APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Napier and Mr. Justice Kumaraswami Sastri.

1918, December, 1919, January, 6.

KRISHNA SHETTI (APPELLANT), PLAINTIFF,

v.

GILBERT PINTO AND OTHERS (DEFENDANTS NOS. 2 TO 7), RESPONDENTS.*

Landlord and tenant—Stipulation in lease deed for notice prior to exercise of right of pre-emption of leasehold right—Clause of forfeiture of lease and right to re-enter on breach of covenant—Contract Act (IX of 1872), sec. 74, applicability of—Transfer of Property Act (IV of 1882), ss. 111 (g) and 117, applicability of—Relief against forfeiture, whether grantable.

Where a *mulgeni* lease provided for previous notice to the lessor in case of any intended sale or mortgage of the lease hold interest by the lessee and for forfeiture of lease and re-entry on breach of the covenant,

Held that section 74 of the Indian Contract Act did not apply, that Courts had no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant;

Held further that by reason of the prohibition in section 117 of the Transfer of Property Act, section 111 (g) of the Act did not in terms apply but that the principles of the Courts of Equity embodied in section 111 (g) applied to the case.

APPEAL under clause 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J. (BAKEWELL, J., dissenting), in Second Appeal No. 92 of 1916 against the decree of B. C. SMITH, the acting District Judge of South Kanara, in Appeal Nos. 64 and 67 of 1915, preferred against the decree of S. VENKATASUBBA RAO, the District Munsif of Mangalore, in Original Suit No. 410 of 1913.

This was a suit by a lessor of a *mulgeni* (permanent) lease against the lessee and alienees from him for recovery of the leased land and for arrears of rent under the following circumstances: the lessor (the plaintiff) who was himself a *mulgeni* lessee let the land on *mulgeni* lease in April 1909 to one Ramappa Achari at an annual rent of Rs. 22-8-0. There was a small tiled building on the agricultural holding and it was sold by the plaintiff to the lessee, Ramappa Achari, for Rs. 81-4-0

* Letters Patent Appeal No. 103 of 1917.

which the plaintiff received. There was a forfeiture clause in the lease deed in the following terms :—

In case I (the lessee) or my representatives are obliged to mortgage or sell my *mulgeni* right in respect of the said land as well as the existing house belonging to me and also the improvements effected hereafter, we shall first inform you (the lessor) and your daughters after you, giving a written notice. If you fail to act in accordance with the said notice or if a reply is not given thereto, we will effect the alienation through mortgages, etc., to others as we like. The alienations which I or my representatives may effect in contravention hereto shall immediately be void and neither I nor my representatives shall raise any right or objection to your or to your daughters taking possession of and enjoying the said land inclusive of improvements.

The widow and heir of Ramappa Achari sold her *mulgeni* right to the first defendant on 30th November 1911, the plaintiff having consented to such transfer and having attested the transfer deed. Then the first defendant transferred his rights to the second defendant in March 1912 and the second defendant sold his rights in September 1913 to the third defendant. Prior notice was not given of either of these later transfers to the plaintiff. The second defendant built a rice factory worth about Rs. 2,000 on the site. Under these circumstances the plaintiff sued to recover the site and arrears of rent with the rice factory building on it without paying any compensation. The defendants pleaded *inter alia* that the plaintiff was under the terms of the lease deed only entitled to rent, that he was not entitled to eject the defendants for want of notice of sales effected, that the forfeiture ought to be relieved against by payment of compensation and that if the defendants ought to be ejected they must be given the value of the rice factory or be allowed to remove the superstructure. The District Munsif gave a decree for the plaintiff for possession and arrears of rent. On appeal the District Judge holding that the plaintiff was not entitled to forfeit the lease and recover possession of the property, gave a decree only for arrears of rent and damages. On appeal by the plaintiff to the High Court, SADASIVA AYYAR, J., confirmed the District Court's decree, while BAKEWELL, J., confirmed the Munsif's decree. The plaintiff filed this appeal under clause (15) of the Letters Patent.

