ORIGINAL CIVIL.

Before Mr. Justice Starling

SARAFALI TYABALI, PLAINTIFF, *v.* SUBRA'YA BATERA'YA AND NAROTAMDA'S CA'NDA'S, DEFENDANTS.* 1895. *September* 13, 15, 17.

Lease—Assignment—What amounts to—Terms appropriate to freehold and fazendári land—Forfeiture by assignment without licence—Waiver of forfeiture, what amounts to—Result of waiver of forfeiture—Damages on forfeiture for breach of covenant to repair.

An assignment by way of mortgage of leasehold property in terms appropriate to fazendári property, the lease and mesne assignments being handed over to the mortgagee on execution of the deed, and a subsequent assignment of the equity of redemption of the same property in terms appropriate to freehold property will, in the absence of any circumstances to lead the assignees to believe that the assignor had further interest in the property, operate as assignments of the lease.

Where there is a proviso in a lease for forfeiture on assignment without previous licence of the lessor, the acceptance by the lessor of rent or insurance premia from the assignee without license or the entering into an agreement with him in respect of repairs operates as a waiver of any and all causes of forfeiture of which the lessor is at the time aware.

Where assignments of leaseholds are invalid as being in breach of a covenant not to assign without previous license and so causing forfeiture of the lease, but are valid in all other respects, on waiver of the forfeiture the assignments become operative, and those taking under them become assignees of the lease with the consent of the lessor, and are subject to all the liabilities of such assignees.

The rule in *Joyner* v. *Weeks*(1) that when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left, applies where a term has ceased by forfeiture as well as where it has expired by efflux of time.

BY a lease dated the 16th February, 1891, the plaintiff and his two brothers Mahomedali and Esofali demised to one Harirám Deoji and another certain land and premises in Bombay for the term of ninety-nine years from the 1st October, 1890, at the quarterly rent of Rs. 525 payable in advance by four quarterly payments in each year.

The lease contained (*inter alia*) the following covenants by the lessees, their executors, administrators and assigns:—

(1) to pay the rent on the dates specified;

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(1) (1891) 2 Q. B. 31 at p. 43.

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(2) within two months from the date of the lease to repair thoroughly the old chawls Nos. 1, 2 and 3 marked in the plan annexed thereto, and throughout the said term at their own expense well and sufficiently repair, maintain and keep the said premises and all fixtures and additions thereto in good and substantial repair and condition;

(3) to insure and to keep the said premises insured against loss or damage by fire;

(4) not to assign, mortgage and charge the said premises, or any part thereof, without the previous license in writing of the lessors, their heirs or assigns;

(5) at the expiration or sooner determination of the said term to deliver up the said premises and all new fixtures and additions thereto in good and substantial condition and in such state and condition as should be consistent with the due performance of the said several covenants.

The said lease also provided that if the rent should be in arrears, or if and whenever the lessees, their executors, &c., should assign, mortgage or charge the said premises without such license as aforesaid, and whenever there should be a breach of any of the covenants aforesaid, the lessors, their heirs and assigns might at any time during the said term re-enter upon the said premises, and thereupon the term of ninety-nine years should absolutely determine.

In the year 1893 the said lease was with the lessors' consent assigned to one Shetiba Enkati Silam.

On the 28th September, 1893, the said Shetiba Enkati Silam mortgaged the said premises to the second defendant (Narotamdás Cándás) for Rs. 7,000. The mortgage-deed contained no mention of the lease, and the mortgage was made without the knowledge or consent of the lessors. The lease and mesne assignments were, however, handed over to the second defendant on execution of the deed.

On the 2nd February, 1894, the said Shetiba Enkati Silam assigned the equity of redemption in the said leasehold to the

first defendant (Subráya Bateráya) without the knowledge and consent of the lessors.

