1938.

SRIMATI HEMANGINI DEVI v. ANIL KRISHNA BANERJEE.

MANOHAR LALL AND CHATTERJI, JJ.

the same should have been allowed to him. It is true that no reasons are assigned in the judgment but the learned Subordinate Judge has expressly stated that "I allow no future interest in this case."

The question of interest pendente lite and future interest is entirely in the discretion of the court, and although the court has not given any reasons whatsoever in the judgment, the circumstances in this case do not justify our interference with the discretion of the learned Subordinate Judge. It appears that it is difficult to make full realisations from this estate, and the learned Subordinate Judge himself has directed the money to be realised from the income of the properties which are in the possession of the lady. We, therefore, do not think that we would be justified in interfering with the discretion of the learned Subordinate Judge when we are going to direct that a receiver should be immediately placed in possession of the estate to pay over the various legacies as well as the arrears due to the plaintiff. The result is that the appeal and the cross-objection must both be dismissed without costs.

Appeal and cross-objection dismissed.

J. K.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1938.

January, 28.

BANSI SINGH

v.

CHAKRADHAR PRASHAD.*

Landlord and Tenant—lease for homestead or residential purposes granted before the passing of the Transfer of Property Act, 1882 (*Act IV of* 1882), *whether is transferable—estoppel.*

* Appeal from Appellate Decree no. 774 of 1935, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Patna, dated the 27th of July, 1925, reversing a decision of Babu Kamini Kumar Banerji, Munsif of Bihar, dated the 27th of November, 1933.

A lease of land taken for homestead or residential purposes granted before the Transfer of Property Act, 1882, was passed and which is not governed by the Bihar Tenancy Act is not transferable without the consent of the landlord. The mere fact that permanent buildings have been erected upon the land cannot in any way alter the incidents of the tenancy.

If there had been a representation by the landlord which led the tenant to believe that he had a permanent tenancy and he erected the building there might be an estoppel.

Banee Madhub Banerjee v. *Joy Kishen Mookerjee*(1), *Doorga Pershad Misser* v. *Brindabun Sookul*(2), *Ambica Prasad Singh* v. *Baldeo Lal*(3), *Madhusudhan Sen* v. *Kamini Kanta Sen*(4), *Hari Nath Karmakar* v. *Raj Chandra Karmakar*(5), *Kamala Mayee Dasi* v. *Nibaran Chandra Pramanik*(6), *Safar Ali Mia* v. *Abdul Rasid Khan*(7) and *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta*(8), reviewed.

Appeal by the defendants.

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

Dr. D. N. Mitter and *G. P. Singh*, for the appellants.

S. M. Mullick and *Hareshwar Prasad Sinha*, for the respondents.

WORT, J.—This appeal is by the defendants arising out of an action in which the plaintiffs claimed possession of certain property which the defendants contended they had purchased under a sale deed of the 15th of May, 1925.

It is unnecessary to state the details of the case considered by the learned Judges in the courts below, because only two points come up for consideration

(1) (1869) 12 W. R. 495.
(2) (1871) 15 W. R. 274.
(3) (1916) 1 Pat. L. J. 253.
(4) (1905) I. L. R. 32 Cal. 1023.
(5) (1897) 2 Cal. W. N. 122.
(6) (1931) 36 Cal. W. N. 149.
(7) (1924) 39 Cal. L. J. 585.
(8) (1926) I. L. R. 54 Cal. 333.

1938.

BANSI SINGH v. CHAKRADHAR PRASHAD.

WORT, J.

before us. One I propose to deal with at once for the purpose of disposing of it, and that is whether the learned Judge was in error in not calling for a further commissioner's report having not accepted the evidence of the commissioner nor the report that he made.

Apparently the question upon which the commissioner was asked to report was whether there had been an encroachment on the defendants' land. This was not for the purpose of deciding any question of trespass but for assisting the court in coming to the conclusion whether or not the defence, that consent to transfer the land had been given by the landlords, was true. Shortly the case of the defendants was that such consent had been given and that subsequent to the consent there had been an exchange of land, and the land which the defendants exchanged with the plaintiffs had been built upon by the plaintiffs. This piece of land as far as my memory goes is 6 dhurs in area. That statement in the report of the commissioner as to whether buildings of the plaintiffs were actually upon the land in dispute was not evidence of any agreement on the part of the landlords to the transfer but was mere evidence of the fact whether the buildings stood thereon or not. Had the commissioner's report been directed against any particular point which had been advanced by the parties, even so the report and the evidence of the commissioner himself were nothing more than evidence in the case which the learned Judge in the court below was entitled to accept or reject as he would. Both parties apparently had given evidence on this matter and the fact that the learned Judge did not accept the commissioner's report, in my judgment, does not support the appellants' contention that the judgment of the Judge in the court below is erroneous in point of law and that another commissioner should have been appointed to report with regard to the matter.

