(1923) 03 CAL CK 0008

Calcutta High Court

Case No: None

Sundermull and Others	APPELLANT
Vs	
Ladhuram Kaluram	RESPONDENT

Date of Decision: March 9, 1923

Acts Referred:

- Contract Act, 1872 - Section 73
- Transfer of Property Act, 1882 - Section 106

Citation: 83 Ind. Cas. 757

Hon'ble Judges: Page, J

Bench: Single Bench

Judgement

Page, J.

This suit raises interesting and important questions with regard to the principles in accordance with which damages are to be measured against a tenant who holds over after the determination of his lease. For some 6 years prior to 10X9 the defendant had been in occupation of a room in 13, Nirmal Lohia Lane in Calcutta as a monthly tenant of the plaintiffs. He paid rent at the rate of Rs. 50 a month. On the 19th September 1919 notice on behalf of the plaintiffs, to quit was given to him, the notice determining the tenancy as from the 7th November 1919. The defendant did not act upon that notice. He did not give vacant possession and he remained in occupation of the premises. On the 11th November 1919, therefore, the plaintiffs brought a suit in the Calcutta Court of Small Causes for ejectment, and in answer to that suit the defendant alleged that he was in occupation under a lease for 3 years at a rental of Rs. 100 a month, and he also alleged that he had paid a salami for the lease of Rs. 500. On the 5th January 1920 the defendant commenced proceedings in the High Court for a declaration that he was in occupation of the premises under this lease for 3 years and he claimed an injunction to prevent the Court of Small Causes from acting further in the matter until the final-determination of the proceedings in that-suit. On the 23rd August 1920 the plaintiffs through their

Solicitors wrote a letter to the defendant and three other tenants in the same building No. 13, Nirmal Lohia Lane in these terms:

"To
Messrs. Ladhuram Kaluram.
Jivan Bux and Co.
Ahmedin and Mahomed Ismail.
Tiloke Chand Daimull.
Re premises No. 13, Nirmal
Lohia Lane.
Sirs,

Under instructions from and on behalf of our client Johurmull Sundermull of 9, Chitpora Road, Calcutta, we beg to state that our clients who are the owners of the above premises have repeatedly asked you since July last to vacate the said house and premises by giving up possession of the respective portions of the house in the occupation of each of you as my (sic) clients urgently wanted vacant possession of the house for the purpose of demolishing the existing structure and constructing a new building in its place according to a plan in conformity with the Building Regulations of the Calcutta Corporation; but in spite of that you have neglected to give up vacant possession as aforesaid, and have been wrongfully occupying the same, thereby preventing our said clients from commencing the building operations in respect of the proposed new building which will yield reasonably and fairly a monthly income of Rs. 12,140 to our clients. You are, therefore, causing by your wrongful act a monthly loss of the aforesaid sum to our elients. We are, ther fore, instructed by our clients to call upon you which we hereby do, to make good the damage to our said clients from 1st July 1920 upto date at aforesaid rate of Rs. 12,140 per month and also to deliver vacant possession of the respective portions of the house in the occupation of each of you within 3 days from date hereof failing which our clients will take legal action in the matter.

Yours faithfully,
(Sd.) Norendranath Sen & Co.

2. On the 9th August the plaint in this suit was filed, and on the 26th April 1921 the defendant''s suit in the High Court was dismissed. On the 1st May 1922 the defendant gave up possession of the portion of the premises in his occupation to the plaintiffs. The plaintiffs claim as damages under item (i) mesne profits as denied in Section 2 of 1] the Civil" Procedure Code, Sub-section (12). Mesne profits are described therein as " those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession" and the plaintiffs claim under this head such a sum of money as they might have reasonably expected to

receive as rent from the time when the defendant ought to have given up possession on the 7th November 1919 until the 1st May 1922, and interest thereon. Under item (2) they claim a further sum of Rs. 6,100 being the difference between Rs, 900 per month rent for the building, including the defendant''s holding which was received in 1919, and Rs. 7,000 a month which the plaintiffs allege that they would have received as rent for the building after reconstruction, which operation they were prevented, as they allege, from carrying out by reason of the refusal of the defendant to give up possession of the part of the premises of which he was in occupation.

