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It is not necessary to consider the effect of section 24 of the Contract Act upon the case; whether, even had the stipulation in partial restraint of trade not been illegal, the defendants' agreement would not nevertheless have been void, part of the consideration for it having been the undertaking by the plaintiff absolutely to refrain from carrying on the business of dubash: probably that would be the proper construction of the contract.

The appeal is allowed, the order of the Subordinate Judge is set aside, and the decree of the Munsiff dismissing the suit restored. Appellant to have his costs throughout.

Appeal allowed.

H. T. H.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

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DINOBUNDHU ROY AND OTHERS (DEFENDANTS) *v.* W. C. BONERJEE AND ANOTHER (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

Landlord and tenant—Transfer of tenure—Contract regarding transfer of tenure—Bengal Tenancy Act (VIII of 1885), s. 12.

A transfer of a tenure made in terms of the provisions of the Bengal Tenancy Act of 1885 is not binding on the landord if there be a contract between the landlord and the tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished by the transferee, and such security has not been furnished. The tenant is still liable for the rent.

THE plaintiffs as *mourusi mokuraridars* of certain mouzas sued the defendants for arrears of rent for the years 1293 to 1296. Defendant No 5 was the widow of one Shib Narain Roy, who on the 7th Chait 1279 (19th May 1872) executed in the plaintiffs' favour a *dur-mokurari* kabuliyat for the said mouzas. The kabuliyat contained amongst others the following provisions:—"If the *talook* hypothecated as security be sold for arrears of rent, then within 15 days the lessee shall give fresh security to be approved by you. Failing that, you may take *khas* possession until satisfactory security be given. *Dur-mokurari* right is transferable by sale, &c., but if my vendee does not furnish to your satisfaction security

* Appeal from Appellate Decree No 671 of 1891, against the decree of J. Pratt, Esq., District Judge of Midnapore, dated the 31st of January 1891, affirming the decree of Babu Juggobundhoo Gangooly, Subordinate Judge of that district, dated the 19th of July 1890.

in due course, such sale will not be valid, and you will not be bound to recognize it."

On the 27th Asar 1295 (10th July 1888) the defendants, who were members of the same joint family, by a registered deed of sale transferred their rights to one Ram Jibun Ghosal. Ram Jibun neither gave nor offered any security to the plaintiffs. Notice of the transfer, after registration, was given to the plaintiffs by the Collector, and the landlord's fee was also sent to them. Defendant No 5, after the institution of the suit, deposited the rents for the years 1293 and 1294, and joined the other defendants in a plea of non-liability for the rents of the subsequent years, because she and the other defendants had transferred their interest to Ram Jibun Ghosal by the registered deed of sale of the 27th Asar 1295.

The Subordinate Judge found that the transfer to Ram Jibun was a mere benami transaction, that the plaintiffs had in no way recognized it, and were not bound to do so. He consequently gave the plaintiffs a decree for rent for the years 1295 and 1296.

On appeal this decision was upheld by the District Judge, who agreed with the Subordinate Judge that the transfer was one which the plaintiffs were not bound to recognize, and in fact never recognized.

The defendants Nos. 1, 6, 7, and 8 appealed to the High Court.

Baboo *Srenath Das* and Baboo *Kishen Dyal Roy* for the appellants.

Mr. *R. E. Twidale* and Baboo *Umakali Mookerjee* for the plaintiffs, respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

The plaintiffs, landlords, contracted with the defendants, tenants, that they were at liberty to make a transfer of the under-tenure given to them, but that, unless the transferee furnished security, they (defendants) were not to be absolved from liability; in other words, the sale would not be valid, and the plaintiffs would not be bound to recognize the transferee.

It seems that, notwithstanding this contract, the defendants have sold the tenure to one Ram Jibun by a registered document, and that the formalities prescribed by section 12 of the Bengal Tenancy

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Act have been observed; that is to say, the Registration Officer has received and sent the "landlord's fee" as prescribed by that section. Notwithstanding this, the transferee, Ram Jibun, has not furnished security, and the plaintiffs, landlords, therefore, in accordance with the terms of the kabuliyat executed by their under-tenants, the transferor-defendants, have refused to recognize the transfer.

It is contended, in appeal, that all the preliminaries required by the Bengal Tenancy Act having been observed, the transfer became valid notwithstanding any contract made with the landlords to the contrary.

We do not find that the Bengal Tenancy Act contains any provision to this effect. It merely provides that a permanent tenure shall, subject to the provisions of that Act, be capable of being transferred in the same manner and to the same extent as other immoveable property. It then provides that no such transfer shall be made, except by a registered instrument, and next it provides that the Registering Officer shall not register any document of transfer unless the landlord's fee is deposited with him, and that, on such deposit being made, he shall send it to the landlord. But it nowhere provides that such a transfer between the parties shall be valid and binding on the landlord if he should have made a contract with the transferor requiring certain other conditions such as there are in the present case. Section 178 does not deal with this matter, and therefore it must be dealt with under the ordinary law of contract. The appeal must therefore, be dismissed with costs.

C. D. P.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

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May 9.

JAGAN NATH DAS (PLAINTIFF No. 1) *v.* BIRBHADRA DAS AND OTHERS (DEFENDANTS).*

Limitation Act (XV of 1877) Sch. II, Arts. 120 and 124—Shebait nominated to office, limitation to suit brought to oust.—Suit to oust a shebait from office, the appointment to which is made by nomination.

A suit to oust a shebait from his office, the appointment to which has been made by nomination, is one for which no period of limitation is

* Appeal from Appellate Decree, No. 777 of 1891, against the decree of Baboo Bulloram Mullick, Subordinate Judge of Cuttack, dated the 18th of February 1891, affirming the decree of Baboo Khetter Mohun Mitter, Munsiff of Balasore, dated the 6th of September 1890.

