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have to be considered along with the decision in *Bai Devkore* v. *Amritram Jamiatram*.[1]

I should have mentioned that certain pedigrees, Exhibits A, B and C were not relied on to any great extent by counsel for the defendants. Even so far as they are admissible, they do not carry the matter much further on what I have described as the main point of the case. I should also state that I fully appreciate that it has been held that the definition of *family* in the Watan Act is an inclusive definition and not an exclusive definition. But, notwithstanding that, on the authorities of this Court it does not absolve the parties from the necessity of proving that the original watandar was an ancestor of the parties. In the result, therefore, I agree that this appeal must be dismissed with costs.

As to the question of interest on costs, the learned Judge should not have awarded interest at 12 per cent. The maximum fixed by section 35 (3) of the Civil Procedure Code is 6 per cent., but as he has considered this to be a case where interest on costs ought to be given, we will let his order in that respect stand subject to substituting 6 per cent. for 12 per cent.

Decree confirmed.

J. G. R.

APPELLATE CIVIL

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September 27

Before Mr. Justice Patkar and Mr. Justice Baker.

HARI LAXMAN JOSHI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Contract Act (IX of 1872), section 56—Lessor and lessee—Contract for manufacture of salt—Offer and acceptance—Delay in acceptance—Strike of workmen—Impossibility of performance.

On May 11, 1920 tenders were invited for the lease of Government Salt Works for a period of five years. Tenders were to be delivered before July 1, 1920. On July 1, the tenders were opened and were found to include an offer of Rs. 1,425 annual rent by defendants. Their tender was, after further negotiations, accepted on October 4, 1920, and notice of acceptance was given to them on October 11. On October 22,

*First Appeal No. 228 of 1925.

[1] (1885) 10 Bom. 372.

the lessees asked for reduction of rent on the ground of late acceptance. The application was refused, and in January 1921 the deposit amount was tendered. The lessees, however, failed to execute the lease and to pay rent. A suit was, therefore, filed to recover the rent for the first year. The lessees-defendants denied liability on two grounds (1) that there was late acceptance of the tender and (2) that the contract had become impossible of performance under section 56 of the Contract Act on account of a strike of the workmen.

Held, (1) that, the defendants having failed to take any objection on the score of late acceptance of their offer at the time when the acceptance was communicated to them, there was a completed contract between the defendants and the plaintiff and they could not escape from their liability.

(2) That the circumstances proved in the case not having *suggested* that there was an implied condition of the contract that, if the manufacture of salt became impossible owing to the strike of workmen, the parties were to be excused from further performance, the contract to pay rent or to make repairs to the salt pan had not become impossible of performance within the meaning of section 56 of the Contract Act.

Goculdas Madhavji v. *Narsu Yenkuji*[1]; *Taylor* v. *Caldwell*[2]; *Dhuramsey* v. *Ahmedbhai*[3] and *Krell* v. *Henry*,[4] discussed.

The Bombay and Persia Steam Navigation Company, Limited v. *The Rubattino Company, Limited*[5]; *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas*[6] and *Karl Ettlinger* v. *Chagandas & Co.*,[7] referred to.

FIRST APPEAL against the decision of Beram N. Sanjana, Joint Judge at Thana.

Suit to recover rent.

The facts material for the purposes of this report are sufficiently stated in the judgment of Mr. Justice Patkar.

A. G. Sathaye, for the appellants.

P. B. Shingne, Government Pleader, for the respondent.

PATKAR, J.:—This is a suit brought by the Secretary of State for India in Council against the present defendants to recover a sum of Rs. 1,138-14-9 from the defendants, the lessees of the salt-pans belonging to Government. The circumstances giving rise to the action were as follows : On May 11, 1920, the Deputy Commissioner of Salt and Excise, C. D., invited tenders for the lease of the Government salt works " Sonagar " for a period of five years commencing

(1) (1889) 13 Bom. 630.
(2) (1863) 3 B. & S. 826.
(3) (1898) 23 Bom. 15.
(4) [1903] 2 K. B. 740.
(5) (1889) 14 Bom. 147.
(6) (1896) 21 Bom. 23.
(7) (1915) 40 Bom. 301.

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from September 1, 1920. The tenders were to be delivered before July 1, 1920, at Uran to the Assistant Collector of Salt and Excise. On July 1, the tenders were opened and there was an offer of a tender for payment of Rs. 1,425 annual rent from four persons, namely, the first two defendants, the father of defendants Nos. 3 to 5 and one, Bhate. An objection was taken to Mr. Bhate as doubt was entertained about his solvency, and the first three persons who made the tender were asked if they would consent to drop Bhate and accept the lease in the names of Joshi, Agharkar and Dev. They expressed their consent accordingly, and on October 4, 1920, the tender was accepted by the Commissioner of Salt and Excise, and notice of the acceptance was given to the lessees on October 11. They failed to execute the lease and were repeatedly asked to pay the deposit of Rs. 1,000 as security for the due fulfilment of the lease. On October 22, they asked for reduction of the rent on the ground of late acceptance of the tender, and also for exemption of the payment of deposit. Their application was refused on November 24, 1920, and ultimately they deposited in January 1921 a Government Promissory Note of the face value of Rs. 1,000 as deposit. The lessees, however, failed to execute the lease and to make repairs and to pay the three instalments payable on September 1, 1920, January 1, 1921, and May 1, 1921. In July 1921, the lease was put an end to, and the authorities decided to cancel the lease for the rest of the term by virtue of the power reserved to that effect in the 24th clause of the lease and notice of cancellation was served on the lessees. However, an association of land-holders, including the three original lessees was formed, and the lease for the remaining period of four years was given to the association in the name of one of them for the rent of Rs. 1,425. The present suit is brought to recover the amount of the rent for the first year, Rs. 1,425, and the costs of the repairs, which they were bound to make under the agreement,

