

Before Mr. Justice Pigot and Mr. Justice Banerjee.

GOLAK NATH ROY CHOWDHRY (PLAINTIFF) v. MATHURA NATH ROY CHOWDHRY, ON HIS DEATH HIS SONS AND HEIR RADHA CHURN ROY CHOWDHRY, WHO APPEARED, AND OTHERS WHO DID NOT APPEAR IN THIS APPEAL (DEFENDANTS).*

1891

September 1.

Lease—Osathowla—Re-entry—Forfeiture—Sale in execution—Saleable interest—Alienation by operation of law—Conditions restraining alienation—Civil Procedure Code (Act XIV of 1882), s. 266.

A sued to recover possession of certain land which was leased in *osathowla* by his father to B. The lease expressly prohibited the lessee and his heir from making any assignment of the property either by sale or gift, but it did not contain any provision for forfeiture or for re-entry by reason of an assignment in violation of its terms, nor was there any provision restricting a sale in execution of a decree. The *osathowla* passed to B's executor and was sold in execution of a decree against B. Held, that the sale passed a good title. It is clear law in India, as in England, that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution.

Vyankatraya v. Shivrambhat (1), *Diwali v. Apaji Ganesh* (2), and *Tamaya v. Timapa Ganpaya* (3), referred to.

Held also, that even if there had been a provision in the lease for forfeiture or for re-entry by reason of an assignment in violation of its provisions, it would not have the effect of invalidating the sale in execution, which has always been held not to be of itself a breach of a covenant not to assign.

B, and also his executor at the time of the sale, had an interest in the lease which was "saleable" within the meaning of section 266 of the Civil Procedure Code. *Diwali v. Apaji Ganesh* (2) distinguished.

THIS was a suit to recover possession of a certain *bari*, which was let to one Boikant Nath Saha Roy by the plaintiff's father, Srinath Roy Chowdhry, by a registered lease in the following terms:—

"I, Srinath Roy Chowdhry, son of the late Gour Kishore Roy Chowdhry, the place of residence, pargana and thana as above, do execute this

* Appeal from Appellate Decree No. 858 of 1890 against the decree of G. G. Dey, Esq., District Judge of Backergunge, dated the 14th of April 1890, affirming the decree of Bahoo Nuffer Chunder Bhutti, Subordinate Judge of that district, dated the 28th December 1888.

(1) I. L. R., 7 Bom., 266.

(2) I. L. R., 10 Bom., 342.

(3) I. L. R., 7 Bom., 262.

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osathowladari patta without the power of disposing of the property of the *patta* either by sale, gift or transfer to the effect following :—

I hold, under a *mirashowla*, the dwelling-house of Kebul Krishna Das in the *modafut brohmutter* property of Kali Agradani, in *kismut* Majungger appertaining to the *modafut* property of Ghoshanubita Rani, the *khanabari* of Rani Rajessuri and Rani Annopurna obtained under a gift, situate at pargana Chandradip, &c. You have applied to me for an *osathowladari patta* of the said house, in order to dwell therein without the power of transferring the said house either by sale or gift.

“According to your prayer, I grant you this *patta* for the entire land with the house aforesaid (with the tank ?) as well as the banks on the four sides of the tank” * * * * * (here followed the boundaries) “the rent of the same is fixed at Rs. four (4) to be paid by you to me annually according to the kists fixed below. Should you default to pay the rent, I shall be competent, according to the law in force, to realise interest for default of payment in due kists. You are to enjoy and hold the aforesaid house, together with the tank as per boundaries stated, and the entire *jama jami* by holding possession of it, by excavating it, raising embankment on it, by erecting *ghors*, and planting gardens hereditarily in good felicity, the property descending from son to grandson, and so forth. It is further stated that neither you nor your heirs nor your representatives shall be competent to transfer this *osathowla* right either by sale or gift, or by any other manner of alienation, or grant a *maurasi patta* of the property to anybody. Should you or your heirs do make any such transfer or grant, such transfer or grant should not be accepted by the Court. On these conditions, receiving a *habuliyat*, I execute this *osathowladari patta*, the 29th Assur 1272 B.S.”

