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thereafter. As pointed out by the Judicial Committee in *Hemanta Kumar's case* (1) "An agreement for a lease, which a lease is by the statute declared to include, must, in their Lordships' opinion, be a document which effects an actual demise and operates as a lease.....The phrase which in the context where it occurs and in the statute in which it is found, must in their opinion relate to some document which creates a present and immediate interest in the land." The compromise decree expressly provides that unless the sum of Rs. 8,000 was paid within the stipulated time the Singhs were not to execute the decree or to take possession of the disputed property. Until the payment was made it was impossible to determine whether there would be any underlease or not. Such a contingent agreement is not within clause (d) and although it is covered by clause (b), is excepted by clause (vi) of sub-section (2). We therefore agree with the conclusion of the High Court though on different grounds and dismiss the appeal with costs.

Appeal dismissed.

Agent for the appellant: *P. K. Chatterjee.*

Agent for the respondent : *Sukumar Ghose.*

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 RAJA KAMALA RANJAN ROY

v.

BAIJNATH BAJORIA.

[SHRI HARILAL KANIA C. J., PATANJALI SASTRI
 and DAS J.J.]

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Contract—Specific performance—Offer to purchase leasehold right—Stipulation that lessee should obtain consent of lessor—Lessor unreasonably refusing consent—Lessee, whether relieved of liability to assign—Suit for specific performance by purchaser—Maintainability—Lease deed—Covenant prohibiting assignment of lease without lessor's consent, "such consent, however, not to be unreasonably withheld in case of respectable person"—Meaning and effect of covenant.

(1) 47 Cal. 485, at p. 494.

The defendant had obtained certain premises on lease under a deed which contained a covenant by the lessee "not to assign the demised premises or any part thereof without first obtaining the written consent of the lessor, such consent, however, not to be unreasonably withheld in the case of respectable or responsible person". After some offers and counter offers the plaintiff finally made an offer to purchase the defendant's leasehold interest on certain terms one of which was that "the consent of the landlord will be obtained by you before the completion of the sale"; and the offer was unconditionally accepted by the defendant. The defendant subsequently refused to assign on the ground that the lessor had withheld his consent, and the plaintiff sued for specific performance of the agreement:

Held, (i) that the agreement was not, for its coming into being, conditional or contingent on the obtaining of the lessor's consent, the obligation to obtain the lessor's consent being only a term of the agreement which the defendant had to fulfil; (ii) the words "such consent, however, not to be unreasonably withheld in the case of a respectable or responsible person" in the lease-deed did not amount to a separate or independent covenant by the lessor that he would not refuse consent except on reasonable grounds in the case of a respectable or responsible person, but only limited or qualified the lessee's covenant not to assign without the lessor's consent, by relieving him from the burden of the covenant if the lessor withheld his consent unreasonably in the case of proposed assignment to a respectable or responsible person; (iii) that, as the plaintiff was admittedly a respectable and responsible person and on the facts of the case the lessor's refusal to give consent was unreasonable, the defendant could validly assign the lease without such consent; (iv) that the court could come to a decision on this matter even though the lessor was not a party to the suit and the decision might not bind him; (v) that the defendant could not under these circumstances plead the absence of the lessor's consent as relieving him from the obligation to perform his part of the agreement if the plaintiff insisted on his carrying out the agreement even though the lessor had not given his consent; and the plaintiff was therefore entitled to a decree for specific performance of the agreement.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4 of 1950.

Appeal from the High Court of Judicature of Calcutta (Sir Trevor Harries C.J. and Mukherjea J.) from a judgment and decree dated May 30, 1948, in Appeal No. 21 of 1947 confirming with modifications the decree of a single Judge of the same High Court (Ormond J.) dated January 24, 1947, in suit No. 1031 of 1945.

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N. C. Chatterjee (Samarendra Nath Mukherjee, with him) for the appellant.

