

(1937) 11 BOM CK 0007
In the Bombay High Court

The Secretary of State

APPELLANT

Vs

The Kuchwar Lime and Stone Co., Ltd.

RESPONDENT

Date of Decision : 19-11-1937

Acts Referred:

Registration Act, 1908 — Section 17

Citation : (1938) 40 BOMLR 292

Hon'ble Judges : Lancelot Sanderson, J; George Lowndes, J; Alness, J

Bench : Full Bench

Judgement

George Lowndes, J.—The principal question in this appeal is whether two quarrying leases granted by the appellant to the respondents have been forfeited by reason of the breach of a covenant contained in each against assignment.

2. The quarry lands were situated in the Shahabad district of the then Province of Bihar and Orissa : the leases were dated April 1, 1928, and were for terms of twenty years. The covenant against assignment was in similar terms in each, and provided that neither the lessee (the respondent company) nor any person claiming through or under it should assign the lease or transfer any right or interest thereunder, or underlet the whole or any portion of the premises comprised in such lease without the assent of the Board of Revenue of Bihar and Orissa first being obtained, and that the penalty for infraction of this condition should be the forfeiture of the lease.

3. In January, 1933, the respondent company went into liquidation, and on September 30 of that year the company, through its liquidators, contracted with one, Subodh Gopal Bose for the sale to him of the leasehold rights under both leases for the sum of 6,000 rupees, but subject to the sanction of the Board of Revenue : the agreement to stand cancelled if such sanction was not obtained. It was also provided that in the meantime Bose should act as the agent for the respondents in respect of the lease-hold rights in the quarries ; that he should pay to the company the royalties and any other sums payable by it to the Government; and that he should be entitled to work the quarries for his own

profit.

4. The contract was in writing but was not registered. Clauses 4, 6, 7, 8 and 9 upon which the question stated above mainly depends were as follows :-

4. It is stipulated in the leases in respect of the lands set out in the schedule that the lessees shall not assign the leases or transfer any right or interest thereunder without the assent of the Board of Revenue first obtained. The vendors shall apply for such assent, but shall not in any way be responsible and this agreement for transfer of the) vendors" lease-hold right to the lands set out in the schedule hereto shall stand cancelled if such assent be not given by the said Board of Revenue.

6. The purchaser shall be appointed local agent of the vendors in respect of the leasehold right of the vendors to the lands set out in the schedule hereto and continue to act as such until the transfer of the lease-hold right be effected or until it is finally decided that such transfer cannot be made on and after the purchaser"s furnishing guarantee to the vendors of regular payment of all royalties and other dues on despatches from the Murli Centre or otherwise in respect of the lands set out in the schedule hereto and on and after his depositing with the Liquidators a sum of Rs. 4,000 (Rupees four thousand) in cash by way of security for such payment, such deposit bearing interest at the rate of five per cent, per annum from the date of deposit till the transfer of the said lease-hold rights or final decision that the leases should not be transferred.

7. Subject to the purchaser"s furnishing guarantee and depositing the said sum of Rs. 4,000 (Rupees four thousand) as aforesaid the purchaser shall be at liberty to quarry, burn, manufacture and sell lime and stone from the said lands on his own account without being liable to the vendors for any of the profit or loss thereof.

8. During the term of his local agency the purchaser shall-

(a) submit to the vendors plans and details of working and monthly statement of account relating to quarrying, despatching and selling lime and stone from the said lands and regularly pay to the vendors the royalties and other dues if any payable to Government,

(b) bear and pay all expenses of working the quarries, manufacturing, despatching and selling lime and stone and of otherwise using the said lands and shall perform and observe the covenants and conditions contained in the said leases under which the said lands are held,

(c) indemnify the vendors against any loss or damage which the vendors may sustain by reason of the purchaser"s working the quarries or burning, manufacturing, despatching and selling lime and stone from the said lands or Murli Centre.

