

(1905) 07 CAL CK 0017
In the Calcutta High Court
Case No : Appeal from Order No. 251 of 1903

Madhu Sudan Sen

APPELLANT

Vs

Kamini Kanta Sen

RESPONDENT

Date of Decision : 08-07-1905

Acts Referred:

Citation : (1905) 07 CAL CK 0017

Final Decision : Dismissed

Judgement

1. This is an appeal in a suit for ejectment. The third Defendant was a tenant of the Plaintiff in occupation 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 the second Defendants. These Defendants pleaded a permanent and transferable right in their vendor. The Munsif gave effect to their plea and dismissed the suit.

2. 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.

3. 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 sec. 108, C.P.C. 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.

4. 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.

5. 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.

6. The order of the Subordinate Judge was apparently one under sec. 562 of the Code, and sub-sec. 28 of sec. 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.

7. In *Jatinga Valley Tea Co. v. Chera Tea Co.* ILR 12 Cal. 45 (1885), the Appellant had presented an appeal to this Court from an order of remand under sec. 562 before a final decree 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 remand did not affect the appeal and that it could be heard. 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 ease is no authority on the question now before us.

8. Sec. 588 of the Code allows appeals from the orders specified therein and from no other orders. They are to 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 affect the decision on the merits. And an order under sec. 562 is of such a nature. But, sec. 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 sec. 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 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.

9. 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 centred 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 Behari Ghose for Appellant that the provisions of that Act did not apply of its own force to the present case. sec 108 cl. (j) of the Act does not affect the right and obligations of the parties.

10. 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 v. Raj Chandra 2 C.W.N. 122 (1897) 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. Beni madhub v. Jaikrishna Mookerjee 7 B.L.R.152 (1869) 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 2 gold mohurs.