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Letters Patent make superintendence, not appellate jurisdiction, the condition of exercise of the power of removal which the High Court at Bombay has put in force.

Appeal dismissed.

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitor for the respondents: *Holman, Birdwood and Co.*

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

1904. *September* 10.

N. C. MACLEOD AND ANOTHER, PLAINTIFFS, *v.* KISSAN VITHAL SINGH AND ANOTHER, DEFENDANTS.*

Practice—Receiver—Suit in ejectment by Receiver—Discharge of Receiver before termination of suit—Devolution of interest—Civil Procedure Code (Act XIV of 1882), *sec.* 372—*Mortgage—Accession to mortgaged property—Transfer of Property Act* (*IV of* 1882), *secs.* 8, 70—*Lease by mortgagor—Sub-lease* pendente lite—*Rights of mortgagee.*

Somjee, a Khoja merchant, died in 1885, leaving, as his survivors, four sons by his first wife (who predeceased him), his second wife Labai, and four sons by Labai.

By his will, Somjee gave the whole of his moveable and immoveable property to his sons by his first wife, directing them out of such property to give to Labai and her sons Rs. 30,000 within six years of his death.

On the 12th January 1899 Somjee's sons by his first wife mortgaged certain of the properties to the Bank of Bombay.

In 1903, the Bank having advertised such properties for sale under a power reserved to them by the mortgage-deed, Somjee's sons by Labai (who had since died) brought a suit (No. 554 of 1903) against Somjee's sons by his first wife and the Bank of Bombay, claiming that the properties could only be sold subject to the charge in their favour.

On the 14th January 1904, the Bank assigned the mortgage to Dwarkadas.

On the 26th January 1904 Mr. Macleod was appointed a Receiver by the Court.

On the 24th February 1904, the Receiver was authorised to file ejectment suits where necessary.

* Suit No. 177 of 1904.

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On the 18th March 1904, the Receiver as plaintiff No. 1 and Dwarkadas as plaintiff No. 2 filed the present suit to eject Kissan, the first defendant, from a portion of the property mortgaged to the Bank.

Kissan claimed to be in possession under a lease from Goolam, the second defendant, one of the four sons of Somjee by his first wife.

After the commencement of the suit, Suit No. 554 of 1903 was disposed of in favour of the Bank of Bombay and the Receiver was discharged.

The first defendant contended that Dwarkadas had no right to join the Receiver in bringing the suit, that the moment the Receiver was discharged, his power to sue and with it the suit itself came to an end.

Held, that the Bank or its assignee Dwarkadas had a right to come in under section 372 of the Code of Civil Procedure and apply that the suit be continued by one or the other of them. No such application was in fact made because Dwarkadas was already on the record as plaintiff No. 2. The joinder of Dwarkadas as a co-plaintiff with the Receiver, though it was not perhaps strictly speaking legal at the time did not constitute a misjoinder.

Held, also, that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage.

The Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in sections 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed.

Held, also, that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.

SOMJEE Parpia, a Khoja merchant, died in 1885, leaving, as his survivors, four sons by his first wife deceased, his second wife Labai, and four sons by Labai.

By his will, Somjee gave the whole of his moveable and immoveable property to his four sons by his first wife, directing them out of such property to give to Labai and her four sons Rs. 30,000 within six years of his death.

On the 12th January 1899 Somjee's sons by his first wife mortgaged certain of the properties to the Bank of Bombay.

On the 1st September 1903, the Bank having advertised such properties for sale under a power reserved to them by the mortgage-deed, Somjee's sons by Labai (who had since died) brought Suit No. 554 of 1903 against Somjee's sons by his first

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wife and the Bank of Bombay, claiming that the properties could only be sold subject to the charge in their favour.

On the 2nd December 1903 Goolam Hoosein, the second defendant in this suit, one of the four sons of Somjee Parpia by his first wife, leased a portion of the mortgaged property, called the New Elphinstone Theatre, to Kisan Vithal Singh, the first defendant.

On the 14th January 1904, the Bank assigned the mortgage to Dwarkadas Dharamsey, the second plaintiff in the present suit.

On the 26th January 1904 Mr. N. C. Macleod, the first plaintiff in the present suit, was appointed by the Court a Receiver in Suit No. 554 of 1903.

On the 24th February 1904, the Receiver was authorised to file ejectment suits where necessary.

On the 18th March 1904, the Receiver as plaintiff No. 1 and Dwarkadas Dharamsey as plaintiff No. 2 filed the present suit to eject Kisan Vithal Singh, the first defendant, from a portion of the mortgaged property, *viz.*, the New Elphinstone Theatre, of which he claimed to be in possession, under the lease dated 2nd December 1903, from Goolam Hoosein, the second defendant.

After the commencement of the suit, Suit No. 554 of 1903 was disposed of in favour of the Bank of Bombay, and the Receiver was discharged.

