APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

DHARANI KANTA LAHIRI

v.

SIBA SUNDARI DEBI.*

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July 14.

Grant, construction of—Inheritance—Whether the words of inheritance contained in the grant created an absolute estate in favour of the grantee—Re-entry, right of—Breach of restriction against voluntary alienation, effect of.

A by a deed granted a *miras taluq* to his daughter *B*. The demise was to her for life, on her death to her son, if she adopted one, for life; on his death "to his sons, grandsons &c.", by right of inheritance in the male line; without any power of disposing of the property at will, by gift, sale, &c. If the grantee did not adopt a son, or if she adopted, and the son died without a son, grandson, &c., the property was to revert to the grantor or to his representative.

It was also provided that "the said property cannot be attached or sold for any debt incurred by you or your adopted son or grandson, &c. If it be attached or sold, the grant will at once become null and void, and the property will come into *khas* possession of me or my representatives."

B adopted a son *C*, and subsequently made a gift of the land to him by a deed. Upon a suit by the grantor's son against *B* and *C* for recovery of possession of the land, on the ground that the conveyance operated as a forfeiture:—

Held, that, although the alienation by *B* to *C* being directly contrary to the provisions of the grant, was bad in law, yet, inasmuch as the breach of the provisions did not operate as a forfeiture, the plaintiff was not entitled to a decree for *khas* possession.

APPEAL by the plaintiff, Dharani Kanta Lahiri.

This appeal arose out of an action brought by the plaintiff for recovery of *khas* possession of a certain property on a declaration that the transfer made by defendant No. 1 was invalid.

One Tarini Kanta Lahiri, deceased, father of the plaintiff, granted a *miras taluq* to his widowed daughter, defendant No. 1. The conditions of the lease were that the defendant No. 1 should enjoy the *taluq*, till her death, and then should she adopt a son, that son, and after him his son, and after him his male

* Appeal from Original Decree, No. 95 of 1906, against the decree of Ananda Nath Mazumdar, Subordinate Judge of Mymensingh, dated Nov. 22, 1905.

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issue in the direct line should enjoy the property without the power of disposing of it at will, and pay the stipulated rent by certain *kists*: should defendant No. 1 however fail to adopt a son or that adopted son die without leaving any male issue, the property should revert to the plaintiff or his heir, and no other heir of defendant No. 1 should have any right or interest in it, and that the property should not be charged with any debt incurred by defendant No. 1 or her heirs or sold in satisfaction thereof, and that in the event of any such incumbrance or alienation, the same shall be invalid and the property return to the possession of the lessor or his heirs.

Subsequently, defendant No. 1 adopted a son, defendant No. 2, and executed a deed of gift in his favor.

The plaintiff construed this act of the defendant No. 1 as a breach of one of the conditions of the lease, and brought this suit for a declaration that the defendant No. 1 had no right to make the said alienation, and prayed for recovery of possession of the *taluq*, on the ground that the breach of the provisions of the lease created a forfeiture, and as such he was entitled to re-enter on the land.

The defence was, that the suit was barred by limitation, that absolute interest in the property was granted to defendant No. 1, and the restrictions against alienation were not binding on her; and that the lease not providing for forfeiture upon alienation, the claim for *khas* possession was not maintainable.

The Court of first instance declared that the alienation in favor of defendant No. 2 was invalid as against the plaintiff, but dismissed the suit so far as the claim for *khas* possession was concerned.

Against this decision the plaintiff appealed to the High Court.

