

(1927) 04 CAL CK 0008
In the Calcutta High Court

Bengal National Bank Ltd.

APPELLANT

Vs

Janoki Nath Roy and Others

RESPONDENT

Date of Decision : 07-04-1927

Acts Referred:

Transfer of Property Act, 1882 — Section 116, 58

Citation : AIR 1927 Cal 725

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

Bench : Full Bench

Judgement

Rankin, C.J.—Plaintiffs are lessors of 31-3, Marquis Street and the Anglo-American Motor Gar Company were lessees under a registered lease, dated 21st December 1920, for a term of three years from 6th November 1919 at a rent of Rs. 500 per month. That lease contained the following clause:

Provided further that if the lessees shall regularly and punctually pay the rent hereby reserved and duly observe and perform the covenants and conditions on their part to be observed and performed, then the lessees shall be entitled to a renewal of this demise for a further period of three years on the same terms and conditions as are contained in these presents except that the monthly rent shall be six-hundred rupees instead of five-hundred rupees and that there will be no covenant for a further renewal.

2. Also a covenant not to

assign or sub-let or part with the possession of the said demised premises without the consent in writing of the lessors first had and obtained, but such consent shall not be unreasonably withheld.

3. The original term having expired on 5th November 1922 the lessees continued in occupation and in November 1923 the plaintiffs sued them for rent in arrear (Suit No. 3017 of 1923) setting out in their plaint the renewal clause and complaining inter alia that for January, February and March 1923 the lessees had paid rent at the rate of Rs. 500 only "in breach of the covenants in the said

lease," The lessees by their written statement denied that they had paid only Rs. 500 for January, February and March and said that they had paid the rent in full for these months and also for April and May 1923 and that for June they had paid Rs. 500 leaving Rs. 100 owing. They admitted a certain sum as due and owing on this basis, namely, Rs. 2,647, and for this judgment was obtained on admission.

4. It seems that the lessees had erected a factory or workshop and some sheds on the premises and had certain plant, machinery and other things thereupon. They were being financed by or accommodated with a loan from the appellant bank, the Bengal National Bank, Limited, by means of a cash credit loan account. On 18th February 1924 a registered mortgage deed was entered into by these parties which contained the following operative words:

And this Indenture also witnesseth that in further pursuance of the said agreement and in consideration of the premises the Company doth hereby transfer and assign unto the Bank first all that piece or parcel of land containing by measurement one Bigha and ten chittaks situate and lying at 31-3, Marquis Street, particularly mentioned and described in the first Schedule hereunder written and all other premises comprised in and demised by the said lease of twenty first December one thousand nine hundred and twenty aforesaid or expressed so to be and all that the benefit and advantages thereunder; secondly all those the workshop factory buildings and sheds machineries, apparatus, tools, implements, plants and stores which have been or may hereinafter be erected and are used in connexion with the business carried on by the Company on the demised premises or at No. 5, Chowringhee.... To have and to hold unto the Bank as to the premises first herein before transferred and assigned for all the residue now unexpired of the terms created by the said lease subject to the payment of the rents reserved by the said lease and performance of the covenants and conditions in the said lease contained and as to all other the premises hereby transferred and assigned unto the Bank absolutely and for ever,

subject to a proviso for redemption. There was a declaration that in case of default by the company the bank should be entitled to enter into possession of the said land, hereditaments and premises and to seize and sell the machinery, etc. Also that the deed should be construed as an English mortgage as defined in the Transfer of Property Act, 1882.

And the Company doth hereby covenant with the Bank that the Company now hath full power and absolute authority to grant convey and transfer and assign the said premises herein comprised and hereby mortgaged unto the Bank in manner aforesaid that the said lease dated twenty-first day of December 1920 is still valid and subsisting...to hold and enjoy etc,

5. The Company went into voluntary liquidation at some date in November or December 1924 which does not appear clearly from the record and in February 1925 a compulsory winding up order was made against it, a Mr. S.K. Dey being

appointed official liquidator. The plaintiffs had several grounds of forfeiture had they chosen to proceed to forfeit the term - rent was in arrear for over a month, the, covenant against assignment had been broken and the Company had gone into liquidation.

