

(1936) 05 PAT CK 0012

In the Patna High Court

Pancham Singh and Others

APPELLANT

Vs

Rai Promotha Nath Mitra and Others

RESPONDENT

Date of Decision : 07-05-1936

Acts Referred:

Citation : AIR 1936 Patna 450 : 164 Ind. Cas. 358

Hon'ble Judges : Dhavle, J;Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—The plaintiff-respondents are the owners of an eight annas proprietary interest in Mauzas Labrikhud Par-sauna, Raghubar and Neura. In 1865 their predecessors granted a permanent mukarrari of 7 1/2 annas in these villages to a number of persons on an annual rent of Rs. 560. The lessees covenanted not to transfer the mukarrari property without the consent of the lessors, and the lease contained a clause entitling the lessors to re enter on breach of the covenant. In the present suit the plaintiffs-respondents claim to re enter by reason of the transfer of a 1 pie share on March 9, 1927, and the tranfers of a 15 karants share on August 27, 1927. It has been found by the Court below that previous to these transfers there had been frequent transfers by the lessees inter se and this finding was not challenged in this appeal. The transfers of 1927, however, were to strangers. The Court below decreed the suit and the defendants appealed. The material portions of the kabuliyat which was in Persian, evidencing the grant of the mukarrari are as follows:

We have obtained the whole and entire 7 1/2 annas...together with all boundaries...at a uniform jama of Rs. 560 of the present currency with effect from 1276 Fasli on depositing Rs. 1,400 of the present currency. We have paid up the entire nazarana money and entered on possession of the mukarrari property We shall continue to pay up rent thereof year after year. The expenses relating to the village and Court affairs - boundary disputes in the Civil and Criminal Courts and the Collectorate concern us the mukarraridars. We shall continue to execute the orders of the Government and the landlords.

2. Here followed a number of other undertakings by the lessees, which are not material and then followed the following:

In the event of default in payment of instalment we shall continue to pay interest thereon at 1 per cent. per mensem. If three consecutive instalments are defaulted, or if we, without the permission of the landlords, give this mukarrari property (shai mukarrari) in darmukarrari or transfer it by sale, conditional sale, gift, rehan or otherwise, or allow a single bigha or biswa of the land (zamin) of the said Mauzas to go into the possession (ilaka) of others or commit atrocities of any sort upon the tenants of the villages, then when these (ye manihae lit; these matters) are brought to light, the landlord or their heirs are and shall be competent to bring the said Mauzas into their sir possession and settle them with others. In this case we, the executants, and our heirs, neither have nor shall have any claim to the mukarrari and refund of the said nazarana money.

3. Subsequent clauses stated that the annual rent was Rs. 560, that the mukarran property was 7 1/2 annas out of 16 annas asli mai dakhli, and that the interest of the several lessees was as follows : Fateh Singh 1 1/2 annas, Mahabal Singh 1 3/4 annas Harakh Singh 1 3/4 annas, Sheobarat Singh 1 3/4 annas and Thakur Prasad 1/2 anna. In the suit Fateh Singh's interest was represented by defendants I-4a, Mahabal Singh's by defendants Nos. 5 19, Harakh Singh's by defendants Nos. 20-37 and Thakur Prasad's by defendants Nos. 38-44. The entire interest of Sheobarat Singh has passed into the ownership of the representatives of these, four lessees. The transfers of the 1 pie share and the ,15 karants share, which the plaintiffs claim bring the forfeiture clause into operation were made by Harihar Prasad and Bhairo Prasad, respectively both of whom were interested in the share of Thakur Prasad. Defendants Nos. 45 to 52 represent the transferee of the 1 pie share and defendants Nos. 53-58 the transferee of the 15 karants share. The question for decision is whether these transfers entitle the lessors to re enter on the whole or any part of the demised property.

