CALCUTTA HIGH COURT

Indraloke Studio Ltd

Vs

Santi Debi

(P.N Mookerjee and U Law, JJ.)

18.03.1960

JUDGMENT

P.N. Mookerjee, J.

1. The suit, out of which this appeal arises, was a suit for ejectment and mesne profits. It was instituted on 19-6-1951, and decreed by the trial Court on 31-5-1956. Against that decree, the present appeal was filed on 24-8-1956.

2. In the suit, which was filed by the predecessor of the present respondent No. 1, there were three defendants, of whom, the appellant Indroloke Studio Ltd., was defendant No, 3 and the present respondents Nos. 3 and 4 were respectively defendants Nos. 1 and 2. The original plaintiff Kanhyalal Kanodia, husband of the present respondent No. 1, Santi Devi, and father of the minor respondent No. 2, Chandra Kumar Kanodia, died during the pendency of the suit in the trial Court, and, in his place, the said respondents Nos. 1 and 2 were substituted as the plaintiffs. The suit, as we have said above, was eventually decreed, and, against that decree, the defendant No. 3 has come up in appeal.

3. The original plaintiff, claiming to be a lessee under the superior holders, whom, for brevity and convenience, we may call the Ghoses, sued to recover possession of the suit property Premises (Municipal holdings) Nos. 20 and 21, Baburam Ghose Road, Tollygunge, 24 Parganas, and also mesne profits from the three defendants, upon the ground, inter alia, that defendants Nos. 1 and 2 were lessees under him in respect of the above suit premises but had forfeited their rights under their respective leases by reason of nonpayment of rent and by reason also of unauthorised transfer of the same to defendant No. 3 without his (lessor-plaintiff's) consent, which, in the circumstances, amounted to breaches of conditions of the said leases, entitling him (the plaintiff-lessor), under the express terms thereof, to re-enter the suit property. In short, the plaintiff's case was that defendants Nos. 1 and 2 had lost their rights in the suit property on account of forfeiture of their respective leases, as aforesaid, and defendant No. 3 did not acquire any interest therein inasmuch as the relevant transfers or assignments in his (defendant No. 3's)

favour were unauthorised and invalid against the plaintiff, and, accordingly, the latter was entitled to a decree for possession and mesne profits.

4. To turn to the relevant details, the plaintiff's case, as made in the plaint, was as follows :

By two registered indentures of leases, bearing date, 24-11-1944, the plaintiff, as "owner in possession" of the suit premises Nos. 20 and 21 Baburam Ghose Road, Tollygunge, district 24 Parganas, leased out the same to defendants Nos. 1 and 2 for a term of 10 years, with option of renewal to the lessees for a further term of 5 years. The two indentures aforesaid were on similar terms, which included, inter alia, the following:

(a) that "the defendants Nos. 1 and 2 as lessees would pay Rs. 300/- as monthly rent for premises No. 20 Baburam Ghose Road and Rs. 250 for premises No. 21 Baburam Ghose Road, aforesaid,"

(b) that "they would pay such rent regularly in advance without any deduction or abatement whatsoever within the 15th day of each and every month, for which the rent is payable, whether formally demanded or not, in addition to all municipal taxes, Chowkidary taxes and all other outgoings and impositions" ;

(c) that "they would not, during the period of the lease, transfer, assign, sublet or sub-demise or deal with the said premises in any manner whatsoever without the written consent of the plaintiff, first had and obtained";

(d) that "the lease would determine if the defendants Nos. 1 and 2, the lessees, did not pay rent for 2 consecutive months, whether legally demanded 'or not" ; and

(e) that "in case there was, on the part of the defendants Nos. 1 and 2, breach of any of the covenants and conditions contained in the said Indenture of lease including those mentioned in items Nos. (a), (b), (c) and (d), the lease would 'ipso facto' determine and the said premises would 'ipso facto' become the property of the Plaintiff, who would, thereupon, be entitled to re-enter and enjoy the said premises".Under the express terms of the above two indentures, the leases were to commence on the derequisition of the demised premises by the Military authorities, who were, at the time, in occupation of the same upon and under requisition. This derequisition was made on 31-3-1947, when the Military authorities delivered possession to the lessees, defendants Nos. 1 and 2 and the leases actually commenced on and from 1-4-1947. In the mean time, however, on 19-12-1946, the defendant No. 2, without the consent of the plaintiff, had transferred all his right, title and interest in the disputed premises to one Rohini Kumar Sen Gupta, who, in his turn, by a deed of assignment, dated 14-8-1947, transferred all his right, title and interest in and to the said premises under the aforesaid indenture of 19-12-1946, to defendant

No. 3. On the same day, namely, 14-8-1947, defendant No. 1 also, without the plaintiff's consent, had and obtained as required by his (defendant No. 1's) own indenture of lease aforesaid, dated 24-11-1944, transferred, by another or a separate deed of assignment, all his right, title and interest in the disputed premises to the said defendant No. 3. The defendants Nos. 1 and 2 did not also nay any rent to the plaintiff up to the date of the suit.

