1922.

DIGAMBAR MAHTO v. DHANRAJ MAHTO

DAS, J.

fully represented in the action by their father and there is no prejudice to their interest by the decree which has been pronounced by the learned Subordinate Judge. But the learned Vakil on behalf of the appellant makes a grievance and I think that the best course to adopt in this matter would be to bring the grandsons on the record as parties to the suit. The learned Vakil for the plaintiffs undertakes to present an application to the Court below for the purpose of bringing the sons of the plaintiffs and the sons of defendant No. 2 on the record as party defendants. The names of these added parties will be mentioned in the decree and the commissioner will proceed to make the partition in accordance with the decision of the learned Subordinate Judge. If, however, the added defendants wish to have shares allotted to them they must apply to the Court for that purpose and in that case the learned Subordinate Judge will give the necessary directions to the commissioner. Subject to this variation, this appeal will stand dismissed but without costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

HIRANANDAN OJHA

v.

RAMDHAR SINGH.*

1922.

February, 1.

Lease—clause of ullity—relief against forfeiture—English law, whether applicable to India—Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 111 *and* 114.

Where, in a *mukarrari* lease granted before the enactment of the Transfer of Property Act, 1882, it was provided that in default of three instalments of rent the lease should be null

* Appeal from Original Decree No. 33 of 1919, from a decision of Babu Suresh Chandra Sen, Special Subordinate Judge of Palamau, dated the 28th November, 1918.

1922.

HIRANANDAN OJHA v. RAMDHAR SINGH.

and void, *held*, that the court was competent to relieve the lessee against forfeiture on the ground of non-payment of three instalments of rent.

Bowser v. *Colby*(1) and *Davenport* v. *Her Majesty the Queen*(2), referred to.

Sections 111 and 114 of the Transfer of Property Act, 1882, do not recognise the distinction which is made in English Law between a condition of forfeiture and a clause of nullity and it is doubtful whether the English Law on the subject applies to India.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Das, J.

Naresh Chandra Sinha and *Lakshmi Kanta Jha*, for the appellants:

The lease in this case was executed before the Transfer of Property Act. The provisions of section 111 and section 114 of the Transfer of Property Act are not, therefore, applicable. Refers to section 2, clause (*c*).

There is no clause for re-entry on failure to pay rent for three instalments. The covenant is that on such failure the lease will be null and void. Where there is a proviso for re-entry, the lessor has a discretion, which he may or may not exercise. It is voidable at the lessor's option; whereas in a case of nullity, such as this, it is void. The law allows a distinction between void leases and voidable leases. Relief cannot be given in the case of void leases, though it can be given in the case of voidable leases. In the case of void leases, the subject-matter of the lease is at an end. In the case of voidable leases, where there is a proviso for re-entry the clause is only intended as a security for rent. The dictum in *Mohomed Ammer* v. *Peryag Singh* (3) is *obiter*. Refers to White and Tudors' Leading Cases (8th Ed.) Vol. II, 271, Story on Equity Jurisprudence, sections 1315 and 1317, *Bowser* v.

(1) (1841) I Hare 109; 66 E. R. 969. (2) (1877-78) 3 Ap. Cas. 115.
(3) (1881) I. L. R. 7 Cal. 566.

1922.

JUBRANANDAN OJHA v. RAMA NAN SINGH.

Colby(1), *Arnsby* v. *Woodward*(2), *Aryan* v. *Bancks*(3), Coke on Littleton page 251a., *Pennant's* case (4), *Finch* v. *Throckmorton*(5).

Sambhu Saran, for the respondents: A clause of nullity stands on no higher footing than a proviso for re-entry on default. The English Law in this respect should not be applied in India. Refers to *Davenport* v. *Her Majesty the Queen*(6), *Bowser* v. *Colby*(1), and *Mohomed Ameer* v. *Peryag Singh*(7).

DAS, J.—This appeal arises out of a suit instituted by the appellants against the respondents for possession of certain lands specified in the plaint. The plaintiffs are the landlords and the *mukarrari patta* executed by the predecessors in title of the plaintiffs in favour of the predecessors in title of the defendants provided that in default of payment of three instalments of rent the *mukarrari* shall be null and void. It is important to remember that the *mukarrari* was granted before the enactment of the Transfer of Property Act.

The judgment of the learned Subordinate Judge is not quite clear on the point whether there has been a default in the payment of three instalments of rent. In one portion of his judgment he recorded the finding that there was no agreement between the parties as to the instalments in which the rent was payable. But then he came to the conclusion that section 114 of the Transfer of Property Act protected the defendants from ejectment inasmuch as they deposited the rent in Court for the years 1322-1325. Reading the whole judgment, it appears to me that the learned Subordinate Judge decided that the plaintiffs had incurred forfeiture; but that the case was one in which the defendants should be relieved against the forfeiture. In the result he declined to grant a decree for ejectment as against the defendants.