6. The bank in November had entered into possession and put up a notice-board with the name of the bank. That the plaintiffs' solicitors did not know of the terms of the deed of 18th February 1924 or that it purported to be an absolute assignment of the premises is dear. The correspondence shows that the bank repudiated liability to pay rent claiming inter alia that by merely taking, possession of the assets mortgaged to them they were not in possession of the premises. It seems that from 17th November 1924 to some date in March 1925 various executions were levied on the assets, but in what way this affects the bank's position is not intelligible to me. The plaintiffs' solicitors continued to allege by their letter that the bank, was in occupation, that it was liable for rent or at least to pay for use and occupation. They continued also to claim against the company, At last, on 30th June 1925 they gave both the company and the bank notice to quit at the end of July, but; the liquidator could not get the bank to do so, and on 27th August 1925 the plaintiffs brought this suit for rent against both.

7. The plaint was originally based as against the bank on the allegation that the bank were mortgagees of goods which they had kept on the premises and were in occupation of the premises "without the leave or license of the plaintiff." The suit came on for hearing; on 21st April 1926 when certain issues, were framed and learned Counsel for the Bank contended that the plaint disclosed no cause of action against his clients. The plaintiffs in the meantime had come to know the terms of the mortgage deed. They obtained leave to amend and the amended plaint proceeded as against the bank on the basis that by taking an assignment of the term the bank made itself liable for the rent but it alleged in supplement of this contention that the bank had been in possession of the premises and claimed to hold the bank liable till the premises should be vacated.

8. The defence to the amended plaint; denied that the lease had been renewed and contended that the company, after the expiry of the original term, were only monthly tenants and had been so treated by the plaintiffs. It alleged that the company thereafter had no lease. It denied that the bank was ever in possession or had ever been recognized as transferees of any lease or as tenants.

9. The learned Judge has held that after the expiry of the original term the defendant company was not merely in the position of a tenant holding over by the month and in this I think he is clearly right. The question is one of fact and although it is not impossible that a tenant should hold over at an enhanced rent cf *Mayor of Thetford v. Tyler* [1845] 8 Q.B. 95 it is clear that these lessees remained in possession under the renewal clause of the lease as persons who had exercised the option given to them by this clause and whose right so to do had been acknowledged by the lessors and acted on by both parties. This

appears abundantly from the pleadings in suit No. 3017 of 1923 as from the terms of the mortgage-deed of 18th February 1924. The drafting of that deed proceeded on the basis that the lease of 21st December 1920 was a registered instrument, which by its own force created two terms or at least that in February 1924, there was a residue un-expired of the term granted by the lease of 1920. This view may be technically incorrect, but it is clear enough that the company were in possession under the renewal clause.

10. Having found that the company were not merely holding over with the landlord's consent as contemplated by Section 116, Transfer of Property Act, and finding that the mortgage deed of February 1924 was expressed to contain an absolute assignment of the lessee's right the learned Judge has held the appellant bank liable for the rent which accrued due after the date of the deed. He did not decide the question whether the appellant bank was or was not in possession of the premises from November 1924 onwards, but treated them as liable to pay the rent by privity of estate.

