CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MOFIZ SHEIKH

v.

RASIK LAL GHOSE.*

1910
May 26.

Landlord and tenant—Kaimi lease—Lease created before the Transfer of Property Act (IV of 1882)—Trees planted after lease—Right of removal of trees by tenant—Fixtures, doctrine of—Bengal Tenancy Act (Act VIII of 1885) s. 23—Transfer of Property Act (IV of 1882) ss. 2, 108 (h).

In the absence of any special provision in a lease granted before the Transfer of Property Act (IV of 1882) came into force, the property in the trees planted by the lessee after a *kaimi* lease had been granted, does not vest in the landlord.

The rule laid down in s. 108, cl. (*h*) of the Transfer of Property Act (IV of 1882) has no application to such a case.

The lease in the present case not being for agricultural or horticultural purpose, s. 23 of the Bengal Tenancy Act has no application.

The doctrine of the English Law of Fixtures cannot be appropriately extended to this country on equitable grounds.

Bain v. *Brand* (1), *Mears* v. *Callender* (2), *Elwes* v. *Maw* (3), *Ness* v. *Pacard* (4) referred to.

The Law of Fixtures is not recognised under the Hindu or Mahomedan laws.

Thakoor Chunder Paramanick v. *Ramdhone Bhuttacharjee* (5), *Secretary of State* v. *Charlesworth Pilling & Co.* (6), *Khodeeram Serma* v. *Trilochun* (7), *Jankee Singh* v. *Bukhooree Singh* (8), *Pogose* v. *Nyamutoollah* (9), *Brij Bhookun* v. *Dabee Dyal* (10), *Kalee Pershad Dutt* v. *Gouree Pershad Dut* (11) relied upon.

Before the passing of the Transfer of Property Act, the doctrine of the English Law of Fixtures did not prevail in this country, and the provisions of

*Civil Rule No. 1004 of 1910, against the order of Sarat Chandra Ghose, Munsif of Jessore, exercising the powers of a Small Cause Court Judge, dated Dec. 2, 1909.

(1) (1876) 1 App. Cas. 762, 772.
(2) [1901] 2 Ch. 388.
(3) (1802) 2 Smith's L. C. 189, 211; 3 East 38.
(4) (1829) 2 Peters 137.
(5) (1866) 6 W. R. 228; B. L. R. F. B. 595.
(6) (1901) I. L. R. 26 Bom. 1.
(7) (1801) 1 Mac. Sel. Rep. 35.
(8) (1856) Beng. S. D. A. 761.
(9) (1858) Beng. S. D. A. 1517.
(10) (1863) 2 Agra. S. D. A. 480.
(11) (1866) 5 W. R. 108.

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that Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence.

Ismai Kani Rowthan v. *Nazarali Sahib* (1) referred to.

RULE granted to the defendant Mofiz Sheikh, the petitioner.

The plaintiffs brought a suit against the defendant for damages for the removal of jack trees growing on the plaintiff's land leased to the defendant. The defendant admitted the lease, but alleged that he and his ancestors have been in possession of the property for over 100 years under a *kaimi* right, and that the trees were planted by his grandfather after the lease had been granted, and he was therefore entitled to remove the same. The Court of first instance ignoring the evidence given by the defendant that the trees had been planted after the lease had been granted, decided that, as the defendant was not a cultivator, section 23 of the Bengal Tenancy Act (VIII of 1885) did not apply, and the tenant was not entitled to cut down and appropriate the trees in the absence of any evidence to establish any contractual or customary right.

The defendant, thereupon, moved the High Court and obtained this rule.

Babu Debendra Chandra Mallick, for the opposite party. This case is governed by section 23 of the Bengal Tenancy Act (VIII of 1885). The property in the trees belongs to the landlord. The occupancy tenant has only a right to enjoy the benefits during his occupancy. He may not appropriate the trees when felled unless the landlord's rights are modified by custom or contract, and the onus of proving the custom is on the tenant: *Najar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2), *Ruttonji Edulji Shet* v. *The Collector of Tanna* (3), *Nuffer Chunder Ghose* v. *Nund Lal Gossyamy* (4), *Sitab Rai* v. *Dubal Nagesia* (5).

