

would be for the witnesses to show that their absence rested on lawful excuse. It is urged before us that where a number of witnesses have been cited, it would be casting too great a burden on a court to proceed against all who might have defaulted. The probability is that in such a case the Court would of itself see that the evidence of all such witnesses is not material. The Court can generally make a shrewd guess where witnesses have been unnecessarily summoned. In any case a discretion is allowed by law. We think that the court should have proceeded under order XLI, rule 27, to direct the admission of fresh evidence and under order XLI, rule 25, to refer the issues, which in this case had never been really tried, for trial to the court of first instance, directing that court to return findings. We so far allow the appeal as to make the order just pointed out. Costs will abide the event.

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*Appeal allowed.*

*Before Mr. Justice Karamat Husain and Mr. Justice Chamier.*

IKRAM-ULLAH KHAN AND OTHERS (DEFENDANTS) v. MOTI CHAND,  
AND OTHERS (PLAINTIFFS).\*

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May 24.

*Act (Local) No. II of 1901 (Agra Tenancy Act), sections 10, 20, 83—Sale of zamindari—Agreement to surrender ex-proprietary rights—Possession not delivered—Suit for damages for breach of contract—Void contract.*

*Held* that a transaction, one of the objects of which is that one party shall be divested of his ex-proprietary rights and that those rights shall vest in the other party, or a sale of zamindari property coupled with an agreement to relinquish the exproprietary rights of the vendor, is void so far as the relinquishment of exproprietary rights is concerned. *Bhikham Singh v. Har Prasad* (1), *Murlidhar v. Pem Raj* (2), *Kashi Prasad v. Kedar Nath Sahu* (3), *Raghunath Sahai v. Brijnandan Lal* (4), *Bharath Singh v. Debi Dayal Singh* (5) and *Khurshid Ali v. Wasir-un-nissa* (6) referred to.

The facts of this case are, briefly, as follows:—

The defendants sold certain zamindari property to the plaintiffs by a registered sale deed, dated the 2nd of May, 1903. The sale deed contained a stipulation that the defendants would relinquish their sir and khudkasht lands and give the

\* First Appeal No. 444 of 1909 from a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 13th of October 1909.

(1) (1896) I. L. R., 19 All., 35. (4) (1909) 6 A. L. J., 477.  
(2) (1899) I. L. R., 22 All., 205. (5) (1909) 6 A. L. J., 555.  
(3) (1897) I. L. R., 20 All., 219. (6) (1910) 7 A. L. J., 778.

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plaintiffs possession thereof, or in default would be liable to damages at the rate of Rs. 16 per bigha. On the 5th of May, 1903, the defendants executed a deed of relinquishment of the sir and khudkasht lands, but they did not get it registered, nor did they give the plaintiffs possession. On the application of the plaintiffs for compulsory registration it was registered as against some of the defendants, but not as against all. The present suit was brought to recover a sum of Rs. 9,468-8-0 as damages for breach of the covenant to relinquish the sir and khudkasht lands. The court of first instance (Subordinate Judge of Azamgarh) gave the plaintiffs a decree. The defendants appealed to the High Court.

Maulvi *Muhammad Ishaq* (with Mr. *B. E. O'Connor*) for the appellants, contended that the contract which was the basis of the plaintiffs suit was wholly void, and cited the following rulings:—*Indar Sen v. Naubat Singh* (1), *Kashi Prasad v. Kedar Nath Sahu* (2), *Murlidhar v. Pem Raj* (3), *Bhikham Singh v. Har Prasad* (4), *Bharath Singh v. Debi Dayal Singh* (5) and *Khurshed Ali v. Wazir-un-nissa* (6).

