
(1917) 01 MAD CK 0018
In the Madras High Court

Nochulliyil Eazhuvan Theethisson Theethalan

APPELLANT

Vs

The Eralpad Rajah styled Elaya Rajah Avergal of Patinhara
Kovilagom in Calicut (deceased) and Others

RESPONDENT

Date of Decision : 17-01-1917

Acts Referred:

Transfer of Property Act, 1882 — Section 58

Citation : (1917) 32 MLJ 442

Hon'ble Judges : John Wallis, C.J.; Spencer, J

Bench : Full Bench

Judgement

John Wallis, C.J.—The question raised in this appeal is whether mortgagees with possession from lessees are liable to the lessor for rent.

The Subordinate Judge has held that they are liable on the ground that privity of estate exists between them. In this I think he is clearly wrong.

Privity of estate is a technical term of English law, and it is clear that under that law no such privity arises unless the whole of the lessee's interest is

assigned over. Where a subsidiary interest is carved out of the lessee's interest no fresh privity arises. For instance there is no privity of estate

between a lessor and a sub-lessee. Where the lessee mortgages his whole leasehold interest, privity arises in English law, because there the

mortgage is by conveyance with a right to a reconveyance, and therefore the whole interest of the lessee is assigned to his mortgagee; but, as this is

not considered a desirable state of things, conveyancers prevent such privity of estate from arising by making the mortgage by way of sub-lease of

something less than the whole interest of the lessee. In India a mortgage such as this is not an out and out transfer of the mortgagor's interest

(Section 58, Transfer of Property Act) and therefore on the English doctrine no

privity of estate can arise.

2. We have however to consider the provisions of the Transfer of Property Act as to leases which should be followed in India in preference to

English decisions even where it does not in terms apply, as to agricultural leases, Section 108(j) provides, "the lessee may transfer absolutely or by

way of mortgage or sublease the whole or any part of his interest in the property.... The lessee shall not, by reason, only of such transfer, cease to

be subject to any liability attaching to the lease." One effect of this provision is that the lessee does not cease to be liable on the lease by reason 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. It is also to be noted that the liabilities of the transferee arise, as in England, on and by reason of the transfer, and do not

depend on the question whether the transferee has obtained possession, *Monica Kitheria Saldanha v. Subraya Hebbara* ILR (1907) M. 410,

Knnhi Sow v. Mulloli Chathu ILR (1912) M. 86. If the transfer is absolute, it has been held that the transferee becomes liable to the lessor,

Kunhanujan v. Anjelu ILR (1896) M. 296 as in that case privity of estate arises under the English decisions. The section however says nothing

about privity of estate, and the question really is what is the intention of the legislature as regards transfers by the lessee by way of mortgage in the

Indian form or by sub-lease, in which cases there would clearly according to the English decisions be no privity of estate on which the liability could

be rested. The case in *Kunhanujan v. Anjelu* ILR (1893) M. 296, does not afford much assistance, for that was a case of an assignment or

absolute transfer of the lease, and all that was held was that there was nothing in the section to prevent the transferee being liable on the doctrine

of privity of estate as in England. It is quite another thing to hold that in the case of a mortgage or sub-lease by the lessee the transferee becomes

liable directly to the lessor, as such liability cannot be based on any recognised doctrine of privity of estate. The decision in *Kannye Loll Sett v.*

Nistoriny Dossee ILR (1884) C. 443, appears to have proceeded on the footing that the mortgage in that case amounted to an assignment or

transfer of the lease-hold interest in which case privity of estate would arise, and is of no assistance in the present case where the transfer by

mortgage did not amount to an assignment or out and out transfer. This is clearly pointed out by Farran, C.J., in Timmappa Kuppaya v. Rama

Venkanna Naik ILR (1895) B. 311 where however, as has been pointed out in Vital Narayan v. Shriram Savant ILR (1905) B. 391 the word

contract both in the head-note and the judgment is a slip, what was meant being not privity of contract but privity of estate. "A sub-lease differs

from the assignment of a lease in that it creates no privity of contract (read, estate) between the sub-tenant and the landlord. The landlord has to

deal with his lessee and not with the sub-tenants of the latter. The English authorities show conclusively that a landlord putting an end by a proper

notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter. This is undoubted law". Later on the learned

judge observes. "An assignee of a lease JB of course in, a different position, for he is brought by his assignment into direct relations with the

landlord" that is to say in the language of the English law that privity of estate arises between them, It appears clear that the learned Chief Justice

did not consider that in India sub-lessees could be sued for rent by the lessor u/s 108(j) of the Transfer of Property Act or for any other reason.

To so hold would be a very serious innovation. We cannot hold that in India the mortgagee in possession is to be directly liable to the lessor for

rent without applying the same doctrine to the sub-lessee. Both are governed by the same Section 108(j) of the Transfer of Property Act, and, if

actual possession of the land is to make the one liable for rent, it must also be the case with the other. It was no doubt held in Vithal Narayan v.

