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Present: Ennis J. and De Sampayo A.J.

CANTHIAH *v.* MUTTIAH CHETTY.

110—C. R. Colombo, 42,284.

Evidence Ordinance, s. 92—Lease of houses and grounds—May oral evidence be led to prove that house was leased to be used as a rice store?—House prohibited to be used as a rice store by authorities—Cancellation of lease—Remission of rent.

Plaintiff brought this action to recover rent due on a notarial lease. The defendant pleaded that prior to the execution of the lease it was agreed between the parties that the plaintiff should effect certain alterations to the premises so as to fit them for a rice store, and lease the same to defendant, and that after the lease was executed, in consequence of certain plague regulations, the defendant was prohibited by the authorities from storing rice in the said premises. There was no provision in the deed to indicate the purpose for which the premises were to be used. The defendant prayed in reconvention that the deed of lease be cancelled, and he be declared entitled to a remission of all rent payable thereunder.

Held, that it was not open to the defendant to lead oral evidence to prove that both parties agreed and intended that the premises should be fit for and be used as a rice store.

THE facts are set out in the judgment of De Sampayo A.J.

Bawa K. C. (with him *J. S. Jayewardene*), for appellant.—The defendant is a trader in rice, who advanced large sums of money

[1] *(1914) 17 N. L. R. 294.* [2] *(1914) 17 N. L. R. 381.*

to the plaintiff to enable him to convert the premises leased into a rice store. The defendant is unable, through no fault of his own, to have commodious use of the leased premises. The Roman-Dutch law under such circumstances not only permitted a recision of the rent due, but also a cancellation of the lease. (*Voet 19, 2, 23.*) Among the just causes for quitting, Voet mentions (*a*) incursion of the enemy or brigands whom the tenant could not resist, (*b*) spectres haunting houses, and pestilence.

In the present case it was the outbreak of plague which induced the authorities to prohibit the use of the rice store as such. [Ennis J.—But the deed does not speak of a rice store; it says " houses and grounds."]

The defendant is entitled to prove, under section 92, sub-section (2) of the Evidence Ordinance, that the parties contemplated a particular mode of use of the " houses and grounds." It is a matter upon which the deed is silent, and not inconsistent with its terms. Counsel cited *Wille on Landlord and Tenant, pp. 402 and 403*; *L. R. 10 Q. B. 174.*

Arulanandam (with him *A. St. V. Jayewardene*), for respondent.—If in the converse case the landlord had sued for a cancellation of the lease, on the ground that through some unforeseen cause rental in that locality had trebled and that the leased premises could be put to an infinitely better use than a rice store, the Court would not grant him relief. Why, then, should the lessee be entitled to relief ?

Vis major has only prevented the tenant from using the house as a rice store. All that the landlord is bound to do is to assure to the tenant the commodious use of the premises. The tenant is free to use the store for any other purpose but storing rice. If he has nothing else to store, there is nothing to prevent him from sub-letting the premises.

The case is covered by authority (*8 N. L. R. 315*). The oral evidence sought to be led is not merely explanatory of " houses and grounds," but seeks to add to the terms of the notarial lease. This is repugnant to the provisions of section 92.

Bawa, K.C., in reply.

Cur. adv. vult.

May 7, 1915. ENNIS J.—

In this case the plaintiff sued for the recovery of Rs. 116.50, rent due on a lease of certain property in Bankshall street. There is no evidence in the case, which has been decided on the averments of fact in the plaint and answer. The plaint avers the plaintiff leased to the defendant an undivided half share of certain " houses and grounds " in Bankshall street for a term of five years. The answer admits this fact, and asserts that prior to the execution of the lease the plaintiff and other owners of the property entered into

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an agreement with the defendant by which they undertook to make certain alterations and repairs to the premises " so as to be used as a rice store," and then to lease the premises. It is admitted that the alterations were made, and that after the execution of the lease and the payment by the defendant of several months' rent the Municipal authorities prohibited the use of the premises as a rice store; the defendant thereupon quitted the premises and refused to pay further rent, on the ground that it had become impossible for him to enjoy the use.

One of the issues framed was, " Can the agreement to lease as a rice store be proved by parol evidence ?" It is conceded that if evidence is inadmissible to prove this, the decree of the learned Commissioner of Requests is right and that the appeal should be dismissed.

The point is one of considerable difficulty. The lease was apparently silent as to the use to which the " houses and grounds " were to be put, and so far as I can see an agreement to lease them as a rice store would not necessarily be inconsistent with the terms of the lease, but in this matter the degree of formality of the document has to be considered. Further, the evidence may be admissible on the ground that the term " houses and grounds " does not truly represent the facts. In view of the importance of the point, I think it desirable that the appeal should be heard before a Bench of two Judges, and refer it accordingly.

