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OSTENSIBLE AUTHORITY AND SUB-LETTING: REVISITING SECTION 41 OF THE TRANSFER OF PROPERTY ACT IN INTERMEDIARY-LED RENTAL HOUSING

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Abstract

India's urban rental market increasingly runs on a layered arrangement in which an intermediary takes a flat on lease from the owner and re-lets it to occupants, collecting a large refundable security deposit from each. Statute and case law have given little attention to the occupant at the bottom of this chain. This article is a critical study of whether the bona fide sub-tenant has an effective remedy under the Transfer of Property Act 1882, the Registration Act 1908, the law of contract and the doctrines of ostensible ownership and estoppel. It shows that the sub-tenant's possession and deposit are exposed to a dispute in which the sub-tenant has no part, namely the dispute between owner and intermediary. It then considers how the Model Tenancy Act 2021 and comparative deposit-protection regimes address the problem, and proposes targeted reforms: recorded owner consent to sub-letting, custody of deposits, and procedural protection for sub-tenants in eviction suits.

Keywords: sub-tenancy; security deposit; tenancy law; Transfer of Property Act; Model Tenancy Act 2021; rental housing; socio-legal studies.

I. INTRODUCTION

A familiar arrangement has become routine in India's large cities. An owner, who may live abroad or simply wish to avoid the daily chores of being a landlord, lets a flat to a company or an individual for a fixed monthly sum. That intermediary then re-lets the flat to families, students or working professionals at a higher rent and takes a substantial refundable security deposit from each occupant. So long as rent reaches the owner on time, nobody has any reason to look behind the arrangement. The difficulty appears when the intermediary stops paying, stops answering calls, or disappears. The owner, unpaid for months, serves notice and sues for

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possession. The occupant, who has paid the deposit and the rent faithfully, learns for the first time that the person to whom she paid may have had no right to keep the premises, and that the person who now asks for them back has never received a rupee from her.

This article is a critical study of one question: does the sub-tenant, the occupant at the bottom of such a chain, have an effective remedy in Indian law? It asks what the law offers and why the answer is so unsatisfactory in practice. Its argument has three parts. First, the doctrine is, formally, reasonably clear: a sub-tenant's estate is derived from, and cannot exceed or outlast, the estate of the tenant who granted it. Second, that clarity is deceptive, because the facts on which a sub-tenant's protection depends, namely whether the owner consented to the sub-letting, whether the head tenancy has validly ended, and whether the deposit can be recovered from anyone, are precisely the facts the sub-tenant is least able to verify or prove. Third, the current reform effort, led by the Model Tenancy Act 2021, concentrates on the landlord–tenant relationship and says little about the commercial intermediary who sits between them.

The analysis is doctrinal and socio-legal. It reads the Transfer of Property Act 1882 and related statutes alongside the way informal rental markets actually operate. It does not present original empirical findings. The description of the market in Part II rests on widely observed practice and is offered as context for the legal analysis, not as proven data.

II. THE MASTER-LEASE MODEL AND ITS SOCIAL LOGIC

Renting is not a marginal form of housing in urban India. The 2011 census recorded that roughly a quarter of urban households lived in rented homes,[1] and renting is especially common in cities that attract migrant workers and students. Much of this housing is supplied by individual owners who hold one or two flats as investments. Their priorities are predictable: a steady rent, minimal management and protection against damage and long-term loss of possession. Intermediaries, whether companies, property managers or enterprising individuals, offer exactly that bundle. They promise a fixed rent regardless of occupancy and take responsibility for finding occupants, collecting rent and maintaining the flat.

On the demand side, sub-tenants are typically people who need housing quickly and cannot easily deal with owners directly: workers relocating at short notice, students, and families new to a city. For them the intermediary offers convenience, ready-to-use premises and a single point of contact. The intermediary earns the spread between the rent it pays and the rent it

[1]Census of India 2011, Houselisting and Housing Census Data (Office of the Registrar General and Census Commissioner, India).

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collects, and also the use of the security deposits it takes. This second source of income is easily overlooked. A deposit of several months' rent, collected from many occupants and not placed in any separate account, is in economic terms an interest-free loan from tenants to the intermediary. It can finance the intermediary's own deposits to owners, its expansion, or its losses.

