CALCUTTA HIGH COURT

Peter

Vs.

East India Phar. Works

A.F.O.D. No. 499 of 1968

(Murari Mohan Dutt and Ramkrishna Sharma, JJ.)

12.06.1975

JUDGMENT

Murari. Mohan. Dutt, J.

1. This appeal is at the instance of the plaintiffs and it arises out of a suit for ejectment.

2. The case of the plaintiffs is that the defendant East India Pharmaceutical Works Limited took a lease of the suit premises by a registered deed of lease dated July 20, 1951 for a term of forty years commencing from July 1, 1951 and ending on June 30, 1991 at a progressive rent starting from the rate of Rs. 800 per month and ending with the rate of Rupees 1,482 per month according to the English Calendar month, from Mr. Basil Aviet Basil, the sole trustee to the estate of the plaintiffs. The defendant agreed not to make any structural alterations or additions in or to the suit premises without the previous consent in writing of the lessors, that is, the plaintiffs. In terms of the said agreement, the plaintiffs gave their written consent for construction of some structures on the suit premises by the defendant in accordance with two plans submitted by it on November 25, 1951 and August 13, 1955 to the South Suburban Municipality. The defendant erected those structures according to the plans. In or about the month of February 1962 the defendant surreptitiously and wrongfully erected an asbestos shed of brick built walls with pucca cemented floor measuring about 60' X 30' in the middle portion of the suit premises and made an addition of about 15' X 6' on the eastern side of the approved leanto constructed on the western side of the suit premises, without the knowledge and consent of the plaintiffs and thereby changed the nature and character of the tenancy and committed breach of an express condition of the lease. In spite of notices served by the plaintiffs, the defendant failed and neglected to remove the said unauthorized constructions. Accordingly, the plaintiffs determined the tenancy of the defendant on the ground of forfeiture of the lease. The defendant not having vacated the suit premises, the suit was filed.

3. The defendant entered appearance and contested the suit. The defendant denied that it had constructed any structure without the knowledge and consent of the plaintiffs. The case of the defendant is that whatever structure it has erected on the demised premises, the same has been done with the approval of the plaintiffs. It has been denied that there has been forfeiture of the

lease or that the lease has determined by forfeiture.
4. The learned Subordinate Judge, 7th Court, Alipore, came to the findings that the plaintiffs failed to prove that the two constructions referred to in the plaint were made by the defendant in the demised premises in or about February 1962 without the approval of the plaintiffs and that, accordingly, there was no breach of covenant by the defendant and the lease was not legally terminated and forfeited. Upon the said findings, the learned Subordinate judge dismissed the suit. Hence, this appeal.

5. The principal question which is involved in this appeal is whether or not the defendant erected two structures in February 1962 without the written consent of the plaintiffs. Clause (3) of tile lessee's covenants in the lease *inter alia* provides as follows:

> "(3). And will make no structural alterations or additions in or to the said demised premises without the previous consent in writing of the lessor but such consent shall not be unreasonably or arbitrarily withheld PROVIDED HOWEVER AND IT IS HEREBY AGREED AND DECLARED that the lessee shall be entitled to use the demised premises for its office accommodation and factory and laboratory in connection with its business and residence. The lessee will be allowed to build and erect any house and structure on the demised land with the written approval of the Lessor."

6. Clause (ii) of the lease *inter alia* provides that in case of any breach of any of the covenants or conditions by the lessee and on its part to be observed and performed then and in any of the said cases it shall be lawful for the lessor to re-enter, possess and enjoy the demised premises immediately.

7. The first part of clause (3) contains a covenant by the defendant not to make any structural alterations or additions to the demised premises without the previous consent in writing of the lessor. The words "such consent shall not be unreasonably or arbitrarily withheld" do not amount to a covenant by the lessor not to withhold such consent unreasonably or arbitrarily. If, however, the lessor withholds such consent unreasonably the lessee will be at liberty to make structural alterations or additions to the demised premises without committing a breach of the covenant. In an action by the lessor, the lessee is to prove that the consent was unreasonably and arbitrarily withheld by the lessor (See *Raja Kamala Ranjan Roy v. Baijnath Bajoria*[1]*,).*

