Defendant preferred this civil revision petition on the grounds that the suit was not maintainable, and that the assignment of the ferry was void in law as such assignments are prohibited by Government. He relied on the principle laid down in *Marudamuthu Pillai* v. *Rangasami Mooppan*(1).

M. Bhaskara Menon for petitioner.

V. Ryru Nambiar for respondent.

JUDGMENT.—One of the terms of the lease of ferries in the District of Malabar seems to be that the renter shall not transfer or sub-rent the ferry without the previous sanction of the Collector. But it does not appear that any rule was framed under section 16 of the Canals and Public Ferries Act (II of 1890 (Madras)), prohibiting such transfer or sub-lease. Though the transfer may be invalid against Government, it will be valid as between the renter and his assignee. The cases of *Bhikanbhai* v. *Hiralal*(2) and *Gauri Shankar* v. *Mumtaz Ali Khan*(3) support this position. The decision of this Court (*Marudamuthu Pillai* v. *Rangasami Mooppan*(1)) under the Abkári Act is inapplicable to the present case.

The petition is therefore dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Bashyam Ayyangar and Mr. Justice Moore.

1902. March 10, 25.

PARAMESHRI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

VITTAPPA SHANBAGA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Permanent lease with covenant against alienation—Subsequent alienations—Suit to evict alienees—Maintainability—Transfer of Property Act—IV of 1882, ss. 10, 111 (g)—Applicability of principles of the Act to lease executed prior to its enactment.

In 1862, V leased certain land on permanent lease to Y, the instrument reciting that Y had no right to alienate the property. In 1890, Y sold the

(1) I.L.R., 24 Mad., 401. (2) I.L.R., 24 Bom., 622. (3) I.L.R., 2 All., 411.

* Second Appeal No. 841 of 1900, presented against the decree of M. Achutan Nair, Subordinate Judge of South Canara, in Appeal Suit No. 39 of 1899, presented against the decree of V. C. Mascarenhas, District Munsif of Karkal, in Original Suit No. 185 of 1898.

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holding to S. In 1892, plaintiff acquired the rights of the original lessor V, by purchase; in 1894, S sold the holding to the defendants. Plaintiff now sued to evict the defendants claiming that the alienation to them operated as a forfeiture of the lease. The lease contained no express condition to that effect, nor did it provide that, on breach of the stipulation against alienation, the lessor might re-enter:

Held, that the alienation did not entitle the plaintiff to terminate the permanent lease and re-enter upon the land.

SUIT to the evict tenants from land. The plaint recited that the land had been originally obtained on mulgeni, or permanent lease by one Yellappa Shetti, in 1862, from the then Mulgar, Venkatesha Pai, and alleged that the lessee had, by the terms of the lease, no right to alienate the holding. Plaintiff's title was derived by purchase in March 1892, from an intermediate purchaser from the heirs of Venkatesha Pai. Plaintiff alleged that Yellappa Shetti had, in 1890, sold the holding to one Sheshappaya, and that Sheshappaya had in 1894, sold it to the defendants, who had since occupied it. He claimed that the sale was opposed to the terms of the lease and invalidated it. Defendants admitted the mulgeni lease but denied plaintiff's rights to recover the holding, pleading that the lease contained no provision for forfeiture as a consequence of alienation. The lease, which was filed as exhibit A, was to the following effect:—

"Mulgeni chit, dated 24th April 1862, executed to Venkatesappa . . . . by Yellappa Shetti . . . . is as follows:— I have taken for mulgeni from you this day all property [describing it] and have settled a geni of . . . . for the same which I shall pay you every year in four instalments according to kistbandi and shall obtain a receipt from you. I have no right to alienate the said property, &c., to any body in any manner whatever. While I enjoy the said property by planting plantain plants and effecting improvements therein you have no reason to ask me either to surrender the said property or to claim more rent. If I do not require the said land and if by that time there are any improvements made by me I shall have only to sell them to you for the price fixed by four (respectable) persons and I shall have no right to sell them to any one else. If the geni for any year is left in arrears unpaid out of the said geni amount, I shall have no objection, &c., to your engaging the said property to any tenant that you please and enjoying the same. According to the Gadi mentioned in your sale deed I and my descendants shall have to

enjoy the soil and fields watershed and springs rights and privileges, &c. Thus this mulgeni chit has been executed. [Signed] Yellappa Shetti."