The plaint alleged that the rent due under the said lease having fallen into arrear, and Shetiba Enkati having neglected to repair and insure the premises, the lessors through their attorneys sent him a letter on the 21st April, 1894, setting forth his breaches of the covenants in the lease and giving him notice that they intended to exercise their right of re-entry in accordance with the terms of the lease and calling upon him to give up possession within eight days from the service of such notice, &c.

On the same day the lessors having been informed of the mortgage to the second defendant sent him a notice stating that they did not in any way recognize him as having any interest in the property, as the mortgage to him was made in breach of covenant and without their consent.

On the 25th April, 1894, Shetiba Enkati Silam's solicitors sent a letter to the lessors informing them that he had assigned the said leasehold to the first defendant (Subráya), and on the same day they sent another letter to the second defendant (Narotamdás) calling upon him forthwith to comply with the covenants in the lease, and adding "in the event of your failing to do so, and if any steps are taken by the fazendárs against our client in respect thereof, our client will hold you responsible for the costs and consequences."

On the 27th April, 1894, the solicitors for the first defendant wrote to the lessors' solicitors tendering the plaintiff Rs. 1,050 "being the ground rent now due by him together with Rs. 37-8, the premium paid by your client." On the 28th April the lessors' solicitor wrote a reply refusing to accept the amount tendered, unless the covenants of the lease in respect to repairs of the property were forthwith complied with or unless some guarantee was given that the premises would be repaired. A correspondence subsequently took place, the result of which was that the first defendant paid to the lessors the rent then claimed by them and undertook to do the necessary repairs after the monsoon of 1894.

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On the 16th October, 1894, by a partition deed executed between the lessors the said premises subject to the said lease became vested in the plaintiff.

The plaintiff filed this suit on the 10th June, 1895. He alleged that the repairs had not been effected and that the first defendant had committed a further breach of covenant in not having paid the rent as provided by the lease. He claimed Rs. 1,050 as due for rent. He also alleged that the first defendant had failed to insure the premises, and he claimed Rs. 37-8 as the sum paid by himself for insurance.

The following paragraph of the plaint sets forth the plaintiff's case as against the second defendant :—

"The plaintiff is informed and believes that the said second defendant has been in possession and receipt of the rents and profits of the said premises since the date of the alleged mortgage to him as aforesaid, and the plaintiff says that the second defendant is liable to pay damages, as hereinafter prayed, for the non-repair of the said premises and the sum hereinafter claimed for the insurance thereof. The plaintiff will also contend that the said alleged mortgage to the second defendant is void and of no effect as against the plaintiff."

The plaint prayed for a declaration that the lease had been forfeited and that the mortgage to the second defendant was void and inoperative as against the plaintiff; that the defendants should give up possession, and that they or either of them should pay Rs. 1,050 due as rent on the 1st April, 1895 and such further sums as might accrue due up to the date of re-entry. It also prayed for damages for non-repair and for Rs. 37-8 paid for insurance charges, &c.

The following issues were raised at the hearing :—

(1) Whether as against the first defendant there has been a forfeiture of the lease?

(2) Whether the plaintiff has not waived such forfeitnre, if any?

(3) Whether the first defendant is not entitled equitably to be relieved from the effect of such forfeiture, if any, and, if so, on what terms?

(4) Whether the plaintiff is entitled to recover from the second defendant the sum of Rs. 1,050, or any further sum, as prayed in clause (*d*) of prayer?

(5) Whether the plaintiff is entitled to recover from the second defendant the sum of Rs. 37-8 mentioned in clause (*e*) of prayer?

(6) Whether the second defendant is under any obligation to the plaintiff to repair the premises?

(7) Whether the plaintiff is entitled to recover damages from the second defendant for non-repair as claimed in clauses (*f*) and (*g*) of prayer?

(8) Whether the plaintiff is entitled to recover any and what amount of damages from the first defendant?

