
(1928) 05 MAD CK 0004
In the Madras High Court

The East India Distilleries and Factories Limited
Vs
P.F. Mathias

APPELLANT

RESPONDENT

Date of Decision : 03-05-1928

Acts Referred:

Transfer of Property Act, 1882 — Section 108

Citation : (1929) ILR (Mad) 994 : 114 Ind. Cas. 234 : (1928) 28 LW 778 :
(1928) 55 MLJ 663

Hon'ble Judges : Odgers, J;Murray Coutts Trotter, J

Bench : Full Bench

Judgement

Murray Coutts Trotter, Kt., C.J.—After careful consideration of this case I have come to the conclusion that the plaintiff cannot succeed

unless he can bring home negligence to the defendants. It is argued that the covenant in the lease imposes an absolute obligation on the lessees to

restore the building at the end of their term in the condition in which they took it without regard to the provisions of Section 108, Transfer of

Property Act. That such a result might be reached in England I do not contest. English authorities were quoted and there is no doubt much to be

said for the view that, if you enter into a general repairing covenant and do not provide for the contingency of fire, you will be held strictly to the

words of your covenant. But in India the Section 108 of the Transfer of Property Act clearly contemplates that a lessee should not be responsible

for the consequences of fire unless he has definitely taken that burden upon his shoulders by his covenant. In my opinion the material covenant of

this lease did not contemplate the case of fire at all. It merely provided for the obligation that the lessee would incur in restoring premises which he

had altered to suit his own purposes to their original use as a dwelling house at

the termination of the lease. That covenant to my mind was founded upon the basis that at the termination of the lease the premises should exist in a state capable of conversion and never was meant to impose upon the leasees the obligation of re-building what had in the events that happened become a mere heap of burnt out ashes.

2. With regard to the question of negligence which of course, if established, would prove the plaintiff's case, I do not think it is established. It is

quite true that there was no watchman so far as one can ascertain on this night, but I am entirely unable to gather from the evidence that that can be

in any way regarded as the proximate cause of this fire. Nor can I see that the principle of *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 has any

application to a case of this kind for two reasons. In the first place, there is no evidence whatever that proof alcohol is a dangerous thing which a

man can reasonably be held to store at his peril owing to its dangerous nature. It is not apparently liable to spontaneous combustion in any

circumstances and it seems more likely on the evidence and from what we have been told that the building fired the alcohol than that the alcohol

fired the building. Moreover it was from the beginning known to the lessors for what purpose the lessees required the building and to what use they

proposed to put it. The cases relied upon by the plaintiffs appear to me not to rest upon the doctrine in *Rylands v. Fletcher* (1868) L.R. 3 H.L.

330, but to be based upon negligence. I need only refer to the latest cases relied upon. The earlier are too well known to render it necessary to

discuss them again. Such cases I mean as *Scott v. The London and St. Catherine Docks Co.* (1865) 3 H & C 596 : 159 E.R. 665 and *Smith v.*

London and South Western Railway Co. (1870) L.R. 5 C.P. 98 C.P. I confess that the case that has given me" most difficulty is that of *Musgrove*

v. Pandelis (1919) 2 K.B. 43 which was put before us as being an instance of the application of the doctrine of *Rylands v. Fletcher* (1868) L.R. 3

H.L. 330. I have satisfied myself after analysing it carefully and especially having regard to the judgment of Duke, L.J., that the case ultimately

resolves itself into a finding of negligence against the defendant's servant. Conditions of danger were no doubt present, but the determining factor

was the failure of the defendant's servant who was an unskilled person put in charge of a car (in itself, I think, possibly a negligent employment by

him) to turn off the tap and hence the petrol in the carburetter was ignited. Since writing this I have seen that Sir Frederick Pollock takes the same

view of the scope of the decision in the last edition of his well-known book on Torts. The other recent case was that reported in *Mulchand Nemi*

Chand v. Basdeo Ram Sarup ILR (1926) A. 404, which clearly contains a finding that it was negligent to leave cotton bales in the place where

they were left without ventilation and without inspection.

3. In my opinion there is no evidence of negligence here or at any rate of negligence which had any casual connection with the fire. I think the

appeal must be allowed with costs here and below. The memorandum of objection is dismissed with costs.

Odgers, J.

