

in a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity. In our opinion, without straining words, the *machhwa* must be considered to have been a place within the meaning of section 4 rather than of section 12, being more of the nature of a house or room than of a place *ejusdem generis* with a street or thoroughfare. Had it been so used for the profit or gain of any person owning, occupying, using or keeping it, then the case would, we think, have come within sections 3 and 4 of the Bombay Gambling Act. But what the party apparently aimed at was seclusion and not publicity, and we think that their manifest object of avoiding notice would have been attained as far as the public was concerned and that, save for the exceptionally close scrutiny of the police, the structure sufficed to exclude both the access and the observation of the public. We desire to add that the view we take in this particular instance by no means involves as a corollary that people gambling in a carriage in a street or ordinary thoroughfare would be exempt from liability under section 12. We do not think that the accused in this particular case were in a similar position, and reverse the convictions and sentences passed on the accused.

R. R.

 APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Aston.

VITHAL NARAYAN KALGUTKAR (ORIGINAL DEFENDANT 11), APPELLANT, *v.* HIS HIGHNESS RAJE BAHADUR SHRIRAM SAVANT *alias* RAO SAHEB BHOSLE, SIE DESAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Lease—Assignment of lease—Mortgage of lease—Liability of the mortgagee to the landlord—Possession of the mortgagee.

The plaintiff, the Sárvátvádi State, leased certain lands to defendants 1 to 10. Of these, defendants 1, 2, 3 and 9 mortgaged their shares in the lands to defendant 11; the mortgagee was not put in actual possession of the lands, but subsequently to the execution of the mortgage-deed the tenants of the mortgagor passed *kabuláyats* to the mortgagee under which they agreed to pay the mortgagee (defendant 11) Rs. 36 per annum. The plaintiff thereafter

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sued defendants 1—11 to recover the rent of the lands demised. The lower Appellate Court passed a decree against all the defendants, including defendant 11. On appeal by defendant 11 to the High Court:—

Held, that, although it did not clearly appear whether the mortgagee (defendant 11) did receive any of the rents of property, still he put himself into possession and must be treated as if he had received such rent and that, therefore, he was liable to pay to the plaintiff his share of rent.

In India there is no distinction between legal and equitable estates, although in ordinary parlance the distinction is often referred to. Hence, when a lessee mortgages his interest in the land, the mortgagee becomes liable for the rent to the lessor only if he (the mortgagee) enters into possession of the land or does any act equivalent to entry into possession.

SECOND appeal from the decision of D. G. Gharpure, Joint 1st Class Subordinate Judge, with Appellate Powers, at Ratnágiri, varying the decree passed by G. V. Saraiya, Subordinate Judge of Vengurla.

Suit to recover rent.

The plaintiff leased a *thikán* called Devsu to defendants 1 to 10, who were placed in possession of the property; of these defendants 1, 2, 3 and 9 mortgaged their shares in the *thikán* to defendant 11 by a deed of mortgage, dated the 7th May 1876. The material portions of this deed of mortgage (Exhibit 33) were as follows:—

“I have received from you for my own purposes Rs. 399-12, in letters three hundred and ninety-nine rupees and twelve annas, of the Government currency bearing the Queen's stamp. I have this day received this amount in cash from you. There is no interval of time left for passing a separate receipt (in respect of the same). The mortgage security for this amount is the Sarkár's (*i. e.*, the Sávantvádi State) *thikán* (called) Devsu Bagayati Wádi This *thikán* has been held by us from the Vádi Sarkár (*i. e.*, the Sávantvádi State) as tenants since the time of our ancestors, and we have been carrying on the *vahivát* (management) thereof. I mortgage to you my right, title and interest in one plot out of the said *thikán* The interest for this amount is agreed to be paid at the rate of nine per cent. per mensem. Therefore, as to the amount of interest, which is to be paid to you from year to year, I will get a *kabuláyat* directly passed to you by the tenant in respect of the same, and if you do not receive the amount of interest as agreed upon from the tenant, I will pay the said amount to you with interest at one per cent. per month at the time of redeeming the mortgage, and then redeem the *thikán* I will deliver the mortgage property as enclosed within the four boundaries described above into your possession in the year in which there will be an objection (or obstruction) on my part to the tenant's *kabuláyat* being passed to you.”

