

*Privy Council Appeal No. 107 of 1928.*

Hunsraj and others - - - - - *Appellants*

*v.*

Bejoy Lal Seal and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 12TH DECEMBER, 1929.

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*Present at the Hearing :*

LORD ATKIN.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR JOHN WALLIS.]

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This is an appeal from a decree of the High Court of Calcutta, reversing the decree of Page J. in a suit tried before him under the ordinary original jurisdiction of the Court.

The suit was brought to enforce a forfeiture for an alleged breach of a covenant against assignment contained in a lease for a term of 61 years of premises in Halliday Street, Calcutta, made on the 23rd August, 1910. On the 7th May, 1923, the first and second defendants, who are the owners of the leasehold interest, executed a mortgage by way of sub-lease of the leasehold premises, sub-letting them for the unexpired residue of the term, and on the 25th of January, 1924, the plaintiffs, who are the representatives of the original lessor, instituted the present suit to enforce a forfeiture.

Both the Courts below held, following the English decisions, that an absolute demise by sub-lease for the unexpired residue of the term would operate as an assignment of the term and be a breach of a covenant against assignment, but the Trial Judge

held that, under the terms of the mortgage of the 7th May, 1923, there was not such an absolute demise, whereas the Appellate Bench held that there was, and consequently that the plaintiffs were entitled to enforce the forfeiture. They accordingly allowed the appeal and gave the plaintiffs a decree.

Had the usual practice in England been followed of creating a mortgage of this kind by granting a sub-lease for a few days less than the unexpired residue of the term, the lessees as sub-lessors would not have parted with their reversion, and no question of assignment could have arisen.

The question having arisen in India, it has, of course, to be decided in accordance with the law, not of England, but of India; it does not, however, seem to have occurred to anyone in the Courts below to see, in the first place, before resorting to English decisions, whether under the law of landlord and tenant in India a sub-lease by a lessee for the unexpired residue of the term operates as an assignment of the term. That law is to be found in the Transfer of Property Act, 1882, which has now been in force for nearly half a century. Though founded on English law, and drafted in the first instance by eminent lawyers in England, it has only applied the English law in so far as it was considered applicable to India. It is not surprising to find that the rule, arising out of the special conditions of land tenure in England, that a conveyance to operate as a lease must reserve a reversion to the lessor finds no place in the Act. In India a lessor is expressly empowered to grant a lease in perpetuity, and is not obliged for that purpose, as in England, to grant a lease for lives, or for a term, with a covenant for perpetual renewal; and, similarly, a lessee as sub-lessor can create a sub-lease for the unexpired residue of the term with the same incidents as any other sub-lease.

Leases in perpetuity are expressly included in the definition of "lease" in Section 105 of the Transfer of Property Act.

"A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

"The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

The provision in Section 108 (j) that, in the absence of a contract to the contrary, a lessee may grant a sub-lease for the unexpired residue of the term in the same way as a sub-lease for any shorter term is equally clear:—

"(j) 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 may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease."

There is therefore no ground for the contention that in India a sub-lease for the unexpired residue of the term operates otherwise than as a sub-lease.

It only remains to be considered whether in this lease there is any contract to the contrary. The fifth and sixth covenants of the lessees with the lessor are as follows :—

“ *Fifth.*—That the said lessees shall be at liberty or shall have the full power and authority without having recourse to previously securing to that effect the consent of the said Lessor written or verbal to underlet the said demised land and the buildings, structures, sheds, godowns, stables or any portion thereof to be so erected and built by them as aforesaid.

“ *Sixth.*—The said lessees shall have no power save amongst themselves as hereinafter mentioned to assign, transfer or in any way to alienate their right, title and interest upon the demised land and the buildings so to be erected by them thereon as aforesaid created by virtue of these presents PROVIDED nevertheless that neither of the said lessees shall be entitled to exercise the right of transfer or assignment among themselves as is hereinbefore reserved until a competent engineer to be approved by the lessor certifies that the construction of the buildings so to be erected on the demised lands as aforesaid is completed at a cost of not less than ten thousand rupees as is hereinbefore provided.

The covenant against assignment, in their Lordships' opinion is clearly subject to the express power to underlet. All that the lessees have done in this case is to underlet, and no question of forfeiture arises.

This disposes of the appeal, and their Lordships are not called upon to express any opinion on the question as to which the Courts below differed, or on the contention raised for the first time before their Lordships by Mr. Upjohn, that a covenant, expressed as here, that the lessees “ shall have no power ” to assign has merely the effect of rendering such assignments void, and cannot occasion a breach by the lessees “ of the covenants, conditions, agreements herein contained and on their part to be kept observed and performed according to the true intent and meaning of these presents ” so as to involve a forfeiture.

In the result their Lordships will humbly advise His Majesty that the appeal be allowed and the suit dismissed with costs throughout.

In the Privy Council.

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HUNSRAJ AND OTHERS

v.

BEJOY LAL SEAL AND OTHERS.

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DELIVERED BY SIR JOHN WALLIS.

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