

(18)

ORIGINAL CIVIL.

Before Mr. Justice Latham.

In re PURMANANDAS JEEWANDAS AND ANOTHER.

1882
August 1.

Landlord and tenant—Lease—Covenant for renewal—Ambiguous covenant—Right to remove soil and open mines—Interpretation by acts of the parties—Estoppel—Confirmation—Land Acquisition Act X of 1870.

A lease for ninety-nine years made in 1794 by the East India Company to W. contained a covenant that the said Company upon application of the heirs, executors, administrators and assigns of the said W. would re-grant and renew the said lease thereby made "on the terms and conditions above mentioned," &c.

Held that the above covenant was not a covenant for perpetual renewal of the lease, but a covenant for a single renewal only.

The above lease granted to the said W., his heirs, executors, administrators and assigns Bhandarvada Hill "with the houses, buildings, offices, stables, garden and wells, &c. &c., thereon standing and now in his own occupation or possession." It was contended that this clause, if not on the face of it granting the right to remove and sell the soil, was, at all events, ambiguous, and had been interpreted by the subsequent conduct of the parties themselves who had always recognized the right of the holders of the lease to the soil and stones of the land in question. It appeared that in 1864 the holders of the lease had permitted the E. Company to enter upon the land and to remove the earth and stones of the hill for purposes of reclamation; and that on May 10, 1870, an indenture had been executed to which the Secretary of State, the E. Company, and all persons interested in the lease were parties, which indenture recited the above facts and contained mutual releases by the persons interested in the lease, the E. Company, and the Secretary of State in respect of any claims that might be made against any of them on account of the excavation of the said hill and the removal of the earth and stones therefrom. The said indenture also contained a confirmation, by the Secretary of State, of the lease of 1794. A schedule to the indenture described the property comprised in the lease, and specified (*inter alia*) the "quarries situated at Bhandarvada Hill".

Held that the words of the lease of 1794 were not ambiguous, and gave no right to remove the soil and stones, and that the acts of the parties could not be admitted to affect the construction of the lease.

Quære—whether the acts of the parties in removing soil, which removal was not proved to have taken place earlier than 1863, could be called in aid of the interpretation of ambiguous words in the lease of 1794. There was no "*contemporanea expositio*". Even if the words *quarries* or *mines* had been used in the lease of 1794 they would have given no right to work quarries or mines of other than those open when the tenant came in, which, moreover, he might have worked in the absence of such words.

To allow the opening of new quarries or mines an express power to that effect must be given.

1882

In re
PURMANAN-
DAS
JEEWANDAS,

Held, also, that the Secretary of State was not estopped by the indenture of May 10, 1870, from disputing the claimant's right to remove the soil and stones. The claimant's position had not been altered so as to make it inequitable in the Secretary of State now to assert his claims under the lease.

Held, also, that the indenture of May 10, 1870, did not operate as a fresh demise of the premises in their condition at the date of the indenture. A confirmation does not operate so as to make the estate confirmed subject to the incidents which it would have had if granted in the condition at the date of the confirmation.

REFERENCE to the High Court by the Collector of Bombay, under section 15 of the Land Acquisition Act (X of 1870), to ascertain the amount of compensation to be paid to Purmanandas Jeewandas for land taken by the Collector on behalf of the Municipality of Bombay for public purposes.

On the 12th November, 1879, notification was given in the *Government Gazette* that a portion of land, known as Bhandarvada Hill, standing in the name of Purmanandas Jeewandas (measuring more or less 69,761 square yards) was required by Government for public purposes. The Collector took possession on the 22nd April, 1880.

In his letter of reference the Collector stated that he had offered to Purmanandas Jeewandas the total sum of Rs. 1,10,350 as compensation for the land in question, including buildings and trees standing thereon, but his offer had been refused.

Purmanandas Jeewandas in his statement of claim, dated 1st October, 1881, claimed a sum of Rs. 5,73,360 as compensation, with interest thereon from the 22nd April, 1880, the date on which the Collector had taken possession.