Dr. Suhrawardy (*Moulvi Nuruddin Ahmed* with him), for the petitioner. The present case is not governed by section

(1) (1903) I. L. R. 27 Mad. 211.
(2) (1894) I. L. R. 22 Calc. 742.
(3) (1867) 11 M. I. A. 295.
(4) (1890) I. L. R. 22 Calc. 751, note.
(5) (1907) 6 C. L. J. 218.

23 of the Bengal Tenancy Act (VIII of 1885). Apparently section 108 (*h*) of the Transfer of Property Act (IV of 1882) alone is applicable. If that section is held to be applicable, the tenant was perfectly justified in cutting and appropriating the trees planted by his ancestors.

[MOOKERJEE J. The tenancy commenced prior to the Transfer of Property Act. The provisions of section 2 of the Transfer of Property Act exclude the operation of section 108 (*h*). What was the law applicable prior to 1882 ?]

Prior to legislation, custom must be law. In the absence of statutory or judicial rule, the rules of equity, justice and good conscience should apply. The principles recognised by English law ought not to be extended to this country.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The substantial question of law which calls for decision in this rule, relates to the right of a tenant of homestead land to cut and appropriate fruit-trees grown by him or his predecessors-in-interest on the holding, when it is established that the tenancy was created before the Transfer of Property Act, 1882, came into operation. The plaintiffs, opposite party, commenced this action for recovery of damages on the allegation that the defendant petitioner had cut and appropriated one jack tree which stood on his holding. The defendant resisted the claim, *inter alia*, on the ground that the tree had been planted by his grandfather after the commencement of the tenancy, and that he was consequently entitled to cut and appropriate it. The learned Judge of the Court of Small Causes did not come to any finding upon this point, but decreed the suit on the ground that, as the defendant was not a cultivator, section 23 of the Bengal Tenancy Act, 1885, was inapplicable, and consequently the tenant was not entitled to cut and appropriate the tree in the absence of any evidence to establish a contractual or a customary right to that effect. We have been invited by the defendant to set aside this judgment on the ground that, as the tree was planted by the tenant, and the holding was of a

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non-agricultural character, he was entitled to cut and appropriate the same.

It may be stated at the outset that the evidence as to the origin of the tenancy and the time when the tree was planted is entirely one-sided, and is sufficient to establish the allegations of the defendant that the holding was created long before the Transfer of Property Act came into force, that it was neither agricultural nor horticultural, and that some ancestor of the defendant planted the tree. Section 23 of the Bengal Tenancy Act has, therefore, obviously no application. Under these circumstances, it has been contended before us on behalf of the tenant that under section 108, clause (*h*) of the Transfer of Property Act, he is entitled to cut and appropriate the tree. This position has been controverted on behalf of the landlord, on the ground that, by reason of the provisions of section 2 of the Transfer of Property Act, the rule laid down in section 108, clause (*h*), is inapplicable; and it has further been argued that as no statutory provisions govern the matter, the property in the tree ought to be deemed to have vested in the landlord on the principle that what is permanently attached to the earth becomes part of the soil and passes with it. In this connection, reference has been made to the rule on the subject recognised under the Common Law of England. Before we examine the validity of these arguments, it is desirable to consider for a moment what law is applicable to the matter now before us.

In the first place, it is clear that the provisions of the Bengal Tenancy Act have no application, because, as found by the Judge in the Court below, the tenancy is neither agricultural nor horticultural. No useful purpose, therefore, would be served by an examination of the provisions of section 23 of that Act, or of the judicial decisions in which that section has been interpreted; nor is it necessary to review the earlier cases which refer, directly or indirectly, to the principles of law applicable to agricultural tenancies before the Bengal Tenancy Act came into force. It is also clear that the rule laid down in section 108, clause (*h*), of the Transfer of Property

Act has no application, because section 2 expressly provides that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability. No doubt it is conceivable that provisions of the Act which are consistent with the rules of justice, equity and good conscience may be applied to cases where the legal relation was created before the Act came into force [*Parameshri* v. *Vithappa* (1)], but such application is sustained, not on the ground that the provisions of the Act directly govern the matter, but rather on the principle that, in the absence of any statutory or judicial rule applicable to the subject, the rules recognized by the Act may be applied as based on equitable grounds. In view, therefore, of the provisions of section 2 of the Transfer of Property Act which excludes the operation of section 108, clause (*h*), and in view of the nature of the holding which excludes the operation of section 23 of the Bengal Tenancy Act, we are left without any statutory provision which directly governs the matter. The landlord has, therefore, contended that the rules of English Law on the subject should be adopted and applied as based upon grounds of justice, equity and good conscience. In answer to this contention, it has been argued by the tenant that the principles recognised by the English law are based upon a technical law of Fixtures, and ought not to be extended to this country, inasmuch as a law of Fixtures does not find a place in the Common Law of India.