Three features of this market make the arrangement fragile. The first is information asymmetry. The sub-tenant usually meets only the intermediary or a broker, often does not know the owner's identity, and rarely sees the head lease. The second is informal documentation. Agreements are commonly short, unregistered and drafted by the intermediary, and may be styled as leave and licence rather than lease. The third is an imbalance of bargaining power. The occupant must pay the deposit before taking possession, has little ability to negotiate its amount, and has no practical means of enforcing its return except through litigation. None of these features is unique to India, but combined with slow civil courts they produce a market in which risk is borne by the party least able to assess or spread it.

III. THE DOCTRINAL FRAMEWORK

A. Sub-Letting as a Derivative Interest

A lease of immovable property is, in the language of the Transfer of Property Act, a transfer of a right to enjoy the property for a certain time, in consideration of a price paid or promised.[2] Section 108(j) provides that, in the absence of a contract to the contrary, a lessee may transfer absolutely or by way of sub-lease the whole or any part of his interest in the property, and that the lessee remains subject to the liabilities of the original lease.[3] Sub-letting is therefore permitted by default and prohibited only if the lease says so. Many head leases do contain such a clause, which is why the owner's consent, express or implied, is so often the decisive fact in later disputes.

The sub-lessee's estate is carved out of that of the head lessee. It follows that it cannot be larger than, or survive the end of, the head lessee's interest. The sub-tenant has no contract with the owner and, absent attornment or a direct arrangement, owes the owner no rent and can claim nothing from the owner. This is the doctrinal source of the sub-tenant's vulnerability, and it is why a deposit paid to the intermediary is not a debt of the owner.

Characterisation also matters. Intermediaries frequently describe the occupant's rights as a

[2]Transfer of Property Act 1882, s 105.
[3]Transfer of Property Act 1882, s 108(j).

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licence, in the hope of avoiding the incidents of tenancy. Indian courts look to substance, and in particular to whether the occupant was given exclusive possession for a term in return for payment, rather than to the label the parties chose.[4] An occupant who has had sole possession of a self-contained flat for months or years, paying a monthly sum, will in most cases be treated as a tenant whatever the document says.

B. Registration and the Eleven-Month Convention

A lease for more than a year, or reserving a yearly rent, can be made only by a registered instrument.[5] An unregistered instrument that requires registration cannot be received in evidence of the transaction it affects, although it may be used for a collateral purpose.[6] The result is the well-known practice of drafting leases for eleven months, which avoids compulsory registration and its costs. The practice is rational for each party individually but has a collective cost: the market runs largely on unregistered paper, and there is no public record from which a prospective sub-tenant could confirm who holds what interest in a flat.

Unregistered documentation does not leave the sub-tenant without rights. Where a person is in possession with the permission of the owner or head tenant and pays rent, courts have in appropriate cases been willing to recognise a periodic tenancy on the footing of conduct, even where the written instrument is inadmissible. But proof then rests on receipts, bank transfers and oral evidence, which is a poor substitute for a registered instrument.

C. Termination of the Head Tenancy

The most important practical question for a sub-tenant is whether the head tenancy has ended, because on its termination the sub-tenancy ordinarily falls with it. A lease may be determined by efflux of time, by notice, by surrender, by forfeiture and in other ways listed in section 111.[7] For a periodic tenancy, section 106 requires a written notice of the prescribed period, which for a month-to-month tenancy is fifteen days, given by the party terminating and served on the other.[8] An owner who wishes to recover possession from a sub-tenant must therefore first, or at least in the same proceeding, establish that the head tenancy has validly ended.

Service is where disputes arise. If the head tenant cannot be found and a notice is returned

[4] *Associated Hotels of India Ltd v R N Kapoor* AIR 1959 SC 1262; *Anwar Hasan Khan v Mohd Shafi* (2001) AIR 2001 SC 2984

[5] Transfer of Property Act 1882, s 107; Registration Act 1908, s 17(1)(d).

[6] Registration Act 1908, s 49.

[7] Transfer of Property Act 1882, s 111.

[8] Transfer of Property Act 1882, s 106 (as amended in 2002).

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unserved, the sub-tenant may argue that the head tenancy has not been terminated and that the owner has no present right to possession. The owner will answer that the presumption of service in section 27 of the General Clauses Act 1897 applies where a notice is properly addressed and sent by registered post, and that a recipient who avoids service cannot benefit from doing so.[9] Which argument prevails depends on the evidence of addressing and dispatch, the endorsements on the postal cover and the court's view of the head tenant's conduct. The point shows how much of the sub-tenant's position depends on facts about a relationship to which the sub-tenant is not a party.

