even a necessary step, because a man may make a false return who has no books either to produce or to withhold. Conversly, a man might withhold his books and render himself liable to punishment under section 39, without taking the further step of sending in a false return. I conceive the policy of the statute to be, to provide by section 39 a punishment for any of the steps likely to be adopted by a fraudulent assessee to impede the Collector in a just estimate of his true income; and to provide an alternative remedy of punishment under section 40, or penal assessment under section 24, for an actual false return. If he commits one of the former offences, he may be punished for it, though he does not commit the latter; if he commits the latter, he may be punished for it in one of two ways, and one only. But if he commits both, he may be separately punished for each. Perhaps the clearest way to put it is by an illustration. Suppose a man to have committed an offence under section 39, by withholding his books, and to have been prosecuted and convicted for it before he made a return of his income, as he clearly might be; suppose that subsequently he returns his income at a figure found to be false—could any one say that his conviction under section 39 was a bar either to his being penally assessed, under section 24, or convicted under section 40?

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

UDIPI SESHAGIRI (PLAINTIFF), APPELLANT,

v.

SESHAMMA SHETTATI AND THREE OTHERS (DEFENDANTS NOS. 1 TO 3 AND 5), RESPONDENTS.*

1920 January 21, February 3 and 23.

Mulgeni lease—Covenant against alienation—Breach—Assignment, validity of.

In the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, an assignment of the lease by the lessee in breach of his covenant not to assign is perfectly valid. *Parameshri* v. *Vittappa Shanbaga*, (1903), I.L.R., 26 Mad., 157, explained.

* Letters Patent Appeal No. 31 of 1919.

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Tamaya v. *Timapa Ganpaya*, (1883) I.L.R., 7 Bom. 264, *Basarat Ali Khan* v. *Manirulla*, (1909) I.L.R., 36 Calc., 745 and *Promode Ranjan Ghosh* v. *Aswini Kumar Nag* (1914) 18 C.W.N. 1138, followed.

Per SESHAGIRI AYYAR, J.—The same principle would apply even in the case of a mulgeni lease executed subsequent to the Transfer of Property Act.

APPEAL under clause 15 of the Letters Patent against the judgment of BAKEWELL, J., in *Seshagiri* v. *Seshamma*(1)

By a mulgeni chit, dated 29th December 1876, the plaintiff's predecessors-in-title granted to the predecessors of defendants 4 and 5 a lease in perpetuity of certain agricultural land containing the following clause: 'When you and also your representatives do not require this property, it should be delivered back to us and to our representatives, and you shall have no right to alienate the same to anybody in any way.' By a sale deed, dated 16th January 1907, defendants 4 and 5 assigned their interest to defendants 1 to 3. In 1916 the plaintiff obtained a decree against defendants 4 and 5 for rent due for 1913 to 1915 and then sought to execute this decree against the leasehold property; but defendants 1 to 3 obtained an order in those proceedings recognising their interest in the demised property, and this suit was brought to establish plaintiff's claim against it as the property of defendants 4 and 5.

The lower Courts dismissed the suit and the Second Appeal was heard by BAKEWELL and PHILLIPS, JJ. His Lordship Mr. Justice BAKEWELL construed the clause as meaning that the lessees agreed that if they did not wish to enjoy the demised land themselves they would not transfer it to a third party but would surrender it to the lessors. He further held that if the lessors did not avail themselves of their right of re-entry the grant remained unrestricted and carried with it the right of alienation. His Lordship therefore held that the assignment was operative and that the suit failed. His Lordship Justice PHILLIPS was of a contrary opinion. The appeal was dismissed and thereupon a Letters Patent appeal was preferred.

K. T. Adiga for *Lakshman Rao* for *plaintiff*.—BAKEWELL, J, held that in spite of the agreement the lessee could alienate.

(1) Second Appeal No. 1172 of 1918 preferred against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal Suit No. 211 of 1917 against the decree of M. Ananthagiri Rao, the District Munsif of Udipi, in Original Suit No. 68 of 1917.

His Lordship thought that there is a right of re-entry. This is not the case of either party. I submit that an assignment by the lessee does not pass his interest when the lease contains a covenant as in the present case. *Parameshri* v. *Vittappa Shanbaga*(1) supports me. See also *Jacki Minezes* v. *Venkatramana Kamthi*(2) and *Narayana* v. *Narayana*(3). The latter is a decision exactly in point. *Basarat Ali Khan* v. *Manirulla*(4) is against me, but it was dissented from in *Jacki Minezes* v. *Venkatramana Kamthi*(2), which was decided by SADASIVA AYYAR and PHILLIPS, JJ. Section 10, Transfer of Property Act, says that restraint against alienation is valid.

