

(1915) 09 MAD CK 0022
In the Madras High Court

Moideen Saiba and Others

APPELLANT

Vs

Gopala Kudwa and Others

RESPONDENT

Date of Decision : 21-09-1915

Acts Referred:

Transfer of Property Act, 1882 — Section 111(g)

Citation : AIR 1916 Mad 964 : 31 Ind. Cas. 454

Hon'ble Judges : Tyabji, J;Spencer, J

Bench : Division Bench

Judgement

1. The principal appellants are tenants under a mulgeni lease obtained from the predecessors-in-title of the respondents, and the question that falls

to be decided is whether there has been such a forfeiture of the lease as is referred to in the Transfer of Property Act, Section 111(g).

2. The forfeiture is claimed by reason of a breach of a covenant in the lease, which may be translated in the following terms: ""If I fail to conduct

myself accordingly, I shall at once give up the raid land to you and I shall have no objection to your giving it away to others."" It is argued in the first

instance that this covenant must be read as referring to a breach only of the covenant to pay rent. We are unable to accept this construction of the

lease. Reading the clause with the rest of the lease, we are of opinion that it was meant to come into operation on the tenants failing to act in

accordance with any of the covenants contained in the lease.

3. The covenant which the tenants are alleged to have failed to observe is that they shall not alienate the land in any manner.

4. It is admitted that there have been alienations of portions of the tenancy that might prima facie cause forfeiture of the lease under the clause

referred to. We reserve the question whether alienations of portions operate as forfeiture of the whole. But it is contended that the forfeiture has

been waived in the manner referred to in Section 112 of the Transfer of Property Act.

5. The third issue in the suit is whether the forfeiture of the lease by the lessee, if there has been any forfeiture, has been waived by the temple.

6. The District Munsif discussed this question at some length in paragraphs II and 12 of his judgment and came to the conclusion that "the mulgar

has acknowledged the alienation by receiving rent from the alienee and cannot now repudiate the alienation.

7. The Subordinate Judge says he feels no doubt that there was no waiver of forfeiture. We cannot regard the reasons given in paragraph 4 of the

lower Appellate Court's judgment as a satisfactory ground for this finding, as they do not meet the whole of the defendants' case.

8. The Subordinate Judge first refers to the money receipts, which he says do not show that rent was sent by the 8th defendant as alienee, and then

he considers the oral evidence of Amrita Rao and accepts his statement that no alienation ever came to his notice.

9. Now there are four alleged alienations, viz., (1) a mortgage by Azimuddin to the 11th respondent in 1894, (2) a partition into three shares in

1901, (3) a conditional sale in 1801 by Azimuddin to Kasim Sahib, father of the defendants Nos. 8 to 10, and lastly (4) a usufructuary mortgage

by 7th defendant of his share to 11th defendant on 29th January 1908.

10. During these years, the proprietorship has not remained in the hands of a single lessor continuously but has changed hands three times. In

1905, Amrita Rao sold the suit property to Ramakamthi and on 20th January 1908, Ramakamthi sold it to the temple, whose moktessors are the

present plaintiffs.

11. Under the law as to waiver of forfeiture analogous to the provisions of Section 112 of the Transfer of Property Act; acceptance of rent by any

one of these lessors might operate as a waiver of such forfeiture as might arise from any breach committed during the period when he had the

landlord's interest in the land. Where after forfeiture the lessor transfers his rights to another person, the act and the mode of transfer may itself

show an intention either to keep the right to claim the forfeiture subsisting or to

waive it. Whether or not the lessor intended to waive the forfeiture and to treat the lease as subsisting, may be clear from the terms of the transfer. The terms of the sale-deeds B and have not been considered by either of the Courts below.

12. It is necessary, therefore, to consider as to each of the alleged acts of forfeiture whether there has been a subsequent acceptance of rent or other equivocal act by the lessors concerned or by any of their successors-in-interest, and if so, what was its effect "on the subsistence of the lease.