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B. Sitarama Rao for the appellant.—Under the terms of the lease, the plaintiff was entitled to put an end to the lease as forfeited on breach of the covenant and became entitled to possession. Courts cannot relieve against any forfeiture incurred in a lease except that for non-payment of rent. That was the law always in England. Even when the Conveyancing Act, 44 and 45 Vict., c. 41, of 1881, introduced reliefs against forfeiture in various instances, a forfeiture of this kind was exempted; see *Peachy* v. *Duke of Somerset*(1), *Hill* v. *Barclay*(2), *Barrow* v. *Isaacs and Son*(3), *Eastern Telegraph Company* v. *Dent*(4), though all forfeitures can be relieved against, if there be fraud, accident, surprise or mistake. Even in India it was only forfeiture for non-payment of rent that was relieved against, see *Kothal Uppi* v. *Edavalath Thathan Nambudri*(5) *and Appayya Shetty* v. *Mahammed Beari*(6), and no relief was afforded in cases of forfeiture by alienation when the lease contained a clause for re-entry; see *Subbaraya* v. *Krishna*(7), *Parameshri* v. *Vittappa Shambaga*(8), *Vyankatraya* v. *Shivrambhat*(9) and *Tamaya* v. *Timapa Ganapaya*(10). Even a permanent lease can be forfeited for failure to observe conditions other than payment of rent; see *Abhiram Goswami* v. *Shyama Charan Nandi*(11). Forfeiture was enforced in several cases before; see *e.g. Pattabhiramier* v. *Venkatarow*(12). Section 74 of the Contract Act does not apply. Though section 117 of the Transfer of Property prohibits the application of sections 106 to 116, yet those sections embody the principles laid down by Courts of Equity in the abovementioned cases and hence the principle of forfeiture embodied in section 111 (*g*) of the Transfer of Property Act should be applied.

K. P. Lakshmana Rao for the respondent.—Under the early English law forfeiture in any case was relieved against; see *Saunders* v. *Pope*(13). Section 117 of the Transfer of Property

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(1) (1724) 2 White and Tudor, 255.
(2) (1811) 18 Ves., 56.
(3) (1891) 1 Q.B., 417, 425.
(4) (1849) 1 K.B., 835.
(5) (1871) 6 M.H.C.R., 258.
(6) (1916) I.L.R., 39 Mad., 834.
(7) (1883) I.L.R., 6 Mad., 159, at p. 164.
(8) (1903) I.L.R., 26 Mad., 157, at pp. 161, 162.
(9) (1883) I.L.R., 7 Bom., 256.
(10) (1883) I.L.R., 7 Bom., 262.
(11) (1909) I.L.R., 36 Calc., 1003, at p. 1015.
(12) (1876) 13 M.I.A., 539.
(13) (1803) 12 Ves., 282.

Act prohibits the application of sections 106 to 116 to agricultural leases; hence neither section 111 (*g*) nor its principle should be applied. Section 74 of the Indian Contract should be applied. The word 'penalty' in that section is not confined to 'money'; see *Raja of Ramanad* v. *Selachami Tevar*(1), *Muthukrishna Iyer* v. *Sankaralingam Pillay*(2). In cases of breaches of conditions of lease return of the leased property alone may not be a penalty but if something more, such as improvements, etc., is to be lost, then the condition will be a penalty; see *Subbaraya* v. *Krishna*(3), *Kilmer* v. *British Columbia Orchards Lands, Ltd.* (4).

WALLIS, C.J.