8. In the latter part of clause (3), it has been agreed by the parties that the lessee will be allowed to build and erect any house and structure on the demised land with the written approval of the lessor. The plaintiffs have not based their case on the breach of the latter part of clause (3) but they have founded their case on the breach of the first part of use (3), namely, that the defendant has made structural alterations or additions to the demised premises without the consent in writing of the lessor. The allegations of the plaintiffs are that the defendant has erected asbestos shed on the demised land. It is not the case of the plaintiffs that the defendant has made any structural alterations or additions to the demised premises. But nonetheless the plaintiffs placed reliance on the breach of the first part of clause (3). Mr. Mitter, learned Advocate appearing on behalf of the defendant has urged that the latter part of clause (3), "the lessee will be allowed to build and erect any house and structure on the demised land with the written approval of the lessor" is not a

[1](1949) 53 Cal WN 329
covenant of the lessee. He submits that even if the defendant has committed a breach of the latter part of clause (3) it will not be a breach of an express condition within the meaning of clause (g) of Section 111 of the Transfer of Property Act.

9. In order to decide the point raised by Mr. Mitter, it is necessary to consider what is meant by the word 'covenant'. A covenant has been defined in Woodfall's Landlord and Tenant, 26th Edition, Article 1238, Page 507 as follows:

> "A covenant is a contract made by deed. The covenants of a lease are therefore contractual stipulations by one or more parties to the deed promising that something has or has not been done, or that something shall or shall not be done, or that some right or power exists."

The English law makes a distinction between a covenant and a condition but the Indian Law does not recognise any such distinction. It seems to us that by the latter part of clause (3) the lessor agreed that the lessee will have the right to build and erect any house and structure on the demised land. This was really a covenant of the lessor but that was subject to a qualification, namely, that the lessee will have to take the written approval of the lessor. We do not, however, think it necessary to finally decide the point, for we may dispose of the case on merits on the basis of the evidence adduced by the parties.

10. There can be no doubt that the onus is upon the plaintiffs to prove that the defendant constructed the said two asbestos sheds on the demised land without the consent in writing of the plaintiffs. It is not disputed that in 1951 and 1955 the plaintiffs permitted the defendant to make certain constructions on the demised land in accordance with the plans submitted by the defendant to the South Suburban Municipality. It is the case of the defendant that they have not made any further construction on the demised land. In other words, their case is that the constructions which have been alleged to have been made by the defendant in February 1962 were made in 1951 and 1955 under the said plans as sanctioned by the Municipality and approved by the plaintiffs. None of the parties has produced the plans. If the plans had been produced that would have resolved the dispute between the parties, namely, whether or not the impugned constructions were made in 1951 and 1955 under the said sanctioned plans.

11. It is contended by Mr. Bankim Chandra Dutt, learned Advocate appearing on behalf of the plaintiffs that the defendant not having produced the plans an adverse inference should be drawn against them under Section 114 (g) of the Evidence Act, even though the onus is on the plaintiffs to prove that the constructions are unauthorized. In support of his contention Mr. Dutt has placed reliance on two decisions of the Supreme Court. The first one is the case of *Gopal Krishnaji v. Mahomed Haji Latif*[2], It has been held by the Supreme Court in that case that even if the burden of proof does not lieon a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts in issue. In the other decision of the Supreme Court in *Virendra Kumar v. Jagjiwan*[3], an adverse inference was drawn against the respondent in an election petition for his failure to produce a material witness and the notes made by him at a meeting. The principles of

[2](1968) 3 SCR 862
[3] AIR 1974 SC 1957

law which have been laid down in the aforesaid decisions of the Supreme Court are well known. The said principles will apply where a party deliberately withholds from court a material document which is in his possession.