4. Mr. Manuk, for the appellants, contends that a forfeiture clause in a lease must be construed strictly against the lessors and that so construed, the relevant clause in the present kabuliyat does not entitle the plaintiffs to re-enter. He referred to the cases in Church v. Brown (1808) 15 Ves. 258 : 38 ER 752 : 10 RR 74, Spencer v. Goodwin (1815) 4M & Sel. 265, 105 E R 833 : 16 RR 463, Russel v. Beecham (1924) 1 KB 525 : 93 LJKB 441 : 130 LT 570 : 40 TLR 66, Good Title v. Saville (1812) 16 East 87 : 104 ER 1022 : 14 RR 305, at p. 95 Page of(1812)16 East--[ED] Wooler v. Knott (1876) 45 LJ Ex. 313 : 1 Ex. D 124 : 34 LT 362 : 21 WR 615, Doe v. Ingleby (1846) 15 M & W 465 : 153 ER 933 : 71 RR 731, Croft v. Lumley (1858) 6 HLC 672 : 27 LJQB 321 : 4 Jur. 903 : 6 WR 523 : 10 ER 1459 : 108 RR 252, Chhabildas Lallubhoy v. Krishnarai Ramchandra 5 Bom. LR 1016, and Promatha Nath Mullick Vs. Pradyumna Kumar Mullick and Another, , in which there are observations to the effect that the Court leans against a forfeiture and, consequently, construes strictly a clause under which a right to re-enter is

claimed. Mr. Das, for the respondents, referred to a passage in the judgment of Jessel, M. R., in *Taylor v. Corporation of St. Helens* (1877) 6 Ch. D 264 : 46 LJCh. 857 : 37 LT 253 : 25 WR 885, (1877) 6 Ch. D[Ed].270, relating to the construction of a deed of grant:

I think the rule of construction is to construe the language of the instrument according to its ordinary meaning giving to technical terms their technical meaning unless we find a context such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied.

5. In effect, however, it does not appear that there is any essential difference between the rules for construing the various clauses. of a lease. The agreement between the parties is contained in the several clauses and the object of the Court is to ascertain the intention of the parties. The ordinary rules of construction are that the document must be looked at as a whole and the intention of the parties is to be gathered not by speculating but by reference to the language used and the object of the agreement. When it is claimed that a lessor is entitled to re-enter by reasons of the lessee's breach of a covenant, it is first necessary to ascertain what it was that the lessee covenanted to do, or not to do ; then to see, first whether the agreement provides for re-entry on breach of such covenant ; and, finally, whether that has been a breach of the covenant by the lessee. So far as I have been able to ascertain there is no difference in the rules to be applied in ascertaining the nature of the covenant and the nature of any other term of the agreement. In *Good Title v. Seville* (1812) 16 East 87 : 104 ER 1022 : 14 RR 305, Lord Ellenborough said:

In the construction of covenants of this sort they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put a fair construction upon them, according to the intention of the contracting parties.

6. In *Corporation of Bristol v. Westcott* (1879) 12 Ch. D 461 : 41 LT 115 : 27 WR 841, where the construction of a lease with a provision for re-entry was in question, Jessel, M. R., said:

In my opinion we must, in the first place, construe the covenant without regard to the proviso for reentry, for its construction must be the same in an action for damages for breach of the covenant as in an action for the recovery of the land on the ground that the proviso for re-entry has come into operation by reason of such breach.

7. He went on to point out that such covenants in a lease are often inartistically drawn and are often meaningless, but that having regard to the nature of the property leased, it is generally possible to construe them so as to effectuate the intention of the parties. In the same case Cotton, L.J. observed:

I agree that, although it is a question of forfeiture, we must construe the

covenant fairly, ascertain its meaning without regard to forfeiture and then see whether upon that ascertained meaning, a forfeiture has been incurred.

8. The kabuliyat under consideration is an illustration of the inartistic draftsmanship referred to by Jessel, M. R. There is, in the first place, no express covenant by the lessees not to transfer. The material clause may be rendered

In the event of default in payment of instalments we shall continue to pay interest thereon at 1 per cent, per mensem.

