The facts in the present case are materially different from those in *Emperor* v. *Nirmal Kanta Roy*.[1] In this case there were no specific charges before the jury of culpable homicide not amounting to murder and abetment of culpable homicide not amounting to murder. The jury were not bound to return a verdict in respect of these offences unless they were of opinion that the accused could be held guilty of these offences instead of murder and abetment of murder. Had these specific charges been framed in the original trial, the jury would be bound to return a verdict on them. The position at the present trial seems to be this, that two charges are preferred against the two accused respectively which charges were not specifically framed against them in the original trial. The case, in my opinion, is covered by the provisions of section 403 of the Criminal Procedure Code and a fresh trial on the second and fourth counts is not competent. The trial should proceed under the first and third counts only.

Order accordingly.

B. K. D.

[1] (1914) 41 Cal. 1072.

APPEAL FROM ORIGINAL CIVIL.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Blackwell.

ESMAIL ISSAC CHAND (ORIGINAL DEFENDANT), APPELLANT *v.* ABDULLA HAJI CASSUM AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1930
September 2

Bombay City Municipal Act (Bom. Act III of 1888), section 147—Lease—Lessor covenanting to pay all existing and future rates and taxes except water-tax—Lessor's liability to pay enhanced taxes on basis of lessee's recovery of higher rent from sub-tenants.

Under a lease of buffalo stables it was provided that the lessee was to pay the Municipal bill for water and that the lessor was to pay all "other existing and future rates, taxes, charges and outgoings whatsoever", in respect of the said premises. After the premises were let, the Bombay Municipality recovered

*O. C. J. Appeal No. 11 of 1930; Suit No. 1602 of 1928.

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assessment from the lessor on the basis of the rents recovered by the lessee from his sub-tenants. On a suit by the lessor to recover the difference between the assessment leviable on the basis of the rent reserved under the lease, and that recovered by the lessee from his sub-tenants :—

Held, that the landlord had by the terms of the lease contracted himself out of the benefit of section 147 of the Bombay Municipal Act and that he was not entitled to recover the enhanced assessment from the lessee.

Salaman v. *Holford*,[1] followed.

Watson v. *Home*,[2] distinguished.

Darashah v. *Lipton Ltd.*,[3] explained.

CONSTRUCTION of lease.

By an agreement dated September 11, 1924, one Tarmahomed agreed to lease to the defendant his buffalo stables in Bombay for a period of three years from September 1, 1924, at a monthly rent of Rs. 2,501. Under the terms of the lease the defendant covenanted to :—

"pay and discharge the Municipal bill for water consumed in the premises hereby demised according to the consumption recorded in the meter and for the hire of the meter."

The lessor on his part covenanted to :—

"pay all existing and future rates and taxes, charges and outgoings whatsoever for the time being payable in respect of the said premises hereby demised except such rates taxes charges and outgoings as are hereinbefore covenanted to be paid by the lessee."

From April 1, 1926, the Bombay Municipality enhanced the property-taxes leviable on the said premises on the ground that the rateable value of the property had gone up and assessed the said premises on the basis of the rents recovered by the defendant from his sub-tenants in respect of the various stalls in the said stables let out by him.

Tarmahomed died in March 1928, leaving a will by which he appointed the plaintiffs his executors.

The period of the lease expired on August 31, 1927. The defendant continued to remain in possession of the said stables till February 29, 1928.

(1) [1909] 2 Ch. 602. (2) (1827) 7 B. & C. 285.
(3) (1922) 24 Bom. L. R. 479.

The plaintiffs called upon the defendant to pay to them a sum of Rs. 1,659 in respect of water-tax and the hire of a meter payable by him under the terms of the lease. The defendant while admitting his liability to pay the said amount claimed to set off a sum of Rs. 475-8-0 being a moiety of the attorneys' charges payable by Tarmahomed for preparation of the lease, and a sum of Rs. 100 paid by the defendant to one of the plaintiffs. The defendant on July 18, 1928, sent his attorneys' cheque for Rs. 1,084 being the balance due to the plaintiffs after deducting the amounts payable to him.