WALLIS, C.J.—This is a letters patent appeal from the decision of SADASIVA AYYAR, J., who held (BAKEWELL, J., dissenting) that the Court has power to relieve against a provision in a mulgeni or permanent lease, a form of agricultural lease in use in South Kanara, for re-entry by the landlord on breach of a covenant or condition against any alienation by the lessee of his mulgeni right except in the manner therein provided. The lease, which is inartistically drawn, provides in substance that, if the lessee or his representatives have to sell or mortgage their mulgeni right, they are first to give a written notice to the lessor or his heirs, and, if they fail to act on it or to reply thereto, the lessee is to be free to make the alienation, but that alienations in contravention of these provisions are to be void, and the lessor is to be at liberty to re-enter and enjoy the land inclusive of improvements. This we read as meaning that the lessee is to give notice to the lessor of the terms of any transaction which he proposes to effect by way of sale or mortgage of his mulgeni right, and that the lessor is then entitled to become himself the purchaser or mortgagee on those terms, and as in fact conferring a right of pre-emption.

Two questions arise in the case, whether the Court has any general jurisdiction to relieve in a case of this kind, and if not, whether such jurisdiction has been conferred upon it by the amendment to section 74 of the Indian Contract Act.

As regards the first question, it is well settled that a Court of Equity could not relieve against the right of re-entry or

(1) (1916) 2 M.W.N., 217.
(2) (1913) I.L.R., 36 Mad., 229 (F.B.).
(3) (1883) I.L.R., 6 Mad., 159.
(4) (1913) A.C., 319.

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forfeiture under any provision or stipulation in a lease for a breach of any covenant in the lease except the covenant for payment of rent. The history of this question is most lucidly explained by KAY, L.J., in *Barrow* v. *Isaacs and Son*(1) :

"Courts of Equity," he says, "assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise or mistake. On this principle it relieved against the payment of the whole penalty on a money bond before the Statutes of 4 & 5 Anne, chapter XVI, sections 12 and 13 and 8 and 9 Wm. 3, chapter II, which enabled the Courts of Law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo. 2, c. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breaches of covenants such as to repair, to insure, and the like where compensation could be made, but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation and since the decision of Lord ELDON in *Hill* v. *Barclay*(2) it has always been held that equity would not relieve, merely on the ground that it could give compensation upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise or mistake."

The law, as here laid down, has been reproduced in the Transfer of Property Act which provides expressly in section 111 that a lease of immovable property determines "(*g*) by forfeiture, that is to say (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or the lease shall become void" and only gives power to relieve against such determination by forfeiture for non-payment of rent (section 114). It is noteworthy that the Indian Legislature preferred to adhere to the old law in this respect, and did not adopt the provisions of section 14 of the Conveyancing Act of 1881 which was followed in several other sections. Section 14 of that Act imposes restrictions on and confers powers of relief against forfeitures of leases generally and not merely as regards

(1) (1891) 1 Q.B., 417, at p. 425. (2) (1811) 18 Ves., 56, at p. 64.

forfeitures for non-payment of rent, but it leaves the law as it was before with regard to cases such as the present, because it provides in sub-section (6) that the section does not extend

"to a covenant or condition against the assigning, underletting, parting with the possession or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest."

This section gives the English Courts power to relieve against stipulations which were not regarded by Courts of Equity as stipulations by way of penalty because they were not intended to secure the repayment of money; but it did not interfere with provisions such as the present, designed to prevent transfer of the land to third parties against the landlord's will. As observed by Lord ELDON in *Hill* v. *Barclay*(1) as regards a covenant of this kind:

"It is sufficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation,"

a view to which the legislature has adhered in sub-section 6 of section 14 of the Conveyancing Act.

Such a covenant in my opinion cannot properly be regarded as a stipulation by way of penalty, and it is therefore unnecessary to decide whether provisions in leases for re-entry for breaches of other covenants in the lease can be regarded as coming within section 74, Indian Contract Act, as amended. Section 74 in its present form provides that—

"when a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulations by way of penalty the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for."

This amendment and the decisions which gave rise to it have been very fully discussed in *Natesa Iyer* v. *Appavu Padayachi*(2) where it is pointed out that the word 'penalty' was first inserted in the Contract Act in 1899 by this amendment and is not defined in the Act. Equity as we have seen, only considered stipulations in contracts penal which were intended to secure

(1) (1811) 18 Ves., 56, at p. 64. (2) (1910) I.L.R., 33 Mad., 375.

