parties have agreed that if it be held that the plaintiffs are entitled to recover, the question as to what abatement, if any, of the price the defendants ought to get in respect of mildew damage shall be referred. The reference will be to some gentleman agreed on between the parties : in the event of their being unable to agree, to the Official Referee.

The plaintiffs will be entitled to judgment for the amount claimed less the sum, if any, to which the Referee finds the defendants entitled in respect of mildew damage. Costs on scale 2. Liberty to apply to enter judgment in accordance with the Referee's report.

J. C. *Judgment for plaintiffs.*

Attorneys for plaintiffs : *Manuel & Agarwalla.*
Attorneys for defendants : *Leslie & Hinds.*

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Mookerjee.

BASARAT ALI KHAN
v.
MANIRULLA.*

1909
June 2.

Lease—Covenant restraining Alienation—Assignment notwithstanding such covenant, whether operative.

A lease contained a covenant in these terms: " you (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was no right of re-entry reserved. The lessee assigned her interest under the lease :—

Held, that the assignment was operative notwithstanding the covenant.

Williams v. *Earle* (1) referred to.

APPEAL under section 15 of the Letters Patent by Basarat Ali Khan, the defendant No. 1.

* Letters Patent Appeal No. 34 of 1908, in Appeal from Appellate Decree No. 2316 of 1906.

(1) (1868) L. R. 3 Q. B. 739.

1909

BABARAT ALI KHAN v. MANIRULLA.

This appeal arose out of an action by the plaintiffs to recover possession of a raiyati holding on declaration of title thereto. The defendant No. 2 had held a *kaimi raiyati* holding under the defendant No. 1 and she sold it to the plaintiffs by a registered *kobala* dated the 25th Chaitra, 1262 *Maghi*. After their purchase the plaintiffs served a notice on the landlord as required by the provisions of the Bengal Tenancy Act, who also accepted rent from them. In 1903 the landlord (defendant No. 1) brought a suit against defendant No. 2, the original lessee, for arrears of rent and obtained an *ex parte* decree, and in execution of that decree he purchased the holding at an auction sale on the 11th November 1903. The plaintiffs alleged that they were then dispossessed by the defendant No. 1, and hence the suit. The defendant No. 1, who contested the suit, pleaded that the suit was barred by limitation and that the plaintiffs had no title to the disputed land. It appeared that in the *kaimi* lease executed by defendant No. 2 in favour of defendant No. 1 there was a clause to the following effect—"You shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect."

The Court of first instance found that the plaintiffs had established their case and gave them a decree. It further found that the holding was a permanent and transferable one, and that defendant No. 2 was not restricted from alienating the same by reason of the fact that there was the aforesaid clause in the lease. On appeal by the defendant No. 1, the learned Subordinate Judge of Chittagong affirmed the decision of the first Court.

The defendant No. 1 preferred a second appeal to the High Court, which was heard before Mr. Justice Brett sitting alone. The learned Judge relying upon the decision in the case of *Nilmadhab Sikdar* v. *Narattam Sikdar* (1), overruled the objection of the appellant that the assignment was not operative at any rate as between the lessor and lessee, and affirmed the decisions of the Courts below.

(1) (1890) I. L. R. 17 Calc. 826.

1909

BASARAT ALI KHAN v. MANIRULLA.

The defendant No. 1 then preferred this appeal under section 15 of the Letters Patent.

Babu Mohendra Nath Roy (*Babu Krishna Prosad Sarbadhicary* with him), for the appellant. The learned Judge is wrong in holding that the covenant is void. Section 10 of the Transfer of Property Act does not apply, as the covenant in the lease is not in absolute restraint of transfer. Moreover, the condition is for the benefit of the landlord. Section 11 of the said Act has also no application. Sections 11 and 18 of the Bengal Tenancy Act cannot destory rights created under a covenant. Section 11 of the Bengal Tenancy Act must be controlled by section 179 of the Act. Neither the Transfer of Property Act nor the Bengal Tenancy Act does make the covenant against assignment void. If the transfer is not binding upon the landlord the lessee remains liable for rent, and in execution of rent decree against the lessee the tenure passes, and the purchaser gets the tenure. The case of *Parameshri* v. *Vittappa Shanbaga* (1) shows that after the transfer the landlord can proceed against his tenant. Section 65 of the Bengal Tenancy Act creates a statutory charge on the tenure. Supposing that the condition in the present case is to be regarded merely as a condition which the lessee had to observe before transferring the holding, the principles laid down in Shepherd and Brown's Transfer of Property Act, at page 509, dealing with section 108 would apply, and the ordinary remedy of a lessor in a case of a breach of such a condition would be by a suit for injunction or for damages in the absence of a condition for re-entry.

Babu Dhirendra Lal Khastgir, for the respondent, was not called upon.

JENKINS C.J. AND MOOKERJEE J. This appeal arises out of a suit for possession of property. On the 20th of October 1881, a permanent lease of the property in suit was executed by defendant No. 1 in favour of defendant No. 2, and in that lease

(1) (1902) I. L. R. 26 Mad. 157.

1909

BASARAT ALI KHAN v. MANIRULLA.

was a covenant in these terms:—"You (*i.e.*, the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was, however, no right of re-entry reserved. On the 7th of April 1901, the lessee purported to assign her interest under this lease to the plaintiff. Apart from the covenant, which I have read, there can be no question that the assignment was good, for all notices and formalities required by the Bengal Tenancy Act were given and observed. But it has been argued before us that the assignment was inoperative, at any rate as between the lessor and the lessee. The appeal in the first instance came before a learned Judge of this Court sitting alone, and he decided against the appellant's contention on the ground that the covenant was void and, in support of that view, reliance was placed on a decision in the case of *Nilmadhab Sikdar* v. *Narattam Sikdar* (1). We are not at present prepared to support the decision of the learned Judge on that ground; but we think the assignment was operative, notwithstanding the covenant. In support of this view may be cited the case of *Williams* v. *Earle* (2), where in reference to a similar covenant it was said by Mr. Justice Blackburn, as he then was, that "though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative;" and, on that footing, damages were awarded in that suit. It has been conceded in the course of this case, and it is the view that has been adopted by the Madras High Court in the case of *Parameshri* v. *Vittappa Shanbaga* (3), that a suit for damages would lie, and that involves the view that an assignment notwithstanding such a covenant would be operative. But if the assignment was operative, it necessarily follows that title did pass to the plaintiff and, if this be so, then the defendant No. 1 took nothing by his purchase in the execution proceedings. On this ground, we think the decision of the learned Judge was correct. We, therefore, dismiss the appeal with costs.

S. C. G. *Appeal dismissed.*

(1) (1890) I. L. R. 17 Calc. 826. (2) (1868) L. R. 3 Q. B. 739.
(3) (1902) I. L. R. 26 Mad. 157