

**(1926) 01 BOM CK 0056****Bombay High Court****Case No:** None

Janardan Govind Mahale

APPELLANT

Vs

Mhalappa Venkatesh Shetti

RESPONDENT

**Date of Decision:** Jan. 8, 1926**Acts Referred:**

- Transfer of Property Act, 1882 - Section 111

**Citation:** AIR 1926 Bom 304**Hon'ble Judges:** Macleod, C.J; Coyajee, J**Bench:** Full Bench**Judgement**

Macleod, C.J.

The plaintiff sued to recover possession of the land described in the plaint free from any rights or charges thereon, alleging that defendant No. 1 held the land in suit under a mulgeni lease, dated June 17, 1882; that under it the lessee was liable to pay the stipulated rent at a fixed time of the year; that the lease also stipulated that the lessee should enjoy the land without transferring it to anybody; that if he broke any of these conditions the lessee was under its terms liable to forfeit his leasehold rights; that Defendant No. 1 did not give the stipulated rent at the stipulated time; that Defendant No. 1 mortgaged the land to Defendant No. 2 on November 11, 1922; that he thus broke both the conditions and that, therefore, the plaintiff had got a right to recover possession of the land.

2. The first defendant contended that the stipulation against alienation was illegal. But that is obviously a point which cannot be relied upon by the first defendant.

3. We must take it, considering the terms of the lease, although it is not very clear whether the District Judge considered that the terms "transfer" or "alienation" include a simple mortgage, that the first defendant has transferred by mortgage his "interest in the land to the second defendant, which would involve a forfeiture if the owner wished to exercise his rights under the lease.

4. It has been argued that this Court has no power to relieve against forfeiture, except for non-payment of rent. But Section 111 of the Transfer of Property Act and the other sections of Chapter V do not by virtue of Section 117 apply to leases for agricultural purposes, and there is no other restriction that I know of against the Court exercising its equitable powers by relieving against forfeiture in a proper case. Considering that the lease does not expressly restrain the tenant from mortgaging his interest, and that apparently the owner had refrained from objecting to a prior mortgage executed by Defendant No. 1 in favour of Defendant No. 3, we think the proper order to make in this case is that Defendant No. 1 should have three months from the time the record reaches the lower Court, to release the land held by him from the mortgage of the second defendant, and if he cannot release the land from the mortgage within that time, then the decree which has been passed by the trial Court will come into effect. If the land is released from the mortgage, then the suit of the plaintiff will be dismissed. But in any event the first defendant will "have to pay the plaintiff's costs throughout.

Coyajee, J.

5. I concur.