5. In the premises, the plaint continued, the leases of defendants Nos. 1 and 2 had been forfeited, on account of, inter alia, the above unauthorised transfers to defendant No. 3 and also on account of non-payment of rent, under the express terms of the respective indentures, mentioned hereinbefore, and the plaintiff, having given due notice to the said defendants Nos. 1 and 2, with copy or copies to defendant No. 3, to determine the aforesaid leases, the same had been duly determined in law and none of the defendants had any right to or in respect of the suit property or to the possession of the same and the plaintiff was entitled to recover possession with mesne profits.

6. The claim for arrears of rent was expressly reserved in the plaint and the plaintiff craved leave therein to sue for the same separately.

7. The suit was contested by defendants Nos. 1 and 3, who filed two separate written statements, but, practically speaking, the defence was common and it was to the following effect:

(a) that the assignments made by the defendants Nos. 2 and 1 to Rohini Kumar Sen Gupta and defendant No. 3 respectively, and by Rohini to defendant No. 3 were all made with the plaintiffs consent;

(b) that, in any event, assignment of defendant No. 2 to Rohini was invalid and ineffective in law, and so also was Rohini's to defendant No. 3 as a necessary consequence, so that, at the most, there was assignment only of a moiety of the leasehold interest of defendants Nos. 1 and 2 and, in the above context, namely, of part transfer or part assignment, no question of forfeiture could arise ; and

(c) that there was no default in payment of rent, as, under an agreement or agreements between the parties, the rents were being adjusted against, inter alia, an advance of Rs. 25000/-, made by defendants Nos. 1 and 2 to the plaintiff, and an advance of Rs. 50,000/- made by defendant No. 3 to the firm Unity Productions, to whom the plaintiff was indebted to that extent at the relevant time and who were the assignees or lessees of the plaintiff in respect of the disputed properties long before defendant No. 1's assignment to defendant No. 3 (which was dated 14-8-1947) (vide paragraph 5 of defendant No. 1's written statement) and prior to January 1947 (vide paragraph 13 of defendant No. 3's written statement) and from whom also defendant No. 3's Vendor or predecessor (assignor) Sett Indra Kumar Karnani had, on 10-1-1947, taken an assignment with

the plaintiffs consent.

8. In short, the defence was a denial of default or non-payment of rent and a denial of forfeiture on that ground and a denial also of unauthorised assignment or transfer or, at any rate, of transfer or assignment of the lessee's (transferees') whole interest without the plaintiff's consent, and of forfeiture on that ground and a plea, further, o subsisting interest of defendant No. 3, at least, under the assignment from the firm Unity Productions, who were direct assignees from or lessees from or under the plaintiff, as aforesaid, or had, at least, a right to resist eviction, under Section 53A of the Transfer of Property Act, under the document of lease or assignment or intended lease or assignment, dated 1-1-1944, as disclosed by the defendants at the time of opening of the same.

9. On the above pleadings and cases of the parties, the main issues, which arose, for decision were Issues Nos.:

> "5. Was Kanhayalal Kanodia at all material times or at any time whatsoever owner in possession of the properties in suit as alleged in paragraph 1 of the plaint?

6 (a). Did Kanhyalal Kanodia lease out the premises in suit to the firm Unity Productions by the alleged document dated 1-1-1944?

6 (b). Did Kanhayalal Kanodia consent to the said lease being transferred and/or assigned in favour of one Indra Kumar Karnani by his alleged letter, dated 10-1-1947, addressed to Indra Kumat Karnani?

6 (c). Can the alleged consent contained in the plaintiff's alleged written representation, dated 10th January, 1947, be construed as consent to the assignment in favour of defendant No. 3 of the two documents of lease, dated 24-11-1944, in favour of defendants Nos. 1 and 2, as alleged in paragraph 5 of the written statement of defendant No. 1 and paragraph 13 of the written statement of defendant No. 3?

6(d). What is the effect of the lease in favour of Unity Productions and the documents of leases in favour of defendants 1, 2 -- all ultimately assigned in favour of defendant No. 3 and of the possession of the premises by the defendant No. 3?

7 (a). Was there any Incidence of non-payment of rent with respect to the leases in suit?

7 (b). Is the story of adjustment of such rent against the dues from Kanhyalal Kanodia to the lessees and/or by way of payment of head rents to the superior landlords true?

8 (a). Has there been a breach of the terms of the aforesaid two documents of lease in favour of the defendants Nos. 1 and 2? and 8 (b). Are these leases liable to be determined by forfeiture and have they been actually determined?"

10. The learned Subordinate Judge answered all the above issues and the other relevant issues too against the defendants and in favour of the plaintiffs and decreed the plaintiff's suit. Hence this appeal by the main contesting defendant, defendant No. 3.

11. It will be useful and convenient at this stage to recall and set out, in brief, the principal findings of the learned Subordinate Judge, which formed the basis of his above judgment. Those findings stand as follows:

1. That Ext. A-7, the letter, dated 1-1-1944, alleged to have been written by Kanodia to Unity Productions, on which the latter's claim of lease of the year 1944 rests, was not a genuine document and it was never written or executed or authorised by Kanodia.