The following issues were raised at the trial :—

1. Whether, having regard to the order in Suit No. 554 of 1903, dated the 20th August 1904, discharging the first plaintiff from the office of Receiver, this suit can be maintained.

2. Whether the suit is not bad for misjoinder of plaintiffs.

3. Whether the Theatre structure is included in the mortgage of the 12th January 1899.

4. Whether the mortgage was assigned to the second plaintiff.

4 (*a*). Whether the second plaintiff is not a mere nominee for Ahmedbhoy.

4 (*b*). Whether, if so, Ahmedbhoy is not a necessary party.

5. Whether, if so, the second plaintiff acquired any right in the Theatre.

6. Whether the first plaintiff has any right to the possession of the Theatre.

7. Whether the lease dated the 2nd December 1903 is not a good and valid lease of the Theatre and binding against the plaintiffs.

8. Whether the lease is collusive and fraudulent and at a gross undervalue.

Lowndes, with him *Scott* (Advocate General), for the plaintiffs:—We should never have allowed the Receiver to be discharged had we not had the second plaintiff to fall back upon. The course, which we adopted, had, as its object, the avoidance of a multiplicity of suits.

Kirkpatrick, with him *Davar*, for defendant 1:—The Receiver alone was authorised to bring the suit. When he was discharged, his power to sue, and with it, the suit itself came to an end. The joinder of Dwarkadas as a co-plaintiff constituted a misjoinder. The New Elphinstone Theatre was erected on the land subsequent to the date of the mortgage. The omission of the words "buildings and fixtures" in the deed shows that the theatre is not included in the mortgage.

Defendant 2 in person.

CHANDAVARKAR, J.—This action is an offshoot of suit No. 554 of 1903, which was decided by me on the 23rd of August last, and has been brought by Mr. N. C. Macleod as Receiver appointed by the Court in that suit with power to sue, and suing as plaintiff No. 1, and by Mr. Dwarkadas Dharamsey as plaintiff No. 2, suing in the character of assignee of the Bank of Bombay, which was defendant No. 5 in the said suit. For a due understanding of the questions of law which arise, it is necessary to state succinctly some of the facts of that suit and the events which have led to the present action.

One Somjee Parpia, a Khoja merchant of Bombay, died in 1885, leaving him surviving four sons by his first wife who had predeceased him, his second wife Labai, and four sons by the latter. By his will Somjee gave the whole of his moveable and immoveable properties to his four sons by his first wife, and directed them to give out of those properties to Labai and her four sons Rs. 30,000 within six years from the date of his death. Somjee's four sons by his first wife mortgaged to the Bank of Bombay certain immoveable properties on the 12th of January 1899 by a deed (Exhibit A). The Bank having, under the power of sale reserved to them by that deed, advertised the properties for sale, the four sons of Somjee by his second wife Labai, (who had died by that time), gave notice of the charge

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in their favour for Rs. 30,000 and claimed that the properties should be sold subject to that charge. The Bank having denied the charge and set up a right of priority in favour of their mortgage, Labai's sons brought suit No. 554 of 1903 against the four sons of Somjee by his first wife, and the Bank of Bombay. After that suit had been filed, the Bank assigned the mortgage to Dwarkadas Dharamsey, the second plaintiff in the present suit, on the 14th of January 1904 (*vide* Exhibit B).

On the 26th of January 1904, Mr. Macleod was appointed by the Court Receiver in that suit of the immoveable properties except a portion which is not material to the present case (Exhibit 1).

On the 13th of February 1904, Dwarkadas Dharamsey was added as a party-defendant to that suit (Exhibit 2).

On the motion of the Bank of Bombay and of Dwarkadas Dharamsey, in the said suit, made on the 24th of February 1904, the Receiver was "authorised by the Court to file ejectment when necessary" (Exhibit 3).

Accordingly, on the 18th of March 1904, the Receiver as plaintiff No. 1 and Dwarkadas Dharamsey as plaintiff No. 2 filed the present suit, to eject defendant No. 1, Purdesi Kisen Vithal Sing, from the property in dispute, which was included in the mortgage to the Bank but of which the said defendant claimed to be in possession under a lease from the second defendant, Goolam Hoosen Somjee, one of the four sons of Somjee Parpia by his first wife, and defendant No 2 in suit No. 554 of 1903.

That suit was disposed of by me in favour of the Bank of Bombay except as to one point with which we are not in the present suit concerned. It was held that though the plaintiffs in that suit had a charge in their favour on the properties devised by Somjee's will to his four sons by his first wife yet the Bank of Bombay had a prior right to those properties (except as to one-fourth of one of them) in virtue of its mortgage as *bona fide* transferee for value. I accordingly passed an administration decree, subject to the said right of the Bank declared, and discharged the Receiver.