11. The main contention of the appellant bank in this appeal is that the renewal clause is not itself a lease for a new term commencing in November 1922, but is a mere covenant or agreement to grant a future lease, provided that the lessees should comply with certain conditions and should be desirous of obtaining a fresh term; that the assignee of a person in possession under an agreement for a lease has no privity of estate with the lessor; and that, apart from privity of contract such as would arise by the assignee's attorning tenant to the lessor, the only way in which the lessor could claim to hold an assignee liable upon the covenants which run with the land, is by making out a right to specific performance, on the principle illustrated by the case of *Walsh v. Lonsdale* [1882] 21 Ch. D. 9. On this last point it is contended : (1) that as laid down in *Grey v. Shyer* [1922] 1 K.B. 184, the plaintiffs must make a proper case for specific performance on their pleadings, showing that they were ready and willing to grant a proper lease and to accept the appellant bank as assignee of the term. This, it is said, is particularly necessary in view of the notice to quit given to the appellant bank on the 80th June 1925, by the plaintiff's solicitors; (2) that as shown by the case of *Purchase v. Lichfield Brewery* [1915] 1 K.B. 184 equity will not grant specific performance for the purpose of making a mortgagee liable to the lessor for rent and covenants. To do so would be contrary in effect to the principles laid down in *Moore v. Grey* [1848] 2 Phi 717 and *Cox v. Bishop* [1857] 8 De. G.M. & G. 816. It is denied that the appellant bank did enter into possession of the premises but it is admitted that they entered upon the land to take possession of the mortgaged chattels. Possession, however, is immaterial according to the appellants' argument save as an element in any question of privity of contract, and as the possession, if any, in this case was accompanied from the first by denial of possession and a refusal to admit liability for rent there can be no question here of privity of contract and possession is altogether immaterial. Neither the original nor the amended plaint makes the case that the bank entered into possession or was accepted by the lessors as tenant; indeed

the original plaint is to the contrary.

12. I propose first to decide the question of fact whether the appellant entered into possession of the premises, that is to say, went upon the land and occupied it claiming to have exclusive right of occupation. On that point we have the correspondence and the evidence of Nanda Lal Sen. No evidence has been given by the appellant bank on this question. I pay much more attention to what the appellant bank said and did vis a vis the company than I do to such a letter as that of 15th December 1924, by the bank's solicitors to the plaintiffs' solicitors. I find as a fact that the bank entered into possession of the premises and was in possession of the premises down to the institution of the suit.

13. The law of India as to the liability of assignees of leaseholds is in no way in a satisfactory condition. The Transfer of Property Act, by Section 105 defines lease as a "transfer of a right to enjoy" and by Section 107

a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

14. By Section 108 it is provided that the benefit of the covenant of quiet enjoyment

shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time vested.

15. It is also provided that

the lessee may transfer absolutely or by way of mortgage or Sub-lease 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 the lease.

16. By Section 109 the principle applied in case³ of assignment of the reversion is that the lessor can part with his rights to the assignee but cannot substitute his assignee in his place to shoulder his liabilities except with the lessee's consent. These would appear to be the only express provisions bearing upon the present question, though it is true that as between mortgagor and mortgagee Section 65 provides that the mortgagor of the leasehold is responsible for the payment of the rent so long as the mortgagee is not in possession.

17. The English law upon this subject depends entirely upon a distinction between the legal and equitable estates, a distinction for which the Transfer of Property Act has left no room in India and which is not to be imported into Indian law. By English law, a term is not merely a right but an estate : *Deo v. Watts* [1826] 5 B. & C. 111. Notwithstanding the language of Section 105, Transfer of Property Act, such cases as *Kunhamjan v. Anjelu* [1894] 17 Mad. 296 show that this principle has always been recognized in India. Even since *Williams v. Bosanquet* [1819] 1 Br. & B. 238 overruled *Eaton v. Jaques* [1780] 2 Douglas

455 a mortgagee who takes a legal assignment of the term is" liable in England for such covenants as run with the land like any other assignee of the legal estate; but no equitable mortgagee is so liable and there is no equity on the part of the lessor to compel such a mortgagee to accept a transfer of the legal estate even when the assignee goes into possession of the premises. The commonest case in practice is the mortgage by sub-demise which is devised to exclude privity of estate. These are authorities which are difficult to apply when the distinction between law and equity has been eliminated, and the provisions of the Transfer of Property Act give little assistance to overcome the difficulty. The statute indeed contributes difficulties of its own as Section 108 says that "the lessee may transfer absolutely or by way of mortgage" while Section 58 as part of its definition of an English mortgage employs the phrase;

transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money.