2. That, even assuming that Ext. A-7 was genuine and had been written by Kanodia to Unity Productions, it was invalid as a lease, in view of Section 107 of the Transfer of Property Act and Section 17(1)(d) of the Indian Registration Act and was not also available for purposes of a defence under Section 53A of the said Act, as, from it, all the conditions of the lease, particularly those, relating to the rent and the period of the lease, were not ascertainable with reasonable certainty, and as from it alone, the entire bargain between the parties could not be gathered. It may, no doubt, be admissible for proving the date and character of Unity's possession but, as the present suit was, admittedly, brought within 12 years of this document, the defendants could not derive any assistance or benefit from the same.

3. That, there being, as aforesaid, no lease and no right, enforceable in law, in favour of Unity Productions, its assignment to defendant No. 3, even if with the plaintiff's consent and even if otherwise valid would confer no right, title or interest on the said assignee.

4. That, the assignment of defendant No. 2 to Rohini Kumar Sen Gupta was without the plaintiff's consent and so also the assignments made by defendant No. 1 to defendant No. 3 and by Rohini to defendant No. 3, and, accordingly, there were breaches of the conditions of the leases, entitling the lessor-plaintiff to re-enter.

5. That, the fact that defendant No. 2's assignment to Rohini Kumar Sen Gupta had taken place before the period of the relative lease commenced upon the Military authorities' de-requisition of the suit property, that is, on and from April 1, 1947, did not affect the above position as, first, the said assignment would be effective only on such commencement, and, as, secondly, in any event, Rohini's assignment to defendant No. 3 was, admittedly, after such de-requisition and commencement of the relative lease and would, as such, obviously, constitute a breach of the relative condition in the said particular lease.

12. Each of the above findings of the learned Subordinate Judge was challenged before us on

behalf of the appellant, defendant No. 3, and Mr. Mitter, who argued in support of the appeal, also challenged the propriety of the learned Subordinate Judge's declining to entertain the said defendant's claim of title or protection under Unity Production's lease of the year 1942, upon the view, that that was inconsistent with the said defendant's claim of title under the above lease of 1944 (vide Ex. A-7, dated 1-1-1944,) and must be held to have been waived or abandoned in the pleadings and in the issues and was not part of its case, as made therein. Indeed, one of the main arguments of Mr. Mitter has been directed to this part of the learned Subordinate Judge's judgment and one of his main submissions has been that, in view of the said 1942 lease of Unity Productions the plaintiff cannot make any claim for possession without determining the same and in the absence of Unity Production his suit must fail, at least, on that ground.

13. We shall deal with Mr. Mitter's argument and Mr. Gupta's replies thereto, one by one, but, before we do so, it is necessary and convenient to set out the essential details of the same for proper appreciation of the respective scope and implications thereof.

14. The plaintiff's case is quite simple. He claims eviction and recovery of possession on the allegation of forfeiture of the two leases of defendants Nos. 1 and 2, dated 24-11-1944, on account of non-payment of rent and unauthorised transfer or assignment. Forfeiture on the above grounds is clearly provided in the said two leases themselves and, so far as the defendants rely on the said leases, they can have no case, if non-payment of rent is proved and no relief against forfeiture on account of it be available to them, in law, or if unauthorised transfer in contravention of the relative terms of the aforesaid leases be established.

15. The defence, however, raised a further question of claim of title otherwise than on the aforesaid two leases and sought to make out a valid lease in favour of Unity Productions from the plaintiff or, at any rate, a valid defence in its favour under Section 53A of the Transfer of Property Act on the strength of certain transactions between the said firm and the plaintiff. It also denied the plaintiff's allegation of non-payment of rent and of unauthorised transfer as well, -- at least, of such transfer as would entail forfeiture under the conditions of the 1944 November leases aforesaid. In the trial Court, the validity and operative character of these leases were also challenged but that challenge has not been repeated or asserted in this Court and, it has, as a matter of fact, been expressly given up.

16. In short, the defense, urged by Mr. Mitter, is, primarily of a two-fold character with certain ramifications under each head and the validity of this defence is really the point for consideration in this appeal. This two-pronged attack with its multitudinous strokes on the plaintiff's claim may better he stated as follows:

1. On the 1944 November leases :--

(a) Denial of non-payment of rent, upon the plea that, under the arrangement between the parties, rents were to be adjusted against inter alia the defendants' advance of Rs. 25,000/- and Rs. 50,000/- to the plaintiff and to Unity Productions on his behalf, and the same have been so adjusted or should be held to have been so adjusted, at least, up to the date of the suit. In any event, the defendants ate entitled to relief against forfeiture, if any, on the above ground, under Section 114 of the Transfer of Property Act.

(b) Denial of unauthorised transfer, upon the plea that the assignments in question, namely,

(i) by defendant No. 2 to Rohini Kumar Sen Gupta (vide Ext. J) and, then, by Rohini Kumar to defendant No. 3 (vide Ext. J (2)); and

(ii) by defendant No. 1 to defendant No. 3 (vide Ext. J (4)) were with the knowledge and consent of the plaintiff.

(c) Even if there was no consent of the plaintiff to the aforesaid assignments, no forfeiture has occurred as the transfer by defendant No. 2 to Rohini Kumar Sen Gupta and, consequently, by Rohini Kumar to defendant No. 3 also, were inoperative in law to pass any interest to the respective transferees, or, in other words, so far as those assignments were concerned, there was no transfer of any interest in the disputed lease-hold so that, at the worst, there was, in law, transfer or assignment of only a part or moiety thereof, namely, toy defendant No. 1 to defendant No. 3, and part transfer or part assignment was, in law, ineffective or insufficient to work out or support a forfeiture, -- at any rate of the whole, -- even on the express terms or conditions, as embodied in the respective leases in the present case.