P. L. Banerjee (Upendra Chandra Mullick, with him) for the respondent.

1950. December 1. The Judgment of the Court was delivered by

DAS J.—This is an appeal by the defendant in a suit for specific performance against the judgment and decree of the High Court of Judicature at Fort William in Bengal (Sir Trevor Harries C. J. and Mukherjee J.) dated May 30, 1948, dismissing his appeal and confirming, with certain modifications, the judgment and decree for specific performance passed by Ormond J. on January 24, 1947. There is no substantial dispute as to the facts leading up to the suit out of which the present appeal has arisen and they may shortly be stated :

Maharaja Sris Chandra Nandy of Cossimbazar is the owner of premises No. 374 Upper Chitpur Road in the town of Calcutta (hereinafter referred to as the "said premises"). By an Indenture of lease made on April 27, 1931, the Maharaja as manager of the Cossimbazar Raj Wards Estate which was then under the management of the Court of Wards demised the said premises to one Madan Gopal Daga for a term of 51 years commencing from May 1, 1931, at and for the monthly rent of Rs. 1,083-5-3 and upon terms and conditions contained therein. By sub-clause (6) of clause 2 of the said Indenture the lessee covenanted, amongst other things, "not to assign the demised premises or any part thereof without first obtaining the written consent of the lessor, such consent, however, not to be unreasonably withheld in the case of respectable or responsible person" There was the usual proviso for re-entry for non-payment of rent for three months or for breach of any of the lessee's covenants, without prejudice to the lessor's right of action for such breach. On March 25, 1943, Madan Gopal Daga, with the written consent of the lessor, assigned the unexpired residue of the lease to the defendant who

was accepted as the lessee by the lessor. By an agreement said to have been arrived at by correspondence exchanged between the plaintiff and the defendant and their respective solicitors between January 27, 1945, and February 2, 1945, the defendant is alleged to have agreed to assign the said lease to the plaintiff for the unexpired residue of the term with effect from February 1, 1945, at and for the price of Rs. 1,80,000 and upon terms and conditions contained in the correspondence to which reference will be made in greater detail hereafter. On February 21, 1945, the defendant wrote a letter to the lessor intimating that he had agreed to assign his interest in the lease to the plaintiff and requesting the lessor to give his consent in writing to such assignment. On March 5, 1945, the lessor replied that the question of his giving consent to the transfer of the lease could not be entertained as he had already determined the lease and that in the circumstances the whole initiative was in the hands of the defendant. This letter clearly indicated that the lease had been determined for non-payment of rents and it obviously implied that it was for the defendant to get the lease revived by paying up the arrears of rent so that the question of giving consent to an assignment of the lease might be considered by the lessor. On March 8, 1945, the defendant by his solicitors' letter informed the plaintiff's solicitors that the defendant had approached the lessor but had failed to secure his consent and that, as no valid transfer could be made without such consent and the agreement for sale was subject to such consent being obtained, the defendant was reluctantly compelled to cancel the agreement. The plaintiff by his solicitors' letter of March 10, 1945, maintained that the agreement was not subject to the alleged condition and that the defendant was not entitled to cancel the agreement. It was pointed out that under the terms of the lease the lessor could not refuse his consent to the transfer of the lease to a respectable or responsible person which the plaintiff undoubtedly was. It is not necessary to refer to the further correspondence that followed in which each

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party maintained his own contention. On March 17, 1945, the lessor filed a suit (being suit No. 425 of 1945) in the High Court against the defendant for the recovery of the demised premises on the ground that the lease had been determined. It was during the pendency of that suit that on July 4, 1945, the suit for specific performance of the agreement to assign the lease out of which the present appeal has arisen was filed by the plaintiff against the defendant.