This was the state of things when the present suit came on for trial before me. And the first question raised by Mr. Kirk-

patrick, counsel for defendant No. 1, is, whether, having regard to the order made in suit No. 554 of 1903, discharging the first plaintiff from the office of Receiver, this suit can be maintained.

Mr. Kirkpatrick's argument, as I have understood it, is this:— The first plaintiff was a Receiver, appointed by, and therefore an officer of, the Court, to whom an express power was given to file suits in ejectment when necessary. It was under that express power that he brought the present suit. No doubt the second plaintiff joined him, but he had no right to join the Receiver who was the only person empowered to sue. At the date of the suit, therefore, it was the first plaintiff alone who could bring the suit. It was his suit, and the moment he was subsequently discharged by the Court from the office of Receiver, his power to sue and with it the suit itself came to an end.

The industry of Counsel on either side has not enabled them to find any decided case as a direct authority on the point thus raised and I am left to decide it by the light of first principles.

Now, when a Court appoints a Receiver in a suit and empowers him to sue in ejectment a person who is not a party to the suit, the necessary implication is, that the Receiver as an official representative or trustee has to bring the suit for the benefit of the party, who may ultimately prove to be entitled to the property. When the party entitled to the property has been ascertained the Receiver will be considered his Receiver: *Sharp* v. *Carter* [1]; *Boehm* v. *Wood* [2].

Had a decree been passed in the present suit before the decision in suit No. 554 of 1903, such decree would have been *res judicata* as between the true owner when ascertained and the defendants in the present suit. That is the converse of the principle enunciated by West, J., in *Sanganabasaya* v. *Nagalingaya* [3] under the following circumstances:—

Section 10, clause I, of Bombay Regulation VIII of 1827 provides that if a person dies intestate, and without known heirs, leaving property, the Judge within whose jurisdiction the property is situate shall appoint an administrator for the

(1) (1735) 3 P. Wms. 375 at p. 379. (2) (1823) 1 T. & R. 332 at p. 345.
(3) (1878) P. J., p. 173.

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management thereof. A having died intestate and without known heirs, leaving property, the Court appointed the Nazir its administrator. The Nazir having taken possession, B sued him in ejectment, alleging that he (B) was the heir. It was held in that suit that B was not the heir of the deceased. Subsequently C was adjudged to be the true heir in a suit to which B was not a party. B then sued C, again claiming to be the heir of the deceased. It was held that the decree passed in the suit by B against the Nazir was *res judicata* against B so as to preclude him from litigating the same title in a suit against C. West, J., said:—"It is not open to those, who have as heirs sued the official representative of an estate and failed, to sue the owner when ascertained a second time on the same right. Though his right was undetermined, it subsisted during the previous suits and was effectively represented at the cost and risk of his estate."

If this is so, the converse of it must also hold equally good. Where the official representative of an estate sues to recover possession of an estate while the true owner of it is being ascertained by proceedings duly instituted in a Court, any decree passed in favour of the official representative would be for the true owner when ascertained, though he was not a party to it, and bind the other party to the decree.

Accordingly, had Mr. Macleod, the first plaintiff in the present suit, succeeded in recovering possession of the property in dispute by means of a decree passed before his discharge in suit No. 554 of 1903, that decree would have enured for the benefit of the Bank of Bombay and its assigns, who by the decree in that suit have been held to be entitled to the property as mortgagees; and the present defendants could not have in that case maintained that a decree so obtained by the Receiver was not binding upon them in a suit as between them and the Bank or its assignee. Though the Bank's right had been undetermined at the date of the Receiver's suit, that right was subsequently determined on the basis of its existence at that date and the Receiver must be regarded as having sued and obtained the decree for its benefit and on its behalf under the express power conferred by the Court.

The same principle should apply, if before the suit ends in a decree, the Receiver's office has come to an end. The Court appointed him as the official representative of the unascertained owner and gave him power to sue in ejectment for the benefit of such owner. When the Court conferred upon him that power it must be taken to have been well aware that the suit which it empowered him to bring might not result in a decree before the disposal of the suit in which the appointment was made; and it must also be taken to have intended that the suit he was empowered to bring should run its course and lead to a decree, though the Receiver's office might come to an end by reason of the disposal of the suit in which he was appointed and by reason of the determination of the party entitled to the property. When, therefore, that party was ascertained by the Court in suit No. 554 of 1903 and the Receiver was discharged, the party ascertained obtained a right to step into the Receiver's place, because the latter had held that place until then as the official representative of the party in question. When his power came to an end by reason of his discharge, it did not come to an end for the purpose of rendering abortive all the proceedings he had taken but only because the party entitled to the benefit of those proceedings having been determined, the necessity for the continuance of his office disappeared, and there was then the party entitled to continue those proceedings.

But, asked Mr. Kirkpatrick, under what law could the party so ascertained step into the shoes of the Receiver in this suit? The shortest answer to that is, under section 372 of the Code of Civil Procedure, which says: "In other cases of assignment, creation, or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed." Now, the words "devolution of interest" have been held by the Calcutta High Court in *Sourindra Mohun Tagore* v. *Siromoni Debi*[1] to

(1) (1900) 28 Cal. 171.