2. By title, claimed through Unity Productions --

(a) On Unity's lease of 1-1-1944, as evidenced by Ext. A-7, in the light of the assignment, dated 10-1-1944, Ext, J-1, by Unity to Sett Indra Kumar Karnani and the plaintiff's letter of consent, Ext. A-6, and the subsequent assignment (Ext. J-3), dated 14-8-1947, by Sett Indra Kumar to defendant No. 3.

(b) Even if the above lease qua lease be invalid in law, a claim of protection under Section 53A of the Transfer of Property Act on the above documents in the light of the other evidence in the case.

(c) On Unity's lease, dated 15-6-1942, as evidenced by Ext. 13, with or without the assignment deed, Ext. J-1, and with or without the consent letter Ext. A-6, the substance of this argument being that Unity's interest under this lease is subsisting either in the said lessee or in the assignee, defendant No. 3, and that is a sufficient answer to the plaintiffs claim for possession and this is so, even if all defendants be held to have had otherwise no right, title or interest in the disputed

properties, as, in this suit for ejectment, the plaintiff must succeed on the strength of his own title or on his own right to recover possession or immediate possession, which right is, obviously, unavailable to him, so long as Unity's above lease remains subsisting, that is, until its due determination in law; and a rider is also added that, in the absence of Unity Productions, this particular question cannot be decided so that the present suit would fail on that ground in limine.

17. Let us examine, first, the arguments, based on the two leases of November, 1944. The validity and operative character of these two leases and their terms and conditions, as evidenced by the two documents (Exts. 1 and 1-1), are admitted before us. On those terms and conditions, there can be no question that forfeiture will occur in case of non-payment of rent subject of course, to relief, if any, against such forfeiture under the law, and, also, in case of transfer without the lessor-plaintiff's consent.

18. Admittedly, no rent has been paid by the defendants except, possibly, some payments by way of payment of rent of the head lease to the superior landlords, which, in no view, can liquidate the arrears of rent but can, at the most, liquidate only a small or insignificant part thereof. There is also no very satisfactory or reliable evidence of adjustment, as pleaded by the defendants, -- at any rate, no evidence that the whole of the aforesaid arrears has been, with or without the above payments to the superior land-lords, so adjusted. The requisite non-payment of rent is thus fairly established and the only question on this part of the case is whether the defendants would be entitled to claim, relief against the consequential forfeiture under Section 114 of the Transfer of Property Act. On this last question, it is enough to say that even Luxmi Spinning and Weaving Mills Ltd. v. Md. Ibrahim, , cited by Mr. Mitter would not help his client, as the circumstances there, which weighed with the Court in refusing relief to the tenant, are also present here, at least substantially. Moreover, in view of our finding, to be presently made, on the question of forfeiture on the other ground, this aspect is not very material as, even if the appellant be entitled to relief against forfeiture on account of non-payment of rent under Section 114 of the Transfer of Property Act, that would be of no avail in the face of our aforesaid finding.

19. Turning, now, to the question of the relevant assignments it is perfectly clear that, as to the plaintiff's consent to the three assignments (Exts. J, J-1 and J-2), the evidence is practically nil and, as a matter of fact, Mr. Mitter did not seriously urge this point but concentrated his arguments, mainly, on the point of law, arising on this part of the case, namely, that, at any rate, defendant No. 2 Misser's transfer to Rohini was invalid in law, and, necessarily, therefore, Rohini's transfer to defendant No. 3 did not pass any title or interest, or, in other words, there was, in law, no transfer so far as defendant No. 2 Misser's moiety in the lease-hold was concerned, and, in the circumstances, there was, at the worst, part transfer or part assignment, which, on established authorities, would not amount to a breach of the covenant or condition against alienation or assignment and would not entail forfeiture on that ground. As a matter of

fact, this last part of Mr. Mitter's argument appears to be correct. It is settled law that, in the absence of a specific provision to the contrary, a part transfer or part assignment does not amount to a breach of condition or covenant against alienation or assignment and does not entail a forfeiture on that ground. To cite authority, we need refer only to *Cook v. Shoesmith*[1], the latest English decision on the point, where the earlier authorities including the two leading cases *Church v. Brown,*[2]*' and Grover v. Portal*[3]*, and the later English case, reported in Russel v. Bcecham*[4]*,* were cited, discussed and explained and actually followed and applied by the English Court of Appeal. The relevant pro-position rests upon the principle that such terms of forfeiture are to be construed strictly against the lessor so that, in the absence of express stipulation to the contrary, the condition can apply to involve forfeiture only in cases of alienation of the whole and not in cases of alienation of part. The decision of the English House of Lords in the case of Chatterton v. Terrel, (1923) AC 578, is in no sense, inconsistent with the above view. There was, admittedly, in that case, transfer of the whole premises and there was no consent to such transfer and the consent, that was proved, was only to the transfer of a part. So far, therefore, as the lessee was concerned, there was a breach of the relative covenant or condition against alienation or assignment, as consent to transfer a part was not consent to transfer the whole, and, therefore, transfer of the whole, even though it included transfer of a part with consent and of the rest only without consent, would involve breach of the aforesaid covenant or condition and would support forfeiture. True, no doubt, that, in the absence of a contract to the contrary, an alienation or assignment, to come within the mischief of the above rule of forfeiture would have to be of the whole of the premises without the lessor's consent, or, in other words, part transfer would not attract the mischief of the said provision, for application whereof transfer of the whole would be necessary, and such transfer of the whole, again, to come within the mischief aforesaid, must be without the lessor's consent. But this would evidently be satisfied, if there is transfer of the whole and there is no consent of the lessor to the transfer of the whole though there may be consent to the transfer of part and that was what happened or was found in the English House of Lords case 1923 AC 578, supra. That indeed, was the reason why that case (1023 AC 578, supra), where also, the above-quoted earlier authorities barring of course, the later case of 1924-1 KB 525, supra, were cited in argument, was differently decided. The law thus is well-settled, as set out above by us, beyond any possible conflict or controversy.