1. If three consecutive instalments are defaulted, or

2. If we, without the permission of the landlords (a) give this mukarrari property in darmukarrari, or (b) transfer it by sale, conditional sale, etc, or

(c) allow a singls bigha or biswa of the land of the said mauzas to go into the possession of others or

(d) commit atrocities of any sort upon the tenants of the village, etc.

Then when these are brought to light, the landlords and their heirs shall be entitled to re-enter.

9. It is to be observed, in the first place, that although there is an express covenant to pay interest on arrears of rent, there is no express covenant by the lessees not to transfer. That it was the intention of the parties that the lessees should not transfer the demised property without the consent of the lessors is plain, and it is not disputed that the lessees impliedly covenanted not to do so. Secondly, the right of re-entry is expressed to depend on "these matters" (i. e. breach of all the implied covenants) being brought to light. It was indeed contended by Mr. Manuk that it was only on proof of breaches of all the implied covenants that the forfeiture clause comes into operation. When I ask myself whether that was the intention of the parties, as ascertainable from the language used, and with regard to the object of the agreement between the parties, I have no difficulty in rejecting this construction. On a reasonable and fair construction of the document the intention of the parties was that the right to re-enter should come into existence on breach of any of the implied covenants.

10. It was next contended by Mr. Manuk that a transfer of a part of the property by one of the lessees is not a breach of the covenant by all the lessees not to transfer the demised property, and reliance was placed in the observations of Lord Eldon in *Church v. Broom* (1808) 15 Ves. 258 : 38 ER 752 : 10 RR 74, and on *Grove v. Portal* (1902) 1 Ch. 727 : 71 LJCh. 299 : 86 LT 350 : 18 TLR 319, *Chatterton v. Terrel* (1923) AC 578 : 92 LJCh. 605 : 129 LT 769 : 39 TLR 589, *Dassorathy Huri Chunder v. Rama Krishna Jana* 9 C 526 : 13 CLR 114 *David Cutinha Vs. Salvadora Minazes and Others*, , and *Swarnamoyee Debya Vs. Aferaddi and Others*, . In the first of these cases the question to be decided was whether a covenant not to assign was a usual covenant. While discussing this question Lord Eldon indicated that a covenant not to sub-let the demised

premises did not include a covenant not to sub-let a part of the premises. In *Grove v. Portal* (1902) 1 Ch. 727 : 71 LJCh. 299 : 86 LT 350 : 18 TLR 319, the lessee of the fishing rights in a portion of a river covenanted not to be under-let, assign, transfer or set over or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over without the consent in writing of the lessor. The lessee granted a license entitling the licensee to fish in the whole of the portion of the river covered by the lease, Joyce, J. said:

I must say, looking at the particular nature of the property demised in this case--the subject of the demise that I doubt whether the granting of the license to Mr. Bryant is a transfer of any part of the demised premises; but I do not decide the case upon that. I decide it upon the dictum of Lord Eldon and I hold that by reason of the emission from the covenant of the words "any part of the premises" an assignment of a part of the premises was not forbidden.

11. In *Chatterton v. Terrel* (1923) AC 578 : 92 LJCh. 605 : 129 LT 769 : 39 TLR 589 the lessee had first under-let a part of the premises with the consent of the lessor and had then under-let the remainder without the lessor's consent. It was held that the lessee had in fact under-let the whole of the premises without the consent of the landlord to the under-letting of the whole. The case is, therefore, distinguishable from the present one, but Lord Wrenbury there observed:

It is said, and said with truth, that if there be a covenant not to assign or under-let the premises, it is not a breach to assign or sub-let part of the premises. It was not so stipulated if those be the words, for the words "or any part thereof" are not found in the covenant.