Babu *Durga Charan Bunerji* (with him The Hon'ble Pandit *Sundar Lal* and *Munshi Kalandi Prasad*), for the respondents:—

The contract to relinquish or surrender an ex-proprietary right is not illegal. The law recognizes relinquishment in favour of a zamindar, hence a contract to relinquish is perfectly lawful. Specific performance of such a contract may not be allowed, because the law does not favour surrender by compulsion. Consideration has nothing to do with the legality of such a contract. See the Agra Tenancy Act, 1901, section 83 (3), *Gaya Singh v. Udit Singh* (7) and *Lekhraj v. Parshadi* (8).

Surrender means the placing of the zamindar in possession. This deed is evidence of an agreement to surrender the rights which came into existence upon the sale. We seek to enforce, not a sale of ex-proprietary rights, but an agreement to pay damages in the event of the ex-proprietary tenant failing to

(1) (1885) I. L. R., 7 All., 847.

(2) (1897) I. L. R., 20 All., 219.

(3) (1899) I. L. R., 22 All., 205.

(4) (1893) I. L. R., 19 All., 35.

(5) (1909) 6 A. L. J., 555.

(6) (1910) 7 A. L. J., 778.

(7) (1891) I. L. R., 13 All., 396.

(8) (1909) 6 A. L. J., 713.

surrender those rights. Under Article 115 of the Limitation Act, the suit is within time.

Maulvi *Muhammad Ishaq*, in reply referred to *Indar Sen v. Naubat Singh* (1), *Baldeo v. Kundan* (2) and *Raghubans Sahai v. Brijnandan Lal* (3).

KARAMAT HUSAIN, J.—The defendants, on the 2nd of May, 1903, executed a sale deed of certain zamindari property in favour of the plaintiff. The material portion of the sale deed is the following:—

“We, all the executants.....absolutely sold in lieu of the remaining amount of Rs. 77,500, the whole of the mauzas Khorant Daulsapur, and Bharthpur, together with all the zamindari rights appertaining to them and mal and sair items.....in short, all the rights appertaining to the zamindari property, together with sir and khudkasht lands and ex-proprietary tenancy right, without the exception of any thing or right.

“We, the executants have relinquished our claim and interest in respect of all the sir and khudkasht lands. We shall execute a deed of relinquishment of claim in respect of the sir lands and shall file an application surrendering the holding. If we should make a delay in, or take any objection to the filing of an application surrendering the holding, or to the execution of the deed of relinquishment of claim in respect of the sir lands, or should we, the executants, our heirs, or representatives, or successors, keep in our possession any portion of the sir and khudkasht lands; then we and our heirs and representatives and successors shall pay damages in respect thereof at the rate of Rs. 16 per bigha.”

In pursuance of the stipulation set forth above, the defendants, on the 5th of May, 1903, executed a deed of relinquishment in favour of the plaintiffs which contained the following passages:—

“We, the executants, have absolutely sold the whole of the mauzas Khorant Daulsapur, and Bharthpur, .....and have removed our possession and put the said vendees in possession of the whole of the property sold. We, the executants, have 735 bighas 9 biswas 4 dhurs of the sir and khudkasht lands in the said mauzas according to the detail given below. As we, the executants, have no longer any concern whatever with the property sold in the said villages, and as we, for want of concern, are unable to cultivate the sir lands and pay the rent, we have of our free will and accord relinquished our claim and right in respect of all the sir and khudhasht lands which, according to the detail given below, we, the executants, have in the villages sold and have removed our possession and put the vendees in possession of the same.”

(1) (1885) I. L. R., 7 All., 847 (850). (2) Weekly Notes, 1893, p. 27.  
(3) (1909) 6 A. L. J., 477.

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The defendants did not, however, have the deed of relinquishment registered, and on the application of the plaintiffs it was registered compulsorily against the male executants of the said deed, but not against the female executants. On the 14th of July, 1903, according to the allegations in the plaint, a demand was made by the plaintiffs calling on the defendants to relinquish the ex-proprietary holdings and to put the plaintiffs in possession thereof. The defendants did not deliver possession of the sir to the plaintiffs. On the basis of the deed of relinquishment there were law suits between the parties for the arrears of rent of the sir and for the determination of the rent therefor. As those suits, in my opinion, do not bar the present suits, I need not give their details.