20. The point, however, is whether the assignment by Misser (defendant No. 2) to Rohini Kumar Sen Gupta was invalid and inoperative in law as contended by Mr. Mitter, for, unless that be so, the present case would be one of transfer of the whole and not of part and the above principle would not apply. On this material question, Mr. Mitter drew our attention, to the date, when Misser's lease under Ext. I-1 commenced, namely, on de-requisition by the military authorities which took place on March 31, 1947, with effect from 1-4-1947. That that was the commencement of the lease according to its own terms cannot be disputed. Misser's assignment

(Ext. J) to Rohini Kumar Sen Gupta, was on 19-12-1946, when the lease in question (vide Ext. I-1) had not commenced. Mr. Mitter, therefore, argued that Misser's assignment (Ext. J) of the lease (Ext. I-1) was at a time, when, it (the lease under Ext. I-1) had not commenced or taken effect, or, in other words, when it was non-existent. It was, thus, according to him, assignment or, transfer of non-existent property, which was not permissible in law and accordingly, invalid and inoperative. So put, the argument is, obviously, attractive and it has also an apparent element of plausibility but a closer examination of the legal position betrays its inherent weakness.

21. Until de-requisition, Misser's interest under the lease (Ext. I-1) was a contingent interest. Contingent interest is property and it is clearly transferable (vide Ma Yait v. Official Assignee . The transfer to Rohini was, therefore, perfectly valid and operative. It was not transfer of non-existent property in the eye of law. Contingent interest, again, it must be remembered, does not necessarily require a prior, interest for its support and does not, always, take effect after the termination of a prior interest (vide, in this connection, Section 21 of the Transfer of Property Act). The case of subsequent contingent interest, arising on the termination of a prior interest, is separately dealt with in the statute in the succeeding Section 23 and, obviously, therefore, that type is not exhaustive of contingent interest as a whole. It is just one kind of such interest. Even if prior interest be necessary to support the contingent interest in the present case, it is legitimately to be found in the interest created in the military authorities by or under the requisition.

22. Assuming, again, that it is a case of transfer of non-existent property in the sense of transfer of a lease-hold, which is not in existence at the time, the assignment would not be invalid but would be fully operative from, the future date, namely, after de-requisition, in the instant case, when, admittedly the lease would commence or take effect. This follows from the well-known principle of feeding the estoppel, which is so familiar in law and is so often applied by Courts (vide e.g., *Mokhoda Debi v. Umesh Chandra*[5], *Khobari Singh v. Ram Prasad Roy*[6]; *Surendra Nath Dey v. Rajindra Chandra*[7], *and Rustam Ali v. Abdul Jabbar*[8]). That principle as the above quoted authorities show, underlies -- and is, in essence, in its most common aspect recognised and embodied in--section 43 of the Transfer of Property Act and is of wider application too. The deed of assignment (Ext. J). in the instant case, contains express assertion or representation of the assignor's subsisting lease-hold (interest) at the time. That the representation was either erroneous or fraudulent cannot be denied, and, in the absence of anything to the contrary, the assignee must be deemed to have taken the assignment on the said representation. It may, possibly, be open to the assignor to defeat the assignee's claim on the application of the above section or principle by showing that the assignee knew about the non-existence--and the consequent invalidity and inoperative character,--of the lease, at the time and took the assignment in spite of such knowledge, but the onus on the point would clearly be on the assignor and such onus would not

be discharged in the absence of proof of the assignee's knowledge of the incorrectness of the assignor's representation or assertion of title and it would not be held to have been discharged by simply showing that, in the circumstances, -- which of course, are not the circumstances here, -- it was the duty of the assignee to make enquiries and satisfy himself as to the existence of the lease and, if he had done so, he would have found its non-existence and the error in the assignor's representation, vide *Redgrave v. Hurd*[9], *vide also Frederick Bloomenthal v. James Ford*[10], *(per Lord Halsbury) and p. 168 (per* Lord Herschell).

23. It is to be remembered further, that the effect of the above representation is not materially altered or destroyed or whittled down in any effective manner by merely placing the title deeds with the assignee unless that is expressly stipulated and the assignee takes on the express understanding that the representation of the assignor may or may not be correct, vide Redgrave v. Hurd, supra; vide also *De Tchihatchef v. The Salerni Coupling Ltd*[11]*.,*

24. In the above view, the appellant's defence, so far as it rests on the defence claim of title on the 1944 November lease, must fail.