3. The defendant admits his liability in respect of mesne profits under item (i) of the plaintiffs'' claim but he alleges that the plaintiffs'' claim under item (ii) is ill-founded both in law and in fact. Counsel for the defendant relied on three contentions, firstly, that the plaintiffs'' claim to damages, if any, under item (i) was founded upon breach of contract; secondly, that having regard to the provisions of the Indian Contract Act (IX of 1872) and the Transfer of Property Act (IV of 1882) the only remedy open to the plaintiffs was u/s 73 of the Contract Act and that the plaintiffs were not entitled to treat their claim under item (ii) as being founded in tort and as damages for trespass. Thirdly, that neither the failure to re-build nor the delay in reconstructing the premises was caused by the failure of the defendant to give up possession of the part of the premises which he occupied.

4. Now, by Section 106 of the Transfer of Property Act it is provided that a lease of Immovable property for any purposes other than agricultural or manufacturing purposes, shall be deemed to be a lease from month to month terminable on the part of either the lessor or the lessee by 15 days'' notice expiring at the end of month of tenancy; and by Section 108 it is provided that, in the absence of a contract or local usage to the contrary, the lessor and the lessee of Immovable property as against each other respectively possess the rights and are subject to the liabilities mentioned in the rules following, or such of them as are applicable to the lease, and by Sub-section (q) it is provided that on the determination of the lease, the lessee is bound to put the lessor in possession of the premises. By Section 73 of the Indian Contract Act it is provided that "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him. thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract."

5. It is in my opinion, quite clear that no claim under item (ii) for damages in respect of the defendant''s breach of contract in failing to yield up possession to the plaintiffs on the determination of the tenancy is maintainable for the scheme of reconstructing the premises was not in the contemplation of the parties when the contract of tenancy was first entered into. It is well settled under the Common Law of England which, except where it has been abrogated, and in so far as it is not inapplicable to Indian conditions is part of the law of India, that a landlord is entitled to claim damages against a tenant who holds over, either ! for breach of his contract to yield up peaceful possession or for trespass. See per Baron Parke in Robinson v. Learoyd (1840) 7 M. & W. 48 at p. 54 : 10 L.J. Ex. 166 : 151 E.R. 673 : 56 R.R. 610. In that case an action, was brought, by a landlord against a tenant under the Statute in that behalf for double value for holding over. A further claim was made by the plaintiff for damages in respect of inability to use certain machinery which was on the premises: during the time in which the defendant was holding over after the determination of the tenancy, and it was held that in an action for double value you could not get such further damages, but (see page 54), Baron Parke laid it down that if a landlord by reason of his tenant having held over, is prevented from vising his powers beneficially and is deprived of profit thereby, he has a remedy on his contract Math the tenant to give up at the end of the term or for trespass in continuing to occupy and may recover compensation for his loss by way of special damage. [See also the case of Bramley v. Chesterton (1857) 2 C.B. (N.S.) 592 : 27 L.J.C.P. 23 : 3 Jur. (N.S.) 1144 : 5 W.R. 690 : 109 R.R. 790 : 140 E.R. 548. It is, in my opinion, also well settled that the measure of damages for trespass whether the claim be founded on contract or on tort, is not the value of the land but the real damages sustained, which may be considerable or merely nominal. [See per Baron Martin in Watson v. Lane (1856) 11 Ex. 769 at p. 774 : 25 L.J.Ex 101 : 2 Jur. (N.S.) 119 : 4 W.R. 293 : 156 E.R. 1042 : 105 R.R. 782.]

6. Now, although it is an established principle of law that a Code is exhaustive with'' respect toallmatters therein specific-ally provided for, it is equally well settled,'' as was pointed out by Lord Justice Bowen in In Re: Cuno, Mansfield v. Mansfield (1890) 43 Ch.D. 12 at p. 17 : 62 L.T. 15 that "in the construction of Statutes, you must not construe the words so as to take away rights which already existed before the Statute was passed, unless you have plain words which in dicate that such was the intention of the Legislature" and Lord Selborne, Lord Chancellor in Seward v. Vera Cruz (1884) 10 A.C. 59 at. p. 68 : 54 L.J. Adm. 9 : 52 L.T. 474 : 33 W.R. 477 : 5 Asp. M.C. 386 : 49 J 324 expresses the view that "if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so," The same principle of construction in my opinion, applies to existing Common Law rights as it does to existing statutory rights. The

