RAGHURAM RAO AND ORS. A

v.

ERIC P. MATHIAS AND ORS.

JANUARY 30, 2002

[M.B. SHAH AND R.P. SETHI, JJ.] B

Transfer of Property Act, 1882:

Section 111(g)—Lease—Perpetual lease—Partial alienation of leasehold property—Forfeiture clause—Invoking of—Lease deed imposing express prohibition on lessee from alienating the leasehold property—However, no express condition restraining partial alienation of property—Held, unless there is an express condition restraining partial alienation, forfeiture clause would not apply. C

Section 10—Lease—Perpetual lease—Prohibition restraining lessee from alienating the leasehold property—Held, not illegal or void. D

Section 111(g)—Lease—Termination of lease—Notice in writing—Requirement of—Lease deed executed prior to the coming into force of the Transfer of Property (Amendment) Act, 1929—Held, notice in writing not necessary for terminating the lease deed. E

Section 108(j) and (g)—Lease—Determination of—Partial alienation of leasehold property—Suit for possession by transferee of lessor's interest invoking forfeiture clause—Legal heirs of the original lessee not made parties to the suit—Effect of—Held, privity of contract is between the lessor and lessee and not between the lessor and transferee—For determining the lease the lessees were necessary parties—Suit liable to be dismissed for non-joinder of necessary parties. F

Practice and Procedure:

G

Plea—New plea—Raising of—Perpetual lease—Partial alienation of—Provision restraining tenant to sublet or transfer the lease premises—Not applicable to tenant having a right to enjoy the premises in perpetuity—Plea that lessor not entitled to possession on the ground of partial alienation of property—Not raised before High Court—Held, not required to be considered H

by Supreme Court—Karnataka Rent Control Act, 1961—Section 23.

Words and Phrases:

'Express condition'—Meaning of in the context of Section 111 (g) of the Transfer of Property Act, 1882.

Original owner of the property in dispute created a permanent lease deed with an express condition that the lessee could not have right to alienate the leased property and if such alienation was effected the lease shall stand cancelled and the possession would be reverted back to the lessor. On the death of the lessee there was partial alienation of the leasehold property between the legal heirs of the lessee through a partition suit. Plaintiff respondents transferee of lessor's interest did not invoke the forfeiture clause on the ground that the alienations were within the members of the family of the deceased lessee. However, when the legal heirs of the lessee sold certain portion of the leased property in favour of defendants by various sale deeds, plaintiff-respondents filed suits for possession invoking the forfeiture clause. Trial court decreed the suit holding that though the lease deed does not specifically prohibit alienation of the part of the property but since there was an express condition not to alienate the whole leasehold property, portion of the leased property could not also be transferred by implication. On appeal, the First Appellate Court held that as there was no condition which prohibits partial alienation of the property, it would not give right to the plaintiffs to enforce forfeiture clause; that the lessor has to seek the relief mainly against the lessee even though the lessee has assigned the property in favour of his assignee as by virtue of Section 108 of Transfer of Property Act, 1882, the liability of the lessee would not extinguish by mere reason of such alienation. However, on second appeal, High Court set aside the judgment and decree passed by the First Appellate Court and held that the plaintiffs were entitled to recover the possession of leasehold property and decreed the suit accordingly. Hence the present appeals.

Allowing the appeals and setting aside the order of the High Court, the Court

HELD : 1. Unless there is an express condition restraining partial alienation of the leasehold property, it would not be open to the transferee of the lessor's right to invoke the forfeiture clause for determining the perpetual lease and such conditions cannot be inferred by implication.