It cannot be disputed that under the law of England the property in trees is vested in the owner of the inheritance of the land upon which they grow, on the principle that the property in trees, or of that which is likely to become timber, is in the landlord: *Berriman* v. *Peacock* (2). On this ground it has been ruled that a farmer who raises young fruit-trees on the demised land for filling up the orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade, who may, if he has planted fruit trees in the way of his trade,

(1) (1902) 12 Mad. L. J. 189. (2) (1832) 9 Bing. 384; 35 R. R. 568.

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remove them, if not of larger growth than could be dealt with in his trade : *Penton* v. *Robart* (1), *Wyndham* v. *Way* (2) and *Wardell* v. *Usher* (3). Similarly, it has been ruled that a tenant, not being a gardner, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord [*Empson* v. *Soden* (4) and *Jenkins* v. *Gething* (5)]. A tenant of a garden may not also plough up and destroy the strawberry beds, although he paid the preceding tenant for them : *Watherell* v. *Howells* (6). These cases are based on the principle that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is subject to the same rights of property as the soil itself. The maxim *quicquid plantatur solo solo cedit* is, as Broom points out (Legal Maxims, 305), one of great antiquity, and has been treated as a part of the law of England from very early times. This is clear from a significant passage in Bracton (edited by Sir Travers Twiss, Vol. 1, p. 79, Book 2, Chap. 2, sec. 6) : "whatever is planted, sown or built in, belongs to the soil, if root has struck." The same reason is assigned by Britton and Fleta for the position that, if trees are planted or seeds sown in the land of another, the owner of the soil becomes owner also of the tree, the plant, or the seeds as soon as it has taken root [Britton, Book II, Chap. 2, section 6; Chap. 12, sec. 2, Ed. Nichols, Vol. I, pp. 217, 288 ; Fleta, Book III, Chap. 2, sec. 12, pp. 176, 177, 220]. It may be conceded, therefore, that, under the law of England, a tree planted by the tenant on his holding cannot ordinarily be removed by him on the ground that the property in the tree is vested in the owner of the soil. The question, therefore, arises, how far this doctrine, based upon a law of fixtures, was applicable to this country before the Transfer of Property Act came into operation. We have been invited by the learned vakil for the landlord to hold that the

(1) (1801) 2 East 88; 6 R. R. 376.
(2) (1812) 4 Taunt. 316; 13 R. R. 607.
(3) (1841) 3 Scott. N. R. 508; 60 R. R. 645.
(4) (1833) 4 B. & Ad. 655; 38 R. R. 347.
(5) (1862) 2 J. & H. 520.
(6) (1808) 1 Camp. 227.

principle is one based on justice, equity and good conscience, and consequently applicable to this country. We are unable to adopt this contention as well-founded. The tenant who has taken the land is bound, upon the termination of his tenancy, to restore the land to his landlord in the same condition in which he took it; but it is difficult to appreciate upon what intelligible principle he may be compelled to leave on the land trees grown and structures erected by him for his own benefit. It must further be remembered that the tendency under English law has been to restrict rather than to enlarge the scope and operation of the law of Fixtures, and various exceptions have been allowed in favour of trade fixtures and agricultural fixtures: *Bain* v. *Brand* (1), *Mears* v. *Callender* (2), notes to *Elwes* v. *Maw* (3); while in American Courts, when an attempt was made to apply in its entirety the doctrine that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance, Mr. Justice Story, in delivering the unanimous judgment of the Supreme Court of the United States, declined to give effect to the contention on the ground that the law of Fixtures was not suited, in its unqualified form, to the circumstances of the country: *Ness* v. *Pacard* (4). Under such circumstances, it would obviously be inappropriate to extend the doctrine of Fixtures to this country as based on equitable grounds. This position is fortified when we remember that neither the Hindu Law nor the Mahomedan Law recognised any law of Fixtures, as was pointed out by Sir Barnes Peacock C.J. in the case of *Thakoor Chunder Paramanick* v. *Ramdhone Bhuttacharjee* (5).