C. V. Anantakrishna Ayyar for respondent.—Assignment passes by title and the landlord's only remedy is to claim damages for breach of contract. My lease is one of 1876 and therefore English law applies. All the text-books treat it as settled that in England the estate would pass. See Halsbury, Vol. 18, page 575, Foa on Landlord and Tenant, page 268, Redman on Landlord and Tenant, page 356. See also *Williams* v. *Earle*(5), *London Corporation* v. *County of London Electric Supply Company*(6), *Parker* v. *Jones*(7), *Basarat Ali Khan* v. *Maniru Ma* (4) and *Promode Ranjan Ghosh* v. *Aswin Kumar Nag*(8). In *Donoughmore* (*Lord*) v. *Forest*(9) the law is stated to be the same, though changed as regards Ireland by special statute. The cases in this Court are all based on the doubt suggested in *Parameshri* v. *Vittappa Shanbaga*(1) and are wrong. Sections 6 and 111 (*g*) of the Transfer of Property Act referred to.

WALLIS, C.J.—In 1876 the plaintiff's predecessors-in-title granted a mulgeni lease, containing a covenant against alienation, to the predecessors of defendants Nos. 4 and 5, who in 1907 in breach of their covenant alienated the holding to defendants Nos. 1 to 3. The plaintiff having obtained a decree for rent against defendants Nos. 4 and 5 in Original Suit No. 490 of 1916, attached the holding in execution of the decree, when defendants Nos. 1 to 3 put in a claim petition and succeeded in getting the attachment raised. The plaintiff then filed this suit to

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(1) (1903) I L.R., 26 Mad., 157.
(2) (1915) 28 I.C., 904 Mad.
(3) (1883) I.L.R., 6 Mad., 327.
(4) (1909) I.L.R., 36 Calc., 745.
(5) (1868) L.R., 3 Q.B., 739
(6) [1910] 2 Ch., 214.
(7) [1916] 2 K.B., 32.
(8) (1914) 18 C.W.N., 1138.
(9) (1871) 5 I.R., C.L., 443.

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establish his right, which was dismissed by both the lower Courts. In Second Appeal, BAKEWELL and PHILLIPS, JJ., differed and this is an appeal from the prevailing judgment of BAKEWELL, J., dismissing the suit. It is well settled in England that an assignment by a lessee in breach of his covenant not to assign is perfectly valid to pass the term; and we have been asked to apply the same rule here as it was applied by SARGENT, C.J., in *Tamaya* v. *Timapa Ganpaya*(1), in *Busarat Ali Khan* v. *Manirulla*(2), *Promode Ranjan Ghosh* v. *Aswin Kumar Nag*(3), and by BAKEWELL, J., in the present case. On the other hand it was contended that the rule was inapplicable, on the authority of an observation of BHASHYAM AYYANGAR, J., in *Parameshri* v. *Vittappa Shanbaga*(4), which was followed by a Bench of this Court in another case. All that BHASHYAM AYYANGAR, J., said was that a transfer by the lessee in breach of a covenant not to alienate might be void against the lessor, and that in his view the transfer would be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract, under section 108 (*c*), Transfer of Property Act. I have no doubt the learned Judge was well aware that such transfers are valid in England, and having regard to his express mention of section 108, Transfer of Property Act, I think that his suggestion that they may be void was made with reference to the fact that in section 108, Transfer of Property Act, the lessee's power of transfer in clause (*j*) and the provision as to the transferee's rights under the transfer in clause (*c*) are made subject to the words 'in the absence of contract or local usage to the contrary', at the beginning of the section. It may be argued on the strength of these words, and this, I think, was the view BHASHYAM AYYANGAR, J., was disposed to take, that whatever be the law in England, the Transfer of Property Act only recognizes transfers by the lessee in the absence of a contract by him not to alienate, which of course means a valid contract. It has, however, been expressly decided and may now be considered settled, that covenants not to alienate are valid under the Transfer of Property Act, as being for the benefit of the lessor, and it was so held by him in that case. It would also

(1) (1883) I.L.R., 7 Bom., 262.
(2) (1909) I.L.R., 36 Calc., 745.
(3) (1914) 18 C.W.N., 1138.
(4) (1903) I.L.R., 26 Mad., 157.

