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 PRABHU LAL
 UPADHYA
 v.
 DISTRICT
 BOARD,
 AGRA

For the reasons which I have given I hold that the learned Civil Judge was right in dismissing the plaintiff's claim for all reliefs except a relief by way of damages and as to the latter I hold that the damages awarded were excessive and must be reduced to a sum of Rs.810 and that such sum must be decreed against the defendant Board only.

RACHHPAL SINGH, J.:—I agree with my learned brother and have nothing more to add.

*Before Mr. Justice Niamat-ullah, Acting Chief Justice,
 and Mr. Justice Verma*

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 December, 2

GIRENDRA NARAIN (DEFENDANT) v. GANGA NARAIN
 (PLAINTIFF)*

Specific Relief Act (I of 1877), section 27(b)—Trusts Act (II of 1882), section 91—Transfer of Property Act (IV of 1882), section 108(j)—Lease—Mortgage with possession by lessee—Lessor's suit for rent against mortgagee—Privity of estate—Contract, enforcement by a person not a party.

A perpetual lease was granted on a rent of Rs.400 a year; the lessee sold his rights, and later on the vendee executed a usufructuary mortgage of the lessee rights in favour of the defendant. It was a term of the mortgage that the mortgagee was to pay the rent of Rs.400 a year under the lease to the lessor; the mortgagee made such payment, and it was accepted by the lessor, for some time; but thereafter no payment was made, and the lessor brought a suit for rent against the mortgagee:

Held that under section 27(b) of the Specific Relief Act, and also under section 91 of the Trusts Act, the lessor was entitled to enforce against the mortgagee the contract to pay rent entered into by the original lessee. The mortgagee was a person claiming under a party to the contract of lease by a title arising subsequently to that contract, of which he had notice; and not only he had notice of that contract but he actually undertook by an express term of the mortgage to pay the rent to the lessor according to the lease.

*Second Appeal No. 839 of 1934, from a decree of K. K. K. Nayar, Additional Civil Judge of Aligarh, dated the 8th of May, 1934, confirming a decree of Har Prasad Gupta, Additional Munsif of Etah, dated the 18th of February, 1933.

Further, the mortgagee having actually paid rent to the lessor and the lessor having accepted it, the parties had been brought into direct relations with each other, and the question of the existence of a privity of contract between the parties did not arise.

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The latter part of the provision in clause (j) of section 108 of the Transfer of Property Act is for the benefit of the lessor and he has the option either to take advantage of it and to enforce his rights against his lessee alone or to accept the transfer made by the lessee and to sue the transferee for the enforcement of his rights under the lease.

Messrs. *Baleshwari Prasad* and *Krishna Murari Lal*,
 for the appellant.

Mr. *M. L. Chaturvedi*, for the respondent.

NIAMAT-ULLAH, A. C. J., and VERMA, J.:—These two second appeals arise out of two different suits but as the point which ultimately emerges for consideration is the same in both they have been connected and have been heard together.

One Abdullah Shah is the *muafidar* of certain plots of land in qasba Ganj Dundwara in the district of Etah. On 29th of March, 1927, Abdullah Shah executed a perpetual lease in respect of these plots of land in favour of one Ganga Narain. The rent reserved was Rs.400 per annum, and the lessee was expressly stated to have the power to transfer his lessee rights. On the 28th of March, 1928, the lessee Ganga Narain sold his lessee rights to one Narain Das by means of a sale deed executed on that day and registered on the 31st of March, 1928. It was laid down in this deed of sale that the vendee should comply with the conditions laid down in the lease and that the lease would be as much binding on him as it was on the vendor, the original lessee. On the 14th of July, 1928, Narain Das, the purchaser of the lessee rights from Ganga Narain, executed a deed of usufructuary mortgage in respect of the lessee rights which he had acquired under the sale deed of the 28th of March, 1928, in favour of the present appellant Rai Girendra Narain, and put the latter in possession of the property

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as a usufructuary mortgagee of the lessee rights. One of the terms laid down in this deed of mortgage was that the mortgagee should continue to pay the rent due to Abdullah Shah according to the terms laid down in the lease. In accordance with that term the appellant paid to Abdullah Shah the rent due up to the 31st of March, 1930, and did not pay it thereafter.

