APPELLATE CIVIL.

1936.

Before Dhavle and Agarwala, JJ.

THAKUR DAYAL SINGH

v.

RAI PROMATHA NATH MITRA.*

January, 22, 23, 27 and 31. *February*, 3 4. *May*, 5.

Lease—covenant running with the land, whether binds assignees from the lessees—covenant not to alienate applies to reassignment to the original lessee—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 114—*forfeiture, relief against, whether confined to forfeiture due to non-payment of money —Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 155, *whether applies to tenants only.*

The ancestors of *P* granted a mukarrari lease of 7½ annas share in certain villages to *G* which contained a covenant restraining the lessees from alienating the demised premises without the consent of the lessors. *G* sold 1 anna interest and the purchaser's sons executed a deed in favour of the lessors containing all the terms of the original lease. Subsequently they sold the 1 anna interest to *D* without *P's* consent. *P* instituted a suit and obtained a decree for rent against *D* and in execution *E* purchased the share and then reconveyed it to *D*. *P* brought the present suit for ejectment which was decreed by the courts below. *D* appealed to the High Court.

Held, (*i*) that a covenant not to transfer the demised properties without the consent of the landlord is a covenant running with the land, and is therefore enforceable against a person who purchases the lessee's interest in execution of a decree for rent obtained by the lessor against the lessee.

Saradakripa Lala v. *Bepin Chandra Pal*(1), *Williams* v. *Earle*(2), *McEacharn* v. *Colton*(3) and *West* v. *Dobb*(4), followed.

* Appeal from Appellate Decree no. 702 of 1932, from a decision of Babu Nand Kishore Chaudhuri, Officiating Subordinate Judge of Gaya, dated the 29th February, 1932, affirming a decision of Babu Bijay Krishna Sarkar, Munsif of Aurangabad, dated the 2nd April, 1931.

Appeal from Appellate Decree no. 1761 of 1932, from a decision of S. K. Das, Esq., I.C.S., District Judge of Gaya, dated the 24th September, 1932, confirming a decision of Babu Radha Krishna Prasad, Subordinate Judge of Gaya, dated the 6th August, 1930.

(1) (1922) 37 Cal. L. J. 538.
(2) (1868) L. R. 3 Q. B. 739.
(3) (1902) A. C. 104.
(4) (1869) L. R. 4 Q. B. 634.

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(*ii*) that a covenant running with the land binds not only the lessees but also assignees from them although they are not expressly mentioned;

Goldstein v. *Sanders*(1), followed.

(*iii*) that a covenant by a lessee not to assign without the lessor's consent applies to a reassignment to the original lessee.

McEacharn v. *Colton*(2), and *Rai Parmatha Nath Mitra* v. *Hari Singh*(3), followed.

The power of a court to relieve against forfeiture is contained in section 114 of the Transfer of Property Act and is confined to forfeiture for non-payment of money.

Krishna Shetti v. Gilbert Pinto(4) and *Hill* v. *Barclay*(5), followed.

In the case of breach of a covenant in restraint of alienation, if the lessor insists upon his covenant no one has a right to put him in a different situation.

Vittapa Kudva v. *Durgamma*(6), followed.

A transferee from a lessee who is bound by a covenant not to alienate is not a tenant and, therefore, is not entitled to the benefit of section 155 of the Bengal Tenancy Act which enables the court to relieve against forfeiture in an ejectment suit.

Dwarka Nath Roy Chowdhury v. *Mathura Nath Roy Chowdhry*(7), followed.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

K. Hasnain (with him *N. K. Prasad, II, A. N. Lal* and *Rameshwar Prasad*), for the appellants.

(1) (1915) 1 Ch. 549.
(2) (1902) A. C. 104.
(3) (1930) S. A. no. 1468 of 1928.
(4) (1918) I. L. R. 42 Mad. 654.
(5) (1811) 18 Ves. 56.
(6) (1919) 38 Mad. L. J. 190; 55 I. C. 781.
(7) (1916) 21 Cal. W. N. 117.

P. R. Das (with him *S. M. Mullick* and *S. K. Mitra*), for the respondents.

AGARWALA, J.—Second Appeal no. 702 of 1932 arises out of a suit by the lessors for recovery of possession on breach of a covenant not to transfer the demised property.

