
(1935) 10 BOM CK 0010

In the Bombay High Court

Case No : O.C.J. No. 18 of 1935 and Suit No. 274 of 1934

Abdul Rehman Mohamud Yusuf

APPELLANT

Vs

Sir Phiroze Cursetji Sethna

RESPONDENT

Date of Decision : 08-10-1935

Acts Referred:

Contract Act, 1872 — Section 63

Transfer of Property Act, 1882 — Section 109

Citation : AIR 1936 Bom 88 : (1936) 38 BOMLR 34

Hon'ble Judges : John Beaumont, J;Blackwell, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is a suit in which the six plaintiffs sue the defendants for rent under a lease dated January 22, 1922. Defendant No. 1 is the original lessee under the lease, and he is sued by virtue of his express covenant to pay the rent. Defendant No. 2 is the assignee of the lease, and as against him a decree for payment of the rent was granted, and from that decree there is no appeal. Defendants Nos. 3 and 4 were sued in the capacity of partners with defendant No. 2. The suit was dismissed against them, and there is no appeal from that dismissal. So that the only question with which we have to deal on this appeal is the liability of defendant No. 1 on his express covenant for payment of the rent.

2. The matter is one of very great importance to the parties, because the rent reserved under the lease was over Rs. 16,000 per month, the property, we are told, has fallen very much in value and cannot be underlet at anything like the rent reserved by the lease, and defendant No. 2 is not in a position to meet his liability.

3. The lease in question which, as I have said, was dated January 22, 1922, was made between Sir Mohamud Yusuf (who is plaintiff No. 6), who is referred to as "the landlord,"-that expression to include "the reversioner for the time being"

immediately expectant upon the term hereby created,"-of the one part, and defendant No. 1, therein called "the tenant,"-which expression was to include "his heirs, executors, administrators and assigns," of the other part. The term of the lease was fifty years, commencing on the day on which the building to be erected was completed, and that date was subsequently agreed between the parties as August 16, 1923; and the rent reserved was the monthly rent of Rs. 16,667. The covenant for payment of rent was in these terms:

The tenant for himself his heirs, executors, administrators and assigns and to the intent that the obligations may commence from the beginning of and continue throughout the term hereby created covenants with the landlord as follows :-(a) To pay the reserved rent on the days and in manner aforesaid at the office of the landlord in Bombay.

4. The only other covenant, which it is material to notice, is that against assigning without the written consent of the landlord-such consent not to be unreasonably withheld.

5. On September 5, 1923, that is, shortly after the term of the lease had commenced, defendant No. 1 applied in writing to the landlord for liberty to assign the lease to defendant No. 2, and on September 24, 1923, a reminder was sent to the landlord. On September 28, 1923, the landlord wrote to defendant No. 1:

With reference to your letter dated the 5th instant, I have no objection to your assigning the lease of the Yusuf Building to Sir Fazulbhoy Currimbhoy, Kt., provided you send me within two days the rent from 16th August to 30th instant as agreed.

The rent was not sent within the time specified, but on October 5, 1923, Sir Fazulbhoy Currimbhoy, defendant No. 2, sent the rent for the building due from August 16 to the end of September, 1923, that is, the rent due from the commencement of the term down to date; and thereupon, on October 17, 1923, the agent of the landlord wrote to defendant No. 1:

As per your request we have consented to the lease being assigned. Will you kindly let me know under what arrangement the lease was assigned.

And the answer to that from defendant No. 1 was that " I have absolutely transferred my entire interest in the lease to Sir Fazulbhoy Currimbhoy, Kt." In fact, the lease was not actually assigned until March 28, 1924, when there was a deed of assignment between defendant No. 1 and defendant No. 2. The landlord was not a party to that deed, and therefore there is no question of defendant No. 1 being released from his obligations under the lease by that deed.

6. Then on April 29, 1929, the lessor, that is, plaintiff No. 6, assigned the reversion in this property to himself and others by way of wakf, and the six plaintiffs are now the persons entitled to the reversion as Mutawalis of the wakf. The relevant terms of the assignment are that-

the Wakif (that is, plaintiff No. 6) doth hereby grant convey and assure unto the Mutavalis subject to all leases and tenancies now subsisting in respect thereof all the said lands hereditaments and premises described (which included the property, the subject-matter of the lease in question), together with rights liberties easements profits privileges and appurtenances whatsoever to the said lands hereditaments and premises or in anywise appertaining or with the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed and all the right title and interest claim and demand whatsoever of him the. Wakif into or upon the said lands hereditaments and premises hereby granted, conveyed or assigned.