At the hearing two preliminary points were argued with regard to the nature and value of the interest of Purmanandas in the land in question—

(1) He alleged that he held the land under a lease for 99 years, with a covenant of perpetual renewal. The lease had been granted on the first October, 1794, by the East India Company to Captain W. Blackford, a period of eleven years thus remaining unexpired of the first term of 99 years. It was contended, on the other hand, that under the covenant in the lease Purmanandas Jeewandas was entitled only to one renewal of the lease for 99 years, so that his interest in the land was that of a tenant for 110 years.

(2) Purmanandas Jeewandas in his statement inserted a claim for a sum of Rs. 2,82,530 as "the value of the earth and stones in, on and under the said land." This claim was objected to, and it was contended that under the lease he was only entitled to the use of the surface of the land.

With regard to the first point, it appeared that Purmanandas Jeewandas held the land under a lease dated 1st October, 1794, made, as above stated, by the East India Company to one Captain W. Blackford for a term of 99 years, with a covenant for renewal for the further term of 99 years, subject to the payment of an annual rent of Rs. 324 and a fine of one *parah* of batty every twenty-one years, and a further fine upon renewal of Rs. 90. Purmanandas submitted that, in case of renewal, he was entitled to a covenant for further renewal inserted in the renewed lease.

The following were the terms of the covenant contained in the lease :—

"And the said Hon'ble the United Company do hereby covenant, promise and grant, and agree to and with the said Captain William Henry Blackford, his heirs, executors, administrators and assigns, that upon the expiration of the said term of 99 years hereby leased and granted of the premises aforesaid, they, the said Hon'ble Company, shall and will, upon the application of the heirs, executors, administrators and assigns of the said Captain William Henry Blackford for that purpose, re-grant and renew the said lease hereby made and given to his heirs, executors administrators and assigns on the terms and conditions above mentioned and contained upon his, her or their paying to the said Hon'ble United Company an additional fine or premium of Rs. 90 good and lawful money of Bombay for such renewal of the lease herein thereby made, granted and expressed ; and in case no such application for renewal of the said lease shall be made by the said heirs, executors, administrators or assigns of the said Captain William Henry Blackford at the expiration of the said period of 99 years hereby granted, then he and his heirs, executors, administrators and assigns do and each and every of them doth hereby covenant, promise and agree to and with the said Hon'ble the United Company and their President in Council of Bombay for the time being to surrender and deliver up possession of the

1882

In re
PURMANAN-
DAS
JEEWANDAS.

1882

In re
PURMANAN-
DAS
JEEWANDAS.

said hill or ground, houses, buildings and premises to the said President in Council of Bombay for the time being for and on behalf of the said United Company."

With regard to the second point, the original lease granted to the said Captain W. H. Blackford, his heirs, executors, administrators and assigns "all of the aforesaid hill or ground above described and of the measurement and boundary as above specified and expressed, with the houses, buildings, offices, stabling, garden and wells, &c., &c., thereon standing and now in his own occupation or possession, together with all trees, woods and underwoods now standing, growing or being or which at all times during the term hereby granted shall stand, grow or be on or upon the said demised premises or any part thereof, and all common ways, paths, passages and appurtenances whatever."

It was contended by Purmanandas Jeewandas that the above clause had been interpreted by the subsequent conduct of the parties themselves, and that they had always recognized the right of the holder of the lease to the earth and stones of the land in question. It appeared that the lease of 1st October, 1794, had, prior to 1852, become vested in Canjee Chatoor, the claimant's grandfather, who died in 1859, leaving two sons, viz., Ranchordas Canjee and Jeewandas Canjee (the father of the claimant), who succeeded to their father's property. An indenture was produced dated 10th May, 1870, and made between Purmanandas Jeewandas of the first part, the executors of Ranchordas Canjee of the second part, the Elphinstone Land and Press Company of the third part, and the Secretary of State for India in Council of the fourth part, in which after reciting that by the indenture of the 1st October, 1794, the said Bhandarvada Hill, "*the present description whereof is contained in the schedule hereunder*", was demised to Captain W. H. Blackford for 99 years, &c., &c.; that *in the year 1864 the Elphinstone Land and Press Company had been permitted by the executors of Ranchordas Canjee to enter upon the said land and to pull down part of the said Bhandarvada Hill and remove the earth and stones thereof, and apply the same for the purposes of reclamation; that difficulties had been found to exist with regard to the powers of the executors; that divers disputes and differences had arisen between the*