D. Owner's Consent and the Ostensible Owner Doctrine

Two further questions determine the strength of the sub-tenant's position: did the owner permit the sub-letting, and did the sub-tenant take reasonable care before paying? If the head lease permits sub-letting, or the owner knowingly allowed the intermediary to do it, the sub-tenancy is a legitimate exercise of the head tenant's rights, and the owner's remedy for any default lies against the head tenant. If the head lease prohibits sub-letting, the sub-letting may expose the head tenant to forfeiture, but that is a right of the owner against the head tenant, and it does not by itself make the sub-tenant a trespasser until the owner acts on it.

The sub-tenant may invoke section 41 of the Transfer of Property Act, which protects a transferee for consideration who has taken reasonable care to ascertain that the transferor had power to transfer, where the real owner has consented, expressly or impliedly, to the transferor appearing as owner.[10] The provision fits uneasily with the master-lease model, because an intermediary is typically a lessee and not an ostensible owner of the property. A more promising route is the general law of estoppel. An owner who allows an intermediary to hold itself out as entitled to sub-let, and who accepts rent knowing that the flat is occupied by others, may be estopped from later denying that authority as against occupants who acted on that appearance.[11] Whether a court will find such an estoppel is a question of fact, and the sub-tenant carries the burden of proving the owner's conduct, which is difficult when the owner never met the sub-tenant.

[9]General Clauses Act 1897, s 27.
[10]Transfer of Property Act 1882, s 41; the doctrine's roots lie in *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) 2 IA 283.
[11]Indian Evidence Act 1872, s 115, now replaced by the Bharatiya Sakshya Adhiniyam 2023; the corresponding section should be confirmed before publication.

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IV. THE DEPOSIT PROBLEM

Even a sub-tenant who is entitled to remain in possession for the time being faces a second problem: the deposit. It was paid to the intermediary and is recoverable, if at all, from the intermediary. The claim is contractual. The sub-tenant may also frame it as a claim for damages for misrepresentation, where the intermediary falsely asserted that it held the owner's authority, or for breach of contract.[12] Each route leads to an ordinary money suit against a party who may be insolvent, uncontactable or based in another state. A decree against such a party is worth little.

The owner, meanwhile, owes no duty in respect of the deposit. The owner recovers premises that have been occupied, and often furnished and maintained, at the sub-tenant's expense, while the sub-tenant loses both the premises and the deposit. Some will say that this is simply the consequence of dealing with the wrong person, a risk that sub-tenants accept by not checking the head lease. That reply has force where the sub-tenant was careless. It is less persuasive where, as is common, the intermediary was a corporate entity with a professional appearance, the owner had permitted the arrangement, and there was no feasible way for an ordinary occupant to verify rights over the flat. The allocation of loss then looks arbitrary rather than principled.

A criminal complaint of cheating is the other route sub-tenants commonly take. It can put pressure on an intermediary, but it is not a mechanism for restitution, its outcome is uncertain and the process is slow. The structural point is that the law treats the deposit as an ordinary private debt and provides no mechanism to keep it safe in the meantime.

V. THE SUB-TENANT IN THE EVICTION SUIT

Procedure adds to the difficulty. An owner who sues for possession will usually join the head tenant and the occupants as defendants and plead that the occupants are in illegal possession. The sub-tenant's defences are largely those discussed above: that the owner consented, that the head tenancy has not validly ended, and that the owner has no cause of action against the sub-tenant as such. These defences are made harder by the absence of the head tenant, who has the documents and the personal knowledge and who is often the one party that does not appear.

The sub-tenant's own monetary claim is a separate matter. A counterclaim ordinarily lies against the plaintiff, and the owner owes the sub-tenant nothing.[13] Recovery of the deposit from

[12]Indian Contract Act 1872, ss 18, 19 and 73.
[13]Code of Civil Procedure 1908, Order VIII rule 6A; Order I rule 10 (joinder and striking out of parties).

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the head tenant, who is a co-defendant, generally requires a separate suit. The result is a multiplicity of proceedings: the sub-tenant defends one suit while preparing another. Courts have discretion over the time they allow for delivery of possession and may take hardship into account, but nothing in the statute requires them to consider the unrecovered deposit.

