Privy Council Appeal No. 110 *of* 1925.

Dhanna Mal and others - - - - - - *Appellants*

v.

Rai Bahadur Lala Moti Sagar - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 3RD MARCH, 1927.

Present at the Hearing:

LORD PHILLIMORE.
LORD SINHA.
LORD BLANESBURGH.
LORD SALVESEN.

[*Delivered by* LORD BLANESBURGH.]

This suit relates to a plot of land about 2,250 square yards in area situate in the Sudder Bazaar in Delhi. The land belongs to the respondent. At the commencement of the suit it was in the occupation of the appellants at a rent of Rs. 25 per mensem. The buildings upon the land are the property of the appellants. The suit by the respondent as plaintiff is a suit in ejectment and for arrears of rent. The great question between the parties is as to the nature of the appellants' interest in the land. Were they, as the respondent contends, mere tenants at will, or, as they themselves assert, are they entitled to a permanent inheritable right therein subject to the payment of a fixed rent?

The Subordinate Judge of Delhi decreed the suit. On appeal by the defendants the District Judge of Delhi dismissed it. On the 17th March, 1922, the High Court of Judicature at Lahore, on second appeal by the plaintiff, reversed the decree of the District Judge and restored that of the Subordinate Judge, with a modification relating to the buildings on the land, to which their Lordships

will refer later. This appeal to the Board is against the decree of the High Court. The appellants ask that the order of the District Judge be restored and that the suit against them be dismissed.

The appeal was elaborately argued before the Board, and the questions involved are very fully discussed in the judgments of the Courts in India. As a result, the effective issues are now reduced in number and simplified in character, and they can be dealt with by their Lordships, as they hope, with comparative brevity. It will be convenient at once to clear away certain matters preliminary in character which were much discussed in the Courts below.

The land in question had been let in or about the year 1871 by one Karim Baksh to a firm of Jais Raj and Khem Raj. The respondent is the successor in interest of Karim Baksh, and the appellants are the successors in interest of the firm. With a view of establishing that the appellants had become mere tenants at will of his, the respondent tendered in evidence at the trial a declaration, dated the 10th September, 1871, signed by one Ghasi Ram, Gumashta and manager of the firm, purporting to set forth the terms of the tenancy of the land which on that day had been granted to the firm by Karim Baksh. The authenticity and authority of the declaration have not been proved, but its reception in evidence was objected to *in limine* by the appellants on the ground that the declaration was, or purported to be, a lease or counterpart of a lease which, under section 17 of the Indian Registration Act, had to be, and had not been, registered. This objection was upheld by the Trial Judge and by both of the higher Courts in India. Their Lordships are in entire agreement with all the learned Judges on this point. The declaration, in their view, being unregistered, cannot, even if proved, be receivable in evidence in this suit. Accordingly, they dismiss from their minds both the declaration and its contents.

Up to March, 1904, the rent paid for the land by the tenants had been Rs. 12.8 per mensem. In that month the respondent's father, who had by purchase become the ground landlord, served the then tenants—in substance, the present appellants—with notice requiring them to pay an enhanced rent of Rs. 25 per mensem or vacate the land, and on the 9th January, 1905, filed a suit against them in the Court of the Subordinate Judge at Delhi claiming to recover arrears of rent at that rate of Rs. 25. This claim the defendants resisted, setting up, in terms to which their Lordships will later refer, a tenancy which had not then expired, and which, for present purposes only, may, without prejudice, be conveniently enough described as a permanent tenancy.

This suit was on the 16th January, 1906, decreed by the Subordinate Judge. He held that the tenancy was not a permanent one, and that the plaintiff was entitled to enhance the rent to the extent which he claimed. From that decree the defendants appealed to the Divisional Judge. In the course of his judgment

on the appeal, that learned Judge stated that on the question whether the tenancy was permanent or not he was disposed to differ from the view of the lower Court. He went on, however, to say, that in his view, it did not follow from the fact of the tenancy being permanent that the rent could not be enhanced, and he agreed with the lower Court in thinking that it should. Accordingly he affirmed the decree and dismissed the appeal. Thereupon an application for review of his order was made by the plaintiff on the ground that, although the decree was in his favour, the learned Judge had held that the defendants were permanent tenants, and that he had so held owing to a misapprehension of counsel's argument upon the subject. The Divisional Judge refused this application for review, while acknowledging that he had apparently misunderstood the argument addressed to him by the plaintiff's counsel. He stated that in the circumstances he would have been prepared to allow the application if he had thought that it lay. In his judgment, however, such an application could only be made by a person aggrieved by a decree, and he added that it could not possibly be said in that case that the granting of a decree

> "for enhancement of rent implies that the defendants are permanent tenants. If the decree could be said to involve any implication at all as to the nature of the tenancy, the implication would be the other way, namely, that the tenancy is not permanent. It is only the judgment by which the plaintiff is aggrieved. He is in no way aggrieved by the decree, and, therefore, he cannot apply for a review."

In the result the enhanced rent was decreed. No appeal against the order decreeing it was made by the defendants, and that rent has been paid by the tenants ever since.