Section 111(g) of the Transfer of Property Act itself requires that for forfeiture, lessee should commit breach of 'an express condition' which provides that on breach thereof, the lessor may re-enter. The words 'express condition' itself stipulates that condition must be clear, manifest, explicit, unambiguous and there is no question of drawing any inference. In the instant case the lease deed provided that the lessee will not have any right to alienate the property, either the right of permanent tenancy or the building etc. (which may be built by the lessee on the property) by way of sale of mulgeni or in whatsoever manner to others and if such alienation is affected, the permanent lease shall be liable to be totally cancelled and the property shall be reverted to the possession and enjoyment of lessor, on receiving the value of the buildings and improvements estimated by four gentlemen. Therefore, there is express condition accepted by the lessee not to alienate the leasehold property. However, there is no express condition to the effect that lessee will have no right to alienate part of the property. Thus, in the instant case, plaintiff respondent were not entitled to invoke the forfeiture clause. [770-E-F; H; 771-A]

A. Venkataramana Bhatta v. *Krishna Bhatta,* AIR (1925) Madras 57; *David Cutinha* v. *Salvadora Minzes and Ors.,* AIR (1926) Madras 1202; *P. Veda Bhat* v. *Mahalaxmi Amma,* AIR 34 (1947) Madras 441; *Keshab Chandra Sarkar and Ors.* v. *Gopal Chandra Chanda,* AIR (1937) Cal 636 and *Indraloke Studio Ltd.* v. *Smt. Santi Debi and Ors.,* AIR (1960) Cal 609, approved.

Chatterton v. *Terrel,* (1923) A.C. 578, referred to.

2. In case of perpetual lease, the condition restraining the lessee not to alienate the property is not illegal and void. Section 10 of the Transfer of Property Act which *inter alia* provides that "where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except 'in the case of a lease where the condition is for the benefit of the lessor or those claiming under him". The Section does not carve out any exception with regard to perpetual or permanent lease. It applies to permanent or temporary lease. [769-B-C]

3. In the instant case, notice in writing is not necessary as contemplated under Section 111(g) before terminating the lease because the lease deed was executed prior to the coming into force of the Transfer

A of Property (Amendment) Act, 1929 (20 of 1929). The relevant part of the amended section provides that a lease of immovable property determines "by forfeiture; that is to say, in case the lessee breaks an express condition which provides that, on breach thereof the lessor may re-enter and the lessor or his transferee 'gives notice in writing to the lessee of' his intention to determine the lease". The words 'give notice in writing to the lessee of' B were substituted by the Amendment Act which came into force from 1.4.1930 for the words 'does some act showing'. So prior to the aforesaid amendment which requires giving of notice in writing was not essential for determining the lease and what was required was some act of showing intention to determine the lease. [769-E-G]

C

Namdeo Lokman Lodhi v. *Narmadabai and Ors.,* [1953] SCR 1009 and *Shri Rattan Lal* v. *Shri Vardesh Chander and Ors.,* [1976] 2 SCC 103, relied on.

4. The First Appellate Court was justified in holding that for D determining the lease the lessees are necessary parties. Privity of contract is between the lessor and lessee and not between the lessor and the transferees. If there is breach of contract, that is to say, express condition of lease, then it gives option to the lessor to determine the lease and re-enter the properties let out. For that purpose, lessee is a necessary party and transferees would be only proper parties. But without the presence E of lessees, lease cannot be determined and decree for possession of the property cannot be passed in favour of the lessor. Section 108(j) of Transfer of Property Act specifically provides that the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. In the present case, the liability to hand over vacant F possession is that of the lessee. Privity of contract is with the lessee and not with the assignee. Further, under Section 108 (q), on determination of lease, the lessee is bound to put the lessor into possession of the property. Admittedly, in the present case, the heirs of the deceased lessee are not joined as party-defendants and thus, the First Appellate Court rightly held that on ground of non-joinder of necessary parties, the suit was required G to be dismissed. [772-F-H; 773-A]

Treasurer of Charitable Endowments v. *S.F.B. Tyabji,* AIR 35 (1948) Bombay 349, approved.

