1905
JULY 8.

APPELLATE CIVIL.

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[1023] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

MADHU SUDAN SEN *v.* KAMINI KANTA SEN.*

[8th July, 1905.]

Appeal—Appeal from order—Appeal presented after final disposal of suit—Civil Procedure Code (Act XIV of 1882) s. 588—Landlord and Tenant—Transfer by tenant—Yearly tenancy—Transfer of tenancy.

The right of appeal from interlocutory orders ceases with the disposal of the suit.

Where on the plaintiff's appeal a suit was remanded under s. 562 of the Civil Procedure Code and on remand the Court of first instance decided the case in the plaintiff's favour and there was no appeal from that decision, but the defendant afterwards appealed to the High Court against the order of remand.

Held, that the appeal was not maintainable.

Jatinga Valley Tea Company, Limited v. *Chera Tea Company, Limited* (1), distinguished.

The incident of non-transferability is common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary.

Hari Nath Karmakar v. *Raj Chandra Karmakar* (2) followed.

Banee Madhub Banerjee v. *Joy Kishen Mookerjee* (3) distinguished.

[Appeal—Remand—No appeal after disposal of Suit; **Dist**: 30 All. 479 F. B.=5 A. L. J. 447=1908 A. W. N. 195=4 M. L. T. 162; **Not Fol**. 37 Mad. 29; **Fol**: 29 All. 659 =4 C. L. J. 569=1907 A. W. N. 284 ; 30 All. 191=5 A. L. J. 270=1908 A. W. N. 76; 7 C. L. J. 107 ; 17 C. W. N. 860=16 C. L. J. 209=19 I. C. 630; **Ref**. 12 C. W. N. 590=6 C. L. J. 547; 7 C. L. J. 553=12 C. W. N. 72 note; 36 Cal. 762; 15 C. W. N. 830;

Landlord and tenant—Non-transferabilty of homestead lands: **Dist**: 18 I. C. 379 ; **Not Fol**: 37 Mad. 29; **Ref**. 23 C. L. J. 193=60 I. C. 826; 7 C. L. J. 107; 23 I. C. 246 ; 26 I. C. 500; 33 I. C. 502; 50 I. C. 522 ; 23 C. W N. 201; **Rel**. 20 C. W. N. 1113 ; 1 Pat. L. J. 253; **Fol** 37 I. C 939.]

APPEAL by the defendant No. 1, Madhu Sudan Sen.

Plaintiff Kamini Kanta Sen instituted a suit against three persons—(1) Madhu Sudan Sen, (2) his wife Sarojini Sen and (3) Abdur Rahman for possesion of a piece of land on the ground that it belonged to him in *miras ijara pattai* right under one Rahim Baksh and that the defendant No. 3, who had a non-transferable temporary *karsa* right therein, had sold his rights to the defendants Nos. 1 and 2 and had given up possession and **[1024]** that the defendants Nos. 1 and 2 were keeping him out of possession.

The defendant No. 1 pleaded *inter alia* that the suit could not be maintained, no notice to quit having been given to him ; that the right of the defendant No. 3 was a permanent, heritable and transferable right ; that the father of the defendant No. 3, who had taken the settlement, had improved the land by filling up excavations at great expense and that he and his heirs owned and held the same by dwelling thereon for upwards of 100 years ; he further pleaded that Rahim Baksh, under whom the plaintiff claimed, had taken a mortgage of the land in the name of his son-in-law from the defendant No. 3, who sold the land to him (the defendant

* Appeal from Order No. 251 of 1904, against the order of Bhuban Mohan Ganguli, Offg. Subordinate Judge of Barisal, dated the 29th of March 1904, reversing the order of Pramatha Krishna Sinha, dated the 23rd of November 1903.

(1) (1885) I. L. R. 12 Cal. 45.
(2) (1897) 2 C. W. N. 122.
(3) (1869) 12 W. R. 495 ; 7 B. L. R. 152.

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No. 1) and that at the time of the purchase Rahim Baksh had represented to him that the property was transferable ; that the property was subsequently put up for sale in execution of a decree on the mortgage and he, the defendant No. 1, again purchased it with the knowledge and consent of Rahim Baksh, and that consequently Rahim Baksh and the plaintiff claiming under him were both estopped from denying the transferability of the holding.

He contended that the plaintiff was not entitled to eject him.

The Munsif, who tried the suit, framed fourteen issues, but on the 2nd, 12th and 14th issues, *viz* :

2. Is the suit maintainable without a notice ?

12. Whether his (defendant No. 3's) tenancy was determined by his transfer to defendants Nos. 1 and 2 ; and

14. Did the defendants acquire any title by their purchase :—he held that the defendants Nos. 1 and 2 could not be treated as trespassers and that the suit could not be maintained in the absence of a reasonable notice to quit.

He accordingly dismissed the suit.