25. A point was raised by Mr. Mitter, that Section 43 of the Transfer of Property Act would not apply where the intended transfer was of nonexistent or future property. For this submission, reliance was placed by Mr. Mitter on Section 5 of the Act and it was contended that the Act did not sanction transfer of non-existent or future property and that, accordingly, such transfer was not permissible under the statute and, in effect, prohibited thereunder, and Section 43 would not certainly be available to validate a transfer, prohibited by the statute itself. The argument, though seemingly attractive, appears to proceed upon a misconception, so far as the present point is concerned. It is, possibly, true that Section 43 cannot validate a transfer, prohibited by the statute, though opinion, even on this point, does not appear to be uniform (vide e.g. *Armada Mohan Roy v. Gour Mohan Mullick*[12], *Lakshmi Narayana v. Lakshmi Narasimha*[13], *Official Assignee, Madras v. Sampath Naidu, AIR 1933 Mad 795; Jodi Bibi v. Vajiar Khan Saheb*[14] and Jumma Musjid v. Kodimani Andra Devdiah, (FB). But the instant case is not one of prohibited transfer at all. It may be that Section 5 cannot be invoked to validate transfer of non-existent property but that is very different from saying that such transfer, is prohibited in law or by the statute or under the section. In this view, there can be no valid objection to the application of Section 43 to such transfers for validating or giving effect to the same. Indeed, the very purpose of the section is to make effective transfers which would not otherwise have been valid and effective under the Act, barring, possibly, cases of transfers, prohibited under the statute, including transfers effected in contravention of the statute, either as to subject-matter (vide Section 6) or as to the particular mode of transfer, prescribed therein. At the most, it may be argued that transfer of non-existent property is not contemplated by the Transfer of Property Act so that such transfer would be outside the said Act, but then, though Section 43 may not strictly apply, Its underlying principle,

namely, that of feeding the estoppel, would obviously apply to give effect to the particular transfer (*vide Misri Lal v. Mozhar Hossian*[15], *Bansidhar v. Sant Lal*[16], *Palaniappa v. Lakshmanan*[17], *Baldeo Par-shad Sahu v. A.B. Miller*[18], and H. V. Law and Co. Ltd. v. Pulin Beharilal Singh .

26. In either view, then, Mr. Mitter's objection would fail.

27. One word now as to the two cases, cited by Mr. Mitter to support his above argument. The first is the decision of the Privy Council in *Raja Sahib Perhlad Sein v. Rajender Kishore Singh*[19], and the second is the decision of the same Tribunal in the Newfoundland case of Aveline *Scott Ditcham v. James J. Miller* [20]at p. 206. These cases, however, are of little assistance to Mr. Mitter. They are not cases, --at least not strictly so, --of the applicability or otherwise of the rule of feeding the estoppel, which, both on principle and upon the Section (section 43), is the point before us. They are at the most, authorities for the view that the transfer of non-existent property is not valid in law, as a transfer qua transfer though (vide 12 Moo Ind App 292, 306-7) (PC) it may operate as an agreement or contract to transfer which may, subject to limitations, prescribed by law, be specifically enforced but they do not go further to lay down that such transfers would not or cannot be validated, in proper cases, by the rule of feeding the estoppel. Indeed, no such question arose -- or could arise On the terms of the deeds before the Court -- in any of the aforesaid two cases, It is to be noticed, further, that Raja Sahib Perhlad Sein's case, 12 Moo Ind App 292 (PC), supra, was not even a case of transfer of non-existent property but a case of transfer of property by a person who had no possession at the time and might not have been able to make out a title ultimately and that transfer was held to be invalid and ineffective as a transfer qua transfer and as having effect only as an agreement or contract to transfer, of which specific performance could have been obtained by the so-called purchaser, if he had done all that was required of him, in law, for the purpose -- and, in the instant case before their Lordships, this requirement had not been fulfilled -- but, even apart from the fact that the decision in that case is distinguishable as above and it has also been commented upon, distinguished and explained it; the two subsequent cases, one of this Court reported in *Gunga Hurry Nundee v. Raghubram Nundee*[21], and the other of the Privy Council itself in *Kali Das Mullick v. Kanayalal*[22], there can be little doubt that, at least, after the enactment of the Transfer of Property Act, the said decision (12 Moo Ind App 292 at pp. 306-7) (PC) would no longer be good law and a sale would not be held invalid merely on the ground that, at the date of sale, the vendor had no possession of the property sold and might not have been able to make out ultimately a good title to the same. If, of course, the vendor's title ultimately fails, the purchaser would get nothing but that would be not on the ground that his purchase was invalid or defective in law but because he purchased nothing, his vendor having had no title to the property sold.

28. Thus, on the above view, Misser's transfer to Rohini that is, of his lease which was to take

effect on and from a future date -- would be quite valid and effective in law, even if the said lease or future lease itself be regarded as immovable property (vide Section 3 of the Transfer of Property Act, read with Section 3(26) of the General Clauses Act and Ramchandra v. Subraya, and that is a complete answer to Mr. Mitter's objection on the point.

