BOMBAY HIGH COURT

Doongersey Lakhmidas

Vs

Keshavji Meghji

(Beaman, J.)

13.04.1917

JUDGMENT

Beaman, J.

1. The facts of the present case are that the plaintiff is the lessor and the defendant the lessee of a godown in Baroda Street near Carnac Bunder. The godown was originally owned by one Mr. Pavri under a lease from the Port Trust commencing from the year 1883 which passed through various hands in the meantime. In 1910, Mr. Pavri leased this godown to the defendant for a term of five years, the said term beginning from the 1st of May 1911. The lease itself appears to be dated in 1910. In 1912, Pavri transferred his lease to the present plaintiff, Doongersey Lakhmidas. Under the rules governing all leases given by the Port Trust on the transfer of leasehold interest it is necessary to satisfy the Port Trust that any buildings on the land demised are in good and tenantable condition. Thus at the time of the transfer, in 1912, the godown, which is now the subject of this litigation, was examined by the Port Trust engineers, directions given and apparently obeyed and the transfer from Pavri to Doongersey Lakhmidas was sanctioned by the Port Trust. From this it must be inferred, I think, that, in 1912, that is to say, two years after Pavri had demised this godown to the defendant for a term of five years, the godown was substantially in geca repair. The godown had been leased to the defendant for the purpose of storing rice therein and its capacity is proved to have been some 40,000 bags. The defendant continued to store rice, much of which lay un-removed for years, in this godown up to the 19th of February 1915. On the night of the 19th the southern wall of the godown collapsed bringing with it the portion of the roof and some of the rice bags piled within. In its fall the southern wall of the godown damaged the adjacent godown of Bai Moghibai.

2. On these facts the plaintiff sues the defendant for damages on the ground of waste. He also seeks for a declaration that the defendant must indemnify him against any claims made and substantiated against him by Bai Moghibai. The defendant on, the other hand counter claims the damage done to 700 bags of rice through the godown being untenantable or in insufficient repair,

the loss thus occasioned being due to the negligence of the plaintiff-landlord. There is nothing in the underlease of 1910 which has any material bearing upon the law to be applied to the facts of this case. It is true that under that lease the lessor agrees to maintain in good repair the doors, windows, shutters and such interior fixings of a like kind. We have no concern here with the terms of the lease granted by the Port Trust to the plaintiff's predecessor-in-title.

3. A great point was made at the trial of a notice alleged to have been given by the defendant-lessee to the plaintiff on the 24th of July 1914 complaining that the roof of the godown was leaking and that the goods stored therein were by reason of such leaking being damaged. I do not myself think that, whether such notice was in fact given or not, it has any material bearing upon the questions I am here to answer. The defendant very likely relied upon it in consequence of certain dicta to be found in the judgment delivered by the Court of Appeal in the case of Manchester Bonded *Warehouse Company v. Carr*[1]

4. Now, in the first place it is necessary, after stating these Very simple facts, to lay down the principle upon which cases of this kind have to be determined. It is not easy, reading the judgments of the English Courts in the various cases of this kind, to extract any very clear and definite principle sharpe demarcating off cases of permissive from those of voluntary waste. There are dicta not only in the English law books but in the writings of accredited authorities upon which the plaintiff has very confidently relied to the effect that in all tenancies for years it is the business of the tenant to keep up the building and it is his duty to restore it at the end of the tenancy in as good a condition as that in which he received it. Dicta of that kind appear to me to be much too loosely and generally expressed. They are all found in particular cases to be subject to qualifications and it appears to me after a careful study of the case-law with particular reference to the statute law which in this country is alone authoritative that the simple rule is that in all cases of alleged voluntary waste the duty lies heavily upon the party alleging it to prove that it has been committed by the tenant. We have permissive waste provided for by Clause (m) of Section 108 of the Transfer of Property Act and by implication the limits to voluntary waste appear to be laid down in Clause (c) of the same section. Considering that permissive waste is always conditioned by reasonable wear and tear, I should think it extremely doubtful whether the doctrine can ever be earned the length to which, assuming that the allegation of voluntary waste cannot be established, the plaintiff has asked to carry it here. I doubt much whether in a tenancy for years a tenant would ever be held bound to rebuild the whole of the demised premises should they fall down during the currency of the tenancy, so that he might thus restore them not only in as good but probably in better condition than that in which he had received them. I take it that the doctrine of permissive waste is to be applied under the rules of general common sense and goes no further than that a tenant is bound to take reasonable care of the property entrusted to him and see that through no neglect of his own it is irreparably damaged. Here, however, having regard to