Those are all the documents which are relevant to the question which we have to decide.

7. The learned Judge held two points in favour of defendant No. 1. He held, first of all, that the plaintiffs were not entitled to sue, because they were not the assignees of, or entitled to enforce, the covenant of defendant No. 1 to pay the rent, and, secondly, that defendant No. 1 had been released from his obligations under the lease. I will deal with the second point first.

8. Section 108 of the Transfer of Property Act, which deals with the rights and obligations as between a lessor and a lessee, provides in Sub-section (j) that:

the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

That provision seems to me to introduce the English rule, which is well-established, that the lessee remains liable on his covenants contained in the lease notwithstanding an assignment. That English rule, to my mind, admits of no doubt whatever. It has been established in avgreat many cases, and is referred to in all the text books; and I think the passage which the learned Judge in his judgment in the Court below quotes from the judgment of Sir John Wallis in the case of Thethdan v. The Eralpad Rajah, Calicut ILR 22(1910) . 40 Mad 1111, ?namely (p. 1113)-

that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent .from the assignee and thereby creates a privity of contract between them-

had reference to English cases in which there was no express covenant to pay the rent, but the liability of the lessee arose only under the reddendum. It is well settled that an action for rent on the reddendum is an action of debt which depends upon privity of estate, and that action does not lie after the assignment by the lessee of his interest in the lease. But that principle has no application where, as here, you have a direct covenant by the .lessee to pay the rent during

the whole currency of the term, and the action, under the old forms of pleading would have been in covenant. The mere acceptance of rent from the assignee cannot affect the question, because the assignee normally pays the rent after assignment.

9. The learned Judge, I would add, does not really dispute that proposition. But he holds that there is in this case something beyond the assignment, namely a release of the lessee from his liability. In so holding, he relies on the evidence of defendant No. 1. The relevant evidence seems to me to come to this. Defendant No. 1 says that he had arranged for the assignment of this lease somewhere about the end of February, 1923, that is to say, before the commencement of the term, and that thereafter all his negotiations with the lessor were in fact made on behalf of the intended assignee, that is, defendant No. 2. Then he says that some time early in March, 1923, he met the agent of the landlord, and said to him something to this effect: " I want the landlord to allow me to assign the lease to defendant No. 2 and to treat him as a tenant in my place." Defendant No. 1 Said very candidly in the witness-box that that conversation took place a long time ago, and he could not remember any details. He could not remember where the conversation took place or whether anybody else was present, and he does not purport to remember the exact expressions used at that interview. But I am quite willing to take it that substantially his recollection is right, and that he did say something like this that: " I want the landlord to accept defendant No. 2 as tenant in my place." But that, to my mind, as between laymen, is really no more than an application for a consent to an assignment; and I think the fact that the parties had no more than this in mind is made perfectly plain by the subsequent correspondence, to which I have in part referred. That correspondence shows clearly that the landlord was during the months of August and September, 1923, looking to defendant No. 1 as the lessee to pay the rent, and defendant No. 1, so far as his relations with the landlord were concerned, was admitting that he was the tenant of the property. When one comes to the actual request for leave to assign, there is no mention whatever of any release of the lessee from his covenants in the lease. Probably the parties did not appreciate that defendant No. 1 would remain liable on his covenants after the assignment, but whatever the reason may have been, I am con-didn't that in fact they never dealt with any question of the release of defendant No. 1. Even if one takes the arrangement made between defendant No. 1 and the agent of the landlord as an arrangement that defendant No. 2 should be substituted as the lessee for defendant No. 1, that substitution never took place. Defendant No. 1 never procured defendant No. 2 to enter into any personal covenant with the lessor. There never was, therefore, in law any substitution of defendant No. 2 for defendant No. 1 as the lessee under the lease. I am clearly of opinion, therefore, that the learned Judge's finding that there was a release, express or implied, or a discharge u/s 63 of the Indian Contract Act of defendant No. 1 from his obligations under the covenants in the lease is not sustainable, even if evidence on the subject can be given in view of proviso 4 to Section 92 of the Indian

Evidence Act.

10. Then the second point which arises is as to whether the plaintiffs can sue defendant No. 1 on his covenants in the lease, whether, that is, the right by privity of contract has passed to them. I agree with the construction placed by the learned Judge on the deed of wakf. I think that it is impossible to hold that that deed contains any express assignment of the benefit of the lessee's covenants under the lease. The only question, therefore, is whether the benefit of those covenants passed to the plaintiffs by operation of law, and that involves the construction of Section 109 of the Transfer of Property Act. As I have mentioned, Section 108 deals with the general rights between the lessor and the lessee, and the whole of that section is subject to any contract to the contrary.