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mean not only devolution by death but to be applicable to a case in which, pending a suit instituted by the Manager of a Chota Nagpore Encumbered Estate, the estate is released from management and restored to the owners. The learned Judges who decided that case refer to the use of the word "come" in the latter part of the section in support of their decision, which I am of opinion I should follow as putting a sensible construction on the section in question. The Legislature should not be presumed to have omitted to provide for a case of this kind if there are sections in the Code within which it can be brought by a reasonable interpretation of the words used. Now, in a strictly technical sense, where a decree declares or determines the right of a party to certain property it may be correct to say that it only declares what existed previously and that it does not create that right. But it is usual even in legal phraseology to speak of a right declared or determined by a decree in favour of a party as a right which has "come" to the party under the decree, and the use of so homely a word in section 372 is sufficient to show that by that section the Legislature intended to provide for all cases not falling within the sections as to devolution by assignment, marriage, or death. Until the decree the right was in the Receiver; after the decree and the Receiver's discharge, it "came" to the party determined by the decree.

The result, then, of the decree in suit No. 554 of 1903 was that the Receiver's interest in that suit devolved on the Bank of Bombay, the fifth defendant in that suit. The Bank or its assignee, Dwarkadas Dharamsey, the second plaintiff in the present suit, had, therefore, the right to come in under section 372 of the Code of Civil Procedure and apply that it be continued by either of them. No such application has indeed been made in this suit but none was made because the Bank's assignee, Dwarkadas, had already been on the record as plaintiff No. 2, having joined the Receiver in bringing the suit. It may be that at that time, such joinder was not, strictly speaking, legal; but that cannot constitute misjoinder. In *Bachubai and L. A. Watkins* v. *Shamji Jadowji*[1], the estate of a deceased testator having proved insolvent, an administration suit was filed by creditors.

(1) (1885) 9 Bom. 536.

By a decree in that suit a Receiver was appointed. That Receiver brought a suit with the executrix of the testator as co-plaintiff in respect of certain property belonging to the deceased. It was contended on behalf of the defendant therein that there was a misjoinder, because the Receiver could sue only for what had been due to the testator's estate up to the moment of his death and the executrix could sue only for what was due after that. Sargent, C. J., and Bayley, J., held:—"Two suits would be quite unnecessary. Here apparently the Receiver might have sued alone to recover everything that was due to the estate; but for greater safety, the executrix, Bachubai, is added as a plaintiff. We do not think there is a misjoinder." In any case, when the present suit came on for hearing, Dwarkadas Dharamsey, who, as assignee of the Bank, had the right to ask the Court under section 372 to be placed on the record in place of the discharged Receiver, had already been on the record; and the defendants' Counsel and defendant No. 2 were heard on the question whether he was rightly there or not. I held that there was no misjoinder and that the suit could be continued. Moreover, the objection raised by Mr. Kirkpatrick that the suit could not be continued at the instance of Dwarkadas forms the subject of the present issue, and the result of my finding now is that it can be. That finding substantially satisfies the conditions of section 372. The fact that the name of the Receiver as plaintiff No. 1 is still there cannot prejudice the defendants. Though the Receiver was discharged by the decree in suit No. 554 of 1903, he has been continued on the record for greater safety as the person who initiated the suit. I find, therefore, the first issue in the affirmative.

On the second issue I have held that there was no misjoinder.

The next issue is—whether the structure known as the Elphinstone Theatre is included in the mortgage to the Bank of Bombay, dated the 12th of January 1899.

This was also one of the issues in suit No. 554 of 1903*, to

* NOTE.—The issue referred to by the learned Judge was decided in Suit 554 of 1903, *Sooleman Somji and others* v. *Rahimtula Somji and others*. Two appeals in this suit were heard by the Appellate Court and one judgment delivered in both appeals. From this judgment an appeal has been preferred to the Privy Council and is now *sub judice*.—Editor.