principle is well illustrated in the case of Irrawaddy Flotilla Co. v. Bugwandas 18 I.A. 121 : 18 C. 620 : 15 Ind. Jur. 403 & 542 : 6 Sar. P.C.J. 40 : 9 Ind. Dec. (N.S.) 413 (P.C.). In that case the Judicial Committee of the Privy Council held that although Section 151 of the Indian Contract Act sets out the degree of care which is required of a bailee in all cases of bailment the effect of that provision of the Statute was not to prevent the recovery of damages to which a common carrier was liable by reason of a breach of the obligation imposed upon him as a common carrier by the Common Law. At page 629 Page of 18 C.--[Ed], Lord Macnaughten, who gave the judgment of the Committee, expressed the view that "at the date of the Act of 1872 the law relating to common carriers Was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty, cast upon common carriers by reason of their exercising a public (employment, for reward. ''A breach of this duty'' says Dallas, C.J., [Bretherton v. Wood (1821) 3 Brod. & B. 54 : 9 Price 408 : 6 Moore 141 : 23 R.R. 556 : 129 E.R.1203] ''is a breach of the law, and for this breach an action lies founded on the Common Law, which action wants not the aid of a contract to support it''. If in codifying the law of contract, the Legislature had found occasion to deal with tort, or with a breach of the law'' common to both contract and tort, there was all the more reason for making its meaning clear."

7. In my view, according to the principles of construction which I have enunciated, notwithstanding the Indian Contract Act and the Transfer of Property Act, the plaintiffs are entitled to sue the defendant in these proceedings for damages for trespass. It was suggested although the plaint was wide enough to cover such a cause of action, that a cause of action in tort could not be joined with a cause of action for ejectment, and I was referred to Order II, Rule 4. Under that rule it is provided that: "No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of Immovable property, except--(a) claims formesne profits or arrears of rent in respect of the property claimed or any part thereof; (6) claims for damages for breach of any contract under which the property or any part thereof is held; and (c) claims in which the relief sought is based on the same cause of action:

8. Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property."

9. Now, I have given leave, so far as it was. necessary, for the plaintiffs to join a cause of action for trespass with a claim for ejectment and for mesneprofits. Therefore, the next question which I have to consider, having regard to the fact that the plaintiffs have no cause of action under item (ii) which is founded on breach of contract, is whether there is any differ-ence in the principles by which the measure

of damage for a tort and for a breach of contract is to be determined. In The Notting Hill (1884) 9 P.D. 105 at p. 113 : 53 L.J. Adm. 56 : 51 L.T. 66 : 32 W.R. 764 : 5 Asp. M.C. 241, the Master of the Rolls laid it down that "the rule with regard to the remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort, and it has been laid down many times both in Hadley Baxendale (1854) 9 Ex. 341 : 23 L.J. Ex. 179 : 2 Com.L.R. 517 : 18 Jur. 358 : 2 W.R. 302 : 156 E.R. 145 : 96 R.R. 742 and other cases." Again in the case of The Argentino (1888) 13 P.D. 191 at p. 200 : 58 L.J.P.D. & A. 1 : 59 L.T. 914 : 37 W.R. 210 Lord Justice Bowen giving the judgment of himself and Lord Justice Lindley and differing from the judgment of Lord Esher, the Master of the Rolls, lays down the principle in this manner: "The damages recoverable from a wrong doer in cases of collision at sea must be measured according to the ordinary prin-ciples of the Common Law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English Law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not be too remote; that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law super-adds in the case of a breach of con-tract (or to speak according to the view taken by some jurists, the law includes under the head of these very damages where the case is one of breach of contract), such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English Law only permits the recovery of such damages as are produced immediately and naturally by the act complained of." In the House of Lords the decision of Lord Justice Bowen and Lord Justice Lindley was affirmed and Lord Herschell in The Argentino (1889) 14 A.C. 519 at p. 523 : 59 L.J.P. 17 : 61 L.T. 706 : 6 Asp.M.C. 433 stated the principle in these words: "I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act of a wrong doer cannot be regarded as too remote. The loss of the use of a vessel and, the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore, not available for trading purposes is certainly damage which directly and naturally flows from a collision."