29. The matter, again, may be looked at from another point of view. Lease of immovable property is, under Section 105 of the Transfer of Property Act, -- to quote its relevant part, -- transfer of a right to enjoy such property for a certain or particular time. This right is, undoubtedly, an interest in immovable property. Transfer of a lease, therefore, is transfer of this interest and, if the) lease is to take effect in future, it is transfer of a future interest in immovable property. So regarded, Misser's transfer is transfer, of future interest in immovable property, which is a valid and effective transfer under Section 5 of the Transfer of Property Act even without Section 43. The property transferred is, in the ultimate analysis, the property, in respect of which the lease was taken or intended to be taken and the interest transferred or purported to be transferred is the leasehold interest created which was to take effect on a future date and which, as a future leasehold as such, is future interest in the above property. It will thus be a case not of non-existent property at all and, with or without Section 43, the transfer in question, namely, Misser's transfer to Rohini, would be a valid and effective transfer under Section 5. This approach would be quite legitimate and perfectly valid, even if, in the instant case Misser's lease or future lease be itself regarded as immovable property--though it is well to remember that the definition of immovable property, both under the Transfer of Property Act (Section 3) and the General Clauses Act (Section 3(26)), referred to above, is subject to the usual reservation clause "unless there is anything (somthing) repugnant in the subject or context" which may, in the present context, well justify a different view, -- inasmuch as, if the transfer or transaction in question be valid under a particular approach, not open to objection in law, although there may be other approaches or points of view, from which it may not appear to be valid, the Court will lean towards its validity and favour the particular approach, which gives it that effect.

30. We hold, accordingly, that Misser's transfer to Rohini was a valid transfer, taking effect on the commencement of the lease after derequisition by the military authorities and, a fortiori, Rohini's transfer to defendant No. 3 was also valid.

31. The instant case was, thus, clearly a case of transfer of the entire leasehold and, that transfer having been made without the necessary or requisite consent on the landlord's part, it entailed forfeiture under the express terms of the relative document of lease.

32. We take up next the appellant's defence, founded on the Unity Production's letter, dated 1-1-1944. This letter, which, on this part of the case, is the sheet-anchor of the appellant-defendant's claim and is, in truth, the said defendant's document of title, was not referred to in the plaint

expressly or specifically or, even sufficiently, for purposes of any implication in that behalf. Its genuineness was challenged by the plaintiff during evidence and also at the commencement of the hearing, that is, as soon as it was mooted as part of the defence case, vide recast Issue No. 6(a). The circumstances also are very patent against its genuineness and they militate against its existence prior to January 1947. These have been referred to and discussed by the learned Subordinate Judge in all necessary details and we need only add our fullest concurrence with the same. The evidence of D. W. 1 (Sudhir), which appears to be the only evidence to support the genuineness of, inter alia, this letter (Ext. A-7) is, as held by the learned Subordinate Judge, contradicted on material points by admitted documents, and we would only supplement his reference to such documents by including within them Exts. 8, 15 and 15(a), reference whereto in the said connection, was not opposed by Mr. Mitter and the technical objection which might otherwise have been taken in that behalf was expressly waived by him, -- and is, in no sense, reliable. It is also plainly insufficient for the above purpose and self-contradictory too, in material particulars. The alleged consent letter of the plaintiff. Ext. A-6, is also open to similar objection, criticism and comment as have been raised and made against Ext. A-7 above. Prima facie, therefore, the aforesaid two exhibits (Exts. A-6 and A-7) are liable to be discarded as unreliable documents.

33. Let us assume, however, that both the above documents (Exts. A-6 and A-7) arc genuine and consider their legal effect on that footing. Ext. A-7 appears to be a document of lease but it purports to be a lease for 10 years. It is, therefore, hit by Section 107 of the Transfer of Property Act, both because it is unregistered and also because it is unilateral. It is also clearly within the mischief of Section 49 read with Section 17(1)(d) of the Indian Registration Act. It cannot, therefore, in law, be a valid document of lease and no lease-hold right can be claimed under it. At any rate, the lease, purporting to have been granted by it, being for 10 years, cannot be valid in law, which, for the purpose, requires, under the above Section 107 of the Transfer of Property Act, a registered bilateral document. Of this, Mr. Mitter was fully conscious. He, therefore, did not rely upon it (Ext. A-7) except for purposes of Section 53A of the Transfer of Property Act, in which case, of course, neither Section 107 of the Transfer of Property Act nor Section 49 of the Indian Registration Act would stand in the way. In the context, however, the assignment (Ext. J-1) and the alleged consent letter (Ext. A-8) would lose all importance except for purposes of the aforesaid section. The question of Section 53A of the Transfer of Property Act thus assumes, in the instant case before us, paramount importance and we shall turn to it presently in the light of the above three documents, in particular, and the other evidence, relevant on the point.