Rs. 246-7-6. After giving them credit for the amount of the sale-proceeds of the Promissory Note of Rs. 1,000 and the deposit of Rs. 200, the present suit was brought to recover the amount of Rs. 1,138-14-9 from the defendants. Defendants Nos. 3 to 5 are the sons of the original third lessee Moreshwar Dev now deceased.

The defence against the plaintiff's claim is based on two grounds: first, the late acceptance of the tender, and second, the strike of the workmen. It is urged that the late acceptance of the tender resulted in their inability to secure the labourers who had gone away in October. If the defendants did not wish to accept the lease on account of the late acceptance of the tender, it was open to them to repudiate their offer. They consented to drop the fourth lessee on September 2 and their offer was accepted on October 4 and the acceptance was communicated to them on October 11. The defendants did not take any objection on the score of late acceptance of their offer at the time when the acceptance was communicated to them. On the other hand, they treated the contract as completed, and on October 22 applied for certain concessions, and even when they were refused, they made the deposit in January 1921. There is, therefore, no doubt that there was a complete contract between the defendants and the plaintiff, and the defendants cannot escape from their liability under the contract after having waived the objection on the ground of lateness of acceptance.

The contract between the parties, therefore, being complete, the question that arises is whether the defendants can escape from their liability for payment of rent and for making repairs under the lease by reason of the alleged fact that there was a strike of local workmen which rendered it impossible to manufacture salt. It is urged on behalf of the defendants that the purpose of the contract was the manufacture of salt, and the purpose having failed, no liability under the contract to pay rent or to make repairs

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arose ; and it was urged that under section 56 of the Indian Contract Act the contract became impossible and therefore became void on account of the subsequent impossibility of manufacturing salt on account of the strike of the workmen, and reliance was placed on the cases of *Goculdas Madhavji* v. *Narsu Yenkuji*,[1] *Taylor* v. *Caldwell*,[2] *Dhuramsey* v. *Ahmedbhai*[3] and *Krell* v. *Henry*.[4] It appears from the evidence of defendant No. 2 that the tenants had combined against the land-lords from October 1920. Trimbak Govind Dev, Exhibit 55, says that there was a combination of workmen in the Taluka which began in July or August 1920, and in Bhadrapad, that is September, of that year, they had not gone to the repair work of the *Agars* of field-owning manufacturers. It is thus clear that the contingency of the strike of workmen was not unforeseen, and the defendants either ought to have secured other labour in order to carry out the contract, or ought to have made it an express condition with the plaintiff that they would be bound by the contract only if they secured skilled labour to manufacture salt. It appears, however, from the evidence of Trimbak Dev, that other skilled labour was available but at prohibitive rates. He said that the Kharvas from Gujerat were not imported for doing salt work as their wages were high. Dinkar, Exhibit 56, proves that in the first year the combination was declared in October, and the next year repairs were made with the help of other labourers, and that even persons belonging to the camp of the strikers used to come stealthily to work and that the labour of the Mahars was available. On the evidence it cannot therefore be said that there was no labour available for the manufacture of salt. It also appears from the evidence that the repairs which were to be done under the agreement were of an ordinary character.

The question, therefore, that falls to be decided is whether the defendants were justified in refusing to perform their

(1) (1889) 13 Bom. 630.
(2) (1863) 3 B. & S. 826.
(3) (1898) 23 Bom. 15.
(4) [1903] 2 K. B. 740.

contract to carry out repairs and to pay rent on account of the alleged strike of workmen. Under section 108, clause (*e*), of the Transfer of Property Act, a lease shall, at the option of the lessee, be void only if by fire, tempest or flood, or violence of an army or of a mob or other irresistible 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 contention of the defendants does not fall within the exemption allowed under section 108, clause (*e*), of the Transfer of Property Act. I do not think that the contract to pay rent or to make the repairs to the salt-pan had become impossible within the meaning of section 56 of the Indian Contract Act.