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which the Bank and the present plaintiff Dwarkadas Dharamsey, claiming as the Bank's assignee, and the present second defendant, Goolam Hoosein Somjee, were all party-defendants. In that suit I have found on the issue in the affirmative. Though the Bank and the present plaintiff Dwarkadas, and the present second defendant Goolam Hoosein Somji were all arrayed in that suit as defendants, yet the adjudication of the issue which was raised on the rival contentions of the plaintiffs in that suit and the present second defendant, Goolam Hoosein, on one side, and the Bank on the other, was necessary as between the defendants in that suit for giving the appropriate relief to the plaintiffs therein. Such an adjudication constituted *res judicata* between the defendants in that suit: *Ramchandra Narayan* v. *Narayan Mahadev*[1]. The present second defendant, Goolam Hoosein Somjee, is, therefore, bound by my finding in the previous suit. The first defendant, Pardesi Kisen, is also bound because, though he was not a party to that suit, yet he claims under a title derived from the second defendant, Goolam Hoosein, after suit No. 554 of 1903 had been filed. That suit was brought on the 3rd of September 1903 whereas the sub-lease to the 1st defendant by the second defendant was executed on the 2nd of December 1903. The sub-lease is void on the principle of *lis pendens* (see section 52 of the Transfer of Property Act). I have, however, reconsidered the finding recorded by me on this issue in that suit and I see no reason whatever for coming to any other conclusion than that at which I arrived in that case. The main argument of Mr. Kirkpatrick, the first defendant's Counsel, in support of his contention that the Theatre is not included in the mortgage is that it is not specifically mentioned as part of the property mortgaged. The mortgage (Exhibit A) relates to two properties—(1) the house in Bhaji Pala Street and (2) the leasehold property at Falkland Road, which forms the subject-matter of the present suit. As to the former, the mortgage deed describes it as follows:—

"All those the several immoveable properties first described in the 1st schedule hereunder together with all buildings, fixtures, trees, rights, easements, advantages, and appurtenances whatsoever to the said premises appertaining or with the same held or enjoyed or reputed as part thereof or appurtenant thereto,

(1) (1886) 11 Bom. 216.

and all the estate, right, title, property, interest, claim and demand whatsoever of them the mortgagors in, to, out of, or upon the same premises."

In the 1st Schedule to the deed the same property is described as "all that piece of Fazandari land together with a messuage, tenement, or dwelling house thereon situate, etc."

Mr. Kirkpatrick's argument is that whereas as to the property abovementioned, the deed is specific in the mention of buildings and fixtures standing on the land, it is silent as to them when it deals with the leasehold property on Falkland Road, which is thus described :—

"The immoveable property secondly described in the said 1st Schedule hereto and all other (if any) the premises comprised in and expressed to be demised by the hereinbefore mentioned Indenture of Lease with their appurtenances and all the estate of them the mortgagors in the same."

And in the Schedule it is described as "all that piece or parcel of ground on which the New Victoria Theatre has been erected and is now standing."

The omission of the words "buildings and fixtures" from the description of this second property and their inclusion in the description of the first furnishes no doubt a point worthy of consideration in support of Mr. Kirkpatrick's argument but it must be weighed with other considerations.

Section 8 of the Transfer of Property Act provides :—

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

"Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, *and all things attached to the earth.*"

According to the second clause of the section, the Theatre which stood on the land in dispute at the date of the mortgage and was known as the "New Victoria Theatre" must as a thing attached to the earth be treated as having passed to the mortgagee "unless a different intention is expressed or necessarily implied."

Since the date of the mortgage, the mortgagors have removed it and erected a new structure in its place, called the Elphinstone Theatre. According to section 70 of the Transfer of Property Act :—

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"If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession."

Illustration (*b*) to the section is as follows:—

"A mortgages a certain plot of building land to B, and afterwards erects a house on the plot. For the purposes of his security B is entitled to the house as well as the plot."

The theatre, then, now standing on the land and erected after the execution of the mortgage, would be included in it, unless there was a contract to the contrary. The fact that the land mortgaged is a lease-hold is immaterial, for the Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in the sections above quoted. In this respect the Act reproduces the English law, which is that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed: *Southport and West Lancashire Banking Company* v. *Thompson*[1].

The question, therefore, is, whether there is anything in the deed (Exhibit A) from which a contrary intention can be collected. It is said, there is such intention apparent upon the face of the deed because buildings and fixtures are specifically mentioned with reference to the property on Bháji Pála Street, whereas the deed is silent as to them with reference to the land now in dispute. But in judging of this contention we must have regard to the fact that the property in Bháji Pála Street with the buildings, etc., belonged absolutely to the mortgagors, whereas the land at Falkland Road was held by them for a definite period under a lease, the object of which, judging from its continued user, was to enable the mortgagors to use the land for the purposes of a theatre. And so it has been used ever since it was let. The 2nd defendant admits in his deposition that at first there was a mere shed on the land used as a theatre called the Old Victoria Theatre. Subsequently that shed was replaced by another structure called the New Victoria Theatre; and since then again that structure has been enlarged and is called

(1) (1887) 37 Ch. D. 64.

