1895

IN THE GOODS OF HENDERSON.

seals of which English Courts take judicial notice. But would not the English Courts be bound to take judicial notice of it when used by the Chief Magistrate for the special purpose mentioned in section 32 of 'The Probate and Letters of Administration Amendment Act, 1858?' Indeed, under that section, would not the Chief Magistrate's signature alone be sufficient? It may be a question whether the provisions of that section would be applicable to a case where the declaration was taken under 'The Statutory Declarations Act, 1835.' In the present case, however, it is not necessary that these questions should be considered, inasmuch as the certificate of the Chief Magistrate is authenticated, not only by the common seal of the City of Glasgow, but also by a certificate of a Notary Public, whose official seal attached to his certificate is required to be judicially noticed by section 57 of the Indian Evidence Act."

The following order was made by

SALE, J.—In this case an application was made for letters of administration under a power of attorney as to the execution of which a declaration was made before the Chief Magistrate of Glasgow. On the question whether that declaration is sufficient evidence of the execution of the power, I have been furnished with a very full note by the Registrar, Mr. Belchambers, I entirely approve of that note, and for the reasons therein stated, I think the declaration is sufficient proof of the execution of the power.

Attorneys for the applicants: Messrs. *Dignam, Robinson & Sparkes.*

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

1895. *March* 5.

SASI BHUSHUN RAHA (DEFENDANT) *v.* TARA LAL SINGH DEO BAHADUR (PLAINTIFF).*

Transfer of Property Act (Act IV of 1882), section 108, sub-section (j)—Liability of a lessee after transfer—Leases of non-agricultural character.

To suits brought by a landlord against his lessee for rent based upon *kabuliyats*, the leases being of non-agricultural character, an assignee of

* Appeal from Appellate Decree No. 232 of 1894, against the decree of Babu Debendra Lal Shome, Subordinate Judge of Manbhum, dated the 29th of November 1893, reversing the decree of Babu Taraprosanna Ghose, Munsif of Raghunathpur, dated the 10th of May 1893.

1895

SASI BHUSHUN RAHA v. TARA LAL SINGH DEO BAHADUR.

the lessee was made a party defendant on his own application. It was contended, on behalf of the lessee, that under the common law of India it was competent for the tenant to rid himself of his liability by assignment, or at any rate by assignment and notice thereof to his landlord,

Held, that if there was such a common law in India enabling the tenant to put an end to his liability by transfer and notice, it did not at all events extend to leases of a non-agricultural character; and that section 108, sub-section (*j*), of the Transfer of Property Act, which governed the case, must be construed without reading it as governed by, or interpreted with reference to, any such principle, and that after a transfer by the lessee and notice thereof to the landlord the liability of the lessee would not cease, merely at his pleasure, without any act or consent on the part of the landlord.

THIS appeal and two other similar appeals arose out of three suits brought by the plaintiff, lessor, against defendant No. 1, the lessee, for the rent of three leasehold properties, which accrued due after the lessee had transferred his rights in the leases to defendants No. 2. The assignee, on his own petition, was added as a party by the Court of first instance. The leases were of a non-agricultural character, for taking coal, stone, and limestone from three mouzahs. It was alleged that defendant No. 1, after transferring the leases to defendants No. 2, gave due notice of the transfer to the landlord. The Munsif gave a decree against defendants No. 2, the assignees, holding that inasmuch as defendant No. 1 had parted with his rights, and as the leases were of a permanent and transferable character, he could not be held liable for rent that fell due after the transfer. The plaintiff appealed. The lower Appellate Court gave a decree against both defendants No. 1 and No. 2, on the ground that under section 108, clause (*j*), of the Transfer of Property Act, the liability of the defendant No. 1 did not cease even after the transfer or assignment.

Against this judgment defendant No. 1 appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Jyoti Persad Sarvadhicary* for the appellant.

Mr. *J. G. Apcar* and Babu *Jogesh Chunder Day* for the respondent.

Dr. *Rash Behari Ghose*.—The lease is clearly a permanent one, and the lessee was entitled to sell whatever rights he had by the terms of the lease. There is no authority for the proposition that a lessee remains bound to pay rent notwithstanding a notice of

1895

SASI BHUSHUN RAHA v. TARA LAL SINGH DEO BAHADUR.

his assignment to the landlord. It is the common law of India that, on transfer of a tenure with notice, the lessee ceases to be liable for rent. When a lessee assigns his leasehold, if it is assignable, he is not liable for rent after the assignment.