The plaintiff filed a suit against all these defendants to recover rent for the years 1898-99 to 1900-1901.

Defendant 11 answered that the shares of defendants 1, 2, 3 and 9 had been mortgaged to him; that the said defendants 1, 2, 3 and 9 had been in possession of the land appertaining to their shares; that he had not taken profits of the lands for the years in suit; and that he was not liable as he never entered into any agreement with the plaintiff in respect of the rent claimed.

The Subordinate Judge passed a decree against all the defendants, excepting defendant 11. The grounds for excluding defendant 11 were as follows:—

“The defendant No. 11 is sought to be made liable on the ground that he is mortgagee in possession of the lands of defendants 1, 2, 3 and 9. Exhibit 33 is the deed of mortgage, dated 7th May 1876, and executed by Vithu Dadu Kamli in favour of Venku Naroji (father of defendant 11) On the authority of *Govind v. Shamtaya* (5 Bom. L. R. 118) it is clear that defendant 11 is liable only if the mortgage in his favour amount to assignment by tenants of their rights by way of mortgage. The mortgage-bond of 7th May 1876 does not, in my opinion, amount to an assignment by Vithu Dadu of his rights by way of mortgage The mortgagee, Venku, was not put in possession of the mortgaged land measuring 700 *hāths* in length and 150 *hāths* in width under the mortgage of 1876. The mortgagee was not to occupy and enjoy the profits of the whole land. Under the terms of the mortgage of 1876 the mortgagee was to get Rs. 36 only in the shape of rents under *kabulāyats*, and the mortgagor was to see that the mortgagee got *kabulāyats* for payment of Rs. 36 on account of rent at 9 per cent. per annum. The mortgage-bond is for Rs. 399-12-0, and interest on Rs. 399-12-0 is Rs. 36 at the rate of 9 per cent. Defendant 11, son of the mortgagee, says that rent payable to him is Rs. 36. The assessment or rent payable for three years by defendants 1, 2, 3 and 9 is Rs. 254-0-3, and the defendant No. 11 would get Rs. 108 for ‘three years’ rent. Hence it is clear that the defendant No. 11 cannot be made liable on the ground of his enjoyment of the profits. The mortgagee has no right, under the mortgage of 1876, to recover all the profits of the lands. At best the mortgage is a partial assignment of the tenant’s rights. On the whole, I do not think that defendant 11 should be made liable along with defendants 1, 2, 3 and 9 to pay assessment due to Sāvantvādi State on the ground that he is mortgagee in possession of the tenants.”

On appeal the lower Appellate Court held defendant No. 11 also liable to the plaintiff’s claim to the extent of Rs. 108, for the following reasons:—

“The law governing this case is thus laid down in *Govind v. Shamtaya* (5 Bom. L. R. 118):—‘The mere fact of a tenant having mortgaged the land

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held by him under a lease does not entitle the landlord of that tenant to hold the mortgagee liable for rent. To create such a right in the landlord there must be something in the nature of a privity of contract between him and the mortgagee, and an assignment of his rights by the tenant by way of mortgage does operate to create such privity.' The lower Court held that there was no such assignment in the present case on the ground that the mortgagee had no right under the mortgage (Exhibit 33) to possession, neither had he any. In this, I think, the lower Court was wrong. The mortgage, indeed, is not in express terms a usufructuary mortgage. But it is so in a disguised form. It stipulates that the mortgagor would cause his tenants to attorn to the mortgagee. If this is not handing over possession I fail to see what it is. The amount of the rent which the tenants were to pay to the mortgagee, and to which the lower Court has attached great importance, does not render this possession less effective because it (amount) happens to equal the amount of yearly interest due upon the mortgage. As a matter of fact tenants had attorned to the mortgagee and he had also recovered rent from them, though he was unable to recover the whole. Moreover, though the ultimate liability for assessment (rent to plaintiff) lies upon the mortgagor, yet *prima facie* one is expected to fall upon the mortgagee. At any rate, such a contingency is contemplated by the deed. To my mind these provisions make the present case on all fours with *Govind v. Shantaya* referred to above, where their Lordships held the assignment proved on very similar grounds. That the mortgagee would have to pay to plaintiff more than what he would receive from his tenants is not a circumstance which affects the question of privity.'

