

PRIVY COUNCIL.

HUNSRAJ

v.

BIJAYLAL SEAL.*

P. C.*

1929

Nov. 1, 4;
Dec. 12.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Landlord and tenant—Lease—Covenant against assignment—Liberty to underlet—Mortgage by underlease for residue of term—Transfer of Property Act (IV of 1882), ss. 105, 108 (j).

Under the Transfer of Property Act, 1882, having regard to section 105 and section 108(j), an underlease for the entire residue of the underlessor's term operates, in the absence of a contract to the contrary, as an underlease, and does not, as under English law, constitute an assignment of the lease.

A lease made in 1910 of premises in Calcutta for a term of 61 years contained covenants by which the lessee had liberty to underlet, but had no power to assign, transfer or alienate his right, title and interest in the demised premises, and it was provided that, if the lessee should commit any breach of his covenants, the lessor should be at liberty to re-enter. In 1923, the lessee's representatives executed a mortgage by way of sub-lease of the demised premises, sub-letting them for the whole residue of the term of the lease. The lessor sued to enforce a forfeiture on the ground of a breach of covenant.

Held that the mortgage was not a breach of the covenant against assignment, having regard to the above stated effect of the Transfer of Property Act, 1882, and the contract contained in the lease by which the covenant against assignment was subject to an express power to underlet.

APPEAL (No. 107 of 1928) from a decree of the High Court in its Appellate Jurisdiction (November 25, 1927) reversing a decree of the Court in its Original Civil Jurisdiction (April 14, 1927).

On August 23, 1910, the predecessor-in-interest to respondents Nos. 1 to 5 executed, in favour of a lessee represented by respondents Nos. 6 and 7, a building lease of immovable property in Calcutta, for a term of 61 years. The lease contained covenants, fully set out in the judgment of the Judicial Committee, by which (covenant 5), the lessee had liberty, without obtaining the lessor's consent, to underlet the premises and the buildings to be erected; and (covenant 6) the

*Present : Lord Atkin, Sir John Wallis and Sir Lancelot Sanderson.

lessee had no power (subject to an immaterial exception) to assign, transfer, or alienate his right, title and interest in the demised premises. The lease further provided, by clause 10, that if any breach should be made by the lessee in any of the covenants and agreements on his part to be observed, it should be lawful for the lessor to re-enter upon the demised premises, as if the lease had never been executed.

On May 7, 1923, the respondents Nos. 6 and 7 executed in favour of the appellants' predecessor-in-title a mortgage of property, including the mortgagors' leasehold interest under the lease of August 23, 1910. By the mortgage, the mortgagors demised and sub-let the premises to the mortgagee for the unexpired residue of the term of 61 years, subject to the proviso that the sub-lease should terminate if the sum advanced with interest and costs was repaid by the mortgagors or was realised out of the rents and profits, in which event the premises sub-let were to be reconveyed or surrendered.

On January 25, 1924, the lessors instituted a suit in the High Court against the lessees and the mortgagees, claiming a forfeiture of the lease, on the ground that the mortgage was a breach of the covenant by the lessee, and mesne profits.

The trial judge (Page J.) dismissed the suit. The learned Judge said that it was conceded before him that for certain purposes an underlease for the whole unexpired term of the lease amounted to an assignment. But in his view, the mortgage was not such an absolute transfer of the lessee's rights as to be within covenant 6 of the lease. He so held, having regard to *Doe v. Hogg* (1), applied in *Russell v. Beecham* (2), and the right of redemption which remained in the lessee.

Upon appeal, the decision was reversed by C. C. Ghose and Buckland JJ., and a decree made as prayed. The learned Judges were of opinion that, as in *Bengal National Bank, Ltd. v. Janaki Nath Roy* (3), the

(1) (1824) 4 Dow. & Ry. 226.

(2) [1924] 1 K. B. 525.

(3) (1927) I. L. R. 54 Calc. 813.

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mortgage was an assignment of the lessees' interest contrary to the covenant, even though there was a proviso for re-assignment in a certain event.

