

with interest at  $1\frac{1}{2}$  pice per rupee per month, by the sale of the mortgaged property.

We are accordingly of opinion that the case is governed by Article 132 of the Limitation Act.

The decree of the lower Appellate Court is therefore set aside and that of the Court of first instance restored with costs.

G. S.

*Appeal allowed.*

1919

INDRA  
NARAIN  
SHAU

c.

DWIJABAE  
SAMANTA.

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## APPELLATE CIVIL.

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*Before Chatterjea and Duval JJ.*

PORAN MATIA

v.

INDRA SENI.\*

1919

May 28.

*Raiyati Holding—Registered lease—Oral surrender—Bengal Tenancy Act (VIII of 1885), s. 86 (i)—Evidence Act (I of 1872), s. 92, proviso 4.*

Even where the original lease is a registered one, a raiyat can orally surrender his holding under s. 86 of the Bengal Tenancy Act if it was not for a fixed period and if possession is given up.

*Khankar Abdur Rahman v. Ali Hafiz* (1) and *Brajonath Sarma v. Maheswar Gohani* (2) referred to.

*Sarat Chandra Sinha v. Nritya Gopal Biswas* (3) distinguished.

SECOND APPEAL by Poran Matia and another, the plaintiffs.

\* Appeal from Appellate Decree, No. 551 of 1917, against the decree of W. N. Delevingne, District Judge of Midnapore, dated Jan. 30, 1917, affirming the decision of T. P. Chatterjee, Munsif of Midnapore, dated July 29, 1915.

(1) (1900) I. L. R. 28 Calc. 256.      (2) (1918) 28 C. L. J. 220.

(3) (1910) 13 C. L. J. 284.

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This appeal arose out of a suit for declaration of title to and recovery of possession of 6 bighas 7 cottahs of raiyati land in the village of Bhatbandi. Four persons, *viz.*, plaintiff No. 1, the father of plaintiff No. 2 and the predecessors of defendants Nos. 8 to 11 had taken settlement of 25 bighas from the landlords by a registered *kabulyat* in 1311 B. S. They then divided the said lands among themselves in four equal shares each being in possession of his share. The plaintiffs alleged that they had been dispossessed by the principal defendants in 1321 B. S. Hence this suit. The defence was that plaintiffs Nos. 1 and 2 and their other co-sharers having fallen into arrears as to their rent and the lands being covered with a deposit of sand, came to terms with the landlords and orally surrendered the holding. The lands were then in the *khas* possession of the landlords for some time who then let them out to the principal defendants Nos. 1—7 who removed the deposit of sand from a considerable portion of the lands, and this improvement had roused a desire of wrongful gain in the plaintiffs. The learned Munsif of Midnapore dismissed the plaintiffs' suit holding the defence to be true and, on appeal, the learned District Judge of Midnapore confirmed the finding as to the surrender by the plaintiffs. Hence the present appeal to the High Court.

*Babu Peary Mohan Chatterjee*, for the appellants. One can be unbound only in the same way that he has been bound. Here as the original lease was by a registered document the surrender can be made by means of a registered instrument as provided in proviso 4 of section 92 of the Evidence Act: *Sarat Chandra Sinha v. Nritya Gopal Biswas* (1).

*Babu Atulya Charan Bose* (with him *Babu Nitish Chandra Lahiri*), for the respondents. No written instrument is necessary for the surrender of this raiyati holding as the lease was not for a fixed period and the plaintiffs had given up possession to the landlord under section 86, clause (1) of the Bengal Tenancy Act. I rely on the decisions in *Khankar Abdur Rahman v. Ali Hafiz* (1) and *Brajonath Sarma v. Maheswar Gohani* (2).

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*Babu Peary Mohan Chatterjee*, in reply.

CHATTERJEA AND DUVAL JJ. The question involved in this appeal is whether the plaintiffs are entitled to recover the lands which were surrendered by them in favour of the landlord and which the latter settled with the defendants.

The lands constituted a raiyati holding and though it was held under a lease, it was not for a fixed period. Under section 86, clause (1), therefore, the raiyat could surrender the holding. He did in fact surrender it and the surrender was accepted by the landlord.

There is no doubt that a surrender can be effected without an instrument at all: see the cases of *Khankar Abdur Rahman v. Ali Hafiz* (1), and *Brajonath Sarma v. Maheswar Gohani* (2). This proposition is not disputed. But the learned pleader for the appellant contends that as the original lease was a registered one the surrender must, under the provisions of section 92, proviso 4 of the Evidence Act, also be by a registered instrument. He relies upon the case of *Sarat Chandra Sinha v. Nriya Gopal Biswas* (3) where it was held that the lease having been a registered one, oral evidence was not admissible to prove a surrender and abatement of rent. But in that case possession was

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not given up. The landlord sued to recover possession on the allegation that there was an oral surrender of a portion of the tenancy and a reduction of rent, and it was accordingly held that the original lease having been a registered one, oral evidence was not admissible to prove the surrender, and the subsequent variation in the rent. Besides it does not appear what the nature of the tenancy was, in that case.

In the present case, as stated above, the tenancy was a raiyati holding. It is found by both the Courts below that the plaintiffs and their co-sharers surrendered the holding and gave up possession in favour of the landlord who accepted the surrender, and entered into possession and let out the lands to the defendants who have since then been in possession.

We think, in the circumstances, the plaintiffs are not entitled to succeed.

The appeal accordingly fails and is dismissed with costs.

G. S.

*Appeal dismissed.*