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benefit accrued to the defendant by the payment made by the plaintiff the defendant was not liable under section 70 of the Indian Contract Act. Consequently section 70 has no application.

I therefore agree with the views expressed in the decisions relied upon by the learned Judicial Commissioner and dismiss the appeal with costs.

JWALA PRASAD, J.

ROSS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Ross, J.J.

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RAM URAON

v.

DOMAN KALAL.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *sections* 72 *and* 46(3)—*Transfer of holding—subsequent surrender, validity and effect of.*

A *raiyat* is entitled to surrender his holding under section 72 of the Chota Nagpur Tenancy Act, 1908, even though he has mortgaged it to a stranger, and the consent of the mortgagee is not necessary.

Saiyid Mohsinudddin v. *Baikunthanath Sutradhar*(1) referred to.

In such a case the mortgage is not binding on the landlord even though it was executed for consideration.

Semble, that in places where the Chota Nagpur Tenancy Act, 1908, is in force a *raiyat* is entitled to surrender his holding even in a case where he has already executed a sale of it to a stranger.

* Appeal from Appellate Decree No. 127 of 1912, from a decision of Babu Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 18th April, 1921, reversing a decision of Lala Tarak Nath, Munsif of Ranchi, dated the 27th June, 1919.

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Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

Abani Bhushan Mukherji, for the appellant.

P. K. Sen (with him *Ragho Prasad*, *Guru Saran Prasad* and *Raghunandan Prasad*), for the respondents.

JWALA PRASAD, J.—This appeal arises out of a suit in ejectment. The lands in question appertain to the holding of one Husaini Gorait, the defendant No. 5 in this case. On the 31st November, 1916, he gave a major portion of it in usufructuary mortgage to defendant No. 2 for a term of five years, from 1973 to 1977 (corresponding roughly to 1916-1920), in consideration of a loan of Rs. 800. A similar plot of his holding No. 460 he had mortgaged to other persons who are not parties to this case. His holding consisted of 7·06 acres of land which included his homestead plots Nos. 239 and 247 and 497, amounting to about ·08 acre. Husain surrendered his holding in favour of the manager of the Encumbered Estates on the 19th June, 1917, reserving thereout homestead *parti* lands amounting to ·7 acre for himself. The surrender was, therefore, of all the cultivated lands in the holding. The surrender was effected by means of a registered *istifanama*, *Exhibit 3*. The plaintiff obtained settlement of the lands from the manager of the Encumbered Estates in September, 1917. Having come to know of the intention of Husaini to surrender the holding he approached the manager by means of a letter from the Roman Catholic priest at Dighia who recommended the settlement of the land with him, which, he said, Husaini was going to surrender. After the surrender, the settlement question was started in the office of the manager of the Encumbered Estates on the 28th June, 1917, and ultimately, as observed above, it was settled with the plaintiff in September, who paid rent for the same on account of 1973 per receipt, *Exhibit 2*. The plaintiff was, however, resisted by the defendants

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Nos. 1, 2 and 3 in taking possession of the land The defendants Nos. 1 and 3 were the *sajhadars* having taken *batai* settlement of the land from the mortgagee. The plaintiff, therefore, commenced his action for recovery of possession of the land by filing his plaint on the 19th July, 1918. The Munsif decreed the suit; but the learned Subordinate Judge, on appeal, set aside the decision of the Munsif and dismissed the suit. Hence the plaintiff has come here in second appeal.

On behalf of the plaintiff-appellant the decision of the learned Subordinate Judge is assailed. The Subordinate Judge held that Husaini in making the surrender :

> " could not have been actuated by anything less than a dishonest and improper motive. He had already come to an understanding with the plaintiff and that unmistakably shows how his conduct came to be influenced in the matter,

and that Husaini having given the land in *zarpeshgi* :

> " could not fairly be permitted to put an end to this interest which he himself created by surrendering the land."

In support of his view the learned Subordinate Judge has relied upon the Full Bench decision of the Calcutta High Court, *Saiyid Mohsinuddin* v. *Baikunthanath Sutradhar* (1). That was a decision in a case governed by the Bengal Tenancy Act. But that decision was based upon the general principle that a person cannot be permitted to derogate from his own grant and consequently if a *raiyat* has dealt with his holding in such a manner as to create an interest in favour of a third person, he has lost the power conferred upon him under section 86 of the Bengal Tenancy Act of surrendering the holding to the landlord and thus defeating the previous transfers already made by him of the entire holding, or a portion thereof.

The present case is governed by the Chota Nagpur Tenancy Act. The provisions contained in section 72 of the Chota Nagpur Tenancy Act are similar to those contained in section 86 of the Bengal Tenancy Act

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with this difference that the provisions contained in clause (6) of the Bengal Tenancy Act do not find place in section 72 of the Chota Nagpur Tenancy Act. That provision is stated in the following terms :

" When a holding is subject to incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer."

