

applied for setting aside the abatement and for substitution. He chose, however, to appeal and even after the decision of the High Court against him he waited for nearly a month before making any application. Furthermore he made an application for substitution instead of for setting aside the abatement. In the circumstances it is difficult to see how the plaintiff could possibly be allowed any benefit from section 5. The order of the learned Subordinate Judge is manifestly wrong and without jurisdiction and should be set aside.

1922.
 MUSSAMMAT
 BIBI
 KHOZAIMA
 v.
 THE OFFICIAL
 LIQUIDATOR
 OF THE
 KAYESTHA
 TRADING
 AND
 BANKING
 CORPORATION,
 LIMITED.
 COUTTS, J.

I would accordingly allow this application and set aside the order of the learned Subordinate Judge.

DAS, J.—I agree.

Application allowed.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.

RAGHUBIR SINGH

v.

JETHU MAHTON.*

1922.

July, 25.

Hindu Law—Woman's estate—transfer of holding, effect of—suit by reversioner, whether notice to quit necessary—Chota Nagpur Tenancy Act, 1908 (Ben. Act VI of 1908)—Transfer of Property Act, 1882 (Act IV, of 1882), section 106.

If a Hindu woman in possession of a *raiyat* holding as a limited owner, transfers the holding, the next reversioner of the last full owner may, on the death of the limited owner, treat the transfer as a nullity, and in such a case he is not bound to sue to set aside the transfer.

Bijoy Gopal Mukerji v. Krishna Mahishi, Debi(1), applied.

*Letters Patent Appeal No. 3 of 1922.

(1) (1907) I. L. R. 34 Cal. 329; L. R. 34 I. A. 87.

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(See *Maharaja Kesho Prasad Singh v. Chandrika Prasad Singh* (1), Rep.)

The institution of a suit for possession by the reversioner is sufficient to shew that he treats the transfer as a nullity.

The interest of the transferee terminates on the death of the transferor and it is not necessary for the reversioner to serve the transferee with a notice to quit.

Query.—Whether, before instituting a suit for ejectment against an under-*raiyat*, it is necessary to serve a notice to quit on him either under the Chota Nagpur Tenancy Act, 1908, or under section 106 of the Transfer of Property Act, 1882.

Appeal under the Letters Patent by the plaintiffs.

The facts of the case material to this report are stated in the judgment appealed from which was as follows:—

The plaintiffs in this suit are the reversioners of one Manmohan Singh who was a tenant of land in Chota Nagpur. After his death the land was held by his daughter who granted a *mukarrari* lease to the defendant. The plaintiffs sued to eject the defendant, and the only question tried in the courts below was whether notice to quit was necessary before the suit could be brought. Both the courts decided that it was not. The defendant, holding under a *mukarrari* lease granted by a limited owner was, in my opinion, entitled to notice of the reversioners' intention to avoid the lease. It cannot be said that the lease granted by the daughter of Manmohan ceased to have any effect on her death and that thereafter the defendant ceased to be on the land under any title. His title only came to an end when the plaintiffs, the reversioners, showed their election to terminate the lease. It is contended on behalf of the respondents that the defendant was only a tenant at sufferance after the death of his lessor and consequently he was not entitled to notice. But, as I have already said, it cannot be said that the title of the defendant ended until the plaintiffs elected to terminate the tenancy. Consequently the defendant was not at any time before the suit was brought a tenant at sufferance.

Then it is contended that there is no provision in the Chota Nagpur Tenancy Act by which an under-tenant is entitled to notice. In my opinion under the general law as the defendant was on the land under a legal title he was entitled to notice to quit before being brought into court in an action in ejectment. I therefore disagree with the findings of the lower courts on this point. It appears, however, that the plaintiffs pleaded a verbal notice to quit in paragraph 14 of the plaint. This was denied in paragraph 4 of the written statement, and

an issue was raised "Is the alleged notice true and sufficient?" This issue was not decided, but, on my decision on the main question, this has to be decided.

1922.

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The result is that the present appeals must be decreed and the decrees of the lower courts set aside, and the suits remanded for trial of Issue No. 2; "Is the alleged notice true and sufficient?" Both the parties will be at liberty to adduce further evidence.

Atul Krishna Rai, for the appellants.

Abani Bhushan Mukerji, *Ambica Upadhya* and *Hari Bhushan Mukerji*, for the respondents.