Russell (with *Macpherson*, Acting Advocate General) for plaintiff:—He cited *Spencer's Case*[1]; *Williams* v. *Bosanquet*[2]; Woodfall's Landlord and Tenant (15th Ed.), pp. 275-76; *Perry* v. *Walker*[3]; Cruise's Digest, Vol. IV, sec. 18; *Beardmore* v. *Wilson*[4]; *Williams* v. *Heales*[5]; Roscoe's Nisi Prius, 693. As to the second defendant's liability, Shepherd's Touchstone, p. 175, note 2; *Aspden* v. *Seddon*[6]; *Pomfret* v. *Ricroft*[7]; *Burnett* v. *Lynch*[8]. As to the duty of the second defendant to see that the covenants of the lease were performed, *Moule* v. *Garrett*[9]; *Pollock* v. *Stacey*[10]. As to damages, *Joyner* v. *Weeks*[11]; *Lepla* v. *Rogers*[12]; Mayne's Damages, (Ed.) p. 261.

Robertson (with *Rivett-Carnac*) for first defendant:—The second defendant is primarily liable. The mortgage to him is in effect an assignment. As to the first defendant, there has been a waiver of forfeiture. In any case the Court will relieve against forfeiture. The plaintiff had notice of the mortgage to the second defendant before the 20th April, 1894. Subsequently to that he received Rs. 3,000 as rent from the first defendant. That is a waiver of forfeiture—Woodfall's Landlord and Tenant, p. 337; see also pp. 343 and 344. The second defendant in his written statement alleges that the mortgage to him was with the consent of the plaintiff. A mortgagee in possession is bound by the covenants of a lease—*Perry* v. *Walker*[13]. Even if he was not in possession he would be bound—*Westerdell* v. *Dale*[14]; *Lucas* v. *Comerford*[15]; *Stone* v. *Evans*[16]. Counsel referred to the Transfer of Property Act (IV of 1882), sec. 76, and Woodfall's Landlord and Tenant, (Ed.) p. 620.

(1) 1 Smith's Leading Cases, p. 252.
(2) 1 Bro. and Bing., 238.
(3) 1 Jur (N. S.), 746.
(4) L. R., 4 C. P., 57.
(5) L. R., 9 C. P., 177.
(6) 1 Ex. D., 496.
(7) 1 Wms. Saund., 565.
(8) 5 B. and C., 589.
(9) L. R. 5 Ex., 132. On app. L. R., 7 Ex., 101.
(10) 9 Q. B., 1033.
(11) (1891) 2 Q. B., 31.
(12) (1893) 1 Q. B., 31.
(13) 1 Jur. (N. S.), 746.
(14) 7 T. R., 312.
(15) 1 Ves. (Jun.), 235.
(16) Peake's Add. Cas., 94.

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Inverarity and *Lowndes* for defendant No. 2:—The plaintiff did not assent in writing to the mortgagee—*In the matter of the Bombay Insurance Company*; *Ex parte Gilbert*(1). The second defendant is not assignee. The plaintiff took rent from the first defendant—*Pollock* v. *Stacey*(2); *Beardmore* v. *Wilson*(3). The second defendant is not liable for the damages claimed. He is only liable to keep the premises in the state of repair in which he had got them—*Doe dem. Dalton* v. *Jones*(4); *Gutteridge* v. *Munyard*(5); *Burdett* v. *Withers*(6); *Stanley* v. *Towgood*(7); *Mantz* v. *Goring*(8); *Mills* v. *East London Union*(9); *Williams* v. *Williams*(10); *Henderson* v. *Thorn*(11); *Baring* v. *Abingdon*(12); *Joyner* v. *Weeks*(13); *Elliott* v. *Johnson*(14).

STARLING, J.:—The plaintiff and his brothers were, in 1891, the owners of a piece of land with four chawls thereon at DeLisle Road, which on the 16th February, 1891, was demised for a term of ninety-nine years to one Harirám Deoji. The lease contained covenants against assignment without the written consent of the lessor, for payment of rent, for repairs and for insurance; and it was provided that on breach of any of these covenants the lessors should be at liberty to re-enter. By divers valid assignments the lease was from time to time assigned, and in 1893 the remainder of the term became vested in one Shetiba Enkati.