several parties to the indenture now in recital with regard to the occupation, by the Company, of the said hill and the excavation thereof and the removal of the earth, stones and materials therefrom by the said Company; that it had been agreed between the parties that all such disputes and differences should be settled on the terms following, *viz.*, that a sum of Rs. 67,500 should be paid by the said Company to the said Purmanandas Jeewandas and the said executors as full compensation for the occupation of the said Bhandarvada Hill *and the excavation thereof and the removal of earth, stones and materials therefrom* and in respect of the said proceedings for the purpose of acquiring possession of the said hill, and that the said Purmanandas Jeewandas and the said executors of the one part and the said Company and the said Secretary of State of the other part should execute such mutual releases as were thereafter contained, and that the said Purmanandas Jeewandas should enter into the covenant thereafter contained to indemnify the said Company and the said Secretary of State against all claims which might be made against them, or either of them, in respect of the premises, and that the said Secretary of State should enter into the confirmation thereafter contained of the lease of the said Bhandarvada Hill to the persons or person entitled thereto under the will of the said Canjee Chatoor it was witnessed—(1) that Purmanandas and the said executors released and discharged the said Company and the Secretary of State from all claims in respect of the occupation of the said Bhandarvada Hill or the excavation thereof or the removal of earth, stones or materials therefrom; (2) that Purmanandas Jeewandas covenanted for himself, his executors and administrators with the said Company and the Secretary of State that he would indemnify them from any claim and demand whatever in respect of the occupation of the said hill or the excavation thereof or the removal of earth, stones or materials therefrom; (3) that the said Company and the said Secretary of State released Purmanandas Jeewandas and the executors from all claims and demands in respect of the said Bhandarvada Hill or the excavation thereof, or the removal of earth, stones or materials therefrom; (4) that the Secretary of State for himself, his successors and assigns did confirm unto the person or persons entitled under the will of the said Canjee

1882

In re
PURMANAN-
DAS
JEEWANDAS.

1882

In re
PURMANAN-
DAS
JEEWANDAS.

Chatoor and his and their heirs, executors, administrators and assigns the said indenture of lease of 1st October, 1794, and every clause, covenant, matter or thing therein contained.

The description of the property contained in the schedule referred to in the above indenture was as follows:—"All that piece or parcel of land or ground, together with the messuages, tenements, dwelling-houses, bungalows, fazandari houses, stables, cook-rooms, out-houses, chawls, erections, buildings, gardens and *quarries* situated at Bhandarvada Hill, called or known as Bhandarvada Hill, &c."

Farran and Inverarity for Purmanandas Jeewandas, the claimant.

Starling and Anderson for the Government.

The following authorities were cited:—*Hare v. Burgess* (1); *Willan v. Willan* (2); *Owen Elias v. Snowdon Slate Quarries Company* (3); *Honywood v. Honnywood* (4); *Baynham v. Guy's Hospital* (5); *Eaton v. Lyon* (6); *Wilmott v. Barbir*; *Simm v. Anglo-American Telegraph Company* (8); *Duchess of Kingston's Case* (9); Davidson's Precedents (2nd ed.), Vol V, Part I, page 126-7 (note); Woodfall's Landlord and Tenant, chap. 16, sec. 5.

August 7. LATHAM, J.—At the request of counsel on both sides I now deliver my judgment on two preliminary points in this case, viz., (1) is the covenant for renewal contained in the lease of October 1, 1794, a covenant for perpetual renewal or for a single renewal only; and (2) is the lessee under that lease, as confirmed by the indenture of May 10, 1870, entitled to remove and sell the soil and stones of the hilly ground comprised in that lease.

The first question, though probably not of much pecuniary importance, is of considerable speculative interest. The current of legal opinion seems to have changed towards the end of last century, and then to have set against construing such covenants so as to import a perpetual renewal. The history of the earlier

(1) 4 Kay & J., 45.