Upjohn K. C. (with him *Parikh*), for the appellants. By the lease, the lessee had express power to underlet; the mortgage was a valid exercise of that power. No doubt, in English law an underlease for the whole residue of the term demised ordinarily amounts to an assignment. But that is because, in English law, a reversion in the grantor is essential to the relation of landlord and tenant; *Parmenter v. Webber* (1). That is not so under the Transfer of Property Act, 1882, as by section 105, a lease may be made in perpetuity, and by section 108 (j) a lessee can transfer the whole of his interest in the property, in the absence of a contract to the contrary. As by covenant, the lessee could underlet, an underlease valid by the law applicable cannot be an assignment for the purposes of covenant 6. Further, the mortgage was not a complete transfer of the lessee's rights. Not only had he a right to a surrender upon redemption, but the rents were collected by the mortgagees on his behalf and he was entitled to the benefit of any surplus. *Bengal National Bank, Ltd. v. Janaki Nath Roy* (2) is distinguishable, as in that case there was in terms an assignment to the mortgagee. But in any case, no forfeiture can arise under covenant 10, because what is described as "covenant" 6 is not expressed as a covenant, condition, or agreement; its effect is merely to render void an assignment.

Sir Gerald Hurst K. C. (with him *Dube*), for respondents Nos. 1 to 5. Section 108 (j) of the Transfer of Property Act, 1882, by its terms operates only in the absence of a contract to the contrary. The lease here was in the terms of an English lease, and the mortgage was what is described in section 58 of the Act as an English mortgage. Both documents should be construed according to English law. It is clear that in English law an underlease for the whole residue

(1) (1818) 8 Taunt. 593; 129 E. R. (2) (1927) I. L. R. 54 Calc. 813.
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of the term, whether by mortgage or otherwise, is an assignment: *Lewis v. Baker* (1), *Hallen v. Spaeth* (2). Under the Transfer of Property Act also, a mortgage of the residue of a leasehold term amounts to a complete transfer to the mortgagee: *Kannye Loll Sett v. Nistoriny Dossee* (3), *Bengal National Bank, Ltd. v. Janaki Nath Roy* (4), *Monica Kitheria Saldanha v. Subraya Hebbara* (5), *Vithal Narayan Kalgutkar v. Shriram Savant* (6). Whether or not there was in the present case technically an assignment, there was a transfer of the lessee's interest contrary to covenant 6. The liberty to underlet given by covenant 5 is subservient to the provision against an assignment or transfer in covenant 6, and that provision amounts, expressly or by implication, to a covenant or agreement by the lessee within the proviso in clause 10.

Upjohn K. C. replied.

The judgment of their Lordships was delivered by

SIR JOHN WALLIS. This is an appeal from a decree of the High Court of Calcutta, reversing the decree of Page J. in a suit tried before him under the Ordinary Original Jurisdiction of the Court.

The suit was brought to enforce a forfeiture for an alleged breach of a covenant against assignment contained in a lease for a term of 61 years of premises in Halliday Street, Calcutta, made on the 23rd August, 1910. On the 7th May, 1923, the first and second defendants, who are the owners of the leasehold interest, executed a mortgage by way of sub-lease of the leasehold premises, sub-letting them for the unexpired residue of the term, and, on the 25th of January, 1924, the plaintiffs, who are the representatives of the original lessor, instituted the present suit to enforce a forfeiture.

Both the Courts below held, following the English decisions, that an absolute demise by sub-lease for the

(1) [1905] 1 Ch. 46, 50.

(2) [1923] A. C. 684.

(3) (1884) I. L. R. 10 Calc. 443.

(4) (1927) I. L. R. 54 Calc. 813.

(5) (1907) I. L. R. 30 Mad. 410.

(6) (1905) I. L. R. 29 Bom. 391.

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unexpired residue of the term would operate as an assignment of the term and be a breach of a covenant against assignment, but the trial Judge held that, under the terms of the mortgage of the 7th May, 1923, there was not such an absolute demise, whereas the Appellate Bench held that there was, and consequently that the plaintiffs were entitled to enforce the forfeiture. They, accordingly, allowed the appeal and gave the plaintiffs a decree.