seem that the learned Judge was disposed to apply the same rule to agricultural leases not governed by Chapter V, even when they were executed before the coming into force of the Act. As regards the last point, the English rule was applied in 1883 in *Tamaya* v. *Timapa Ganpaya*(1), by SARGENT, C.J. and MELVILL, J., in the case of one of these mulgeni leases in North Kanara executed before the enactment of the Transfer of Property Act, after a very careful examination of the history of this tenure in the previous case *Vyankatraya* v. *Shivrambhat*(2), judgment in which was given on the same day. It was there pointed out that in ancient times the interest of the permanent lessee or mulgenidar was freely transferred, and that restrictions against alienations by mulgenidars though not invalid, were of comparatively recent origin. In these circumstances, I have come to the conclusion that the decision in *Tamaya* v. *Timapa Ganpaya*(1), is sufficient authority for the application of the English rule, in the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, and that it is unnecessary to consider the effect of section 108 of that Act on transfers by lessees in breach of covenants in leases subsquent to the Act, more especially as the view of the section apparently taken by BHASHYAM AYYANGAR, J., has not yet been expressly adopted in any cases, and on the other hand, the English rule has been applied in Calcutta even after the passing of the Act, though without advertance to the terms of section 108. In the result, I agree with BAKEWELL, J., and dismiss the appeal with costs.

WALLIS, C.J.

OLDFIELD, J.—I agree with the judgment just delivered.

OLDFIELD, J.

SESHAGIRI AYYAR, J.—The plaintiff's predecessor granted to the ancestor of defendants Nos. 4 and 5 a mulgeni lease of the property in dispute, in 1876. On 18th January 1907, defendants Nos. 4 and 5 transferred that lease to defendants Nos. 1 to 3. The plaintiff obtained a decree for rent against the former, and attached the properties ignoring the transfer and treating them as if they still belonged to the judgment-debtor. The question is whether the plaintiff is entitled to do that.

SESHAGIRI AYYAR, J.

The lease was granted in the year 1876. There can be no doubt that, if the alienation had been made in the year 1878 or

(1) (1883) I.L.R., 7 Bom., 262. (2) (1883) I.L.R., 7 Bom., 256.

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1877, and if the question came up before the Courts before 1882, it would have been decided, following English decisions enunciating principles of equity, justice and good conscience, that the alienation was not invalid. I fail to see why the conclusion should be different because the matter comes up before the Court after the Transfer of Property Act was passed. The rule that prima facie, the legislative enactments of this country should be consulted for principles of equity, justice and good conscience should not be held applicable to a transaction which was entered into before the Act. It would lead to anamolous results to interpret a document in a sense in which it could not have been construed when it was executed. Moreover, to the class of leases with which we are concerned, the Transfer of Property Act in terms does not apply.

I shall next deal with the question with reference to the Transfer of Property Act itself. Under section 6, every kind of property may be transferred subject to certain exceptions. By virtue of section 8, every such transfer passes to the transferee all the interest which the transferor has in the property, and in its legal incidents. Section 10, provides that a condition in a lease reserving a benefit for the lessor, or those claiming under him, will not be regarded as a repugnant condition. Section 12 is important. After enunciating the general rule that conditions reserving a benefit to the transferor on the transferee endeavouring to dispose of the property are invalid, it says that the benefit clause in a lease is an exception to the rule. This, and section 10, are clear indications that no condition against alienation is valid unless it be in a lease, and the condition is for the benefit of the lessor. Consequently, whenever in a lease a contract to the contrary is inserted, what the Court has to inquire into is whether that contract is for the benefit of the lessor. I do not think this proposition is affected by anything contained in section 108.

Clause (*c*), of that section, provides that the lessor shall be deemed to contract with the lessee, that if the latter pays the rent he may hold the property during the period of the lease without interruption. The further provision is that

"the benefit of such a contract shall be annexed to and go with the lessee's interest and may be enforced by every person in

whom that interest is for the whole or any part thereof from time to time vested."

I understand this sentence to mean that the lessor would ordinarily have a right to rent against the lessee's assignee, and the lessee's assignee would have a right to claim that the lease should subsist during the stipulated period. This undoubtedly is subject to any condition against alienation that may be found in the lease deed, provided such a condition is for the benefit of the lessor. Clause (*j*) is absolute in terms, but I take it that the lessee will be governed by the prohibitions mentioned in sections 10 and 12.

Then we come to section 111 which deals with the determination of the lease. It is to be noted that there is no provision terminating a lease on the breach of every condition in the lease: that is to say, every breach of a contract would not determine a lease *ipso facto*. By clause (*g*), it is provided that the lessee would incur forfeiture if he breaks an express condition to the effect that, on breach thereof, the lessor may re-enter or the lease shall become void. If there is no provision for re-entry, or declaring that, on the breach of a condition, the lease shall become void, forfeiture is not incurred. Consequently, a bare stipulation that the lessee shall not transfer the property would not render the transfer inoperative.

