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natural-born son, to succeed, he must show that he is virtuous; but the question does not arise because the natural-born son in this case died soon after his birth and it cannot be suggested that he was not virtuous. If this particular form of adoption be the same as *Kritrima* form of adoption, then this passage in Vivada Chintamani (Tagore's Edition, page 287) is conclusive of the rights of the parties. If, on the other hand, this particular form of adoption is not the same as the *Kritrima* form of adoption, as I am inclined to think, the rule laid down by Bachaspati Misra must still apply since he has made it clear that where a natural-born son is in existence, he is entitled to exclude every other kind of son from sharing with him in the estate of his father.

In my opinion the suit was rightly dismissed by the learned District Judge and I must dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

MAHARAJA PRATAP UDAI NATH SAHI DEO

v.

MAHABIR SAHU.*

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May, 13.

Chota Nagpur Landlord and Tenant Procedure Act, 1879 (*Bengal Act I of* 1879), *section* 10(*b*), *scope of—clause* (*5*)—*Effect of proviso—Chota Nagpur Tenancy* (*Amendment*) *Act,* 1903 (*Bengal Act V of* 1903), *section* 5.

Every transfer of a raiyati holding effected after the 1st of January, 1903, falls within the purview of clause (*1*) of section 10(*b*) of the Chota Nagpur Landlord and Tenants Procedure Act as amended by the Chota Nagpur Tenancy (Amendment) Act, 1903.

* Appeal from Appellate Decree no. 1063 of 1922, from a decision of H. Foster, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 24th June, 1922, affirming a decision of B. Kshetra Nath Singh, Munsif of Ranchi, dated the 11th February, 1921.

Sebastian v. *Kuloda Prasad Deogharia* (1), *Braja Lal Dutta* v. *Kenaram Pal* (2) and *Ganpat Mahto* v. *Chotan Ram* (3), distinguished.

Appeal by the defendants.

This was an appeal by the defendants 1 and 5 and arose out of a suit brought by the plaintiffs for a declaration of their title to and recovery of possession of certain plots of land. It appeared that one Jagdam had a holding in *mauza* Okhar Garha of which the defendant no. 5, the Maharaja of Chota Nagpur, was the proprietor. On the 7th May, 1903, Jagdam executed two deeds in favour of Mussammat Mango. One of these deeds was a *zarpeshgi* deed for Rs. 159 in respect of a portion of the holding and the other was a *rehan* deed for Rs. 57 in respect of another portion of the same holding. Mussammat Mango took possession of the lands given to her under the *zarpeshgi* and the *rehan*. The plaintiffs 1 to 3 purchased the interest of Mussammat Mango under a deed of sale, dated the 13th December, 1916. They were, however, dispossessed by defendant no. 1 who claimed the holding of Jagdam under a settlement from the defendant no. 5 on the allegation that Jagdam had abandoned the holding and the Maharaja had taken direct possession of the land and settled the same with the defendant no. 1 in November 1917. There was a criminal case which was decided against the plaintiffs in May 1919 and the plaintiffs stated that they were dispossessed as the result of this criminal case. The suit was brought by the plaintiffs 1 to 3 who are the purchasers of the interest of Mussammat Mango and by the plaintiffs 4 and 5 who are the sons of Jagdam. The suit was contested by the Maharaja, the defendant no. 5, and by the defendant no. 1, and their case was that the original tenant Jagdam had abandoned the holding and that the Maharaja had taken possession thereof. It was further alleged that the transfer by Jagdam to Mussammat Mango was invalid under the

(1) (1910-11) 15 Cal. W. N. 43. (2) (1919) 4 Pat. L. J. 411.
(3) (1917) 42 Ind. Cas. 387.