5. The contention of the appellant that since the provisions of Section H 23 of the Karnataka Rent Control Act, 1961 prohibiting tenant to sub-let

or transfer the premises would not be applicable to a tenant having a right to enjoy any premises in perpetuity, the lessor in the instant case is not entitled to possession of the premises on the ground of alienation of the part of the leasehold property, is not required to be decided in the present appeal since the said plea was not raised before the High Court.

[774-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 856-859 of 2002.

From the Judgment and Order dated 27.10.98 of the Karnataka High Court in R.S.A. No. 1319/96 C/W. R.S.A. Nos., 1320-1322 of 1996.

S.N. Bhat for the Appellants.

Ambrish Kumar and Ms. Leena Gonsalves for the Respondent.

The Judgment of the Court was delivered by

SHAH, J. Leave granted.

These appeals are filed against the judgment and decree dated 27.10.1998 passed by the High Court of Karnataka at Bangalore in RSA Nos. 1319-22 of 1996. By the impugned judgment and decree, the High Court set aside the judgment and decree passed by the lower appellate court and held that plaintiffs are entitled to recover the possession of lease hold property and decreed the suit accordingly.

Before dealing with the contentions of both the parties, we would refer to the relevant facts in short. One Nellikai Vyasa Rao was the owner on mulgeni right of TS No. 234 corresponding to RS No. 359 of Attavar village of Mangalore City. Out of the said property, on 1.11.1903, a registered mulgeni lease was granted for a land admeasuring approximately 35 cents (subsequently it was found as 40 cents) by Nellikai Vyasa Rao in favour of Ammanna Maistry. The relevant condition of the permanent lease deed—mulgeni chit dated 1.11.1903 executed by one Ammanna Maistry in favour of Nellikai Vyasa Rao, which requires consideration is as under:-

> "In case I do not pay rent within time every year or if there is any short payment I am liable to pay the said sum with interest at 12% per annum from the date it is due till payment on the security of the building that may be built on the property and other improvements

A therein. In the event of my feeling that I do not require the said property, the said property alongwith the buildings and the improvements shall have *to be handed over only to you on receiving the value of the buildings and improvements estimated by four Gentlemen and I shall not have any right to alienate the property either the right of permanent tenancy or the building etc., by way of* B *sale, mulgeni or in whatsoever manner to others.* If I effect alienation contrary to this in any manner or if I allow the property to be attached and sold by any court in connection with my personal debt, immediately, such alienation and also this permanent lease shall be liable to be totally cancelled and the property shall be reverted to C your possession and enjoyment."

Thereafter, Nellikai Vyasa Rao sold his mugleni rights in respect of 1.20 acres of land in favour of P.F. Mathias which included 40 cents already leased out to Ammanna Maistry by registered sale deed dated 24.2.1914.

D On the death of lessee Ammanna Maistry, his mulgeni holding was partitioned among his legal heirs pursuant to the decree dated 31.3.1955 passed in partition suit No. O.S.235 of 1950, as under:-

Portion No. *To*

E

1.	Amba Bai and S. Jyoti	daughter and grand-daughter of lessee
2.	Chandrashekhar	sons of deceased Ammanna Maistry
3.	Gangadhar	

F

It is also admitted that by a gift-deed dated 17.11.1960 Gangadhar gifted 11 cents to his sister Amba and sold remaining 11 cents to Sanjiva Sapalya by a sale deed dated 31.3.1960. Again on 3.10.1974 Amba transferred her holding to Sucharita. For the aforesaid transfers, plaintiffs did not invoke G and enforce the forfeiture clause on the ground that alienations were within the members of the family of the deceased—lessee.

Original Suit No. 786 of 1990

On 30.3.1981, Sucharita (1) by sale deed sold some portion of the land H in favour of defendant Nos. 1 to 4; - (2) on the same day, under another sale

deed, sold some other portion of the land in favour of defendant Nos. 5 and 6; and—(3) thereafter on 13.5.1982 sold remaining portion of the land in favour of defendant No. 7. On the alienation of entire mulgeni holding i.e. 11 cents, by Sucharita, the plaintiffs invoked the forfeiture clause on the ground of breach of the condition referred to in the parental lease and, therefore, filed Original Suit No. 25/83, which was subsequently numbered as Original Suit No. 786 of 1990 for possession of the mulgeni holding.

