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 DAWSON MILLER, C.J.

is brought are cases where the tenancy has terminated and the tenant refuses to quit and I consider that the word tenant as used in the section was intended to cover such cases. In my view the circumstances of the present case, namely, a tenant who was the *thikadar* and whose *thikadari* interest has expired but who refuses to quit, whatever the reason may be, comes within the clause (cc) of paragraph (xi) of the section, and that section applies where in such circumstances the landlord brings a suit to eject him. For these reasons I think that the decisions both of the trial Court and of the learned Judicial Commissioner on appeal were right and ought to be affirmed and the appeal dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

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Oct., 31.

Appeal—date of presentation—memorandum presented to Assistant Registrar, in the absence of the Registrar during vacation—Rules of the Patna High Court, 1916, Chapter II, rules 13(iii), 14 and 16—Court-Fees Act, 1870 (Act VII of 1870)—Bihar and Orissa Court-Fees (Amendment) Act, 1922 (B. & O. Act II of 1922).

A memorandum of appeal presented to the Registrar during the vacation must be taken to be filed on the day on which it is actually presented to the Registrar. But when a memorandum of appeal is presented during the vacation to an officer who is not empowered to receive it, and it is put up before the Registrar on the re-opening of the High Court, it must be deemed to have been presented on the date on which the High Court re-opened.

In the absence of the Registrar a memorandum of appeal must, under Chapter II, rule 16, of the Rules of the Patna High Court, 1916, be presented to a Judge of a Bench and not to any other officer of the court unless the power of the Registrar to receive memoranda of appeals under rule 13(iii) has been properly delegated to such other officer.

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A memorandum of appeal properly stamped in accordance with the provisions of the Court-Fees Act, 1870, was presented to the Assistant Registrar on 18th August, 1922, during the vacation. On that date the Registrar was not in Patna. The Bihar and Orissa Court-Fees (Amendment) Act, 1922, which enhanced the fees payable upon the memorandum of appeal, came into force on the 24th August, 1922. The vacation ended on the 22nd October, and the court re-opened on the 23rd.

The memorandum was put up before the Registrar on the latter date and he noted in the order sheet that it had been filed on that date. *Held*, that the enhanced court-fee prescribed by the Bihar and Orissa Court-Fees (Amendment) Act, 1922, was payable on the memorandum of appeal and not the lesser-fee prescribed by the Court-Fees Act, 1870.

Ununto Ram Chatterjee v. Protab Chunder Shiromonee(1), *Gobind Kumar Chowdhury v. Hargopal Nag*(2) and *Ram Das Chakrabati v. Official Liquidator of the Cotton Ginning Company, Limited, Cawnpore*(3), referred to.

The following portions of Chapter II of the Rules of the High Court at Patna, 1916, are referred to in the judgment:—

Rule 13. In addition to the powers conferred upon him by other rules the Registrar shall have the following duties and powers:—

* * * * *

(iii) To receive a plaint or an appeal from the decree or order of a Subordinate Civil Court and to determine whether it shall be admitted and notice issued at once to the other side or be posted for hearing under Order XLI, Rule 11, or otherwise laid before the Court for orders.

Rule 14. The Registrar may delegate any of his functions under these rules except those which are of a judicial or quasi-judicial character to the Deputy Registrar or other Officer of the Court.

Rule 16. In the absence of the Registrar, or whenever the Chief Justice so directs, his powers and duties under rule 13 (i) to (viii) of

(1) (1871) 16 W. R. 230.

(2) (1869) 3 Ben. L. R. (App.) 72.

(3) (1887) 9 All. 366.

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this chapter shall be performed by a judge or judges and his powers and duties under rule 13 (xiv) to (xviii) shall be performed by the Deputy or the Assistant Registrar.

The facts of the case material to this report are stated in the note of the Stamp Reporter, which was as follows :—

The suit out of which this appeal arises was instituted in 1921 for certain declarations and a perpetual injunction. It having been dismissed by the Lower Court the plaintiffs have preferred this first appeal from its decree. The suit was valued at Rs. 36,783-8-3 and as it is governed by section 7 (iv) (c) of the Court-Fees Act (VII of 1870), a proposition which cannot be disputed, a court-fee of Rs. 1,055 calculated *ad valorem* on Rs. 36,783-8-3 according to article 1, schedule I of that Act, was paid on the plaint. The appeal is similarly valued and stamped. The plaint is sufficiently stamped but the memorandum of appeal appears to me to be insufficiently stamped.