10. Now, the general principles thus enunciated require, in my opinion, explanation or amplification, for, as in contracts special damages which the parties, at the time when the contract was first entered into, contemplated might result if a breach of the contract was committed, become reasonable and natural in the circumstances relating to that particular contract, so in the case of tort, if, at the time when it is committed the tort-feasor knows, or as a reasonable person in the circumstances ought to have known, that the commission of the tort may reasonably cause damages which would not usually result from the commission of the wrongful act, these damages become, and are deemed to be the reasonable and natural

consequences of the tort which has been committed. [See Sharp v. Powell (1872) 7 C.P. 253 : 11 L.J.C.P. 95 : 26 L.T. 436 : 20 W.R. 584, Clark v. Chambers (1878) 3 Q.B.D. 327 : 47 L.J.Q.B 427 : 38 L.T. 454 : 26 W.R. 613, Bodley v. Reynolds (1846) 8 Q.B. 779 : 15 L.J.Q.B. 219 : 10 Jur. 310 : 70 R.R. 640 : 115 E.R 1066 France v. Gaudet (1871) 6 Q.B. 199 : 40 L.J.Q.B. 121 : 19 W.R. 622, The London (1914) P. 72 : 83 L.J.P. 74 : 109 L.T. 960 : 12 Asp M.C. 405 : 30 T.L.R. 196, see also Engell v. Fitch (1869) 4 Q.B. 659 : 38 L.J.Q.B 304 : 10 B & S. 738 : 17 W.R. 894, Jaques v. Millar (1877) 6 Ch.D. 153 : 47 L.J.Ch. 544 : 37 L.T. 15l : 25 W.R. 846 and Jones v. Gardiner. (1902) 1 Ch. 191 : L.J.Ch. 93 : 50 W.R. 65 : 86 L.T.].

11. Now, if the principles which I have propounded are sound, the plaintiffs are entitled to recover as damages for trespass under item (ii) the trespass being a continuing wrong, a sum equivalent to the increased rent which he would have received during the period in which the defendant was in wrongful possession of the premises, but which he has lost by reason of the failure of the defendant to give up possession if the defendant knew or ought to have known before he committed the tort that such loss would probably result through his refusal to give up possession and yet deliberately remained in occupation of the premises.) Now, while these principles are in my view. not difficult to ascertain, the application of them to any particular case is often a task of considerable difficulty. As Mr. Justice Blackburn said in Hobbs v. London and South Western Railway (1875) 10 Q.B. 111 : 44 L.J.Q.B. 49 : 32 L.T. 352 : 23 W.R. 520 "on the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. (Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation, and, therefore, I agree with what my Lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day."

12. Applying these principles to the facts of this case, in my opinion, after the letter of the 23rd August, the defendant must be taken to have contemplated that if he continued in possession of the premises which he was occupying, building operations might have to be suspended with a consequent loss of increased rent to the plaintiffs. In fact the building operations were not begun until August 22nd and one not yet completed and the issue of fact which falls to be determined is whether the delay in carrying out the work was caused by the wrongful act of the defendant or not. Now, a plan of the premises was put in and it appeared from the evidence that in January 1920 the plaintiffs caused plans to be prepared for the re-building of the premises, and that these plans were approved by the Corporation. No steps were taken, however, to carry out the works in accordance with this plan. No

estimates were prepared, and except that the scheme was vaguely discussed by the plaintiffs amongst themselves, the scheme remained throughout 1920 very much in the air. The plaintiffs'', manager estimated that the cost might have amounted to Rs. 1,20,000 and he said that the plaintiffs had it in their minds that out of the scheme they would get something like Rs. 10,000 in rents per month. However, nothing was done under that scheme, and it was never brought to maturity, and the matter came to nothing. "At the end of the year 1919 or the beginning of 1920" the plaintiffs'' manager stated "there was a scheme of ours maturing, the plan of making these additions and alterations, that might be sometime in January 1921 or December 1920."

Q. At that time did you form a new scheme? Yes.

Q What was the new scheme? It was to make certain alterations. Shall I explain with reference to the old building.

Q. You formed the idea of making alteration? Yes.

Q. Did you have any plans prepared? Yes.

Q. Who prepared these plans? They were prepared not at that time but after the defendant left the premises after May 1922.

Q. The new scheme was to alter the premises not to demolish them? Yes.

Q. Why did you not commence the alterations before May 1922? Beeause I compared the plans with the existing building and I found that the alterations would serve the same purpose as a wholesale demolition; secondly it would be less expensive, and thirdly, it would take much less time than the wholesale demolition. For these three reasons I changed the original conception of having the building demolished and reconstructed.

Q. When did you get the plans completed for these alterations? Sometime in July 1922.

13. Later on in his evidence the same witness states in answer to this question.

Q. Why did you wait till August to start the alterations? Because we have to submit a plan to the Corporation: of course, we are allowed to commence in anticipation of sanction but we had to collect the materials and demolish certain portions. We had to do all these things, and he also stated in his evidence in answer to this question.