9. If the purchaser do not take any appointment as local agent of the vendors as

provided in Clause 6 aforesaid he shall not do any work in the quarries of the lands set out in the schedule or burn or manufacture lime thereon nor despatch lime and stone from the said Murli Centre until the transfer of the said leases has been accomplished.

5. Bose entered into possession of and worked the quarries upon the terms of this agreement, but the Board of Revenue refused their assent to the sale, and on July 18, 1934, they declared the leases to be forfeited on the ground that the respondent company had transferred or sublet the rights and interests under the lease to Bose in breach of the covenants above referred to.

6. On September 24, the respondent company instituted the suit out of which the appeal arises, in the Court of the Subordinate Judge of Shahabad claiming a declaration that the leases had not been validly forfeited, an injunction and Rs. 11,000 damages.

7. A written statement of defence was put in by the appellant justifying the forfeiture, and the case went to trial before the Subordinate Judge upon the following two issues only-

1. Whether the plaintiff has under the terms of the indenture dated April 1, 1928, forfeited the lease by reason of the transaction between the plaintiff and Subodh Gopal Bose under the indenture dated September 30, 1933.

2. Is the plaintiff entitled to any damage ? If so, what amount ?

8. The Subordinate Judge delivered his judgment on March 7, 1936. He held that the agreement of September 30, 1933, though purporting to appoint Bose to work the quarries as agent of the respondent company, was in substance and reality a sub-lease to him of the quarrying rights, and being without the consent of the Board of Revenue, was in breach of the covenants contained in the leases, and that they had therefore been duly forfeited. He accordingly passed a decree dismissing the suit with costs.

9. The respondent company appealed to the High Court at Patna. The appeal was heard by Khaja Mohammad Noor and Varma JJ., who delivered their judgment on February 7, 1936. On the question of forfeiture the learned Judges disagreed with the Subordinate Judge, holding that the agreement with Bose did not amount to either a sub-lease or a transfer within the covenants in question. They were also of opinion that if the agreement could be so construed, it would be void for want of registration. They accordingly allowed the appeal and granted the respondent company the declaration and injunction which it claimed. They also dealt with the question of damages to which their Lordships will revert later on in this judgment.

10. From this decision the Secretary of State appeals to His Majesty in Council seeking to reinstate the decree of the Subordinate Judge for the dismissal of the suit.

11. Before the Board a preliminary point was taken by the appellant that the suit was not maintainable on the ground that the respondent company was out of possession at the date of filing their plaint. This question had not been raised in the trial Court and the High Court held that the question, depending as it obviously did upon facts for which evidence would be necessary, was not open before them. On this their Lordships are in full agreement with the High Court and have not deemed it necessary to hear the respondents' counsel with respect to it.

12. The main contention for the appellant has been that the agreement was in reality a sub-lease to Bose, The High Court coming to the contrary conclusion had relied on the judgment of Lord Russell C.J. in the case of *Horseley Estate, Limited v. Steiger* [1898] 2 Q.B. 259 and their Lordships think that the passage cited by the learned Judges is directly in point. There is, in their opinion, nothing in the agreement which points to a relation of landlord and tenant between the parties. Bose was to be appointed the local agent of the respondent company and his right to work the quarries was dependent on his accepting this position. The Subordinate Judge thought the agency was a mere cloak to disguise a sub-tenancy, but their Lordships do not think that it should be so regarded. There may have been many ways in which Bose could have served the company as their agent, e.g. in respect of the care of buildings, plant, material, etc. No doubt he was not to be their agent in working the stone and manufacturing the lime and selling it, all of which was to be done on his own account and at his own risk. But it is not unusual to have an agency coupled with an interest and their Lordships think that this was the real effect of the agreement in the present case. There is, however, nothing in the document to suggest that the interest which Bose took was that of a sub-lessee. For these reasons their Lordships agree with the learned Judges of the High Court that there was no sub-letting by the respondent company.