the short period of the lease, that is to say five years, it could, not, I think, seriously be contended that if the premises were in good repair and tenantable at the time they were demised in 1910 any merely permissive waste on the part of the tenant could have had the result of causing them to fall in ruins in February 1915. The plaintiff, therefore, must stand or fall by the allegation of voluntary waste.

5. What is necessarry to make out a case of that kind becomes, I think clear from the consideration of such cases as *Saner v. Bilton*[2] and the Manchester Bonded *Warehouse Company v. Carr*[3] in England and *Koegler v. Yule*[4] in India. It is true that in Manchester Bonded Warehouse Company v. Carr the tenant was held liable to the extent of putting the interior of the building, that is to say, the floor of the warehouse and so forth, into as good a condition as they were in when he entered, but that was upon the special ground that the cause of destruction was not excepted under the covenants making the maintenance of the tenantable condition fall upon the tenants. In the absence of any such condition, I think, it is quite clear that the case would have been decided in the same way and upon the same principle as Saner v. Bilton. The earliest case of Gott v. Gandy (1853) 2 El. & Bl. 845 is a different case and useful in another connection. It has no bearin upon the principle. I am a present discussing. Now, if we adopt he rule laid down in the case of Koeglev v. Yule the facts of which are very similar to the facts before me though indeed both in that case and in Saner v. Bilton the facts were very much more favorable to the plaintiff than they are here, it becomes clear that in order to succeed the plaintiff must satisfy the Court that the defendant has committed voluntary waste, that is to say he has not used the demised premises m a fair, easonable and tenantable way. I say the case here is much weaker than either the case of Koegler v. Yuleor Saner v. Bilton For there the alleged waste was committed by storing goods in excessive weight and quantity upon the floor which gave way and so caused damage to the dennsed premise. We have here the case of a godown which is intended to contain rice or other grain or merchandise and the bulk of the waight of such goods rests upon the ground and only bears indirectly and laterally upon the walls it indeed to goods are stacked in such a way as to touch them at all. I think it would be extremely difficult for the lessor of the godown, deliberately let for the storage of bags of rice or other seeds to prove that there was any untenantable use made of the building by so filling it up with commodities of the intended kind. The plaintiff's case here upon the facts is that the defendant overloaded the godown and stacked the rice in such a way that if it did not actually lean against the southern wall the bags were piled so close to it that under pressure and possibly under expansion owing to moisture and heat the sides exercised steady and forcible pressure upon the wall. The defendant's case is that at the time the godown fell it contained roughly some 30000 bags which is about three-fourths of its total holding capacity. The bags piled against the southern wall are sworn to have been stacked clear of the wall though very close to it. It is obvious that if this were true little or no pressure could

