

(1924) 02 CAL CK 0026
In the Calcutta High Court

Shebaita of Idol Srridhar Jin Thakur Manmatha Nath
Chowdhury and Others

APPELLANT

Vs

Nalinaksha Rai and Others

RESPONDENT

Date of Decision : 08-02-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 108(J)

Citation : 79 Ind. Cas. 557

Hon'ble Judges : Suhrawardy, J; Chotzner, J

Bench : Division Bench

Judgement

1. The plaintiff brought a suit for rent against the defendants in respect of a piece of homestead land in the town of Burdwan in which the defendant had a permanent transferable right. The defence was that the relationship of landlord and tenant between the plaintiffs and defendants was extinguished by the defendants transferring the leasehold interest to one Jnandayini before the rent sued for had accrued. The Court of first instance found that it was a heritable and transferable lease and that the defendant had transferred it to Jnandayini before the period in suit; but it being of opinion that in spite of the transfer the defendants were liable for rent to the plaintiffs, decreed the suit. On appeal, the learned Subordinate Judge reversed the decision of the first Court on the ground that under the lease the plaintiffs were bound to recognise the transferee of the defendants and hence they could not claim rent from them after the transfer of the lease to Jnandayini. The present appeal is by the plaintiffs.

2. A preliminary objection is taken to the competency of the appeal, on the ground that the suit, from which the appeal arises, is of the nature cognizable by a Court of Small Causes and is valued at less than Rs. 500. This objection is based on the Full Bench decision of the Madras High Court in the case of Soundaram Ayyar v. Sennia Naiikan 23 M. 547 : 10 M.L.J. 329 (F.B.): 8 Ind. Dec (N.S.) 785. A suit for rent in respect of homestead land is excepted under Article 8 of Schedule II to the Provincial Small Cause Courts Act. But it is argued that as

that Article empowers a Court of Small Causes to try suits for rent in general, a suit for rent of homestead land, though excluded, is of the nature cognizable by a Court of Small Causes. The Madras High Court has no doubt taken this view under the special conditions obtaining there. There the local Government had by Notification extended the powers of the Small Cause Courts to take cognizable of all suits for rent; but it is not so " in this Province. This point came up for consideration in the case of Sahadwram Mudiali v. Sarbosobha Dasi and it was there ruled that a suit for rent of homestead land is excluded from the jurisdiction of the Small Cause Court. We therefore hold that this appeal is competent.

3. The substantial point raised in this appeal is whether the lease on the basis of which the suit is brought absolves the lessee from all liability to payment of rent to the lessor. It may be conceded that where a lessee transfers the lease, whether permanent or temporary, the claim to pay rent to the lessor is not extinguished by assignment u/s 108 (j) of the Transfer of Property Act. This position may now be treated as accepted by a series of decisions in all the High Courts and it is in accordance with the English law. The principle that is deducible from the reported cases and the text-books is that the lessee's liability to pay rent to the lessor is founded upon a dual right. It is based, first, on the contractual relation between the lessor and the lessee, and secondly, on privity of estate. By assignment the lessee no doubt divests himself of the latter but the personal covenant by which he undertook to pay rent for the leasehold is not affected by the assignment. This consideration arises equally in the case of permanent and transferable leases as also in other kinds of leases. The result is that the lessor may avail himself of the relation that has come into existence between him and the assignee as well as of the contractual relation as existing between him and the lessee. He has, therefore a remedy for realization of rent against both the lessee and the assignee emanating from privity of contract and privity of estate but he can take out only one execution. The principle of English law upon which Section 108(J), Transfer of Property Act, is based is thus enunciated in For on Landlord and Tenant, 5th edition, at page 163: If the lessee assigns his interest in the premises, the questions whether he continues liable for the rent would appear not altogether an easy one to determine. That he does so continue where, as happens in most leases, he has entered into what is usually called an "express covenant" (that is, a formally express personal undertaking by the lessee to pay rent) to pay it, may be said to be well-established. Such covenant is not (after assignment) as between lessor and lessee, one merely of suretyship, nor is it even any defence to the lessee in an action upon it that the assignee may have tendered the rent. Upon such a covenant, therefore, as upon any express covenant running with the land, the lessor may sue either the lessee or the assignee though he can only have execution against one of them." This principle of law has been followed in this Court in the case of Sasi Bhushan Baha v. Tara Lai Singh 22 C. 494 PC: 11 Ind. Dec. (N.S.) 330, and has been endorsed in Bhota Nath Das v. Raja Durga Prosad Singh 12 C.W.N. 754. and Akurmani v.

Madhab Chandra 47 Ind. Cas. 800 : 22 C.W.N.C. 32 S.N, (3. A. 2728 of 1916 decided on the 5th June 1918). The same view has been adopted in the Madras High Court in Kunhanujan v. Anjelu 7 M. 296 : 6 Ind. Dec. (N.S.) 205, and Monica Kitheria v. Subraya Hebborn 30 M. 410 : 17 M.L.J. 258 : 2 M.L.T. 363, and by the Bombay High Court in Vithal Narayan v. Shriram Savant 29 B. 391 : 7 Bom. L.R. 313. This question arises before us in connection with non-agricultural land. It is not necessary, therefore, to extend this principle of law to agricultural lands as has been done in the case of Monica v. Subraya 30 M. 410 : 17 M.L.J. 258 : 2 M.L.T. 363. It does not apply to the Bengal Tenancy Act. Swapati Boy v. Bam Narayan Mukerji. 73 Ind. Cas. 193 : 39 C.L.J. 26 : AIR 1923 (P.C.) 88 : 45 M.L.J. 219 : 50 C. 680 : 18 L.W. 681 : 33 M.L.T. 314 : 287 C.W.N. 517.

4. It being undisputed that under the law the defendants are liable to pay rent unless they can get rid of the claim under the terms of the contract, the question, therefore, that arises for consideration is whether the contract can be construed in such a way as to make it obligatory upon the lessor to recognise the assignee and thus extinguish his right to proceed against the lessee. The term of the lease upon which reliance is placed by the respondent runs thus: "I shall enjoy and possess the land according to my wishes with my sons, grandsons and other heirs, by erecting katcha and pucca houses thereon and by planting and cutting down trees, etc., and by exercising the right of sale, gift to which you or your heirs and legal representatives will not be able to object in any way." The learned Subordinate Judge, after quoting this passage, remarks that "in plain words it indicates that the lessor was bound to recognise the transferee. In our judgment these words neither plainly nor impliedly indicate that the lessor under the contract binds himself to recognise the transferree in lieu of the lessee. The learned Vakil for the respondent has drawn our attention to the words "to which you or your heirs and legal representatives will not be able to object in any way." He argues that these words indicate that the lessor not only will not object to the transfer but should also recognise the transferree as his tenant. In our opinion, it would, be straining the language too much to make it convey what it does not ordinarily convey. This view finds strength from the latter portion of the Kabuliyat in which the tenant says: "I shall pay annually Be. 1-8 as rent and shall not be able to make any objection on the ground of the land lying patit. This condition is binding upon successors of both parties." On the construction of the lease, therefore, we hold that the lessor does not absolve the original lessee on assignment from the liability to pay rent under the contract.

5. In the view that we take of this case we are of opinion that this appeal should succeed. The decree of the Court below will be set aside and that of the Court of first instance restored with costs in all the Courts.