13. Their Lordships; are, however, unable to agree with the High Court in their view that " the transaction does not amount to a transfer of any interest in the lease-hold property." They think it clear that pending the completion of the proposed sale the agreement purported to invest Bose with a definite interest in the quarries. He was entitled under it to dig the stone, convert it and sell the resultant product on his own account, and this, in their Lordships' opinion, if it was an effective transfer, would be a breach of the covenants in the leases to the company and would entitle the appellant to forfeit them. The only question their Lordships think is whether it was an effective transfer. The judgment of the High Court continues, after the sentence quoted above, " assuming that it does, it is inoperative for want of registration of the document. Being an interest created in an Immovable property of more than Rs. 100 the document was compulsorily registrable u/s 17 of the Indian Registration Act and not having been registered has not affected the property u/s 49 of that Act." Reading this sentence as meaning that the interest transferred was of the value of more than Rs. 100, as their Lordships think they must do, and assuming it to be correct, counsel for the

appellant does not dispute the accuracy of the dictum, nor does he contend that if it was merely an attempted but wholly ineffective transfer there would be a breach of the covenants. His only answer is that there is no proof that the interest was, in fact, of the value of more than Rs. 100, and if not, registration would be unnecessary and the transfer would be effective. Their Lordships do not think that it is open now to the appellant to raise this objection. There was no contention before the Subordinate Judge as to registration or as to the value of the interest transferred. But it would clearly have been open to the appellant to take the point before the High Court if the value had really been in doubt. The High Court seem to have assumed that the value was over Rs. 100, but no protest or objection was made on the Secretary of State's behalf either to the Court or in the application for leave to appeal from their judgment. Nor indeed is the point raised in the appellant's printed case before the Board. If there had been any substance in the objection, the value could obviously have been determined either by the High Court or by a reference back to the Subordinate Judge. But their Lordships have little doubt that it cannot have been seriously disputed in India that the value of the concession was worth more than Rs. 100. The appellant's contention is obviously one dependent upon proof of facts, and not merely a question of law, and their Lordships must hold therefore that it is not now open to him.

14. It only remains to deal with the question of damages. As already stated the respondent company by their plaint claimed Rs. 11,000 damages and at the trial an issue was raised as to this in the ordinary form. In the judgment of the Subordinate Judge the issue is dealt with in the following words :-

In view of my findings on the issue No. 1 the plaintiff is not entitled to any damage or to any other relief in the suit. In fact no evidence on the question of damage was adduced on behalf of the plaintiff.

15. The High Court nevertheless affirmed the respondent company's right to damages and ordered the amount to be ascertained by further proceedings in the lower Court; the judgment contains the following passage :-

The next question urged by the learned Government Pleader was that the plaintiff was not entitled to any damages for interference with the leases as it had abandoned the claim for them. I do not find any abandonment. In fact an issue about the damages was raised, but no evidence was given as parties very rightly wanted the determination of the main issue. When dealing with the question of damages the learned Subordinate Judge has stated that the plaintiff adduced no evidence. The remark is not justified. Both parties seem to have agreed that no oral evidence should be adduced and the case should be decided on the pleadings and documents.

16. Their Lordships can find no justification for this conclusion or for the learned Judges' criticism of the Subordinate Judge. The order sheet of the proceedings in the trial Court is on the record of the appeal and it contains nothing to suggest

that the trial of the issue as to damages was postponed, or that there was any agreement between the parties to that effect. Nor can counsel for the respondent company throw any further light on the matter. In their Lordships' opinion the proper inference is that the claim for damages was abandoned, and they think that the decision of the High Court on this point was erroneous.

17. For the reasons given above their Lordships think that the decree of the High Court dated February 7, 1936, should be affirmed only in so far as it granted the respondent company the declaration and injunction prayed in the plaint and that the claim for damages should be disallowed. In their Lordships' opinion the respondent company was entitled to its costs against the appellant in the first Court and to half its costs in the appeal to the High Court, and the appellant to half his costs before the Board against the respondent company : they will be set off in the usual way.

18. Their Lordships will humbly advise His Majesty to this effect.