On July 13, 1945, the lessor's suit for ejectment was settled by the defendant consenting to a decree for Rs. 59,213-11-0 for arrears of rent which was paid up. There is no dispute that the forfeiture of the lease for non-payment of rent was waived and the lease was accordingly revived. Shortly after the settlement of the ejectment suit the defendant on August 6, 1945, applied to the lessor for his consent to the assignment of the lease and on the same day the lessor in reply declined to give his consent without assigning any reason whatever. The suit for specific performance came up for disposal before Ormond J. in November 1946 when it was heard in part and was adjourned. It was eventually further heard in January 1947 and finally disposed of on January 23, 1947, when Ormond J. passed a decree against the defendant for specific performance of the agreement. The decree provided that in the event of the defendant being unable within a fortnight from the date of the decree to obtain the written consent of the lessor the assignment should be made without such consent. The defendant appealed. After two days' hearing, "in order to clear up the matter" the appeal Court "gave the plaintiff an opportunity to examine the Maharaja as a witness in this case so that all relevant facts might be brought out and placed before the Court for the purpose of enabling it to come to a proper decision on this point." The appeal was accordingly adjourned and the lessor was examined on commission and his evidence was filed in the proceedings. After further hearing the appeal Court dismissed the defendant's appeal and confirmed the decree for specific performance of the agreement

without the need for obtaining the consent of the lessor prior to the execution of the deed of assignment in favour of the plaintiff. This decree was subsequently amended by inserting therein a provision enabling the plaintiff to set off from the purchase price the amount of rent payable as and from February 1, 1945, until the date of conveyance less all outgoings and interest on the purchase price at four per cent. per annum from that date to the date of the conveyance. The defendant has now come up before us in appeal from this judgment and decree of the appeal Court.

The first point urged by learned counsel appearing in support of this appeal is that, being subject to the consent of the lessor, the agreement was contingent on the defendant obtaining such consent and as the defendant could not secure the lessor's consent no effective agreement came into being which could be ordered to be specifically performed. The determination of this question must depend on a correct analysis and ascertainment of the meaning and import of the correspondence by which the agreement is said to have been arrived at. It was on January 27, 1945, that the plaintiff offered to purchase the defendant's leasehold interest in the said premises upon terms and conditions set forth in the plaintiff's letter of that date. Clauses 3 and 4 of those terms were as follows :

“(3). The lease will be transferred in my favour as from the 1st February, 1945, and I shall be entitled to recover rents from the tenants as from that date and shall pay the rent to the superior landlord and municipal taxes from that date.

(4). You shall have to obtain the necessary consent for the transfer of the lease in favour of myself or my nominees from the said Maharaja of Cossimbazar before the execution of the transfer of lease in my favour.”

The defendant replied to the plaintiff's above letter on January 28, 1945. By this reply the defendant expressed his willingness to transfer the lease to the plaintiff on terms contained therein. Clauses 3 and 4 of this letter were as follows :

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“(3) If your final acceptance as stated above is received within 30th January current and if I am able to obtain the consent of Maharaja Cossimbazar for transfer of the leasehold interest within the first week of February, 1945, I agree to your para 3.

(4) Your para 4 is agreed to but the name or names of the persons to be mentioned in the sale deed for whom permission is to be taken from Maharaja Cossimbazar should be clearly stated with their respective addresses.”

It is quite clear that no agreement was concluded by these two letters for the defendant's letter was not an unconditional acceptance of the plaintiff's offer but amounted in law to only a counter-offer. By clause 3 the defendant offered to transfer the lease to the plaintiff as from February 1, 1945, so as to entitle the plaintiff to realize the rents from that date and to be liable to pay the rent to the lessor also from that date on two conditions, namely, that the plaintiff's acceptance was received within January 30, 1945, and the defendant was able to obtain the lessor's consent within the first week of February, 1945. This clause did not make the offer itself contingent on the obtaining of the lessor's consent but made one of the terms of the offer, namely, that the lease would be transferred as from February 1, 1945, conditional on the obtaining of the lessor's consent within the first week of February, 1945. Likewise, subject to the name of the assignee being clearly stated the defendant by clause 4 offered to obtain the lessor's consent to the assignment of the lease. Clause 4 of the defendant's letter was not so expressed as to make the defendant's offer contingent on his obtaining the lessor's consent. On the contrary, clause 4 constituted one of the terms of the offer which, on the offer being accepted, would become binding on the defendant as one of the terms of the agreement. The plaintiff, however, does not appear to have accepted the defendant's counter offer but on January 29, 1945, through his solicitors made a fresh offer to purchase the defendant's leasehold interest at Rs. 1,80,000 on the following terms :

“(a) That the earnest money will be Rs. 5,000 (Rupees five thousand) instead of Rs. 30,000.