It appeared that one Manicka Mala Chowdhrani had obtained a decree against Boikant Nath, and on the death of the latter she took out execution against the defendant No. 3, Kisto Bundhu Roy, the executor of the estate of Boikant Nath. In execution of this decree the defendant No. 1, Mothura Nath Roy, purchased the *bari* in the *benami* name of the defendant No. 2, Kunju Behary Sen. The auction-purchaser took possession through the Court, ousted the heirs of Boikant Nath, and eventually made considerable improvements upon the property by enlarging a tank and building masonry landing-stages and walls.

The plaintiff contended that by virtue of the provisions in the lease nothing passed to the purchaser under the sale, nor was there any saleable interest within the meaning of the provisions of section 266 of the Civil Procedure Code, in Boikant

Nath or his executor, inasmuch as Boikant Nath was expressly prohibited from alienating the property by sale or gift or in any manner. The plaintiff did not ask for any relief against the executor.

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The material defence was that the suit was not maintainable, inasmuch as there was no right of re-entry reserved in the lease; that there was no forfeiture clause; that the terms restraining alienation were not enforceable, and that the lease did not prevent a sale in execution.

The Subordinate Judge dismissed the suit. The plaintiff appealed to the District Judge, the material portion of whose judgment was as follows :—

“It is admitted that there was no express condition of forfeiture or re-entry in the lease. The clause ‘if you do alienate.....it will be liable to be set aside by the Civil Court’ does not necessarily imply that the lease would terminate in the event of a voluntary transfer by the lessee. The transfer would be invalid, and the position of the lessee would remain as before. The contingency of an involuntary transfer was not contemplated, and no provision was made for it, or for the case of the transferee obtaining possession. A number of rulings were relied upon by the defendant here, as in the lower Court, as supporting the contention that without an express stipulation of forfeiture or re-entry, the defendant could not be ousted and the title of an auction-purchaser would not be affected by a clause against alienation. On the first point the rulings cited were the cases of *Gooropersaud Sircur v. Phillipe* (1), *Gordon Stuart & Co. v. Taylor* (2), *Narayana Swabhoga v. Narayana Nayak* (3), *Ram Nursingh Chuckerbutty v. Dwarkanath Gangooly* (4). The last case was referred to only with regard to the general principle therein stated, that a forfeiture clause is to be construed strictly, and not to be extended, if possible, beyond the words in which it is expressed. The other rulings deal with cases in which it was sought to terminate leases on a breach of contract by the lessee, but there being no express forfeiture clause, the claim for ejectment was held untenable. With one exception, the persons sued in these cases were the original lessees themselves, and the Subordinate Judge considered that, although an express condition of re-entry might be necessary to enable a landlord to oust the lessee, he should be able to eject third parties, without it. It does not seem to me that there is any sound basis for this distinction, or that a condition, ineffectual as against the lessee himself, can have any greater effect against a transferee of the lessee’s interest.

(1) Marsh., 366.

(3) I. L. R., 6 Mad., 327.

(2) W. R. F. B., 9.

(4) 28 W. R., 10.