Defendant No. 11 appealed to the High Court chiefly on the ground that the lower Appellate Court erred in law in holding that appellant was liable to pay rent to the respondent.

G. N. Nadkarni for the appellant.

H. C. Coyaji for the respondent.

RUSSELL, J.:—The plaintiff herein is the Sāvantvādi State and the plaint was filed by that State as landlord against defendants 1 to 10, their tenants, and defendants 11 and 12, the mortgagees from certain of these defendants, to recover the rent of the *thikan* called Devsu, Survey Nos. 34 and 36.

The only point for decision is, whether the lower Appellate Court was right in holding that defendant No. 11 was liable to pay Rs. 108, the rent for 3 years, under the circumstances following.

Defendant 11 pleaded that the shares of defendants 1, 2, 3 and 9 had been mortgaged to him, and that they had been in possession of the land appertaining to their shares, and that he

had not taken the profits of the land for the years in suit, and that he had never entered into any agreement with the plaintiff in respect of the rent claimed.

The mortgage-deed (Exhibit 33) is dated 7th May 1876, and was executed by Vithu Dadu in favour of one Venku Naroji, the father of defendant 11. The deed recites the receipt by the mortgagor from the mortgagee of Rs. 399-12-0, and that the mortgage security is the Sarkar's (*i. e.*, Sávantvádi State's) *thikán* Devsu, which had been held by the mortgagor from the State as tenant since the time of his ancestors, and that he has been carrying on the *vahivádt* thereof. It goes on to say: "I mortgage to you my right, title and interest in one plot out of the said *thikán*. Interest is to be paid at nine per cent. per annum. As to the amount of interest which is to be paid to you from year to year, I will get *kabuláyats* passed by the tenants in respect of the same. And if you do not receive the amount of interest as agreed on from the tenants I will pay the said amount to you with interest, 1 per cent. per month, at the time of redeeming the mortgage and then redeem the *thikán*. In case you do not receive the interest, by reason of any obstruction being caused to the continuance in the said mortgage property with you, I will pay the whole amount, together with interest, and make good the expenses on account of damages. As to Government assessment which will have to be paid in respect of the said plot, I will pay the same. If you will have to pay the same on my failing to pay, I will pay the amount when redeeming the mortgage at 1 per cent. per month. I will deliver the mortgaged property into your possession in the year in which there will be any objection on the part of the tenants to *kabuláyats* being passed to you."

The *kabuláyats* were passed by the original mortgagor (or, after his death, by his representative) to the original mortgagee (or, after his death, to his representatives) and by those documents the former took the *thikán* on rent from the latter at Rs. 36 per annum. Rs. 36 per annum is interest on Rs. 399-12-0 at 9 per cent. The whole rent for which defendants 1, 2, 3, and 9 were liable to the plaintiff was Rs. 254-0-3.

The leases from the plaintiff to defendants 1 to 10 were not produced before us and we cannot say how they were worded.

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The question raised is: Is defendant 11 liable to the plaintiff for three years rent at Rs. 36 per annum, *i. e.*, Rs. 108 or not; whether the defendant 11 has received that amount from the defendants 1, 2, 3 and 9 or not?

The point raised, which is a novel and interesting one, is thus stated at pages 378 and 379 of Ghose's Law of Mortgage, 3rd edition: "The anomalous character of the English Law of Mortgage with its distinction of legal and equitable estates is strikingly exemplified by the position of a legal mortgagee of lease-hold property who may be sued on the covenants if the whole term is mortgaged to him, though he does not enter into possession. But an equitable mortgagee incurs no such liability even by taking possession, though it may be noted in passing that in Ireland his lines are not cast in such pleasant places. But, happily in this country, we know of no distinction between law and equity. A mortgagee, therefore, simply as such cannot be sued as the assignee of the mortgagor on the covenants in the lease. But where the subject of mortgage is lease-hold property, and the mortgagee is put in possession of it, he becomes liable, as a rule, to pay the rent."