(b) Our client will have the conveyance in his own favour. The consent of the landlord will be obtained by you before the completion of sale.

(c) That your client will complete the conveyance within a month after the receipt by us of all the original title deeds with you.

(d) That the transfer of the property in favour of our client will take effect on and from the 1st February, 1945, irrespective of the date of the conveyance, he being entitled to all the rents, issues and profits and being liable for all the liabilities in respect thereof since the said date.

(e) That our client will not be liable to pay your Solicitor’s Bill of cost in respect of the sale.”

Again, it will be noticed that by clause (b) the offer was not made contingent on the obtaining of the lessor’s consent but the plaintiff insisted on the defendant’s obtaining such consent as a substantive term of his offer so that if the offer by being accepted ripened into an agreement the defendant would be bound to obtain the lessor’s consent as a term of such agreement. The defendant by his solicitors’ letter dated February 1, 1945, purported to accept the plaintiff’s last offer with a slight reservation, namely,—

“As regards clause (d) of your said letter, it is distinctly understood that the same should be given effect to only in case the conveyance is completed in terms of clause (c) of your said letter.”

On February 2, 1945, the plaintiff by his solicitors’ letter of that date unconditionally accepted this reservation and so a concluded agreement was arrived at between the parties. This agreement was not, for its coming into being, contingent or conditional on the obtaining of the lessor’s consent. The obligation to obtain the lessor’s consent was cast upon the defendant as a term of the agreement. In our judgment the Court below was right in holding that the agreement

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itself was not contingent as contended for by the appellant.

The contentions next advanced by learned counsel for the appellant relate to the lessee's covenant contained in sub-clause (6) of clause 2 of the lease to which reference has already been made. The legal incidents of such a covenant are now well established by judicial decisions referred to in the judgment of the High Court and it is not necessary to refer to them in detail. Suffice it to say, that the words "such consent, however, not to be unreasonably withheld in the case of respectable or responsible person" contained in the covenant do not amount to a separate or independent covenant by the lessor that he would not refuse consent except upon reasonable grounds in the case of respectable or responsible person, but that those words limit or qualify the lessee's covenant not to assign the demised premises without the consent in writing of the lessor. In other words, those words have the effect of relieving the lessee from the burden of this covenant if the lessor withholds his consent unreasonably in case of proposed assignment to a respectable or responsible person. In this view of the matter, the plaintiff contended that he being a respectable and responsible person the lessor had unreasonably withheld his consent to the proposed assignment to him and had consequently relieved the defendant from the burden of his covenant so that the defendant could legally and validly assign the lease to him without such consent of the lessor.

The first objection taken by the appellant to this contention of the plaintiff is that in his plaint the plaintiff insisted on the defendant obtaining the lessor's consent and that he should not have been permitted to make this new case at the hearing. Both the trial Court and the appeal Court held that there was, strictly speaking, no element of surprise, particularly because the plaintiff relied upon facts admitted and proved by the defendant himself and that it was open to him to take this point. We may also add that this point was in a manner indicated in the plaint

itself for in paragraph 11 thereof it was pleaded that the plaintiff was a responsible and respectable person and that if consent to assign in his favour was withdrawn such withdrawal would be unreasonable and would not be valid and binding. In view of such pleading we are unable to say that the point raised by the plaintiff at the trial was an entirely new point or that the defendant was taken by surprise.