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specially provided, and is therefore governed by Article 120 of Schedule II of the Limitation Act.

The plaintiff, as shebait of a certain Hindu endowment, instituted a suit to set aside certain leases and alienations created by one who had formerly been shebait, but who it was alleged had relinquished and abandoned the office, on the ground that such leases and alienations were void and not binding on the endowment, and he sought to obtain khas possession of the lands occupied by the defendants under such leases and alienations. Although it was admitted that the plaintiff had held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality, the defendants put the plaintiff to proof of his title as shebait. The Lower Courts found that the plaintiff had failed to prove his title, and, holding that on this ground he had no *locus standi*, dismissed the suit.

Held, that as a suit to oust the plaintiff from his office would have been barred by limitation, by reason of his having held the office for a period exceeding that provided by the law of limitation, he had acquired a complete title for the purposes of any litigation connected with the affairs of the endowment, and that the suit had been wrongly dismissed on the ground that the plaintiff had failed to prove his title.

IN this case there were originally three plaintiffs, of whom the principal one Jagan Nath Das, plaintiff No. 1, alone preferred this appeal to the High Court. The suit was to set aside certain alleged perpetual leases purporting to have been granted by one Ram Chunder Nandha, who had admittedly been a former shebait of the endowment to which the lands covered by such leases belonged. Plaintiff No. 1 claimed in his capacity of shebait. He alleged that Ram Chunder Nandha, the former holder of the office, while leading a vicious life, had disappeared long before 1286, and had not since been heard of; that he, the plaintiff, with the sanction of the District Collector, had been nominated as shebait by the general public in the year 1287, since which time he had been in possession of the properties belonging to this endowment and duly performing the duties of his office.

The other two plaintiffs claimed as tenants of the lands in suit, and the plaint contained a claim for damages for the value of certain paddy grown on the lands, which it was alleged had been cut and misappropriated by the defendants. As their claim was dismissed by both the Lower Courts, and they did not appeal to the High Court, it is unnecessary to refer further to that portion of the case.

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The defendants, in answer to the case of plaintiff No. 1, pleaded, *inter alia*, that according to custom only Brahmins and Baistabs could be eligible for the office of the shebait in question, and as the plaintiff was neither the one nor the other, he had no *locus standi*, and could not maintain the suit.

Numerous issues were fixed for trial in the court of first instance, amongst them one relating to the abovementioned plea, which alone was decided by the Lower Courts. In consequence of the course so adopted by those Courts, as well as the question upon which the decision of the High Court turned, it becomes immaterial for the purposes of this report to refer to the remaining issues, or to the facts bearing on the merits of the case. As regards the issue referred to above, it is only necessary to state that it was admitted that the plaintiff No. 1 had held the office of shebait for more than ten years, but although it was contended on his behalf that this fact precluded the defendants from questioning his title, both the Lower Courts held that this could not be so, and decided the issue in favour of the defendants, and, without going into the merits of the case or the other issues raised, dismissed the plaintiff No. 1's suit with costs.

The plaintiff No. 1 appealed to the High Court.

Baboo *Monmotho Nath Mitter* for the appellant.

Baboo *Jagut Chunder Banerjee* for the respondents.

The Court (PRINSEP and BANERJEE, JJ.) delivered the following judgment:—

In this case the plaintiff, as shebait of a certain Hindu endowment, sues to set aside certain leases and alienations created by a person who, he says, has relinquished and abandoned the right of shebait, and consequently he asks to obtain khas possession of the land occupied by the defendants under such title.

The defendants put the plaintiff to the proof of his title as shebait, and on failure of such proof the suit has been dismissed.

It has been admitted that the plaintiff has held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality. It has not been shown that there is any local custom or authority for such appointment, and we may dismiss the suggestion that the appointment was made by the Collector,

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for it does not appear that anything further was done than that the appointment made was notified for the information of the Collector. It has been contended before us in second appeal, as it was contended in the Lower Courts, that inasmuch as a suit to oust the plaintiff from his office as shebait of this endowment is now barred by limitation, it was not competent to the defendants to call upon the plaintiff to prove the validity of his title.

We can find no direct authority for limitation in such a suit as this. The suit is for possession of an office, the appointment to which is made by nomination. The Law of Limitation, Schedule II, Article 124, provides for a suit for possession of an hereditary office, and, if the appointment to the office of shebait in the present case had been by succession through inheritance, a suit for possession of such office would be covered by that article. Any suit to oust such a person as the plaintiff from his office as shebait would not necessarily be a suit for possession of immoveable property, or an interest in immoveable property, because, by the nature of the endowment, the title rests with the idol, and the plaintiff would occupy at most the position of trustee or shebait for the purpose of performing the duties and managing the affairs of the endowment. We have, therefore, after much consideration, come to the conclusion that the suit should be regulated by Article 120, Schedule II of the Limitation Act, that is to say, that a suit to oust the plaintiff from his office would be a suit for which no period of limitation is specially provided. If, therefore, no suit could be brought to oust the plaintiff by reason of his having held the office for a period of ten years, that is, a period exceeding that provided by the law of limitation, he would acquire a complete title for the purposes of any litigation, or anything connected with the affairs of the endowment. We think, therefore, that the suit has not been properly dismissed by the Lower Courts, and we accordingly direct it to be tried on the merits, that is to say, whether the leases and alienations which the plaintiff seeks to set aside are void as against the endowment. The case will be remanded to the Lower Appellate Court and the costs will abide the result.

Appeal allowed and case remanded.

C. D. P.