1936.

BANSI SINGH v. CHAKRADHAR PRASHAD.

WORT, J.

The other question was whether the tenancy was permanent and whether it was transferable. The Judge in the court below has held that it was neither permanent, nor was it transferable, nor was the consent of the landlords given. That being the state of facts as found by the Judge in the court below, Dr. Mitter on behalf of the appellants seeks to contend in this Court that a tenancy not governed by the Bihar Tenancy Act and coming into existence before the Transfer of Property Act (not being governed by that Act also) was transferable without the consent of the landlord. Shortly stated, I should have come to the conclusion, considering the authorities on this matter, that that point could not at this time of day be questioned.

All those who contend otherwise rely in the first place on the statement of Sir Barnes Peacock in *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee*(1). There the learned Chief Justice made this observation:

"Independently of this, speaking for myself, I should say that if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another."

It must be observed that the lower court from which the appeal was preferred had come to the conclusion that the defendant there had proved a local custom to transfer. It is quite obvious, therefore, that the observation of Sir Barnes Peacock, important as it might have been, was not necessary for the purpose of the decision of the case.

The next case to which reference was made was the decision in *Doorga Pershad Misser* v. *Brindabun Sookul*(2) in which it was decided that "Where a proprietor grants permission to a party to build upon

(1) (1896) 12 W. R. 495.
(2) (1871) 15 W. R. 274.

1938.

BANSI SINGH v. CHARADHAR PRASHAD.

WORT, J.

and occupy a portion of his land, without any reservation of rights to oust him at will or limitation of the grant to him individually, the permission must be construed in the ordinary way; and if the occupation continues for a very long period, the occupant cannot be turned out at a moment's notice or denied the power of transferring his right, though he may be sued for rent". There the learned Judges referred to the case of *Banee Madhub Banerjee*(1) with these words: "A case has been cited by the appellant to be found in XII Weekly Reporter, page 496, in which the late Chief Justice Sir Barnes Peacock has expressed an opinion which seems to us to bear directly upon this case."

Coming from those decisions to the decisions of this Court, in *Ambica Prasad Singh* v. *Baldeo Lal*(2) Mullick and Kingsford, JJ. decided that with regard to tenancies of homestead lands created before the Transfer of Property Act the onus of proof was upon the tenants if they wished to show that they had a right to transfer and relied upon *Madhusudhan Sen* v. *Kamini Kanta Sen*(3), a decision of Sir Francis Maclean.

Taking the other decisions in order of time I come to the case to which I have just made reference and upon which Mullick, J. relied, the facts being these. The Subordinate Judge in the case who heard the appeal from the decision of the Munsif had held that the tenancy in question was neither permanent nor transferable and remanded the case to be heard by the Munsif on its merits. The Munsif gave a decree in favour of the plaintiff. Meanwhile there was an appeal from the remand order to the High Court, and the only question with which the learned Judges in that Court were principally concerned was whether in the circumstances of the case an appeal lay to the High Court from the interlocutory order. But Sir

(1) (1869) 12 W. R. 495.
(2) (1916) 1 Pat. L. J. 253.
(3) (1905) I. L. R. 32 Cal. 1023.

Francis Maclean proceeds to observe that the case had also been heard on the merits. He pointed out that the only question which was open to the appellant in second appeal was the question of the transferability of the tenancy and, as the question of permanency was a question of fact, it could not be disturbed by the High Court. The only observation that could be considered in any way in point with regard to the question before us in this case is the statement of the learned Judge to this effect: "That the incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands before the passing of the Transfer of Property Act was held in *Hari Nath Karmakar* v. *Raj Chandra Karmakar*(1)" and the learned Judge goes on to observe that they had taken that view in certain other cases which the learned Judge there mentioned. He then refers to the observation of Sir Barnes Peacock to which I have already made reference, and makes this observation: "The tenure in that case was one for building purposes and according to the custom of the district, which was proved by evidence, it was assignable as well as heritable. It has not been proved in this case that any such custom exists. There are no doubt certain observations of Chief Justice Peacock in that case, which give support to the appellant's contention. They were, however, unnecessary for the decision of the case, and we doubt whether they accurately state the law as now understood in Bengal".