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provisions of the Chota Nagpur Tenancy Act. After the filing of the plaint, and before the filing of the written statement, the plaintiffs 4 and 5 filed a petition on 6th May, 1920, in which they alleged that certain proceedings taken by the defendant no. 5 under section 73 of the Chota Nagpur Tenancy Act were correct and legal and they admitted that their father Jagdam had ceased to have any right to the disputed land and that these plaintiffs, namely, nos. 4 and 5, had no claim to the land and they asked that their claim might be dismissed and they might be exonerated from the liability of paying costs. The Munsif who tried the suit held that there was no abandonment and that the transfer to the plaintiffs 1 to 3 was not invalid under the provisions of the Chota Nagpur Tenancy Act. He refused to give effect to the application of the plaintiffs 4 and 5 and made a decree in favour of plaintiffs 1 to 3. On appeal by the defendants 1 and 5 the Judicial Commissioner has affirmed the decree of the Munsif.

S. M. Mullick and *B. C. De*, for the appellants.

G. S. Prasad and *A. Prasad*, for the respondents

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The principal question for decision in the present case is whether the transfer by Jagdam to Mussammat Mango under the two deeds of the 7th May, 1903, was valid having regard to the provisions of the Chota Nagpur Tenancy Act. The Act in force at the time the transfer was made was the Act of 1879 as amended by Bengal Act V of 1903. By section 5 of Act V of 1903 section 10(*b*) was inserted in the Act of 1879. This section 10(*b*) has been re-enacted in Act VI of 1908 and is now section 46 in the latter Act. Act V of 1903 came into operation on the 4th November, 1903. Section 10(*b*), which was enacted by section 5 of Act V of 1903, provided that no transfer by a *raiyat* of his right in his holding or any portion thereof by mortgage, or lease, for any period exceeding five years, or by sale, gift or any other contract or agreement should be

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valid to any extent. Clause (*5*) of this section provided that nothing in this section shall affect the validity of any transfer not otherwise invalid of a *raiyat's* right in his holding or any portion thereof made *bonâ fide* before the 1st day of January, 1903. The transfer in the present case took place on the 7th May, 1903, that is, after the 1st of January, 1903, and before the 4th of November, 1903. The question is as to whether a transfer of a *raiyati* holding effected between these two dates comes within the mischief of the section. It has been held by the learned Judicial Commissioner that section 10(*b*) had no retrospective effect and that although the transfer in question in the present case was made after the 1st of January, yet inasmuch as it was before the 4th November, 1903, when the Act came into operation, the transfer was valid. Now, in order to put this interpretation upon the wordings of the section the learned Judicial Commissioner had to introduce certain words into the section. He was of opinion that the words " made after this Act comes into operation " have to be added to clause (*1*) of section 10(*b*). In other words, he was of opinion that it is only transfers made after the Act came into operation that would be invalid under the provisions of this section. I am, however, of opinion that it is not permissible to add words to the section in order to construe it. We must construe the section as it stands, and, having regard to the language used, it is clear that all transfers, whether made before the Act came into operation or not, provided they were made after the 1st of January, 1903, would come within the provisions of this section. Clause (*5*) of the Act clearly saves transfers made *bonâ fide* before the 1st day of January, 1903. That shows the intention of the Legislature. That is, it is clear from clause (*5*) of the section that but for this exception all transfers even of a period prior to the 1st day of January, 1903, would have come within the operation of this section and the Legislature has deliberately saved transfers made *bonâ fide* before the 1st day of

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January, 1903, otherwise there appears to be no object in enacting clause (*5*) of the section. The learned Judicial Commissioner says that unless some such words, as he intends to add to the section, are added, the meaning of the first clause of the section would become absurd. In my opinion there is no absurdity in the section. Clause (*1*) provides that no transfer shall be valid if it purports to create an interest for a period exceeding five years and clause (*3*) of the section provides that no transfer in contravention of sub-section (*1*) shall be registered, or shall be in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction. On reading the different clauses of this section I am of opinion that it was clearly intended by the Legislature to provide that all transfers for a period exceeding five years of *raiyati* holdings should be invalid and the Courts were enjoined to refuse to recognize such transfer as valid. By clause (*5*) *bonâ fide* transfers and not all transfers were saved if made before the 1st day of January, 1903. The section is no doubt silent as regards the fate of the transfers between the 1st day of January and 4th November, 1903, but the meaning to my mind is plain and such transfers would come within the operation of the section.