Mr. S. P. Sinha (*Advocate-General*), (*Babu Jogesh Chandra Roy* and *Babu Rajendra Chundra Guha* with him) for the appellant: The Court below ought to have held that the plaintiff was entitled to a decree for *khas* possession. The effect of the deed of gift was to abandon the holding, and the landlord had a right of re-entry. Section 10 of the Transfer of Property Act has made an exception in the case of a lease, where the condition is for the

benefit of the lessor. In the present case, which is one of a lease, the lessor has a right to put a condition in the lease, which is for his benefit, and such a condition is not void. A lease is determined by forfeiture under section 111, cl. (*g*) of the Transfer of Property Act. If there is a condition that the lease shall become void, the lessor will have a right of re-entry, although there is no clause giving him such a right. The question is what was the intention of the grantor. If he contemplated that the property should not go out of his daughter's hands by involuntary alienations, he also contemplated that it should not go out of her hands by voluntary alienations. If the transferee could not be turned out, how could the lady benefit? And she would be in no better position, whether the transfer would be involuntary or voluntary. The grantor's intention was that the property should be enjoyed by the grantee, and any alienation would operate as a forfeiture, and the grantor would have a right of re-entry.

Babu Dwarka Nath Chakravarty (*Babu Mohini Mohan Chatterjee* with him) for the respondent: In construing a deed the intention of the parties must be looked into. By the deed Tarini Kanto created an absolute estate in favour of the lady. The words "your sons, grandsons, &c.", are words of inheritance. If an absolute estate is created, any limitation of that is void. A Hindu lady can retire in favour of the reversioner; see *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*(1) and *Behari Lal* v. *Madho Lal Ahir Gayawal*(2). In the present case I do not admit there was any alienation at all. Whenever an estate is created in favour of a Hindu lady, the primary intention would be to create a woman's estate, [see *Radha Prosad Mullick* v. *Ranimoni Dassi*(3)]; if that is so, the woman has a right to retire in favour of the reversioner. There is no clause of forfeiture, if the lady makes a gift. Unless there is a clause providing for re-entry for a breach, the lessor cannot re-enter; see *Nil Madhab Sikdar* v. *Narattam Sikdar*(4).

The Advocate-General, in reply.

Cur. adv. vult.

(1) (1884) I. L. R. 10 Calc. 1102.
(2) (1891) L. R. 19 I. A. 30; I. L. R. 19 Calc. 236.
(3) (1908) 12 C. W. N. 729.
(4) (1890) I. L. R. 17 Calc. 826.

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STEPHEN AND HOLMWOOD JJ. The facts of this case are as follows. In 1874 one Tarini Kanta Lahiri Choudhuri granted a *miras taluk* to his widowed daughter, Srimati Siva Sundari Debya, at a rent of Rs. 77. The demise was to her for life; on her death to her adopted son, if she adopted one, for life; on his death "to his sons, grandsons, &c.," by right of inheritance in the male line; without any power of disposing of the property at will, by gift, sale, &c. If the grantee did not adopt a son, or if she adopted and the son died without any son, grandson, &c., the property was to revert to the grantor or his representative. It was also provided that "the said property cannot be attached or sold for any debt incurred by you or by your adopted son or grandson, &c. If it be attached or sold (this seems a more correct translation than the official one), it (*i.e.*, this grant) will at once become null and void, and the property will come into khas possession of me or of my representatives." What happened was that Srimati Siva Sundari Debya adopted a son Dwigendra Nath Sanyal, defendant No. 2, a fact that was disputed in the lower Court, but was not called in question before us, and made a gift of the land to him by a deed dated the 7th September, 1901, reciting that he was taking care of her, and that she was far advanced in years and not sufficiently strong to manage and protect the properties, and therefore intended to pass her days in devotion.

The plaintiff is the legal representative of Tarini Kanto and sues to have it declared that the conveyance of defendant No. 1 to defendant No. 2 is invalid, and for possession of the property on the ground that the conveyance has operated as a forfeiture. The lower Court has declared the alienation in favour of defendant No. 2 invalid as against the plaintiff; but has dismissed the suit so far as the claim for possession and consequential relief is concerned.