The District Munsif upheld this plea, and merely granted plaintiff a decree for certain rent that was in arrears, dismissing the suit in other respects. The Subordinate Judge held that alienation was forbidden by the terms of the lease, and that it was not necessary that a right of re-entry should be given in so many words. He modified the decree by adding a direction for the property to be surrendered to the plaintiffs.

Defendants preferred this second appeal.

C. V. Anantakrishna Ayyar for appellants.

C. Ramachandra Rau Saheb for respondents.

BHASHYAM AYYANGAR, J.—The plaintiffs (respondents) sue to evict the defendants (appellants) from the holding mentioned in the plaint on the ground that the permanent lease (mulgeni lease), dated 24th April 1862, under which defendants claim to hold the property, has become void by reason of its absolute assignment to them, in or about 1894, by one Sheshappaya, who in 1890, became the assignee of the lease from the original lessee Yellappa Shetti, and that by reason of such assignment in favour of the defendants there has been a forfeiture of the lease and the plaintiffs are entitled to re-enter. It was stipulated in the counterpart of the lease, exhibit A, that the lessee "had no right to alienate the holding to any body in any manner whatever" and that in the event of his "not requiring the land," he would sell the improvements, which he might have made upon the holding by that time, to the lessor alone, for a price that might be fixed by four respectable persons and that he would not sell the same to any one else. The construction placed by the Subordinate Judge upon the lessee's stipulation that he would not sell the same to any other person, that it refers to the land itself and not simply to the improvements is clearly erroneous and the repondents' pleader is unable to support such a construction.

The District Munsif held that there was no forfeiture of the lease by reason of the alienation and dismissed the plaintiffs' suit so far as it sought to recover possession of the holding. But the Subordinate Judge, on appeal, differed from the District Munsif and gave a decree in favour of the plaintiffs for possession of the land on the ground that it was not necessary that the right of

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re-entry should be provided for in express terms and that inasmuch as, under the terms of the lease, the lessee had no right to alienate and if he did not want the land, he was to sell the same to the lessor with improvements, if any, effected by him, it followed that by reason of the alienation made in favour of the defendants, "the lessor was entitled to have the sale set aside." As already stated the Subordinate Judge misconstrued the lease in holding that the lessee agreed to sell his interest in the land to the lessor.

The result of merely setting aside the sale would only be to restore the permanent lease-hold to the defendants' assignor and that would not entitle the plaintiffs to recover possession of the holding. The Subordinate Judge must be understood to mean that the plaintiffs are entitled to set aside the lease.

In my opinion the decision of the Subordinate Judge cannot be upheld and the decree of the District Munsif should be restored. Though the Transfer of Property Act, as such, may not be applicable to the case [see 2 (c) and 117 of the Transfer of Property Act], yet the principle of law governing the case will be found clearly enunciated in sections 10 and 111 (g) of the Transfer of Property Act. Section 10 provides that in the case of a lease a condition absolutely restraining the lessee or any person claiming under him from alienating his interest in the property is not void where such condition is for the benefit of the lessor or those claiming under him. The stipulation that the lessee shall have no right to transfer his interest is clearly one intended for the benefit of the lessor and it would be unreasonable to hold, following the dictum in *Nil Madhar Sikdar* v. *Narattam Sikdar*(1) that the condition against alienation cannot be said to be for the benefit of the lessor and hence it is void under the provisions of section 10 of Act IV of 1882. The stipulation against alienation is not void but valid (*Vyankatraya* v. *Shivrambhat*(2)) and if the plaintiffs had sued for an injunction to restrain the defendants' assignor from making the assignment or sued for damages for breach of the stipulation, they would have been entitled to the remedy sought for (*Jivandas Keshavji* v. *Framji Nanabhai*(3), *Tamaya* v. *Timapa Ganjaya*(4), *McEacharn* v. *Colton*(5) and Foa on 'Landlord and

(1) I.L.R., 17 Calc., 827. (2) I.L.R., 7 Bom., 256.
(3) I.L.R., 7 Bom., H.C.R., (A.C.J.) 69.
(4) I.L.R., 7 Bom., 262 at p. 265. (5) [1902] A.C., 104.

