

**(1965) 09 CAL CK 0012**  
**In the Calcutta High Court**

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| Bhupat Hirachand and Jamnadas and Bros. (P) Ltd. | APPELLANT  |
| Vs                                               |            |
| Choonilal Chunder and Others                     | RESPONDENT |

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**Date of Decision :** 22-09-1965

**Acts Referred:**

Transfer of Property Act, 1882 — Section 115

**Citation :** (1965) 09 CAL CK 0012

**Hon'ble Judges :** P.N. Mookerjee, J;D. Basu, J

**Bench :** Division Bench

**Advocate :** A.K. Sett and P.K. Nahata, for the Appellant;H.C. Ghosh and M.C. Banerjee, for the Respondent

**Final Decision :** Dismissed

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## Judgement

P.N. Mookerjee, J.—The appellants before us in these two appeals were the plaintiffs in the Court below in the corresponding suits. The suits were for a declaration that the appellants, who were originally sub-tenants in respect of the disputed premises, had become direct tenants under the landlords-respondents.

2. The suits have been dismissed by the learned trial Judge and hence these appeals by the plaintiffs. The relevant facts lie within a short compass and they are as follows:

3. The municipal premises No.65, Canning Street, of which the disputed premises form parts, were leased out to one Taher Ali by the landlords-respondents on November 9, 1957 for a period of 21 years. The lessee is defendant No.3 in the present suits and the landlords are defendants Nos.1 and 2. The lease was to commence on and from October 1, 1957. On May 20, 1958, defendant no.3 is alleged to have leased out the disputed premises and created sub-tenants in respect of them in favour of the present plaintiffs-appellants. On July 17, 1958, defendants nos. 1 and 2 filed a suit for ejectment against defendant no. 3 on the ground of forfeiture of the latter's lease for non-payment of rent and taxes and for non-repairing of the disputed premises, which constituted breaches of the

lessee"s constituted breaches of the lessee"s covenants under the corresponding lease. That suit was filed on the Original Side of this Court and, on September 19, 1958, an ex parte decree was obtained therein by defendants nos. 1 and 2 against defendant no.3.

4. The plaintiffs allege that they came to know of the above decree on January 12, 1959, and, on the 15th following, they approached the landlords defendants nos.1 and 2 for direct tenancies in respect of the portions, occupied by them, as sub-lessees, as aforesaid, and handed over to them a cheque for Rs. 150/- each, for that purpose. They were, however, surprised to find that, on January 28, 1959, the Sheriff"s men, in execution of the ex parte decree against defendant no. 3, as mentioned above, came to dispossess them, whereupon they resisted delivery of possession in execution of the said decree. Thereafter, followed, on February 26, 1959, an application under Order 21, Rule 97 of the CPC by defendants Nos.1 and 2. The plaintiffs were given notice of this application and, on June, 2, 1959, the said application was allowed with a reservation, giving liberty to the plaintiffs to institute suits under Order 21, Rule 103 of the Code of Civil Procedure, if they were so advised. Upon this reservation, the present suits were filed on June 22, 1959.

5. It is necessary to state further that, between January 28, 1959, and February 26, 1959, the plaintiffs sent the amounts, covered by the cheques, already handed over, according to them, to defendants nos. 1 and 2, by money orders as they got the information that the said cheques were not encashed. The money orders, however, were refused, and, accordingly, the said amounts were deposited with the Rent Controller by the present plaintiffs.

6. The learned trial Judge has rejected the plaintiff"s contention that they approached the defendant nos. 1 and 2 for direct tenancies, as stated by them, and made over cheques for that purpose and that the plaintiffs agreed to accept them as direct tenants. He has, further, held that, in view of Section 115 of the Transfer of Property Act, the plaintiffs" alleged sub-tenancies had terminated by reason of the forfeiture of the head-lease of defendant no. 3 on which the decree for ejectment was made in the suit, brought on the Original Side of this Court, as aforesaid. He has, accordingly, come to the conclusion that the plaintiffs have the claim to be declared direct tenants under defendants nos. 1 and 2 and their present suits must fail.

7. Before us, Mr. Sett, appearing on behalf of the plaintiffs-appellants, has pressed all the contentions, raised on behalf of his clients in the Court below. He has contended, first, that, on the evidence before the Court the learned Judge ought to have accepted the plaintiffs" story that they were accepted as direct tenants by defendants nos. 1 and 2, for which cheques were paid by him and accepted by the said defendants.

8. In our view, however, the evidence on record hardly warrants the acceptance of this story. The circumstances, under which the said offer is said to have been

made and accepted, do not inspire confidence so as to justify a conclusion in favour of the plaintiffs. We would, accordingly, reject this submission of Mr. Sett.

9. The other question raises a point of law apart from the submission of Mr. Ghosh, who has argued the appeals on behalf of the contesting respondents, that the alleged sub-tenancies of the plaintiffs were not bona fide sub-tenancies, but must be held to have been made with the ulterior motive at defeating the superior landlords' rights under the law. Mr. Ghosh had contended that there are ample indications in the evidence that these sub-tenancies were created at a time, when the original tenant was perfectly aware that his tenancy was liable to forfeiture; or, in other words, that he had incurred forfeiture, and, even if it be assumed that these sub-tenancies were created in fact, they must be held to have been created in collusion and conspiracy between the defendant no.3 and the present plaintiffs with the ulterior motive of defeating the landlords' rights under the law. There are certain circumstances, which no doubt, support Mr. Ghosh's submission, but the difficulty in his way is that no such case was ever made in the trial Court and the learned trial Judge has apparently held that these sub-tenancies, apart from their extinction u/s 115 of the Transfer of Property Act, did not suffer from any other infirmity.

