APPELLATE CIVIL.

Before Nasim Ali J.

1939

April 25, 26.

ANWAR ALI BEPARI

v.

JAMINI LAL RAY CHAUDHURI.*

Landlord and Tenant—*Lease from month to month or year to year, if heritable —Notice of ejectment—Transfer of Property Act (IV of 1882), ss. 105, 106, 107, 108, 111, 116.*

A monthly tenancy or a lease from month to month, or from year to year, created after the passing of the Transfer of Property Act, is a lease-hold interest. Unlike a tenancy at will as understood by English law, it is not extinguished by the death of the lessee, and devolves on his heirs like any other interest in immovable property.

Where, therefore, there was more than one joint tenant at the inception of the tenancy, a notice of ejectment, given to only the surviving tenant and not to the heirs of the deceased tenant also, was invalid and did not terminate the tenancy.

APPEAL FROM APPELLATE DECREE preferred by the defendants.

The facts of the case and the arguments in the appeal are sufficiently set out in the judgment.

Nagendra Nath Ghose and *Sukumar Ghose* for the appellants.

Hira Lal Chakravarti and *Rabindranath Bhattacharya* for the respondents.

NASIM ALI J. This appeal arises out of a suit for ejectment after service of notice to quit. The subject-matter of the litigation is C. S. plot No. 531, bearing *khatiyân* No. 575 of *mouzâ* Narayanganj No. 188 in

*Appeal from Appellate Decree, No. 728 of 1937, against the decree of Ramesh Chandra Sen, Third Subordinate Judge of Dacca, dated Feb. 10, 1937, reversing the decree of Niranjan Banerji, Second Munsif of Narayanganj, dated Mar. 23, 1936.

the district of Dacca. Plaintiffs' case is that the defendants are mere tenants-at-will and that their tenancy has been determined by a notice to quit. The defences of the defendants are: (1) that they are not tenants-at-will, but are permanent tenants; (2) that the suit is bad for defect of parties as some of their co-sharers have not been impleaded as defendants in the suit; (3) that the notices to quit were never served on them; and (4) that even if they were served, they were not legally valid and sufficient as they were not served on the entire body of tenants.

The learned Munsif arrived at the following conclusions: (1) that the defendants or their predecessors had no permanent tenancy right in the disputed land; (2) that the defendants were not licensees, but tenants; (3) that the tenancy was created after the Transfer of Property Act came into operation; (4) that their status was that of monthly tenants; (5) that the notice to quit was duly served; (6) that the notice was not a valid and sufficient notice as it was not served on the entire body of tenants; and (7) that the suit was bad for defect of parties, as all the tenants were not impleaded in the suit. On these findings the Munsif dismissed the suit.

Plaintiffs appealed to the lower appellate Court. The learned Subordinate Judge who heard the appeal arrived at the following findings:—

(1) That the defendants were not licensees but tenants; (2) that their lease was for an indefinite period and must be deemed to be one from month to month; (3) that the notice to quit was duly served; (4) that the tenancy in question was not heritable; (5) that the heirs of some tenants who died before the service of the notice were never recognised as tenants by the plaintiffs, that they never paid any rent to them and the plaintiffs never accepted any rent from them, and (6) that the notice served on the defendants was valid in law and that the suit was not bad for defect of parties. On these findings the learned

1939

Anwar Ali Bepari v. *Jamini Lal Ray Chaudhuri.*

Nasim Ali J.

Subordinate Judge allowed the appeal, set aside the decree of the trial Court and passed a decree for ejectment against the defendants. Hence this Second Appeal by the defendants.

The only point for determination in this appeal is whether the notice that was served upon the defendants was a valid notice. If the finding of the learned Judge that the tenancy is not heritable is correct, then the notice which was served upon the defendants must be taken to be a valid notice and the plaintiffs' suit must be decreed. The question, therefore, is whether the tenancy of the defendants is heritable.

This tenancy was created after the Transfer of Property Act came into operation. Section 105 of the Transfer of Property Act says :—

> A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
>
> The transferor is called the lessor, the transferee is called the leasee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

A lease is, therefore, the outcome of the rightful separation of ownership and possession. The essential characteristic of a lease is that the subject is occupied and enjoyed, but the corpus of the subject does not disappear by user. Before the lease the owner had the right to enjoy possession of the land, but by the lease he excludes himself during its currency from that right. A lease is, therefore, not a mere contract, but is a transfer of interest in land. It creates a right *in rem*.

The duration of the lease under the Transfer of Property Act must be, for a certain time, express or implied. A lease which is silent as to duration of its term would not be a lease within the meaning of s. 105

of the Transfer of Property Act. The phrase "a "lease of uncertain duration" occurs in s. 108 (*i*). Leases of uncertain duration apparently are leases which are determined under cls. (*b*), (*c*) and (*h*) of s. 111. Under s. 111 (*h*), a lease is determined by a notice to quit. The notice referred to in this clause is a notice under s. 106 of the Act. The lease contemplated by this clause must, therefore, be a lease from year to year or from month to month.