The payment by the 8th defendant is not the only payment which can be considered, nor is Amrita Rao's statement sufficient to dispose of the matter. The alleged waiver of the forfeiture arising from the alienation through Exhibit L is the act of permitting 1st to 7th defendants to pay the assessment after the plaintiffs knew of the execution of Exhibit L, thus showing an intention to treat the lease as subsisting.

13. We must, therefore, call on the Subordinate Judge to return a fresh finding on the third issue which should be amplified by adding the words "or by the predecessors-in-interest of the temple."

14. At the same time, he will also return a finding on the question, whether there has been a forfeiture of lease by reason of non-payment of rent. In

paragraph 5 of his judgment, he has given it as his bald opinion that there has been forfeiture of rent on this account also, but he has not given

reasons for his opinion nor has he stated what rent, was not paid and when. The District Munsif has considered this point more fully in paragraph

13 of his judgment and has found that there has been no forfeiture on the score of non-payment of rent. The Subordinate Judge has not dealt with

the payments referred to by the District Munsif, as it was necessary that he should do in a reversing judgment. Findings to be returned on the

evidence on record within two months. Objections within six days.

15. In compliance with the order contained in the above judgment, the Subordinate Judge of South Canara submitted the following

Findings.

16. The issues remitted for; findings are:

(1) Whether the forfeiture, if any, has been waived by the temple or by the predecessors-in-interest of the temple?

(2) Whether there has been a forfeiture of lease by reason of non-payment of rent?

17. On the first issue the lower Appellate Court submitted a finding that Amrita Rao and his brother and his mother had waived their right to claim

forfeiture when they executed; the sale-deed, that, no forfeiture occurred during the period the property was owned by Ramakamthi and that the

temple did not waive any right it could have had in consequence of the alienation made in favour of the 11th defendant, and, on the second issue he

held that there was a proper and valid tender of the full rent from 1906 to 1909 both inclusive.

18. This second appeal coming on for final hearing after the return of the findings of the lower Court on the 14th and 17th September 1915, and

having stood over for consideration till this day, the Court delivered the following.

Judgment.

19. With reference to the findings now received, it is urged that there is no evidence to support the Subordinate Judge's conclusion that the

forfeiture caused by the conditional sale in 1901 by Azimuddin to Kasim Sahib, (father of defendants Nos. 8 to 10) was waived. The Subordinate

Judge relied on the terms of Exhibit B and the conduct of the parties in not giving notice to the tenants or their lienees. We think that these were

matters which the Subordinate Judge might properly take into consideration in determining the question of waiver, and we declined to disturb his

finding on this point. We, therefore, accept all the findings.

20. Next with reference to the usufructuary-mortgage by 7th defendant of his share to 11th defendant on January 29th, 1918, if it offended against

the forfeiture clause, we have the lower Court's finding that there was no waiver on behalf of the temple of any right arising out of it. The lease

(Exhibit A provides, "Further I have no right to alienate the said land in any manner"; and contains a provision for re-entry on the breach of any of

the covenants in the lease, to which we have already adverted. Now, is it clear that the parties intended to refer to such a transaction as is now

before us when they spoke of alienating the land? The law leans against forfeiture. To adopt the language of Lord Chancellor in *Northcote v. Duke*

(1765) 2 Eden 319. "When you come for a forfeiture, you must be very exact and certain," vide *Northcote v. Duke* (1765) 2 Eden 319. Here

there was no abandonment or divestment by the 7th defendant of all his interest in the land. He usufructuarily mortgaged his share for a term of 12

years, which was not co-extensive with his own right of occupancy, and at the same time, as recited in Exhibit L, he took a lease from his

mortgagee, so that, in the result, the possession remained with him. We are of opinion that this was not such a disposition of the property in the

land as would necessarily amount to an alienation within the terms of the forfeiture clause in the lease-deed.

21. We must, therefore, allow the appeal, and as the defendants did not appeal against the decree of the District Munsif, we restore that decree

with costs in this Court, Each side to bear their own costs in the lower Appellate Court.