12. *Dassorathy Huri Chunder v. Rama Krishna Jana* 9 C 526 : 13 CLR 114 , was not decided upon the terms of a contract but upon custom. It was, however, there held that, where by custom a tenure is inalienable, the landlord is not entitled to re-enter on sale of a portion of the tenure. *Odgers, J.*, in *David Cutinha Vs. Salvadora Minazes and Others*, , held that a restraint on alienation of the demised premises is not a restraint on an alienation of a portion. To the same effect is the decision of *Guha and Ghose, JJ.* in *Swarnamoyee Debya Vs. Aferaddi and Others*, , and of *Krishnan, J.*, in *A. Venkataramana Bhatta and Another Vs. Krishna Bhatta and Others*, . Mr. Das contends that the object of a restraint upon alienation is to prevent the lessee from introducing on to the landlord's property tenants in whom the landlord has no confidence and of whom he does not approve and that a forfeiture clause operates as soon as the lessee parts with the whole of his interest in either the whole or a portion of the leased property. He therefore seeks to distinguish those cases in which the transferor retained an interest in the property transferred or in a portion of it. No authority was cited in support of this proposition and it cannot be inferred from *Grove v. Portal* (1902) 1 Ch. 727 : 71 LJCh. 299 : 86 LT 350 : 18 TLR 319, in view of the emphatic statement of Joyce, J., that he decided that case on the dictum of Lord Eldon in *Church v. Brown* (1808) 15 Ves. 258 : 38 ER 752 : 10 RR 74, and not the view that a license is not a transfer. A consideration of the English decisions referred

to above leaves no doubt that in England a covenant not to transfer the demised premises is not a restraint on a transfer of a part, and that a transfer of a part only does not confer upon the lessor the right to re-enter. This I think is explainable. Even since the dictum of Lord Eldon in *Church v. Brown* (1808) 15 Ves. 258 : 38 ER 752 : 10 RR 74, English conveyances have been held to intend to restrain an alienation of part of the demised property only when the lease expressly says so. If the parties do not expressly include a covenant to restrain alienation of a part of the premises it is judicially recognized that that was not their intention. The Indian decisions referred to above apply the English rule in respect as if it were an established rule of Indian conveyancing. It may be that the leases which were under consideration in those cases disclosed that, reading the document in each case as a whole, the intention of the parties was to restrain not only an alienation of the entire demised property but also an alienation of any part of it. We have to ascertain in the present case whether that was the intention of the parties to the lease now under consideration, and I do not think that English conveyancing precedents will assist that object. In construing documents in the vernacular it is not safe to rely upon English precedents. As long ago as 1886 Wilson, J. observed:

It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied.

13. This dictum received the appeal of the Judicial Committee of the Privy Council in *Bhagabati Barmanya v. Kalicharan Singh* 38 C 468 : 10 Ind. Cas. 641 : 38 IA 54 : 15 CWN 393 : 9 MLJ 411 : 13 CLJ 431 : 21 MLJ 387 : 8 ALJ 433 : 13 Bom. LR 375 : (1911) 2 MWN 295 (PC) , at p. 474 Page of 38 C.--[Ed.]. In the lease now under consideration, there is not only the implied covenant not to transfer the mukarrari properly but also an implied covenant not to allow a "single bigha or biswa" to go into the possession of others. This, in my view, indicates that it was the intention of the parties to restrain not only a transfer of the entire mukarrari property but also a transfer of any portion of it. Mr. Manuk, however, contends that it is only a transfer by the entire body of lessees which entitled the lessors to re-enter, for the covenants, he argues, are by all the lessees jointly and not by "the lessees or any of them." This view is not consistent with the view taken of a similar lease by Devadoss, J. in *Koragalva Vs. Jakri Beary and Others*, . That was a lease to three persons and contained a covenant by the lessees not to alienate the demised property. One of the lessees sold his interest to his daughter. This sale was held to be a breach of the covenant and to entitle the lessor to re-enter. The report of that case does not show that the interest of the several lessees was specified in the lease. Devadoss, J , however, based his decision on *Krishna Shetti v. Gilbert Pinto* 42 M 654 : 50 Ind. Cas. 898 : AIR 1919 Mad 12 : 36 MLJ 367 : 9 LW 431, the facts of