On July 19, 1928, the plaintiffs' solicitors returned the cheque to the defendant's solicitors with a letter wherein they stated as follows:—

"Your client is well aware and he himself admits in your letter under reply that a sum of Rs. 1,605 for Municipal water charges and Rs. 54 for rent for meter, making together the sum of Rs. 1,659, are payable by your client to our clients. Our clients therefore cannot accept Rs. 1,084 in full payment of the said sum of Rs. 1,659 less Rs. 100 due to your client. We therefore return you herewith your said cheque for Rs. 1,084."

On July 26, 1928, the plaintiffs called upon the defendant to pay to them a sum of Rs. 1,972-4-0 being the excess amount of the property-tax which the plaintiffs had to pay to the Bombay Municipality because of the enhanced assessment from April 1, 1926, till the date the defendant handed over possession to the plaintiffs. On failure of the defendant to pay the various sums claimed by the plaintiffs they on July 28, 1928, filed a suit against the defendant to recover the said sums of Rs. 1,654-8-0 as water-tax charges and the rent for the meter and the said sum of Rs. 1,972-4-0 as excess of property-tax.

The defendant filed his written statement denying his liability to pay the enhanced property-tax, and paid a sum of Rs. 1,079 into Court on account of the water-tax and the rent of the meter after deducting the said sum

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of Rs. 475-8-0 and Rs. 100. The defendant contended that he had offered to pay the said amount to the plaintiff and had in fact sent his attorneys' cheque for the same which the plaintiffs had returned. He further contended that the plaintiffs must be ordered to pay his costs of the suit.

The suit was heard by Baker J. His Lordship held that the defendant was liable to pay the enhanced property-tax and that the defendant was entitled to take credit for the said sums of Rs. 475-8-0 and Rs. 100 and he passed a decree for the plaintiffs for the amount so found due to them, and he also directed the defendant to pay the whole of the plaintiffs' costs of the suit.

The defendant appealed.

Sir Jamshed Kanga, Advocate General, with *F. J. Coltman*, for the appellant.

Manekshah, for respondents Nos. 1 and 3.

BEAUMONT, C. J. :—This is an appeal from the decision of Mr. Justice Baker and it raises an important question between lessor and lessee as to the liability to pay property-tax based on an increased assessment made after the date of the lease.

The lease was made between one Tarmahomed Haji Alimahomed, who has since died and whose executors are the plaintiffs, as the lessor and the defendant as the lessee. The lease demised certain property, which consisted of buffalo stables, for a term of three years from September 1, 1924, at a monthly rent of Rs. 2,501, and the lessee covenanted with the lessor that he would, during the continuance of the term, pay and discharge the Municipal bill for water consumed in the premises. That is the only material covenant by the lessee. The lessor covenanted for himself his heirs executors administrators and assigns with the lessee that he would,

during the said term, pay all existing and future rates and taxes charges and outgoings whatsoever for the time being payable in respect of the said premises thereby demised except such rates taxes charges and outgoings as were thereinbefore covenanted to be paid by the lessee. So that, apart from the water rate which the lessee has to pay, the lessor is, under the contract between the parties, to pay all existing and future rates and taxes charges and outgoings whatsoever for the time being payable in respect of the demised premises.

The question to be determined is what is the effect of that covenant having regard to the provisions of sections 146 and 147 of the City of Bombay Municipal Act, 1888. Section 146 provides, so far as is material—

" (1) Property-taxes shall be leviable primarily from the actual occupier of the premises upon which the said taxes are assessed, if such occupier holds the said premises immediately from Government or from the corporation or from a fazendar."

that does not apply here.

" (2) Otherwise the said taxes shall be primarily leviable

(*a*) if the premises are let, from the lessor."

