APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Justice Abdul Raoof.

MUHAMMAD ISMAIL (DEFENDANT)—*Appellant,*

versus

SHAMUS-UD-DIN (PLAINTIFF) AND FAUKHAR-UD-DIN (DEFENDANT) } *Respondents.*

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June 16.

Civil Appeal No. 2748 of 1916.

Punjab Pre-emption Act, I of 1913, *section* 3—*whether the right of a temporary lessee to plant trees and take their produce (sardrakhti) is "agricultural land" or "village immoveable property" within the meaning of the Act—Punjab Alienation of Land Act, XIII of* 1900, *section* 2 (3) (*b*)—*General Clauses Act, X of* 1897, *section* 3 (25).

The vendor in this case was the tenant of certain land under a lease made in 1888 in which it was stated that the land was leased *waste lagane sardrakhti, i.e.* for the planting of a grove of trees or plantation. The lease was for seven years, and after expiry of that period the lessor was to receive ¼ of the produce of flowers, fruits, etc. of the land. Another condition was that if the lessor wanted to evict the lessee after the expiry of the seven years he would pay the latter the value of his *sardrakhti.* By a deed of sale made in 1914 the vendor sold his *sardrakhti* in the land, *i.e.* the rights owned by him in the trees. The plaintiff sued for pre-emption in respect of this sale and the questions for decision, were, whether the subject of the sale came within the definition of (1) "agricultural land" in the Punjab Pre-emption Act, section 3, read with the Punjab Alienation of Land Act, 1900, section 2 (3) (*b*), as being a share in the profits of an estate or holding, or (2) "immoveable property" under the Punjab Pre-emption Act, section 3.

Held, that the temporary rights which the vendor had in the produce of the trees under the lease did not constitute him owner of "a share in the profits of the holding" and that consequently the subject of the sale was not "agricultural land" within the meaning of section 3 of the Punjab Pre-emption Act.

Held also, that the temporary rights sold were not "immoveable property" under the Punjab Pre-emption Act, taking the definition as given in the General Clauses Act, 1897, *viz.*, that it includes "land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth"; and the plaintiff had therefore no *locus standi* to bring a suit for pre-emption.

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Shepherd and Brown's Indian Transfer of Property Act, 7th Edition, page 14, referred to.

The facts of the case are given in the judgment of this Court.

Santanam for Appellant—What was sold was merely the leasehold rights which the vendor possessed by virtue of the lease. As a lease itself is not pre-emptible, its assignment cannot be pre-empted, the only exception being the case of an occupancy tenancy and the lease in this case is not of that description.

Moti Sagar for Respondents—The point raised by the appellant that this being a transfer of a lease is not pre-emptable should not be allowed to be taken at this stage as in neither of the Courts below nor in the grounds of appeal in this Court was this point raised.

Their Lordships overruled the objection holding that it was a point of law apparent on the record and could be raised at any time.

Santanam—The analogous case is that of a mortgage, see Shadi Lal's Pre-emption Act, Second Edition, 1910, page 13. The doctrine of pre-emption does not apply to the case of leases even though they be perpetual and *mourusi*—*Dewan-ut-Ulla* v. *Kazem Molla* (1) and *Nihal Chand* v. *Rai Singh* (2). The assignment of a lease is not a sale as contemplated by the Pre-emption Act because sale is a permanent transfer of ownership—Ellis's Pre-emption Act, page 91, Shadi Lal's Pre-emption Act, pages 27 and 28.

My contention is that if pre-emption is allowed in such a case a tenant on a cultivating lease would not be able to sell his crops without the risk of a pre-emption suit, for the definition of immoveable property as given in the General Clauses Act which is sought to be applied here would include standing crops, though the definition as given in the Transfer of Property Act excludes it definitely. The definition of immoveable property, as given in the Transfer of Property Act, cannot be overridden by the definition given in the General Clauses Act because the former being a particular Act overrides the latter which is a General Act.

(1) (1887) I. L. R. 15 Cal. 184. (2) 43 P. R. 1892.

