

(1927) 11 CAL CK 0025
In the Calcutta High Court

Bejoy Lal Seal and Others

APPELLANT

Vs

Benarasidas Khandelwal and Others

RESPONDENT

Date of Decision : 25-11-1927

Acts Referred:

Transfer of Property Act, 1882 — Section 108(J)

Citation : AIR 1928 Cal 681

Hon'ble Judges : C.C. Ghose, J;Buckland, J

Bench : Full Bench

Judgement

C.C. Ghose, J.—This is an appeal against a decision of my learned brother Page, J, passed on 14th April 1927. The facts, shortly stated, are as follows : On 23rd August 1900, one Bolai Lal Seal who was the predecessor-in-interest of the present plaintiffs let out the premises in suit then known as No. 7/1, Halliday Street, to the predecessor of defendants 1 and 2 for a term of 61 years on certain terms and conditions specified in the indenture of lease. On 7th May 1923 defendants 1 and 2 mortgaged the leasehold interest in the said premises by way of sub-demise to the defendant 3.

On 20th August 1923 the plaintiffs gave notice to the defendants that they regarded the lease of 23rd August 1900 as having been determined by reason of the mortgage of 7th May 1923, which, according to them, operated as a breach by the lessees of a covenant in the lease.

2. The present suit was filed on 25th January 1924, in which the plaintiffs prayed for a declaration that the indenture of lease dated 23rd August 1900 stood determined and for possession of the premises in question, and also for mesne profits, On 30th June 1925, defendants 1 and 2 were adjudicated insolvents in Karachi and subsequently the Official Assignee of the Court of the Judicial Commissioner of Sind was added as a party defendant in their places. The principal defendant, namely, defendant 3, pleaded in his written statement that the mortgage in his favour was not an assignment of the lease in breach of any of the terms of the said document and denied that the plaintiffs were entitled to

any relief whatsoever in the suit.

3. It is alleged that the plaintiffs came to know of the said mortgage in favour of defendant 3 shortly before 20th August 1923. The rents in respect of the premises had been paid to the plaintiffs up to the month of June 1923. In para. 9 of the written statement of defendants land 2 it was stated that, although they had always been ready and willing to pay the rent reserved to the plaintiffs the plaintiffs, as a matter of fact, had not received any rent subsequent to the month of June 1923. When the suit came on for hearing before Page, J., in April 1927, it was suggested that the plaintiffs had accepted rent after they had become aware of the mortgage and that the forfeiture, if any, had been waived. It may be stated at once that, as far as one can make out from the pleadings, they do not raise any issue as to whether or not, after the forfeiture had occurred, the same was waived by the plaintiffs by acceptance of rent. Page, J., held that, on a true construction of the said indenture of lease and the mortgage, there had been no forfeiture of the lease and he accordingly dismissed the plaintiffs' suit.

4. For the purposes of the determination of this appeal, it is necessary to consider the effect of two clauses of the said indenture of lease, namely, Clauses 5 and 6 and of Clause 3 of the mortgage. Clauses 5 and 6 of the said Indenture are as follows:

(5) That the said lessees shall be at liberty or shall have the full power and authority without having recourse to previously securing to that effect the consent of the said lessor written or verbal to under-let the said demised land and the buildings, structures, sheds, godowns, stables or any portion thereof to be so erected and built by them as aforesaid.

(6) The said lessees shall have no power save amongst themselves as hereinafter mentioned to assign, transfer or in any way to alienate their right, title and interest upon the demised land and the buildings so to be erected by them thereon as aforesaid created by virtue of these presents provided nevertheless that neither of the said lessees shall be entitled to exercise the right of transfer or assignment among themselves as is hereinafter reserved until a competent Engineer to be approved by the lessor, certifies that the construction of the buildings so to be erected on the demised lands as aforesaid is completed at a cost of not less than ten thousand rupees as is hereinafter provided.

5. Clause 3 of the mortgage is as follows:

In further pursuance of the said agreement and for the consideration aforesaid, the mortgagors hereby demise and sub-let unto the mortgagee all the hereditaments and premises comprised in and demised by the said lease and more fully described in Schedule A hereunder written which is valued at Rs. 10,000 and covenant to hold the same unto the mortgagee for the unexpired residue of the term of 61 years granted by the said lease subject to the proviso that this sub-lease shall terminate forthwith as and when the amount of money advanced by the mortgagee shall be repaid with interest herein-before

mentioned and all costs as between attorney and clients and all dues for the time being as hereinbefore and hereinafter mentioned either by the mortgagors personally or by realization of rents and profits by the mortgagee himself and from the tenants now occupying or those who will occupy in future less the expenses and costs of realization and all other payments to be incurred and paid in connexion therewith the said hereditaments and premises comprised in and demised by the said lease.

6. It is argued on behalf of the appellants that, having regard to the three clauses set out above, the mortgage of the leasehold in this case operated as an absolute assignment of the residue of the term of the lease and that it is hit by Clause 6 of the said indenture of lease. On the other hand it is argued on behalf of defendant 3, first, that having regard to the fact that under-letting even for the residue of the term is permitted by Clause 5 of the said Indenture of lease, the circumstance that along with the under-letting there is a mortgage by way of sub-demise cannot possibly amount to a breach of the sixth covenant of the said indenture and, secondly, that, having regard to the terms of the mortgage, there is, as a matter of fact, no conveyance of the lessee's interest to the mortgagee but that there is merely a charge in favour of the mortgagee as is apparent from the terms employed in the mortgage itself in respect of the two classes of properties referred to in the mortgage, namely, the properties mentioned in Schedules B and A respectively. In other words, it is argued that, if the document amounts to a mortgage at all, it is a class of mortgages which is not hit by Clause 5 of the said indenture and that an under-lease being permitted the fact of the creation of the mortgage by way of sub-demise, does not extend it into something which is precluded by the terms of the said clause.