The question for determination, therefore, is whether the memorandum of appeal is insufficiently stamped and if so by how much? The decision of this question hinges upon another question of considerable importance, namely, "When was the appeal validly presented?" The decision of the latter question will decide the question of court-fee raised not only in this appeal filed before the Assistant Registrar in the last long vacation but in a good many other appeals filed during the same vacation before that officer or the Deputy Registrar.

The High Court was closed for the last long vacation from the 4th of August to the 22nd of October, 1922, and reopened on the 23rd of October. The office of the High Court was open, though not working with full strength, throughout the vacation, as in previous years for administrative and urgent purposes. There is no order, rule or law compelling a litigant or conferring a statutory right upon him to file a civil appeal during a vacation. This is so on account of the sufficient protection given by section 4 of the Limitation Act, 1908, against limitation expiring on a day when the Court is closed. But as the office is open for the said purposes Vakils desiring and choosing to file appeals during any long vacation in the office are permitted, at their request, to file them in the office, not as a matter of right but as a matter of favour to suit their convenience, on the distinct understanding that the appeals filed during a long vacation will be kept in the office by way of deposit and will be treated as having been filed on the day that the Court re-opens. Accordingly this appeal and many others were filed either before the Deputy or the Assistant Registrar during the last long vacation. They were kept in the Vernacular Department by way of deposit and presented before the Registrar on 23rd October 1922, when the Court re-opened. This appeal which will be in time up to 7th November, 1922, but was filed before the Assistant Registrar on 18th August, 1922, during the vacation, was presented to the Registrar on 23rd October, 1922, when the Court re-opened, and the first entry, signed by the Registrar, in the order sheet, therefore, is "23rd October 1922. Filed. Put up for orders". Therefore in my humble opinion this appeal was validly presented on 23rd October, 1922. This view is supported by the High Court's letter

No. 3908 V.-D., dated 11th September, 1919, which is a reply from the then Registrar to a letter received in the long vacation of 1919 from Mr. Shoroshi Charan Mitra as Vice-President of the Vakils' Association, Patna High Court, to the Registrar of the High Court complaining that since a certain date in the vacation of that year the Vakils had not been able to file non-urgent civil appeals and that that was causing great inconvenience to litigants and Vakils. The said High Court letter runs as follows:—

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" To

THE VICE-PRESIDENT,
VAKILS' ASSOCIATION,
Patna High Court.

SIR,

With reference to your letter No. Nil dated the 29th August 1919, regarding the receipt of appeals during the vacation, I am directed to say that no appeal can be claimed to be filed in office as of right on any day except on a Court day but appeals will be, as in previous years, received during the vacation and kept to be formally dealt with when the Court re-opens. They will be treated as having been filed on the re-opening date".

The above High Court letter is a conclusive authority for my submission that the appeal was validly presented on 23rd October, 1922. But it may be contended that according to the rules of presentation of appeals as contained in the Code of Civil Procedure, 1908, and the Rules of the Patna High Court, 1916, the presentation of the appeal to the Assistant Registrar on 18th August, 1922, and other appeals presented to him or the Deputy Registrar on that date or any other date during the last vacation is valid, and that therefore they were validly presented before them on the dates on which they were presented during the vacation. My idea is that those rules, except Rule 4, Chapter II. of the Patna High Court Rules, are applicable only when the High Court is open and not when it is closed. However, assuming that they are applicable when the Court is closed for the long vacation on the ground that the Hon'ble Mr. Justice Adami, the Vacation Judge, held Court during the vacation, I proceed to examine those rules in order to see if the appeal presented to the Assistant Registrar on 18th August, 1922, was a valid presentation.