have been exerted by the bags upon the wall and stacking the rice in that manner could not have been, as far as I can see, upon any reasonable construction of the intended uses for which the building was let, an untenantable and unreasonable user. Everything, therefore, turns upon whether, as alleged by the plaintiff', the defendant so stored rice in the godown as to bring an unnecessary weight to bear upon the southern wall. Of that I can discover no proof whatever in the evidence of the plaintiff's witnesses. The argument has really proceeded upon a priori grounds that as the wall was passed as good, sound and solid in 1912, it could not possibly have fallen in 1915 unless it had been exposed to an altogether unreasonable weight. That however, is merely begging the question. The evidence, such as it is, is practically confined to the evidence of Mr. Chambers. I can safely neglect, upon this point, the evidence of the first witness, Mulji Ranchordas and that of the plaintiff himself; and what after all does Mr. Chambers know about it ? After the wall had fallen on the night of the 19th of February, he was on the spot in the morning of the following day and there he surveyed the scene of the ruins and he noted that the wall had fallen and there was a great mass of debris and rice bags lying upon the ground and against the adjoining wall of Bai Moghibai. He did not count the bags that had fallen and the impression which he gave the Court appeared to me to be of no higher value than the observation of any other person who happened to be passing that way and saw what had happened. It is obviously impossible for him to say how the bags of rice had been piled before the collapse. He certainly gives it as a suggestion of his own that they were so close to the wall that if not at first touching it under pressure and atmospheric influences they had expanded so as to exert considerable force upon the wall. That was in his opinion the cause of the collapse. I do not think his opinion is worth anything. We have really no data upon which to estimate the kind of pressure which might thus be exerted by the bulging of the bags which, in the first instance were not resting against the wall. And we have no means of knowing to what extent the structure had deteriorated between 1912 and February 1915. I do not think it necessary to turn to the evidence for the defendant on this point although much more use has been made of that than of the evidence led by the plaintiff himself in support of his allegation that the fall of the godown was due to bad and unwarrantable overloading. All that need be said of the evidence of Adam Jan Mahomed, who is the defendant's most responsible agent for the purposes of this kind, is that as far as it goes it supports the defendant's rather than the plaintiff's story. This was to be expected and I attach no very great importance to Adam's account of the manner in which the rice bags were piled. This, however, is of some importance that both Mr. Chambers and Adam agree that after the fall of the wall the bulk of the stock close to it was still standing. A considerable number of bags had fallen outwards indicating that they at least had been leaning against the wall though Mr. Chambers admits that it is not impossible that they may have been knocked off when the roof fell. It is common ground that as far as the piled rice contiguous to the wall was concerned, it was not leaning upon the wall. Thus, we have a godown of a holding capacity of 40000 bags let out for

storing rice and at the time the southern wall gave way holding only some 30000 bags of rice and upon these facts the Court is asked to conclude that such a storage was untenantable use of the godown. I can see no ground whatever upon which to rest such a conclusion. Attempts were made to show that the southern wall may have been weakened by rain drippings from the godown itself or those of Moghibai's godown. But that has nothing to do with the case of voluntary waste. Indeed in treating the evidence recorded as a whole it is very necessary to analyse it with the object of keeping distinct and separate those parts of it which are proper to the case of voluntary and those parts which are proper to the case of permissive waste. As to the former I think I have exhausted all the evidence, such as it is which is both relevant and material and it must be apparent that it falls very far short of establishing the case such as the plaintiff set out to prove.

6. As regards the defendant's counter-claim, that appears to me to be entirely without foundation. There is no implied warranty in contracts of leasing and it is not pretended that the landlord has broken any special covenant in the lease. As, therefore, I hold that the defendant committed no voluntary waste and that the case is not within the meaning of permissive waste or of such a kind as under that head would impose upon the defendant the necessity of maintaining the structure, or, suppose it to be demolished by the influence of natural conditions during the tenancy of rebuilding it, the conclusion is that the plaintiff has no cause of action and his suit against the defendant must be dismissed with all costs. Similarly the defendant's counter-claim must be dismissed with all costs.

7. I think there is one further point. As I have stated the plaintiff claims a declaration that he is entitled to be indemnified by the defendant against any claim which Moghibai may establish against him. For the reason given in the foregoing judgment it necessarily follows that he is not entitled to any such indemnity.

8. The suit and counter-claim both dismissed with all costs.

Cases Referred.

1(1880) 5 C. P. D. 507
2(1878) 7 Ch. D. 815
3(1880) 5 C.P.D. 507
4(1870) 5 Beng. L.R. 401