11. Then Section 109 deals with the position under an assignment of the reversion. It provides:

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him.

12. Now the question we have to determine, as it seems to me, is whether the right sought to be enforced against defendant No. 1 is a right of the lessor as to the property transferred. If it is, the plaintiffs can enforce that obligation by virtue of Section 109. I think the words " all the rights of the lessor as to the property " clearly include rights of the lessor under covenants affecting the demised property, that is,-to use the English expression,-under covenants " which run with the land," and that no other rights pass. The concluding words of the section, which leave the lessor liable after the assignment "to any of the liabilities imposed upon him by the lease.", would seem to be wider and to leave him liable under personal obligations which do not run with the land. But in my view the only covenants the benefit of which passes to the transferee are covenants running with the land, Mr. Coltman argued that the rights of the lessor as to the property did not include any obligation arising by contract, but I think that would be far too narrow a construction to place upon the section. If that were the right construction, Section 109 would only cover rights arising u/s 108, which, as I have said, is subject to any contract to the contrary. So that, where, as in the present case, the lease contains express covenants for payment of rent, repairs, and so forth,-the provisions of Section 108 are excluded, and the benefit of none of the covenants would pass to the transferee u/s 109. I am of opinion that that is not the meaning of the section, and that the transferee of the reversion becomes entitled, after the transfer, to enforce covenants in the lease which run with the land.

13. But then the question arises, can it be said that a purely personal right against the lessee, after he has assigned his interest in the term, is a right of the lessor as to the property ? I confess that I feel considerable doubt on the question. On the whole, however, I have come to the conclusion that on a fair reading of the language, one cannot say that a purely personal right against the original lessee, who has parted with the land, is a right of the lessor as to the property. Whilst the lessee is in possession of the property, undoubtedly the covenant to pay rent, which issues out of the property, is a covenant which runs with the land; and I apprehend that if the rent were a rent payable in kind, for instance, that the lessee would hand over to the lessor a certain proportion of the produce of the land,-that covenant could be enforced specifically in a proper case. But it is obvious that where the lessee has parted with all interest in the land, the only right which the lessor can have against him is a right to damages for breach of covenant. The lessee cannot in fact pay the rent, if he is not entitled to the land, and cannot collect the rent issuing out of the land. The sole right, which the lessor has against him, is a personal right, arising under the contract, for damages; and that is not in my view a right of the lessor " as to the property.

14. The law which preserves the personal liability of the lessee on his covenants throughout the term of the lease often occasions considerable hardship; and I see no reason why we should apply that branch of the law to a case not clearly falling within it. It is to be noticed that the words of Section 109 of the Transfer of Property Act are a good deal narrower than the words of Section 141 of the English Law of Property Act, 1925, which was in force when the Transfer of Property Act was amended. That section provides that:

The rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land.

15. The language of that section substantially follows the language of the earlier enactments on the subject, 32 Henry VIII, e. 34, and Section 10 of the Conveyancing and Law of Property Act of 1881, both of which refer to the benefit of the covenants in the lease relating to the property passing to the reversioners. Section 109 of the Transfer of Property Act does not provide that the benefit of the covenants under the lease affecting the property are to pass; it only says that the rights of the lessor as to the property are to pass. Even under the English Acts we have only been referred to one case, namely, the case of *Mayor of Swansea v. Thomas* (1882) 10 Q. B. D. 48, where it was held that the lessee could be sued on his personal covenant by an assignee of the reversion, after the lessee had parted with the whole of the term.

16. Then there is one other point to be noticed, namely, that one of the plaintiffs, No. 6, is the original covenantee under the lease , and he has applied for leave to

amend the plaint by submitting, first, that the benefit of the covenant for payment of rent was transferred to and became vested in the original six plaintiffs; and then by claiming that if and so far as it may be held that it was not so transferred, plaintiff No. 6 may recover for the benefit of the plaintiffs the said sum from defendant No. 1. In my opinion, the proposed amendment cannot be allowed, because it would involve misjoinder of causes of action. As I pointed out at the commencement of my judgment, this was not in its inception a plain suit between the plaintiffs and defendant No. 1 on his personal covenant. There was also the claim against the other defendants as the assignees of the lease; and the plaintiffs have got a judgment against defendant No. 2 for the amount of the rent. If we were to allow the amendment, and hold the claim of plaintiff No. 6 established, the result would be to combine two judgments into one, first, a judgment in favour of plaintiffs against defendant No. 2, and, secondly, a judgment in favour of plaintiff No. 6 against defendant No. 1. That would really be converting this action into two actions by different plaintiffs against different defendants, and, in my opinion, we are not justified in doing that. I think, therefore, that the leave to amend must be refused, and that being so, it is not necessary or proper in this suit to consider what the rights may be as between plaintiff No. 6 and defendant No. 1 alone.