The suit out of which this appeal arose, was brought on the 3rd of July, 1909, for damages amounting to Rs. 9,468-8-0 for the breach of the contract of relinquishment, together with interest. The case for the plaintiffs is that the defendants in pursuance of a stipulation entered in the sale deed of 2nd May, 1903, executed a deed of relinquishment on the 5th of May 1903, which was compulsorily registered on the 13th of July, 1903. On the 14th of July, 1903, the plaintiffs asked the defendants to relinquish the sir and put the plaintiffs in possession of it. But they declined to do so, and hence the suit for damages for the breach of the contract to relinquish. The pleas in defence with which we have to deal in this case are, that the sale deed and the deed of relinquishment, so far as they entitle the plaintiffs to sue for damages, are illegal, and that the suit is barred by limitation. The court below decreed the claim. The agreement to relinquish in its opinion is a lawful agreement inasmuch as a sir holder is entitled under the law to relinquish his holding, whenever he pleases, according to the provisions of section 83 of the Agra Tenancy Act. In support of this view the court below relies upon *Gaya Singh v. Udit Singh* (1) and *Lekhraj v. Parshadi* (2). The cause of action, according to the court below, arose on the 14th of July, 1903, when delivery of possession was refused to be made and a breach of the contract to relinquish was committed, and hence the suit under article 116 of the schedule II of the

(1) (1891) J. F. R., 12 ALL., 386.

(2) (1899) G. A. I. J., 712.

Limitation Act is not time-barred. The defendants appeal to this Court, and their learned vakil contends that the transaction of the sale of the zamindari and the so-called relinquishment of the sir land form one single transaction having for one of its objects the transfer of the sir, which is illegal, and that if the transaction of relinquishment be supposed to be a separate and independent transaction, even then, according to the rulings of this Court, it would be unlawful. In support of the above proposition he relies on *Indar Sen v. Naubat Singh* (1), *Baldeo v. Kundan* (2), *Bhikham Singh v. Har Prasad* (3), *Kashi Prasad v. Kedar Nath Sahu* (4), *Murlidhar v. Pem Raj* (5), *Dipan Rai v. Ram Khelawan* (6) and *Khurshed Ali v. Wazir-un-nissa* (7). The learned advocate for the respondents in answer to the argument of the learned vakil for the appellant says that the rulings quoted by the learned vakil do not touch the point in question in the present case, which really is whether a sir holder can or cannot agree to relinquish his holding in favour of his zamindar; that, according to the provisions of section 83 of the Tenancy Act relinquishment of a sir land in favour of the zamindar is sanctioned by law, and that, as the relinquishment of a sir is a lawful act, an agreement to relinquish sir cannot in any way be unlawful. In support of what he says he relies on *Gaya Singh v. Udit Singh* (8) and *Bharath Singh v. Debi Dayal Singh* (9). The case reported in I. L. R., 13 All., p. 396, simply lays down that there is nothing in law to prevent a tenant from voluntarily relinquishing his ex-proprietary tenancy in favour of his zamindar. But it does not touch the question whether a tenant can or cannot enter into an agreement to relinquish his ex-proprietary holding. In the case of *Bharath Singh v. Debi Dayal Singh* (9), there was an actual relinquishment of an ex-proprietary holding in favour of the zamindar, and therefore that case also has no bearing upon the point in the present case. The transaction entered into between the plaintiffs on the one hand and the defendants on the other, may either be regarded as a single transaction, one of the objects of which

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| (1) (1885) I. L. R., 7 All., 847.  | (5) (1899) I. L. R., 22 All., 205. |
| (2) Weekly Notes, 1893, p. 27.     | (6) (1907) I. L. R., 32 All., 883. |
| (8) (1896) I. L. R., 19 All., 35.  | (7) (1910) 7 A. L. J., 778.        |
| (4) (1897) I. L. R., 20 All., 219. | (8) (1891) I. L. R., 13 All., 396. |
| (9) (1909) 6 A. L. J., 555.        |                                    |