Order 41, Rule 1 (1), of the Code enacts " Every appeal shall be preferred in the form of a memorandum of appeal signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from....." The italics are mine. The above italicised provisions are imperative, so that it is obligatory upon an appellant to present his appeal to the Court or such officer as it appoints in this behalf and if he does not so present it the presentation is invalid just as the presentation of an appeal without a copy of the decree appealed from is invalid as held by this Court in *Chaturbhuj Sahay v. Muhammad Habib*(1).

(1) S. As. Nos. 704 to 706 of 1919, decided on the 20th November, 1919, by Adami, J.

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The proper officer appointed by the Court to receive an appeal from the decree or order of a Subordinate Civil Court is the Registrar according to clause (iii), Rule 13, Chapter II of the Patna High Court Rules. Therefore the present appeal, which is an appeal from the decree of a Subordinate Civil Court, must have been presented either to the Court or to the Registrar. It was not presented to the Court, the Vacation Judge, the Hon'ble Mr. Justice Adami, as an urgent matter under Rule 4, Chapter II of the Patna High Court Rules. But a presentation to his Lordship was possible only if in his Lordship's opinion the filing of the appeal before his Lordship was an urgent matter. Probably the appellants did not think that it was urgent and therefore they did not venture to present it to his Lordship. However, the fact remains that the appeal was not presented to his Lordship on 18th August, 1922. On the other hand it was filed before the Assistant Registrar. But it could not have been filed before him under law because the Court did not by an order, so far I know, appoint him or the Deputy Registrar as the officer to receive appeals during the last vacation under Order 41, Rule 1 (1), of the Code in temporary supersession of Rule 13(iii), Chapter II of the Patna High Court Rules. It may further be contended that the presentation of the appeal to the Assistant Registrar (or the Deputy Registrar) was valid under Rule 26 or 27, Chapter VII of the Patna High Court Rules. There are several conditions which must be fulfilled before those two rules can be applied. I lay stress on only one of them, namely limitation. According to both the Rules any memorandum of appeal or application which might be barred by time may be presented to the Deputy Registrar or the Assistant Registrar under certain circumstances. But the present appeal was not going to be time-barred on 18th August, 1922. The time for presenting it is, as already started, up to 7th November, 1922. Even if the period of limitation prescribed for the appeal had been expiring on 18th August, 1922, nay, even if it had already expired on any previous date during the vacation, the appeal would have been in time up to 23rd October, 1922, the day that the Court re-opened, by virtue of the provision of section 4 of the Limitation Act. Therefore Rules 26 and 27 aforesaid have no application to this appeal or any other appeal filed before the Deputy Registrar or the Assistant Registrar during the vacation. It may further be contended that the presentation to the Assistant or the Deputy Registrar is valid because the Registrar might have delegated his function of receiving appeals under Rule 13(iii), Chapter II of the Patna High Court Rules to those officers under Rule 14 of the same chapter on the ground that such a function is neither of a judicial nor quasi-judicial character. With regard to this my first respectful submission is that it is a matter of considerable doubt whether the Registrar can delegate his powers of receiving a memorandum of appeal to the Deputy or the Assistant Registrar because (1) under Rule 16 of Chapter II of the Patna High Court Rules, in the absence of the Registrar or whenever the Chief Justice so directs, his powers and duties under Rule 13(iii) of the same chapter, i.e., of receiving appeals, etc., shall be performed by a Judge or Judges and not by the Deputy or the Assistant Registrar, which shows that the function of receiving appeals is of a quasi-judicial character; and as an example of this I may note that when the Registrar was absent on leave from 31st May to 9th June last memoranda of appeal used to be received by Judges and not by the Deputy or the Assistant Registrar; and (2) Order 41, Rule 1 (1), of

the Code does not provide that the officer appointed by the Court to receive an appeal (*e.g.*, the Registrar) can delegate his powers of receiving it to any other officer. My next respectful submission is that, apart from the question whether the function of receiving a memorandum of appeal is of a quasi-judicial character or not or whether the Registrar can delegate that function or not, the Registrar did not as a matter of fact, so far as I know, delegate his powers of receiving a memorandum of appeal to the Deputy or the Assistant Registrar so as to authorise them to receive that document during the last vacation. Therefore Rule 14 of Chapter II of the Patna High Court Rules cannot be relied on. Therefore presentation of the appeal to the Assistant Registrar (or the Deputy Registrar) during the last vacation was no presentation or an invalid one and it became valid only when it was presented to the Registrar on 23rd October, 1922.