Shriram Savant ILR (1905) 29 Bom. 391 that a mortgagee of a lease-hold interest if in possession is liable for rent to the mortgagor; and one

reason given is that the distinction between legal and equitable estates does not exist in India. As already pointed out, it is owing to that distinction

that in England a legal mortgagee of a lease is held liable for rent to the lessor where the mortgage is an assignment creating privity of estate, but an

equitable mortgagee is not so liable; and to avoid this untoward consequence it is usual to create a legal mortgage by way not of an assignment

having this effect, but by way of sub-lease of something less than the lessee's interest so that no privity of estate and no liability on the part of the

mortgagee arises. This is the invariable practice as stated in the standard works of Coote, Fisher and Robins. The decision in Kannye Loll Sett v.

Nistoriny Dossee ILR (1884) C. 443, proceeded as already pointed out on the view that the mortgage was an out and out assignment of the lease

which it is not in the present case or ordinarily in India, The judgment of Lord Mansfield in *Eaton v. Jaques* (1780) 2 Dougl. 455, which was also

referred to is if any thing an authority the other way. What Lord Mansfield held was that the mortgagee of a lease-hold interest, even when the

mortgage was by way assignment of the whole term, was not liable for rent by virtue of privity of estate, unless he obtained possession as well, a

point on which he was overruled by ten Judges in *Williams v. Bosanquet* (1819) 1 & B. 233. Both cases however proceed upon the view that the

mortgagee is not liable at all to the lessor unless the mortgage be by way of assignment of the term. "All this", Lord Mansfield observed, "arises

from a mere slip in the attorney in making the conveyance; for, if he had made it an under-lease by leaving a reversion of a day in the mortgagor,

the landlord would have had no pretext to call upon the mortgagee." It is thus clear that what Lord Mansfield was arguing against was the

mortgagee being held liable unless there were both privity of estate and possession, and that his judgment is no authority for the position that

possession in the absence of privity of estate will make the mortgagee liable. See also *Cox v. Bishop* (1857) 8 De. G.M. & G. 815 and *Ananda*

Chandra v. Abdullah Hossein Chowdhury ILR (1913) C. 148. I am therefore of opinion with great respect that the authorities referred to in *Vithal*

Narayan v. Shriram Savant ILR (1905) B. 391 do not support the decision. No such liability is imposed by English Law on sub-lessees or on

mortgagees from lessees either, except as pointed out by Lord Mansfield owing to the mere slip of an attorney, and if it is to be imposed in India it

must be by virtue of Section 108(j) of the Transfer of Property Act and not by virtue of possession. The latter part of the section shows that sub-

leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, at all less do they affect the rights of lessee

against his sub-lessee or mortgagee. There appears to be no sufficient reason for supposing that it was the intention of the legislature by this section

to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. I read the judgment of Farran, C.J., in *Timmappa*

Kuppaya v. Rama Venkanna ILR (1895) B. 311 as holding that it has no such effect as regards sub-lessees, and can see no reason for applying a

different rule to mortgages from the lessee. To hold otherwise would, it need hardly be pointed out, introduce all sorts of complications as to

apportionment, notice to quit etc. For these reasons I think the Lower Courts were wrong and would modify the decree by dismissing the suit as

against the appellant and defendants 8 and 9 with costs throughout.

Spencer, J.

3. I concur. The only case in which a mortgagee of a lease-hold interest in India becomes after entering into possession liable to pay the rent

appears to be where his possession is attributable to his having obtained a decree for foreclosure, the reason being that in such a case the lessee

parts with the whole of Ms interest, and the entire interests both of the lessee and of the mortgagee become by operation of law merged in the

person of the latter, vide E". Macnaghten v. Bheekaree Singh (1878) 2 C.L.R. 323 and Ananda Chandra Boy v. Abdullah Hossein Chowdhury

ILR (1913) C. 148.

4. Here the defendants 7 to 9, who are mere transferees of a Kanom interest, are clearly possessed of something less than the Anubhavam interest

under the lease in favour of 1 to 6 defendant's predecessors. Consequently the agreement in Exs. III, IV and VII between the lessees and the

mortgagees and their assignees inter se that the mortgagees should pay the michavaram or rent will not affect the right of the lessor to look to his

lessees for the recovery of his rent, and to them alone. Even if the mortgage document were silent as to the rent, Section 65(d) Transfer of

Property Act provides that the mortgagor shall pay the rent reserved by the lease so long as the mortgagee is out of possession of the mortgaged

property, which may be read as implying that the mortgagee should pay it if he gets into possession. But this section deals only with the rights and

liabilities of the mortgagor and the mortgagee as between themselves, The rights and liabilities as between the mortgagor and his lessor are

regulated by Section 108(j).

5. The Subordinate Judge who heard the first appeal observed that there was not only privity of estate but privity of contract also. He has given no

reasons for his opinion but simply states that plaintiff can enforce the provision in his favour in Ex. VII though he was not a party to it. Privity of

contract is personal privity and extends only to the person of the lessor and to

the person of the lessee vide Walker's case (1589) 3 Co. Rep. 22

a.

6. It has not been suggested that there is any foundation in the records of this case for a personal privity existing between the lessor and the mortgagees.

7. The Appellant is entitled to succeed in his appeal with costs throughout.