Then section 147 provides :—

" (1) If any premises assessed to any property-tax are let and their rateable value exceeds the amount of rent payable in respect thereof to the person from whom, under the provisions of the last preceding section, the said tax is leviable, the said person shall be entitled to receive from his tenant the difference between the amount of the property-tax levied from him, and the amount which would be leviable from him if the said tax were calculated on the amount of rent payable to him."

This is not a very happily worded section, but, I think, its meaning is tolerably plain. It means that if the rateable value exceeds the amount of rent at which the premises are let, then the landlord is to be entitled to recover—the word used in the section is ' receive ' but I think that must mean ' recover '—from the tenant the tax attributable to that excess.

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Now, the point really for decision in this case is whether a landlord can enforce that right of recovering part of the tax from his lessee, when he has, in the contract between himself and his lessee, covenanted that he will be liable for all present and future taxes chargeable in respect of the property.

Dealing with the matter apart from authority, I should say that it is quite clear that the landlord cannot recover in such a case. He has agreed with his lessee that as between himself and the lessee he will be liable for all the rates and taxes, and if he seeks to recover a part of the taxes from the lessee under the statutory right given to him by section 147, it seems to me that he is committing a breach of his agreement with the lessee. But Mr. Manekshah says that we are not at liberty to give that meaning to the agreement between the parties, because of various cases to which he has drawn our attention.

The first case which he relies on is *Watson* v. *Home*,[1] and he says that that case lays down the principle that in construing covenants between lessors and lessees as to payment of rates and taxes, the Court is justified in imposing an equitable distribution of the incidents of taxation between the parties apart apparently from the language which the parties themselves have chosen to use in framing their agreement. The marginal note in *Watson* v. *Home*[1] is this—

"By lease, lessor demised for a term of years a piece of ground at a fixed annual rent. The tenant covenanted not to build on the land without the licence of the lessor. The lessor covenanted to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises: Held, that the landlord was liable upon his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value."

[1] (1827) 7 B. & C. 285.

I think it is very difficult to read that case without coming to the conclusion that the Court really imposed upon the parties a bargain different to the one which they had made for themselves.

Beaumont C. J.

The Court of Appeal in England, in a recent case, *Salaman* v. *Holford*,[1] have explained the case of *Watson* v. *Home*.[2] All the members of the Court say that the case turned on the construction of the particular document there in question, and Lord Cozens-Hardy further pointed out that the covenant in *Watson* v. *Home*[2] was a covenant by the landlord to pay the taxes in respect of the property demised, which was unbuilt-upon land, and really all that the Court held was that the covenant as matter of construction did not apply to the buildings upon the land erected after the lease. Whatever the true explanation of *Watson* v. *Home*[2] may be, I think it cannot be treated as laying down any principle applicable to the construction of leases generally.

Then Mr. Manekshah has referred us to the English cases dealing with land tax—cases beginning with *Smith* v. *Humble*[3] and ending with *Mansfield* v. *Relf*.[4] Those cases do seem to lay down the general proposition that in construing a covenant by the lessor to pay the land tax the covenant is to be held only as applying to such proportion of the land tax as is attributable to the lessor's interest in the land. Land tax is leviable under an Act which is worded in quite different language to that used in the City of Bombay Municipal Act, and authorities upon the Land Tax Act cannot therefore be authorities on the Bombay Municipal Act, and it seems to me unnecessary to consider the exact principle on which those English

[1] [1909] 2 Ch. 602.
[2] (1827) 7 B. & C. 285.
[3] (1854) 15 C. B. 321.
[4] [1908] 1 K. B. 71.

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cases were decided. It is, in my opinion, impossible to contend that they lay down any principle which ought to govern the construction of the Bombay Act.