10. As we have said above, there might be some suspicion or suspicious circumstances in the matter of creation of these sub-tenancies. But suspicion is not proof and the Court's decision cannot rest on suspicion or surmise unless there be positive or sufficient evidence to that effect and unless there was some indication of such a case in the trial Court. These are absent on the present record, and, accordingly we are unable to accept Mr. Ghosh's extreme submission on the point and to reject the appellants' claim on the preliminary ground that their sub-tenancies were mala fide created with the ulterior motive of defeating the superior landlords' legitimate rights under the law. Even then, however, we are of the view that, in the circumstances of these cases and on the documents before us, in the light of the relevant provisions of law, the plaintiffs' claim must fail.

11. The general view, almost universally accepted, has been that, in case of forfeiture of a lease, the under-leases become extinguished under the law. That also seems to be the underlying idea u/s 115 of the Transfer of Property Act, which, it may be pertinent to point out, does not contain any express reservation in favour of a contract, although it is equally true that it does not also expressly seek to supersede or override any contract. Even though, however, the Section does not speak of or refer to any contract, one thing may be clear from the scheme of the Transfer of Property Act that, wherever a contract is sought to be preserved, there is express reservation or exclusion in that behalf. This will follow from the various sections of the Act, where contracts have been expressly preserved. In that view, all contracts to the contrary will be abrogated and the section, notwithstanding any such contract, will have full play and the decision of the learned trial Judge, holding inter alia that the appellants' sub-tenancies, if

any, became extinguished, under the above section, by reason of the forfeiture of the tenant's lease, will be fully supported.

12. Even otherwise, that is, upon the view that a contract may well be preserved without any express mention in that behalf, the position, in the instant cases, will be the same. This follows from the relevant terms of the lease between the landlords (defendant nos. 1 and 2) and the tenant (defendant no. 3). There can be no doubt that, under the said terms, reading, particularly, clauses 12 and 13 of the lease in question, the lessees had a right to sublet or underlet, but this was a right, given to them only under certain specific conditions, and the acceptance of the sub-tenants as direct tenants by attornment on the extinction or sooner determination of the lease, as provided therein, must be read as subject to those conditions. Those conditions were for the benefit of the lessor and they are fully valid in law, and it may well be held that it was the intention of the parties that, unless those conditions were fulfilled, the sub-leasees or sub-tenants in question had no right to get recognition from the superior landlord in case of extinction or sooner determination of the intermediate lease. One of those conditions was that the lessee was to notify the creation of these sub-tenancies or any sub-tenancy, if he intended that the same would be binding upon the superior landlords, within a period of 14 days from their creation. This was to apprise the superior landlord and to notify him about the creation of such a sub-tenancy, so that he may be in a position to know about the sub-tenant and take steps according to law if he is so advised, for the protection of his own interest vis-?-vis such subtenants. On the facts, found by the Court below, there has been, admittedly, no such notification in the instant cases, and,, having regard to the circumstances, under which the sub-leases in question came to be created, it may well be held that such intimation was purposely and deliberately withheld by the lessee (defendant no. 3). There was thus a clear breach of the paramount or essential condition, on which alone the lessors would have been obliged to accept or recognise the sub-tenants concerned, with the result that the so called contract to the contrary would, on its own terms, cease to have any application in the instant cases.

13. The above condition was, no doubt, for the benefit of the lessors (landlords), defendants nos. 1 and 2, and it was open to them to waive it but, unless they waived the same, they were entitled to insist on strict compliance therewith, and, in case of any breach, failure or default in that respect, to refuse to accept or recognise the sub-tenant or sub-tenants concerned under the corresponding dependent term, which was really in the nature of a concession to the lessee on the above express condition. It is only necessary to state here further that, in the facts and circumstances of the instant cases and upon the materials on record, no waiver in the above respect can at all be found.

14. In the above circumstances, it cannot be held that the contract to the contrary, if any, contained in the lease between the lessee and the superior landlord was strictly complied with so as to affect or alter the express

consequences under the said section.

15. We would, accordingly, hold that the appellants cannot claim to have become direct tenants under defendants Nos. 1 and 2 on the extinction or determination of the intermediate lease by the decree for ejectment, passed on the Original Side of this Court as aforesaid, and their present suits must fail. It is only necessary to add that, in the peculiar facts and circumstances of this case, no point, possibly could have been raised under the West Bengal Premises Tenancy Act, 1956, and, presumably, because of that and of the decision of this Court, reported in *Laxmi Debi Loyalka Vs. Messrs Frank Ross and Co. Ltd. and Another*, , no such point was urged, either in the trial Court or before us. It is, therefore, unnecessary to consider the said statute in the instant cases.

16. In the premises, these appeals will fail, but, in the circumstances of these cases and having regard to the prevailing conditions in the city with regard to accommodation, we would give the plaintiffs appellants time, in the first instance, till the end of November, 1964, to vacate the disputed premises and make over vacant and peaceful possession thereof to the landlords respondents, subject to this that, if, by November 25, 1964, the appellants file in this Court, an undertaking or undertakings, as the case may be, to vacate the disputed premises and deliver up vacant and peaceful possession thereof to the respondents, defendants nos. 1 and 2, within May, 1965, they will be given time until the end of the said month of May, 1965, for the above purpose, provided, of course, that, in either case, they go on depositing, in the trial Court to the credit of the respondents defendants nos. 1 and 2, amounts, equivalent to the rentals in case, month by month, regularly, according to the English calendar, within the 15th of the next succeeding month according to the same calendar and, in default of any two of such deposits, the provision for time in respect of the appellant or appellants concerned will immediate-lapses.

Subject as aforesaid, these appeals fail and they are dismissed.

There will be no order as to costs in this Court or in the Court below in any of these appeals.

D. Basu, J.

17. I agree.