Abdullah Shah brought suit No. 563 of 1931 for the rent due for the period 1st April, 1930, to 30th September, 1931, and impleaded Ganga Narain, Narain Das, and the appellant as defendants. Subsequently Abdullah Shah withdrew the suit as against the appellant with liberty to bring a fresh suit in future. Ultimately the suit was decreed against Ganga Narain. On the 6th of July, 1932, Ganga Narain paid to Abdullah Shah a sum of Rs.728-4-0 due under the said decree. Thereafter Ganga Narain filed suit No. 659 of 1932 against the appellant and Narain Das for the recovery of the said sum of Rs.728-4-0 together with a sum of Rs.110 on account of certain costs and a sum of Rs.16-7-0 for interest, in all Rs.854-11-0. The learned Munsif decreed that suit against the appellant as well as Narain Das for the recovery of a total sum of Rs.807-7-0. The appellant alone appealed to the lower appellate court and that court upheld the decree of the trial court. Second appeal No. 839 of 1934 has been filed by Rai Girendra Narain against that decree.

On the 7th of December, 1932, Abdullah Shah filed suit No. 846 of 1932 against Ganga Narain, Narain Das and Rai Girendra Narain for the recovery of Rs.400 as the rent due for the period 1st October, 1931, to 30th September, 1932, together with Rs.13 as interest, total Rs.413. The learned Munsif decreed the suit against all the defendants. The present appellant, Rai Girendra Narain, alone appealed and the lower appellate court upheld the decree of the court of first instance. Second Appeal No. 840 of 1934 has been filed by Rai Girendra Narain against that decree.

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The main contention of the appellant in both the appeals is that he is liable to pay the rent to his mortgagor, Narain Das, alone, that he is not liable to Abdullah Shah the lessor, and therefore Abdullah Shah has no right in law to recover the rent from him direct, and neither Abdullah Shah can bring a suit against him for the recovery of the rent, nor can Ganga Narain sue him for contribution on account of the payment which he has made to Abdullah Shah. The argument is that there is no privity of estate between the appellant and Abdullah Shah and therefore Abdullah Shah has no right at all to bring a suit against him for the recovery of the rent. He contends that if there is a sale of the lessee rights then the whole of the rights of the lessee are transferred to the purchaser and vest entirely in him and so in that case a privity of estate between such purchaser and the lessor comes into existence; but where, as here, there is only a usufructuary mortgage, some rights are still left in the lessee mortgagor and so no privity of estate between the mortgagor and the lessor comes about.

The learned counsel for the plaintiff respondent, on the other hand, urges (1) that arguments as to the existence or non-existence of privity of estate are immaterial for the purposes of this case because an obligation to pay rent is a covenant running with the land, and refers to the second paragraph of section 40 of the Transfer of Property Act (IV of 1882) in support of the argument that in any case Abdullah Shah is entitled to the benefit of the obligation to pay rent to the lessor imposed upon Rai Girendra Narain by the mortgage; (2) that when, as has admittedly happened in this case, the transferee from the lessee has paid rent direct to the lessor and the latter has accepted it, the relationship of landlord and tenant is established between the lessor and the transferee and the former is entitled to sue the latter for the rent due to him; and (3) that a usufructuary mortgagee in possession is as good as an absolute assignee because, according to the learned counsel, the entire estate of the lessee

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mortgagor vests for the time being in the usufructuary mortgagee.

A number of cases have been cited by counsel on both sides in support of their respective contentions. Before coming to the cases, however, we think it necessary to refer to certain provisions of the statute law in force in these provinces.

Section 108 of the Transfer of Property Act (IV of 1882) which deals with the rights and liabilities of the lessor and the lessee provides in clause (j) that 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 or part may again transfer it. It goes on to lay down that the lessee shall not by reason only of such transfer cease to be subject to any of the liabilities attaching to the lease. This latter provision is in our opinion for the benefit of the lessor and we consider that he has the option either to take advantage of it and to enforce his rights against his lessee alone or to accept the transfer made by the lessee and to sue the transferee for the enforcement of his rights under the lease.

Section 27 of the Specific Relief Act (I of 1877) provides that except as otherwise provided by chapter II of the Act, specific performance of a contract may be enforced against (a) either party thereto and (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee in good faith and without notice of the original contract.