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None of the above cases, however, deal with circumstances similar to those of the present case, and I pass on to the second point urged, that the position of an auction-purchaser is not affected by a condition against voluntary transfer. On this point the case of *Surbaraya Kamti v. Krishna Kamti* (1) is strongly in favour of the defendant's contention. There also the person sued was the auction-purchaser of property leased under a stipulation against alienation, and the landlord's case was stronger, inasmuch as there was an express forfeiture clause, and he gave notice at the time of sale of his intention to enforce it. It was held by the Court that an assignment by operation of law was not *per se* a breach of the covenant against alienation, and the suit for possession was dismissed. The same principle was affirmed in the case of *Tamaja v. Timapa Ganpaya* (2), which ruled that a clause against voluntary alienation afforded no ground for impeaching the title of an auction-purchaser, to whom the alienation was by act of law and not of the lessee. In this case it was also held that the plaintiff could not recover possession even from a private purchaser in the absence of a clause of forfeiture or re-entry in the lease. In the case of *Vyankatraya v. Shivrambhat* (3), it was held that a special agreement of the lessee not to allow the land to be sold in satisfaction of judgment-debts was a valid agreement. This was a decision of the same Judges who delivered judgment in the case just before mentioned, and in that judgment they referred to the case, which is in no way inconsistent with the principle there laid down. If these cases are good law, they clearly dispose of the question now in issue, and put the plaintiff out of Court so far as his present claim is concerned. On the other side, however, an argument has been advanced, which certainly looks a strong one. It is based on the terms of section 266, Civil Procedure Code, and on the ruling in *Diwali v. Apaji Ganesh* (4). According to section 266 the property which is liable to sale in execution of a decree includes "all saleable property . . . belonging to the judgment-debtor, or over which, or the profits of which he has a disposing power, &c." In the case of *Diwali v. Apaji Ganesh* (4) it was held that an usufructuary interest assigned to a Hindu widow for her maintenance with stipulations against alienation was an interest over which she had no power of disposal, and therefore not saleable in execution under section 266 of the Civil Procedure Code.

I think, however, on the authority of the two classes of rulings above referred to, that it must be held that the property in question was saleable property—firstly, because there was no stipulation against the lease against sale even by the lessee himself; and secondly, because even if the lessee could not sell, the property was saleable otherwise, according to the construction of the law by the Bombay and Madras High Courts above referred to."

(1) I. L. R., 6 Mad., 159.

(2) I. L. R., 7 Bom., 262.

(3) I. L. R., 7 Bom., 256.

(4) I. L. R., 10 Bom., 342.

The appeal was accordingly dismissed. Against that decision the plaintiff appealed to the High Court.

Mr. *Evans* and Baboo *Grija Sanker Mosundar* for the appellants.

Mr. *Garth* and Baboo *Chunder Kant Sen* for the respondents.

The nature of the arguments sufficiently appear in the judgment of the High Court (PIGOT and BANERJEE, JJ.) which was as follows:—

This is a suit for possession of a piece of land, which was leased in *osathowla* by plaintiff's father to Boikant Nath Saha Roy, whose executor the 3rd defendant is. The *osathowla* was sold in execution of a decree against Boikant in January 1887 shortly after Boikant's death, and the plaintiff's case is that thereby by reason of the terms of the lease the auction-purchaser and his principal defendants 2 and 1 got nothing, and this suit is brought to eject them; no relief is expressly asked for against the executor.

The lease, addressed to Boikant in the usual manner, is by Sri Nath Roy, and commences thus:—"I * * * * do execute this *osathowladari patta* without the power of disposing of the property of the *patta*, either by sale, gift or transfer to the effect following":—

It recites:—"You have applied to me for an *osathowladari patta* of the said house in order to dwell therein without the power of transferring the said house either by sale or gift." "According to your prayer, I grant you." Then follows the description of the premises. "You are to enjoy and hold the aforesaid" * * * "hereditarily in good felicity the property descending to your son and grandson, and so forth."

"Neither you nor your heirs nor your representatives shall be competent to transfer this *osathowla* right either by sale or gift or by any other manner of alienation, or grant a *mourasi patta* of the property to anybody. Should you or your heirs do make any such transfer or grant, such transfer or grant should not be accepted by the Court. On these conditions, receiving a *kabuliyat*, I execute this *osathowladari patta*."

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We may assume that the lessee was bound as by the *kabuliyat* in similar terms. But the terms of the letting are only before us in this *patta*.

