

his rights by reason of another transfer. The plaintiff is merely asking for a mortgage decree at present. He may not have to execute his decree or on execution somebody else may become the auction purchaser. It is for this reason, I think, that the learned Subordinate Judge did not deal with this matter because in his view it was unnecessary to decide it in the present action. The learned Subordinate Judge took the view that the plaintiff as an assignee of the mortgage bond was entitled to enforce his rights to recover his dues; "the fact as to whether defendant no. 6 has derived any valid rights on the basis of that agreement or not will remain unaffected by that sale of the surface and sub-soil rights of mouza Telmocho in this mortgage decree". If the defendant chooses to redeem the plaintiff he may do so otherwise he must submit to a decree for sale of the mortgaged properties including those portions of village Telmocho which the appellant claims as his leasehold properties. In my view the appellant has no locus standi to resist the claim of the plaintiff to sell the properties covered by the contract for lease of August, 1923.

In the result I agree with my learned brother that the appeal of this defendant also fails. The appeal must be dismissed with costs.

S. A. K.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Courtney Terrell, C. J. and Fazl Ali, J.*

RAJA SHIVA PRASAD SINGH

v.

TOM SMITH.\*

1938.

February,  
2, 3, 4, 18.

*Lease—mortgage by assignment by the lessee—mortgage, whether liable for the rent reserved—Transfer of*

\*Appeal from Original Decree no. 80 of 1935, from a decision of Babu Harihar Prasad, Subordinate Judge of Dhanbad, dated the 6th December, 1934.

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1938. *Property Act, 1882 (Act IV of 1882), section 58(e)—Transfer of property (Amendment) Act, 1929 (Act XX of 1929)—mortgage by assignment not strictly coming within the definition of "English mortgage", whether is effective—lessee covenanting to pay rent on behalf of himself and his assigns*  
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 2.  
 TOM SMITH. —*mortgagee taking possession of leasehold property with express knowledge of covenant—privity of contract, whether exists between mortgagee and landlord.*

In India, a lessee mortgaging his interest by assignment as contemplated by section 58(e) of the Transfer of Property Act, 1882, passes the whole of the interest to the mortgagee and the latter (certainly when in possession) is liable for the rent reserved in the lease.

The law on this point remains unaltered by the Transfer of Property (Amendment) Act XX of 1929.

*Bengal National Bank, Limited, v. Janoki Nath Roy*(1), followed.

*Falakrishna Pal v. Jagannath Marwari*(2), not followed.

Section 58 of the Transfer of Property Act, 1882, does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage.

Where the lessee covenants on behalf of himself and his assigns to pay the rent to the landlord and the mortgagee from the lessee takes possession of the land under the mortgage with the express knowledge of the mortgagor's covenant, there is a privity of contract between the mortgagee and the landlord and the former is liable to pay the rent reserved; the fact that the mortgagor has covenanted with the mortgagee to pay the rent to the landlord and has actually paid the rent for a period of time is immaterial.

*Jamna Das v. Pandit Ram Antar Pande*(3) and *Nanku Prasad Singh v. Kamta Prasad Singh*(4), distinguished.

*Williams v. Bosanquet*(5), referred to.

(1) (1927) I. L. R. 54 Cal. 813.

(2) (1932) I. L. R. 59 Cal. 1314.

(3) (1911) I. L. R. 34 All. 63; L. R. 39 Ind. App. 7.

(4) (1922) 26 Cal. W. N. 771, P. C.

(5) (1819) 1 B. & B. 238; 129 E. R. 714.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

*P. R. Das* (with him *B. C. De* and *N. N. Ray*), for the appellant.

*S. N. Bose* and *J. C. Sinha*, for the respondents.

COURTNEY TERRELL, C. J.—On the 24th of April, 1907, Raja Durga Prasad Singh, ancestor of the plaintiff, granted to Mr. C. J. Smith a coal mining lease of land in his zamindari of Jharia for nine hundred and ninety-nine years at a royalty of 2 annas 6 pies per ton on the quantity of coal raised every year with a minimum of Rs. 975 per annum. The tenant was to pay Government cesses. Clauses 8, 9 and 13 were as follows:—

8. " That for the amount of royalty the leasehold land and the machineries and (here follows an illegible word) remain wholly hypothecated. If I make default in payment of royalty, you will be competent to realise the same by selling the leasehold land. In regard to the same I or my heirs or successors-in-interest shall have no objection "

9. " That I shall be competent to transfer the leasehold land by gift, sale or otherwise, according to my wish. But thereby there will be no obstacle to the priority of dues, i.e., the transferee will remain wholly bound to pay the amount of royalty "

13. " That I as well as my heirs and successors-in-interest remain wholly bound by the aforesaid terms....."