Section 107 of the Transfer of Property Act says :—

A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompained by delivery of possession.

An oral agreement of a lease accompanied by delivery of possession if from year to year or for more than one year is valid by delivery of possession for the first year and thereafter the lessee, continuing in possession with the assent of the lessor, becomes a tenant holding over under s. 116 of the Transfer of Property Act. Such a tenancy is to be deemed to be a tenancy from year to year or from month to month according to the purpose for which the property is leased. A tenant holding such a tenancy has an interest for one year or one month certain, as the case may be, with an accruing interest during every year or month thereafter springing out of the original contract and as parcel of it.

The effect of the findings of the Courts below in this case is this : The tenancy in question was created after the Transfer of Property Act. The lessees entered into possession on the basis of an oral agreement and are continuing in possession on payment of rent to the lessors. The purpose of the tenancy was neither agricultural nor manufacturing.

1939

Anwar Ali Bepari v. *Jamini Lal Ray Chaudhuri.*

Nasim Ali J.

The lease in the present case must, therefore, be taken to be a lease from month to month under s. 106 of the Transfer of Property Act.

A tenancy-at-will is determined by the death of either the tenant or the landlord. See *James* v. *Dean* (1). Such a tenancy is not a lease as defined in the Transfer of Property Act. A tenancy from year to year or from month to month can be terminated only by a notice to quit. See ss. 106 and 111(*h*) of the Transfer of Property Act. It is nowhere stated in the Act itself that it is determined by the death of either party. It is not, therefore, a tenancy-at-will. It continues until it is terminated by a notice to quit. In other words, the landlord has no right to re-enter until the tenancy has been terminated. A lease from year to year or from month to month is, therefore, not extinguished by the death of the lessee and must devolve on his heirs like any other interest in immovable property. Under the English law—

> Upon the death of a person all his leasehold interest (including tenancies from year to year) vests in his personal representatives.

(Foa's Landlord and Tenant, p. 495, 6th Ed.)

In India tenancies from year to year or from month to month are leasehold interests. Section 116 of the Transfer of Property Act places leases from year to year and from month to month on the same footing. These tenancies under the Transfer of Property Act are transferable and I see no reason why they should not be heritable.

There are authorities to support the statement that ordinary tenancies before the Transfer of Property Act were neither transferable nor heritable. Whether this statement is based on some custom which was prevalent before the Transfer of Property Act was passed, or on some legal conception of lease

(1) (1805) 11 Ves. 383 (391); 32 E. R. 1135 (1138).

different from what is given in the Transfer of Property Act is not very clear. If the conception of a lease before the Transfer of Property Act was not the same as in the Transfer of Property Act, the reason of the rule having now disappeared by the passing of the Transfer of Property Act, it cannot be said that a lease from year to year or from month to month created after the Transfer of Property Act is not transferable or heritable. If, however, by custom, ordinary tenancies before the Transfer of Property Act were not transferable or heritable, that custom must be taken after the passing of the Transfer of Property Act to be no longer in force.

It was, however, contended by Mr. Chakravarti appearing on behalf of the plaintiffs-respondents that tenancies from year to year or from month to month being very precarious should not be treated as heritable. But such tenancies are leaseholds. They have been now made expressly transferable by the provisions of the Transfer of Property Act. If they are transferable, there is no reason to hold now that they are not heritable. Further the facts of this case clearly indicate that the plaintiffs themselves have treated the tenancy in suit as heritable.

For the aforesaid reasons, I am of opinion that the learned Judge was wrong in holding that the tenancy in question is not heritable.

The notice served on the defendants, not having been admittedly served on the heirs of some of the tenants who are dead, cannot be taken to be valid and sufficient in law to determine the tenancy. The suit, therefore, must fail on this ground.

Mr. Chakravarti appearing on behalf of the plaintiffs-respondents, however, contended that the Courts below were wrong in holding that the defendants were tenants. His contention was that the defendants were mere licensees. In the *dâkhilâs*

1939

Anwar Ali Bepari v. *Jamini Lal Ray Chaudhuri.*

Nasim Ali J.

granted by the plaintiffs to the defendants they are described as tenants. The plaintiffs also admitted the defendants to be tenants in their plaint in a previous suit (Ex. C). The defendants are in exclusive occupation of the land in suit. They have got the exclusive right of either selling fish or letting out the land to other people for selling fish. The facts of this case clearly indicate that, when the defendants' predecessors were inducted into the land, the intention of the parties was that the persons inducted would be in exclusive occupation of the land and that they would have the right to exclude the owners from the possession of the land during their occupation of the land.

The Courts below were, therefore, right in coming to the conclusion that the defendants are tenants and not mere licensees. This view is also supported by the notice to quit which was served by the plaintiffs upon the defendants.

This appeal is accordingly allowed. The judgment and decree of the lower appellate Court are set aside and those of the trial Court are restored. The defendants-appellants will get their costs in this Court, but the parties will bear their own costs in the lower appellate Court.

The prayer for leave to appeal under s. 15 of the Letters Patent is refused.

Appeal allowed; *Suit dismissed.*

A. A.