APPELLATE CIVIL.

Before Costello and Jack JJ.

PRAKASHCHANDRA DAS
v.
RAJENDRANATH BASU.*

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Feb. 23.

Notice—Service tenure—Forfeiture—Transfer of Property Act (IV of 1882), s. 111, sub-cl. (g).

Mere delay does not necessarily create an estoppel or operate as a waiver.

The Transfer of Property Act has no application to a tenancy created long anterior to its enactment, where no lease between the grantor and grantee or their successors was made after its enactment, of such a character as to bring the matter within the provisions of one or other of the various sub-clauses of section 111.

Where the rights and obligations of the parties are regulated by section 111, clause (*g*) of the Transfer of Property Act, and a right to forfeiture arises, the lessor is required to do some act thereafter showing his intention to determine the lease.

In English law, the bringing of an action (which corresponds to an institution of a suit in India) is of istelf an act which definitely determines the lease with regard to which forfeiture has been incurred.

Isabali Tayabali v. *Mahadu Ekoba* (1) followed.

Nowrang Singh v. *Janardan Kishor Lal Singh* (2) dissented from.

If the bringing of the action is equivalent to the old "entry" in the English law courts, there is no valid reason why it should not be equivalent to and constitute the " act showing the lessor's intention, " which is required by the Indian statute.

Under section 111, sub-clause (*g*), as amended since 1st April, 1930, however, before the right to institute a suit can arise it will be necessary for the lessor to indicate definitely his intention to take advantage of the forfeiture, which has been incurred, by giving notice to that effect to the lessee.

It is clear on the authorities that the refusal by a tenant to perform services, which are incidental to his holding, is sufficient of itself to ground a suit for ejectment.

Hurrogobind Raha v. *Ramrutno Dey* (3) referred to.

Where there is a right to service of a public character, *e.g.*, *chaukidârî châkrân*, the *zemindâr* himself is not or may not always be entitled to resume possession ; but where the service is to a private person (such as the grantor in the present case) he can do so either when the service is not required or when the grantee has refused to perform the service.

Ramnath Sil v. *Siba Sundari Debya* (4) referred to.

*Appeal from Appellate Decree, No. 999 of 1929, against the decree of Bhupendranath Mukherji, Subordinate Judge of Sylhet, dated Dec. 6, 1928, affirming the decree of Rameshchandra Sen Gupta, Munsif of Moulvibazar, dated May 25, 1926.

(1) (1917) I. L. R. 42 Bom. 195.
(2) (1917) I. L. R. 45 Calc. 469.
(3) (1878) I. L. R. 4 Calc. 67.
(4) (1915) 25 C. L. J. 332.

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A service tenant holds the land on condition that, if he refuses to render service, the lease shall determine and, thereupon, the landlord will be entitled to re-enter.

If the tenant renounces his character as a service tenant, by claiming to hold the land at money or produce rent, and denies the title of the landlord to resume the lands, the lease to him determines and no notice is necessary to eject him.

The tenancy (in the present case) *ipso facto* came to an end at the time when the service failed to be rendered.

No question of the lessor having to assert a right of forfeiture or any matter of the kind arises.

The tenancy automatically came to an end when the tenant made default in rendering the services stipulated for and the grantor thereupon became entitled to re-enter.

SECOND APPEAL by the defendants.

The facts of the case, out of which this appeal arose, appear fully in the judgment.

Jogeshchandra Ray and *Priyanath Datta* for the appellant.

Brajalal Chakrabarti and *Pareshlal Some* for the respondent.

COSTELLO J. This appeal arises out of a suit, which was brought in the first court of the Munsif at Moulvibazar by the plaintiffs, Bamasundari Dâm (the widow of one Taranath Dâm) and Rajendranath Dâm (the adopted son of Taranath Dâm) against Prakashchandra Das and Gopicharan Das, who were the sons of one Gourram Das. The suit was instituted on the 9th April, 1925, and shortly afterwards, and before the suit was heard, the female plaintiff died and an order was, in consequence, made, declaring that, as against her, the suit had abated. The case was, however, proceeded with by Rajendranath Dâm, the second plaintiff, and he ultimately was successful against the defendants.