It is contended that, by virtue of these provisions, nothing passed under the sale to defendants 1 and 2. *Vyankatraya v. Shivrambhat* (1), and *Divali v. Apaji Ganesh* (2) were relied on by the defendants, and the cases *Tamaya v. Timaya Ganpaya* (3) and *Subbaraya Kamti v. Krishna Kamti* (4) were cited and distinguished.

We take it to be clear law in India, as in England, that "a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale ** under an execution" (Davidson's Conv., vol. V, p. 177). The Bombay cases cited are authorities for this proposition as regards India.

In the present case there is no provision in the lease for forfeiture, or for re-entry or forfeiture by reason of an assignment in violation of the provisions of it. Had there been such a provision, it would not have the effect, we think, of invalidating the sale in execution, which has always been held not to be of itself a breach of a covenant not to assign.

The case of *Vyankatraya v. Shivrambhat* (1) does not affect, in our opinion, the present case. That decision only applied the special rules (perhaps it should be called exception to the general rule) that a clause in a lease is valid which expressly gives a right of re-entry by the landlord in case the term be taken in execution, the clause in the lease in that case on which the question arose "not to let the lands be attached and sold in satisfaction of judgment-debts" being held to have a similar operation, and to render a passive attitude by the lessee in respect of process of execution, to amount to a breach within the operation of the special rule in question.

In the present case there is no provision relating to process in execution, and we think the general rule applies.

It is also contended that as the lessee is expressly prohibited from alienating, there was not any interest in him or in his executor at the time of the sale which was "saleable" within the meaning of section 266 of the Civil Procedure Code, and in

(1) I. L. R., 7 Bom., 256.

(3) I. L. R., 7 Bom., 262.

(2) I. L. R., 10 Bom., 342.

(4) I. L. R., 6 Mad., 159.

support of this contention the case of *Diwali v. Apaji Ganesb* (1) was relied on.

We agree with the District Judge in thinking that the decision in that case turned on the very special nature of the limited usufructuary interest there in question. We do not understand the Court as in any way departing from the general rule recognized or acted upon in the cases of *Vyankatraya v. Shivrambhat* (2) and *Tamaya v. Timapa Ganpaya* (3) by the same high authority which decided the case of *Diwali v. Apaji Ganesb* (1). We think, in the present case, the general rule must apply, that the sale passed a good title, and that the appeal must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Macpherson, and Mr. Justice Beverley.

RAFIKUNNESSA BIBI AND ANOTHER (DECREE-HOLDERS) *v.* TARINI CHURN SARKAR (JUDGMENT-DEBTOR).*

1891

August 9.

Decree—Construction of decree—Consent decree—Decree in foreclosure suit—Redemption, extension of time for—Appeal, consent decree on—Interest—Transfer of Property Act (IV of 1882), ss. 86, 87.

The plaintiffs obtained a decree for foreclosure. On appeal the lower Appellate Court made a decree in terms of section 86 of the Transfer of Property Act, ordering the defendant to pay the amount due with interest and costs calculated up to the 28th February 1890, or in default to be foreclosed his right to redeem. Upon second appeal on the 30th January 1891 it was "ordered and decreed, with consent of the parties, that the defendant be allowed one month's time to redeem," and in other respects the appeal was dismissed. On the 28th February 1891 the defendant deposited in Court a sum calculated so as to include interest up to that date, but subsequently objected to pay interest after the 28th February 1890.

Held by PETHERAM, C.J., and BEVERLEY, J., (MACPHERSON, J., dissenting) that the effect of the consent decree was to extend the time for redemption to the 28th February 1891, and that interest should be allowed to that date.

*Appeal from Order No. 351 of 1891, against the order of J. F. Bradbury, Esq., Judge of Pubna and Bogra, dated the 10th of August 1891, affirming the order of Babu Promótho Nath Banerjee, Subordinate Judge of that district, dated the 23rd of May 1891.

(1) I. L. R., 10 Bom., 342.

(2) I. L. R., 7 Bom., 256.

(3) I. L. R., 7 Bom., 232.

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