It is urged, however, on behalf of the defendants that the purpose of the contract was the manufacture of the salt and, that purpose having failed, no liability under the contract to pay rent or to make repairs could be enforced. In *Goculdas Madhavji* v. *Narsu Yenkuji*,[1] the decision proceeded on the intention of the parties deduced from the terms of the contract, and it was held that, looking to the nature of the contract, it must be taken to have been the intention of the parties to it that the monthly payment was to be payable so long as the quarrying was permitted by the authorities. The case did not fall within section 56 of the Indian Contract Act. In *Taylor* v. *Caldwell*,[2] and in *Dhuramsey* v. *Ahmedbhai*,[3] there was the destruction of the building the continued existence of which formed the basis of the contract, and the case of *Dhuramsey* v. *Ahmedbhai*,[3] clearly fell under section 108, clause (*e*), of the Transfer of Property Act. In the present case, there was no express contract that the liability to pay rent and to make repairs should subsist only if the salt could be manufactured in the *Agar* or if skilled labour was available for the manufacture of salt.

[1] (1889) 13 Bom. 630. [2] (1863) 3 B. & S. 826.

[3] (1898) 23 Bom. 15.

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In Halsbury's Laws of England, Vol. VII, p. 430, it is stated:—

"Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing, without which the contract cannot be fulfilled, will continue to exist, or that a future event which forms the foundation of the contract will take place, the contract, though in terms absolute, is to be construed as being subject to an implied condition, that if before breach performance becomes impossible without default of either party and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance."

In the present case, the strike of the workmen was not unforeseen. There was no express condition that the contract was to be enforceable only if skilled labour was available. The circumstances proved in this case do not suggest that there was an implied condition of the contract that if the manufacture of salt became impossible owing to the strike of the workmen, the parties were to be excused from further performance. The evidence shows that the defendants knew that there was a strike in July and August and that, as a matter of fact, in September the workmen did not go to the repair work of the Agars of field-owning manufacturers, and they ought to have, therefore, taken precautions to secure the requisite labour, or ought to have entered into an express stipulation with the plaintiff that they would not be liable under the contract in case the manufacture of salt was rendered either difficult or impossible on account of the strike of workmen. It appears also from the evidence that labour was available from other quarters though at a higher rate.

In the case of *Krell* v. *Henry*,[1] the test laid down at page 752 is as follows: "The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against." The cases of *The Bombay and Persia Steam Navigation Company, Limited* v. *The Rubattino Company, Limited*[2] and *Purshotamdas Tribhovandas*

(1) [1903] 2 K. B. 740.

(2) (1889) 14 Bom. 147.

v. *Purshotamdas Mangaldas*,[1] relied on on behalf of the plaintiff, would to a certain extent support the contention that the defendants were bound to pay the rent and make the repairs and were not excused from the performance of the contract by reason of the difficulty or impossibility of the manufacture of salt on account of the strike of the workmen. According to the view of Beaman J. in *Karl Ettlinger* v. *Chagandas & Co.*,[2] the performance of the contract in that case did not become impossible within the meaning of section 56 merely because freights from Bombay to Antwerp were not procurable from a commercial point of view when the defendants repudiated the contract ; and it was held that no implied condition could be read into the contract that it was agreed by the parties that normal freight conditions should continue, and that before a contract could be broken on the ground that the acts to be done had become impossible, the Courts must be very sure that they were physically impossible, and that physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices.

We, therefore, agree with the lower Court in holding that it cannot be said that there was at the root of this contract an implied understanding as to the availability of a sufficient supply of labour for the manufacture of salt, so that when the labour supply failed, the obligations under the contract ceased to operate. It may be mentioned that in the next year the contract continued and the lessees of that year, who included the present defendants, paid their stipulated rent. We, therefore, think that the grounds on which the claim is resisted by the present defendants in this suit fail.

We would, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

BAKER, J. :—I agree.

[1] (1896) 21 Bom. 23.

[2] (1915) 40 Bom. 301.

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So far as the question of the late acceptance by Government of the defendants' offer is concerned the learned Joint Judge has put the case very clearly at pages 2 and 3 of his judgment, and I agree with his conclusions. The defendants never raised any contention that they were injured by the delay in the acceptance of their offer. On the contrary, they asked for certain concessions as late as October 22, in view of the workmen's strike and the alleged impossibility of manufacturing salt. I am not satisfied that it was impossible to get labour though at a heavy cost, which might result in a loss to the contractors. Government placed the salt work at the disposal of the defendants, which is all they had contracted to do and they are not responsible for the inability of the defendants to secure labour at a rate which would allow them to work the salt works at a profit.

The cases quoted by the appellants were mostly cases where there was complete destruction of the property regarding which the contract was made, rendering the performance of the contract impossible without the default of either party, and do not apply to the present case.

In *Krell* v. *Henry*,[1] the property was hired for a particular purpose, viz., viewing the Coronation procession, and that purpose became impossible owing to unforeseen circumstances beyond the control of either party. That is not the case here. The salt work was available for the manufacture of salt, and it was the defendants' business to provide labour. Knowing that labour was scarce they took the risk of entering into the contract and if they failed to find labourers that is not the fault of Government, nor are the defendants relieved from their liability to pay the rent. I agree, therefore, that the appeal should be dismissed.

Decree confirmed.

J. G. R.

[1] [1903] 2 K. B. 740.