Reliance has been placed upon certain decisions of this Court and of the Calcutta High Court. The case of *Sebastian* v. *Kuloda Prashad Deogharia*(1) was a case from Manbhum. The Chota Nagpur Tenancy Act was introduced in Manbhum by a notification of the Government, dated the 22nd December, 1909. In that case a deed of sale had been taken, by the petitioner to the High Court, on the 19th August, 1909, that is, before the Act was extended to Manbhum, and it was held that the deed of sale which was taken before the Act was extended to Manbhum, did not come within the operation of section 46 of the present Act which corresponds to section 10(*b*) of the

(1) (1910-11) 15 Cal. W. N. 48.

Act of 1879 as amended by Act V of 1903. This case was followed by a Division Bench of this Court in *Braja Lal Dutta* v. *Kenaram Pal*(1). That was also a case from Ranchi in Chota Nagpur where the Act came into operation in November 1903. In *Ganpat Mahto* v. *Chotan Ram*(2), the question related to the effect of section 47 of the present Chota Nagpur Tenancy Act. In that case a sale of a holding had been ordered by the Court before the Act came into operation and their Lordships held that the Act did not apply to an order already passed by a Court. The present case is distinguishable from all these cases and upon a plain reading of the section itself I am of opinion that the transfer by the original tenant Jagdam to Mussammat Mango by the deeds of 7th May, 1903, was invalid and by their purchase of the 13th December, 1916, the plaintiffs 1 to 3 acquired no valid interest in the holding. The transfer to Mussammat Mango and to the plaintiffs 1 to 3 being invalid, the title would remain in the heirs of the original tenant, namely, plaintiffs 4 and 5. The plaintiffs 4 and 5 by their petition expressly asked the Court to dismiss the claim so far as they were concerned. Having regard to the petition filed by these two plaintiffs, it is clear that the Court could not make a decree in their favour. The claim therefore of the plaintiffs must be dismissed.

In this view of the case the other questions referred to in the judgment of the learned Judicial Commissioner and argued by the learned Advocates on both sides do not arise. As regards the effect of the application filed by the plaintiffs 4 and 5 it was contended that it amounted to a surrender. The learned Judicial Commissioner relied upon the decision of the Calcutta High Court in *Syed Mohsenudddin* v. *Baikuntha Chandra Sutradhar*(3), which held that a tenant having created an encumbrance could not by an act of surrender derogate from the encumbrance

(1) (1919) 4 Pat. L. J. 411. (2) (1917) 42 Ind. Cas. 387.

(3) (1921) I. L. R. 48 Cal. 605, F. B.

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created by him. This decision of the Calcutta High Court has been expressly dissented from by a Full Bench of this Court in *Sheoraji Kuer* v. *Dhani Mian* (1).

As regards the finding of the learned Judicial Commissioner that the evidence on the record showed that there was no abandonment by the original tenant, that is a finding on a question of fact which is not open to us to interfere with in second appeal. But as I have said this question does not properly arise in view of the interpretation placed on section 10(*b*) of the Chota Nagpur Tenancy Act of 1879 and upon that interpretation the plaintiffs are not entitled to a decree.

The result is that the appeal will be allowed and the suit dismissed with costs.

Ross, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

1925.

June, 2.

HIA LAL KUMAR

v.

GENU MAHTO.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 182(2), *applicability of—Appeal, abatement of—application for execution—Limitation*—terminus a quo.

Where an appeal against one of the respondents had abated and a consent decree was passed in favour of the remaining respondents and the legal representatives of the deceased respondent applied for the execution of the decree within three years from the appellate Court's decree,

held, that the fact that the appellants allowed their appeal to abate against the deceased respondent could not

* Appeal from Original Order no. 249 of 1924, from an order of M. Wali Muhammad, Subordinate Judge of Bhagalpur, dated the 25th August, 1924.

(1) (1924) I. L. R. 3 Pat. 1.