On appeal the Subordinate Judge held that the decision of the question whether any notice to quit was necessary depended on the finding on the 13th issue, *viz.*, whether the holding in suit was transferable and heritable. He decided this issue and held that the defendant No. 3 had no transferable right in the holding in question ; he further held that the tenancy was determined by the transfer and that the purchasers had acquired no [1025] right to the land and that no notice to quit was necessary and that the findings of the first Court on the issues Nos. 2, 12 and 14 were erroneous. By his order dated the 29th March 1904 he allowed the appeal and remanded the suit apparently under s. 562 of the Civil Procedure Code for trial of the remaining issues which related to the questions of the plaintiff's title, estoppel, form and valuation of the suit, the plaintiff's right to eject, right to compensation and whether the defendant No. 3 was a tenant-at-will.

The defendant No. 1 appealed to the High Court from the order of remand.

It appeared that on the remand the Munsif had tried the suit and made a decree in favour of the plaintiff *ex parte*. An application by the defendants under s. 108 of the Civil Procedure Code was rejected on the 21st June 1904.

The appeal to the High Court against the order of remand was presented on the 24th June 1904.

Dr. *Rashbehary Ghose* (Babu *Trailokhya Nath Chakravarti* with him) for the appellant.

The interest of the defendant No. 3 was transferable : *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee* (1) in which Peacock C. J. held that a tenure of this description would be assignable in the absence of evidence to the contrary, and this was followed in *Doorga Pershad Misser* v. *Brindabun Sookul* (2). Leasehold interest is property and is *prima facie* transferable ; the mere fact that a lessee, although only a lessee from year to year, has assigned his interest would not operate as a forfeiture to entitle the lessor to re-enter. Even before the Transfer of Property Act there was no law, which placed a lessee of homestead land on

(1) (1869) 12 W. R. 495; 1 B. L. R. 152.

(2) (1871) 15 W. R. 274.

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the same footing as an agricultural lessee. *Hari Nath Karmakar* v. *Raj Chandra Karmakar* (1) professes to follow Peacock C. J. in *Banee Madhub Banerjee's case* (2), but Peacock C. J. never held in that case that the tenure might or might not be transferable. Although the Transfer of Property Act does not govern this case the Courts cannot do better than take the law as there laid down [1026] for their guide: *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (3). S. 108 (*j*) of the Act only formulates the law as it stood before; the two cases in the Weekly Reporter show the state of the law as it was before the Act and the language of the section was evidently borrowed from the judgment of Peacock C. J. The ground on which it is held that an occupant tenant, who transfers his holding, abandons the land is inapplicable to the case of a tenant of homestead land—the former is a person who is attached to the land and when he gives up occupation he cuts off all connection with the land. The question is one of some importance, and the view of Rampini J. in *Hari Nath Karmakar* v. *Raj Chandra Karmakar* (1) is not well founded; he misapprehended the ruling of Peacock C. J. [MITRA J. After the remand the Munsif has decreed the suit.] I had a right to appeal against the order of remand. I was not bound to appear before the Munsif, for in fact there was nothing left to decide, and on the judgment of the lower appellate Court the decree of the Munsif is quite right. I was not bound to appeal against that. [MITRA J. You appealed after the Munsif had passed the final decree in the suit.]

Babu *Dwarka Nath Chakravarti* for the respondent. The proceedings having terminated by the final decree of the Munsif there was no competent appeal from the order of remand, the suit had terminated when the appeal to this Court was preferred. Before the Transfer of Property Act there was no rule as to whether leases of homestead lands were transferable or not; in every case the question of transferability had to be proved; in the present case no evidence has been given that it was transferable. *Hari Nath Karmakar* v. *Raj Chandra Karmakar* (1).

Dr. *Rashbehary Ghose* in reply. The question is, is plaintiff entitled to treat me as a trespasser? Assume that my transferor's interest was not permanent—it was at least from year to year, then the mere fact of the transfer cannot entitle the plaintiff to treat me as a trespasser. The Transfer of Property Act is not of its own force applicable but it may be referred to as embodying rules of equity and good conscience; by equity and good [1027] conscience property, however precarious, is transferable. Can it be contended that in the case of a lease of a house in Calcutta before 1882 the lessee's interest would be not assignable? Shephard's Commentaries on the Transfer of Property Act, notes to sec. 108 (*j*). *Venkatasamy Naick* v. *Srimatu Muthuvijia Ragunada Rani Kathama Natchiar* (4). The other side has not shown that the Transfer of Property Act has altered the law on this point. [MACLEAN C. J. Has the *dictum* of Peacock C. J. been followed?—If that view is sound any tenancy, even a weekly tenancy, would be assignable.] *Doorga Pershad Misser* v. *Brindabun Sookul* (5) followed Peacock C. J. I put it on the broad ground that property is transferable, leaseholds are property; it is for those, who assert the contrary, to prove it. If the lease were for a term, say for 99 years, would it still not be assignable, and where is then the line to be drawn? The appeal is competent.

(1) (1897) 2 C. W. N. 122.
(2) (1869) 12 W. R. 495; 1 B. L. R. 152.
(3) (1898) I. L. R. 26 Cal. 39.
(4) (1870) 5 Mad. H. C. 227.
(5) (1871) 15 W. R. 274.