Immoveable property in the Transfer of Property Act excludes growing crops and standing timber ; here *sardrakhti* is only a right in the trees and such a right is not immoveable property nor is it agricultural land because the tenure is a temporary one, nor is the right a proprietary one.

[SCOTT-SMITH, J.—Does not the land as defined in the Punjab Alienation of Land Act of 1900 include " a share in the profits of an estate or holding " ?]

Yes, but such a share is clearly the share of the person having the *dominium* over the land which he gets merely by right of being an owner. A tenant's share obviously does not come under it as it merely represents his wages. It is in no sense " a share in the profits."

Moti Sagar for Respondents—The transaction in question was not merely a transfer of leasehold rights but an out and out sale of immoveable property. There is no doubt that the vendor had obtained the land on a lease to acquire *sardrakhti* rights but having planted trees thereupon and having thus acquired *sardrakhti* rights thereof it was either a sale of agricultural land or of village immoveable property within the meaning of the Pre-emption Act. The vendor was for all practical purposes a permanent tenant of the land. A person who builds a superstructure is a permanent tenant. Sale of *sardrakhti* is analogous to the sale of the superstructure over the land of another. Trees standing on land are immoveable property : *Sakharam* v. *Vishram* (1), *Krishnarao* v. *Babaji* (2), *Katwaru* v. *Ram Adhin* (3) and *Alisaheb* v. *Mohidin Sadik* (4). The definition of immoveable property as given in the Transfer of Property Act does not support the contention of the appellant inasmuch as trees are not standing timber within the meaning of this definition, hence the definition as given in the General Clauses Act applies.

Santanam replied.

Second appeal from the decree of S. Clifford, Esquire, Additional District Judge, Delhi, dated the

(1) (1894) I.L.R. 19 Bom. 207.
(2) (1899) I.L.R. 24 Bom. 31.
(3) (1912) I.L.R. 10 All. L.J. 516.
(4) (1911) 13 Bom. L.R. 874.

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14th June 1916, *modifying that of Lala Murari Lal, Khosla, Senior Subordinate Judge, Delhi, dated the 15th April* 1916, *decreeing plaintiff's claim.*

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—In the suit out of which the present appeal arises the plaintiff-respondent claimed pre-emption of certain *sardrakhti* rights in two gardens and other land sold by Fakhr-ud-Din to Muhammad Ismail, defendant-appellant, by a registered deed of sale on the 23rd November 1914. The Courts below have decreed the claim in regard to a part of the subject of the sale, holding that there was a sale either of agricultural land or village immoveable property within the meaning of the Punjab Pre-emption Act. The defendant-vendee has filed a second appeal in this Court, and it is urged on his behalf that the property sold is neither agricultural land nor village immoveable property within the meaning of section 3 of the Pre-emption Act of 1913. In order to see what has really been sold it is necessary to examine the deed of lease under which the vendor held possession of the gardens and the deed of sale executed by him in favour of the appellant. The deed of lease shows that the land was leased *waste lagane sardrakhti*, in other words, for the planting of a grove of trees or plantation which is the meaning given to the word "*sardrakhti*" in Fellow's Dictionary. The lease was for seven years and after the expiry of that period the lessor was to receive ¼ of the produce, flowers, fruits, etc. of the land over which trees were planted. Another condition of the lease was that if the lessor wanted to evict the lessee after the expiry of seven years, he would pay the latter the value of his *sardrakhti* according to the market rate to be assessed by arbitrators agreed to by the parties. This shows that the lessee was to improve the land by planting trees, and when he was dispossessed therefrom by the lessor he was to receive the value of his improvements, in other words, the value of the trees planted by him. As I understand this term, the lessee did not become the owner of the trees, but was to be entitled to receive their value upon dispossession. Now turning to the deed of sale, I find that all that was sold was the

vendor's *sardrakhti* and by the term as used here I understand the right owned by the lessee in the trees and not the actual trees themselves.