In 1863 the ancestors of the plaintiffs, who were the proprietors of an eight annas share in mauzas Pandepura and Dihri, granted a mukarrari lease of 7½ annas to Gouri Singh and Gobind. The interest of each of the lessees in the mukarrari was specified to be one half. The lease contained a covenant by the lessees not to alienate the demised property without the consent of the lessors. Gouri Singh sold a 1 anna share to three persons in 1864, without the consent of the lessors. In 1899, however, the sons of the purchasers executed a jamognama in respect of this 1 anna share in favour of the lessors, containing all the terms of the original grant of 1863. It is not disputed that one result of this was that the rent of the one anna share was separated from the rent payable for the remainder of the mukarrari property. In 1906 the purchasers sold the one anna share to defendants 1—7 without the consent of the lessors. Thereafter the latter sued defendants 1—7 for rent and, in execution of the decree obtained in that suit, the 1 anna share was purchased by defendant 8. On the 23rd February, 1925, defendant 8 resold his interest to defendants 1—7 by a sale deed which was registered on the 25th May, 1925. Two years later defendants 1—7 instituted a suit for partition of the 1 anna share. This suit was decreed. Pending an appeal from the decree the lessors served on defendants 1—7 a notice alleging that their purchase was in contravention of the terms of the lease and demanding possession. The partition decree was confirmed in appeal. In the meanwhile, on the 11th August, 1928, the lessors instituted the present suit for recovery of possession. Defendant 8 did not enter

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appearance. The suit was decreed in the trial court and this decision was affirmed in appeal. Defendants 1—7 have preferred this Second Appeal.

The Courts below held that the covenant in restraint of alienation was a covenant running with the land and, therefore, that it was binding on defendant 8, the purchaser in execution of the rent decree, and on defendants 1—7 who had re-purchased from him. In *Saradakripa Lala* v. *Bepin Chandra Pal*(1), Mukerjee and Chotzner, JJ. following *Williams* v. *Earle*(2), *McEacharn* v. *Colton*(3) and *West* v. *Dobb*(4), held that an express covenant not to transfer the demised property without the consent of the landlord is a covenant running with the land and, therefore, that it was enforceable against a person who purchased the lessee's interest in execution of a decree for rent obtained by the lessor against the lessee. In the present case, therefore, the covenant in restraint of alienation was binding on defendant 8, the auction-purchaser. A covenant running with the land binds not only the lessee but also assignees from him although they are not expressly mentioned: *Goldstein* v. *Sanders*(5).

It was, however, contended by the appellants that inasmuch as the transfer to defendants 1—7 was a transfer to persons whom the lessors had previously accepted as tenants, it was not a transfer which brought the forfeiture clause into operation. This was negatived in *McEacharn* v. *Colton*(3) where it was held that a covenant by a lessee not to assign without the lessor's consent applies to a re-assignment to the original lessee. This case was followed by Ross and Chatterji, JJ. in *Rai Permotho Nath Mitra* v. *Hari Singh*(6) which was decided on the 13th

(1) (1922) 37 Cal. L. J. 538.
(2) (1868) L. R. 3 Q. B. 739.
(3) (1902) A. C. 104.
(4) (1869) L. R. 4 Q. B. 634.
(5) (1915) 1 Ch. 549.
(6) (1930) S. A. no. 1468 of 1928 (unreported).

June, 1930. It was next contended that a covenant by a lessee not to assign without the landlord's consent implies that the landlord's consent will not be unreasonably withheld. The answer to this is that the landlord's consent was never asked for so that there is no question of it being unreasonably withheld: *see Barrow* v. *Isaacs*(1). It was suggested, however, that in such a case the court should relieve against forfeiture if in fact the transferee is a person to whom the landlord could not reasonably object. The power of a court of equity to relieve against forfeiture is reproduced in section 114, Transfer of Property Act, 1882, and is confined to forfeiture for non-payment of money, *Krishna Shetti* v. *Pinto*(2) following *Hill* v. *Barclay*(3) where, with regard to the right of re-entry the breach of a covenant in restraint of alienation, Lord Eldon said, "It is sufficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation" [*see* also *Viltapa Kudva* v. *Durgama*(4)].