If we look to the ancient Hindu Law, we find the following texts in the Institutes of Narada (Chap. II, verses 20, 21; Sacred Books of the East, Vol. 33, page 143):

"(20) If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when

(1) (1876) 1 App. Cas. 762, 772.
(2) [1901] 2 Ch. 388.
(3) (1802) 2 Smith's L. C. 189, 211; 3 East 38.
(4) (1829) 2 Peters 137.
(5) (1866) 6 W. R. 228; B. L. R. F. B. 595.

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he leaves, the house, the thatch, the timber, the bricks and other building materials.

"(21) But if he has been residing on the ground of a stranger without paying rent and against that man's wish, he shall by no means take with him on leaving it the thatch and timber."

These texts are quoted as authoritative by Jagannath in his Digest of Hindu Law (tr: Colebrooke, Book III, Chap. 2, para. 99, Vol. II, page 398), who quotes another text of Narada which explains the reason for the rule: "The grass, wood and bricks which are thus removed belonged to him who leaves the ground, provided he paid rent for the spot, and not otherwise."

When we turn to the Mahomedan Law, we find the following passage in the Hedaya: "If a person hire unoccupied land for the purpose of building or planting, it is lawful, since these are purposes to which land is applied. Afterwards, however, upon the term of the lease expiring, it is incumbent upon the lessee to remove the building or trees and to restore the land to the lessor in such a state as may leave him no claim upon it. It is incumbent on the lessee to remove his trees or houses from the land unless the proprietor of the soil agrees to pay him an equivalent, in which case the right of property in them devolves to him (still, however, this cannot be without the consent of the owner of the houses or trees except where the land is liable to sustain an injury from the removal, in which case the proprietor of the land is at liberty to give an equivalent and appropriate the trees or houses without the lessee's consent), or unless the proprietor of the land assents to the trees or houses remaining there, in which case they continue to appertain to the lessee and the land to the landlord." (Hedaya, tr. Hamilton, Vol. III, p. 284; see also p. 325.) This passage was treated as authoritative by their Lordships of the Judicial Committee in *Secretary of State v. Charlesworth Pilling & Co.* (1).

These principles were repeatedly applied in many earlier cases to be found in our Reports, amongst which reference may

(1) (1901) I. L. R. 26 Bom. 1.

be made to *Khodeeram Serma* v. *Trilochun* (1), *Jankee Singh* v. *Bukhotree Singh* (2), *Pogose* v. *Nyamutoollah* (3), *Brij Bhookun* v. *Dabee Dyal* (4) and *Kalee Pershad Dutt* v. *Gouree Pershad Dutt* (5). It has also been recently ruled by Mr. Justice Bhashyam Ayyangar in *Ismai Kani Rowthan* v. *Nazarali Sahib* (6), that before the Transfer of Property Act came into operation, the English doctrine of fixtures did not prevail in this country, and that the Transfer of Property Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence. We must consequently hold that, in the case before us, the tenant did not exceed his rights when he cut down the jack fruit-tree which had been planted on his holding by one of his ancestors.

The result, therefore, is that this rule is made absolute, and the suit dismissed with costs both here and in the Court below.

S. A. A. A. *Rule absolute.*

(1) (1801) 1 Mac. Sel. Rep. 35.
(2) (1856) Beng. S. D. A. 761.
(3) (1858) Beng. S. D. A. 1517.
(4) (1863) 2 Agra S. D. A. 480.
(5) (1866) 5 W. R. 108
(6) (1903) I. L. R. 27 Mad. 211.

LETTERS PATENT APPEAL.

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

NILADRI MAHANTI

v.

BICHITRANAND ROY.*

1910
May 27.

Under-tenure, sale of—Execution sale—Effect of sale of under-tenure by co-sharer landlord for arrears of rent—Non-registration of purchase in execution sale by the whole body of landlords—Locus standi to maintain a suit—Rent Recovery Act (X of 1859) ss. 27, 105, 106, 108, 109 and 110—Civil Procedure Code (VIII of 1859) s. 259—Landlord and Tenant Procedure Act (Beng. VIII of 1865).

While under s. 105 of Act X of 1859, which contemplates a decree by the landlord, or the whole body of landlords, for an arrear of the entire rents due in respect of an under-tenure, it is the tenure that is sold, under s. 108, which does not contemplate a decree for an arrear of rent, but a decree for money

* Letters Patent Appeal No. 20 of 1909 in Appeal from Appellate Decree No. 1775 of 1906.