which were clearly distinguishable. That was a case in which there was only one lessee and he had, with the consent of the lessor, transferred his interest to another who, without the consent of the lessor, transferred the property to a third person. The latter also transferred his interest to a fourth person. In these circumstances the Court upheld the lessor's right to re-enter and held that it had no power to relieve against the forfeiture. The case is not an authority for the proposition that where there is a covenant by all the lessees not to alienate the demised property, the lessor is entitled to possession of the entire property on a transfer of a portion by one of the lessees. Nevertheless, when a lease in the vernacular is in favour of several persons, and the share of each is specified, it would, I think, be unreasonable to construe a proviso for re-entry on breach of a covenant in restraint of alienation as operating on the interests of all the lessees in consequence of a transfer of his own interest by one of them, unless the language of the document as a whole clearly showed that to be the intention of the parties.

14. I would, accordingly, set aside the decree of the Court below and, in place of it, pass a decree that the plaintiffs be placed in possession of the interests of Harihar Prasad, defendant No. 39; and Bhairo Prasad, defendant No. 38, and would also award them mesne profits thereon. The parties will pay the costs of this litigation in proportion to their success.

Dhavle, J.

15. I agree.

16. If the Courts in England have always held a strict hand over covenants which, if broken, entail a forfeiture, they have never done so without endeavouring to put a fair construction on the words of the covenants according to the apparent intent of the contracting parties; and in construing such covenants they have been guided by previous decisions in view of their influence upon the language employed by conveyancers. Thus in *Spencer v. Goodwin* (1815) 4 M & Sel. 265 : 105 E R 833 : 16 RR 463, one of the earliest cases cited for the appellants, the Court declined to read the words "hereinafter contained" as referring to the covenants that had gone before or to omit them, because it was not clear which of these alternatives was intended by the parties; and Dampier, J. added that by giving to the proviso a literal construction, the whole would not be rendered nugatory for it would still be operative for non-payment of rent. In *Chatterton v. Terrel* (1923) AC 578 : 92 LJCh. 605 : 129 LT 769 : 39 TLR 589, it was contended for the appellant on the authority of *Crusoe v. Bugby* (1771) 2 W Bl. 766 : 2 Wils. 234 *Church v. Brown* (1808) 15 Ves. 258 : 38 ER 752 : 10 RR 74 at p. 265, Page of (1808) 15 Ves. - [Ed.] and *Grove v. Portal* (1902) 1 Ch. 727 : 71 LJCh. 299 : 86 LT 350 : 18 TLR 319 at p. (1902) 1 Ch. 731--[Ed.] that having assented to the sub-letting of a part of the premises the lessor could no longer enforce as to the remainder the covenant not to assign, under-let or part with the possession of the demised premises without the lessor's consent. The contention was overruled on the ground that the consent

required was consent to sub-let or part with possession of the whole. The covenant was thus construed according to the intent and not on the principle that forfeitures are to be looked upon with disfavour, a principle which would have led to a decision on the footing that what had been sub-let without consent was only a part of the premises. In *Russel v. Beecham* (1924) 1 KB 525 : 93 LJKB 441 : 130 LT 570 : 40 TLR 66 it was pointed out that the covenant not to assign or part with the lease or the premises or any part thereof must be construed "with reference to the decisions of the Courts, for in reliance upon the meaning attributed to them (sic. the words) by those decisions, they are inserted in documents which have for years regulated the relation of landlord and tenant."

17. A kabuliyat in Persian executed in the district of Gaya away from the Presidency Town of Calcutta as long ago as 1865 is on the face of it not a document of which the language could have been moulded upon English decisions and conveyancing practice. Our Transfer of Property Act, which was passed in 1882, makes some definite departure from the English law, see AIR 1930 59 (Privy Council) , and even now documents in the mufassil are usually drawn up by scribes without a training in law and conveyancing.

