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if the auction-purchaser were relegated to a suit for partition and the plaintiff now put into possession, it is desirable that execution in this case should be stayed. I, therefore, agree that the decree of the lower Court, with the amendment of the word " half share" into "undivided share," should be allowed to stand, and that there should be a stay on the terms proposed by my Lord, the Chief Justice.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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March 5.

VISHVESHWAR VIGHNESHWAR SHASTRI (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* MAHABLESHWAR SUBBA BHATTA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 7), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sections 6, clause (b), *109 and 111 clause* (g)—*Lessor and lessee—Transfer of lessor's interest—Breach of condition prior to the transfer—Right to enforce forfeiture by the transferee.*

A *mulgeni* lease provided that the lessee was not to alienate the property leased. The lessee committed a breach of the condition by sale of his rights under the lease to defendant No. 2 in 1908. In 1911, the plaintiff purchased the landlord's rights from the lessor who had not given the lessee notice of his intention to enforce the forfeiture before the transfer. The plaintiff having sued to recover possession of the property on breach of the condition, defendant No. 2 contended that the plaintiff could not take advantage of the breach of condition incurred before the assignment in his favour,

Held, disallowing the contention, that the plaintiff was entitled to recover possession of the property from defendant No. 2.

APPEAL under the Letters Patent against the decision of Shah J. in Second Appeal No 1018 of 1914, preferred against the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by J. A. Saldanha, Subordinate Judge at Kumta.

*Appeal under the Letters Patent, No. 39 of 1916.

Suit to recover possession.

The plaintiff sued to recover possession of his 5/6th share in the plaint property. That share originally belonged to the family of defendants Nos. 3 to 7. On November 30, 1896, defendant No. 4, manager of the family of defendants Nos. 3 to 7, executed a *mulgeni* lease of their share in favour of defendant No. 1. The lease contained a covenant that if the lessee alienated his right by way of mortgage, sale, &c., the lease would stand cancelled and the lessor would be entitled to recover possession of the lands.

In December 1908, defendant No. 1 committed a breach of the covenant by selling his rights under the lease to defendant No. 2. Notwithstanding this defendants Nos. 3 to 7 did not proceed to enforce the forfeiture clause.

On December 17, 1911, the plaintiff purchased the landlord's rights in the lands from defendants Nos. 3 to 7. He then gave a notice to defendants Nos. 1 and 2 to deliver possession of the lands as they had committed a breach of the condition of the lease. The defendants having failed to comply with the notice, the plainitff sued for possession.

Defendant No. 2 contended that the sale to the plaintiff was not genuine ; that the lessors had not retained the right to recover possession of the lands under the *mulgeni* lease ; and that the plaintiff could not take advantage of the breach of condition of the lease.

The Subordinate Judge held that by the sale to defendant No. 2, the lessee had broken the condition of the lease and that it enabled the plaintiff to take advantage of the forfeiture clause and to determine the lease. He, therefore, allowed the plaintiff's claim.

On appeal, the District Judge confirmed the decree.

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Defendant No. 2 preferred a Second Appeal. It was heard by Shah J. on the 13th March 1916 when his Lordship delivered the following judgment :—

SHAH, J. :—The plaintiff in this case sues to recover possession of 5/6th portion of the land in suit. He claims to have purchased the landlord's rights in this land by a deed, dated the 17th of December 1911, and he relies upon the forfeiture of the tenancy resulting from the breach of a condition of the *mulgeni* lease which was created by his vendors in favour of the predecessor-in-title of defendant No. 2 on the 30th of November 1896. That *mulgeni* lease was not for any agricultural purpose and it was a condition of that lease that the lessee was not to alienate or permit to be alienated, by way of mortgage sale or in any other like manner, the property leased. Defendant No. 2 claims to have purchased all the rights under this *mulgeni* lease ; and the contest in this litigation is principally between the plaintiff and defendant No. 2. Both the lower Courts have held that there was a breach of this condition inasmuch as there was a sale of the *mulgeni* rights in December 1908 in favour of defendant No. 2. On that footing there has been a decree in favour of the plaintiff.

The present appeal is preferred by defendant No. 2, and two points have been urged on his behalf : first, that the plaintiff as transferee cannot take advantage of the breach of a condition of the lease, which took place before the assignment in his favour, and, secondly, that the notice showing the intention to determine the lease is not sufficient in law.

As regards the first point it seems to me that under section 109 of the Transfer of Property Act the transferee, in the absence of a contract to the contrary, would possess all the rights of the lessor, and under section 111,

clause (*g*) the lease would determine by forfeiture resulting from the breach of an express condition on the part of the tenant, the transferee from the landlord having shown his intention to determine the lease by a notice. In the present case there is no doubt about the condition and the breach of that condition; and there can be no doubt under the terms of the assignment in favour of the plaintiff that he was to have the same rights as his vendors for the purpose of enforcing forfeiture against defendant No. 2. It is needless to refer to certain English cases which were cited by the learned pleader for the appellant, as under the provisions of the Transfer of Property Act it is clear that they would have no application to the present case.

