Courts in the Santal Parganas are subject to the superintendence of this Court, since all those Courts are within the jurisdiction of the Sessions Judge who is subject to the superintendence of this Court. That is not the meaning of that paragraph. The Letters Patent must be read subject to the special legislation in the form of Regulation V of 1893 which declares that the Courts other than the Session Court are not subordinate to this Court as their High Court. As to paragraph 22 it is argued that the inquiry Court being a Criminal Court, therefore that paragraph which gives the High Court of Patna power to direct the transfer of a criminal case in any Criminal Court, empowers this Court to order the transfer of the present case. Now, paragraph 22 has to be read subject to the Regulations. It is clearly laid down in paragraph 30 of the Letters Patent that effect must be given to the special law embodied in Regulation V of 1893.

It is not necessary, I think, to go further into the arguments put before us, seeing that it is so plain, on the language of the Regulation, that this Court cannot, while the case is still in the state of inquiry, interfere by way of ordering a transfer.

The application must be rejected.

MACPHERSON, J.—I agree.

Application rejected.

APPELLATE CIVIL.

Before Ross and Wort, JJ.

CHOTA NAGPUR BANKING ASSOCIATION, LTD. 1928.

v. *Jan., 23.*

KUMAR KAMAKHYA NARAYAN SINGH.*

Transfer of Property Act, 1882 (*Act IV of* 1882)—*non-permanent tenure created before the Act, whether transferable*

* Appeal from Original Decree no. 168 of 1924, from a decision of M. Saiyid Muhammad Zarif, Subordinate Judge of Hazaribagh, dated the 31st of May, 1924.

1928.

CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. KUMAR KAMAKHYA NARAYAN SINGH.

—provisions of the Act, whether applicable to such tenancy—transferee from tenant for life, whether can prescribe against landlord during tenant's lifetime—permanent tenure, onus of proving—decree, presumption as to the correctness of—onus of proving want of jurisdiction lies on the person impugning it.

A non-permanent tenure created before the passing of the Transfer of Property Act, 1882, is not transferable, and the provisions of the Act do not apply to such a tenancy. *Hiramoti Dassya* v. *Annoda Prasad Ghosh* (1), followed. *Sital Prasad* v. *Nawab Dilder Ali Khan* (2) and *Basarat Ali Khan* v. *Manirulla* (3), distinguished.

A transferee from a tenant for life cannot prescribe against the landlord so long as the tenant for life is alive.

The burden of proving the existence of a permanent tenure in derogation of the landlord's prima facie title is on the person asserting it.

Rajah Sahib Perhlad Sein v. *Durga Persad Tewaree* (4) and *Sundarbas Kueri* v. *Khawas Dilwar Sahu* (5), followed.

A decree is presumed to be correct and the onus of proving that it is without jurisdiction is upon the party who impugns it.

Seo Lal Singh v. *Raja Wazir Narain Singh* (6), followed.

Appeal by the plaintiffs.

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

Bankim Chandra De, for the appellants.

Sushil Madhab Mullick and *Abani Bhusan Mukharji*, for the respondents.

Ross, J.—This is an appeal against a decree of the Subordinate Judge of Hazaribagh dismissing a suit brought by the plaintiffs for recovery of possession of mauza Nawadi alias Belwatand on a declaration that a decree for ejectment in rent suit no. 210 of 1920 was null and void.

(1) (1908) 7 Cal. L. J. 553.
(2) (1916) 1 Pat. L. J. 1.
(3) (1909) I. L. R. 36 Cal. 745.
(4) (1867-69) 12 Moo. I. A. 286.
(5) (1920) 1 Pat. L. T. 30.
(6) (1921) 2 Pat. L. T. 688.

1925.

CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. KUMAR KAMAKHYA NARAYAN SINGH.

ROSS, J.

In view of the argument which was advanced in appeal, it is necessary to state the pleadings in some detail.

The plaintiffs allege that they are tenure-holders of mauza Nawadi in equal shares and that the former tenure-holders were the ancestors of Bakshi Narayandas and Sambho Prasad, who is defendant no. 2, and their interest in the village was permanent, heritable and transferable. The plaintiffs purchased the interest of Mosahebal, the grandson of Narayandas, and of Sambhu Prasad in execution sales in 1899 and 1901 and took delivery of possession and were in possession until 1923. They also applied for registration of their names in the office of defendant no. 1, the proprietor of the Ramgarh Estate. In 1919 the defendant no. 1 brought a suit for arrears of rent against Sambhu Prasad and obtained a decree with an order for ejectment. This decree is impugned as fraudulent and without jurisdiction on five grounds of which the principal ground is that in the plaint it was alleged that Narayandas and Sambhu Prasad had got the village in suit under registered patta and kabuliyat and that the tenancy was an istimrari mokarrari tenure with life interest, whereas it was in fact a permanent, heritable and transferable tenure which had been granted to some remote ancestors of the family of Sambhuprasad. Another ground was that the plaintiffs were not made parties to this rent suit although they had applied for mutation of their names under section 11 of the Chota Nagpur Tenancy Act. The other grounds need not be specified here, because they were not pressed in appeal.