The contention of Dr. Mitter, as I understand it, is that this right of transferability exists in cases in which the land is let for residential purposes in contradistinction to land let for homestead purposes. This matter was considered in a decision of the Calcutta High Court in *Kamala Mayee Dasi* v. *Nibaran Chandra Pramanik*(2) where again reference

(1) (1897) 2 Cal. W. N. 122.

(2) (1931) 36 Cal. W. N. 149.

1936.

BANSI SINGH v. CHAKRADHAR PRASHAD.

WORT, J.

is made to the observation of Sir Barnes Peacock, and the learned Judge, delivering the judgment of the Court, made a reference to the observation of Maclean, C. J. to the effect " They were however unnecessary for the decision of the case, and we doubt whether they accurately state the law as now understood in Bengal ", and then, later on in the judgment makes this observation: " Mr. Roy attempts to maintain that ' lease for homestead ' means homestead of an agricultural tenant which would be non-transferable but the lease for purposes of residence would be transferable in view of the observation of Sir Barnes Peacock. In my judgment there is no authority for making a distinction between a lease for homestead and a lease for residential purposes. In fact the cases cited above and similar cases were all dealing with leases of ordinary homestead for residential purposes. A lease for homestead may be a lease for residential purposes of such a nature that the parties intended that *pucca* buildings might be built upon the land at some expense by the tenant and it is reasonable to deduce from this fact a contract which though not put into writing but was impliedly understood that the lessee would have a heritable and transferable right in the land."

It is pointed out in a number of other decisions the question whether the tenancy allowed to be built upon may be in the nature of an estoppel but those decisions cannot in my judgment have any reference to the question whether a lease or tenancy being of a permanent character is also transferable. In the case of *Safar Ali Mia* v. *Abdul Rasid Khan*(1) Walmsley and Mukerji, JJ. had again to consider this question. The effect of their decision was that a permanent tenancy created before the passing of the Transfer of Property Act for the purpose of habitation cannot be transferred when pucca buildings have not been erected on the land leased. The learned Judge quoted with approval the decision in *Ambika Prasad Singh*

(1) (1924) 39 Cal. L. J. 585.

v. *Baldeo Lal*(1) in these words: "With regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of judicial decision has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies are non-transferable, and that the only exception to the above rule is when there has been an erection of pucca buildings or a standing by on the part of the landlord while the tenant spends a large sum of money upon the land". The mere fact that permanent buildings have been erected upon the land cannot in any way alter the incidence of the tenancy. At most it could be said that if there had been a representation by the landlord which led the tenant to believe that he had a permanent tenancy and therefore erected buildings, there might be an estoppel although their Lordships of the Judicial Committee of the Privy Council negatived this argument in *Ariff's* case(2) (which dealt with the Transfer of Property Act).

One of the latest decisions which deals generally with the matter is the case of *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta*(3). There the case was of a permanent lease of homestead land and the learned Judge decided that a tenancy of homestead land created before the passing of the Transfer of Property Act was not transferable by law. There was further reference in this case to the statement of Sir Barnes Peacock, and the learned Judges made this observation "In our opinion, these observations of Peacock, C.J. are opposed to the settled view of this Court, and cannot now be regarded as correctly stating the law." It seems to me to be clear that under the general law one of the incidents of a tenancy whether permanent or otherwise in India prior to the Transfer of Property Act or the Bengal Tenancy Act is non-transferability; and, as Mullick, J. pointed

(1) (1916) 1 Pat. L. J. 253.

(2) (1931) L. R. 58 Ind. App. 91.

(3) (1926) I. L. R. 54 Cal. 333.

1933.

RANSI SINGH v. CHAKRADHAR PRASHAD.

out in *Ambica Prasad Singh's* case(1); if the tenant contends that the tenancy carries with it the incidents of transferability, the onus is upon him to show it.

WORT, J. For these reasons, in my judgment, the decision of the Judge in the Court below is right, the appeal fails and it must be dismissed with costs.