In connection with this point it is urged that under section 6 of the Transfer of Property Act the mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of property affected thereby. In the present case it is quite clear that what is transferred is not a mere right of re-entry, but the whole of the landlord's interest in the land, and the transfer is not in favour of any one except the owner of the property affected thereby. It follows, therefore, that there has been a forfeiture of the *mulgeni* lease in this case and that the plaintiff is entitled to enforce the forfeiture.

As regards the point of notice, it was not suggested in the trial Court, and though it was mentioned in the memorandum of appeal to the lower appellate Court, it does not appear to have been urged as there is no reference to the point in the judgment. Besides it seems to me that there is no substance whatever in that point. The notice was given by the plaintiff who represented the whole of the landlord's interest except that of defendant No. 7, and the notice was in respect of the whole interest. The mere fact that defendant No. 7 did

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not join in the notice does not appear to me to render the notice invalid or inadequate in any way.

The result, therefore, is that both the points urged in support of the appeal fail and the decree of the lower appellate Court is affirmed with costs.

There will be only one set of costs.

Defendant No. 2 appealed under the Letters Patent.

Bahadurji, with *V. R. Sirur*, for the appellant :— We submit that the plaintiff-respondent cannot take advantage of a forfeiture incurred before the assignment in his favour. This is a good proposition of law according to the common law of England : see Halsbury's Laws of England, Vol. XVIII, p. 535 ; *Hunt* v. *Bishop*[1] ; *Cohen* v. *Tannar*[2].

Rules of English Common Law are applicable to India as rules of equity and good conscience : see *Waghela Rajsanji* v. *Shekh Masludin*[3]. Therefore unless the Transfer of Property Act enacts to the contrary, the Common Law would prevail.

All that section 6, clause (*b*) of the Transfer of Property Act enacts is that a right of re-entry cannot be transferred away from the right of ownership, and nothing more. It cannot be used as an authority for the proposition that a right of re-entry for a condition broken is assignable, as the right is in the nature of a right to sue.

Section 109 of the Transfer of Property Act cannot be pressed to support the contention, for a right which cannot be transferred cannot vest in the transferee. Compare, Conveyancing and Law of Property Act, 1881 (44 & 45, Vic. C. 41, S. 10), which is similar to

[1] (1853) 8 Exch. 675.

[2] [1900] 2 Q. B. 609.

[3] (1887) L. R. 14 I. A. 89 at p. 96.

section 109 of the Transfer of Property Act. It was held that a right of re-entry for a breach prior to the assignment could not be conveyed along with the reversion. That is why it had to be specifically enacted in Act 1 & 2, George V, 1911, C. 37, S. 2, which is applicable to leases executed after the passing of the Statute.

Nor does section 111, clause (*g*) of the Transfer of Property Act help the respondents, for all that it lays down is that the right of re-entry which could be enforced by the lessor and his heirs alone according to the old law, is available also to the assignee : see Halsbury's Laws of England, Vol. XVIII, p. 534.

S. V. Palekar, for respondent No. 1 :—The right in question can be assigned under the Transfer of Property Act. I rely on sections 6, 109 and 111 (*g*). In any case there is nothing which prohibits such a transfer. Statute of 1911 is in favour of an interpretation contended by me.

Nilkanth Atmaram, for respondent No. 2.

BEAMAN, J :—I doubt whether the true point was present to the mind of the learned Judge below. He appears to have thought that the question could be answered from the language of sections 6, clause (*b*), 109 and 111, clause (*g*) of the Transfer of Property Act. Even were that so I should still doubt whether the answer he has given is right. Section 6, clause (*b*), is no more than a special case of a mere right to sue. For if the mere right of re-entry on breach of condition subsequent is transferred, without the reversion, the person having it could only use it for the purpose of a suit to enforce forfeiture, without gaining any right or interest in the property so demised and forfeited. Section 109 seems to me to have no bearing on the point. Section 111, clause (*g*), need not mean any more than that the lessor must give notice of intention to enforce forfeiture, or if

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the breach has occurred after transfer of the reversion, the transferee must give notice. That is how I read it, and if I am right, it leaves our point untouched.

Put in the simplest and fewest words it is this : does the transfer of the reversion carry with it the right to enforce forfeiture for breach of condition prior to the transfer? The law in England was well settled, and seemingly unquestioned that it did not (*Hunt* v. *Bhishop*[1] ; *Cohen* v. *Tannar*)[2], till by the Act 1 & 2 Geo. V, C. 37, statutory validity was given to the view taken by the learned Judge below.

