

(1912) 06 CAL CK 0085
In the Calcutta High Court

Secretary of State for India in Council	Vs	APPELLANT
A.H. Forbes		RESPONDENT

Date of Decision : 18-06-1912

Acts Referred:

Citation : 17 Ind. Cas. 180

Hon'ble Judges : Beachcroft, J; Ashutosh Mookerjee, J

Bench : Division Bench

Judgement

Ashutosh Mookerjee, J.—This is an appeal by the Secretary of State for India in Council against a decree of the District Judge in reversal of a decree of the Subordinate Judge, by which an action in ejectment commenced by him against the respondent has been dismissed. On the 11th November 1878, the Collector of Monghyr granted a lease to one John Christian in respect of a parcel of homestead land for a term of 27 years from the 1st April 1876. The lease shows, on the face of it, that this was not the commencement of the tenancy, and it is stated expressly that the grant was made upon the expiry of the term of the former settlement. In 1879, the lessee transferred his interest to one Ambler, who, in the same year, sold the property to Alexander John Forbes, now represented by the defendant. Upon the expiry of the term, the Collector made an offer to the defendant to renew the lease on certain terms specified in a draft. The defendant refused to accept a renewal on the terms proposed and claimed a renewal on the same terms as before, subject to the payment of fair rent. The result was that the negotiations terminated, and the Collector, by a notice served on the 25th September 1906, called upon the defendant to quit the land from the 1st April 1907, and to remove the materials of the house which had been erected thereon. The defendant ignored this demand for possession, and on the 7th September 1907, the Secretary of State commenced this action to eject him as a trespasser. The defendant resisted the claim substantially on the ground that he had acquired a permanent right in the disputed land and was not liable to be evicted therefrom. The Subordinate Judge overruled this contention and decreed the suit. Upon appeal, the District Judge has reversed that decision, and

dismissed the suit on the ground that, the defendant had practically a permanent interest in the land as the lease contained a stipulation for renewal. In support of the present appeal, it has been argued on behalf of the Secretary of State that, upon the termination of the lease, the defendant ceased to have any interest in the land and is, consequently, liable to be ejected. On behalf of the respondent, it has been contended, in answer to this argument, that the lease contains a covenant for renewal, that he is entitled to renewal on the same terms as before, subject to the payment of fair rent, that he has always been ready and willing to accept a renewal on this footing, and that, consequently, he is in equity entitled to the same protection as if the lease had been properly renewed in his favour. The questions, therefore, which require consideration are, just, whether there is a covenant for renewal in the lease; secondly, if there is a renewal clause, was the defendant offered a renewal on proper terms; and, thirdly, if the defendant is not to blame, is he protected from ejectment.

2. In so far as the first of these questions is concerned, the answer must plainly depend upon a true construction of the instrument of the 11th November 1878. It recites, in the first place, the prior settlements upon the termination of the last of which the lease was renewed at enhanced rent. It then provides that the lessee would, upon payment of the rent assessed, peacefully dwell on the land, and if he stood in need of constructing any house, he could build on obtaining sanction therefor from the Collector. If the lessee failed to pay rent, the Government might realise the arrear under the laws in force, and further, take possession of the land. During the continuance of the term, the lessee, his heirs and representatives, would have the right to dwell on the land. After the expiry of the term, the Government would have power to re-settle the land with the lessee on a fair rent. The last clause has been construed by the respondent as a covenant for renewal. This has been repudiated on behalf of the Crown, and our attention has been drawn to the fact that no terms are prescribed on which the lease is to be renewed. It has also been suggested, on behalf of the Crown, that if the clause be interpreted as a covenant for renewal, the lessee would practically have a permanent interest in the land, which is inconsistent with the provision for sanction of the Collector, should the lessee build on the land. After careful consideration of all the terms of the lease, some of which are by no means happily worded, I have arrived at the conclusion that the clause in question was intended to be a covenant for renewal. It has not been explained why a contract of tenancy of this character, executed by one Englishman in favour of another, should have been written in what turns out to be a by no means intelligible Indian Vernacular; but this much is plain that, if we accept the construction suggested by the learned Government Pleader, viz., that the clause was intended merely to reserve liberty to the Collector to make a re-settlement with the lessee on fair rent, it would be entirely superfluous. On the other hand, as will presently appear, a renewal clause in a lease does not necessarily import permanency; but even if it did, the clause which requires sanction of the Collector to the erection of a building is not necessarily inconsistent with the

