

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

1938
September 6

SULEMAN HAJI AHMED OOMER (ORIGINAL PLAINTIFF), APPELLANT v.
DARABSHAW PIROJSHAW DUBASH (ORIGINAL DEFENDANT), RESPONDENT.*

Transfer of Property Act (IV of 1882), s. 115—Surrender of head-lease to obtain a new lease—Benefits of under-lease in whom vested.

On the true construction of s. 115 of the Transfer of Property Act, when a lessee, who has previously granted an under-lease, surrenders his head-lease for the purpose of obtaining a new lease, the benefits of the contracts in and the right to rent under the under-leases do not pass to the lessor but continue to vest in the new lessee.

SUIT for specific performance.

In 1933 the National Bank of India leased to the plaintiff the suit properties with an option to purchase. In 1935 the lessee granted an under-lease of a portion of the properties to a Japanese firm. On June 10, 1936, the plaintiff agreed to assign his lease with the option to purchase to a Mr. and Mrs. Pandia to enable them to purchase the freehold from the Bank and to regrant him a lease of the said properties for 999 years. On June 29, 1936, the plaintiff agreed to demise or procure Mr. and Mrs. Pandia to demise the suit properties to the defendant. Clause 3 of the agreement was in these terms:—

“The said properties are subject to two leases dated the 17th day of September 1935 and made between the lessor and Messrs. Mitsubishi Shoji Kaisha Ltd. The lessor declares that they are valid and subsisting leases. The lessee shall take the properties subject to the said leases contents whereof he has notice of.”

On February 4, 1937, the plaintiff surrendered his lease of 1933 to the Pandias who purchased the freehold from the Bank and obtained from the Pandias a lease of the suit premises for a period of 999 years. Two draft leases from the Pandias to the defendant were prepared by the plaintiff.

*O. C. J. Appeal No. 27 of 1938; Suit No. 1634 of 1937.

Messrs. Payne & Co. acting for the Pandias deleted from the drafts the words set out below and refused to execute the leases if those words were retained. The plaintiff then offered to assign to the defendant by a separate document such benefits as he still had in the lease to the Japanese firm.

The defendant having refused to take the leases without the words deleted by Payne & Co. the plaintiff filed this suit.

The main issue in the suit turned upon whether the defendant was entitled to have in the habendum of the lease sought to be specifically performed the words "together with the full benefit of the rents, covenants and other benefits and advantages reserved by and subject to the obligations contained in the Indenture of lease dated 17th September 1935".

To determine this issue it became necessary to decide the proper construction of s. 115 of the Transfer of Property Act, 1882, and it is only on this point that this case is reported.

The suit was heard by Kania J. who on April 7, 1938, delivered an oral Judgment dismissing the suit holding (1) that s. 115 of the Transfer of Property Act had no application to the facts of the case, (2) that the plaintiff had failed to establish that he was ready and willing and able to carry out his part of the contract.

The plaintiff appealed.

Sir Jamshedji Kanga, with *F. J. Coltman*, *V. F. Taraporewala* and *R. J. Colah*, for the appellant.

J. H. Vakeel, with *M. M. Jhaveri*, for the respondent.

BEAUMONT C. J. [His Lordship after setting out the facts of the case proceeded:] The only question which we have to decide, as it seems to me, is whether the defendant is entitled to have the words (set out above). If the benefit of the leases to the Japanese firm remains vested in the

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Pandias, undoubtedly the defendant will not get the benefit of those leases, as they are entitled to do under their agreement with the plaintiff; but if, on the other hand, the benefit of those leases is vested in the plaintiff, the plaintiff offered in the correspondence before action to assign such benefit as he has to the defendant by an independent document to which the Pandias would not be parties, so that there will be no difficulty provided that the benefit of the under-leases is not vested in the Pandias.

Now the question in whom the benefit of those under-leases is vested seems to me to turn on the proper construction of s. 115 of the Transfer of Property Act. That section provides that :—

“The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease . . .”

So that under that part of the section the under-lease to the Japanese firm is not prejudiced by the surrender of the head-lease. Then the section goes on to say :—

“ . . . but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.”