18. Now, there are indications in the Indian authorities of an attempt to strike out a new line and to hold as it is expressed in a well-known text-book (Sir Bash Bahari Ghose's Law of Mortgage) that a mortgagee, simply as such, cannot be sued as the assignee of the mortgagor on the covenants in the lease but that where the subject of the mortgage is leasehold property and the mortgagee is put in possession of it he becomes liable as a rule to pay the rent. The Chief Indian cases appear to be as follows : E. Macnaghten v. Bhukaree Singh [1878] 2 C.L.R. 323, Kannye Lall Sett v. Nistarini Dassi [1884] 10 Cal. 443, Lala Bharuh v. Lalit Mohan [1885] 12 Cal. 185 , Kunhamian v. Anjelu [1894] 17 Mad. 296, Timmappa v. Rama [1897] 21 Bom. 311, Vithal Narayan v. H.H. Shriram Savant [1905] 29 Bom. 391 and Thethalan v. The Eralpad Rajah [1917] 40 Mad. 1111.

19. Where this doctrine comes from unless it be an adaptation of the opinions expressed by Lord Mansfield and Mr. Justice Buller in Eaton v. Jaques [1780] 2 Dou 455, it is not easy to say and in the case of Thethalan v. The Eralpad Rajah [1917] 40 Mad. 1111, Wallis, C.J., has questioned it, holding that apart from privity of contract a mortgagee cannot be liable for rent and covenants in any case in which he has not taken a transfer of the whole interest of the lease and that a simple mortgage as defined by Section 58, Transfer of Property Act, and illustrated by the document in Vithal Narayan's case [1905] 29 Bom. 391, is not such a transfer.

20. Russel, J., in the last-mentioned case affirmed the following proposition:

In India there being an equity of redemption in the lessee (mortgagor) and there being no distinction between his legal and equitable estates, his "whole estate" is not transferred by the mortgage.

21. Notwithstanding the discrepancy already alluded to between the language of Section 58, Transfer of Property Act and the language of Section 108, Clause (j), this proposition seems to me to be too broad to be a correct statement of the

Indian law. The reasoning of Dallas, C.J., in *Williams v. Bosanquet* [1819] 1 Br. & B. 238, seems to me to be valid in India with reference to such a mortgage as that with which we are concerned in the present case:

The assignment of a lease for the whole term, 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; and the assignment as in the present case, is of all the right, title and interest of the assignor in the lease assigned. 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 re-paid. The whole interest is, therefore, assigned and the whole is to be re-assigned. It vests then absolutely, till such re-assignment, in the party who is to re-assign, and is not lost absolutely, 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 re-conveyance by the money being repaid.

22. I am not prepared to hold that in India the lessor does not part with his "whole estate" under an English mortgage. His right to redeem is a right on certain conditions to get it back and in India this right cannot be looked on as an "equitable estate existing" before reassignment.

23. Again if in the present case the plaintiffs' right to succeed depends upon their showing that they are entitled as against the appellant bank to claim specific performance of a mere agreement for a lease, then in my judgment their suit must fail. I am not satisfied that it is in consonance with any principle of equity that a mortgagee should be compelled to perfect his title at the suit of the lessor, for the purpose of enabling the lessor to cast upon him the burden of the covenants of the lease in the absence of any privity of contract between these parties. It is true that in *Purchase v. Lichfield Brewery Co.* [1915] 1 K.B. 184, the assignees while they had done acts which showed that they had accepted the assignment, had never been in possession of the premises. The judgment of Lush, J., is guarded by the sentence:

I do not think it is necessary to say how the case might have stood if the defendants had ever taken possession.

24. But I have the greatest difficulty in seeing how possession taken in the circumstances of the present case can alter the position. I do not consider that either the pleadings or the evidence before us entitles us against the appellant bank to proceed on the basis of specific performance.

25. Apart from specific performance of the covenant for renewal, what is the effect of the Transfer of Property Act when applied to the facts of the present case? The statute uses the word "lease" not merely for interests which can only be created by registered instrument, but for all interests of the character defined by Section 105. Section 106 speaks of a "lease from month to month" and Section 116 which deals with the effect of holding over says that

the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purpose for which the property is leased as specified in Section 106.