VARMA, J.—I agree. Dr. Mitter cited several authorities before us in order to establish that the tenancy with which we have to deal was transferable. He relied upon the decision in *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee*(2), chiefly upon the observation made by Sir Barnes Peacock towards the end of his judgment. I may mention that this observation was relied upon in the subsequent case of *Doorga Pershad Misser* v. *Brindabun Sookul*(3) but the decision in *Banee Madhub Banerjee*(2) ultimately turned upon the question of custom of transferability of such tenures in the locality from which the case came. But soon after doubts were expressed about his observation of Sir Barnes Peacock in *Madhusudhan Sen* v. *Kamini Kanta Sen*(4) where it was declared that this observation was a mere obiter. Dr. Mitter has drawn our attention to a certain passage in *Sulin Mohan Banerjee* v. *Rajkrishna Ghose*(5). That is a passage in the judgment of Mookerjee, A.C.J., who after giving a number of cases of the Calcutta High Court, said: "The only recognized exception of this rule is that stated in the case of *Bani Madhab Banerjee* v. *Joy Krishna Mookerjee*(2). In that case, Sir Barnes Peacock, C.J. observed that if one man grants a tenure to another for the purpose of living upon the land, the tenure, in the absence of evidence to the contrary, is assignable. The same view was subsequently taken in the case of *Durgaprasad Misser*

(1) (1916) 1 Pat. L. J. 253.
(2) (1869) 12 W. R. 495.
(3) (1871) 15 W. R. 274.
(4) (1905) I. L. R. 32 Cal. 1023.
(5) (1920) 33 Cal. L. J. 193.

v. *Brindaban Sookul*(1). In the case before us, the tenancy had not been created for the purpose of residence. Consequently, we must hold that the tenancy was not transferable". From this Dr. Mitter wanted us to conclude that the observation made in *Banee Madhab's* case(2) was followed in *Sulin Mohan's* case(3). But apart from the other decisions of the Calcutta High Court, reading the passage itself, it is clear to me that Mukherjee, A.C.J. held that they were dealing with a tenancy that was not transferable. All that the decision mentions is that there is a list of cases deciding the question in one way and these two cases decide in another way; but the facts of the case in which their Lordships were delivering judgment were different from the facts mentioned in *Sulin Mohan's* case(3), and I am strengthened in this view of mine by a decision in the case of *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta*(4) where Page, J. said: "And we are of opinion that the Acting Chief Justice in *Sulin Mohan's* case(3) when referring to the case decided by Chief Justice Peacock did not do so for the purpose of expressing approval of the observations in that judgment which have been cited above". The most recent case of the Calcutta High Court is that of *Kamala Mayee Dasi* v. *Nibaran Chandra Pramanik*(5). In that case most of the authorities cited before us have been referred to, and the distinction which Dr. Mitter has been trying to draw for the purpose of the present case has been shown to be a distinction without a difference. The passage has been referred to by my learned brother but as this point appealed to me for some time I was at some pains to find out if the distinction pointed out by Dr. Mitter really existed, that is to say, the distinction between a homestead lease and a lease for residential purposes. The interpretation Dr. Mitter

(1) (1871) 15 W. R. 274.
(2) (1869) 12 W. R. 495.
(3) (1920) 33 Cal. L. J. 193.
(4) (1926) I. L. R. 54 Cal. 333.
(5) (1931) 36 Cal. W. N. 149.

1938.

BANSI SINGH v. CHAKRADHAR PRASHAD.

VARMA, J.

was trying to put upon the expression " homestead lease " is that it may be something different from a lease for residential purposes. This was not accepted by Suhrawardy, J. in *Kamala Mayee Dasi's* case(1). He says: " In my judgment there is no authority for making a distinction between a lease for homestead and a lease for residential purposes. In fact the cases cited above and similar cases were all dealing with leases of ordinary homestead for residential purposes ", and then he also says that the observation made in the case of *Banee Madhub Banerjee*(2) " was against the current of decisions " in the Calcutta High Court and therefore he did not like to rely upon it. So far as the Patna decision is concerned it is a clear authority for the proposition upon which the lower appellate court has relied: I mean the case of *Ambica Prasad Singh* v. *Baldeo Lal*(3).

On the question of acquiescence, the finding is that it has not been proved. The only remark made by Dr. Mitter is that if the Court below was not satisfied with the evidence of the commissioner he ought to have appointed another commissioner to inspect the locality and submit a report. But the commissioner's report according to the Code itself is nothing more than a piece of evidence and the Court was perfectly entitled to rely on that evidence. The finding, therefore, on the question of acquiescence is a finding of fact.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

J. K.

(1) (1931) 36 Cal. W. N. 149.

(2) (1869) 12 W. R. 495.

(3) (1916) 1 Pat. L. J. 253.