Q. It was in May or June 1922 that you came to the conclusion that you would reconstruct and not rebuild the premises? That idea was conceived, as I have already stated, about that time; about that time we set to work.

14. Now, in August 1921 there was a scheme prepared for these alterations for the purpose of reconstructing the building but in point of fact it appears from the evidence of the plaintiffs'' manager which I have read that the scheme was not

finally arranged until about May 1922. The work was commenced in August 1922, and the cost of reconstruction has been estimated at Rs. 22,000, and it has been stated that the plaintiffs anticipate that under the new conditions that they will obtain an increase of rent for the whole building from Rs. 900 per month to Rs. 7,000 a month. Not. only, however, was the work of reconstructing the premises not begun until August 1922, but in considering the real cause why this building was not reconstructed before August 1922 it is not immaterial to consider the steps which the plaintiffs took to free the premises from the tenants who were occupying it during the material period. They had 8 tenants, one occupied the top floor and sublet to other tenants, and two went out about February 1921. Three were ejected in January 1920 and one of them a man called Bhugwandass who occupied one of the shops facing the road at the extreme south east corner of the building, went tout in August 1922. Rent receipts were put in till that date showing that he was paying a rent of Rs. 50 a month up till the date when he gave up possession. His room was about the same size and in very much the same position fronting the road as that which was occupied by the defendant. The defendant. himself gave up possession in May 1922 and by reference to the plan it will be observed that the defendant''s shop was a small shop of some 10 to 11 feet frontage with a depth of about 5 feet. It was the middle of three shops on the north-eastern portion of the premises fronting Nirmal Lohia Lane and next to the defendant''s premises and occupying a shop to the south of his shop, was Jivanbux who remained in possession until June 1922. Now, assuming for the moment that the defendant''s wrongful retention of the premises from the plaintiffs was the cause in any manner of the delay in completing the building operations, I accept the evidence which was adduced by the plaintiffs of Mr. Shroshee, an eminent surveyor, who gave evidence on their behalf. Mr. Shroshee gave evidence to this effect. He stated "I express my opinion really in three portions. I divide the building into three portions; roughly speaking I call them the back portion, and the north front portion and south front portion. In my opinion the north front portion could not, speaking practically, have been reconstructed while the tenant was in occupation. That is including the portion morked A in front portion. I said in regard to the south front portion (I have named it by letters) the north front portion which could not be reconstructed was B C D and E and the south front portion is F G and J H. Then in regard to the back portion (F K L C) practically the whole near half. I say it would have been possible to alter that, although it would not have been so convenient.

Q. You think the middle portion, south front could have been altered? That is the archway.

Q. F.G.H and J? I call them the south portion.

Q. That could have been altered? Yes, but it would have been inconvenient and there would have been some danger; but, I think it would be overcome.

15. That being so, assuming that the defendant''s occupation was the cause of the delay or could have been the cause of the delay then I find, having regard to the evidence given by Mr. Shroshee that notwithstanding the defendant''s occupation the back portion could have been re-constructed and that the south-eastern portion could have been reconstructed but that there would be some inconvenience and some increased cost in the building operations of that portion making the best calculation that I can: I would assess the damages for increased cost of reconstructing the south eastern portion at Rs, 2000,

16. As regards the northern portion that could not be and was not reconstructed during the period of the defendant''s occupation, but what special damages have the plaintiffs suffered by reason of the continued occupation by the defendant of the portion of which he had been a tenant? There were three shops; one of which was occupied by another tenant until after the period when the defendant gave up possession. As regards the occupation of the third, I do not find that there is any evidence as to what rent was paid for the shop. But as I have come to the conclusion that in any case the cause of action in respect of damages under item (ii) did not exist until after the notice was given in August 1920 I am not satisfied that any special damage was caused to the plaintiffs by the occupation of these three shops from August 1920 till the time when the occupiers gave up possession for this reason; that on the 15th May 1920 the Calcutta Rent Act came into operation and under that Act it would not have been possible for the landlords to have obtain-ed a higher rental than the rental which was in existence in November 1918. -The plain tiffs might no doubt have applied u/s 153 (d) to the Rent Controller to increase the rent on the ground that the rents were unduly low, but having regard to the fact that until August 1922 the rent for a similiar portion of the frontage was only Rs. 50 I am not able in these circumstances upon the evidence before me to say that the plaintiffs have suffered any special damage under item (ii) in respect of the occupation of north front by these three tenants. But I am not satisfied that the real cause of the delay in these building operations was the failure of the defendant to yield up possession of these premises. As I have already said, for a considerable period after the scheme for demolition had been mooted, and plans had been before the Corporation, the matter was allowed to simmer, and eventually it came to nothing. I further find that, although in August 1921 plans for the reconstruction of the building had been prepared, nothing was done to bring these plans into operation until August 1922. No estimates were got out and the plaintiffs'' manager stated that for a considerable time these plans were maturing. Now, the cost of building in 1920 was considerably higher than it was in 1922, not with standing the increase in the cost of labour, and in considering what the real cause of the delay in undertaking the building operation was, I not only have regard to the dilatoriness of the plaintiffs in getting rid of the tenants, I not only have regard to the delay in getting estimates and in starting these operations, but I find that from the end of 1919 onwards until the present day the position of the plaintiffs which had no doubt