On the 28th September, 1893, Shetiba Enkati mortgaged the demised property to the second defendant; and on the 2nd February, 1894, transferred his equity of redemption therein to the first defendant, both transactions being without the consent in writing, or in any other way, of the lessors. These two transactions ought, if done regularly, to have been carried out by an underlease to the second defendant, and an assignment of the term, subject to the underlease, to the first defendant. This has

(1) I. L. R., 16 Bom., 398 at p. 402.
(2) 9 Q. B., 1033.
(3) L. R., 4 C. P., 57.
(4) 4 B. and Ad., 126.
(5) 7 C. and P., 129.
(6) 7 A. and E., 136.
(7) 3 Bing. N. C., 4.
(8) 4 Bing N. C., 451.
(9) L. R., 8 C. P., 79 at p. 87.
(10) L. R., 9 C. P., 659, at p. 666.
(11) (1893) 2 Q. B., 164.
(12) (1892) 2 Ch., 374.
(13) (1891) 2 Q. B., 31.
(14) L. R., 2 Q. B., 120.

not been the case. Hence it is necessary to determine what is the real effect of the transactions which took place.

The mortgage recites that Shetiba under an assignment of leasehold property of the same date as the mortgage was absolutely entitled to the premises in dispute, and it grants, releases, conveys and assures the same unto the second defendant, his heirs, executors, administrators and assigns as if they were what is called fazendári land, subject to redemption. It makes no provision for payment of a rent to the so-called fazendár; all that it does is to provide that the mortgagee is at liberty to credit the mortgagor with the rents of the property after payment of fazendári dues, rates and taxes and proper outgoings. At the time of the execution of this deed the original lease and the mesne assignments were handed to the second defendant.

What, then, is the effect of this transaction? In Cruise's Digest, Vol. IV, sec. 18, p. 88, it is stated that no particular words are necessary for an assignment of a term, and "that give, grant, &c.," are as good and effectual as "assign, &c.," which are the ordinary terms. In *Beardmore* v. *Wilson*[1], it was held that an underlease for the whole remaining portion of the term operates as an assignment of the term; and from the cases cited and acted on therein it appears that an underlease for a term exceeding that of the original lease has the same effect. Seeing, then, that when this mortgage was executed the lease and assignments were handed over to the second defendant, and that there is no evidence to show that there was anything to lead him to believe that Shetiba had any further interest in the premises mortgaged, I consider I am justified, on these authorities, in holding that the mortgage-deed operated as an assignment of the lease.

The deed to the first defendant of the 2nd February, 1894, commences as if it were a conveyance of freehold property, and it grants and conveys the property to the first defendant, his heirs, executors, administrators and assigns, but only to have and to hold the right, title and interest of Shetiba therein, subject to the mortgage of the second defendant. I can see no substantial

(1) L. R., 4 C. P., 57.

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difference between these two deeds, and I must hold that this also operates as an assignment of the lease.

The execution of these deeds, or either of them, without the consent of the lessors operated as a breach of the covenant not to assign without a license in writing, and gave the lessors the right at any time thereafter to re-enter upon the demised premises. On the 21st March, 1894, when the lessors first gave notice to Shetiba with respect to other breaches of covenant, they seem to have been unaware of the latter of these two abovementioned breaches, but they knew of the former, as they sent a letter to the second defendant enclosing a copy of their notice to Shetiba, but apparently only as a warning of what might happen, as they expressly write that they do not recognize the second defendant as having any interest in the property, as the mortgage was made without their written consent. The case in the Privy Council hereinafter cited shows that this protest on the part of the lessors need not be taken into account. Shetiba on the 25th April, 1894, disclaimed all liability on the ground that he had assigned to the first defendant. If on that day the lessors had brought a suit against the first and second defendants for ejectment, and nothing else, there would have been no defence to it, and a suit would have lain against Shetiba for rent and damage for not insuring and non-repair, which he could not have defended, as he was still the assignee of the lease, his two deeds, being made without the written consent of the lessors, not operating in his favour as an assignment so as to relieve him in any way of liability to perform the covenants of the lease.