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Jatinga Valley Tea Company, Limited v. *Chera Tea Company, Limited* (1). I could not have appealed against the final decree of the Munsif for that was a perfectly good decision and I could not question the remand order before him. [Babu *Dwarka Nath Chakravarti*. In the case cited the appeal to the High Court was pending when the Munsif made his decree.] The reasoning on which the judgment is based shows that it is immaterial whether the appeal had been preferred before or after the final decision. The law gives me a right of appeal to be exercised within a given time; is that right taken away simply because proceedings have been taken by the Munsif on remand? An appeal against the Munsif's decision would have been a perfectly idle appeal. [MACLEAN C. J. You could have appealed from the Munsif to the Subordinate Judge and raised the question of the validity of the order of remand; the decision would have been against you, but you could have come up to this Court and got it set aside.]

Cur adv. vult.

MACLEAN C. J. This is an appeal in a suit for ejectment. The third defendant was a tenant of the plaintiff in occupation [1028] of a piece of homestead land in a town. He sold his tenant-interest, whatever it was, to the first and the second defendants, who were in occupation of the land at the date of suit. The plaintiff alleged that the right which the third defendant had was non-transferable, and he accordingly asked for a decree for possession against the first and second defendants.

These defendants pleaded a permanent and transferable right in their vendor. The Munsif gave effect to their plea and dismissed the suit.

In appeal by the plaintiff, the Subordinate Judge held on the 29th March 1904, that the third defendant had neither a permanent nor a transferable right and he set aside the decree made by the Munsif and remanded the case for the trial of the other issues raised, which, however, were not very material.

On the 28th April 1904, the Munsif disposed of the case in favour of the plaintiff and gave him a decree for possession. The defendants, however, did not appear at the hearing, and they subsequently applied for a rehearing under section 108 of the Code of Civil Procedure. On the 18th June 1904, their application was refused, and thus the decree of the 28th April 1904 became final and there was no appeal from it.

The present appeal is from the order of remand of the Subordinate Judge dated the 29th March 1904, and it was not presented until the 21st June 1904, three days after the decree became final in the Munsif's Court.

The learned Vakil for the plaintiff respondent has taken a preliminary objection that the appeal is not maintainable, the final decree in the suit having been made before its presentation.

The order of the Subordinate Judge was apparently one under section 562 of the Code, and sub-section 28 of section 588 allows an appeal from such an interlocutory order. The question, however, is whether or not the unsuccessful party has lost his right of appeal, in that he has allowed the final decree to be passed uncontested before exercising it?

In *Jatinga Valley Tea Company Limited* v. *Chera Tea Company Limited* (1) the appellant had presented an appeal to this Court from an order of remand under section 562 before a final decree [1029] was passed dismissing the suit. The suit was dismissed notwithstanding the pendency of the appeal, and it was held that the dismissal of the suit by the first Court after the remand did not affect the appeal and that it could be heard.

(1) (1885) I. L. R. 12 Cal. 46.

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Inasmuch as in that case the appeal from the order of remand was presented before the final decree in the suit had been passed the case is no authority on the question now before us.

Section 588 of the Code allows appeals from the orders specified therein and from no other orders. They are mostly interlocutory orders passed during the course of a suit. Many of them do not affect the final decision as regards the rights of the parties – their force lasts only as long as the suit is pending. It seems to us to be clear that the right of appeal from such orders ceases with the disposal of the suit. Some of the other orders specified in the section do affect the decision on the merits. And an order under section 562 is of such a nature. But section 588 makes no distinction between the two classes of orders. A party failing to appeal from an order of remand is not without a remedy. He may appeal from the final decision and on that appeal take exception to the validity of the order of remand. If a party desire to avail himself of the privilege conferred by section 588 in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit. We, therefore, allow the preliminary objection.

We have, however, heard the parties on the merits of the appeal, and we are of opinion that it should fail on that ground also. The argument on behalf of the appellant centered on the question of non-transferability, irrespective of permanency, as the finding of the lower Court on the question of the permanency of the holding of the third defendant was incapable of being impugned on second appeal. The legal relation between the plaintiff and the defendant No. 3 was created before the passing of the Transfer of Property Act, and it was conceded by Dr. Rash Behary Ghose for the appellant that the provisions of that Act did not apply of its own force to the present case. Section 108, clause (*j*) of the Act does not affect the rights and obligations of the parties.

[1030] 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 we have taken the same view in Second Appeals Nos. 339, 448, 449 and 450 of 1903 decided on the 3rd April 1905. The party alleging transferability had to prove a custom to that effect. *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee* (2) cited before us does not touch the question. 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 appeal, therefore, fails and is dismissed with costs.

MIRTA, J. I agree.

Appeal dismissed.

(1) (1897) 2 C. W. N. 122.
(2) (1869) 12 W. R. 495 ; 7 B. L. R. 152.