7. I am of opinion that the contentions argued before you on behalf of defendant 3 must fail. As a general rule, an assurance for a period less than the whole term is an under lease and not an assignment : per A.L. Smith L.J. in *Bryant v. Hancock* (1898) 1 Q.B. 716, while if a termor for years makes a lease for the residue of the term or for a time exceeding his interest, it operates as an absolute assignment, *Parmenter v. Webber* (1818) 8 Taunt 593, *Beairdman v. Wilson* (1868) 4 C.P. 57, *Hicks v. Downing* (1698) 1 Raymond 99. The test in such cases is whether the whole interest of the lessee has been granted - it is immaterial whether it is called a lease or an under lease or a derivative lease ? and if the whole interest has been granted it will operate as an assignment : see *Pluck v. Digges* (1831) 5 Bigh. N.S. 31.

8. This being the general rule it is necessary to find out whether in the present instance there has been such an absolute assignment of the lease as has been urged on behalf of the appellants. Under the Transfer of Property Act (See Section 108, Clause J.) in the absence of a contract to the contrary, the lessee may transfer absolutely or by way of mortgage or sublease 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, however, by reason only of such transfer

cease to be subject to any of the liabilities attaching to the lease. In this case we have, however to determine for ourselves what the contract between the parties was. As pointed out in the case of *Bengal National Bank Ltd. Vs. Janoki Nath Roy and Others*, , the reasoning of Dallas, C.J. in *Williams v. Bosanquet* (1819) 1 Br. And B. 238, in such a case as this, is still valid in India. It is laid down there that

the assignment of a lease for the whole terra whether absolute or subject to a proviso for reassignment in a certain event is as far as concerns the interest to be transferred precisely the same. So completely does the interest pass-from the one and vest in the other that there is a covenant to re-assign when the money shall be repaid. The whole interest is therefore assigned and the whole is to be re-assigned. It vests there absolutely till such re-assignment in the party who is to re-assign and is not less absolute because by agreement between the immediate parties to which the lessor is No. party the assignor may in an event which may or may not happen entitle himself to a reconveyance by the money being repaid.

9. In my opinion having regard to these considerations there cannot be any doubt that the assignment in the present case by way of mortgage of the residue of the term is an absolute one and that there is no substance in the contention that there is a distinction discernible between the words employed when mortgaging the properties set out in Schedule B and when is mortgaging the residue of the term referred to in Schedule A by way of sub-demise. The distinction, if any, is because of the nature of the properties set out in the two schedules; it may be noted further that the draftsman of the said mortgage has used sufficient and apt words to indicate that it was to be an assignment of all the remaining interest in the term. Mortgages of leaseholds by assignment before 1926 were made in England by, assignment of the whole unexpired residue of the term and similarly in the case of mortgages of leaseholds by sub-demise they were made by demising the property to the mortgagee reserving the last days or the last few days of the original term. The mortgage in this case is, as indicated above, of the residue of the term. Further, the mortgage of the residue of the term in this case is really in the nature of a usufructuary mortgage and there would seem to be great force in the contention put forward on behalf of the appellants that it does amount to an alienation within the meaning of Clause 6 of the indenture of lease. I am unable to hold that there was anything reserved by the lessee when he executed the mortgage in the manner in which he did and I am of opinion that no comfort can be derived by defendant 3 from the words used in Clause 3 of the mortgage. In my judgment the transaction complained of in this case does not amount to a mere under-letting or an under-lease but it amounts to an alienation and, therefore, as such, is hit by Clause 6 of the Indenture of lease. In my opinion, it operates as a forfeiture.

10. For the reasons given, the appeal should be allowed with costs in both Courts. The plaintiffs will be entitled to a decree in terms of prayers (1), (2) and (3) in the plaint mesne profits being calculated at the rate of Rs. 205 monthly

from 1st July 1923 until possession is made over.

Buckland, J.

11. As we are differing from my learned brother Page, J., I feel I should say a few words though it is not possible to add to the judgment of my learned brother.

12. Since it has been conceded that an under-lease of the residue of a term amounts to an assignment the only question is whether by the mortgage of 7th May 1923 a breach of the covenant against assignment contained in the lease was committed. The answer to this question depends upon the construction to be placed upon the instrument of 7th May 1923.

13. It is not necessary that I should consider this point in detail for in my opinion it is covered by the decision in *Bengal National Bank Ltd. Vs. Janoki Nath Roy and Others*, , to which I was a party and in which I fully stated my reasons for the view taken. Though, notwithstanding that case it has been argued that the mortgagor retained some interest in the leasehold premises the terms of the instrument in my opinion are inconsistent with such a view.

14. The only other question which arises and as to which it was submitted that there might have to be a remand is that of waiver. Apart from any question of fact such as when the last payment was made, there is no allegation in the written statement of a waiver on the part of the plaintiffs That was the occasion when, if the defendants desired to allege waiver it should have been done by making the necessary allegations. It does at times occur that waiver is allowed to be raised as an issue though not in the pleadings. That is where the defendant alleges that the plaintiff left undone certain things which he ought to have done and consequently he is not entitled to the relief claimed. In those cases, inasmuch as the practice Court does not admit of a reply, the plaintiff only has the opportunity when the case comes on for hearing of stating that there was a waiver by the defendant. But nothing of the sort could have happened in the present case as the plea is one which should have been raised by the defendants in the first instance. In my judgment, not only should this appeal be allowed on the grounds stated but I am also of opinion that it was not open to the defendants to raise an issue of waiver.