Now a mortgage, as distinguished from a sale, is an incumbrance, and the mortgage in the present case of the defendant No. 2 is secured by a registered instrument. Therefore if the Bengal Tenancy Act applied to the present case the surrender would have been invalid unless it was made with the consent of the landlord and the mortgagee. That clause, as observed above, has been omitted from the Chota Nagpur Tenancy Act, and the reason probably is that the legislature did not consider it desirable in the peculiar circumstances of the tenancy of Chota Nagpur to recognize the right of transfer in the tenants with respect to their holdings. This intention is also to be gathered from the restrictions imposed upon the tenants under Chapter VIII of the Chota Nagpur Tenancy Act, namely, section 46. A *raiyat* is not permitted to transfer his holding or a portion thereof, by mortgage or lease, for a longer period than five years or to sell or make a gift of his holding by any contract or agreement. Be that as it may, the absence of provision similar to clause (6) of section 86 of the Bengal Tenancy Act from section 72 of the Chota Nagpur Tenancy Act leaves the power of surrender conferred by the section unhampered by the existence of any incumbrance over the property. It therefore logically follows that in spite of a prior sale or mortgage by a *raiyat* he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (2) of section 46 no transfer by a *raiyat* of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing. This is a complete answer to the contention of the learned vakil, on behalf of the

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respondents, that the surrender must be deemed to be subject to the prior mortgage executed by the *raiyat* in favour of the defendant No. 2. Whatever the value of a transfer by a *raiyat* of his non-transferable holding be so far as the transferee or any other person in the world is concerned, it is absolutely to be ignored and considered to be non-existent so far as the landlord is concerned. The landlord is the owner of the property, and the *raiyat's* interest was carved out of it only for limited purposes and the right of reversion which the landlord undoubtedly has in the land cannot be affected except by express statutory provision. That reversion is recognized in the right which accrued to the landlord by an abandonment of the holding or by a voluntary surrender by the tenant who willingly yields up to him the limited right which was carved out. Therefore it is immaterial that the transfer is for valuable consideration and the surrender for no consideration at all. The principle, upon which the decision of his Lordship Mukerji, A. C. J. in the Full Bench case referred to above is based, namely, that a person cannot be permitted to derogate from his own grant, is not of universal application and certainly cannot apply to the case of a landlord where, by a *bonâ fide* surrender by the tenant, he acquires a statutory right of re-entry into the land which was originally demised in favour of the tenant. Now that the aforesaid principle upon which the decision in the Full Bench case of the Calcutta High Court is based does not obviously apply universally as observed above is clear from the provisions contained in sections 72 and 73 of the Chota Nagpur Tenancy Act. It has been held, and is now recognized as settled law, that if a *raiyat* transfers his entire holding either at once or piecemeal he loses all his rights therein and he ceases to be a *raiyat* and the tenancy is deemed to have been abandoned, giving the right of re-entry to the landlord. In such a case the landlord has the right to ignore the transfers, though for valuable considerations, made by the *raiyat* in favour of third persons. The tenant by

his act destroys the previous transfers of the holding and, therefore, he derogates from his own grant. There is no reason why the same should not be the fact when the tenant exercises his right of surrender conferred upon him by section 72. On the other hand, no equitable considerations would arise in favour of a transferee of a non-transferable holding for he with his eyes open and knowing the limited interest of the tenant and his unquestionable right under sections 72 and 73 of surrender and abandonment—the holding being non-transferable without the consent of the landlord—takes the grant. He must, therefore, have foreseen the possible result of surrender or abandonment by the tenant. There is no reason why the landlord should be prejudiced unless he is a party to any fraud or dishonesty committed by his *raiyat* in surrendering the holding. He never permitted the previous transfers, and the *raiyat* and his transferee of their free-will and choice entered into transactions behind his back and probably to his prejudice. Why should he not have the benefit of a *bonâ fide* transfer in his favour and exercise his right of re-entry simply because his *raiyat* had previously transferred the whole or a portion of the holding?

As I have already said, a surrender like any other act in order to be operative must be *bonâ fide*, and if it is tainted with fraud, it confers no right upon the landlord and need not be avoided. The learned vakil, on behalf of the respondents, submits that the surrender in the present case has been held by the Courts below to have been tainted with fraud and dishonesty and consequently the plaintiff cannot be permitted to derive any benefit from it. In support of his contention he relies upon the view taken by the Court below and expressed in the passage quoted already from its judgment. The learned Subordinate Judge infers fraud from the statement made in the *istifanama* as to the reasons which induced the *raiyat*, Husaini Gorait, to surrender his holding. He says that Husaini Gorait stated:

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"that he had no plough and cattle to enable him to cultivate the land."

and that:

"the question of cultivation could not arise before the expiry of the *zarpeshgi* period."