(5) 3 Ves., 298.

(2) 16 Ves., 72.

(6) 3 Ves., 690.

(3) 4 Ap. Cas., 454.

(7) 15 Ch. Div., 96.

(4) L. R., 18 Eq., 306.

(8) 5 Q. B. D., 188.

(9) Smith's Leading Cases (6th ed.), Vol. II, p. 679.

cases on the point is fully given in Cruise's Digest, Vol. 4, page 393, *et seq.* The earliest case there referred to is *Bridges v. Hitchcock* (1) a strong authority in favour of the lessee, but one which has in effect been got rid of by later decisions; for it is difficult to feel satisfied that Lord Ellenborough's explanation of the case in *Iggulden v. May* (2) is satisfactory. I may further refer specially to *Moore v. Foley* (3) as a decision of Sir W. Grant, and to *Iggulden v. May* (4) as a case decided by Lord Eldon in Chancery and Lord Ellenborough at Common Law, in which they both refused to hold a covenant for renewal to be perpetual, where the words were more in favour of that construction than in the present case.

In later years these cases have occurred far less frequently; probably in consequence of the disuse of renewable leases, and especially of those granted by ecclesiastical corporations. The two most recent cases appear to be *Brown v. Tighe* (5) and *Hare v. Burgees* (6). The present state of the law is summed up in Davidson's Conveyancing (2nd ed.), Vol. V, Part I, page 127, note. Applying these authorities to the present case, I cannot doubt but that the covenant is for a single renewal only. It is to be "on the terms and conditions above mentioned," and not "on the same" or "the like covenants, conditions, &c.;" words which, though stronger than those here used, are held not to be sufficient to render the covenant for renewal perpetual.

The second point is said to be one of great importance. I think that its importance has probably been exaggerated, as in the amended claim the alleged value of the soil of the hill has been simply added to the amount of the claim first sent in, although the two claims are in several points conflicting. It is obvious that the soil could not be bodily removed without destroying the buildings and trees standing thereon; nor, I should suppose, without considerable diminution of the market value of the land. Still there is no doubt that the market value of the property leased must be substantially affected by the lessor having or not having power to remove and sell the soil. It is not, as I understand, argued that the lease on the face of it imports this

1882

In re
PURMANAN-
DAS
JEEWANDAS.

(1) 5 Brown's Parl. Cases (2nd ed.), p. 6. (4) 9 Ves. 325 and 7 East. 237.
(2) 7 East at 245. (5) 2 Cl. & Fin., 396, 419.
(3) 6 Ves., 232. (6) 4 Kay & J., 45, 54.

1882

In re
PURMANUN-
DAS
JEEWANDAS.

power; but it is contended that the words of the lease are ambiguous and have by the acts of the parties been interpreted as containing the power; and, further, that the indenture of May 10, 1870, has conferred the power on or at least recognized it as subsisting in, the lessee. That a lessee for years has not, in the absence of express words, power to remove and sell the soil, except in the case of mines, quarries or pits open when he came in, is a commonplace of real property law. See Co. Lit. 53 (b). The authorities in favour of interpreting the lease by the acts of the parties are summed up in Broom's Legal Maxims (3rd ed.), 608, under the title "*Contemporanea expositio est optima et fortissima in lege.*" The rule is that ambiguous words may be properly construed by the aid of the acts of the parties. See *Doe d. Pearson v. Ries*(1) per Tindal, C. J., and *Chapman v. Black* (2) per Parke, J. The widest effect given to the acts of parties as assisting the interpretation of written instruments is in the case of ancient grants and charters, especially in determining what passed thereunder, a matter naturally hard to discover from the instrument itself after the lapse of many years. The case of *Waterpark v. Fennell* (3) seems to be the one which goes furthest in this direction, in which case the word *village* was held to include a *mountain*. On the other hand, the rule is plain that the acts of parties cannot be allowed to affect the construction of written instruments if that construction be in itself unambiguous; the cases of *Moore v. Foley* (4) and *Iggulden v. May* (5) already cited on the first point reserved are also authorities on this point.