26. This provision must I think be regarded as supplemental to and in qualification of Clause (a) Section 111 which states 1 that a lease determines by efflux of the time limited thereby. But I do not think it can be read as meaning that if there 1 is no agreement to the contrary the lease is renewed from month to month, but that if there is an agreement for any other period then the lease is renewed for that period however long. This r would seriously trench upon the policy of t Section 107. The intention of Section 116 is in my judgment that the lessee holding over with the landlords" mere consent has still a lease but only from month to month : he gets this, but no greater interest; and he does not even get this if there be an agreement with the landlord that he is to be a mere licensee, tenant on sufferance or tenant-at-will. The tenant continuing in occupation under a special agreement for a further lease is a different case from the tenant holding over merely by consent, but if for any reason his agreement has to be disregarded he can fall back upon the landlords" mere consent and claim his rights u/s 116. If the matter be regarded in the first instance as between lessor and lessee the position is that the the latter is either : (1) by virtue of the doctrine of specific performance or otherwise clothed with the estate and right given by the special agreement; or (2) the holder of a lease from month to month. It is doubtless true that if at the expiry of the original term the person who continues in occupation is not the lessee, but his representatives or assigns, there is nothing in Section 116 to enable the lessor by mere consent to convert such representative or assign into a monthly tenant. Such a person in the absence of agreement is a trespasser : cf. *Vadapalli v. Doonamraju* [1907] 31 Mad. 163. But where the original lessee holds over by consent and becomes a tenant I see nothing in the Transfer of Property Act to justify the view that his interest is not assignable, though of course the lessor can determine it by giving the notice specified in Section 106, The stipulation against assignment does not involve that the assignment is void though it might have been made a ground of forfeiture.

27. In these circumstances I am not of opinion that the appellate bank is in a position to escape liability for rent by reason of the fact that the company had not obtained a formal registered instrument creating a fresh form of three year³. Their assignment was an absolute assignment of the whole interest o? the company and if the doctrine of privity of estate is to be applied under the Transfer of Property Act at all it is as applicable to the interest of a tenant holding over by consent as to any other infrared within Section 105. The appellant bank cannot set up the covenant for renewal to exclude Section 116 and at the same time deny to the lessors" any right which specific performance would give to them. By English law, choses in action were not assignable at law and the doctrine of covenants running with, the land is applicable only to demises under seal. Such principles cannot be imported into the Indian statute and in any case

we are here concerned merely with rent and not with collateral covenants and with the liability of an assignee who took his assignment on 18th February 1924 and who entered into possession in November 1924.

28. I think the appellants are not only liable for the rent since November 1924, but since February 1924 up to the 15th August 1925 as claimed, The notice be quit given on 30th June 1925 for the end of July would appear to be bad as the monthly tenancy was from the 6th of the month to the 5th of the next.

29. I think the appeal should be dismissed with costs.

Buckland, J.

30. This appeal is against a judgment of C.C. Ghose, J., dated the 24th May 1926 whereby he held that the appellant bank was liable for rent of the premises No. 31/3, Marquis Street, from the 19th February 1924 and for interest.

31. The date from which he has held the bank to be so liable is the date of an instrument in writing whereby the defendant company by way of mortgage assigned to the appellant bank their leasehold interest in the premises and certain moveable property there situated.

32. The company were lessees of the premises under a lease for three years from the 6th November 1919 with an option to extend it for a further period of three years at an enhanced rent. At the expiry of the term the lessees continued in occupation of the demised premises. That they ever exercised the option in any formal manner does not appear. The lease does not so require nor that the option shall be exercised at any particular point of time. The lessees would have had the right had they exercised the option to call upon the lessors to execute a lease in their favour for a further term of three years, though such right may have become modified by subsequent events. The lessees, however, did not do so whether the option is to be taken as having been exercised or not. They went into voluntary liquidation towards the end of 1924, and on the 12th February 1925 a compulsory winding up order was made. By that time the appellant bank had taken steps under their assignment.

33. It has been contended that the appellant bank did not take possession of the demised premises. In addition to the oral evidence the bank's letter of the 11th November 1924, in which it said that they intend to take possession of the properties mortgaged and "we appoint 2 o'clock tomorrow to take possession" leaves but little room for a decision favourable to the bank on this point. The learned Judge, however, has not decided this question nor in the view which he took was it necessary that he should do so. He held that the appellant bank was liable, for rent of the premises from the date of the assignment on the ground of privity of estate.