It was also argued that as the landlords had recognized Gouri Singh's transferees on payment of a nazrana by them, it should be held that the object of the proviso for re-entry on breach of the covenant in restraint of alienation was merely to secure payment of a sum of money and, therefore, that the court has power to relieve against the forfeiture. There is nothing in the term of the lease to indicate that this was the intention of the parties and it cannot be inferred that this was the intention from the fact that on a previous occasion the landlords condoned a breach of the covenant on receipt of consideration for so doing. It was suggested, however, that by this conduct the landlords had waived the right to insist upon re-entering on breach of the covenant or

(1) (1891) 1 Q. B. 417.
(2) (1918) I. L. R. 42 Mad. 654.
(3) (1811) 18 Ves. 56; 34 E. R. 238.
(4) (1919) 38 Mad. L. J. 190.

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were estopped from asserting their right. No question of estoppel can possibly arise and the mere fact that the landlords refrained from enforcing their right on one or more previous occasions, whether for consideration or not, does not amount to a surrender of their right to enforce it when a subsequent occasion arises.

AGARWALA, J.

The next point raised was with respect to the Bengal Tenancy Act, 1885. Section 155 of that Act enables the court to relieve against forfeiture in a suit for the ejectment of a tenant on the ground, inter alia, that he has broken a condition on the breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment. Even assuming that the lease in the present case is governed by the Act, section 155 is of no assistance to the appellant unless he can shew that he is a tenant of the respondents. A transferee from a lessee who is bound by a covenant not to alienate is not a tenant and, therefore, is not entitled to the benefit of the section: *see Dwarika Nath Roy Chowdhury* v. *Mathura Nath Roy Chowdhury*(1), where it was held that a purchaser in execution of a decree obtained against the lessee, the landlord not having recognized him as a tenant, is a trespasser, and, therefore, that section 155 does not apply to a suit to eject him.

Lastly, it was argued that unless the landlord proves his right to immediate possession he is not entitled to succeed in a suit for ejectment even against a trespasser. Reliance is placed upon the judgment of Sahrawardy, J. in *Ataharuddin Taluqdar* v. *Murari Mohan Dutt*(2). The reasoning of the learned Advocate for the appellants is that the landlords not having instituted within one year of the transfer a suit to eject the transferor, their right to re-enter was barred by Article 1 of Schedule III of the Bengal Tenancy Act, and therefore, they have no right to

(1) (1916) 21 Cal. W. N. 117.
(2) (1926) 47 Cal. L. J. 21.

immediate possession. In the case last referred to a similar contention was upheld. This decision was approved by Guha and Ghose, JJ., in *Sm. Swarnamovee* v. *Aoyajaddi*(1). In the first of these two cases the original tenant contested the suit and the second case was a suit for ejectment against the original tenant only. In the present case defendant 8 (the transferor) did not enter appearance in the suit and a decree for ejectment has been passed against him against which he has not appealed. In this respect the facts of the present case are similar to those in *Buddimanta Paramanik* v. *Sarat Chandra Banerjee*(2), where the landlord was held entitled to eject the transferees, and which was approved by Sanderson, C.J., and Mookerji, J., in *Dwarika Nath Roy Chowdhury* v. *Mathura Nath Roy Chowdhury*(3).

I would accordingly dismiss this appeal with costs.

The facts of Second Appeal no. 1761 of 1932 are similar to those of Second Appeal no. 702 of 1932 and the questions of law which arise there are the same. This appeal must also be dismissed with costs.

DHAVLE, J.—I agree.

The learned Advocate for the appellants has laid much stress inter alia on the recital in the jamognama of 1899 that the Rai Sahibs passed orders for the payment of *nazrana hasb sharah wo riwaj ke*. But though this may point to a scale of nazrana, it does not by any means imply that the landlords were bound to accept nazrana in lieu of enforcing the forfeiture. We have to read the document as a whole and construe it fairly; and when this is done, the meaning is perfectly clear and free from any reasonable doubt notwithstanding the criticism which has been levelled before us against particular words or expressions.

Appeals dismissed.

(1) (1932) 36 Cal. W. N. 819.
(2) (1910) 13 Cal. L. J. 672.
(3) (1916) 21 Cal. W. N. 117.