The only case to which we have been referred dealing with the Bombay Act is *Darashah* v. *Lipton Ltd.*[1] There the words of the covenant were "to let at a monthly rent of Rs. 600 only payable monthly including all rates and taxes whatsoever," so that the words were a good deal less wide than the words we have to deal with in the present case. They did not refer expressly to any future rates or taxes. Sir Norman Macleod in his judgment says (p. 483):—

"The only question is whether the lessor under this lease contracted himself out of the protection afforded to him by section 147."

Lower down, he says:—

"Regarding the protection afforded by section 147 it seems to us that we should require stronger documentary evidence than we have to satisfy us that the parties intended that however much the rateable value might be increased in the future over and above the rent payable under the lease, still the landlord would have to pay the whole of the tax."

I think there must be some slip in the report there. It was not a question of evidence, documentary or oral. It was a pure question of the wording of the contract between the parties and I think what the learned Judge meant to say was that in the lease with which he was dealing in that case, the words were not sufficiently strong to show that the landlord had contracted himself out of the benefit of section 147. That case is clearly distinguishable on the words of the lease from the present case. I think that if we were to hold in this case that the landlord had not contracted himself out of the benefit conferred upon him by section 147 we should be, in effect, holding that it is impossible for a landlord to contract himself out of that section unless he expressly refers to it. There is nothing in the Act

[1] (1922) 24 Bom. L. R. 479.

which requires us to come to such a conclusion and I am not prepared to hold that the landlord cannot contract himself out of this section without expressly or impliedly referring to it. I think, as I have said, that the question really is what was the bargain arrived at between the parties. In this case the parties agreed that the landlord should pay the existing and future taxes, and therefore he must pay them.

The result is that on the main issue the appeal succeeds.

There was another issue as to the payment of the water rate which admittedly the lessee had to pay. The lessee on July 18, 1928, before the suit was instituted, sent a solicitor's cheque for the amount and that cheque was refused because the plaintiffs claimed that more was due. They did not take the objection that they were not prepared to accept the cheque as legal tender. Subsequently, the amount of the cheque was paid into Court. I think that the solicitor's cheque, being refused by the plaintiffs on the ground that it was for a wrong amount and not on the ground that it did not amount to payment in cash, was a good tender. Accordingly, the defendants are entitled to the general costs of the action and the costs of the appeal.

I think the plaintiffs are entitled to the costs of issues 3 and 4.

Appeal allowed with costs. Plaintiffs to pay the costs of the action except the costs on issues Nos. 3 and 4, which are to be paid by the defendant. Costs of the second counter-claim to be paid by the defendant. It is also agreed that there will be no costs of the printing of those documents which were not put in in the Court below. The plaintiffs to be at liberty to withdraw the amount deposited in Court.

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BLACKWELL, J. :—I am of the same opinion. The lessor's covenant, with which we are concerned, seems to me plainly and unambiguously to impose upon the lessor as between himself and the lessee the obligation to pay all existing and future rates and taxes charges and outgoings whatsoever for the time being payable in respect of the said premises except as therein provided.

Mr. Manekshah has invited us to construe this covenant as imposing upon the lessor the obligation to pay only such rates and taxes as by the existing law would be payable by him apart from any right to recover from the lessee. In my opinion, it is not reasonable to construe this covenant in the sense contended for by Mr. Manekshah. Both the parties entering into this lease must be presumed to have known the law. They must be presumed to have known that by virtue of section 147 of the City of Bombay Municipal Act of 1888, the lessor would have been entitled to receive from his tenant any excess assessment if the rateable value of the premises exceeded the amount of rent payable in respect thereof. There is, it is true, no reference to section 147 in the covenant, but the words used are, in my opinion, as wide as they could possibly be with a view to imposing upon the lessor the existing and future rates and taxes charges and outgoings whatsoever and thereby excluding the operation of section 147. In my opinion, it is competent for a lessor to contract himself out of section 147, and I think that the words used here clearly and unambiguously show an intention on the part of the parties to contract out of the statutory provision.