(1) (1841) I Hare 109; 66 E. R. 969.
(2) (1827) 6 B. & C. 519; 108 E. R. 542.
(3) (1821) 4 B & A. 401; 106 E. R. 984.
(4) (1596) 3 Co. Rep. 64 (a); 76 E. R. 775.
(5) Cro Eliz. 221; 78 E. R. 477.
(6) (1877) 3 Ap. Cas. 115.
(7) (1881) I. L. R. 7 Cal. 566.

1922.

HIRANANDAN OJHA v. RAMDHAR SINGH.

DAS, J.

In this Court it was argued by Mr. *Naresh Chandra Sinha* on behalf of the appellants that the case was not one of forfeiture under section 114 of the Transfer of Property Act, but one of nullity putting an end to the subject-matter of the lease which no act of the Court could restore to the defendants. Mr. *Sinha* argued that the English Law has always recognized a distinction between a condition of forfeiture and a clause of nullity. He admitted that where there is a proviso for re-entry on breach of a tenant's convenant to pay rent, then on the failure to pay such rent the tenant incurs forfeiture which the Court has a discretion to relieve against; but he contended that when the lease provides that on failure to pay rent the lease shall be null and void the clause is one of nullity and there is no power in the Court to restore to the tenant that which has come to an end by the express agreement between the parties. The English Law undoubtedly did recognize a distinction between a condition of forfeiture and a clause of nullity but whether it does still maintain that distinction is open to some doubt [See *Bowser* v. *Colby* (1)]. Now the distinction rested on this; the proviso for re-entry being a mere form of security to the landlord for that which the landlord has reserved to himself in the lease, the Court will always treat it as a security and allow redemption if the arrear of rent and the cost be brought into Court within a certain time, the Court acting on the analogy furnished by mortgage actions and on the principle that, if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid upon the prescribed day. But where there is no proviso for re-entry and the parties agree that on breach of a certain condition the lease shall absolutely cease and be void, then on the happening of the condition there is no longer any subject with which the Court can deal or which can be restored. That was undoubtedly the view which at one time prevailed in England. But as has been pointed out in *George Henry Davenport* v.

(1) (1841) 1 Hare, 109; 66 E. R. 969.

Her Majesty the Queen (1), in a long series of decisions the Courts have construed clauses declaring in terms, however clear and strong, that the lease shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. But whether void or voidable, the result ought to be the same so far as we are concerned in the present case, because it is conceded that the plaintiffs, so far as the present breach is concerned, have not elected to treat the lease as subsisting.

Now whether the distinction that obtains in England between a condition of forfeiture and a clause of nullity extends to this country is open to grave doubt. So far as the legislature is concerned, it has not recognized the distinction in section 114 of the Transfer of Property Act. That section provides that:

> "where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred".

It may be argued that there is nothing in section 114 to imply that the Court can relieve the lessee even when the lease has become void under the terms of the lease and the lessor does not elect to treat it as subsisting. In my opinion there is, if we refer to the definition of forfeiture in section 111 of the Act. A forfeiture according to section 111 of the Act is incurred in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void and section 114 gives power to the Court to relieve against the forfeiture, which must mean forfeiture as defined by section 111 of the Act. No distinction has therefore been recognized in the Transfer of Property Act between a condition of forfeiture and a clause of nullity.

(1) (1877-78) 3 App. Cas. 115.

1922.

HIRANANDAN OJHA v. RAMDHAR SINGH.

DAS, J.

It was argued that this case ought not to be governed by the Transfer of Property Act. That may be so; but as the distinction has not been recognized in any of the cases which has been decided in this country, I am not prepared to say that it extended to this country. That distinction rested in England on very technical rules of conveyancing, and it is open to us to take the view that the rule formulated in section 114 of the Transfer of Property Act gave effect to the existing law in the country. The question is not free from difficulty; and I am not prepared to dissent from the view which has been taken by the learned Subordinate Judge. I would dismiss the appeal; but, in the circumstances, without costs.

The cross-objection was not pressed and is dismissed.

ADAMI, J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller C. J., and Bucknill, J.

BISHUN PRAGASH NARAIN SINGH

v.

SHEOSARAN TELI.*

1922.

February, 1.

Record-of-Rights—Presumption as to correctness of entry in, rebuttal of—entry contrary to general law—Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 103B.

The presumption attaching to an entry in the Record-of-Rights is not rebutted merely by shewing that the entry is contrary to the general law on the subject with which the entry deals.

Therefore, where the Record-of-Rights contained an entry that the trees belonged to the tenants, *held*, that the mere fact that ordinarily the law gives to the landlord the full right in respect of the timber was not sufficient to rebut the presumption arising from the entry.

* Letters Patent Appeal No. 13 of 1921.