The suit was brought to eject the defendants from certain lands (which, for the purpose of deciding this appeal, it is not necessary to specify with any particularity) upon the basis that the lands were held by the defendants on a service tenure and the defendants had, ever since the 8th October, 1913, persistently refused or, at any rate, withheld

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performance of the services due from them in respect of the lands so held. It is to be observed that the suit was brought only just within the limitation period of twelve years from the time when, according to the plaintiffs' case, the cause of action had first arisen. The answer made by the defendants, that is to say, the substantial defence put forward by them was that the lands in question were not held as service or *châkrân* lands or by any similar kind of tenure but were, in fact, held by them on a rent-paying basis and that they had in fact, from time to time, paid rent for the lands to the plaintiffs or to their predecessors-in-title. It appears that it was clearly established that the lands, which were the subject matter of the suit, had undoubtedly been held by the defendants and their predecessors from the plaintiffs and their predecessors-in-title for a very considerable period of time. In the circumstances of the case, it was obviously difficult, if not impossible, accurately to discover or even surmise what were the precise terms of the tenure at its inception.

Before I come to deal with the main points of law, that have been raised in this appeal, I will first of all dispose of a subsidiary point, which has been argued before us, namely, that the plaintiff, Rajendranath, was not competent to continue these proceedings after the decease of his co-plaintiff Bamasundari. It appears, however, that what the learned Munsif found as regards this point, as did the learned Officiating Subordinate Judge before whom the matter came on appeal, was that Rajendranath had been taken in adoption by the senior widow of Taranath Dâm (the husband of Bamasundari), a lady named Umatara, and, in consequence, both the courts below were of opinion, on the evidence adduced before them, that the circumstances were such that Rajendra had acquired all such right, title and interest with regard to the subject matter of the suit, as had been possessed by Taranath's other widow, Bamasundari, the female plaintiff in this suit. Mr. Ray, on behalf of the defendants-appellants, did not

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seriously press the point with regard to the competency of the proceedings subsequent to the death of Bamasundari and, therefore, nothing more need be said with regard to that. We have only to concern ourselves with the merits of the case.

The learned Munsif made a decree in favour of the surviving plaintiff, Rajendranath, and gave him *khâs* possession of the lands in dispute and ordered that, as the defendants' right to hold those lands as *châkrân* lands had determined, they should remove certain *ghars*, which were standing on one of the plots, and that, in default, those *ghars* should be removed at the cost of the defendants in execution proceedings. Against that decision, the defendants appealed to the lower appellate court and the learned Officiating Subordinate Judge of Sylhet confirmed the decree of the court of first instance with a slight modification as regards the order for the removal of the *ghars* on plot No. 14.

The defendants now come before us faced with two concurrent decisions in favour of the surviving plaintiff. Mr. Ray on their behalf has urged that the plaintiff was not entitled to recover these lands for two reasons: first of all he argued that no forfeiture had been incurred at the time when this suit was instituted, because the plaintiffs had not complied with the relevant provisions of section 111 of the Transfer of Property Act, 1882; and secondly, that, in any event, having regard to the long lapse of time between the date, on which the services ceased to be rendered by the defendants, and the date of the institution of these proceedings, the plaintiffs had lost whatever rights they might originally have possessed by reason of the operation of the doctrine of estoppel or of waiver. To dispose of this second point, all that need be said, I think, is this: To all intents and purposes the suit was in its nature an action for ejectment. Under English legal principles it would have been described as a common law action. It has to be determined, therefore, either under the

appropriate provisions of the English law (which, in the absence of any express provisions to the contrary, obtains in this country) or by reference to any enactments relating to the matter, which may have been passed by the Indian legislature. The Indian Limitation Act prescribes that, in a case of this kind, the landlord or, as he ought perhaps more accurately be styled in this case, the "grantor," has a period of twelve years within which to assert his rights by proceedings at law. In this particular case, the plaintiff, as the successor-in-title of the original grantor of this tenure, just managed to institute his suit within the time allowed to him under the Limitation Act. Although, in the circumstances, one cannot but regard the delay on the part of the plaintiff with some suspicion, yet one can only say that he is not precluded from succeeding, if, in fact, there was still a cause of action at the time when the suit was instituted and it cannot rightly be held that, by the mere delay, he created an estoppel against himself or thereby waived his rights. Something more than simple delay would have been required in order to enable the defendants to succeed on the ground of estoppel or waiver. I come now to the real and important point taken on behalf of the appellants. Mr. Ray has argued, on the authority of certain cases, which he has put before us, that the matter must be determined on the footing that the section of the Transfer of Property Act, to which I have referred, applies to the facts and circumstances of this case. We are, however, of opinion that the Transfer of Property Act has no application at all to the present case. To begin with, it is clear, upon the findings which were arrived at in the courts below, that the relationship between the plaintiff and the defendants, or rather between their respective predecessors-in-title, had been in existence for such a period of time as to relegate the inception of that relationship to a date long anterior to the passing of the Transfer of Property Act. That of itself would not perhaps have excluded altogether the operation