the Elphinstone Theatre. The mortgagors' interest in the land leased to them was to use it by erecting a structure for the purposes of a theatre. This continued user of the land shows that a structure standing for the time being on the land was never intended to be permanent, that it could be from time to time changed, removed, or enlarged for the better and beneficial enjoyment of the land leased. There was, therefore, no necessity for specifically mentioning the structure, which stood on the land as indicative of the interest of the mortgagors in it. That interest was to use the land leased by erecting a structure or structures on it and occupying it. Now, the words in the mortgage-deed used with reference to this property are "the immoveable property described in the schedule and all other (if any) premises with their appurtenances and all the estate of the mortgagors in the same." The word "appurtenances" has, as pointed out in *Hill* v. *Grange*[1] and *Thomas* v. *Owen*,[2] the meaning of "usually occupied," and would include a structure erected on a land for the purpose of its enjoyment. Then the words "all the estate of the mortgagors in the same," *i.e.*, in the land, are sufficient to include the structure in question as the estate of the mortgagors in the land. The reason, then, why the words "buildings and fixtures" were omitted from this portion of the deed is apparent. The property was lease-hold and enjoyed in a particular way. The structure standing on it indicated the mode of enjoyment and the estate of the mortgagors in the land. In *Plimmer* v. *Mayor, etc., of Wellington*[3] it was held that, where land was occupied by a person under a revocable license from the owner to use it for the purposes of a wharfinger and where that person was allowed by the owner to erect a jetty on the land, the license ceased to be revocable and the person in question acquired "an estate or interest" in the land. That was held, following *Ramsden* v. *Dyson*.[4] Now, if a right of that kind is an estate in land, equally so should be the right of a lessee to whom land was let for a definite period for the purpose of erecting a structure on it and using that structure for the beneficial enjoyment of the land. The right to such erection is an estate in the land belonging to

(1) Plowd. 170.
(2) (1887) 20 Q. B. D. 225 at p. 232.
(3) (1884) 9 App. Cas. 699.
(4) (1865) L. R. 1 H. L. 129.

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the lessee. These considerations outweigh whatever force might attach to Mr. Kirkpatrick's argument based on the omission of the words "buildings and fixtures" from the description of the property in dispute either in the body of the deed of mortgage itself or the schedule to it.

I have dealt with this issue at greater length here than in my judgment in suit No. 554 of 1903, because the 2nd defendant in addressing me on this case plaintively urged that certain material points had not been brought to my notice at the hearing of that suit. Evidence has accordingly been given in this case to show that before the execution of the mortgage-deed (Exhibit A) the Bank of Bombay returned to the mortgagors the plan of the New Victoria Theatre, which at that time stood on this land, whereas the Bank retained with themselves all other papers relating to the land. The inference I am asked to draw from that circumstance is that the theatre was not intended to be included in the mortgage. The inference which, in my opinion, should be drawn from the fact that the plan of the theatre which then stood on the land was returned by the Bank to the mortgagors is quite the reverse of that suggested by the 2nd defendant and by the 1st defendant's Counsel. If I am right in holding that no specific mention of the theatre as being included in the mortgage was made in the deed, because the theatre stood as indicative of the estate of the mortgagors in the land and was included in the words "the estate of the mortgagors in the same" which are inserted in the description of the property in the deed, and that the structure was liable to be removed or enlarged for the purposes of the beneficial enjoyment of the land, it follows that there was no necessity for the mortgagee to retain the plan of the theatre as it then stood on the land. Of what use was it to the mortgagee to attach to the deed the plan of a structure which might at any time, according to exigencies, be removed and another substituted in its place, for the better and beneficial enjoyment of the land?

I find, therefore, the third issue in the affirmative.

I now turn to the fourth issue, which is—whether the Bank has assigned the mortgage to the 2nd plaintiff Dwarkadas Dharamsey, whether the said Dwarkadas is a *bonâ fide* assignee

of the mortgage or only a nominee of Ahmedbhoy Habibhoy, one of the directors of the Bank, and whether the said Ahmedbhoy is not a necessary party to the suit?

The assignment by the Bank to Dwarkadas Dharamsey is proved by the deed (Exhibit B), dated the 14th of January 1904. He has proved that he paid the Bank by a cheque drawn upon the National Bank with whom he has an account. His pass book showing his account with the National Bank has been put in (Exhibit 11) and it corroborates him. We have then at the outset this fact *primâ facie* proved that the 2nd plaintiff has paid the Bank money which came from his pockets. Now, what are the facts relied upon to show that he is only a nominee of Ahmedbhoy? Stated shortly, they are as follows:—Ahmedbhoy is a director of the Bank of Bombay. He knew all about the intentions of the Bank as regards the assignment of the mortgage. The 2nd defendant offered to buy the mortgage from the Bank but the offer was declined; one Readymoney thereafter made a similar offer with the same result. Shortly after Readymoney's offer, Dwarkadas Dharamsey wrote to the Bank a letter (Exhibit 4), dated the 24th of November 1903, offering to buy the mortgage for Rs. 42,000—a sum less than that of the offer of the 2nd defendant or of Readymoney. The Bank accepted Dwarkadas' offer on the 27th of November 1903: (Exhibit 10).