Had the usual practice in England been followed of creating a mortgage of this kind by granting a sub-lease for a few days less than the unexpired residue of the term, the lessees as sub-lessors would not have parted with their reversion, and no question of assignment could have arisen.

The question having arisen in India, it has, of course, to be decided in accordance with the law, not of England, but of India; it does not, however, seem to have occurred to anyone in the Courts below to see, in the first place, before resorting to English decisions, whether under the law of landlord and tenant in India a sub-lease by a lessee for the unexpired residue of the term operates as an assignment of the term. That law is to be found in the Transfer of Property Act, 1882, which has now been in force for nearly half a century. Though founded on English law, and drafted in the first instance by eminent lawyers in England, it has only applied the English law in so far as it was considered applicable to India. It is not surprising to find that the rule, arising out of the special conditions of land tenure in England, that a conveyance to operate as a lease must reserve a reversion to the lessor finds no place in the Act. In India, a lessor is expressly empowered to grant a lease in perpetuity, and is not obliged for that purpose, as in England, to grant a lease for lives, or for a term, with a covenant for perpetual renewal; and, similarly, a lessee as sub-lessor can create a sub-lease for the unexpired residue of the term with the same incidents as any other sub-lease.

Leases in perpetuity are expressly included in the definition of "lease" in section 105 of the Transfer of Property Act.

"A lease of immovable property is a transfer of "a right to enjoy such property, made for a certain "time, express or implied, or in perpetuity, in "consideration of a price paid or promised, or of "money, a share of crops, service or any other thing "of value, to be rendered periodically or on specified "occasions to the transferor by the transferee, who "accepts the transfer on such terms."

"The transferor is called the lessor, the transferee "is called the lessee, the price is called the premium, "and the money, share, service or other thing to be so "rendered is called the rent."

The provision in section 108 (*j*) that, in the absence of a contract to the contrary, a lessee may grant a sub-lease for the unexpired residue of the term in the same way as a sub-lease for any shorter term is equally clear:—

"(*j*) The lessee may transfer absolutely or by way "of mortgage or sub-lease the whole or any part of his "interest in the property, and any transferee of such "interest may again transfer it. The lessee shall not, "by reason only of such transfer, cease to be subject "to any of the liabilities attaching to the lease."

There is, therefore, no ground for the contention that, in India, a sub-lease for the unexpired residue of the term operates otherwise than as a sub-lease.

It only remains to be considered whether in this lease there is any contract to the contrary. The fifth and sixth covenants of the lessees with the lessor are as follows:—

"*Fifth.*—That the said lessees shall be at liberty "or shall have the full power and authority, without "having recourse to previously securing to that effect "the consent of the said lessor written or verbal, to "underlet the said demised land and the buildings, "structures, sheds, godowns, stables or any portion "thereof to be so erected and built by them as "aforesaid."

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Sixth.—The said lessees shall have no power, save “amongst themselves as hereinafter mentioned, to “assign, transfer or, in any way, to alienate their “right, title and interest upon the demised land and “the buildings so to be erected by them thereon as “aforesaid created by virtue of these presents provided “nevertheless that neither of the said lessees shall be “entitled to exercise the right of transfer or “assignment among themselves as is hereinbefore “reserved until a competent engineer to be approved “by the lessor certifies that the construction of the “buildings so to be erected on the demised lands as “aforesaid is completed at a cost of not less than ten “thousand rupees as is hereinbefore provided.”

The covenant against assignment, in their Lordships’ opinion, is clearly subject to the express power to underlet. All that the lessees have done in this case is to underlet, and no question of forfeiture arises.

This disposes of the appeal, and their Lordships are not called upon to express any opinion on the question as to which the Courts below differed, or on the contention raised for the first time before their Lordships by Mr. Upjohn, that a covenant, expressed as here, that the lessees “shall have no power” to assign has merely the effect of rendering such assignments void, and cannot occasion a breach by the lessees “of “the covenants, conditions, agreements herein “contained and on their part to be kept observed and “performed according to the true intent and meaning “of these presents” so as to involve a forfeiture.

In the result, their Lordships will humbly advise His Majesty that the appeal be allowed and the suit dismissed with costs throughout.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents: *Watkins & Hunter.*