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of the Act, if in fact it could have been shown that there was at some time or other a lease entered into between the plaintiff's predecessor and the defendant's predecessor of such a character as to bring the matter within the provisions of one or other of the various sub-clauses of section 111. There is, however, no trace of any definite contract in this case. So far, as we know, there never was anything in the nature of a written demise as between the parties and, therefore, there never was any express condition as to the determination of the tenure, whatever it was, such as might have brought the case within the ambit of section 111. I emphasise the word "express." There was, I say, no express condition or any covenant, which might have provided that, on breach of it, the grant should become liable to forfeiture. As, however, the question of the applicability of section 111 was discussed in some detail in the courts below, I think I ought to say a word or two with regard to what, in our view, ought to be the proper interpretation to be put upon the concluding words of sub-clause (*g*) of section 111. It was argued before the learned Munsif that, if the matter fell within the purview of section 111, the landlord that is to say, in the present case the plaintiffs could not have succeeded in the suit, because they had not done some act showing their intention to determine the lease, and it was evidently urged before the learned Munsif that the concluding sentence of sub-clause (*g*) required that some act of the kind mentioned ought to have been done before any suit could be instituted or a cause of action arise. In support of that proposition reference was made in the court of first instance to the case of *Anandamoyee* v. *Lakhi Chandra Mitra* (1). In that case it was held that a lessee of a service tenure incurred forfeiture of his tenancy by denial of the landlord's title; and the landlord, in a suit for ejectment, would be entitled to recover possession, if he did, *by some act or other*, declare

(1) (1906) I. L. R. 33 Calc. 339.

his intention to determine the lease *prior to the institution of the suit*, otherwise the suit should be dismissed. Ghose and Pargiter JJ. came to the conclusion that, although an actual notice to quit was not necessary, yet the landlord must do some overt act indicative of his intention before he could institute a suit to recover possession. Mr. Ray, for the appellants, in this connection also relied upon the case of *Nowrang Singh* v. *Janardan Kishor Lal Singh* (1), where it was held that the "institution of a suit "for ejectment cannot be rightly regarded as the "requisite act to show the intention of the landlord "to determine a lease within the meaning of section "111, clause (*g*). The forfeiture must be completed "and the lease must be determined before the "commencement of the action for ejectment." Mookerjee and Walmsley JJ., in the course of their judgment in that case, after quoting the words of clause (*g*), said: "This makes it plain that where the "rights and obligations of the parties are regulated "by section 111, clause (*g*) of the Transfer of Property "Act, there is no determination of a lease by "forfeiture, immediately on breach of covenant, but "the lessor is required to do some act thereafter, "showing his intention to determine the lease; in "other words, the breach must be followed by an overt "act on the part of the lessor before the tenancy can "be deemed to have determined in the eye of the "law." No one can doubt the correctness of that statement of the law but, after referring to certain authorities including the case of *Anandamoyee* v. *Lakhi Chandra Mitra* (2) (*ubi supra*) and certain decisions of the Madras High Court, the learned Judges continued: "The requirements of the Transfer "of Property Act are perfectly plain, and its express "provisions cannot be ignored or treated as "surplusage, whatever may have been the history of "the development of the law on the subject in "England." They then referred to a whole series of English decisions, many of which, however, are really

(1) (1917) I. L. R. 45 Calc. 469, 474. (2) (1906) I. L. R. 33 Calc. 339.