Both parties now claim this decree as a *res judicata* in their favour. The appellants rely upon it as a pronouncement unappealed from and binding upon the respondent that their tenancy is permanent. The respondent relies upon it as a decree, now binding, that the tenancy is one with respect to which an order enhancing the rent can in proper circumstances be made, and that such a tenancy, whatever else it may be, cannot be a permanent tenancy.

Both of these contentions have been rejected by the Courts in India, and again their Lordships are in complete agreement with the learned Judges in this conclusion. It is impossible, in their Lordships' judgment, as a matter of ordinary fairness —to go no more deeply into the question—that after the plaintiff's application for review was refused for the reason given the previous expression of opinion of the District Judge that the tenancy was permanent could be relied upon by the defendants for any purpose whatever. The learned Judge, treating his pronouncement as entirely irrelevant, must be taken to have withdrawn it as the expression of a concluded opinion. For similar reasons the learned Judge's decree affirming the enhancement of rent, however unjustifiable in point of law it was, if the tenancy

were really permanent, cannot, their Lordships think, be treated as a pronouncement binding as between these parties that the tenancy was not permanent.

The order enhancing the rent is, however, not without importance in the present litigation. The defendants, if their contention that the tenancy was permanent had been well founded, could have had that order discharged on appeal. They did not appeal, and they can not now be heard to say that a less rent than the Rs. 25 which they have since paid without protest was alone properly payable. It may well be that neither party to the 1905 litigation was eager to put prematurely to the test the question so stoutly litigated in the present proceedings, but, as is shown by the plaintiff's application for review, and by the defendants' submission, without appeal, to pay an enhanced rent, the hesitation on the part of the defendants was in this matter more pronounced than the reluctance of the plaintiff. The actual increase of rent was not a very serious matter, and it is not improbable that the defendants were content to submit to it, accompanied as it was by the District Judge's provisional expression of opinion favourable to their main contention, rather than risk an appeal, the result of which might have deprived them of that opinion for whatever it was worth. Their Lordships are unable to appreciate the contrary reasoning in this matter of the learned District Judge.

A third question, more formidable in character, must be disposed of before their Lordships further proceed. The learned District Judge, on appeal here, dismissed the respondent's suit, finding that the appellants' tenancy was permanent. It is thereupon contended by the appellants that this finding was one of fact by the learned Judge not open to review either by the High Court on second appeal or by this Board.

Now their Lordships would be the last to seek to abridge the effect of SS. 100 and 101 of the Code of Civil Procedure or weaken the strict rule that on second appeal the appellate Court is bound by the findings of fact of the Court below. They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact—a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court on first appeal must be accepted. On these lines, which the High Court appear strictly to have observed, the appeal to that Court was competent and it was in their Lordships' judgment open to the learned Judges there to entertain it as they did.

With the actual conclusion of the High Court their Lordships find themselves in agreement. They have heard in argument nothing which would lead them to disturb these findings, and

it would be unprofitable again to discuss at length all the circumstances which influenced the learned Judges in the matter.

Their Lordships will refer only to three outstanding things which have deeply impressed them. The first is the sale deed of the 23rd August, 1885—the only transaction of the kind that has taken place—by which Lachman Das, the then proprietor of the tenant firm, sold for Rs. 4,000 to Lala Mul Chand, the firm's entire interest in the amla then erected on the land and in the land itself. The assurance of the amla is absolute : the vendor's covenants for title are unqualified. As to the land, however, the vendees are to be responsible for loss or damage which might be caused to them in case the owner of the land raises a dispute or sets up a claim against them : the vendor is to have no concern therewith. This reserve, so soon after the original letting, strikes their Lordships as highly significant.

The Board also is struck with the terms of the written statement put in by Mul Chand and the other defendants in the 1905 proceedings. There is no proper allegation of a permanent tenancy there set up. The allegation is that the plaintiff is not entitled to enhance the rent so long as the defendants' building stands on the land : the plaintiff cannot eject the defendants so long as the building in question exists. In a statement on the defendants' behalf the allegation is that at the time of the erection of the building there was an oral agreement between the proprietors of the land and the defendants' predecessors in title that they would pay a fixed rent of Rs. 12.8 so long as the house to be erected was in existence. That is all. How far these pleas, even if they had been proved, were consistent with any permanent tenancy after the destructive fire of 1911 has not been investigated.

Lastly, their Lordships cannot get over the continued payment of the enhanced rent of Rs. 25 per mensem ever since the decree in the 1905 suit. It is not now in contest that such an enhancement of rent is entirely inconsistent with the notion of a permanent tenancy, and the continued payment by the appellants of that rent is a circumstance from the serious import of which they cannot now escape.

On the whole case their Lordships, agreeing with the High Court, are of opinion that no permanent tenancy has here been established.

By the order of the High Court the present appellants were permitted to elect within a period of three months whether, in lieu of removing them, they would accept for the buildings on the land the sums of Rs. 23,480 offered therefor by the respondent. Their Lordships have not been informed whether this matter has been left in abeyance pending the decision of this appeal. If it has, it would be proper. they think, that the period of election should be extended for three months from the date of His Majesty's Order in Council. With that variation the order of the High Court should, in their Lordships' judgment, be affirmed, and this appeal be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

DHANNA MAL AND OTHERS

v.

RAI BAHADUR LALA MOTI SAGAR.

DELIVERED BY LORD BLANESBURGH.

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