

BOMBAY HIGH COURT

The Secretary of State

Vs

Mahomed Yusuf Ismail

(Pratt, J.)

07.08.1919

JUDGMENT

Pratt, J.

1. This is a suit for specific performance of an agreement to lease. The facts are not in dispute. In December 1914 the Presidency Post Master was looking for premises for a new Post Office and entered into negotiations with the 1st defendant, who was constructing a building called the Sutar Chawl. The Presidency Post Master gave the defendant particulars as to the nature and extent of the accommodation required and the defendant made the following offer in letter dated the 1st February 1915. WITH reference to the Post Office Superintendent's interview with me, I have arranged with Messrs. Mistry and Bhedwar, Architects, to have an accommodation for a Post Office at Sutar Chawl measuring about 650 Sq. Yds, and shall let it to you on a lease for ten years on the following conditions:

1. The rent for the place would be Rs. 175 per mensem.
2. The counters and a shelf would be supplied by me.
3. The electric installation to be made by me, but will be maintained thereafter by you.

2. The place would be ready for occupation by the 1st April 1915." The Presidency Post Master then obtained the sanction of the Post Master General and replied as follows on the 13th of February 1915: IN continuation of my letter J. Musjid /2 dated the 6th February 1915, I have the honour to say that the Post Master General, Bombay, has accepted the proposal. I shall, therefore, be much obliged if you will kindly do the needful now with a view to enable me to move the present J. Masjid Post Office into your new building in the Sutar Chawl with effect from the 1st April 1915. The Post Master General has further desired me to insert the optional clause in the lease, i. e , giving the Post Office the option to renew the lease for another five years. Kindly acknowledge receipt of this letter.

3. To this defendant replied on the 16th of February 1915 as follows:

WITH reference to your letter No. Juma Musjid /2 dated the 13th in stant, I am making the necessary arrangements.

4. The defendant proceeded to make what he called the necessary arrangements, that is to adapt the premises for use as a Post Office ; but by the 1st of April these arrangements were not complete. The counters were not varnished, the shelves were not put up, and the electric lights were not installed. Nevertheless the Post Office went into occupation on the 1st of April and the improvements were completed in the following month.

5. Mr. Murtree, the Presidency Post Master, says that he did not tender a lease for execution on entry into possession as the improvements had not been completed. After they were completed he instructed a subordinate to do BO. But the defendant made no reply and the matter was lost sight of. But the Post Office continued in possession and paid the stipulated monthly rental.

6. Subsequently the 1st defendant leased the same property to two rent farmers, the 2nd and 3rd defendants, and they served the Post Office with a notice to quit; and this led to the institution of the present suit. On these facts the questions that arise are those embodied in the first two issues: Does the correspondence disclose a completed agreement? If so, is it inadmissible in evidence for want of registration ?

7. Now, I think, it can hardly be disputed that there was a completed agreement. The defendant's letter of the 1st of February was an offer embodying all the terms of the proposed lease. It is true that the Presidency Post Master's reply was not an unqualified acceptance but suggested a further condition of an option of renewal. It was in fact an acceptance with a counter offer which the defendant in turn accepted by his letter of the 16th of February. The acceptance was not express but it is clearly implied in the statement that the defendant was making the necessary arrangements, specially in view of his subsequent conduct in giving possession to the Post Office.

8. The next question is the more difficult one: whether these letters embodying the agreement to lease are inadmissible in evidence in view of Section 49 of the Indian Registration Act. That section enacts that no document which is required by Section 49 to be registered shall when unregistered be received as evidence of any transaction affecting property comprised therein. There can be no doubt that an agreement may be a transaction affecting property although it does not create an interest in the property. I think it is clear from the terms of Section 91 of the Indian Trusts Act where the same words "affecting property" are used.

9. The question then resolves itself to this: Whether the registration of this correspondence

embodying the agreement to lease is compulsory under Section 17. Now, the period is more than one year, and, if the agreement be equivalent to a lease, registration will be compulsory under Section 17, Sub-section (1), Clause (d). The Advocate General for the plaintiff refers to the case of *Panchanan Base v. Chandi Gharan Misra*¹ where Jenkins C. J. described an agreement to lease as falling under Clause (h) of Section 17 of Act III of 1877, corresponding with Section 17(2) (v) of the present Act (XVI of 1908). But, I think, it is clear that this reference was an oversight, for that sub-section does not apply to leases and applies only to instruments described in Section 17, Sub-section (1), Clauses (6) and (c). The substantial reason given in the judgment was that in the document there considered no immediate interest was created and there was no present demise. This accords with the rule deducible from *Purmananddas Jiwanddas v. Dharsey Virji*² and the recent judgment of this Court in *Kessowji v. Bai Keserbai* (Appeal No. 2 of 1909) that agreements to lease which are compulsorily registrable under the combined operation of Section 2, Sub-section (7), and Section 17 of the Registration Act are those agreements which import a present demise or the creation of an immediate interest.

10. Does this agreement import such a demise ? Under the authorities " the intention of the parties as declared by the words of the instrument must govern the construction," *Poole v. Bentley*³; and "where there is any doubt as to the operation of the contract, the Court must endeavor to discover the intention of the parties from the contents of the instrument; and if we see a paramount intention that the instrument shall operate as a lease, we must hold it to be such, although it may contain conflicting expressions" : *Pinero v. Judson* (1829) 6 Bing. 206, 210.