The suit was defended by defendant no. 1 who put the plaintiffs to proof of their title and possession and alleged that the tenure in suit was not granted to a remote ancestor of the family of Sambhuprasad, but was granted to Narayandas and his grand-son Sambhuprasad for their lives and was resumable on the death of the original grantees and on failure to pay rent;

1928.

CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. KUMAR KAMAKHYA NARAYAN SINGH.

ROSS, J.

and that the mokarraridars had always been paying rent to the Raj and getting receipts and sometimes rent was realized by suit. It was further pleaded that the decree in rent suit no. 210 of 1920 was properly obtained.

The learned Subordinate Judge found that the plaintiffs proved that they had purchased the village and that their previous possession was practically admitted and was supported by collection papers. He further found that the tenure was in fact granted to Narayandas and Sambhuprasad and that it was not a permanent tenure, but a tenure for the lives of the grantees. He also found that there was no fraud or want of jurisdiction in the rent decree in which the order in ejectment was legally made under sections 59 and 178 of the Chota Nagpur Tenancy Act.

With regard to the question of fraud all that was argued was that paragraph 2 of the plaint in the rent suit contained two false statements: (*1*) that the grant to Narayandas and Sambhuprasad was under a registered patta and kabuliyat and (*2*) that Sambhuprasad, the survivor of the two grantees, had been holding possession of the village by virtue thereof. The learned Subordinate Judge has dealt with this point and it need not be further considered.

The main argument was that section 178 of the Chota Nagpur Tenancy Act relates to cases where there is an admitted relation of landlord and tenant, whereas in the present case that relation is not admitted by the defence; that the decree is not binding on the plaintiffs because they were not made parties to the suit; that the decree against Sambhuprasad was void because no lease was executed; and, finally that the plaintiffs have a good title either because the covenant in the draft lease (if it be assumed that a lease was executed in these terms) restraining alienation was void, or by adverse possession. So far as section 178 is concerned, the suit was between the landlord and Sambhuprasad, the tenant, and, as the decree

passed the tenure, the plaintiffs were liable to ejectment even if the landlord did not admit their tenancy; but it may be observed that the case in the plaint is that the plaintiffs were tenants. Secondly, it is true that the plaintiffs were not made parties to the rent suit, but it appears that in 1904 an application was made to the landlord for registration of their names and that application was refused and no further steps were taken by the plaintiffs to enforce mutation. They were therefore not necessary parties. Thirdly, the fact that no lease was executed in favour of Bakshi Narayandas and Sambhuprasad would not make the decree against Sambhuprasad void if the tenancy was otherwise established; and the evidence shows that rent was paid by Bakshi Narayandas and Sambhuprasad in 1869 (Exhibit G) and in 1882 (Exhibit G-1) and further that suits for rent were brought and decrees obtained for rent of 1912 to 1914 against Sambhu prasad (Exhibit S) which were satisfied by the plaintiffs on behalf of the judgment-debtor (Exhibit T), and for 1915 to 1918 against Sambhuprasad (Exhibit S-1) and that decree was incorporated in the decree for rent of 1918 and 1919 (Exhibits R-3, R-5 and R-6) which was also passed against Sambhuprasad. It was in execution of this decree that the plaintiffs were ejected (Exhibit M). Therefore whether or not a lease was executed in favour of Bakshi Narayandas and Sambhuprasad, there can be no doubt that they were treated as tenants and accepted the position of tenants by receipt and payment of rent. Fourthly, assuming that there was a lease in the terms of the draft (Exhibit K), the learned Advocate for the appellant argues on the authority of *Sital Prasad* v. *Nawab Dildar Ali Khan* (1), that the breach of the covenant against alienation does not operate to prevent the assignment of the leased properties, but only entitles the lessor to damages from the lessee, in the absence of any provision for re-entry. That decision

(1) (1916) 1 Pat. L. J. 1.

1928.

CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. KUMAR KAMAKHYA NARAYAN SINGH.

ROSS, J.

is not of much assistance because it was a case of a sub-lease which evidently would not be against the covenant. In *Basarat Ali Khan* v. *Maniralla* (1). Jenkins, C. J., held that an assignment was operative notwithstanding the covenant. That, however, was a case of a permanent lease with a restraint on transfer, without any provision for re-entry. These decisions have no application to the present case where the lease was a lease for life only. In *Hiramoti Dassya* v. *Annoda Prasad Ghosh* (2), it was held that the provisions of the Transfer of Property Act do not apply to a tenancy created before the Act came into force and that a non-permanent tenure created before the passing of the Transfer of Property Act is not transferable. The decisions relied upon on behalf of the appellant are therefore of no assistance to him. It is unnecessary to consider whether the lease was void for want of registration or because it was granted in favour of an infant, because it is the evidence, and it is conceded, that no lease was in fact executed. The respondent relies on the evidence which I have already referred to to show that there was a tenancy which may be inferred from the actings of the parties.