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authorities to the effect that, in English law, the bringing of an action (which corresponds to an institution of a suit in this country) is of itself an act which definitely determines the lease with regard to which forfeiture has been incurred. The learned Judges then said: "It is further obvious that the "institution of the suit for ejectment cannot be rightly "regarded as the requisite act to show the intention "of the landlord to determine the lease within the "meaning of section 111, clause (*g*). The forfeiture "must be completed and the lease determined before "the commencement of the action for ejectment, for "there must be a cause of action in existence "antecedent to the suit; *Deo Nandan Pershad* v. "*Meghu Mahaton* (1)." I regret to say that with the greatest possible respect to these learned Judges I hesitate to accept the view of the law, as enunciated in *Nowrang Singh* v. *Janardan Kishor Lal Singh* (2) (*ubi supra*). I am inclined to think, with all due deference, that the learned Judges read more into sub-clause (*g*) of section 111 than is warranted by the actual wording of it. The concluding words may not have been intended to do anything more than lay down the law as it stood at that time, according to the relevant English authorities. I am fortified in that view of the matter by a judgment of the Bombay High Court, which, I find, was delivered at or about the same time as the point was under discussion in this Court. *Isabali Tayabali* v. *Mahadu Ekoba* (3) was a decision of the then Chief Justice, Sir Basil Scott, and Mr. Justice Batchelor. I would respectfully adopt the language used by Batchelor J., where he says: "Now the only requirement of section 111, "clause (*g*) of the Transfer of Property Act is that "the lessor 'does some act showing his intention to " 'determine the lease.' Neither in the Calcutta case "nor in either of the Madras cases is any special "reason given why the lessor's election must be made "at some time prior to the institution of the suit, and

(1) (1906) I. L. R. 34 Calc. 57, 63. (2) (1917) I. L. R. 45 Calc. 469.
(3) (1917) I. L. R. 42 Bom. 195, 198.

"if the election has been made at the moment when the "suit is instituted, that is, at the moment the plaint "is presented, it seems to me difficult to find any "ground for saying that the cause of action has not "completely accrued. It is clear that in England, "since the Judicature Acts, the landlord's intention "to enforce the forfeiture is sufficiently manifested "by his bringing an action in ejectment. In *Toleman* "v. *Portbury* (1) it was held that by a writ of "ejectment there was a final and conclusive election to "put an end to the tenancy; and that, as explained by "Mr. Justice Fry in *Evans* v. *Davis* (2), was because " 'an action in ejectment is an unequivocal assertion " 'of a right to present possession. It is equivalent " 'to the old entry.' And the same law is laid down "in *Jones* v. *Carter* (3) and in *Serjeant* v. *Nash, Field* "*& Co.* (4). But if the bringing of the action is "equivalent to the old entry in the English courts, I "can see no valid reason why it should not be "equivalent to, and constitute the 'act showing the " 'lessor's intention' which is required by the Indian "statute. And, that act being done and completed "when the plaint is presented, it seems to me to follow "that at that point of time the lessor's cause of action "is complete." Although we are disposed to accept the law as laid down in the judgment from which I have just quoted, and although, speaking for myself, I am unable to find myself in agreement with the decision in *Nowrang's* case (5), having regard to the view we take of the facts of the present case, it will not be necessary for us to take steps to have the matter further considered by another tribunal. Moreover, the point I have just discussed will ere long cease to have any practical importance, because the wording of section 111 of the Transfer of Property Act has been altered in the amending Act of 1929, which came into operation on the 1st April, 1930. The last portion of clause (*g*) of section 111 now reads as follows "and in any of these cases" (that is to say

(1) (1871) L. R. 6 Q. B. 245.
(2) (1878) 10 Ch. D. 747, 763.
(3) (1846) 15 M. & W. 718; 153 E. R. 1040.
(4) [1903] 2 K. B. 304.
(5) (1917) I. L. R. 45 Calc. 469.

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the cases mentioned in that sub-clause) "the lessor or "his transferee gives notice in writing to the lessee "of his intention to determine the lease." The alteration was no doubt made in order to remove the ambiguity of the words in the original sub-clause and to make clear a point which had given rise to a difference of judicial opinion. By reason of the alteration, as from the first of April last year, in a case where a lessee breaks an express condition, which provides that on breach thereof the lessor may re-enter, or where a lessee renounces his character as such by setting up a claim in a third person or by claiming title in himself, it will be necessary for the lessor to indicate definitely his intention to take advantage of the forfeiture which has been incurred, by giving notice to that effect to the lessee and it is obvious that, under the section, as it now stands, it will be necessary that such step has to be taken before any right to institute a suit can arise.