12. The question, therefore, is whether the defendant has deliberately withheld the plans submitted by it to the Municipality in 1951 and 1955. It is the positive evidence of D.W. 3 Kshitish Chandra Sen, an office assistant in the Head Office of the defendant-company that they cannot trace out the plans of 1951 and 1955 and that the copies of the plans retained by the Municipality could not be traced out on enquiry. During the hearing of the appeal, we issued a notice upon the South Suburban Municipality calling upon it to produce the plans submitted by the defendant in 1951 and 1955, but the Municipality intimated us that the said plans were destroyed. At one point of time it was thought by the defendant that the plans were lying with their lawyer Mr. D.B. Sanyal, and the defendant requested the plaintiffs to approach Mr. Sanyal for the plans. Mr. Sanyal, however, informed the plaintiffs by his letter dated April 14, 1962, Ext. 5 (j), that in spite of strenuous searches he could not trace out the sanctioned and approved plans and that, he apprehended that the same were lost or misled. In these circumstances, it cannot be said that the defendant has deliberately withheld the sanctioned plans so that an adverse inference can be drawn against it.

13. Save and except the uncorroborated oral testimony of P.W. 1 E. Priantj, the Manager of the plaintiffs that the defendant made the disputed structures in February 1962 without the consent of the plaintiffs, there is no other evidence to prove the same. Before the institution of the suit some correspondence passed between the parties through their respective lawyers. In the correspondence of the plaintiffs' lawyer which are Exts. 5, 5 (b) and 5 (a), although it was complained that the defendant had made the unauthorized constructions, the nature of the constructions was not pointed out in any of the correspondence. In his letter dated May 14, 1962, Ext.5 (h), the lawyer of the defendant called upon the plaintiffs to point out the unauthorized structures, if any, and stated that his clients were prepared to demolish the same. Although the said letter, Ext. 5 (h) was replied to by the plaintiffs' lawyer by his letter dated May 23, 1962, Ext. 5 (c), no attempt was made to specify the alleged unauthorized structures. Thereafter, there was some further correspondence between the lawyers of the parties and it was only by his letter dated September 24, 1962, Ext. 5 (e), that the plaintiffs' lawyer gave the particulars of the unauthorized constructions, namely, an asbestos shed of brick built walls with pucca cemented floor measuring about 60'X30' and an addition of about 15' X 6' on the western side of the approved leanto. The area of the unauthorized construction as alleged in the said letter and also in the Schedule 'A' to the plaint does not tally with the report of the Advocate Commissioner which is Ext. 'A'. One significant fact may be noticed in this connection that, while it is the positive case of the plaintiffs that the defendant made the said unauthorized construction in February 1962 and that is also the evidence of P.W. 1, the Manager of the plaintiffs, in Ext. 5 (b) which is a letter dated April 10, 1962 of the plaintiffs' lawyer, it was alleged that the defendant was erecting some more structures for which no plan was ever submitted by the defendant to the plaintiffs nor approved by them. Therefore, according to the plaintiffs, own allegation as made in the letter Ext. 5 (b), the structures were being erected in April 1962. This does not support the plaintiffs' case that the defendant constructed the disputed structures in February 1962.

14. The defendant has filed the balance sheets for the years ending December 31, 1956 and December 31, 1962. The balance sheet of 1956 shows an expenditure of Rs. 30,000 on account

of addition to the lease-hold land and factory buildings during the year, but the balance sheet for the year 1962 shows that no expenditure was made by the defendant for any addition during the year on the lease-hold land. Our attention has been drawn by Mr. Dutt to an item in the balance sheet for the year 1962 showing an expenditure of 33,724 on account of repairs to buildings. It is submitted by him that the said expenditure must have been incurred by the defendant for the construction of the disputed structures. We are unable to accept this contention, for we do not find any reason to disbelieve the retries in the balance sheets of the defendant which have been duly audited. The balance sheet of the defendant for the year 1962 supports its case that no construction was made by it in 1962.

15. After considering the facts and circumstances of the case and the evidence on record, we agree with the finding of the learned Subordinate Judge that the plaintiffs have failed to prove that the defendant made unauthorized constructions in February 1962 without the knowledge and consent of the plaintiffs and that, accordingly, the lease of the defendant determined by forfeiture. In these circumstances, the judgment and decree of the learned Subordinate Judge are hereby affirmed and the appeal is dismissed, but in view of the facts and circumstances of the case, we make no order as to costs. The appellants will be entitled to withdraw the rents deposited by the respondent in the trial court without furnishing any security. This disposes their application filed in Court on 3-3-1975.

Sharma, J.

16. I agree.

Order accordingly.