Tenant,' 2nd edition, p. 211). It may also be that a transfer by the lessee, absolutely or by way of mortgage or sub-lease, in breach of the covenant not to alienate, will be void as against the lessor and he may realise arrears of rent due by the lessee, by attaching and selling his interest in the lease as effectually as if there had been no transfer by the lessee and the transfer will also be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract under section 108 (*c*) of the Transfer of Property Act. Assuming, therefore, that the stipulation against alienation is valid, the real question in the case is whether by reason of an alienation in breach of such stipulation, the permanent lease is determined, in the absence of an express condition providing that on breach of the stipulation against alienation, the lessor may re-enter or the lease shall become void. The fact that the landlord waived or did not enforce the forfeiture, if any, which took place by the first absolute assignment in 1890, would not disentitle him to enforce the forfeiture, if any, which subsequently accrued on the occasion of the second assignment in 1894. But the authorities are clear that in the absence of such express condition there will be no forfeiture of the lease (*Tamaya* v. *Timapa Ganpaya*(1), and *Nil Madhar Sikdar* v. *Narattam Sikdar*(2)). Even if there is no express provision for re-entry on breach of a stipulation against alienation, yet, if the lease were subject to a 'condition subsequent' that by alienation the lease shall become void, the lease would become void on breach of such condition and the lessor would be entitled to re-enter (Woodfall's 'Landlord and Tenant,' 16th edition, pp. 192–193, 328; Foa on 'Landlord and Tenant,' pp. 237–238; *Madar Saheb* v. *Sannabawa*(3). In the present case it is impossible to construe the lease either as reserving a right of re-entry on breach of the covenant not to alienate or as conditional on the lessee not making any alienation. The clause providing for sale of the improvements to the lessor himself and none else, when the lessee does not require the lands, is evidently intended to restrain the lessee from selling the improvements to a stranger, while surrendering the lease during the term thereof. A somewhat similar clause in a lease, with reference to which the case of *Narayan Dasappa* v. *Ali Saiba*(4).

(1) I.L.R., 7 Bom., 262.
(2) I.L.R., 17 Calc., 826.
(3) I.L.R., 21 Bom., 195.
(4) I.L.R., 18 Bom., 603.

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arose, was held not to give the lessor a right of re-entry by reason of the lessee having alienated the holding (at p. 605).

The difference between a provision against alienation which amounts merely to a 'covenant' not to alienate—a covenant which runs with the land (*McEachern* v. *Colton*(1))—and one which amounts to a 'condition' which dispenses with the express right of re-entry in the event of breach, is explained in Woodfall's 'Landlord and Tenant,' 16th edition, pp. 192–193, and in the English cases of *Shaw* v. *Coffin*(2), *Crawley* v. *Price*(3) and *Doe* v. *Watt*(4) cited in *Madar Saheb* v. *Sanabawa*(5).

I am therefore clearly of opinion that the alienation under which the defendants claim does not entitle the landlord to terminate the permanent lease and re-enter upon the land. The unreported decision of a Division Bench of this Court in Second Appeal No. 109 of 1879 cited in the judgment of the lower Appellate Court is strongly relied upon by the respondents in support of their contention that though no right of re-entry is reserved in the lease, yet a breach of the covenant against alienation works a forfeiture of the lease. That decision does seem, on the face of it, to support this contention, but it is opposed to the current of decisions above referred to and the law as laid down in the Transfer of Property Act which is in conformity with the English law.

The second appeal therefore must be allowed with costs both in this and in the lower Appellate Court and, in modification of the decree of the lower Appellate Court, so much of the decree of the District Munsif as was reversed by the lower Appellate Court must be restored.

MOORE, J.—I concur.

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(1) L.R. [1902], A.C., 104. (2) 14 C.B.N.S., 372.
(3) L.R., 10 Q.B., 302. (4) 8 B. and C., 308.
(5) I.L.R., 21 Bom., 195, at p. 197.