For the purposes of this judgment it is necessary to amplify this point and refer to some of the cases cited in the above passage as well as to others, and to point out the distinction between the assignment of a lease pure and simple and the assignment thereof by way of mortgage.

Here in India the distinction between legal and equitable estates is unknown, although in ordinary parlance it is frequently referred to in Courts of Justice as is almost inevitable in any system of law which is so closely connected with, and in many cases the same as, English Law. The growth and development of the Court of Chancery and of equitable principles in England, which will be found well set out in Chapters II and III of the Principles of Equity by Ashburner, are no part of the history of the law in India.

First then as to the assignment of a lease in England and India respectively.

In England, "where a person parts with all his estate in land, as where he purports to demise for a period co-extensive with his own interest, or longer, the transaction is in law an assign-

ment, although purporting to be a demise; an under-lease for the whole of the residue of a term is in law an assignment:" *Lewis v. Baker*.⁽¹⁾ In India, by section 58 of the Transfer of Property Act a mortgage is a "transfer of interest," and by section 105 of that Act a lease of immoveable property is a transfer of the right to enjoy such property.

By the transfer of his interest by the lessee to an assignee a privity of estate is created between the plaintiff and defendant 2—see *Timmappa v. Rama Venkanna* ⁽²⁾—where the word "contract" in the judgment and head-note should be "estate"—see Shepherd and Brown on Transfer of Property Act, 5th edition, page 380. In 21 Bombay at p. 314, Farran, C. J., said: "An assignee of a lease is of course in a different position, for he is brought by his assignment into direct relations with the landlord." Again in *Kuñhanujan v. Anjelu*⁽³⁾ it was held that the transferee is liable to the lessor, who at the same time may sue the lessee upon his express covenant, and the transferee upon the privity of estate, although he can have execution against one only. It is to be remarked of course here that the covenant to pay rent is one that runs with the land.

Different considerations, however, apply in the case of mortgages of leases in India, but, before dealing with them, we must consider the effect of the *kabulāyats*. By these documents it appears to us that the mortgagee was put into possession of so much of the land as was comprised in them. And it remains to consider what is the effect of this.

In England in the case of a mortgage of the lease the legal estate is transferred to the mortgagee, the equity of redemption remaining in the mortgagor; hence in *Williams v. Bosanquet*⁽⁴⁾ it was held (overruling *Eaton v. Jaques*⁽⁵⁾) that "when a party takes an assignment of lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied, or become possessed, in fact."

In *Eaton v. Jaques (ubi supra)*, it was held by Lord Mansfield (whose leaning to equitable principles is well known) that "If a

(1) (1905) 1 Ch 46 at p. 50.

(3) (1889) 17 Mad. 296.

(2) (1895) 21 Bom. 311—313.

(4) (1819) 1 B. & B. 238.

(5) (1780) 2 Doug. 455.

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term is assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, right, title, interest, etc., of the mortgagor, even after the mortgage has been forfeited, unless the mortgagee has taken actual possession."

In *In re Gee ; Ex parte Official Receiver*⁽¹⁾ the law in England on this point is so clearly stated by Cave, J., that we set it out *in extenso*. In that case the lessee of premises subject to onerous covenants had before his bankruptcy assigned the premises by way of mortgage for the entire residue of the term, and it was held that, the trustee in bankruptcy not being liable upon the covenants of the lease either by privity of contract or privity of estate, the equity of redemption which vested in him was not "property burdened with onerous covenants" within the meaning of section 55, Bankruptcy Act, 1883. Cave, J. :—