theory of a permanent grant; the object of such sanction may be, not so much to prevent the erection of a building as to secure that the building should be of a suitable type from the sanitary or architectural or other similar point of view. It must again be remembered that the tenancy had apparently continued for many years, had been renewed from time to time, and was intended for dwelling purposes, which would necessarily imply the erection of structures of a more or less substantial character. From this point of view, the insertion of a renewal clause would be appropriate and in perfect harmony with the avowed object of the grant. The construction, therefore, suggested by the respondent is reasonable, and I do not hesitate to accept it, because it is well settled that an express covenant to renew in appropriate technical language is not essential, and the habendum may be so framed as to amount in substance to a covenant for even perpetual renewal. Thus in *Chambers v. Gausson* (1844) 2 Jo. and La To. 99; 7 Ir. Eq. Rule 575; Sir Edward Sugden then Lord Chancellor of Ireland, held, upon a construction of all the terms of a lease, that it was a lease for lives, renewable for ever. He referred to the cases of *Taylor v. Pollard* (1827) Lyne on Leases App. 62 and *Sheppard v. Doolari* (1812) 3 far. & War. 1; 5 Ir. Eq. Rule 6 where a similar view had been taken. I hold, therefore, that the clause in question embodies a covenant for renewal. In so far as the second question is concerned; it has been argued on behalf of the Crown that as the instrument does not specify the terms on which the lease was to be renewed, the lessee could not claim renewal on the same terms as before. This contention, in my opinion, is fallacious. In the first place, a lease which creates a tenancy for a term of years, as in the present case, may yet confer on the lessee an option of renewal: *Moss v. Barton* (1866) L.R. 1 Eq. 174 : 35 Beav. 197 : 13 L.T. 623. In the second place, if the lease does not state by whom the option is exercisable, it is exercisable by the lessee only; in other words, a covenant for renewal, if informally expressed, is enforced only in favour of the lessee: *Lewis v. Stephenson* (1898) 67 L.J.Q.B. 296 : 78 L.T. 165. In the third place, the option is exercisable not merely by the lessee personally, but also by his representative-in-interest, for example, his trustee in bankruptcy: *Buckland v. Papillon* (1866) 2 Ch. App. 67 : 36 L.J. Ch. 81 : 12 Jur. (N.S.) 992 : 15 L.T. 378 : 15 W.R. 92. In the fourth place, if the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself: *Lewis v. Stephenson* (1898) 67 L.J.Q.B. 296 : 78 L.T. 165; *Austin v. Newham* (1906) 2 K.B. 167 : 75 L.J.K.B. 563 : 95 L.T. 490; *Price v. Assheton* (1834) 1 Y. & C. 82 : 11 R.R. 222 : 4 L.J. (N.S.) Ex. Eq. 3; *Richards v. Richards* (1843) 2 Y. & C.C.C. 419 at p. 427 : 7 Jur. 715. The exception just mentioned is of some importance because it negatives the suggestion made on behalf of the Crown that a covenant for renewal practically implies a permanent lease. Lord Macclesfield said in *Hyde v. Shinner* (1723) 2 P.W. 196 that though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewing of this new lease, for as much as then the lease would never be at an end. To the same effect is the observation of Lord Thurlow in *Tritton v. Foote*

(1789) 2 Brown C.C. 636 : 2 Cox. 171 that a covenant in a lease to renew under the same conditions is exclusive of the covenant of renewal. Similarly, Lord Selborne observed in *Swinburne v. Milburn* (1884) 9 App. Cas. 844 at p. 850 : 54 L.J.Q.B. 6 : 52 L.T. 222 : 33 W.R. 325 that though there is no sort of legal presumption against a right of perpetual renewal, yet the authorities certainly do impose upon any one claiming such a right the burden of strict proof and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted. The substance of the matter, therefore, is that the covenant will not be construed as a covenant for perpetual renewal, unless the intention in that behalf is clearly shown; for instance, when the covenant expressly states that the lease is to be renewed for ever; otherwise, the agreement is satisfied and exhausted by a single renewal: *Job v. Banister* (1856) 2 Kay & J. 374 : 110 R.R. 273; *Hare v. Burges* (1857) 4 Kay & J. 45 : 27 L.J. Ch. 86 : 3 Jur. (N.S.) 1294 : 6 W.R. 144 : 116 R.R. 255; *Davis v. Taylor* (1736) 3 Ridgeway P.C. 395; *Moore v. Foley* (1801) 6 Ves. 232 : 5 R.R. 270; *Iggulden v. May* (1814) 9 Ves. 325 : 7 East 237 : 3 Smith 269 : 8 R.R. 623 : 2 Bos. & P. (N.R.) 449. It has accordingly been held that a covenant to receive the construction of perpetual renewal must be plain and distinct and such as to bear no other construction without force and violence done to the words and the context: *Browne v. Tighe* (1834) 2 Cal. 396 : 8 Bligh (N.S.) 272 : 37 R.R. 150. In the present case, therefore, the defendant was entitled to a renewal of the lease on the same terms as in the instrument of the 11th November 1878, subject to the payment of fair rent as expressly stated therein; and this right was not affected by the circumstance that he was a transferee from the original lessee, for, as already stated, a covenant for renewal runs with the land. *Simpson v. Clayton* (1838) 4 Bingham (N.S.) 758 : 44 R.R. 841 : 6 Scott 469 : 1 Arn. 299 : 8 C L.J., . 59 : 2 Jur. 892; *Roe v. Hayley*; *Brooke v. Bulkeley* (1754) 2 Ves. Sen. 498. The renewed lease offered to him, however, was on substantially different terms. Covenants had been inserted which involved restraint against alienation without the written permission of the Collector which could be obtained only upon payment of premium, forfeiture for felling timber without leave, forfeiture for addition to or alteration in building without assent of the Collector, and like clauses, more or less calculated to prejudice seriously the position of the lessee. The lessee was, therefore, clearly entitled to refuse to accept a renewal on conditions so essentially different from the terms of the original grant.