Original Suit No. 929 of 1990

On the death of Chandrashekhar (son of lessee), his heirs filed O.S. No. 541 of 1980 for partition of the property held by him and a decree was passed dividing the leased properties between the heirs who are defendant Nos. 1 to 3 and 8 to 12 and they acquired proportionate leasehold rights over the land. For this partition of the property, it is the say of the plaintiff that the suit invoking forfeiture clause was not filed on the ground that alienations were within the members of the family of the deceased-lessee.

Thereafter - (1) defendant No. 1 by sale deed dated 14.3.1980 sold 0.25 cents 1.12 Sq. meters for Rs. 3,000 in favour of the 6th defendant;

(2) The 2nd defendant along with her 5 minor children by a sale deed dated 14.3.1980 sold an extent of 3½ cents of land for Rs. 57,000 in favour of the 6th defendant;

(3) Defendant No. 1 by a sale deed dated 27.4.1983 sold 0.12 cents but actually 11¼ cents for Rs. 1,30,000 in favour of the 4th defendant.

(4) The 4th defendant in his turn executed a gift deed dated 27.4.1983 in favour of the 5th defendant.

(5) The 3rd defendant by a sale dated 25.2.1988 sold her portion measuring 2½ cents of land for Rs. 1,05,000 in favour of the 4th defendant. Hence, Original Suit No. 929 of 1990 was filed seeking possession of the above land by invoking forfeiture clause.

Both the suits were tried separately and the trial court arrived at the conclusion that the lease deed does not specifically prohibit alienation of the part of the property, but merely because in the document as there is no recital which bars to alienate a portion of the property, would itself be not conclusive and the Court has to read the document according to the intention of the parties. The Court also held that if there is an express condition, not to

A alienate the whole leasehold property, then portion of the leasehold property could not, also, be transferred by implication. The Court held that the properties are situated within the metropolitan area to which The Karnataka Rent Control Act, 1961 (hereinafter referred to as 'Rent Act') is applicable and, therefore, plaintiff was not entitle to actual possession of the schedule property but only to constructive possession of the land subject to payment of all improvements B thereon as provided under the lease-deed.

Being aggrieved thereby, RA Nos. 46 and 52 of 1992 were filed against the judgment and decree dated 31.1.1992 passed in OS No. 929 of 1990 and RA Nos. 148 and 150 of 1994 were filed against the judgment and decree C dated 30.9.1994 passed in OS No. 786 of 1990, before the District Court at Mangalore. The First Appellate Court held that what has been alienated in both the suits was only to the extent of 29 cents from the leasehold property which was 40 cents and the remaining 11 cents of the leasehold property is not the subject matter of alienation. The Court, therefore, held that as there is no condition which prohibits partial alienation of the property in the mulgeni D lease, it would not give right to the plaintiffs to enforce the forfeiture clause. The Court further held that the lessor has to seek the relief mainly against the lessee even though the lessee has assigned the property in favour of his assignee as by virtue of Section 108 of the Transfer of Property Act, 1882 (hereinafter referred to as "the T.P. Act") the liability of the lessee will not E extinguish by mere reason of such alienation. Hence, the last recognized lessee is a necessary party. The lessor can seek relief against the lessee and also the assignee and he may execute the decree for possession only against the assignee, but the decree has to be obtained against the lessee. Sucharita was last recognized lessee, who was necessary party to the suit and the defendants were proper parties. Hence, the appeals were allowed and suits F were dismissed.