So that where you have a surrender of a head-lease with no provision as to the grant of a new lease, the head-lease is obliterated and direct contact is established between the under-lessee and the original lessor. But that position is only “unless the surrender is made for the purpose of obtaining a new lease,” and the section does not provide what is to happen in that excepted case. In my opinion, on the true construction of the section, the only legitimate inference is that, in that event, the benefit of the contracts in, and the right to the rent under, the under-lease must vest in the new lessee. It seems to me that there is nobody else in whom such benefit and right can vest. The rent in the under-lease which has not been affected by the surrender must be payable to somebody; if it is not payable to the

lessor in the excepted case, it must be payable to the new lessee. Now, in the present case, in my opinion, it is quite clear that the original lease of 1933 to the plaintiff was surrendered by him to the Pandias for the purpose of obtaining a new lease ; that was the agreement of June 10, 1936. Under the draft leases submitted by the plaintiff the leases to the plaintiff are to be surrendered and fresh leases granted to the defendant, and it is clear that that is part of the original arrangement for the surrender of the lease and the grant of a new lease, which under the agreement between the parties might be to the plaintiff or to his nominee. On the execution of leases in the terms of the drafts the benefit of the under-leases will become vested automatically in the defendant as the person to whom the new lease was granted and no assignment of any such benefit to anybody is required. In my view, therefore, the plaintiff is entitled to specific performance of the agreement of June 29, 1936, by requiring the defendant to execute the draft leases in the terms of drafts C and D annexed to the plaint without the words which are referred to in the relief claimed by the plaintiff and which I have previously read. The learned Judge took a different view of the construction of s. 115 of the Transfer of Property Act, though I do not gather in whom he considers that the benefit of these sub-leases is now vested. The learned Judge also held that, having regard to the correspondence, the plaintiff was not ready and willing to carry out his contract. But I have some difficulty in understanding that part of the judgment because the plaintiff is asking in his plaint for specific performance by the execution of the document in this particular form. Therefore, he is obviously offering in the plaint to execute a document in that form, and in my view it is irrelevant to point out that at certain periods before the plaint was delivered he was not ready and willing to carry out what he is offering to carry out in the plaint. I think that the plaintiff is entitled to the relief asked for in

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prayers A, B and C. There will be liberty for the defendant to apply in case the plaintiff does not carry out his part of the bargain.

RANGNEKAR J. The point involved in the case is really short and has been fully dealt with in the judgment just delivered, but I propose to state my view as to the meaning of s. 115 of the Transfer of Property Act. The plain meaning of the section is that when a lessee has given a sub-lease and thereafter surrenders the head-lease to the lessor, the position of the sub-lessee remains unaffected, and he becomes the lessee of the original lessor on the same terms as in the sub-lease. That is the ordinary rule. If, however, the lessee surrenders the head-lease for the purpose of obtaining a new lease, the sub-lessee continues as before to hold under the lessee. This is the only way in which the latter part of the section can be given effect to, unless one were to entirely ignore the exception introduced there by the words "unless the surrender is made . . . etc.". The exception implies that the ordinary rule is not to be followed when the surrender is made for the purpose of obtaining a new lease.

Now, apart from the fact that I am unable to see in the agreement of June 29, 1936, any obligation on the part of the plaintiff to retain the disputed words in the drafts C and D, which he tendered to the defendant, it was nobody's case that the defendant was not entitled to the benefit of the sub-leases in this case. That benefit must exist somewhere. It either existed in the Pandias or it existed in the plaintiff, or it must now, under the proposed lease, go to the defendant. It is nobody's case that it vested in the Pandias. At any rate, there is nothing in any of the documents, which were put in in the case, to show that the Pandias ever claimed that after the surrender in their favour by the plaintiff they were entitled to the benefit of the sub-leases. The plaintiff made it clear at the outset that he was not entitled

to the benefit of the sub-leases, and in fact the learned Judge in one part of the judgment says that it is common ground that the benefit of the sub-leases should go to the defendant. That being so, it seems to me it is a great pity that the parties could not agree upon the drafts, the responsibility for which, in my opinion, lies on the attitude taken up by the Pandias. I agree that the appeal must be allowed.

PER CURIAM. Appeal allowed. Plaintiff entitled to the relief asked for in prayers A, B and C of the plaint. Liberty to the defendant to apply in case the plaintiff does not carry out his part of the bargain. Interest to run at six per cent. from September 18, 1936. Conveyance to be executed within one month with liberty to extend the time. Plaintiff will be entitled to the costs of the suit as well as of the appeal from the defendant. Counterclaim dismissed with costs. Cross-objections also dismissed with costs. Security of Rs. 15,000 furnished by the appellant to be returned to his attorneys.

Attorneys for appellant: Messrs. *Ardeshir, Hornusji, Dinshaw & Co.*

Attorneys for respondent: Messrs. *Gagrat & Co.*

Appeal allowed.

N. K. A.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice.

JANARDAN GOVIND MAHALE (ORIGINAL PLAINTIFF), APPELLANT v.
VENKATESH VAMAN SHENVI AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

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Indian Evidence Act (I of 1872), s. 92, prov. (1)—Partition deed—Land in a particular survey number giving correct description as to acreage and assessment assigned to plaintiff—Defendant contending that inclusion of suit portion in the number was a mistake known to all parties—Oral evidence admissible to prove common mistake.

*Second Appeal No. 208 of 1936.

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