June 15, 1915. ENNIS J.—

The facts of this case and the points for consideration on the appeal are set out in my reference of May 7. By consent of parties a certified copy of the lease has been read. This document is of such a formal character that, in my opinion, it bars the admissibility of evidence of the existence of a separate oral agreement as contemplated in the second proviso to section 92 of the Evidence Ordinance. I am unable to see how the evidence is admissible under the first and third proviso to that section, and there remains for consideration whether the evidence would be admissible under the sixth proviso, to show in what manner the language of the document is related to existing facts. It was urged that the property leased was, in fact, a rice store, and that it was the intention of the parties that the " houses and grounds " leased should be used as a rice store. For the respondents the case of *Boustead v. Vandersepar & Co.* [1] was cited. Wood Renton J. in that case drew particular attention to the fact that the distinction between evidence explanatory of the words used and evidence of the intention of the parties must not be lost sight of in cases such as these. In the present case, it seems to me that the evidence the appellant desires to adduce goes beyond a mere explanation of the words " houses and grounds "

[1] *(1906) 8 N. L. R. 318.*

used in the lease: it seeks rather to add to the contract a further expression of the intention of the parties as to the use to which the house should be put—a use which might possibly be implied had the contract used the expression "rice store" instead of the words "houses and grounds." In the circumstances I am of opinion that the evidence is inadmissible, and would dismiss the appeal.

DE SAMPAYO A.J.—

This appeal raises a question as to the admissibility of oral evidence under the following circumstances. The plaintiff by deed of lease No. 820 dated November 17, 1913, leased to the defendant certain premises for a period of five years commencing from January 1, 1914. This action is brought for the recovery of rent due under the lease for the month of November, 1914. The defendant, among other things, pleaded that prior to the execution of the lease it was agreed between the parties that the plaintiff should effect certain alterations to the premises so as to fit them for a rice store, and lease the same to the defendant, that he advanced certain moneys to the plaintiff for that purpose, and that upon the execution of the lease he entered into occupation of the premises thereunder; and he proceeded to allege that in consequence of certain plague regulations he was prohibited by the authorities from storing rice in the said premises, and that thereby it became impossible for him to use the same as a rice store. He accordingly prayed in reconvention that the deed of lease may be cancelled and he be declared entitled to a remission of all rent payable thereunder. At the trial an issue was stated as to whether the alleged agreement to lease the premises as a rice store could be proved by parol evidence. The Commissioner of Requests ruled against the defendant on this issue, and the defendant has appealed.

There is no doubt that under our law, if a lessee cannot have beneficial use of the premises for the purpose for which they have been let, he may quit the premises without being responsible to the lessor for the rent, and the Roman-Dutch authorities cited by Mr. Bawa on this point need not, therefore, be discussed or referred to. The only question before the Court is as to the admissibility of oral evidence to prove the purpose for which the premises are alleged to have been leased. The deed of lease was not filed in the Court below, but we accepted in evidence, with the consent of both parties, a certified copy of the document. The deed, both in the body of it and in the schedule, describes the premises as "all those houses and grounds bearing assessment Nos. 13, 14, 15, 16, 17, and 18, situated at Bankshall street, &c.," and there is no provision or expression in the instrument indicating the purpose for which the premises were to be used. The defendant, however, proposes to call oral evidence to prove that both parties agreed and intended that the premises should be fit for and be used as a rice store. Can he do

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this in view of section 92 of the Evidence Ordinance ? It seems to me that the attempt is to introduce into the written agreement between the parties a matter of substance affecting their rights and liabilities and clearly to add to its terms, and this cannot be allowed unless the defendant brings himself within one or other of the provisos to that section. The provisos which may by any possibility apply are proviso (2) and proviso (6).

Proviso (2) enacts that " the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. " This in effect means that, if the whole agreement is not and is not intended to be contained in the document, but is partly oral and partly documentary, the document may be supplemented by oral evidence; but then the proviso goes on to say, that, " in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document." This lease is not only a notarial instrument, as it should be under Ordinance No. 7 of 1840, but in respect of its provisions is as formal as possible, and if the words last quoted do not apply to it, it is difficult to think of any document whose formality would exclude oral evidence. In support of this part of his argument Mr. Bawa cited *Angell v. Duke*.[1] There the defendant had prior to the letting of a messuage to the plaintiff promised to effect certain repairs, and thereby induced the plaintiff to become tenant, and the action was brought for the breach of that promise as an independent contract distinct from the contract of tenancy. The Court held on demurrer that the promise did not relate to an interest in land within section 4 of the Statute of Frauds, and that an action could be maintained upon it though not in writing. That decision is no authority for the defendant's contention, for here it is sought to prove the oral agreement as constituting an integral part of the contract of lease, and the claim in reconvention is based not on the oral agreement but on the written lease.

Proviso (6) does not help the defendant either. The object of this proviso is to allow extrinsic evidence to explain the language of a document so as to fit it with external things. The language of this deed with regard to the subject of the lease does not require such explanation. The premises leased are certain " houses and grounds," and this description fits the circumstances, for they are " houses and grounds, " though, if you choose, you may call them a rice store. What the defendant in reality wishes to do is not to explain the meaning of " houses and grounds, " but to prove the purpose for which they were to be used by the lessee, and thus to add to the written contract a term which is not contained in it. This distinction is pointed out in *Boustead v. Vanderspar & Co.* [2]

In my opinion the appeal fails, and should be dismissed with costs.

Appeal dismissed.

[1] *L. R. 10 Q. B. 174.*

[2] *(1906) 8 N. L. R. 318.*