I am not aware of any corresponding amendment of the Transfer of Property Act, altering the law in India. Speaking generally, it is safe to say that with few exceptions the Transfer of Property Act is a codified expression of the English law. Presumably, then, it meant to give effect to what was the settled law of England on this point, up to 1911.

In the absence of Statutory provision, and on general principle, I own I should find it hard to come to any other conclusion than that which was so often stated and affirmed in the English Courts.

The facts with which we have to deal are : (1) that there was a breach of condition three years before this transfer ; (2) that breach of condition would undoubtedly have worked a forfeiture ; (3) the lessor did not waive the breach ; (4) the lessor had never given the lessee notice of his intention to enforce the forfeiture, before the transfer.

What then was transferred? The reversion primariby. No one disputes it, or contends that there was anything illegal or even questionable in such an assignment. As between the transferor and transferee of the

(1) (1853) 8 Exch. 675. (2) (1900) 69 L.J. Q. B. 904.

reversion no question arises here, and we have nothing to do with it. But as between the lessor and the lessee the case is different. They had entered into a contract of leasing on conditions. That contract had been broken by the lessee. But before the penalty could be enforced the law required the lessor to give notice of his intention to enforce it. This he had not done. Admittedly till he had (or if the law permits this, till his transferee had done so), no penalty could be enforced, and the contract would be subsisting. What the lessor does is to transfer the property demised to the plaintiff setting forth the prior contract and the fact that it had been broken, so, in other words, leaving the transferee to sue on the breach and enforce the penalty. It is easy to see that this could not be done in the case of an ordinary contract. While such a contract might be assigned before breach, it certainly could not afterwards, for then what is assigned is only the right to sue for damages, and this is a mere right to sue whether or not the transferee is to have what he can get by way of damages after suit. Similarly in this case, the fact that the transferee is to have the property demised as soon as he can enforce the penalty by suit against the lessee for breach of condition prior to his transfer seems to me to make no difference. All that the transferor could assign was the reversion since he had not given notice of his intention to enforce forfeiture on breach of condition already made. But it is argued he might also transfer the right he had to give this notice and thereupon to sue on the contract and enforce the penalty. That is the very point. Could he? For what is this, thus isolated, but a mere right to sue? How can it be distinguished in any essential from the assignment of a contract already broken, under which the only surviving right is the right to sue for damages? This right, it is to be observed, is quite distinct from

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and must not be confounded with the right to the reversion as upon the footing of an existing lease and for that reason it has to be examined by itself after analysis has revealed the true nature of the transfer as a whole. It is thus shown, I think, that the transfer is a transfer of the reversion implying the actual subsistence of the lease, and therefore that the transferee must wait for a breach of condition subsequent to the transfer before he can sue to enforce a forfeiture, or as between transferor, transferee and lessee, it is no more than the transfer by the transferor to the transferee of a right to sue the lessee and turn him out. In the latter case such a transfer is clearly prohibited by the Act, and in the former the transferee would have no cause of action on the breach prior to transfer.

But since the law of England has been altered, and the Statute of 1911 provides in terms for such a case as this, I see no reason why we should not in such matters make the administration of the law as a whole as systematic as possible. It would be difficult to say that the Transfer of Property Act, as it stands, in express words, prohibits the plaintiff from suing here, and although as I have shown a reference to general principles and the spirit of the Act brings out that conclusion, I do not object to accepting the statutory modification of those general principles which has taken place in England. It is only upon that ground that I could bring myself to confirm the decree of the lower Court.

Appeal dismissed with all costs.

HEATON, J. :—My opinion also is that the decree made by Shah J. should be confirmed. The only ground on which that decree is assailed is that the lessor could not transfer his right to put an end to the lease, this right being founded on a breach of a condition of the lease which happened prior to the transfer. The

point is one which was taken for the first time in second appeal; it was not argued in the trial Court or in the Court of first appeal. It is one which invites, and for its satisfactory elucidation in my opinion requires, an investigation of the facts from an altogether new point of view. We cannot make such an investigation here nor ought we to remand the case. I am, therefore, not satisfied that the transfer by the lessor to the plaintiff was illegal in so far as it comprised a transfer of a right to sue. Indeed, though my learned brother takes the contrary view I am rather disposed to think that the transfer in this case is one which is exactly covered by the words of section 109 of the Transfer of Property Act.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

CHANDRAPPA ALIAS APPASAHEB BASAWANTRAO DESAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BHIMA BIN DASSAPPA MANIKERI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1918. *March* 12.

Grant of land—Deshgat Vatan—Grant for peons' services—Resumption of grant—Grant burdened with service, prima facie *irresumable—Grant of office to which lands are annexed by way of remuneration*, prima facie *resumable—Burden of proof.*

In the Bombay Presidency where ancient grants of lands are sought to be resumed, all grants of the kind for the purpose of applying the law of resumption fall into two main categories: (1) grants of lands burdened with service, and (2) grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume lands. Grants under

* Second Appeal No. 40 of 1917.