4. This is an appeal by the East India Distilleries and Sugar Factories, Limited, through their Managing Agents, Messrs. Parry & Co., against the

decree of the Subordinate Judge of South Kanara awarding the plaintiff one P.F. Mathias Rs. 4,400 damages. The appellant company had taken a

lease from the plaintiff for the purpose of storing alcohol and other spirits for the purpose of their distilling business. They had apparently leased the

premises since the beginning of 1916 when they were to occupy for three years at a monthly rental of Rs. 40. The lessees held over on 23rd July

1920, and obtained a renewal for a further term of three years from 1st June, 1920 at a monthly rental of Rs. 50. The defendant to the knowledge

of the plaintiff made internal structural alterations in the buildings to suit their own purposes for use as a liquor warehouse. On the 27th May, 1922

this building was burnt down, and the plaintiff seeks to hold the defendant company liable for reinstatement. The learned Subordinate Judge has

held that the fire was occasioned by the negligence of the defendants and also that by the terms of the lease the defendants had bound themselves

to restore the building undamaged and in good condition to the plaintiff. The first lease is Ex. XIV for a period of three years from the 1st April,

1910, the owner then being Mr. N. Vyasa Rao, and the lease in question is Ex. XIII in which the lessor undertakes to effect certain preliminary

repairs.

5. The important covenant is as follows:

That the lessees on the expiry of the period of this lease or on its sooner

determination the lessees shall restore the building at their own cost to the condition in which they took the same on lease from Mr. Vyasa Rao, the predecessor-in-title of the lessor in the beginning and as described in the plan which is hereto appended and in good and proper condition and allowance being made for all reasonable wear and tear. That in case the lessees fail to remove the additions and alterations made by them to suit their purposes and at their costs and fail to restore the building to the original and habitable condition the cost thereof be estimated by a competent person and shall be paid by the lessees to the lessor.

6. The question is whether the words in this covenant ""the lessees shall restore the building at their own cost to the condition in which they took the same on lease from Mr. Vyasa Rao"" oblige them to re-build in the case of destruction by fire; in other words, was it within the contemplation of the parties that the benefit of the Transfer of Property Act, Section 108(e) should be replaced by this special contract. Sub-section (m) of this section is also important, for ""the lessee is to restore on the termination of the lease the property in as good condition as it was at the time he was put in possession subject to changes caused by reasonable wear and tear and when such defect has been caused by any act or default on the part of the lessee, his servants or agents, is bound to make it good within three months, etc.

8. It appears to me that what was in the contemplation of the parties when they entered into this covenant set out above in the lease was that any structural alterations made by the company for the purposes of their business should be removed and the building should be restored on the termination of the lease so as to be in a good condition for occupation as a dwelling house which it apparently was before the company began to occupy. For instance, in the lease of 1915, between these same parties the lessees covenant at the end of the lease to put the lessor in possession having before the expiry of that period removed all additions and alterations ""made by us in the above premises for our purposes and make at our expense all necessary changes and repairs for the complete restoration of the premises to the original condition in which the premises were when they were first leased to us by our predecessor-in-title Mr. Vyasa Rao.

9. It seems to me, therefore, that although the words of the covenant might be

stretched so1 as to cover the present circumstances they cannot reasonably be so applied, or, among other reasons, the fact that in the same sentence the lessees undertake to restore the buildings in good and proper condition allowance being made for all reasonable wear and tear; that cannot possibly refer to the complete destruction of the building during the lease and its complete reinstatement. Some point was made on the English Law. For instance, Woodfall on Landlord and Tenant, page 732 is referred to, to the effect that a tenant must re-build the premises if burnt down provided he had covenanted to repair and keep in repair and there is no exception as to damage by fire. The answer, I think, to this is that by the Indian Law, Transfer of Property Act, u/s 108(e) the exception as to damage by fire is indicated in favour of the lessee provided the fire be not caused by his negligence. As to this the learned Subordinate Judge comes to the conclusion that the fire was caused by the negligence of the lessees in that they failed to employ a watchman on the night in question. Apparently a watchman was generally employed, but there was no regular watchman round about the time of the fire but coolies were deputed in turn to do the duty. On the night in question the cooly appointed, after locking the warehouse at 6-30 P.M., was allowed to go home. It appears that two locks are placed upon the building and the three inner doors are bolted from the inside. The outer door was locked by Mr. Lobo, D.W. 2 and also by the Warehouse Officer with a Government lock. The witness says he deputed a cooly to watch on the night in question. The learned Subordinate Judge lays great stress on the fact that one witness, Somayya, who was passing on his way from a bioscope performance at 11 P.M. on the night in question, says that one of the outer doors of the bungalow was open and he was consequently able to see the fire burning inside. So that on this evidence the learned Subordinate Judge says that the only alternatives are either that the servants of the company deliberately omitted to bolt the doors and, therefore, allowed ""the intruder or intruders"" to enter the building, or these persons entered by removing the tiles of the roof. It has to be pointed out there is no evidence whatever of anybody having entered the building or of having set fire to it. But the learned Subordinate Judge considers that an intruder must have so entered and that he would not have so entered had the