We start, then, with the fact that the Bank assigned the mortgage, which was for Rs. 52,000, to the 2nd plaintiff for Rs. 42,000, after having rejected two higher offers. There is also the fact that the offer made by the 2nd plaintiff was just on the heels of Readymoney's. The 2nd plaintiff admits that he heard one day, while he had gone to the Bank as usual on business, that the Bank intended to assign the mortgage. He cannot say from whom he got the information at the Bank but he admits that he made further enquiries of his intimate friend Abdula Hussein, a son-in-law of Ahmedbhoy Habibhoy, and that gentleman informed him that the assignment could be had for Rs. 42,000 and also that Readymoney had made an offer. The 2nd plaintiff learnt of the conditions and terms of Readymoney's offer from Abdulla. The 2nd plaintiff did not look into the papers relating to the mortgaged properties before taking the assignment from

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the Bank, but, to quote his own words, "I took it in the dark, trusting to the business capacities of the Bank of Bombay." Nor did he, after the assignment, look into the mortgage-deed or the plans attached to it. He had one *hundi* transaction of Rs. 25,000 with Ahmedbhoy before the assignment—Ahmedbhoy had accepted *hundis* indorsed by the 2nd plaintiff in favour and for the accommodation of Visram Ebrahim & Co. After the assignment the 2nd plaintiff has had many transactions with Ahmedbhoy, who has since then indorsed his *hundis*. The 2nd plaintiff admits:—"At the date of my assignment I was indebted to Ahmedbhoy to the extent of Rs. 55,000."

These are the facts culled from the 2nd plaintiff's deposition, and upon them I am asked to hold that the 2nd plaintiff is a mere tool in the hands of his creditor, Ahmedbhoy Habibhoy, and that the latter, seeing that as a director of the Bank of Bombay he could not take the assignment of the mortgage in his own name, put forward the 2nd plaintiff, assisted him with information, and took the assignment in his name. I confess there is just an apparently suspicious look about some at all events of these facts. It is not clear why the Bank rejected the 2nd defendant's and Readymoney's offers. The 2nd plaintiff's asseveration that he had no conversation whatever with Ahmedbhoy about this property may be true but there is the fact that he got his information and advice from Ahmedbhoy's son-in-law. That suggests the question—whence did the son-in-law get his information? Then there is the fact that the 2nd plaintiff was indebted to Ahmedbhoy at the date of the assignment. But, however suspicious all this may be, I cannot act upon mere suspicion and hold that the 2nd plaintiff is a mere *benámidár* for Ahmedbhoy in the face of the fact that the Bank dealt with and made the assignment to the 2nd plaintiff and that the moneys paid to the Bank as consideration for the assignment came from funds held by the National Bank as belonging to him. It is suggested that these funds were in reality those which had come from Ahmedbhoy and reliance was placed by defendant's Counsel, Mr. Kirkpatrick, upon the fact admitted by the 2nd plaintiff that on or about the date of the assignment his cash book entries show that he had no balances large enough to pay Rs. 42,000 or Rs. 40,000 to

the Bank. But the 2nd plaintiff has proved by his pass book that on these days he sent large sums to the National Bank which are credited to his account and he has explained that these amounts could not be included in his daily balances because they were sent to the Bank. "In matters of this description," say the Privy Council in *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty*,(1) "it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony." There it was argued that the appellant must be held a *benámidár* because he was unable to give a satisfactory account, nay might be supposed to have given a false account in part, "as to the manner in which he became possessed of the money" paid for the alleged *benámi* purchase. That argument was disposed of by their Lordships in these words:—"Their Lordships have been much struck with the unsatisfactory character of the account given by the appellant of the manner in which he alleges he obtained the money, but we cannot help feeling, that it is an inquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it might excite doubt, is not a thing from which we can legitimately infer that the appellant was a bare trustee of the purchase so made by him." And then their Lordships further remark:—"If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe."

My findings, therefore, on issues Nos. 4 (*a*) and 4 (*b*) are that the 2nd plaintiff, Dwarkadas Dharamsey, is a *bonâ fide* assignee of the mortgage (Exhibit A), who has acquired a right to and interest in the property in dispute, including the Elphinstone Theatre, and that Ahmedbhoy Habibhoy is not a necessary party to the suit.

The next question is—whether the plaintiff can eject defendant No. 1 or his lessor defendant No. 2 from this lease-hold property in view of the fact that both at the date of the plaintiff's

(1) (1866) 11 Moo. I. A. 28 at p. 44.