3. In so far as the third question is concerned, it cannot be seriously doubted that the position of the lessee who has been always ready and willing to accept a renewal on proper terms is the same in equity as if a proper lease has been granted. The covenant for renewal was still specifically enforceable at the commencement of the suit, and the position of the defendant in equity is the same as if it had been specifically enforced: *Walsh v. Lomdale* (1882) 21 Ch. D. 9 : 52 L.J. Ch. 2 46 L.T. 858 : 31 W.R. 109; *Bibi Jawahir Kumari v. Chatterput Singh* 2 C.L.J. 343; *Singhee Ram v. Bhagbat Chandar Nundi* 11 C.L.J. 543 : 6 Ind. Cas. 632 and *Sarat Chandra v. Sham Chand Singh* 16 C.L.J. 71: 39 C. 663 :

14 Ind. Cas. 701.

4. The result, therefore, is that although the reasons assigned by the District Judge may be open to criticism, his decree must be affirmed and this appeal dismissed with costs.

Beachcroft, J.

5. I agree and have little to add it is conceded that the determination of the question depends on the interpretation to be put on the clause, which has been translated, "after the expiry of the term put down in this deed, the Government shall have power to re-settle the land on a fair jama." A more accurate translation of the concluding words would be the Government shall have the power to bring into operation a new settlement on a fair jama."

6. If this clause gives an option of renewal, the appellant is faced by this difficulty that the option must be taken to include a renewal of the lease on all the old terms, except such as are excluded other, of course, than the renewal clause itself. It is clear the words on a fair jama" would be meanings less if applied to any person other than the respondent, for in a contract between A and B., it is of no concern to B. for A. to say, "I shall have power to renew the contract with C. on a fair rent."

7. Any difficulty which there is in the case arises from the fact that the lease is loosely worded. It contains other provisions which are unnecessary, e.g., the passage which, after giving Government power to take seer possession in case of default of payment of rent, goes on to give Government authority to keep the property seer or to lease it to some one else. If the clause "after the expiry of the term, Government shall have power to bring into operation a new lease on a fair jama," were merely a clause emphasizing the fact that the termination of the lease in 1902 was to end the contract between the parties, the appellant must succeed. But a meaning must be given to every clause where possible, and if there is ambiguity in a grant, it must be construed in favour of the grantee. Now, if the contract between the parties entirely terminated in 1902, it was quite unnecessary to reserve to Government the power to make a new settlement. Therefore, the reservation of that power to Government appears to indicate that it was considered that the respondent had some right which it was intended to qualify by this clause. And on the terms of the clause that right could only be a right to renewal. This view is borne out by the fact that previous renewals were recited in the patta. And the suggestion that Government had a right to settle the land with any one without giving to respondent the refusal of a lease does not appear to have been the suggestion, at any rate, in the Court of Appeal, for the judgment of the learned District Judge seems to proceed on the lines that then was an option of renewal and that the Government Pleader's contention was not that there was no option, but that the terms of the lease could be varied.

8. Therefore, we must take it that an option was reserved to the respondent. That being so, it must be taken that the terms not mentioned as liable to

variation were to be renewed. Government was, therefore, entitled only to alter the rent on renewal.

9. I agree in dismissing the appeal with costs.