34. This conclusion has been assailed on appeal on the ground that the lessees did not exercise the option and that whatever right the lessor might have had to require specific performance, had the option been exercised, never arose. So

far there is not much difficulty. But the appeal has further been argued upon the facting that the option was exercised, the lessees being taken to have continued in possession under the renewal clause and that therefore a state of affairs arose within the principle of *Walsh v. Lonsdale* [1882] 21 Ch. D. 9.

35. It is contended that in such circumstances the appellant bank would be liable for the rent, This point has been argued at length by learned Counsel but *Purchase v. Lichfield Brewery Co., Ltd.* [1915] 1 K.B. 184, which has been cited in argument, makes it clear that the principle of *Walsh v. Lonsdale* [1882] 21 Ch. D. 9 cannot be invoked against mortgagees who take an assignment of leaseholds by way of security. But apart from that decision the lessors are not in a position to allege, as must be done where specific performance is claimed, that they are, and at all material times have been, ready and willing to execute a lease in favour of the appellant bank, for on the 30th June 1925 through their solicitors they gave the appellant bank notice to quit.

36. If the case stood there the appellant bank might be entitled to succeed but there is another aspect of it which has yet to be considered.

37. The lease in fact was never renewed, but the lessees remained in possession of the premises after it had determined. This *prima facie* brings them within Section 116, Transfer of Property Act. The words "in the absence of a contract to the contrary" must be taken as relating to what follows them in the section, that is to say, a contract inconsistent with the renewal of the lease from year to year or from month to month, as the case may be. There is nothing inconsistent with that in the covenant for renewal in the original lease; rather I should say that by holding over the lessees indicated their intention to take advantage of it (a question which must in each case be dependent upon the form of the renewal clause and provision as to notice), though until they gave notice of renewal they might be deemed to be holding over as provided by this section. There is to my mind no third alternative view open, for it cannot by any process of argument be contended that the lessees were mere trespassers.

38. If then the lessees are regarded as being tenants from month to month u/s 116, Transfer of Property Act, after the expiration of the lease the final question still to be determined is what is the effect of the assignment of the 19th February 1924.

39. The Transfer of Property Act contains no definite provision as to the relative rights and obligations of the lessor and an assignee of the lessee's interest. Section 108(j) permits the transfer absolutely or by way of mortgage or sub-lease of the lessee's interest in the property 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. It is a matter of inference that the sub-section contemplated that while the liability of the lessee is preserved the assignee of the lessee may become liable to the lessor. But it does not say so and so far as the point has been considered the view appears to have been taken that the

subsection cannot be construed as having that effect though liability may be established otherwise.

40. Section 65(d) which is to be found in the chapter on mortgages deals with the case of a mortgage of a lease for a term of years. By the latter part of the sub-section taken with the section itself the mortgagor is deemed to contract with the mortgagee that he will so long as the security exists and the mortgagee is not; in possession of the mortgaged property pay the rent reserved by the lease or, if the lease is renewed, the renewal lease, etc. This section also lends itself to the inference that where the mortgagee enters into possession of the mortgaged property he becomes liable to the lessor for the rent. But as to this too the comment has been made that the section only deals with the rights and liabilities of the mortgagee and mortgagor.

41. There are authorities from which it may be argued that possession is a determining factor but upon examination I do not think they support that view. In *E. Macnaghten v. Bhukaree Singh* [1878] 2 C.L.R. 323, a case decided before the Transfer of Property Act, 1882, the judgment in favour of the plaintiff appears to be based upon the mortgagee's possession. The report, however, states that the mortgage was in the English form, though in the judgment itself it is stated that the contract between the plaintiff and the appellant who had taken a transfer of the mortgage from the transferee of the original mortgagee, was not before the Court. Though I think certain principles can be deduced as running through the later cases this authority to my mind is uncertain as a guide, though the principles to which I shall presently allude in to way conflict with it. In *Kunnye Lal Sett v. Nistarini Dassi* [1884] 10 Cal. 443 it was decided that a mortgagee of leasehold property who is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest becomes liable as a rule to pay the rent. The learned Chief Justice, however, in his judgment observed that Section 65 which relates to the duties of mortgagors contains no rules applicable to the case which was therefore governed by the general law. He seems to have regarded possession not as imposing liability per se, but as evidence from which he arrived at the conclusion that the lessee's interest had been wholly transferred. This was followed in *Lala Bharub Chandra Karpur v. Lalit Mohan Singn* [1885] 12 Cal. 185.