In appeals against the judgment and decree of First Appellate Court, the High Court referred to the judgments which were considered by the First Appellate Court and which were referred to at the time of hearing of the appeals and arrived at the conclusion that the said decisions would be G applicable where there is partial alienation of the leasehold property, but held that in the present case there was alienation of the entire leasehold property. The High Court observed that the decisions in *A. Venkataramana Bhatt and Anr.* v. *Krishna Bhatt and Ors.*, AIR (1925) Madras 57, *David Cutinha* v. *Salvadora Minazes and Ors.*, AIR (1926) Madras 1202, *Terrell* v. *Chatterton,* H (1922) 2 Ch. D. 647 and *P. Veda Bhat* v. *Mahalaxmi Amma,* AIR 34 (1947)

Madras 441 would not be applicable as there is alienation of the entire leasehold property. The Court has not dealt with any other contention. A

Being aggrieved by the judgment of High Court, the defendants have filed the instant appeals.

At the outset, for the nature of Mulgeni lease, we would refer to the decision in *Vyankatraya Bin Ramkrishnapa* v. *Shivrambhat Bin Nagabhat,* (1883) VII Bombay Series 256, wherein the High Court of Bombay considered the same and held as under: - B

> "In the minute of the Revenue Board (see p.28 of a book, Exhibit A, in the suit of *Vyakunta Bapuji* v. *The Government of Bombay,* [(12 Bom. HC Rep. App.1), better known as the Kanara Case] it is said:— "The exclusive rights to the hereditary possession and usufruct of the soil is in Kanara termed varga, meaning separate independent property in the land, and seems originally, as in Malabar, to have been vested in the military tribe of the Nayrs, the first and, at one time, the exclusive mulis or landlords of that province; for, except to unclaimed waste, and to estates escheated from want of heirs, it does not appear that the Government in Kanara at any time possessed, or even pretended to, the smallest right to property in the land. The Nayrs had under them a number of inferior rayats, called genis or tenants, to whom they rented out the portions of their lands which they did not cultivate by means of hired labourers or slaves; the genis or tenants were of two distinct classes' the mulgenis, or permanent tenants, and the chali genis or temporary tenants. The mulgenis, or permanent tenants of Kanara, were a class of people unknown to Malabar, who, on condition of the payment of a specified invariable rent to the muli, or landlord, and his successors, obtained from him a perpetual grant of a certain portion of land to be held by them and their heirs for ever. This right could not be sold by the mulgeni or his heirs, but it might be mortgaged by them, and so long as the stipulated rent continued to be duly paid, he and his descendants inherited this land like any other part of their hereditary property. This class of people, therefore, may be considered rather as subordinate landlords than as tenants of the soil, more especially as though many of them cultivated their lands by means of hired labourers or slaves, others sub-rented them to the chali genis or temporary tenants." C D E F G

The Court in that case traced the history of mulgeni tenure and observed H

thus:-

"These authorities show clearly that the mulgenis were only tenants, although tenants in perpetuity, holding under their superior landlords, the mulgars, whose estate, like that of tenants in fee simple in England, would appear to have been the highest estates in the land known to the law in Kanara; and, further, that although originally mulgeni tenants were not restricted by the terms of their leases from alienation, the practice had grown up—how soon it does not appear, but at any rate by the beginning of the present century - of leasing the land in perpetuity at a fixed rent coupled with such and other restrictions.

Lastly, it is not suggested that the law has either by Statute or judicial decision defined the mulgeni tenure.

Under these circumstances it would be impossible, we think, to hold that restriction against alienation is so repugnant to the mulgeni tenure in the contemplation of law, that a clause to that effect must be held to be void. But it was said that such a clause in a permanent lease makes the land for ever inalienable and is, therefore, void on the ground of public policy. That view however, would not appear to have been taken by the framers of the Transfer of Property Act, for we find that by Section 105 it recognizes leases in perpetuity, and that Section 10, which forbids a clause against alienation in general, makes an exception in the case of leases where it is introduced for the benefit of the lessor."

Nothing is pointed out to take any other view with regard to the nature of the mulgeni tenure and we, therefore, adopt the same.