Against this decision the plaintiff has appealed, and the only question that has been raised before us is, whether under the terms of Tarini's *pottah* to defendant No. 1 the property reverts to the plaintiff as Tarini's representative. The lower Court, it is true, held that the prayer for ejectment might be considered to be time-barred under Article 1 of Schedule III of the Bengal

Tenancy Act by force of section 184 of the Act. No doubt this might apply, if the plaintiff had any remedy by ejectment in respect of the breach of the grantee's covenant not voluntarily to alienate, but in the view we take there is no right of ejectment at all, only a right of re-entry in the event of the grantee being ejected by other persons. Besides the plaintiff seeks to eject the adopted son, with whom he has no contract, and not the grantee.

As to the effect of Tarini's *pottah* of 1874, the effect of which is reproduced in the *kabuliat* of defendant No. 1 of the same date, we find that the words of inheritance contained in the grant do not create an absolute estate in favour of the grantee. The natural heirs of the defendant No. 1 and the female heirs of defendant No. 2 are both excluded; if the defendant No. 1 did not adopt a son, or if she adopted a son and he predeceased her without leaving a son, grandson, &c., she took only a life estate; and if the property was attached or sold while in defendant No. 1's hands at any rate, the property reverted to the grantor and his representatives. These provisions were ample to prevent the creation of an absolute estate in favour of defendant No. 1. We must hold, therefore, that defendant No. 1 took a life estate with a reversion to her adopted son and others; and the question is, whether this estate has been forfeited so as to entitle the plaintiff to re-enter.

Now the only right of re-entry expressly mentioned in the *pottah* is conferred by the provision, to which we have referred, which according to the terms of the pottah as translated, and still more the same terms as we consider they should be translated, seems to refer only to the property being attached or sold for debt. But it is argued on behalf of the plaintiff appellant that, if we consider the whole scope and purpose of the transaction in question, the provision against voluntary alienation was a condition of the grant, and not a mere covenant. The *pottah* was dated before the commencement of the Transfer of Property Act, 1882, but the appellant contends that in looking at the purpose of the grant we should act on the principles laid down in sections 10 and 111 of that Act, after having come to the conclusion on the facts of the case that the grantor intended to retain a right of re-entry on a breach of the restriction against

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voluntary alienation. The main purpose of the grantor was, it is admitted, to provide for the maintenance of his daughter for her life with a remainder to her adopted son. To effect this he not only made any alienation by her void, but intended to to make it confer a right of re-entry on himself, so that though she might be bound by it, he would still have the power to recover the property for her use, if he so saw fit. To us the facts seems to point the other way. An alienation by the grantee was made void, which in itself probably provides a better protection of the grantee's interest, than would be afforded by the re-entry of the grantor or his representatives; but it was only in the case of an involuntary sale in execution of a decree and so on, that a re-entry was provided for; and then only because it would be better for the grantee that the property should go to a member of her family than to a creditor.

The construction of the *pottah* must of course be determined without reference to subsequent events; but it is obvious that, if the plaintiff succeeds in establishing his right to re-entry, the purpose for which the *pottah* was created, will be defeated; while, if he fails, it will be exactly carried out, as defendant No. 1 is at present maintained by defendant No. 2, and she conveyed the property to him after having held it herself for twenty-seven years, because of the infirmities of old age. This fact has led the advocate for the respondent to suggest that the alienation by defendant No. 1 to defendant No. 2 is good in view of the right of a Hindu widow to surrender her estate to the reversioner as though she had died. In this case, however, the defendant No. 1 neither held nor transferred the property as a Hindu widow, and we know of no ground for extending the principle in question to a lessee.

The alienation by defendant No. 1 to defendant No. 2 being directly contrary to the provisions of the *pottah*, we agree with the lower Court in holding that the transfer was bad. But we consider that the breach of the provisions cannot operate as a forfeiture. The result is that the appeal is dismissed with costs.

There is a cross-appeal against the decision of the lower Court in so far as it declares the transfer by defendant No. 1 to

defendant No. 2 to be invalid, as against the plaintiff. From what we have said in the judgment on the appeal the cross-appeal must also be dismissed. We make no order as to costs in this.

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Appeal dismissed.

S. C. G.