42. In *Kunhamian v. Anjelu* [1894] 17 Mad. 293, Section 65 was not referred to but Section 108(j) was said not to exclude the liability of the assignee which was founded on the privity of estate created by the assignment and arising from the vesting of the assignor's interest in the assignee. *Madhubmony Dasse v. Nando Lal Gupta* [1899] 26 Cal. 338 is a case which might at first sight appear to support the appellant bank, but though the learned Judges held that the lessor on the expiration of the original lease made a bargain with the lessee to hold over on an enhanced rent they also very definitely decided that the assignment did not pass the lease as well as the stock-in-trade and fixtures of the lessor who was a veterinary surgeon and livery stable-keeper. I agree with the learned Chief

Justice in what he has said as to the observations of Eussell, J., in *Vithal Narayan v. Shriram Savant* [1905] 29 Bom. 391 which has been commented upon by Wallis, C.J., in *Thelhalan v. The Eralpad Rajah* [1917] 40 Mad. 1111, where the learned Chief Justice observed that in his opinion the authorities did not support the decision. I venture to think with all respect to the learned Judge that he overlooked that the decisions cited by him were founded on a complete assignment of the lessee's interest in each case and he seems to have regarded them as based upon an implication of Section 65, Transfer of Property Act. It is also to be observed that the mortgage in that case was not a mortgage in the English form, a material distinction which must be borne in mind in considering this class of cases.

43. In *Thethalan v. The Eralpad Rajah* [1917] 40 Mad. 1111 the English cases and the sections of the Transfer of Property Act were considered with reference to a mortgage of which the form is not given but which the judgment indicates was not in the form of an English mortgage as defined in Section 58(e) of the Transfer of Property Act for he was not an out and out transfer of the mortgagor's interest. The head note to the report, in that it does not distinguish between one form of mortgage from another, is misleading for the learned Chief Justice in his judgment differentiated as regards privity of estate between mortgages where the lessee mortgage his whole interest and where a subsidiary interest is carved out of the lessees interest.

44. The authorities to which I have referred, with the exception of *Vithal Narayan v. Shriram Savant* [1905] 29 Bom. 391 appear uniformly to require that for the mortgagee to be liable for rent the whole of the lessee's interest must have been transferred. Where the mortgage is in the English form but little question arises; the difficulty is in those cases where the mortgage is in the form more generally employed in the mofussil. In those cases, as I read them, liability is not based upon possession as such, but the fact of possession has been taken into account as a matter for consideration in determining whether the whole interest of the lessee has been transferred to the mortgages.

45. In the case with which we are concerned the whole interest of the lessees was assigned. The English rule as laid down in *Williams v. Bosanquet* [1819] 1 Br. & B. 238 has been quote by the learned Chief Justice and I need not repeat it. A similar rule has been followed in India in cases to which I have referred and indeed in *Thethalan v. The Eralpad Rajah* [1917] 40 Mad. 1111 the learned Chief Justice in referring to *Kunhamian v. Anjelu* [1894] 17 Mad. 196 and *Kannye Lal Sett v. Nistarini Dasse* [1884] 10 Cal. 443, accepted the view that it obtained in this country in cases of a complete transfer of the lessee's interest.

46. Though the lessee's only interest, apart from their right to a renewal of the lease, a point with which I have already dealt, was, at the date of the assignment, their interest as tenants who were holding over u/s 116 Transfer of Property Act, nevertheless in my judgment that was an assignable interest which was assigned by the document of the 19th February 1924 and the appellant bank

is liable for the rent. I agree that the appeal should be dismissed with costs.