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assignment and the date of the suit the term of the lease (Exhibit No. 8) had expired and no fresh lease has yet been taken from the lessor? The lease (Exhibit No. 8) under which the property was acquired by the 2nd defendant is dated the 14th of October 1892 and was for 15 years commencing from the 15th of July 1888. It, therefore, expired on the 15th of July 1903. But there is in it a covenant for renewal for 10 years in favour of the lessee (the 2nd defendant), his heirs, executors, administrators and assigns. Such a covenant has been held to run with the land: *Roe d. Bamford* v. *Hayley*(1); *Simpson* v. *Clayton*(2). The mortgage-deed (Exhibit A) provides that, if the mortgagors commit default in obtaining the renewal, the mortgagee is entitled to obtain it. Further, the mortgage-deed entitled the mortgagee to enter into possession on non-payment of the mortgage amount upon demand within the period stipulated. That such a demand was made on the 3rd of September 1900 by the Bank is proved by Exhibit D. It does not lie in the mouth of the mortgagors and those claiming under them to say that they are entitled to retain possession merely because the old lease has expired and no fresh lease has been obtained. That is a question which the lessor may raise, but as between the mortgagors or their assignees and the mortgagees or their assignees effect must be given to the terms of the mortgage-deed. Though the term of the old lease has expired, the mortgagors still hold possession with the right to obtain a fresh lease. Their possession cannot be said to be wrongful even as against the lessor. Had they obtained a fresh lease under the covenant in the old lease, it would have enured for the benefit of the mortgagee. Their possession, therefore, notwithstanding the absence of a fresh lease, must be regarded as coming from the same root as possession under a renewed lease.

But the 1st defendant claims to be in possession of the theatre under a sub-lease dated the 2nd December 1903 from the 2nd defendant (Exhibit 12). I have already said that it is void as having been made *pendente lite*. It is contended for the plaintiff that this sub-lease is a fraudulent and collusive

(1) (1810) 12 East. 464. (2) (1838) 4 Bing. N. C. 758.

transaction, got up for the purpose of defeating the mortgagee's rights under the mortgage. It is no doubt the case that this sub-lease is for three years, the longest period for which the 2nd defendant has sub-let to anyone, the previous sub-leases having been, as admitted by that defendant, for much shorter periods. After the sub-lease the 1st defendant has given to the 2nd defendant a power of attorney and the 2nd defendant has collected the rents and paid the taxes. These are no doubt circumstances suggestive of suspicion, especially when they are coupled with the fact that the sub-lease came into existence just about the time the Bank declined to accept the 2nd defendant's offer to buy the mortgage. But I do not think the evidence is cogent and clear enough to justify the inference of fraud and collusion, though there is this to be said that the 1st defendant has not gone into the witness-box to deny that the sub lease represents a sham and colourable transaction. It is not, however, necessary to discuss this question further. Even assuming the sub-lease to be a *bonâ fide* transaction, the law plainly is, as was held in *Keech* v. *Hall*,[1] that "the possession held by the mortgagor or those claiming under him until the mortgagee thinks fit to enter is, in the strictest sense, precarious and held at the mere will of the mortgagee." "If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them" (per Earl of Selborne, L. C, in *Corbett* v. *Plowden*[2]). The 1st defendant's sub-lease is, therefore, not binding on the plaintiff. But it is urged that the Bank of Bombay, under whom the plaintiff claims, having allowed the 2nd defendant to sub-let the theatre on many occasions, and such sub-letting having been in the usual course of user of the property, the 2nd defendant must be presumed to have acted either as the

(1) (1778) 1 Doug. 21.

(2) (1884) 25 Ch. D. 678 at p. 681.

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Bank's agent or with the Bank's consent and that the 1st defendant acquired his right as a *bonâ fide* sub-lessee. There is no evidence to show that the 2nd defendant acted as the Bank's agent or that the Bank even assented to the sub-letting by him in such a way as to estop the Bank from asserting its rights under the mortgage against the sub-lessees. I cannot presume such agency or such assent from the mere fact that the 2nd defendant was allowed to remain in possession and to sub-let. He was so allowed subject to the condition in the mortgage-deed that, if there should be demand for payment and the mortgagors should fail to pay, the Bank or its assignees should have the right to enter into possession. The mortgage-deed was registered and the 1st defendant must be treated as having had notice of its terms. As pointed out by Romer, L. J., in *Reynolds* v. *Ashby & Son, Limited*,(1) "it would be very dangerous if anything like a general authority to the mortgagor to deal with or affect the mortgaged property could be implied from the mere fact that the mortgagee has not taken possession of it." [His Lordship then recorded findings on the remaining issues.]

Attorneys for the plaintiff:—*Messrs. Crawford, Brown & Co.*

Attorneys for the defendants:—*Messrs. Caplain & Vaidya* and *Messrs. Thakurdas & Co.*

A. H. S. A.

(1) [1903] 1 K. B. 87 at p. 102.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

1904. *September* 20.

HAJI SABOO SIDICK, ORIGINAL PLAINTIFF, *v.* ALLY MAHOMED JAN MAHOMED AND OTHERS, ORIGINAL DEFENDANTS.*

Kutchi Memons—Succession—Hindu Law—Sons administering the property of their deceased father.

Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs.

Veerasokkaraju v. *Papiah*(1) followed.

* O. C. J. Suit No. 515 of 1903.

(1) (1902) 26 Mad. 792.