For the reason given above my answer to the question "When was the appeal validly presented?" is that it was validly presented on 23rd October, 1922.

On the 23rd of October, 1922, when the appeal was validly presented, as shown above, the Bihar and Orissa Court-Fees (Amendment) Act (II of 1922) which came into operation on 24th August, 1922, was in force. Therefore the memorandum of appeal and other documents filed with it are governed by the Court-Fees Act (VII of 1870) as amended by the said Act I of 1922. According to the former Act as amended by the latter the court-fee on Rs. 36,783-8-3, the value of the appeal, is Rs. 1,567-8-0. The court-fee paid is Rs. 1,055 according to the former Act. Therefore the memorandum of appeal is insufficiently stamped by Rs. 512-8-0. This is my answer to the first question whether the memorandum of appeal is insufficiently stamped and if so by how much.

There are other documents accompanying the memorandum of appeal which according to the said Act II of 1922 are also insufficiently stamped. One of them is the *vakalatnama*. It is insufficiently stamped by Re. 1. The other two are copies of the judgment and the decree. They are insufficiently stamped by annas 4 and 8, respectively.

In the result the appellants have to pay the following deficit court-fees :—

			Rs.	s.	p.
On the memo. of appeal	...	...	512	8	0
„ <i>vakalatnama</i>	...	...	1	0	0
„ copy of judgment	...	...	0	4	0
„ „ decree	...	...	0	8	0
Total	...	...	514	4	0

The Taxing Officer referred the matter to the Taxing Judge under section 5 of the Court-Fees Act, 1870.

Saroshi Charan Mitter, Sailendra Nath Palit, Jadbans Sahay and Hareshwar Prasad Sinha, for the appellants.

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Sultan Ahmed (Government Advocate), for the Crown.

JWALA PRASAD, J.—This is a court-fee matter and has been referred to me as Taxing Judge. The first question for determination is whether the memorandum of appeal is sufficiently stamped.

The memorandum of appeal was filed before the Assistant Registrar of the High Court on the 18th of August, 1922, when the old Court-Fees Act was in force. According to that Act the memorandum of appeal bore court-fee of sufficient value. The new Bihar and Orissa Court-Fees Act (Act II of 1922) came into force on the 24th day of August, 1922, according to which the court-fee should have been much larger than has been paid by the appellant. The Court was closed for the long vacation from the 4th of August to the 22nd of October, 1922, though the offices were open and the Registrar was on duty. Under Order XLI, rule 1. the memorandum of appeal must be "presented to the Court or to such officer as it appoints in this behalf." This Court has appointed the Registrar to receive memorandum of appeal (Chapter II, rule 13, clause 3, Patna High Court Rules). There are ample authorities to show that a memorandum of appeal presented during the vacation to the proper officer appointed in that behalf will be a valid presentation although it is open to an appellant to present a memorandum of appeal on the first day of the opening of the Court under the Law of Limitation if the time fixed for the filing of the same expires during a vacation. This is for the benefit of litigants. But there is nothing to prevent the presentation of a plaint or a memorandum of appeal during a vacation or even on a Sunday, provided it is presented to a proper officer and that officer receives it [*Ununto Ram Chatterjee v. Protab Chunder Shivomonee* (1), *Gobind Kumar Chowdhury v. Hargopal Nag* (2) and *Ram Das Chakrabati v. The Official Liquidator of the Cotton Ginning Company, Limited* (3)]. Therefore, if the Assistant

(1) (1871) 16 W. R. 230.

(2) (1869) 3 Ben. L. R. (App.) 72.

(3) (1887) I. L. R. 9 All. 366.

Registrar in this case was the officer properly constituted to receive the memorandum of appeal, in my opinion the appeal was then properly presented and filed on the 18th of August, 1922, and the court-fee payable was that prescribed by the Act which was then in force, namely, the old Court-Fees Act.