The submissions of the learned counsel for the parties which require consideration are:—

(I) Whether in case of perpetual lease, the condition not to alienate the property would be illegal and void?

(II) Whether notice under Section 111(g) of the T.P. Act is necessary before filing of the suit in the present case?

(III) In any case, there is no express condition restraining partial alienation of the leasehold property, therefore also, the judgment and decree passed by the High Court is illegal.

(IV) Whether the heirs of the original lessee are necessary parties in case of determination of lease? A

Contention Nos. I and II

For appreciating these contentions, we would first refer to Section 10 of the T.P. Act which inter alia provides that "where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except 'in the case of a lease where the condition is for the benefit of the lessor or those claiming under him'." The section does not carve out any exception with regard to perpetual or permanent lease. It applies to permanent or temporary lease. In view of the specific exception carved out in case of lease, in our view, there is no substance in the contention of the learned counsel for the appellant that the condition which restrains the lessee from alienating leasehold property is in any way illegal or void. B C D

Similarly, contention that notice in writing is required as contemplated under Section 111 (g) before terminating the lease is also without any substance because in the present case, the lease deed was executed prior to the coming into force of the Transfer of Property (Amendment) Act, 1929 (20 of 1929). The relevant part of the amended section provides that a lease of immoveable property determines "by forfeiture; that is to say, in case the lessee breaks an *express condition* which provides that, on breach thereof, the lessor may re-enter and the lessor or his transferee 'gives notice in writing to the lessee of' his intention to determine the lease". The words 'gives notice in writing to the lessee of' were substituted by the Amendment Act which came into force from 1st April 1930 for the words 'does some act showing'. So prior to the aforesaid amendment which requires giving of notice in writing was not essential for determining the lease and what was required was some act of showing intention to determine the lease. This issue is concluded by the decision of this Court in *Namdeo Lokman Lodhi* v. *Narmadabai and Ors.*, [1953] SCR 1009 and *Shri Rattan Lal* v. *Shri Vardesh Chander and Ors.*, [1976] 2 SCC 103. The First Appellate Court, therefore, has also rightly rejected the said contention. E F G

Contention No. III

However, the next contention which requires consideration is- whether there is express condition which prohibits partial alienation of the leasehold H

A property?

The finding of High Court on the question of partial alienation, in our view, is without considering the facts as discussed in detail by the trial court as well as by the First Appellate Court. Both the courts on facts held that there was partial alienation of the leasehold property. It appears that the High B Court took into consideration the alienations because of the partition suits filed between the family members of the deceased lessee, but forgot the fact that the lessor in the suit itself had stated that as the said alienations were between family members, forfeiture clause was not invoked at that time. Same thing is stated before this Court in written submission filed by the C learned counsel for the appellants-defendants. The First Appellate Court has specifically arrived at the conclusion that out of the leasehold property which was 40 cents what has been alienated in both the suits was only to the extent of 29 cents and remaining 11 cents acquired in the partition by Sanjiva Sapalya was not the subject matter of alienation. It appears that the High Court has overlooked this aspect and decided the entire matter without D application of mind to the facts and contentions of the parties.

In the present case, the aforequoted lease deed was executed by the lessee and not by the lessor. In the lease deed it is provided that the lessee (I) will not have any right to alienate the property, either the right of permanent tenancy or the buildings etc. (which may be built by the lessee on the property) E by way of sale of mulgeni or in whatsoever manner to others and if such alienation is affected, the permanent lease shall be liable to be totally cancelled and the property shall be reverted to the possession and enjoyment of (you) lessor, on receiving the value of the buildings and improvements estimated by four gentlemen. Therefore, there is express condition accepted by the F lessee not to alienate the leasehold property. However, there is no express condition to the effect that lessee will have no right to alienate part of the property. With regard to the nature of the mulgeni tenure, it has been observed by the Bombay High Court in *Vyankatraya Bin Ramkrishnapa's* case (Supra) that this class of people may be considered rather as subordinate landlords than as tenants of the soil more especially as though many of them cultivated G their lands by means of hired labourers or others sub-rented them to the temporary tenants.