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the payment of money, and it may be questioned whether the term has a more extended meaning in this section, which was designed to abolish, so far as India is concerned, the distinction between stipulations for liquidated damages and stipulations for pecuniary payments by way of penalty, and which speaks of the party complaining of the breach receiving reasonable compensation not exceeding the amount named or the penalty stipulated for, and whether it can be construed as affecting the express provisions of section 111 of the Transfer of Property Act which makes leases determinable by virtue of provisions for re-entry on breach of covenant.

The fact that agricultural leases such as this one are excepted from the operation of sections 105 to 116 of the Transfer of Property Act does not in my opinion affect the present question. The Act was framed by eminent English lawyers to reproduce the rules of English Law, in so far as they are of general application and rest on principle as well as authority and its provisions are in my opinion binding on us as rules of justice, equity and good conscience when we have to deal with agricultural leases in the absence of any special reason for not applying them. The legislature wisely in my opinion, if I may say so, has refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons there is no ground for applying a different rule in the cases of agricultural leases and there are many decisions to that effect. For these reasons, I would allow the appeal and modify the decree of the District Judge by giving the plaintiff possession in addition to the reliefs already granted with costs throughout. Four months for removal of superstructure, etc.

NAPIER, J.

NAPIER, J.—I agree with the learned Chief Justice that section 74 of the Contract Act does not apply to the terms of the contract in this case. I cannot agree with SADASIVA AYYAR, J., that we can apply the principle on which the amendment to that section is based, as I think that we should be very careful in applying statutory provisions that are not in *pari materia*. For the same reason I would not seek the assistance of the Transfer of Property Act as a guide when we are applying

equitable reliefs especially as in this case we are dealing with material that has been excluded from the purview of the Act by express words: vide section 117. The provisions as to forfeiture in the Transfer of Property Act do not coincide with those enacted in the Conveyancing Act which does apply to agricultural leases. There is, however, no statutory bar to our seeking guidance from English Law and I entirely agree with the learned Chief Justice that Courts of Equity would not grant relief in the present case. For these reasons I agree that the appeal should be allowed.

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NAPIER, J.

KUMARASWAMI SASTRI, J.—I agree with the judgment of my Lord and have nothing to add.

KUMARASWAMI SASTRI, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

MUHAMMADEN ABDUL SAFFUR ROWTHER AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

HAMIDA BIVI AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

1919, January, 9 and 16.

Interest Act (XXXII of 1839)—Award of interest, as damages, apart from the Act.

The Interest Act (XXXII of 1839) is not exhaustive of all cases where interest is allowable. The Act while specifically allowing interest in all cases of "debts or sums certain payable at a certain time or otherwise" saves by its proviso other cases in which it is legally allowable.

Where the suit was for a sum of money which would be payable to the plaintiff (a Muhammadan lady) as for her share on taking accounts of the business which was carried on by her father while he was alive and which was continued by her brothers, the defendants, after his death, wherein the amount due to the plaintiff was utilized by her brothers,

Held, (1) that the proviso in the Interest Act applied to the case and (2) that 6 per cent interest was payable as damages on the amount due to the plaintiff.

Miller v. *Barlow*, (1871) I.R., 3 P.C.C., 733, and *Hurro Persaud Roy* v. *Sham Persaud Roy*, (1878) I.L.R., 3 Calc., 654 (P.C.), followed; *Kamalammal* v. *Peerumeera Levvai Rowthen*, (1897) I.L.R., 20 Mad., 481, *Subramania Aiyar* v. *Subramania Aiyar*, (1908) I.L.R., 31 Mad., 250, and *Kalyan Das* v. *Maqbul Ahmad*, (1918) I.L.R., 40 All., 497, distinguished.

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* Appeal No. 390 of 1917.