DAWSON MILLER, C. J.—In my opinion this appeal is really governed by the decision of the Judicial Committee in the case of *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1). The suit was instituted by the reversioner of one Manmohan Singh who was a tenant of land in Chota Nagpur. After his death his daughter had been in possession during her life and had granted what is described as a *mukarrari* lease of the *raiya* holding to the defendant in the suit. Upon the death of the limited owner the plaintiff as nearest reversioner sued to recover possession.

The Judicial Committee have laid down in the case just referred to that in such a case the reversioner may treat the alienation which purports to extend beyond the life of the limited owner as a nullity and he may sue for possession at any time within twelve years of the death of the limited owner without first seeking to set aside the transfer in favour of the defendant. In other words if he elects to treat the transfer as a nullity after the death of the limited owner he may do so and there is nothing left in such a case to be set aside and he may sue for possession and is entitled to obtain possession. The present case is the case of a holding and in either case, it seems to me, all that is necessary for the reversioner to do is to exercise his option, and that he may do by merely bringing a suit to claim possession. If that is the proper view to take, and it appears to me that it is the view taken by their Lordships of the Judicial

(1) (1907) I. L. R. 34 C. 329; L. R. 34, I. A. 87.

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MILLER,
C. J.

Committee, it follows that from the moment the reversioner exercises his option there is nothing left in the transferee and the lease has terminated on the death of the limited owner. It was contended in this case that the defendant had acquired the interest at all events of an under-*raiyat* and that, therefore, he was entitled to notice to quit. Under the Chota Nagpur Tenancy Act there is no provision requiring notice to quit to be served upon an under-*raiyat* but even supposing that it is necessary that he should be served with a reasonable notice by his immediate landlord that is only because the tenancy does not terminate until such notice is given and one cannot sue in ejectment to recover land in the possession of a tenant until the tenancy has come to an end. If the only means by which such a tenancy could come to an end were by notice to quit I agree it would be necessary for the plaintiff to prove that notice had been given. But there are more ways than one by which a tenancy may determine. The limited owner had no power to grant a tenancy beyond her own life as against the reversioner, and once the reversioner elects to treat the interest granted to the defendant as an interest extending only for the life-time of the grantor, then, in such a case, it terminates upon the death of the grantor and there is therefore nothing more to be done to terminate the tenancy. The defendant becomes a trespasser if he refuses to turn out and the plaintiff is entitled to bring a suit in ejectment without giving any notice whatever. In my opinion these appeals ought to be allowed and the decree of the Subordinate Judge restored. The plaintiff is entitled to his costs in each appeal here and in the Courts below.

MULLICK, J.—I agree. There are authorities which show that an under-*raiyat* in Chota Nagpur may in certain circumstances be entitled to notice under section 106 of the Transfer of Property Act but that question does not arise in the present case. Here the defendant is liable to be ejected at the option of the reversioner unless he can show that he has acquired

any statutory right of occupancy. There is no suggestion of any such right here and the decree of the Subordinate Judge is therefore right.

Appeals allowed.

1922.

RAGHUBIR
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MAHTON.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Mullick, J.

SITAL FRASAD RAY

v.

ASHO SINGH.*

1922.

July, 26.

Code of Civil Procedure, 1908 (Act VI of 1908), Order XXXIV, rule 1, Order 1, rules 9 and 10—mortgage suit—parties—whether puisne mortgagee is a necessary party in suit on a prior mortgage.

Order 1, rule 9, of the Code of Civil Procedure, 1908, is not subordinate to Order XXXIV, rule 1.

Girwar Narain Mahton v. Mussammat Makbunessa(1), dissented from.

The combined effect of Order 1, rule 9, and Order XXXIV, rule 1, in so far as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more such persons should not have the effect of defeating the suit if the court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it.

If no decree can be passed without affecting the rights of absent parties the suit cannot proceed in their absence and should be dismissed.

If, however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests

* Second Appeal No. 524 of 1921, from a decision of E. L. Tanner, Esqr., District Judge of Santal Parganas, dated the 25th September, 1920, affirming decision of Babu Satish Chandra Mukherji, Subordinate Judge of Deoghar, dated the 28th June, 1920.

(1) (1916) 1 Pat. L. J. 468, *dictum*.