There is not a single case in which in this country privity of contract has been held to continue after the privity of estate has ceased. In the case of *Kristo Bullav Ghose* v. *Kristo Lal Singh* (1) at p. 644 of the report, PETHERAM, C.J., said: "The liability here is a liability in consequence of the estate, and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred and the vendor ceases to have any estate in the property, but that in whatever way the transfer may be made, the liability remains on the original tenant until notice has been given to the landlord." I rely upon the notice. Under the English law, it would seem that both the assignor and the assignee may be made liable. The question is whether section 108 of the Transfer of Property Act introduces the English law. I submit it does not. The change made by the Transfer of Property Act in the common law is that mere transfer without notice will not make a transferee non-liable. See *Panye Chunder Sircar* v. *Hur Chunder Chowdhry* (2). In the case of *Nilmadhub Sikdar* v. *Narattam Sikdar* (3) their Lordships doubted whether any estate is left in the landlord when he grants a permanent and heritable tenure. Under the English law an action on a covenant against the lessee after an assignment is not maintainable, unless there is an express covenant for liability. See *Thursby* v. *Plant* (4). There is no privity of contract apart from the privity of estate. See Woodfall on Landlord and Tenant, p. 272 (14th edition). In this country notice is insisted upon because the assignor ceases to be liable after the notice. See *Abdul Aziz Khan* v. *Ahmed Ali* (5), *Chintamoni Dutt* v. *Rash Behari Mondul* (6).

Mr. *Apear* for the respondent.—In this case the plaintiff has not recognized the transferees, so that the lessee remains liable for rent. The transferee-defendants, who are a company, can wind up business at any time and

(1) I. L. R., 16 Calc., 642.
(2) I. L. R., 10 Calc., 496.
(3) I. L. R., 17 Calc., 826.
(4) 1 Wms. Saunders, 230*b*.
(5) I. L. R., 14 Calc., 795.
(6) I. L. R., 19 Calc., 17.

can avoid the liability for payment of rent. This is not a lease of agricultural land; not one contemplated by the Bengal Tenancy Act. I rely upon the concluding portion of clause (*j*), section 108, of the Transfer of Property Act. It is difficult to see how the principle laid down in *Thursby* v. *Plant* (1) applies to this case. The case of *Kristo Bullav Ghose* v. *Kristo Lal Singh* (2) proceeded upon section 12 of the Bengal Tenancy Act, which does not deal with liability, but deals only with transfer. In any reading of the case it does not apply to the present one. If the Legislature had intended that there should be a limitation as to liability, they would have said so expressly. The case of *Panye Chunder Sircar* v. *Hur Chunder Chowdhry* (3) does not apply, as there the suit was for rent of agricultural land. Then again the case of *Abdul Aziz Khan* v. *Ahmed Ali* (4) refers to agricultural land also, and to a case where the transfer had been recognized. In the same way the case of *Chintamoni Dutt* v. *Rash Behary Mondul* (5) can be distinguished, as it is a case under the Bengal Tenancy Act. In the present case the Bengal Tenancy Act does not apply, as the case comes from Purulia where Act X of 1859 is in force. In the case of *Shalgram* v. *Kubirun* (6) it was held that suits for rent under mining leases do not fall within the purview of clause (4), section 23, Act X of 1859. This case does not come under section 23 of Act X of 1859. The leases are not of a permanent character, as there is a distinct right of re-entry. If this is a suit upon a covenant, as the other side contends, then both the lessee and the assignee are liable. Where there has been an assignment the lessee's liability does not cease, whether there has been an express covenant or not. It does not matter whether there has been acceptance, the landlord can sue both the lessee and the assignee upon the covenant. See *Orgill* v. *Kemshead* (7). If the claim is brought as a debt, still the lessee is liable. In the leases there is a power given to transfer the right, but no power given to extinguish the liability.

(1) 1 Wms. Saunders, 230*b*.

(2) I. L. R., 16 Calc., 642.

(3) I. L. R., 10 Calc., 496.

(4) I. L. R., 14 Calc., 795.

(5) I. L. R., 19 Calc., p. 17.

(6) 3 B. L. R., A. C. 61; 11 W. R., 400.

(7) 4 Taunt., 642.

1895

SASI BHUSHUN RAHA v. TARA LAL SINGH DEO BAHADUR.

Dr. *Rash Behari Ghose* in reply.

The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

In each of the three suits out of which these appeals arise, the plaintiff sues the defendant No. 1 for rent due under a lease granted by the plaintiff to that defendant. In each case the lease is admitted, the rent is admittedly due, and the only defence is that the defendant No. 1 has assigned to the defendants No. 2 the lease under which the rent has become due.