Further, Section 111(g) itself requires that for forfeiture, lessee should commit breach of 'an express condition' which provides that on breach thereof, the lessor may re-enter. The words 'express condition' itself stipulates that H condition must be clear, manifest, explicit, unambiguous and there is no

question of drawing any inference. In our view, as there is no express condition restraining partial alienation of the leasehold property, it would not be open to the transferee of the lessor's right to invoke the forfeiture clause for determining the perpetual lease and such conditions cannot be inferred by implication. A

On similar clause, it appears that there is uniformity of interpretation by various High Courts that unless there is an express condition restraining partial alienation, forfeiture clause would not apply. B

In *A. Venkataramana Bhatta* v. *Krishna Bhatta,* AIR (1925) MADRAS 57], the Court held thus:- C

> "A clause for forfeiture must always be construed strictly as against the person who is trying to take advantage of it, and effect should be given to it, only so far as it is rendered absolutely necessary to do so by the wording of the clause.
>
> A covenant against assignment does not prevent the tenant from assigning for any part of the term or from assigning a portion of the premises and unless the covenant is expressly worded to exclude a partial alienation of the premises, a partial alienation will not work forfeiture under a clause which prevents alienation of the premises. It is always open to the landlord to put into his lease a covenant against alienation either complete or partial, if he intends that forfeiture should result from partial alienation as well, but where he does not do so, the covenant will not apply to a partial alienation. *Grove* v. *Portel,* (1902) 1 Ch. Dn. 727." D E

In *David Cutinha* v. *Salvadora Minazes and Ors.,* AIR (1926) Madras 1202, the Court observed thus:- F

> ".....There is ample authority in the English Law and in fact in the law here too to show that unless there is a restriction against the assignment of any portion of the demised property, the restraint on the alienation of the demised premises will not prevent the alienation of a portion. I am not impressed with the reasoning of the learned District Judge as to the grant of a mulgeni lease not being an alienation. It clearly is an alienation. But I think that the respondents must succeed on the ground that the restriction on alienation of a portion of the demised premises is not contained in the words of the lease which I have set out above. It is perhaps not necessary to multiply examples, G H

A but there are some cases which have been cited and which lend support to the contention for the respondent, for instance in *Grove* v. *Portal,* (1902) 1 Ch. D. 727, Joyee, J., quotes the passage already cited from *Church* v. *Brown,* (1808) 15 Ves. 258 and says that the dictum of the lower Court has never been disapproved of; and again in *Russell* v. *Beecham,* (1924) 1 K.B.525 Serutton, L.J. says quoting Lord Eldon again that

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> a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises, these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.

C

In *Chatterton* v. *Terrel,* (1923) A.C. 578 Lord Wrenbury says:

> It is said and said with truth, that if there be a covenant not to assign or underlet the premises, it is not a breach to assign or sub-let part of the premises. It was not so stipulated, if those be the words, for the words or any part thereof are not found in the covenant."

D

The above judgments are followed in *P. Veda Bhat* v. *Mahalaxmi Amma,* AIR 34 (1947) Madras 441. Same view is also taken in *Keshab Chandra Sarkar and Ors.* v. *Gopal Chandra Chanda,* AIR (1937) Cal 636 and in *Indraloke Studio Ltd.* v. *Smt. Santi Debi and Ors.,* AIR (1960) Cal 609.