been a very satisfactory one from a financial point of view in the previous year, has not been at all flourishing. The manager stated that in 1919 and 1920 they were in temporary difficulties, or at any rate he said that they were in temporary difficulties to-day and it appears from his evidence that a-sum of no less than 12 lakhs was owing from 1919-20 and is still owing by the plaintiffs to one Balstaun and that there is a further sum of 15 lakhs which is claimed by the Chartered Bank, if not against the plaintiffs'' firm, against a Company, in which the presiding genius, if I may use the expression, of the plaintiffs'' firm is very deeply interested. The conclusion, to which I have come is that the real cause of the failure to carry out either the demolition operations on the reconstruction work was not the refusal of the defendant to give up possession of the premises, but, that the delay was due to the fact that the plaintiffs were considering it first one scheme and then another, and were not disposed to make up their minds in a hurry and were content to consider the matter binding their time until the building trade became less exacting in the cost of materials and until general business conditions in the trade in which they were mainly occupied had been brought back to a more flourishing condition. In these circumstances I have come to the conclusion that the occupation of the defendant of that particular portion of these premises was not the cause of the delay in ''carrying out the building operations in question. I, therefore, hold that under item (ii) the plaintiffs'' claim for damages fails. The plaintiffs, therefore, are entitled to; recover damages in this action only under item (i) that is, for mesne profits. I have carefully considered the damages to which they are entitled under that heading. From November 1919 until May 1920 when the Rent Act came into operation, I assess the rent which the plaintiffs might have received if the defendant had not been in occupation at Rs. 100 a month, that is, twice as much as the rent which in fact the defendant was paying.

17. Evidence was called before me to show that shops in similar position were yielding sometime rents with a salamy of Rs. 75 per month and some times rents of Rs. 231 a month or without a salami but in neither of these cases was any evidence produced before me as to the terms and conditions in respect of which the prospective tenants were prepared to pay that. The plaintiffs'' managar has stated on this issue that he could have obtained even before the reconstruction a sum of Rs. 300 per month for each of these premises although in fact he had been allowing some of the occupants of these premises to retain possession as monthly tenants at a rental of Rs. 50. I asked him why it was if he could have got Rs. 300 a month that he did not get rid of these tenants and obtain the increased rent, but no satisfactory answer to that question, to my mind, was given. I have, therefore, to make up my mind from the materials before me as to what would be a fair sum at which to estimate the rents which the plaintiffs might have received during that period. I estimate it at Rs. 100 a month. Therefore, in respect of the period from 1919 November till May 1920 the plaintiffs are entitled to recover the sum of Rs. 600 from May 1920 until May 1922 the premises came under the operation of the Calcutta

Rent Act, and under that Act it would have been impossible for the plaintiffs to have obtained a larger rental than they had obtained for the premises in November 1918 and that was, so far as I can gather, Rs. 50 plus 10 per cent. in addition making a sum of Rs. 55 per month. The plaintiffs if they had been so minded, could have applied u/s 15, Sub-section (3) (d) and (1) of the Calcutta Rent Act to the Rent Controller to increase these rents on the ground that they were unduly low. I have taken all these matters into consideration, and have come to the conclusion that a sum of Rs. 70 a month is a fair sum to be awarded as rent for the period from May 1920 to May 1922, that is 24 months at Rs. 70 a month, which comes to Rs. 1,680. There will, therefore, be judgment for the plaintiffs for Rs. 2,280 and interest at 6 per cent. until realization. The plaintiffs will have one day''s costs of the hearing, and the defendant will have two days'' costs of the hearing on scale No. 2.