"In this case, however, previous to the bankruptcy, the bankrupt had assigned the lease. Undoubtedly in an ordinary case of assignment for value the assignor after the assignment remains liable on his covenants, and the assignee is also liable on them by virtue of privity of estate. It is only on the ground of privity of estate that the trustee would ever become liable on those covenants; and, inasmuch as the previous assignment has transferred that liability to the assignee, leaving on the bankrupt only the liability under the covenants arising out of privity of contract, he ceases to have the land burdened with onerous covenants. It is true that some years ago a question did arise as to whether in the case of a mortgage the general rule applied. This, however, was decided in the affirmative some considerable time ago; and it cannot be doubted at this day that, where there is an assignment of the whole term to a mortgagee, the mortgagee becomes by virtue of the assignment the owner of the lease burdened with the covenants, and the assignor no longer possesses any land burdened with onerous covenants which can by virtue of the statute become vested in the trustee. It is true that the assignor, where the assignment is by way of mortgage, retains the equity of redemption; but that is an equitable right which is not burdened with onerous covenants. It is not because

(1) (1889) 24 Q. B. D. 65 at p. 67.

he is owner of the equity of redemption that he can be compelled to perform the covenants, but solely by virtue of the privity of contract that exists between him and the lessor, and that liability cannot by bankruptcy be transferred to the trustee. The right to call for a re-conveyance, no doubt, is transferred, and does pass to the trustee; and if the trustee should choose to exercise that right and have a re-conveyance or re-assignment executed to him, he would then become the owner of the land burdened with onerous covenants."

In India there being an equity of redemption in the lessee (mortgagor) and there being no distinction between his legal and equitable estate, his "whole estate" is not transferred by the mortgage. Consequently in accordance with *Eaton v. Jaques* (*ubi sup.*) possession by the mortgagee is necessary before he can be held liable for the rent. Section 65 of the Transfer of Property Act, so far as is material, is as follows:—

"In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee

"(d) Where the mortgaged property is a lease for a term of years that the rent payable under the lease, has been paid down to the commencement of the mortgage and that the mortgagor will, so long as the security exists *and the mortgagee is not in possession of the mortgaged property*, pay the rent reserved by the lease and indemnify the mortgagee against all claims sustained by reason of the non-payment of rent."

In *Kannye Loll Sett v. Nistoriny Dossee*⁽¹⁾ it was held that, where the subject of a mortgage is lease-hold property and the mortgagee is put in possession under circumstances which amount to an assignment or transfer of the lease-hold interest, the mortgagee becomes liable as a rule to pay the rent. See also *E. Macnaghten v. Bheekaree Singh*.⁽²⁾ The principle is thus stated by Powell on Mortgages:—

"If a mortgagee enters into possession he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and enjoying the profits he must submit to the losses."

Under these circumstances although it does not clearly appear whether the mortgagee did receive any of the rents of the

(1) (1884) 10 Cal. 443.

(2) (1878) 2 C. L. R. 323.

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property, still he put himself into possession and must be treated as if he had received such rent.

The decree of the lower Appellate Court will be confirmed, but as held in the Madras case, above referred to, execution in respect of the rent now in question will issue against only one set of the defendants, *viz.*, 1, 2, 3 and 9 on the one hand, and defendant 11 on the other.

Defendant 11 must pay the costs of this appeal.

Decree confirmed.

R. R.

APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Aston.*

1905.
March 13.

BHIMAPPA BIN SHIVBASAPPA AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), APPELLANTS, v. BASAWA KOM SHIVBASAPPA AND ANOTHER (ORIGINAL DEFENDANT 1 AND PLAINTIFF), RESPONDENTS.*

Adoption by the widow of a Hindu who predeceased his father—Presence of the widowed mother-in-law at the ceremony of adoption—Acquiescence—Consent.

The widow of a Hindu who predeceased his father made an adoption. At the ceremony of adoption the widowed mother-in-law of the widow was present. A question having arisen as to whether the presence of the widowed mother-in-law was equivalent to consent on her part to the adoption,

Held, that mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent had been given, bearing in mind that the consent required is a matter, not of form, but of substance.

SECOND APPEAL from the decision of T. Walker, District Judge of Belgaum, confirming the decree of W. O. Alcock, Assistant Judge.

One Basappa had two sons, Shivlingappa and Balappa, the plaintiff. Shivlingappa had a son Shivbasappa who died before

* Second Appeal No. 640 of 1904.