Section 91 of the Trusts Act (II of 1882) lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Now, the appellant Rai Girendra Narain not only had notice of the original contract between Abdullah

Shah and his lessee that a sum of Rs.400 per annum shall be paid as rent to Abdullah Shah but actually undertook, by an express term embodied in the deed of mortgage dated the 14th of July, 1928, to pay that rent to Abdullah Shah in accordance with the conditions laid down in the deed of lease. Furthermore, it is common ground that the appellant paid to Abdullah Shah the rent due up to the 31st of March, 1930, and that Abdullah Shah accepted it from him. The appellant is a person claiming under a party to the deed of lease of the 29th of March, 1927, by a title arising subsequently to the contract of lease. In these circumstances we are of opinion that Abdullah Shah is entitled to enforce against the appellant the contract to pay rent entered into by the lessee.

In the view which we have taken it is not necessary to discuss in detail the cases cited by the learned counsel. We propose, therefore, to refer to them only briefly.

The cases which the learned counsel for the appellant has cited are those of *Thethalan v. The Eralpad Rajah* (1), *Jiban Krishna Mullick v. Nirupama Gupta* (2), *Ramchandra Jat v. Seth Bhawaniram* (3), *Jeiha Nand v. Udho Das* (4) and *Adhar Chandra Mandal v. Dole Gobinda Das* (5).

It will be noticed that the Madras and Calcutta cases cited above discuss decisions of the courts in England at great length and in none of them has any reference been made to section 27(b) of the Specific Relief Act or to section 91 of the Trusts Act. It will also be noticed that there is considerable divergence of opinion in Calcutta. It may, however, be mentioned that WALLIS, C.J., in his judgment in the case of *Thethalan v. The Eralpad Rajah* (1) observes at page 1113 that if the lessor accepts rent from the assignee a privity of contract would come into existence between them. The basis of the decisions on which reliance is placed on behalf of the

(1) (1917) I.L.R. 40 Mad. 1111.

(2) (1926) I.L.R. 53 Cal. 922.

(3) A.I.R. 1928 Nag. 147.

(4) A.I.R. 1931 Lah. 614.

(5) (1936) I.L.R. 63 Cal. 1172.

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appellant was that a sub-lessee or mortgagee of lessee rights is not *ipso facto* brought into direct relations with the landlord lessor. That principle cannot, in our opinion, be applied to a case where the mortgagee has paid rent to the lessor and the latter has accepted it from him. The Nagpur and Lahore cases cited are decisions by single Judges and are also distinguishable on the facts. As to the Calcutta decisions, the learned counsel for the plaintiff respondent has invited our attention to the cases of *Debnarayan Dutt v. Chunilal Ghose* (1), *Dwarikanath Ash v. Priyanath Malki* (2) and *Kshirode Bihari Datta v. Mangobinda Panda* (3), as cases in which the opposite view has been taken. We are content to say that we agree with the judgments of SIR LAWRENCE JENKINS in the case of *Debnarayan Dutt v. Chunilal Ghose* (1), and of LORT-WILLIAMS, J., in the case of *Kshirode Bihari Datta v. Mangobinda Panda* (3). We might also refer to the decision of their Lordships of the Privy Council in *Khwaja Muhammad Khan v. Husaini Begam* (4).

For the reasons given above we are of opinion that this appeal has no force and we dismiss it with costs.

Before Mr. Justice Rachhpal Singh and Mr. Justice Ismail

1937
December, 10

THOMAS SKINNER (JUDGMENT-DEBTOR) v. RAM RACHPAL
(DECREE-HOLDER)*

Civil Procedure Code, order XXI, rule 2—Payment by judgment-debtor “out of court”—Decree-holder attaching a decree in favour of his judgment-debtor against another person passed by another court and realising the amount of such decree in that court—Not payment “out of court”—Certification not necessary.

Where in execution of his decree the decree-holder attached another decree in favour of his judgment-debtor against another person passed by another court and realised the money of that decree by executing it in that court, it was held that

*First Appeal No. 17 of 1936, from a decree of P. D. Pande, Second Civil Judge of Meerut, dated the 4th of November, 1935.

(1) (1913) I.L.R. 41 Cal. 137.

(2) (1916) 22 C.W.N. 279.

(3) (1934) I.L.R. 61 Cal. 841.

(4) (1910) I.L.R. 32 All. 410.