On the 27th April, however, the first defendant sent to the lessors the amount of rent and fire-insurance premium claimed by them, which they accepted, and thereafter accepted an agreement from him as to the repair of the premises within a certain time, taking from him a deposit of Rs. 500 for the due fulfilment of the conditions. By this act, in my opinion, the lessors waived the forfeiture caused by any and all causes of forfeiture, which they then knew. See *Doe* v. *Pritchard*(1); *Croft* v. *Lumley*(2); *Davenport* v. *Reg*(3). Consequently, the two defend-

(1) 5 B. and Ad., 765. (2) 5 E. and B., 648; 6 H. L. Ca., 672.
(3) 3 Ap. Ca., 115.

ants being entitled to the demised property by assignments were thereafter in the position of assignees of the lease with the consent of the lessors.

On the 16th October, 1894, the plaintiff became the sole owner of the reversion. In June, 1895, rent was again in arrears, and repairs had not been done properly; and on the 6th June the plaintiffs' solicitor wrote to the second defendant telling him that while they did not in any way recognize him as having any interest in the property, they would proceed to eject him and get such further relief as the plaintiff might be entitled to, unless he paid up the rent then due together with the fire insurance, and undertook to put the premises in repair. The second defendant of course did not comply with the plaintiff's request, as he would thereby have effectually estopped himself in the future from denying that he was assignee of the term—*Williams* v. *Heales*[1]. His cautiousness cannot, however, avail him in this case.

On the 9th June the plaintiff filed this suit against both the defendants. After setting out the various breaches of covenants he prays against both the defendants possession, and that one or both of them may be ordered to pay rent due and damages for non-performance of covenants to insure and repair. The first defendant practically confesses his liability, and asks for the forfeiture of the lease to be set aside on such terms as the Court may think fit, and I may, therefore, proceed for the present as if the first defendant were out of consideration altogether.

The plaintiff in the 7th paragraph of his plaint alleges the mortgage to the second defendant, but says it was made without his knowledge or consent. In paragraph 17 the plaintiff charges that the second defendant has been in possession of the property and is liable to pay rent and damages for non-insurance and non-repair.

The second defendant in his written statement alleges that the mortgage to him was executed with the knowledge and acquiescence of the plaintiff, apparently thereby claiming to pos-

(1) L. R., 9 C. P., 177.

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sess a valid assignment of the premises, but submits his rights to the Court.

Now all the prayers seem to me to be proper in the present case. Mr. Russell unnecessarily tried to support the prayer for damages as against the second defendant as a mortgagee in possession. A mortgagee in possession of a term ought to pay the landlord's rent and keep the premises insured and repaired, but for non-performance of these duties he is liable to his mortgagor and to no one else, and the plaintiff is not his mortgagor. Consequently this prayer cannot be supported on that ground; but as I hold the second defendant is an assignee of the lease, he is liable to be ejected for breach of the covenants contained therein, and he is also liable in damages for his breach of them.

Supposing, however, that I am wrong as to the effect of the payment of rent by the first defendant, I am of opinion that the effect of the charge in the 17th paragraph and the double set of prayers which are inconsistent unless the second defendant is an assignee of the lease, the plaintiff not indicating which set he is going to press against the second defendant, but up to the end trying to press both, is to cause a waiver of forfeiture by pleading, and that estops him from relying on the breach of covenant—*Evans* v. *Davis*[1], so that he could not eject the second defendant, but must be content with a decree for damages. This view would, however, result in a rather complicated decree, and in my opinion is not so correct as the former one.