VI. LEGISLATIVE AND COMPARATIVE APPROACHES

The Model Tenancy Act 2021, circulated by the Ministry of Housing and Urban Affairs for adoption by the states, is the most significant recent attempt at reform. It proposes written tenancy agreements communicated to a Rent Authority, a cap on residential security deposits at two months' rent, and specialised Rent Courts and Tribunals to resolve disputes.[14] Each of these would help sub-tenants indirectly: a deposit cap reduces the sum at risk, a record with the Rent Authority gives a place to check, and specialised courts promise speed. Tamil Nadu had earlier enacted its own statute on the rights and responsibilities of landlords and tenants.[15]

Yet the model Act's structure is essentially bilateral. Its principal concern is the relationship between landlord and tenant, and it does not appear to treat commercial intermediaries who systematically re-let flats as a distinct category requiring regulation, or to address the deposits they hold from sub-tenants. A deposit cap helps, but a capped deposit is still lost if the person holding it disappears.

Comparative experience suggests an alternative. In England and Wales, the Housing Act 2004 requires deposits taken under assured shorthold tenancies to be protected in a government-authorised scheme, requires prescribed information to be given to the tenant, and penalises landlords who do not comply.[16] The scheme does not solve the problem of unauthorised sub-letting, but it embodies a principle that Indian law lacks: that a deposit is the tenant's money, held for a purpose, and should not be at the free disposal of the person who takes it.

VII. PROPOSALS FOR REFORM

The reforms below are modest. They aim at information, custody and procedure, and none requires an overhaul of the law of lease.

Recorded consent. First, an owner's consent to sub-letting should be capable of being recorded on a public register. A short, low-cost electronic certificate signed by the owner and linked to

[14]Model Tenancy Act 2021 (Ministry of Housing and Urban Affairs, Government of India); see in particular the provisions on tenancy agreements (s 4) and security deposits (s 11). The section references should be checked against the final text, and the current status of state adoption should be updated before publication.
[15]Tamil Nadu Regulation of Rights and Responsibilities of Landlords and Tenants Act 2017.
[16]Housing Act 2004 (UK), ss 212–215.

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the flat's identification would let a prospective sub-tenant confirm both the head tenancy and the authority to sub-let. It would give owners control over who occupies their flats, and it would turn the question of consent from a matter of later proof into a matter of record. A sub-tenant who has checked such a certificate would be strongly placed to plead good faith.

Custody of deposits. Second, security deposits taken by anyone who regularly sub-lets premises should be held in a designated account or placed with a recognised scheme, as in the English model, and released on the conditions of the agreement. Combined with a statutory cap on quantum, this would reduce both the temptation to use deposits as working capital and the loss when an intermediary fails.

Procedural protection. Third, an eviction suit against a sub-tenant should require the owner to join the head tenant and to plead the termination of the head tenancy specifically. A bona fide sub-tenant who is not in arrears should be allowed to pay rent directly to the owner for the remainder of the head-lease term, or for a fixed period, to give time to arrange alternative housing. Courts should be authorised to take the unrecovered deposit into account when fixing the time for delivery of possession.

Regulation of intermediaries. Fourth, commercial intermediaries who re-let residential premises as a business should be required to register, to disclose to occupants the identity of the owner and the term of the head lease, and to maintain records. Disclosure duties of this kind exist in other consumer markets and are inexpensive to comply with.

These proposals impose costs, and some owners may resist a register that exposes arrangements they prefer to keep informal. The reply is that both sides gain: owners obtain a visible record of who occupies their premises, and occupants obtain a means of checking whom they are dealing with. The alternative is a system in which informality benefits those who can afford to be informal and costs those who cannot.

VIII. CONCLUSION

The sub-tenant in India's rental market occupies an awkward place in the law. The Transfer of Property Act treats the sub-tenancy as a derivative estate that depends on the head tenancy, and so makes the sub-tenant's fate depend on facts about owner and intermediary that the sub-tenant cannot see. The Registration Act and the eleven-month convention leave the market without a public record. The law of contract treats the deposit as an ordinary debt owed by an intermediary who may not be there when it falls due. Procedure then requires the sub-tenant to defend one suit and bring another.

None of this means that sub-tenants are without remedy. Consent, estoppel, defective

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termination and good-faith purchase arguments are available and are sometimes decisive. But they are defences raised after the harm has begun, by the party least equipped to raise them. A rental market in which millions of households rely on informal intermediaries needs rules that operate earlier, by making consent visible, keeping deposits safe and giving sub-tenants a fair hearing and a fair time to move. The Model Tenancy Act 2021 provides a useful foundation, but its extension to the intermediary-led market is the unfinished task.

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