I now proceed to see whether the subject of the sale was agricultural land or village immoveable property within the meaning of the definition given in the Act. According to the Act agricultural land shall mean land as defined in the Punjab Alienation of Land Act, 1900, but shall not include the rights of a mortgagee. The definition of land, in the Punjab Alienation of Land Act, embraces six sub-heads; and the only one which, in my opinion, can possibly be applied is "a share in the profits of an estate or holding." Can it be said that the *sardrakhti* rights sold are "a share in the profits of an estate or holding"? What has been sold is the lessee's rights in the trees and their produce. Now, the lessee's rights are only temporary ones, and though, as long as he is in possession as such lessee, he is entitled to keep the produce after deducting the landlord's share. I do not think it can be said that these temporary rights constitute him owner of a share in the profits of the holding. I think the definition is intended to apply only to the proprietor who owns a permanent share in the profits, and not to a mere tenant-at-will who is entitled to reap the produce as the fruits of his labours. I am therefore of opinion that what was sold was not agricultural land.

The next question is whether it is village immoveable property. There is no definition of immoveable property in the Pre-emption Act, and therefore I think we must apply the definition given in the General Clauses Act, which is as follows :—

> "Immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

In accordance with this definition, trees which are attached to the earth are immoveable property, but as I have already pointed out, the lessee is not the owner of the trees and I do not think that it can be said that he has sold them. He has merely sold his rights in the

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trees and that to recover compensation for them when he is dispossessed from the leased property. Has he sold benefits to arise out of land? In the Commentary on the Indian Transfer of Property Act by Shepherd and Brown, 7th Edition, at page 14 the learned authors say :—

"The benefits to arise out of land which are included in the term immoveable property cover such incorporeal rights as a *hat*, a right to a fishery, a right of ferry, a right to market dues on a given piece of land, or a right to the assessment payable on a sub-tenure."

These appear to me to be all permanent rights arising out of land and there is no mention of any temporary rights such as a tenant-at-will enjoys in the produce of the land during his tenancy. At page 15 the authors say :—

" Grass, it is apprehended, in the same way means the present or growing herbage, and a right to depasture or to cut grass for an indefinite time would be regarded as a right in immoveable property.

I do not think the Legislature ever intended that the term " immoveable property " should include mere temporary rights of a tenant-at-will to reap the produce to which he is entitled as a tenant.

There is no authority, that I am aware of, which holds that the rights of a temporary lessee to produce are benefits to arise out of land and therefore immoveable property. I therefore am of opinion that the subject of the sale is neither agricultural land nor village immoveable property within the meaning of the definition. I would accordingly accept the appeal and dismiss the plaintiff's suit with costs in all Courts.

RAOOF, J.—I entirely agree in the order proposed by my learned brother and it is not necessary for me to write a separate judgment. I may, however, add a few remarks. It is not contended that a claim for pre-emption in respect of the *sardrakhti* lease would be maintainable. Can then the assignment of the right of the lessee give rise to a right of pre-emption? I am clearly of opinion that it cannot. Under the lease a limited right was created in favour of the lessee, entitling him to plant trees and improve the land

and enjoy its produce, so long as he was not evicted under the terms of the lease. It is not pretended that a suit to pre-empt the right to occupy the land temporarily could be maintained, but it is contended that the right to enjoy the produce of the trees standing on the land can be acquired by pre-emption. The lessee, however, could have no higher rights in the trees than he had in the land. The assignment of his right in the trees therefore cannot give a right of pre-emption. It would be absurd to say that though the creation of a mortgage or a lease could not give rise to a right of pre-emption under the Pre-emption Act yet the assignment of those rights could give a right to pre-empt. Under the lease in question and according to general principles the lessee was not the owner of the trees. His right *qua* the land and the trees were exactly the same, namely of a temporary nature.

It has, however, been contended that the trees standing on the land came under the description of "things attached to the land" within the meaning of General Clauses Act and as such were immoveable property and liable to pre-emption; but the trees in this case cannot be said to be attached to the proprietary land. They are attached to the special tenure created in favour of the lessee. It is admitted that according to the terms of the lease the right of the lessee to the possession of the trees shall come to an end with the determination of his right to occupy the land.

For the reasons set forth in the judgment of my learned brother and for the additional reasons given above I would also accept the appeal and dismiss the plaintiff's suit.

Appeal accepted.

A. N. C.