On the 4th of February, 1920, Mr. C. J. Smith mortgaged his interest to the Jagadamba Loan Company, Limited, and their assigns. After reciting that the mortgagor was seized and possessed of the lands, hereditaments and premises subject to the payment of rents and royalties and after reciting the lease under which the mortgagor had obtained the same and after reciting that the mortgagor had requested the Company for a loan on cash credit basis of three lakhs of rupees the indenture witnessed that the mortgagor covenanted to pay on the 4th of February, 1923, the full amount of the floating balance for the time being owing by the mortgagor

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to the Company on the cash credit loan account together with interest and the indenture further witnessed that in further pursuance of the agreement

" he the mortgagor doth hereby grant, convey and transfer to the Company all those the mines, beds and seams of coal lying and under the lands hereditaments and premises described..... together with all collieries open and unopened and all erections therein and thereunto belonging or appertaining therewith usually held and enjoyed or occupied and also all estate, right, title and interest use trust property inheritance possession claim and demand whatsoever of law and in equity of him the mortgagor of into out of and upon the said premises and every part or parcel thereof including all rents and royalties payable to the mortgagor from the tenants of the same premises together with all deeds, pattas, muniments and writings and evidences of title whatsoever in anywise relating to or concerning the lands, tenements, buildings and premises or any part thereof which now are or thereafter shall or may be in possession or lawful power or control of the mortgagor or any other person or persons from whom he can procure the same without action or suit at law or in equity to have and to hold the same mines and premises hereinbefore expressed to be hereby granted, conveyed pattas or leases granted by the mortgagor as aforesaid and transferred unto the Company according to the nature and tenure thereof respectively subject nevertheless to the proviso for redemption hereinafter contained "

Then follows a proviso that upon repayment of the money lent

" the Company shall at any time thereafter upon the request and cost of the mortgagor reconvey the said lands hereditaments and premises hereinbefore expressed to be hereby granted, conveyed and transferred unto the mortgagor as he shall direct."

Later on followed a clause by which the mortgagor covenanted with the Company that

" he the mortgagor will during the subsistence of their security pay all rents, royalties, taxes, rates and impositions that are now payable or may hereinafter be payable in respect of the mortgaged premises and shall also perform and observe the terms and conditions contained in the several head leases or pattas under which they are respectively held thereof."

The mortgagor then covenanted for good title to grant, convey and transfer the mortgaged premises to the Company and further that if defaults were made by the mortgagor in paying the rents,

" royalties and taxes in respect of the mortgaged premises and that if the mortgagor committed any breach of any of the covenants

and conditions the Company might either take proceedings to realise the money secured or to enter into possession of the mortgaged premises without being responsible or accountable as a mortgagee in possession and thenceforth to hold and enjoy and receive the rents, issues and profits without any interruption, claim and demand by the mortgagor."

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Lastly there was a clause

"provided always and it is hereby agreed and declared that notwithstanding anything hereinbefore contained, the mortgagor shall be at liberty at any time hereafter to pay off the amount hereby secured and to obtain a reconveyance of the premises hereby mortgaged."

The mortgagee, Jagadamba Loan Company, Limited, entered into possession and remained in possession for some years.

On the 20th of April, 1928, a suit was brought by the receiver of the Jharia Raj estate against Mr. C. J. Smith, lessee of the property, the New Jinagora Coal Company and the Jagadamba Loan Company, Limited for recovery of the royalty commission. Mr. C. J. Smith having died during the pendency of the suit, his son and widow were substituted in his place. A preliminary decree was passed against all the defendants. A final mortgage decree was passed on the 30th August, 1930, for a sum of about Rs. 2,90,000. The decree was put into execution and the charged property was sold for a sum of Rs. 1,00,000 on the 25th June, 1931. The receiver of the Jharia Raj was discharged and Raja Shiva Prasad Singh of Jharia who succeeded to the estate and is the present plaintiff, filed an application under Order XXXIV, rule 6, of the Code of Civil Procedure, for a personal decree against the defendants for recovery of the unrecovered balance of the decretal amount.

The Subordinate Judge granted a personal decree against the Smiths but refused it as to the Jagadamba Loan Company, Limited, and this appeal is directed against that refusal. In the opinion of the learned Subordinate Judge the Company was not liable for the payment of the royalty either by

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privity of contract or by privity of estate and he held that the mortgage deed by Mr. Smith to the Jagadamba Loan Company was not an absolute assignment of Smith's interest in the leasehold properties and that the mortgage deed was not an "English mortgage" within the meaning of section 58(e) of the Transfer of Property Act. The whole argument is based upon the theory that under the Indian law, as expressed in the Transfer of Property Act, a mortgage by assignment always leaves some interest in the mortgagor and that consequently there cannot be an absolute assignment of the whole of the mortgagor's interest. In support of this principle reference has been made to a decision of Mukerji and Guha, JJ. in the case of *Falkrishna Pal v. Jagannath Marwari*(1). In this decision the learned Judges referred to an earlier decision of Rankin, C. J. in *Bengal National Bank, Limited, v. Janoki Nath Roy*(2) in which the learned Chief Justice had decided that in India a lessee mortgaging his interest by an English mortgage passed the whole of the interest to the mortgagee and that the latter became liable for the rent. Mukerji, J. expressed the view that this view could not be accepted in its entirety and that an English mortgage in India could not properly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee. He arrived at this opinion by arguing that section 58, clause (e), must be read subject to the definition of a mortgage as given in clause (a). I am unable to agree with the opinion expressed by Mukerji, J., for section 58(e) expressly contemplates by the words

"and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor."

the recognition of the principle of complete transfer, and no terms will be clearer than the terms set forth in the mortgage now under consideration. There

(1) (1932) I. L. R. 59 Cal. 1314.