The chief question, therefore, for determination is whether the Assistant Registrar was the officer authorized to receive the memorandum of appeal in question. He has not been expressly so appointed by the rules of our Court. The Registrar, though on duty, was not in Patna those days. It has been urged that he had delegated his powers to the Assistant Registrar under rule 14 of Chapter II of our Rules. There is nothing to show that the powers were delegated by the Registrar under that rule, even if the Registrar had the power to do so, and that the receiving of the memorandum of appeal was not a judicial or quasi-judicial matter.

It is then said that the Assistant Registrar must be deemed by implication to have the powers of the Registrar delegated to him. This contention is based upon what is said to have been the practice prior to 1919 when the Deputy and the Assistant Registrar used to receive appeals during vacation. We do not know whether they did it under any delegation of powers made by the Registrar, or only as a mere matter of practice. I do not think that the delegation, if any, prior to 1919, will be of any avail for the year 1922. In order to apply rule 14 it must be clearly shown that there was a delegation by the Registrar of his powers to the Deputy or the Assistant Registrar before he left for Ranchi during the last vacation. Therefore rule 14 does not help the appellants in the present case.

Under rule 16, in the absence of the Registrar, his powers under rule 13, clauses (1) to (13), must be exercised by a Judge or Judges; in other words, the power of the Registrar to receive an appeal under clause (3) of rule 13 could only, during the vacation and in the absence of the Registrar, be exercised by a Judge

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of this Court. The memorandum of appeal should, therefore, have been, in the absence of the Registrar, presented to Adami, J., who was the Vacation Judge. Whether the receiving of a memorandum of appeal is a judicial act or not, rule 16 expressly says that it shall be only within the competence of a Judge or Judges of this Court, in the absence of the Registrar, to receive a memorandum of appeal, and in the face of this express provision I do not think that the Deputy or the Assistant Registrar could receive the memorandum of appeal in question. They could only perform such of the duties of the Registrar as were enjoined upon him under clauses (14) to (23) of the said rule. Therefore although, in my opinion, the appeal could be presented on the 18th of August, 1922, to the Registrar or a Judge of this Court, it was not properly presented to the Court or to the officer appointed by the Court under Order XLI, rule 1, of the Code of Civil Procedure. Therefore, the memorandum of appeal should be deemed to have been presented on the 23rd of October, 1922, when the Court re-opened and the Registrar actually received the document and noted on the order-sheet as having been filed on that date. The new Bihar and Orissa Court-Fees Act, which had already come into force before the 23rd of October, 1922, will apply to the present case, and hence the memorandum of appeal is insufficiently stamped to the extent and the value indicated by the Stamp Reporter.

The *vakalatnama* is also insufficiently stamped as is reported by the said officer.

The copies of the judgments and the decrees, to my mind, are properly stamped and bear sufficient court-fees, inasmuch as they were obtained before the present Act came into force; and therefore the fact that they were filed after the present Court-Fees Act came into force would not make those documents invalid and unreceivable under the new Court-Fees Act. This is also supported by the General Clauses Act, section 6, clause (c). The present Act cannot have the retrospective effect to impose a liability upon the appellants to

pay court-fee which they were not liable to pay on the date when the copies were obtained by them.

I understand that there are a number of cases of this nature. They will all be governed by this judgment.

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APPELLATE CIVIL.

Before Adami and Das, J.J.

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Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rules 3(4) and 11(2)—Guardian ad litem, appointment of—notice to minor, whether necessary—Natural guardian, right of, to be appointed—wishes of minor, when to be consulted.

When the court appoints a fresh guardian *ad litem* for a minor defendant under Order XXXII, rule 11(2), of the Code of Civil Procedure, 1908, it is not necessary to give notice to the minor. Rule 3(4) of that Order applies only when an application is made for the appointment of a guardian in the name, or on behalf of a minor, or by the plaintiff.

Rajendra Prasad v. Probodh Chandra Mitra(1), distinguished.

Although the mother of a minor, as his natural guardian, is the proper person to be appointed his guardian *ad litem* the mere fact that the court has appointed the minor's brother who was the *karta* of the joint family of which the minor was a member does not render the decree obtained in the suit void.

* Appeal from Original Order No. 225 of 1921, from an order of Mr. M. Zahur, Subordinate Judge of Muzaffarpur, dated the 26th July, 1921.

(1) (1921) 6 Pat. L. J. 82.