The next objection of the appellant was that this point should not have been allowed to be raised and no evidence should have been permitted to be adduced on this point in the absence of the lessor as a party to the suit. We do not think that there is any force in this objection. The Court had to decide whether it was a case where relief by way of specific performance should be given. The Court could not force the defendant to apply to the lessor for his consent nor could the Court force the lessor to give his consent and, if the matter only depended on the consent, the Court would not have ordinarily, in those circumstances, directed the agreement for assignment to be specifically enforced. The Court, therefore, had also to consider, for the purposes of this case, as to whether the circumstances were such as would indicate that the defendant had been relieved of the burden of his covenant by reason of the lessor having unreasonably withheld his consent. It is true that a decision on that question in this suit would not be binding on the lessor, but nevertheless the Court had to come to a decision on that question for the purposes of this suit as between the parties thereto in order to award the relief of specific performance to the plaintiff.

The third objection of the appellant is that the appeal Court should not have allowed the plaintiff to adduce further evidence. It will be recalled that the appeal Court directed the evidence of the Maharaja of Cossimbazar to be taken during the hearing of the appeal. The judgment of the appeal Court clearly indicates that it was the appeal Court that "required" the evidence "in order to clear up the matter" and

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“for the purpose of enabling it to come to a proper decision on this point”. The matter, therefore, is fully covered by Order XLI, rule 27 of the Code of Civil Procedure and no objection can be taken to the course adopted by the appeal Court on that ground. We do not think there is any reason to interfere in the exercise of the Court’s discretion.

The fourth objection is that the High Court was wrong in holding that the term in the agreement that the defendant must obtain the consent of the lessor before executing the assignment to the plaintiff was a term for the benefit of the plaintiff only. It will be recalled that that was a term which was introduced by the plaintiff in his offer that eventually ripened into an agreement. The term was not expressed in a manner indicating that it was inserted in the agreement for the protection of the defendant. In other words, the objection that the consent of the lessor had not been obtained was one which could be availed of by the plaintiff who could rescind the contract and claim damages for the breach thereof. We cannot see how, in view of the language used in the correspondence, the defendant could plead the absence of the lessor’s consent as relieving him from the obligation of performing his part of the agreement if the plaintiff waived the objection and insisted on his carrying out the agreement. The absence of consent may amount to a defect in the title of the defendant, but which the plaintiff was willing to accept.

Finally it is said that by directing the specific performance of the agreement the Court has exposed the defendant to the risk of an action for damages for breach of covenant. If the assignment of the lease by the defendant to the plaintiff without the lessor’s consent amounted to a breach of covenant, the lessor could forfeit the lease and sue for possession. Such a course would affect only the plaintiff but not the defendant, for he had already parted with the lease for valuable consideration. It is said that the lessor could sue the defendant for damages for breach of that

covenant and the Court should not, by decreeing specific performance, have put the defendant in that perilous position. There appear to us to be two answers to this argument, namely, (1) that the defendant should have, by proper language, made his obligation to transfer dependent or conditional upon his being able to obtain the lessor's consent which he did not do and (2) that the plaintiff being a respectable and responsible person of means, the measure of damages could only be a problematic conjecture. Indeed, it may have been precisely for this very consideration that the defendant had unconditionally agreed to obtain the consent of the lessor and to assign his interest in the lease. That the plaintiff was a respectable and responsible person cannot, on the evidence before the Court, be denied or disputed and, indeed, learned counsel for the appellant did not so contend. We find ourselves in agreement with the High Court that in the circumstances and on the evidence on record the lessor had unreasonably withheld his consent so as to enable the defendant to assign the lease without such consent. In the circumstances, we are satisfied that both the trial Court and the appeal Court exercised their discretion properly and no ground has been made out for our interfering with the judgment of the High Court. The appeal is accordingly dismissed. The appellant to pay the costs of this appeal.

Appeal dismissed.

Agent for the appellant : *P.K. Chatterjee.*

Agent for the respondent : *S.K. Ghosh.*

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