17. On these grounds, the appeal must be dismissed with costs.

Blackwell, J.

18. I am of the same opinion. I cannot agree with the learned Judge that the evidence in this case establishes that there was in fact a release by plaintiff No. 6, the original lessor of defendant No. 1, of all his liabilities under the personal covenants in the lease. Taking the evidence given by defendant No. 1 as a whole, and accepting it as perfectly truthful from beginning to end, it does not appear to me to establish that defendant No. 1 and plaintiff No. 6's agent were at all directing their minds to the question whether defendant No. 1 should be released from his liabilities under the personal covenants in the lease. It must be remembered that they were laymen, and not lawyers, and, in my opinion, the evidence merely establishes that defendant No. 1 was anxious to secure the assent of plaintiff No. 6 to the assignment of the lease, as early as March of 1923. That view of the evidence is, I think, entirely borne out by the letters which subsequently passed between defendant No. 1 and plaintiff No. 6 in regard to the request for consent to an assignment of the lease. If there had been, as early as March, any agreement by plaintiff No. 6 to release defendant No. 1 entirely from all his personal covenants under the lease, I cannot think that the letter of defendant No. 1 dated September 5, 1923, would have been written in the form in which it was written, namely, as a mere request for consent to an assignment, without any reference to the fact, - if it were a fact, - that plaintiff No. 6 had already released defendant No. 1 entirely from liability under the lease. That view of the evidence is also, in my opinion, borne out by the written statement in which there is not a hint or suggestion that any oral agreement for

a release, had been arrived at. Consequently, with respect to the learned Judge, I think he came to a wrong conclusion on the question of fact, and that there was no release.

19. Even if the oral evidence had been of a character to establish, though I "think it was not, any such agreement, it would, in my opinion, have not been open to defendant No. 1 to give such evidence, having regard to proviso (4) to Section 92 of the Indian Evidence Act, inasmuch as it would amount, in my opinion, clearly to a subsequent oral agreement to rescind or modify a contract, grant or disposition of property, where the contract, grant or disposition of the property was required by law to be in writing or had been registered according to the law. In the present case, there was an agreement in writing, namely, the lease, and it had been registered. Therefore, that proviso would, in my opinion, clearly be a bar to the proof of such an agreement.

20. The terms of Section 63 of the Indian Contract Act were relied upon on behalf of defendant No. 1 under which it is provided that:

Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

It was argued that it was not necessary, having regard to that section, to rely on the terms of any agreement to release, if the section were otherwise applicable; and a decision of the Privy Council in *Chunna Mal-Ram Nath v. Moot Chand-Ram Bhagat* (1928) L.R. 55 I. A. 154 : 30 Bom. L.R. 837 was relied on. It was contended that inasmuch as from the very commencement, the rent had in fact been paid by defendant No. 2, and the rent bills had always been made out in his name, an inference ought to be drawn that plaintiff No. 6 had by his conduct released defendant No. 1 from performance of the promise made by him under the lease. In my opinion, that is not an inference which is warranted by what happened. Plaintiff No. 6, it is clear, was willing to consent to the assignment, and-as constantly happens in the case of assignments,-he thereafter received rent from the assignee. But, in my opinion, the mere receipt by him of rent from the assignee does not warrant the inference that he thereby released defendant No. 1 from his personal covenant to pay the rent during the whole of the term,-a covenant which, no doubt, plaintiff No. 6 would only seek to enforce if the rent had ceased to be paid, as in fact happened in this case, by defendant No. 2 ceasing to pay. In my judgment, the mere acceptance of the rent by plaintiff No. 6 from the assignee certainly did not amount to a release of the covenantee from future performance of the obligation under the lease.