Says the learned Subordinate Judge:

"He was therefore by no means in such a desperate condition as to drive him to the necessity of adopting a course which was so manifestly unfair to the persons who had advanced money on the security of his land."

He therefore says that his motive must be dishonest and improper. This is not a finding of fraud. Nothing has been said against the landlord as being party to the evil intentions, if any, of the tenant, and from the way in which the learned Subordinate Judge has put it, it seems to me that he was influenced largely by the decision in the Full Bench case of the Calcutta High Court in which it has been held that every surrender, after a prior transfer of the entire or part of a holding, must be to the prejudice of the prior transferee. On the other hand, no clear case of fraud seems to have been made out in the pleadings. No doubt it has been stated in the written statement of the defendant No. 2 that:

"Husaini Gorait never surrendered his *raiyati* holding. If Husaini surrendered his *raiyati* holding he has done so in collusion with the collusions with the manager of the Encumbered Estates and his subordinates with a view to prejudice this defendant's *zarpeshgi* right and to deprive him of the *peshgi* money." ...

Now this is not a statement of a man who knows, as a matter of fact, that the surrender was fraudulent; for according to the defendant no surrender had taken place and his attack of the surrender on the ground of fraud is conditional upon the surrender having taken place and is inferred from the fact that it was prejudicial to his *zarpeshgi* right and calculated to deprive him of the *zarpeshgi* money. Fraud, as has been laid down, must be expressly pleaded: positive facts and circumstances must be set out clearly giving rise to the application of fraud. Nothing of the sort was done in this case. That is the reason why no issue of fraud was raised in the case, nor does it seem to have been urged before the Munsif, for he does not seem to have said a word about it in his judgment.

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The Munsif's judgment is dated the 27th June, 1919, and the decision in the Full Bench case of the Calcutta High Court was on the 3rd August, 1920. The decision, however, came out when the appeal was being argued before the learned Subordinate Judge. The question of fraud was made more prominent probably in the argument of the Bar. There being no issue upon the subject, the evidence must, therefore, have been slender and the learned Subordinate Judge had to content himself with such facts as he could gather from the contents of the *istifanama* and the consequences of the surrender which necessarily would deprive the defendant No. 2 of his *zarpeshgi* money. The fraud pleaded has not been found, namely, of there being any collusion between Husaini and the manager of the Encumbered Estates. Therefore the finding of the learned Subordinate Judge of the surrender being actuated by " dishonest and improper motive " is not a real finding of fact binding upon this Court.

There is no necessity of pursuing the matter further, for the appeal must succeed upon still more substantial ground. The mortgage lease, in favour of the defendant-respondent, was for five years, from 1973 to 1977 and expired in 1920. Under section 46 of the Chota Nagpur Tenancy Act the mortgage could not be for a term exceeding five years and therefore it came to an end *ipso facto* in 1920. Thereafter the defendant was not entitled to remain in possession of the property as *zarpeshgidar*. His only remedy, if any, was to hold the executant of the mortgage personally liable to him. No doubt the surrender took place in 1917 and the plaintiff's action was commenced in 1918 but the defendant had all along been in possession of the property for the full term of his mortgage. Therefore, by the surrender in the present case, the defendant is not at all prejudiced. The tenant, defendant No. 5, on the other hand has filed a written statement. He still adheres to the surrender and impugns the mortgage upon the ground that the consideration money, though promised, was not paid.

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Hence the mortgage, whether for consideration or not, terminated in 1920 and the land reverted to the original tenant, and he does not dispute the right of the plaintiff based upon the surrender and settlement by the manager of the Encumbered Estate. Therefore the plaintiff is entitled to recover possession of the property.

Under those circumstances the appeal must succeed. The decision of the Lower Appellate Court is set aside, the judgment of the Munsif is restored and the plaintiff's suit is decreed with costs throughout.

ROSS, J.—I agree.

Appeal decreed.

REVISIONAL CIVIL.

Before Mullick and Bucknill, J.J.

1923.

July, 3.

MUSSAMMAT NAND RANI KUER

v.

DURGA DASS NARAIN.*

Compromise Decree—Extension of time, power of court to grant—Revision—Civil Procedure Code, 1908 (*Act V* of 1908), *section* 115.

Where a compromise decree provides that on the defendant's failure to pay the decretal amount by a certain date the plaintiff shall be entitled to a larger sum, the court has power to extend the time fixed for payment without the con-

Walter(2), referred to.

Kandarpa Nag v. *Banwari Lal Nag*(1), followed.

Australian Automatic Weighing Machine Company v. *Walter*(2), referred to.

An order extending the time in such a case is not subject to revision under section 115, Civil Procedure Code.

* Civil Revision No. 248 of 1923, from an order of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge, Patna, dated the 4th June, 1923.

(1) (1921) 33 Cal. L. J. 344. (2) (1921) W. N. 170.