

(1918) 03 BOM CK 0020
In the Bombay High Court

Vishveshwar Vighneshwar Shastri

APPELLANT

Vs

Mahableshwar Subba Bhatta and Another

RESPONDENT

Date of Decision : 05-03-1918

Acts Referred:

Transfer of Property Act, 1882 — Section 109

Citation : (1919) ILR (Bom) 28

Hon'ble Judges : Heaton, J;Beaman, J

Bench : Division Bench

Judgement

Beaman, J.—I doubt whether the true point was present to the mind of the learned Judge below. He appears to have thought that the question could be answered from the language of Sections 6, Clause (b), 109 and 111, Clause (g) of the Transfer of Property Act. Even were that so I should still doubt whether the answer he has given is right. Section 6, Clause (6), is no more than a special case of a mere right to sue. For if the mere right of re-entry on breach of condition subsequent is transferred, without the reversion, the person having it could only use it for the purpose of a suit to enforce forfeiture, without gaining any right or interest in the property so demised and forfeited. Section 109 seems to me to have no bearing on the point. Section 111, Clause (g), need not mean any more than that the lessor must give notice of intention to enforce forfeiture, or if the breach has occurred after transfer of the reversion, the transferee must give notice. That is how I read it, and if I am right, it leaves our point untouched.

2. Put in the simplest and fewest words it is this: does the transfer of the reversion carry with it the right to enforce forfeiture for breach of condition prior to the transfer? The law in England was well settled, and seemingly unquestioned that it did not (*Hunt v. Bishop* (1853) 8 Exch. 675; *Cohen v. Tannar* (1900) 69 L.J.Q.B. 904, till by the Act 1 & 2 Geo. V, C. 37, statutory validity was given to the view taken by the learned Judge below.

3. I am not aware of any corresponding amendment of the Transfer of Property Act, altering the law in India. Speaking generally, it is safe to say that with few

exceptions the Transfer of Property Act is a codified expression of the English law. Presumably, then, it meant to give effect, to what was the settled law of England on this point, up to 1911.

4. In the absence of Statutory provision, and on general principle, I own I should find it hard to come to any other conclusion than that which was so often stated and affirmed in the English Courts.

5. The facts with which we have to deal are: (1) that there was a breach of condition three years before this transfer; (2) that breach of condition would undoubtedly have worked a forfeiture; (3) the lessor did not waive the breach; (4) the lessor had never given the lessee notice of his intention to enforce the forfeiture, before the transfer.

6. What then was transferred ? The reversion primarily. No one disputes it, or contends that there was anything illegal or even questionable in such an assignment. As between the transferor and transferee of the reversion no question arises here, and we have nothing to do with it. But as between the lessor and the lessee the case is different. They had entered into a contract of leasing on conditions. That contract had been broken by the lessee. But before the penalty could be enforced the law required the lessor to give notice of his intention to enforce it. This he had not done. Admittedly till he had (or if the law permits this, till his transferee had done so), no penalty could be enforced, and the contract would be subsisting. What the lessor does is to transfer the property demised to the plaintiff setting forth the prior contract and the fact that it had been broken, so, in other words, leaving the transferee to sue on the breach and enforce the penalty. It is easy to see that this could not be done in the case of an ordinary contract. While such a contract might be assigned before breach, it certainly could not afterwards, for then what is assigned is only the right to sue for damages, and this is a mere right to sue whether or not the transferee is to have what he can get by way of damages after suit. Similarly in this case, the fact that the transferee is to have the property demised as soon as he can enforce the penalty by suit against the lessee for breach of condition prior to his transfer seems to me to make no difference. All that the transferor could assign was the reversion since he had not given notice of his intention to enforce forfeiture on breach of condition already made. But it is argued he might also transfer the right he had to give this notice and thereupon to sue on the contract and enforce the penalty. That is the very point. Could he? For what is this, thus isolated, but a mere right to sue? How can it be distinguished in any essential from the assignment of a contract already broken, under which the only surviving right is the right to sue for damages? This right, it is to be observed, is quite distinct from and must not be confounded with the right to the reversion as upon the footing of an existing lease and for that reason it has to be examined by itself after analysis has revealed the true nature of the transfer as a whole. It is thus shown, I think, that the transfer is a transfer of the reversion implying the actual subsistence of the lease, and therefore that the transferee must wait for a

breach of condition, subsequent to the transfer before he can sue to enforce a forfeiture, or as between transferor, transferee and. lessee, it is no more than the transfer by the transferor to the transferee of a right to sue the lessee and turn him out. In the latter case such a transfer is clearly prohibited by the Act, and in the former the transferee would have no cause of action on the breach prior to transfer.

7. But since the law of England has been altered, and the Statute of 1911 provides in terms for such a case as this, I see no reason why we should not in such matters make the administration of the law as a whole as systematic as possible. It would be difficult to say that the Transfer of Property Act, as it stands, in express words, prohibits the plaintiff from suing here, and although as I have shown a reference to general principles and the spirit of the Act brings out that conclusion, I do not object to accepting the statutory modification of those general principles which has taken place in England. It is only upon that ground that I could bring myself to confirm the decree of the lower Court.

8. Appeal dismissed with all costs.

Heaton, J.

9. My opinion also is that the decree made by Shah J. should be confirmed. The only ground on which that decree is assailed is that the lessor could not transfer his right to put an end to the lease, this right being founded on a breach of a condition of the lease which happened prior to the transfer. The point is one which was taken for the first time in second appeal; it was not argued in the trial Court or in the Court of first appeal. It is one which invites, and for its satisfactory elucidation in my opinion requires, an investigation of the facts from an altogether new point of view. We cannot make such an investigation here nor ought we to remand the case. I am, therefore, not satisfied that the transfer by the lessor to the plaintiff was illegal in so far as it comprised a transfer of a right to sue. Indeed, though my learned brother takes the contrary view I am rather disposed to think that the transfer in this case is one which is exactly covered by the words of Section 109 of the Transfer of Property Act.