21. It was argued that the receipt of rent by plaintiff No. 6 from defendant No. 2 amounted in law to a release of defendant No. 1 and that acceptance of rent established privity of contract between plaintiff No. 6 and defendant No. 2 and put an end to the contract between plaintiff No. 6 and defendant No. 1, with the result that the plaintiffs were not in a position to enforce payment of rent from

defendant No. 1. Mr. Coltman in that connection relied upon a passage in the judgment of Baron Pollock in *Mayor of Swansea v. Thomas* (1882) 10 Q. B. D. 48. That was a suit against the original tenant under a lease, which contained a covenant to pay the rent. The defendant had assigned all her interest in the term, but rent had not in fact been accepted from the assignees of the lessee. In the course of his judgment, Baron Pollock said as follows (p. 50):-

On the part of the defendant it was contended, first, that the plaintiffs, upon the facts stated, must be taken to have recognised *Watson & Overend* as their tenants, and therefore that they could not now maintain an action against the defendant for the rent sued for. If the plaintiffs had received rent from the defendant's assignees, this might have been so, because by so doing they would be taken to have accepted the assignees as their tenants, and so privity of contract between the plaintiffs and the defendant would have been extinguished, in accordance with the well-known doctrine laid down in *Walker's Case*; but it was admitted by counsel for the defendant that no rent had ever been paid by the assignees, and the defendant's name still stood as tenant in the books of the corporation.

With great respect to the learned Baron, in my opinion, the law is not as there laid down by him. In note (e. 1) to *Walker's Case* (1587) 76 E. R. 676 it is stated that-

...it is fully settled, that though, if the lessor accept the assignee as his tenant, he cannot bring an action of debt for rent incurred after the assignment, because the acceptance of rent extinguishes the privity of contract which was created between them by the lease; yet he may have an action of covenant upon the express covenant by the lessee to pay the rent

and *Barnard v. Godscall* (1612) Cro. Jac. 309 *Bachelour v. Gage* (1630) C C 188, *Thursby v. Plant* (1841) 1 Saund. 237, and *J. W. Orgill v. Kemshead* (1812) 4 Taunt. 642 are there referred to in support of that proposition. I think it is clear law that though the action of debt is not maintainable if rent is accepted from the assignee of the lessee, yet where there is a personal covenant, that personal covenant remains, and may be enforced by action.

22. The further question, however, remains as to whether the present plaintiffs, who are the assignees of plaintiff No. 6 under the deed of wakf dated April 29, 1929, can enforce a personal covenant for rent against defendant No. 1 after he has assigned the property to defendant No. 2. I entirely agree with the observations which have fallen from the learned Chief Justice as to the effect of the provisions of that deed in regard to the personal covenant. In my opinion, the benefit of that personal covenant was not assigned by that deed in any shape or form. Consequently, the question depends for its answer upon the proper construction to be put upon Section 109 of the Transfer of Property Act, which provides in the case of a transfer by a lessor of the property leased or any part thereof that the " transferee, in the absence of a contract to the contrary, shall

possess all the rights, and if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred, so long as he is the owner of it." Can a mere personal covenant to pay rent be regarded as a right as to the property within the meaning of that section which can be enforced against the lessee after he has parted with all his interest in the property ? It is to be observed that when liabilities attaching to the lease are intended to be referred to, the legislature has no difficulty in referring to them in terms. For instance, in dealing, with the rights and liabilities of a lessee, who transfers the whole or any part of his interest in the property, u/s 108 (j) of the Transfer of Property Act, where the legislature desires to refer to the liabilities of the lessee attaching to the lease, it does so in terms, and provides that " the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." Similarly, in the latter part of that portion of Section 109, to which I have already referred, the legislature refers to the " liabilities imposed upon him by the lease ", where it provides that " the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him. " The expression " rights as to the property " would, no doubt, include covenants running with the land. But, in my opinion, it would be an odd thing, if it were intended to include a personal liability on the part of the lessee to pay rent, when he had assigned the land, with the result that privity of estate had been established between the lessor and the assignee. I think it would be straining the fair meaning of the words to treat a personal covenant to pay rent as covered by the expression " rights as to the property ". In my judgment, if the legislature had intended that the transferees of the reversion should have the right to enforce against the original lessee,-even after he had assigned the property, a personal covenant between him and the original lessor to pay the rent,-it would have done so in plain and unambiguous language. I feel that the matter is certainly not free from doubt. But I am not prepared to hold on the language used that a personal covenant to pay rent falls within the words " the rights as to the property", so as to confer upon the transferees of the reversion the right to enforce, what is after all, merely a covenant for damages against the original lessee, after he had assigned the property. In my opinion, therefore, the learned Judge came to the right conclusion upon this part of the case; and the appeal should be dismissed with costs.