34. That Ext. A-7 professes or purports to represent or embody the contract in writing for the proposed or intended lease need not be disputed. That it was signed by the intended lessor, namely, the plaintiff, may also be, as it has actually been assumed. We will assume further that

defendant No. 3 is in possession under, or in pursuance of the above contract. It will, however, still be necessary for the defence to establish that, from the writing (Ext. A-7), the necessary or essential terms of the intended lease will be or can be found with reasonable certainty, or, in other words, that the writing contains all or the whole of the said essential terms and not merely some of them. On this aspect, the evidence of D. W. 1, who proves this document and who has been put forward by the defendants themselves as the most competent person to speak about the intended lease, is very revealing. He definitely states that Ext. A-7 does not stand by itself but there was another- letter, given by the plaintiff on the same day, and the two together constitute the arrangement or bargain between the parties. If that be so, Ext. A-7 cannot be the writing, constituting the whole bargain, or, from which the necessary or essential terms of the lease in question can be gathered with reasonable certainty. By itself, therefore, at any rate, it is unavailing or insufficient under or for purposes of Section 53A of the Transfer of Property Act. Faced with this difficulty, Mr. Mitter turned to the letter, Ext. A-6, and contended that that letter (Ext. A-6) contained or should be deemed to contain the missing terms or the rest of the terms and the two together, namely, Exts. A-6 and A-7, would comprise the whole of the bargain and constitute the contract in writing for purposes of Section 53A. It is, however, difficult to accept or give effect to this contention of Mr. Mitter. Apart from anything else, it suffers from, at least, this infirmity that Ext. A-6 is not a contract in writing, embodying the missing terms in question. It is, at the most, an agreement as to the mode and manner of adjustment of the alleged loan of Rs. 50,000/-against the rent of the aforesaid intended lease but it cannot be regarded as embodying all the terms of the said lease or even all the missing terms thereof, as referred to above, even by reference to the connected deed of assignment, Ext. J-1, or as substituing the missing letter, spoken of by D. W. 1, and not, at any rate, as constituting the said Ext J-1, as part of it, as aforesaid, a contract in writing by the plaintiff, from which the said terms can be gathered. Ext. J-1 is not the plaintiff's document, at all and can, in no view, be regarded as an agreement, signed by the plaintiff, which is essential to make it relevant for purposes of Section 53A of the Transfer of Property Act, and the terms of the lease, as appearing therein, cannot, by reference, be incorporated in Ext. A-6, so as to make it the repository of them and a document, signed by the plaintiff and containing the aforesaid missing terms. For those terms, one has to travel outside Ext. A-6, which alone, for this purpose, is the contract in writing, signed by the plaintiff. From no point of view, then, would Section 53A be available to the defendants in the present case and Mr. Mitter's argument in that behalf must fail.

35. There remains now the appellant's claim and contention, based on the 1942 lease of Unity Productions. The learned Subordinate Judge appears to have been entirely right in refusing to entertain this claim and contention. The written statements are wholly silent about this lease or claim of title. The issues were recast at the time of opening of the case, but even the recast issues do not, strictly speaking and on a proper reading contain the slightest reference to or indication

about it. On the other hand, they proceed solely upon the footing of Unity's lease of the year 1944, so far as this part of the case is concerned. This is particularly noted by the learned Subordinate Judge himself who actually recast the issues, The 1942 lease was sought to be introduced in evidence and at the time of argument and, in the context aforesaid, it would have been wholly unjust and improper to entertain or allow any defence, based upon the same. Moreover, in view of the appellant's basic documents of title, Exts. J-1 and J-3, which make no mention of this 1942 lease but rest the title of Unity Productions on the 1944 lease alone, and in the context of the circumstances, referred to above, it may safely be inferred that the 1942 lease was given a go by and was abandoned or given up by the lessee Unity Productions. This is clearly consistent with and, indeed, the only legitimate inference from the conduct of the parties concerned (Vide, inter alia, in this connection, the judgment Ext. 7), as it appears from the records before us.

36. In the above view, all the contentions, urged in support of this appeal, fail and the appeal is dismissed with costs contesting to the plaintiffs-respondents.

37. As the appeal is disposed of as aforesaid, we do not propose to pass any order on the plaintiffs' (respondents') application, filed in Court on 19-5-1959, except giving liberty to them to renew, if necessary, the prayers (1), (3) and (4) as made therein, before the learned Subordinate Judge in any appropriate proceedings, pending or otherwise. The application, so far as this Court is concerned, is disposed of accordingly.

Law, J.

38. I agree.

Cases Referred.

1(1951) 1 KB 752
2(1808) 15 Ves. 258 at p. 265 (per Lord Eldon)
3 (1902) 1 Ch 727
4(1924) 1 KB 525
57 Cal LJ 381
67 Cal LJ 387
727 Cal LJ 289: (AIR 1918 Cal 419)
8AIR 1923 Cal 535
9(1881) 20 Ch D. 1 at pp. 12-14, 21, 23 and 24
10(1897) AC 150 at pp. 162 and 165
11(1932) 1 Ch 331 at p. 342
12ILR 48 Cal 536: (AIR 1921 Cal 501(2))
13ILR 39 Mad 554: (AIR 1916 Mad 579)
14AIR 1915 Mad 872
15ILR 13 Cal 262 at p. 264
16ILR 10 All 133, 135-6

17ILR 16 Mad 429, 433-4
18ILR 31 Cal 667 at pp. 675-6
1912 Moo Ind App 292 (pp. 306-7) (PC)
20AIR 1931 PC 203
2123 Suth WR 131 at p. 132
2211 Ind App 218 at pp. 231-2, (PC)