I, therefore, hold that by reason of non-payment of rent since the payment by the first defendant in June, 1894, and by reason of the premises being allowed to continue in a state of non-repair and from their not having been insured, the plaintiff is now entitled to re-enter, and that both the defendants are liable for the rent, the amount of fire insurance already paid by the plaintiff, and for damages for non-repair.

The next question to be determined is, what is the amount of those damages. Under the lease of 16th February, 1891, a piece of land with four chawls on it was demised to Harirám Deoji, and he was within two months thoroughly to repair the three

(1) 10 Ch. D., 747.

chawls mentioned therein to the entire satisfaction of the lessors. That was never done; but defendants are not liable for that breach of covenant. There was a further covenant to well and sufficiently maintain and keep all the demised premises and fixtures and additions thereto in good and substantial repairs. This covenant has been broken by the defendants.

It was alleged by the defendants, and admitted by the plaintiff, that Harirám Deoji erected a new chawl after the demise to him; but, so far as I can judge, that can only be true if there were only three chawls on the demised land; whereas the lease shows there were four, and I cannot see on the plan attached thereto where there was room for another. If there was another erected, I am of opinion that the covenants in the lease do not apply to this newly erected chawl. There is nothing said in the lease about separate buildings which might be erected on the demised land, it only provides for additions to present buildings; and under the Transfer of Property Act (IV of 1882) I think the lessee would be entitled to remove any buildings in respect of which there was no covenant in the lease requiring them to be delivered up at the expiry thereof. Consequently, the lessee would not under the lease be bound, in the meantime, to keep such buildings in repair. The defendants, however, are liable to pay damages for the breach of the covenant to repair in respect of all the buildings on the land at the time of the demise, and the amount to which they are liable is thus laid down by the Court of Appeal in *Joyner* v. *Weeks*[1]: "When there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left." The Court was there dealing with a case in which the term had expired by efflux of time. Here the term has ceased by reason of forfeiture; but I see no reason to draw any distinction between the effect of the cesser of the term for these two reasons. The case would be different if this had been a suit to recover damages for breach of a covenant to repair while the term was still in existence. The case must be referred to the Com-

(1) (1891) 2 Q. B. at p. 43.

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missioner to ascertain the amount which it will take to put these premises into a state of good and substantial repair, having regard to the original character of the buildings and the purposes for which they are used.

There will be decree for the plaintiff against the defendants for the amount of rent Rs. 1,050, the cost of fire-insurance premium Rs. 37-8-0, and the amount found to be due for the damages. The amount of rent and fire insurance will be payable forthwith, but execution for the amount of damages for non-repair will be suspended for three months.

If the rent and fire insurance be paid forthwith and within three months, the premises be put into a state of good and substantial repair, and in the meantime all covenants in the lease other than that relating to repairs be observed, then I relieve from the forfeiture of the lease; otherwise the lease to stand forfeited and the defendants must give up possession of the demised property to the plaintiff and pay the damages hereinbefore given against them.

Defendants to pay plaintiff's cost of this suit.

Attorneys for the plaintiff:—Messrs. *Little and Co.*

Attorneys for the defendants:—Messrs. *Chalk, Walker and Smetham*, and Messrs. *Bháishankar and Kánga*.

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Before Chief Justice Farran and Mr. Justice B. Tyabji.

1895.
September 27, October 4.

ANANDRA'O VINA'YAK, PLAINTIFF, *v.* THE ADMINISTRATOR GENERAL OF BOMBAY AND OTHERS, DEFENDANTS.*

Hindu will—Construction—Indian Succession Act (X of 1865), Secs. 101, 102, 159—Power of disposition of moveable property, effect of—Subsequent void gift does not cut down—Gift of balance of rents of immoveable property in hands of trustees—Evidence of intention to limit duration of enjoyment of bequest—Gift by implication, what is necessary to constitute—Estates according to Hindu law in ancestral property, Court will not presume intention to create by will—Assent to provision of will by son of Hindu testator, effect of, where there is doubt whether property ancestral or self-acquired.

* Suit No. 577 of 1894.