I have already stated that in our view this case does not fall within the purview of the Transfer of Property Act. The appellate court below was of opinion that a notice given before the institution of the suit was necessary. The learned Munsif, on the other hand, had come to the conclusion that a definite notice to quit was not necessary to constitute any act on the part of the landlord within the meaning of the last part of clause (*g*) of section 111 of the Transfer of Property Act. The learned Officiating Subordinate Judge, however, finally determined the matter on a footing which, in our view, is the correct one. He says at page 12 of the paper book under the heading 3rd point: "The plaintiff's case being that the tenancy "came to an end on the refusal of the defendants to "serve the plaintiff, I do not think it necessary to "serve any notice on the defendants before the suit. "I agree with the learned Munsif, who held that the "plaintiff indicated before the suit his intention to "terminate the tenancy. The plaintiff's suit cannot "be defeated on this ground." We do not endorse what the learned Subordinate Judge says with regard

to the plaintiff's indicating before the institution of the suit his intention to terminate the tenancy. This part of his judgment is however not really material, because the learned judge does accept the plaintiff's contention that the tenancy had, in fact, come to an end when the defendants refused services to the plaintiff or withheld performance of those services on or about the 8th October in the year 1913. It is clear, on the authorities, that the refusal by a tenant to perform services, which are incidental to his holding, is sufficient of itself to ground a suit for ejectment. I refer, in this connection, to the case of *Hurrogobind Raha* v. *Ramrutno Dey* (1).

There seems to be a distinction between a case, where there is a right to service of a public character, such as *chaukidâri châkrân,* and one where the service is to a private person such as the grantor in the present case. In the former case, the *zemindâr* himself is not or may not always be entitled to resume possession, whereas in the latter case he can do so either when the service is not required or when the grantee has refused to perform the service. I need not refer in detail to any of the authorities which indicate that there is this distinction. It is sufficient for our purpose in determining this case to refer only to the case of *Ramnath Sil* v. *Siba Sundari Debya* (2). The headnote of that case says: "Where a service "tenure was created before the passing of the "Transfer of Property Act, the tenant was not "entitled to continue in possession when he failed to "perform the services and it was competent to the "grantor, on the service thus ceasing, to require and "take possession of the land without reference to the "court at all." Reference is made to the case of *Sreeschunder Rae* v. *Madhub Mochee* (3). The headnote then continues: "If, on the other hand, the "tenancy was created after the passing of the "Transfer of Property Act, the position of the parties "is to be determined with reference to either clause

(1) (1878) I. L. R. 4 Calc. 67.
(2) (1915) 25 C. L. J. 332.
(3) [1857] S. D. A. 1772.

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"(*b*) or clause (*g*) of section 111 of that Act. A "service tenant holds the land on condition that, if "he refuses to render service, the lease shall determine "and thereupon the landlord shall be entitled to "re-enter. If the tenant renounces his character as "service tenant, by claiming to hold the land at money "or produce rent, and denies the title of the landlord "to resume the lands, the lease to him determines and "no notice is necessary to eject him."

I have already dealt with the situation, which might have arisen, if the circumstances of this case had been such that the matter fell within the clause (*g*) of section 111 of the Transfer of Property Act. In our opinion, it does not even fall within clause (*b*) of that section or indeed within the purview of the Act of 1882 at all for the reasons which I have already stated. The matter falls to be decided upon the footing that the service tenure, with which we are concerned, was created before the passing of the Act of 1882 and it seems quite clear, on the authority of the case of *Ramnath Sil* v. *Siba Sundari Debya* (1) (*ubi supra*), that the tenancy (whatever the precise terms may have been) *ipso facto* came to an end at the time when the service failed to be rendered. No question of the lessor having to assert a right of forfeiture or any matter of that kind arises at all. The tenancy automatically came to an end when the tenant made default in rendering the services stipulated for and the grantor thereupon became entitled to re-enter. For the reasons I have given in the early part of this judgment, we are of opinion that he did not lose that right merely by allowing a long period of time to elapse before he took steps to enforce that right by legal process. That seems also to have been the view of the appellate court below. We think that the decision of that court should be upheld and this appeal must be dismissed with costs.

JACK J. I agree.

Appeal dismissed.

G. S.

(1) (1915) 25 C. L. J. 332.