In each case the defendants No. 2 were added as parties defendant, apparently at their request. The Munsif made in each case a decree against the defendants No. 2 alone. On appeal the Subordinate Judge has held (in one judgment disposing of all the cases) that the defendant No. 1 is liable: and has made a decree against him, letting the decree against the defendants No. 2 stand as against them. Defendant No. 1 appeals.

In each case *kabuliyats* only are put in evidence: we are told that no *pottahs* were executed.

In appeal 249 the suit is for rent for one year, from Assin 16th, 1298, to Assin 15th, 1299: the lease is of the right to cut and take limestone from plaintiff's Mouzah Bagmara at the annual jumma of Rs. 300.

In appeal No. 232 the suit is for rent for one year from Aughran 1298 to Kartik 1299: the lease is of the right of mining and taking coals in and from the plaintiff's Mouzah Uttrara at the annual jumma of Rs. 900.

In appeal 250 the suit is for arrears of rent for 1298 and for the Sraban kist of 1299: the lease is of the right of cutting stones from nine hillocks in Mouzah Nadnara at the annual jumma of Rs. 200.

The quarrying lease, that in appeal 250, does not purport to give an interest to the lessee beyond the term of his own life. The two other leases purport to confer the interest for a larger period. In 249 the right is given to the lessee and his heirs; in 232, to the lessee, to his sons, son's sons, and so on in succession.

1895

SASI BHUSHUN RAHA v. TARA LAL SINGH DEO BAHADUR.

The judgment of the lower Appellate Court was given in the case concerning the first mentioned lease, that in question in appeal No. 250, in which the lease does not purport to extend beyond the lessee's life. As to all the leases the lower Appellate Court held that defendant No. 1 could not, by reason of having assigned to the defendants No. 2, claim exemption from liability to pay rent to the plaintiff even if the rent claimed be for a period subsequent to the sale.

In all three cases the assignments to the defendants No. 2 were made on the 24th Assar 1298.

It is not contended that the plaintiff accepted defendants No. 2 as his tenant, at or after the time of the assignment, or at any time.

The case is governed by the provisions of section 108, sub-section (*j*), of the Transfer of Property Act: "the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. Nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee." It was argued that this provision must be interpreted with reference to the ordinary law of India with respect to the relation of landlord and tenant at the time the Act was passed. It was contended that, according to that law (described in the argument addressed to us as the "common law" of India), it was competent for the tenant to rid himself of his liability to pay rent by assignment, or at any rate by assignment and notice thereof to his landlord. With reference to this, a construction was urged of the words in sub-section (*j*): "the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." It was contended that, although the mere transfer would not put an end to the lessee's liability under this provision, notice by the tenant o the landlord of such transfer would, combined with the

1895

SASI BHUSHUN RAHA v. TARA LAL SINGH DEO BAHADUR.

transfer itself, do so: as this, it was said, was the general rule of law relating to the relation of landlord and tenant in India at the time the Transfer of Property Act was passed.

We shall assume, for the purposes of this argument, that in this case such a notice of the transfer as is contended would be sufficient, was in fact given. Assuming this to have taken place we do not think that under sub-section (*j*) the liability of the tenant under the lease would cease by reason of such transfer and such notice.

If there was such a common law of India as was contended for, enabling the tenant to put an end to his liability by transfer and notice (we express no opinion as to whether there was or was not), it did not, at all events, extend to leases of a non-agricultural character such as these: and we think that in this case the sub-section must be construed without reading it as governed by, or interpreted with reference to, any such principle.

We must interpret the words of the provision by themselves. The sub-section provides that the liability of the lessee shall not cease by reason only of the transfer; and we think that this cannot imply that it may be made to cease merely at his pleasure, upon notice to his landlord. His liability to the landlord is expressly preserved, notwithstanding the transfer: that is to say, the landlord's right to the benefit of his contract with the lessee is expressly preserved to him, unaffected by the transfer itself. We can find nothing in the sub-section itself to countenance the construction of it, that a right so belonging to the landlord may be put an end to without any act or consent on his part and solely at the will of the person on whom the liability rests.

We say nothing whatever about agricultural leases: and nothing that we now say can be taken in any way, by implication or otherwise, to suggest any opinion about them, one way or the other. We hold that the liability of the defendant No. 1, the appellant in these appeals, is in no way modified by his transfer to defendants No. 2, or by any notice of it, if he ever gave any, to the plaintiff respondent, and we dismiss these appeals with costs.

S. C. G. *Appeals dismissed.*