The last is the most serious argument and it was on a title by adverse possession that the learned Advocate ultimately rested his case. He pointed out that the plaintiffs had purchased in 1899 and 1901 and had thereafter been continuously in possession, and that in 1901 they had brought their purchase to the notice of the landlord by applying for registration in his office; and he contended that by long continued possession the plaintiffs had acquired a limited interest adversely to the respondent. He supplemented this argument by contending that as the lease in favour of Narayandas and Sambhuprasad was void, the landlord's right of re-entry accrued from the date of its execution and that consequently Narayandas and

(1) (1909) I. L. R. 36 Cal. 745. (2) (1908) 7 Cal. L. J. 553.

Sambhuprasad had also prescribed against the landlord before the plaintiffs acquired their title. The latter argument is not well-founded. There was in fact no lease, void or otherwise, as I have already said, and there is no question of any right of re-entry accruing to the landlord as against Narayandas and Sambhuprasad. It is contended that if the plaintiffs were in long continued possession, the mere fact that the landlord chose to bring a suit for rent against Sambhuprasad would not defeat the plaintiffs' title. Now on this argument it is to be observed in the first place that this was not the case for the plaintiffs at the trial and it is contrary to the pleadings where a valid tenure in the plaintiffs' predecessor is asserted and it is claimed that that tenure was permanent and transferable and was transferred to the plaintiffs. The parties went to trial on the question of the permanency or otherwise of the grant to Narayandas and Sambhuprasad and I am doubtful whether the appellant is entitled, after failing in that contest, to raise an entirely new case in appeal. The learned Advocate for the respondent complains that if this case had been made at the trial, he would have been in a position to produce his collection papers to show that rent had been regularly paid or realized by suit from Sambhuprasad up to the date of the last execution. The answer, however, to the argument is that the plaintiffs could not prescribe against the landlord so long as the tenant for life was alive and it is not disputed that Sambhuprasad is still alive. If he was a tenant for life, time has not yet begun to run against the landlord and, consequently, the plaintiffs can have no title by prescription. The question then reduces itself to this, whether Sambhuprasad was a tenant for life? Strong evidence of the temporary nature of the tenure is found in the fact that a decree in ejectment was passed in the suit for rent, because by the provisions of section 59, it is only a tenureholder who has not a permanent or transferable interest, whose lease is liable to be cancelled and who is liable to ejectment when an arrear

1928.

CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. KUMAR KAMAKHYA NARAYAN SINGH.

ROSS, J.

of rent is adjudged to be due from him. The presumption of the correctness of the decree is against the plaintiffs and it was for them to show that the decree was without jurisdiction. [*Seo Lal Singh* v. *Raja Wazir Narain Singh*(1)]. Moreover unless the plaintiffs predecessor had a permanent tenure, the plaintiffs are entitled to no relief and the burden of proving the existence of a permanent tenure in derogation of the landlord's prima facie title is on the plaintiffs [*Rajah Sahib Perhlad Sein* v. *Durga Persad Tewaree* (2), *Sundarbas Kueri* v. *Khawas Dilwar Sahu* (3)]. But there is no proof of the permanent nature of the tenure to deprive the decree in ejectment of its evidentiary value to the contrary. Oral evidence was given on behalf of the defence by Mosaheblal, the grandson of Narayandas, that the grant to Narayandas and Sambhuprasad was for life only. In his petition to be made a party to the rent suit (Exhibit J) plaintiff no. 1 asserted that he had purchased an istimrari mokarrari interest in mauza Nawadi and it has been held that in Hazaribagh an istimrari mokarrari interest is a life interest only. Apart for this admission (if it can be taken to be an admission) the fact remains that all that is established on the evidence is a tenancy in Sambhuprasad and that the plaintiff has failed to establish that it was a permanent tenure. Consequently it must have been of a temporary nature and it continued by the receipt and payment of rent until the decree in suit no. 210 of 1920 was passed. It is therefore impossible for the plaintiffs to set up a title by prescription acquired during the continuance of the tenancy.

In my opinion therefore all the grounds taken in support of this appeal fail. The appeal must be dismissed with costs.

WORT, J.—I agree.

Appeal dismissed.

(1) (1921) 2 Pat. L. T. 688. (2) (1867-69) 12 M. I. A. 286.
(3) (1920) 1 Pat. L. T. 30.