Are, then, the words of the lease of October 1, 1794, ambiguous in this behalf? The claimant relies on the expression "*&c. &c.*" occurring in the parcels, which no doubt is in itself meaningless. The expression, however, occurs in the course of the general words following the description of the parcels, and is governed by the succeeding words "thereon standing and now in his occupation or possession". It would, to my mind, be hardly consistent with the other words used and with the maxim "*noscitur a sociis*" to construe "*&c. &c.*" as here including quarries or mines. But if

(1) 8 Bing., 178, 181.

(3) 7 H. L. Ca., 684.

(2) 4 Bing. H. C., 187, 195.

(4) 9 Ves., 232.

(5) 9 Ves., 325, and 7 East. 237.

the words *quarries* or *mines* were there, I do not think that they would carry the case further; for it seems clear law that they would give no right to work quarries or mines other than those open when the tenant came in, which indeed he might have worked in the absence of such words, appropriate as they might be if open quarries or mines in fact existed. I think that to allow the opening of new quarries or mines there must be a power or liberty in that behalf, and such a power or liberty is found in every quarrying or mining lease with which I am acquainted. Further, I doubt whether the acts of the parties in removing soil, which removal is not proved to have taken place earlier than 1863, could be called in aid of the interpretation of ambiguous words in a lease of 1794. There is no "*contemporanea expositio*".

The effect of the indenture of May 10, 1870, is a point of more difficulty. I do not think that the indenture can be considered as estopping the Secretary of State from disputing the claimant's right to remove the soil and stones. It might very possibly, especially when coupled with the Collector's letter of December 21, 1871, have estopped him from disputing the claimant's right to dispose of soil actually severed, at least without making good the costs of severance; or from asserting a right to the monies resulting from the sale of portions of soil under the encouragement afforded by the deed and letter. But I see no such alteration of the claimant's position as is required by *Freeman v. Cooke* (1), and the subsequent cases, especially *Wilmot v. Barber* (2), to make it inequitable in the Secretary of State now to assert his claims in this behalf under the lease and to estop him from so doing.

Then, does the indenture of May 10, 1870, operate as a fresh demise of the premises leased in their condition at the date of the indenture; for at that date there certainly were quarries or pits open on the premises, and if the effect of the indenture is as above suggested the claimant is entitled to continue to work them. This is the point on which I have felt most doubt; but, on the whole, I think that the indenture does not so operate. If there had been a surrender and re-grant, the claimant's contention

1882

In re
PURMANAN-
DAS
JEEWANDAS.

(1) 2 Ex., 654.

(2) 15 Ch. Div., 96.

1882

In re
PURMANAN-
DAS
JEEWANDAS.

must have been successful, but in lieu thereof there is a confirmation of the original lease. Now, a confirmation, according to Co. Lit, 295 (b), operates "to make a voidable estate sure and unavoidable, or to increase a particular estate"; but I can find no authority that it can operate so as to make the estate confirmed subject to the incidents which it would have had if granted in its condition at the date of the confirmation. And probably the indenture of 1870 was intended to settle the questions pending between the lessor and lessee in respect of the past excavations made with the consent of the Secretary of State, and not to alter the original effect of the lease. The release therein contained by the lessor to the lessee seems to show that the lessee's right to make such excavation was considered doubtful; and it is plain that the lessor had no right to allow such excavations without the lessee's consent, so that he might well agree to the lessee's receiving a part, if not the whole, of the value of the soil removed.

On the whole I am of opinion that the present lessee under the lease of 1794 has no right to remove and sell the soil and stones on the hill thereby demised, and that the market value of the property demised must be estimated on the footing of his having no such right.

I may perhaps properly add that, according to my present impression, the provision for payment by the lessor of one-half the value of buildings and improvements applies only to a determination of the lease on the expiration of the first period of 99 years, the rights of the lessee at the end of the second period being left to the ordinary law. The point has not yet been discussed, and I am, of course, open to hear argument upon it; it is probably of little pecuniary importance.

Attorneys for claimant.—Messrs. *Ardesir and Hormasji*.

Solicitor to Government.—Mr. *H. Cleveland*.