watchman been on duty. Under the circumstances, I cannot see that there is any relation of cause and effect between the absence of the watchman and the occurrence of the fire. It may be that somebody had during the day or afternoon left some lighted substance in the building and that caused the fire break out in the middle of the night. As to the facts spoken to by Somayya of the door being open D.W. 2 says that after the fire he found both locks in tact but the door had been burnt through. It may be that it was this burning of the door that enabled P.W. 1 Somayya to see the fire inside and that this was the cause of the door being open. The learned Judge further finds that the destruction by fire was rendered possible by the defendant's default in not appointing a regular watchman. I may point out that that finding is not sufficient to mulct the defendant company in damages. It must be found that the failure to provide a watchman was the proximate cause of the fire. Before going further one perhaps ought to refer to an authority quoted on this question of covenant, *J.H. Hechle v. S.J. Tellery* (1900) 4 C.W.N. 521 where the lessee was held liable to make good damage caused to the leased premises by the Calcutta earthquake of 1897. There the lessee had covenanted without restriction or exception "to keep the premises wind and watertight and in habitable condition," and that being so the learned Judges were of the opinion that this was a contract to the contrary and that Section 108, Clause (m) of the Transfer of Property Act did not apply. The facts of that case are in my opinion distinguishable from the present.

10. The other ground on which it is sought to make the company liable is that of negligence. Mr. K. Section Krishnaswami Aiyangar even went as far as to suggest that the principle of *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265 ought to be applied to the present case. I am not aware of any authority upon which one would be justified in holding that spirits, even proof alcohol, are dangerous things which have to be "kept in" at a man's own peril, and an analogy was sought in the common law rule "as to 'keeping in' fire." For instance, Rolle says:

If a fire suddenly light in my house, I knowing nothing of it, and it burnt my goods and also the house of my neighbour an action on the case lies against me by him.

11. The common law rule has been more than once altered by statute and I think

it will be found that most of the modern cases as to fire have turned on the question of negligence, though the Act of George III (Metropolitan Building Act) does not protect a person who brings upon his premises an object calculated to do damage if not kept under control. It was sought to liken this case to that of the motor car case, *Musgrove v. Pandelis* (1919) 2 K.B. 43. There the defence was that the fire had accidentally begun under the Fire Prevention (Metropolis) Act, 1774. But it was held that the fire that caused the damage to the plaintiff's premises was not that which took place in the carburetter but was the fire which spread to the car, and that this fire did not begin accidentally but was caused by the negligence of the defendant's servant who did not turn off the petrol tap; if he had done so the fire would have burnt itself out harmlessly. That again is a case of negligence. So is the case in *Mulchand Nemi Chand v. Basdeo Rain Sarup* ILR (1926) A. 404 where it was held that the fire to the cotton would not have happened had the defendants exercised proper watchfulness and control over it. It is even sought to hold the defendants liable on the doctrine of *res ipsa loquitur*, such as the bag of flour case, *Scott v. The London and St. Catherine Docks Co.* (1865) 3 H. & C. 596 : 159 E.R. 665 and under which may perhaps be included *Smith v. London and South-Western Railway Co.*, fire caused by sparks which escaped from an engine. But it is very difficult to see how the defendant can be made liable in a case like this on this doctrine. Why these persons who to the knowledge of the plaintiffs were storing alcohol in their warehouse should have a special onus of responsibility heavier than that resting on an ordinary lessee is very difficult to understand in the (absence of any special contract between the parties to this effect. There is no evidence that this is a dangerous trade or the storage of these things is a risky or dangerous act. In the case of *Scott v. London and St. Catherine Docks Co.* (1865) 3 H. & C. 596 : 159 E.R. 665. where a bag of flour fell from a window of the defendant's warehouse, there was evidence that *prima facie* the bag which fell was under the plaintiff's control and they had a primary duty to keep it from falling on to the heads of the public passing in the streets. So in the sparks from the engine case, the fire was proximately caused by the sparks setting fire to the dry grass lying on the banks of the Railway cutting. This fire spread and eventually

attacked the defendant's thatched house. There was some evidence of negligence there in the Railway Company allowing the dry grass to lie on

the bank. So in *Attorney-General v. Cory Bros. & Co* (1921) 1 App. Cas. 521. where the land slide in question was held due to the negligence of

the company in depositing the spoil on the hillside without draining the site of the tips.

12. In the absence then of any evidence of negligence on the part of the company (for I have already stated that the absence of watchman cannot

in any way be held to be proximate cause of the fire) it seems to me that the plaintiff has not succeeded in proving that he is entitled to damages at

the hands of the defendants. I think, therefore, that the judgment of the learned Judge was wrong and that the appeal must be allowed with costs

both here and below.

13. The memorandum of objection has not been argued and must be dismissed with costs.