The further question is, what is the construction to be placed on the words in sections 10 and 12 of the Transfer of Property Act, "except in the case of a lease whether the condition is for the benefit of the lessor or those claiming under him". From the earliest times, in England, it has been held that a mere restraint upon alienation is not a covenant for the benefit of the lessor. The principle which has guided the framers of the Transfer of Property Act, and which also underlies the decisions of the English Courts is this: ordinarily the transferee of property is entitled to dispose of his interest in any way he chooses. A condition imposing limitations on him is not valid. A few exceptions are however recognized. One of them is where the landlord, apprehending that the transfer will injuriously affect his interest, stipulates that on the breach of the condition, he shall be at liberty to re-enter the property or to declare that the lease is void. In such cases, a direct benefit to

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him is secured, which would enable him to grant the lease to somebody else. A covenant by which he seeks simply to impose restrictions upon a lessee is not recognized by law as specifically enforceable. Section 111 of the Transfer of Property Act fully recognizes the above principle. Therefore, the construction that I place on section 108 is that no contract to the contrary will be regarded as binding between the parties, unless it be a contract which enables the landlord on the breach of it to re-enter possession or to put an end to the lease. In my opinion, the bare prohibition, not being for the benefit of the landlord is not a contract to the contrary which the law recognizes as operative.

I will not refer to very many English decisions. *Re Johnson, Ex parte Blackett*(1), *Paul* v. *Nurse*(2), all enunciate the principle I have mentioned. In *Williams* v. *Earle*(3), BLACKBURN, J., with the concurrence of LUSH, J., said :

"Though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative. . . But the plaintiff is entitled to recover indirectly by way of damages for the breach of the covenant not to assign."

See also *Hatton* v. *May* (4). I shall now examine the Indian cases. In *Narayana* v. *Narayana*(5), the learned judges held that a stipulation that the lease shall be cancelled is a penal one which can be relieved against. There is also a dictum in that case to the effect that the alienation will be inoperative against the lessor. In *Parameshri* v. *Vittappa Shanbaga*(6), Mr. Justice BHASHYAM AYYANGAR after dealing with a number of other circumstances expressed himself thus :—

"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."

This is a very guarded statement, which suggests, without deciding, a possible conclusion. In *Jacki Minezes* v. *Venkatramana Kamthi*(7), Mr. Justice SADASIVA AYYAR and Mr. Justice

(1) (1894) 70 L.T., 381.
(2) (1828) 8 B. & C., 486.
(3) (1868) L.R., 3 Q.B., 739.
(4) (1876) 3 Ch. D., 148.
(5) (1883) I.L.R., 6 Mad., 327.
(6) (1903) I.L.R., 26 Mad., 157.
(7) (1915) 28 I. C., 904 (Mad.).

NAPIER simply followed the dictum of BHASHYAM AYYANGAR, J., without discussion. On the other hand, we have in *Basarat Ali Khan* v. *Manirulla*(1), the well-considered opinion of Sir LAWRENCE JENKINS, C.J., and MOOKERJEE, J. This was followed in *Promode Ranjan Ghosh* v. *Aswin Kumar Nag*(2). See also *Nil Madhab Sikdar* v. *Narattam Sikdar*(3), *Mahananda Roy* v. *Saratmai Debi*(4), and *Akram Ali* v. *Durga Prasanna Roy Chowdhiri*(5). In *Madar Saheb* v. *Sannabowa*(6), it was held that a clause in a lease prohibiting alienation unaccompanied by a provision for re-entry did not put an end to the lease.

The above discussion leads me to the conclusion that Mr. Justice BAKEWELL has taken the right view.

I am therefore of opinion that the appeal fails and should be dismissed with costs.

M.H.H.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Coutts Trotter.

ELACHURI VENKATACHINNAYYA AND THREE OTHERS (ACCUSED), PETITIONERS,

v.

KING-EMPEROR (RESPONDENT), RESPONDENT.*

1920, February 5 and 20.

Criminal Procedure Code (Act V of 1898), ss. 107, 350, Proviso (1)—Transfer of Magistrate—Trial de novo—Right of accused.

Section 350 (1), proviso (*a*), Criminal Procedure Code, applies to proceedings under section 107, Criminal Procedure Code, and the accused in a security case is entitled to a trial *de novo* on the Magistrate being transferred.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of C. F. BRACKENBURY, the District Magistrate of Kurnool, in

(1) (1909) I.L.R., 36 Calc., 745. (2) (1914) 18 C.W.N., 1138.
(3) (1890) I.L.R., 17 Calc., 826. (4) (1911) 14 C.L.J. 585.
(5) (1911) 14 C.L.J., 614. (6) (1904) I.L.R., 21 Bom., 195.

* Criminal Revision Case No. 677 of 1919 (F.B.).