even if the plaintiffs' right to determine the leases is held to be unaffected the defendants are entitled to be relieved of the forfeiture under section 114 of the Transfer of Property Act on payment of rent, interest and costs and that they have offered to do by their written statement. But in the view I have taken it is not necessary for them to invoke in their favour the provisions of that section.

That being the position, it is not necessary to go into the question whether the plaintiffs require the premises *bona fide* for their own occupation within the meaning of the proviso to section 9 of the Rent Act. But I think there is no doubt on the evidence that the premises are so required by the plaintiffs. I hold that the tenancy has not been validly terminated and the plaintiffs are not entitled to eject the defendants. The result is that the suits must be dismissed with costs.

Solicitors for the plaintiffs: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

Solicitors for the defendants: Messrs. *Hiralal, Thakurdas & Co.*

Suits dismissed.

G. G. N.

[1] (1914) 84 L. J. K. B. 130.