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was that the defendants be divested of their ex-proprietary rights and that those rights should vest in the plaintiffs, or it may be regarded as consisting of two distinct and separate transactions, one, the sale of the zamindari property, and the other the agreement to relinquish the ex-proprietary rights. In either view the cases referred to by the learned vakil for the appellants are authorities for the proposition that the said transaction, so far as it deals with the relinquishment of the ex-proprietary rights, is void, inasmuch as the defendants, by means of a transfer or by means of an agreement to relinquish, had no power under the law to divest themselves of their ex-proprietary rights and the agreement to relinquish ex-proprietary rights is illegal.

For the above reasons I would allow the appeal and set aside the decree of the court below with costs. In this view of the case it is unnecessary for me to enter into the question of limitation.

CHAMIER, J.—It appears to me that the case is covered by authority.

In *Bhikham Singh v. Har Prasad* (1), the defendants had sold certain zamindari property to the plaintiffs, expressly including therein any rights which might accrue to them as ex-proprietary tenants, and they purported to relinquish those rights in favour of the plaintiffs. It was held that the attempted sale of prospective ex-proprietary rights was invalid, and that the plaintiffs were not entitled to any compensation for non-delivery of possession of the sir lands. That decision was approved in *Murli-dhar v. Pem Raj* (2), where a similar contract had been made and the sale deed expressly provided that if the vendors failed to deliver possession of the sir lands, they would refund Rs. 1,500. It was held that the contract being contrary to law, the vendees, who had failed to obtain possession, were not entitled to recover the sum of Rs. 1,500. In *Kashi Prasad v. Kedar Nath Sahu* (3), the parties to a private partition of zamindari lands agreed that if either party was at the time of partition holding sir land in a village which at the partition fell into the share of the other party, he would relinquish his ex-proprietary

(1) (1896) I. L. R., 19 All., 35. (2) (1895) I. L. R., 22 All., 205.  
(3) (1897) I. L. R., 20 All., 219.

rights in favour of the party into whose share the village fell. It was held that the agreement could not be enforced. In *Raghubans Sahri v. Brijnandan Lal* (1) it was held that an agreement to relinquish exproprietary rights in sir land could not be enforced. In *Bharath Singh v. Debi Dayal Singh* (2) the facts were that a sale deed of zamindari property and a perpetual lease of the sir lands therein were executed on the same day, and Rs. 1,105 were paid to the lessor vendor as nazrana on the lease. It was held that the sum ostensibly paid as nazrana was in reality the price paid for the ex-proprietary rights that arose on the sale and could not be recovered by the vendees, although they had not obtained possession of the sir land. In *Khurshed Ali v. Wazir-un-nissa* (3), on a compromise, the defendant agreed to sell certain zamindari property and to relinquish his ex-proprietary right in his sir in consideration of a sum to be fixed by an arbitrator. It was held that the transaction was an agreement to sell ex-proprietary rights when they came into existence and was unlawful. In the present case we have an attempted sale of prospective ex-proprietary rights in sir and khudkasht lands and an agreement to execute a deed of relinquishment in respect of those rights, with a provision that if the vendors fail to carry out their undertaking, they shall be liable for damages at the rate of Rs. 16 per bigha. On the above authorities it appears to me that, whether the transaction is regarded as an attempted sale of ex-proprietary rights or an agreement to relinquish those rights when they arise, it is unlawful, and therefore the claim to damages for failure to deliver possession of the sir and khudkasht lands is not maintainable. I agree that the appeal should be allowed and the suit dismissed.

By THE COURT.—Order of the Court is, that the appeal is allowed, the decree of the court below is set aside, and the plaintiffs' suit dismissed with costs.

*Appeal allowed.*

(1) (1909) 6 A. L. J., 477.      (2) (1909) 6 A. L. J., 555.  
(3) (1910) 7 A. L. J., 778.