E

Contention No. IV

Further, the First Appellate Court rightly held that for determining the lease the lessees are necessary parties. Principle is—privity of contract is between the lessor and lessee and not between the lessor and the transferees. If there is breach of contract, that is to say, express condition of lease, then it gives option to the lessor to determine the lease and re-enter the properties let out. For that purpose, lessee is a necessary party and transferees would be only proper parties. But without the presence of lessees, lease cannot be determined and decree for possession of the property cannot be passed in favour of the lessor. Section 108 (j) of T.P. Act specifically provides that the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. In the present case, the liability to hand over vacant possession is that of the lessee. Privity of contract is with the lessee and not with the assignee. Further, under clause (q) of Section 108, on determination of lease, the lessee is bound to put the lessor into possession

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of the property. Therefore, the First Appellate Court rightly relied upon the decision rendered by Chagle, C.J. in *Treasurer of Charitable Endowments* v. *S.F.B. Tyabji,* AIR 35 (1948) Bombay 349, wherein dealing with a similar contention, it was observed:-

> "The question that arises for determination in this appeal is what are the rights and liabilities of the lessee when he has transferred absolutely his interest in the property. Clause (j) of S.108 expressly provides that the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. It is clear that as far as the privity of contract is concerned, the only person liable as between the lessor and the lessee is the lessee himself. There is no privity of contract established by the assignment executed by the lessee in favour of the assignee. But although such a privity of estate comes into existence between the lessor and the assignee, the lessee continues to remain liable in respect of all his covenants by reason of privity of contract which still continues to subsist as between lessor and the lessee. In my opinion, if there is no contract, then the provisions of S.108 would apply and all the statutory obligations cast upon the lessee by S.108 would bind the lessee notwithstanding his transferring his interest absolutely to another person. The latter part of cl. (j) is in my opinion very plain. It lays down that the lessee shall not cease to be subject to any of the liabilities attaching the lease by reason only of the fact that he has transferred his interest. Therefore, all the liabilities attaching to the lease to which he was subject would continue notwithstanding the transfer or assignment. To put it in a different language, a lessee cannot by his unilateral act, by assigning his interest in the leasehold premises, put an end to the obligations which he has undertaken either by the contract of lease or under the statute under S.108."

Admittedly, in the present case, the heirs of the deceased lessee are not joined as party-defendants. In second suit O.S. No. 786 of 1990, the lessee Sucharita is not joined as a party to the suit by contending that only defendants who were assignees are required to be joined as party to the suit proceedings. Hence, the First Appellate Court rightly held that on ground of non-joinder of necessary parties, the suit was required to be dismissed.

Lastly, the learned counsel for the appellant referred to the provisions of Section 23 of the Rent Act, which reads thus: -

A *"23.—Tenant not to sub-let or transfer after commencement of this part.*

(1) Notwithstanding anything contained in any law, but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Part, for any tenant to sub-let whole or any part
B of the premises let to him or to assign or transfer in any other manner his interest therein;

Provided that the State Government may, by notification, permit in any area the transfer of interest in premises held under such leases or class of leases and to such extent as may be specified in the
C notification:

Provided further that *nothing in this Section shall apply to a tenant having a right to enjoy any premises in perpetuity.*

(2) Any person who contravenes the provisions of sub-section (1),
D shall, on conviction, be punished with fine which may extend to one hundred rupees."

On the basis of aforesaid section, the learned counsel submitted that it shall not be lawful for any tenant to sublet or transfer the premises after commencement of the Act. However, the said provision is not made applicable
E to a tenant having a right to enjoy any premises in perpetuity. Therefore, under the 'Rent Act' lessor is not entitled to take possession of the premises on the ground of alienation of the part of the leasehold property from a present tenant as the Rent Act would govern the relationship between the lessor and lessee. He submitted that as found by first Appellate Court, Rent
F Act is applicable to the suit premises and, therefore, suit for taking possession was not maintainable as subletting by the permanent tenant is not unlawful under the Rent Act. In our view, this contention was not raised before the High Court and hence it is not required to be decided in this appeal.

In the result, the appeals are allowed and the judgment and decree
G passed by the High Court is set aside. The suits filed by the plaintiff(s) are dismissed. There shall be no order as to costs.

S.V.K.I. Appeals allowed.