(2) (1927) I. L. R. 54 Cal. 813.

certainly could not be a "reconveyance" of that which had not previously been conveyed. I prefer the opinion expressed by Rankin, C. J. that a mortgagee by assignment (certainly when in possession as in the case before us) is liable for the rent reserved by the lease.

An argument was addressed to us that the Transfer of Property Act was amended by Act XX of 1929 in which the right of a mortgagee being strictly limited to a right to sue for the mortgage money or for sale of the mortgaged property it was clear that the effectiveness of a transfer as contemplated by an English mortgage was effectually abolished and could no longer be regarded as an absolute transfer. But it may be observed that the legislature took no steps to amend section 58(e); nor did it, as it might have done, repeal section 58(e) and the Act continues to contemplate an absolute transfer of the mortgaged property.

It was further suggested that by reason of the fact that this mortgage does not bind the mortgagor to pay the mortgage money on a specific date but entitles him to have a reconveyance on payment "at any time hereafter", the mortgage in question is not within the strict definition of an "English mortgage". But section 58 does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. There is nothing in this point.

Some argument has been raised upon the fact that the mortgagor covenanted to pay the rent reserved under the lease, and it is certainly true that the lessee mortgagor could not release himself from the obligation to pay the rent. He was bound both to the landlord and to the mortgagee to fulfil this obligation. This, however, has nothing whatever to do with the liability of the mortgagee to the landlord. In my opinion this case is one of privity of contract between the mortgagee and the landlord.

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Mr. Smith covenanted on behalf of himself and his assigns to pay the rent to the landlord and the mortgagees took possession of the land under the mortgage with the express knowledge of their mortgagor's covenant. Whether or not the mortgagor covenanted to pay rent to the landlord and whether or not for a period of time he actually paid the rent is immaterial.

Dallas, C. J., delivering the judgment of ten judges in *Williams v. Bosanquet*(1), said:—

“there is privity of estate, if legal possession, that is, acceptance of the thing assigned by acceptance of the assignment, be equivalent to actual entry, which it is, if there be justness in the observations already made; and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee: it is, therefore, a contract between the lessor and the assignee, that is, in this case, between the plaintiff and the defendants.”

There is, therefore, no need to discuss at length the vexed question as to whether the English conception of privity of estate exists or not in Indian law. The doctrine of privity of contract is certainly a part of Indian law.

On behalf of the respondents reliance was placed upon the decision of the Judicial Committee of the Privy Council in *Jamna Das v. Pandit Ram Autar Pande*(2). But this has no application, for there was certainly no covenant between the original mortgagor and the original mortgagee. They also relied on the Privy Council decision in *Nanku Prasad Singh v. Kamta Prasad Singh*(3) and the question for determination was whether the purchaser of a mortgaged property from the mortgagor became, by retaining part of the purchase price to enable him to pay off the mortgage, personally liable to discharge

(1) (1819) 1 B. & B. 238; 129 E. R. 714, 723.

(2) (1911) L. R. 39 Ind. App. 7.

(3) (1922) 28 Cal. W. N. 771, P. C.



the mortgage debt. In this case there was certainly no privity of contract between the purchasers of the equity of redemption and the mortgagee. I agree with the argument of Mr. Das that this is a case in which the mortgagee has become a party to the original lease, and he has come in voluntarily and not by operation of law. The landlord is not seeking to make the mortgagee liable on the terms of the mortgage but to make him liable on the terms of the lease and consequently he is liable to a personal decree when the exercise of the charge by hypothecation has failed to satisfy the amount of the mortgage decree.

For these reasons I am of opinion that the refusal of such decree by the Subordinate Judge was erroneous and I would reverse his decision and pass a decree against the Jagadamba Loan Company, Limited, for the dues in respect of the six years preceding the institution of the suit with costs throughout to be paid by the Jagadamba Loan Company, Limited.

FAZL ALI, J.—I agree.

*Appeal allowed.*

S. A. K.

## APPELLATE CIVIL.

*Before Dharle and Manohar Lall, JJ.*

NRISINGHA CHARAN NANDY CHOUDHURY

*v.*

TRIGUNAND JHA KHOWARE.\*

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PRASAD  
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*v.*  
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1938.

January, 31.  
March 22.

*Limitation Act, 1908 (Act IX of 1908), section 5—mistaken advice given by legal practitioner, how far constitutes "sufficient cause"—refusal by lower appellate court to*

\*Appeal from Appellate Decree no. 797 of 1936, from a decision of Rai Bahadur Satish Chandra Mukharji, District Judge of Santal Parganas, dated the 24th August, 1936, affirming a decision of Rai Bahadur Bishundev Narayan Singh, Subordinate Judge of Deoghar, dated the 29th March, 1932.