The present case appears to me to be almost on all fours with the decision in *Salaman* v. *Holford*,[1] where the words of the covenant were very near to the words in the covenant which we have to construe.

[1] [1909] 2 Ch. 602 at p. 605.

Mr. Manekshah has relied on the case of *Watson* v. *Home*.[1] The learned Master of the Rolls in *Salaman* v. *Holford*[2] has clearly pointed out the distinction between that class of case and the case before us now. I respectfully agree with his opinion.

Mr. Manekshah also relied upon the English land-tax cases. In my opinion, they have no application whatever to the case which is before us. Lord Justice Fletcher Moulton, in the course of his judgment in *Salaman* v. *Holford*,[2] said as follows (p. 607) :—

"I do not think that the question as to whether persons bear more or less of the burden—whether they are in the favourable position of receiving revenue without bearing their share of burden—ought to influence us in construing a clear covenant."

In my opinion, the covenant, in this case, is clear, and although the raising of this assessment undoubtedly imposed a much higher burden upon the lessor, in my judgment that ought not to affect the question at all, if the words of the covenant are, as I hold them to be, plain and unambiguous.

As regards the question of the costs of the suit, in my opinion, the plaintiffs, on the finding of the learned Judge, which has not been questioned, that the costs of the lease were payable by the parties half and half, ought to have accepted the cheque which was tendered by the defendants. Having regard to the opinion which we have formed on the other part of the case the plea of tender succeeds, the plaintiffs not having objected to the cheque as such but only to the amount thereof. Accordingly the plaintiffs' case entirely fails and it should, in my opinion, be dismissed with costs. There are, however, the issues which the learned Chief Justice has referred to, viz. issues 3 and 4, which were unnecessarily raised by the defendants and in regard to which they should, in my opinion, bear the costs.

[1] (1827) 7 B. & C. 285.

[2] [1909] 2 Ch. 602 at p. 605.

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I agree with the learned Chief Justice that this appeal must be allowed.

Attorneys for appellants: Messrs. *Dastur & Co.*

Attorneys for respondents: Messrs. *Mehta, Laljee & Co.*

Appeal allowed.

B. K. D.

APPEAL FROM ORIGINAL CIVIL.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Blackwell.

1930 *September* 23.

ESSA ABDULLA KHATRI (ORIGINAL PLAINTIFF), APPELLANT *v.* KHATIJABAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 3 (w) (y), 11—Suit on mortgage—Decree for sale of mortgaged property—Personal decree against agriculturist mortgagor residing outside jurisdiction—High Court—Jurisdiction.

The plaintiff, a mortgagee of certain immoveable property at Panvel, filed a suit in the Bombay High Court against defendants, one of whom was an agriculturist and resided at Panvel, praying (*a*) that the defendants may be ordered to pay to the plaintiff the amount due under the mortgage; (*b*) that in the event of the defendants failing to pay the said sum with interest the mortgaged property may be sold; and (*c*) that if the sale proceeds were found insufficient to pay the claim and costs, liberty may be reserved to the plaintiff to apply for a personal decree for the balance. It was contended that as one of the defendants was an agriculturist residing at Panvel in the Kolaba District the Bombay High Court had no jurisdiction to try the suit :—

Held, that as prayers (*a*) and (*c*) involved claims for personal payments the Bombay High Court had no jurisdiction to entertain the suit as regards those prayers because of the provisions of sections 3 (*w*) and 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Court, however, had jurisdiction to grant prayer (*b*) of the plaint under the provisions of section 3 (*y*) of the said Act because it merely asked for a sale of the mortgaged property.

SUIT on a mortgage.

On January 29, 1927, the plaintiff lent to the defendants, who were mother (defendant No. 1) and sons (defendants Nos. 2 to 4), a sum of Rs. 5,500, on the mortgage of their immoveable property situated at Panvel. The mortgage deed was executed in Bombay.

*O. C. J. Appeal No. 13 of 1930: Suit No. 1936 of 1928.