18. Lean as we may against forfeitures, it is impossible to accept the construction contended for on behalf of the appellants as within the apparent intent of the parties. For, this construction is that the lessor is to be at liberty to re-enter only on the coming to light of all the matters mentioned in the clause (ba-zahur-i-manihae), viz. (1808) 15 Ves. 258 : 38 ER 752 : 10 RR 74 three successive defaults in payment of rent, (2) transferring the property in dar-mukarrari or by sale bai-bil-wafa, gift, rehan or in any manner, (3) letting a bigha or biswa of land go into the possession or control of others, and (4) committing any atrocity upon the tenants. The conjunctions "we" and "a" used in the clause as we find it in the document that was admitted in evidence are by no means fully differentiated from each other; but neither party has laid any stress on this circumstance, It is, however, one of the appellants' contentions that the third item above relates not to partial transfers but to suffering encroachments by neighbouring owners. Assuming that that is so, it becomes quite inconceivable that the parties intended to confine re-entry to the discovery of all the four items cumulatively, the result for all practical purposes would be that forfeiture was really not intended at all. It seems to me that we must not read the language so unreasonably in order to avoid a forfeiture, but must put a fair, rational construction on the kabuliat according to the apparent intent of the parties, and only taking care not to go beyond it.

19. The lease specifies the unequal interest of the five lessees, a feature not found in any of the numerous cases cited before us. It is true that they combined to take the lease and were jointly liable for the entire rent. But the express mention of their several interests must, I think, be taken along with such a provision as that about committing any atrocity upon the tenants as a fair indication that an alienation of his share by any of the lessees, without the

consent of the landlords, was to entail a forfeiture of that share only. It could surely not have been intended that the atrocities must be committed by all the lessess together. If, again such a partial alienation was not intended to work any forfeiture at all, and this is what the appellants contend, for it is difficult to conceive why the shares were carefully specified towards the end of the kabuliyat. Upon this, the respondents contend that the transfer of his entire share by one of the lessees was meant to work a forfeiture of the entire lease. It is impossible to accept this in the absence of anything in the language of the document or in the circumstances of the transaction to establish such intention beyond doubt ; and we must not overlook the consideration that it was open to the party entitled to a forfeiture to have its right expressed in clear language. Nor is it easy to conceive of the lessess intending and agreeing to make themselves all jointly liable for a breach of covenant by any one of them. The lease was, moreover, permanent, and the parties could hardly have proceeded on the footing that the number of the lessees would not go up as it has in fact done. For the respondents reliance has been placed on *Koragalva Vs. Jakri Beary and Others*, , a case in which the plaintiff's claim for recovery of possession, apparently of the entire leased property, was allowed when one of the three lessees had conveyed his right to his daughter notwithstanding the provision in the kabuliyat executed by the lessees that they were not entitled to alienate the land demised to any one else:

20. But it does not appear and plainly we cannot assume that that kabuliyat contained any indication that each lessee was to take the consequences of his own defaults and no more. In *Kundun Lal v. Kallu* 24 Ind. Cas. 79 : 24 Ind. Cas. 79 : AIR 1914 All. 305 : 12 ALJ 650, referred to in the judgment under appeal, we have an instance where it was held that one of the three lessees had incurred a forfeiture by transferring his interest in breach of a covenant but that this did not affect the other two lessees who did not join in the breach. The terms of the lease in that case are not reported, but it is rather surprising to find the learned Subordinate Judge saying that that case cannot be held to be good law "in view of the majority of case law to which I have directed my attention." None of the other cases referred to by him raise the precise point under consideration; and each lease or kabuliyat must be construed on its own language and with reference to its own circumstances. On a fair reading of the kabuliat before us I cannot doubt that the default of each lessee was to be visited upon him alone (barring, of course, the liability for rent which was joint), and that while the respondents are right in contending that the default's need not be cumulative for a forfeiture to be incurred, the appellants are entitled to succeed in part to the extent that an alienation by one lessee does not effect a forfeiture of the shares of the other lessees.