11. Now, there are no words of present demise in the correspondence. "I let" or "I agree to let" have been held to be words of present demise but here the words are "shall let". Again, as to the intention of the parties, the terms of the agreement and the collateral circumstances negative a present demise. The defendant offers to provide accommodation for a post office and to make the necessary improvements, and the plaintiff accepts subject to a counter-offer which is itself accepted. The making of the improvements was a condition precedent to the acceptance of the tenure and there can be no doubt but that the plaintiff could have refused to enter into possession on the 1st of April if counters had not been constructed. The parties, therefore, could not have intended the agreement to operate as a present demise. And the fact that the plaintiff waived the previous construction of some of the improvements and did enter into possession on the faith of the defendant's promise to complete does not affect this conclusion.

12. For the defendant it is contended that the fact of plaintiff entering into possession and paying rent is conclusive that there was a demise. No doubt there has been a demise, but how ? Not under the agreement which was executory but by implication from the fact that the defendant put the plaintiff into possession. When that was done on the 1st of April the agreement became

executed and there was a demise. Nevertheless, on the 16th of February the agreement was still executory and imported no present demise. To quote the words of *Baron Alderson in Gore v. Lloyd*⁴ Looking at the whole of this instrument, it appears to me that it was not intended to give an immediate right to the party to be from that moment, and before the execution of any lease, a tenant from a future day, but that the true construction of the instrument is, an agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent, so as to put the premises into a certain state, which the agreement describes. Then, it being shown that this agreement has been performed, and that the tenant is occupying the land, the terms of the agreement, coupled with his occupation, make him a tenant upon the conditions specified as the terms of the future lease.

13. That is exactly the case here. It is not an agreement of demise but an agreement to demise at a future date on the performance of certain conditions.

14. In *Regnart v. Porter*⁵ an agreement containing prospective stipulations by the landlord to lay out money on the premises was held not to operate as a demise in present. There were similar stipulations in *Staniforth v. Fox*⁶, but they were held to be merely accessory in view of the express words "does this day agree to let" and the simultaneous payment of part of the rent. The recent case of *Inland Revenue Commissioners v. Earl of Derby*⁷ illustrates the converse case of conditions to be performed by the tenant. There was an agreement to lease for a term commencing from Lady Day 1910. The agreement was concluded by correspondence of the 5th of April 1910, subject to certain conditions to be performed by the lessee and the Court held that this was not the case of a tenancy actually created by agreement but an agreement which provides the conditions on which a lease can be demanded.

15. Sir Chimanlal for the defendant refers to *Barry v. Nugent*⁸ and *Doe d. Walker v. Groves*⁹ for the proposition that an agreement may operate as a present demise although the execution in the future of a formal document was contemplated. No doubt, that will be so, if such can be collected to have been the intention of the parties. But that is not the case here and the extreme informality of the agreement concluded by the correspondence supports the contention that there was no intention to make a present demise.

16. The agreement is, therefore, not barred by Section 49 of the Indian Registration Act.

17. It is further contended on behalf of the plaintiff that the Crown is not bound by the Registration Act. But, in view of my finding on the construction of the agreement, I need not enter into a detailed discussion of this question and shall content myself with referring to Section 17, Sub-section (2), Clause (vi), and Section 90 as containing an implication which takes away the prerogative of the Crown.

18. It is not contended that the delay in filing the suit disentitles the plaintiff to specific performance. The delay in this case leads to no inference of acquiescence for the plaintiff was in possession. Nor has anything occurred in the interval which would make the grant of the relief claimed inequitable, On the other hand the equities are in favour of the plaintiff for there has been part performance and the plaintiff has been put into possession.

19. The second and third defendants are subsequent lessees with notice for plaintiff's possession was notice. They can, therefore, be made to join in the execution of the lease under Section 27 (b) of the Specific Relief Act.

20. The agreement is not stamped but is nevertheless admissible in evidence in view of the exemption of Government contained in the proviso to Section 3 of the Indian Stamp Act.

21. The following issues were framed:

(1) Whether there was a concluded agreement in correspondence between plaintiff and defendant 1 as alleged in para 2 of the plaint?

(2) Whether, if the first issue is found in the affirmative, the correspondence is admissible in evidence as the agreement to lease being not registered and not stamped?

(3) Whether the plain tiff is not merely a monthly tenant?

(4) Whether the plaintiff is entitled to specific performance of the alleged agreement?

(5) Whether the plaintiff is entitled to an option of renewal for a further period of five years?

22. My findings thereon are: (1) in the affirmative; (2) in the negative; (3) in the negative; (4) in the affirmative; (5) in the affirmative.

23. There will, therefore, be a decree in terms of prayer (a) to the plaint against the 1st defendant. The second and third defendants ordered to join in the execution of the said lease. The plaintiff to recover his costs from the 1st defendant.

Cases Referred.

1(1910) I.L.R. 37 Cal. 808

2(1885) I.L.R. 10 Bom. 101

3(1810) 12 East 168, 170

4(1844) 12 M. & W. 463, 478

5(1831) 7 Bing. 451

6(1881) 7 Bing. 690

7(1914) 3 K.B. 1186

8(1782) 3 Douglas 179, 180

9(1812) 15 Hast 244

