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MAHARAJADHIRAJA OF DARBHANGA v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

COURTNEY TERRELL, C.J.

premium paid to insure the property against risk of damage or destruction. It is quite clear in this case that the premium could not be deducted unless it had been actually paid. Similarly in respect of paragraph (*IV*) which allows the deduction of interest on mortgages or charges, the deduction may not be made unless either the interest on the mortgage or charge has actually been made or unless the assessee is under a legal liability to pay the interest. I would, therefore, answer the question put to us " whether allowance of collection charges is to be made in respect of residential houses in fixing their annual value under section 9 of the Act " in the negative.

These two points conclude all the matters with which we have had to deal in this reference.

We award Rs. 100 as costs to the opposite party.

DHAVLE, J.—I agree.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

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July, 18, 21, 25.

RAMDHARI RAI

v.

GORAKH RAI.*

Abandonment—what constitutes—question of fact—inference drawn from facts found, whether question of law—suit by tenant for possession—settlement with defendant by landlord after the former had entered into land on his own account—suit, whether governed by Article 3, *Schedule III, Bengal Tenancy Act*, 1885 (*Act VIII of* 1885)—*title, whether passes on execution of sale-deed.*

In order that there might be an abandonment within the meaning of section 87 of the Bengal Tenancy Act, 1885, it

*Appeal from Appellate Decree no. 1037 of 1928, from a decision of Babu Krishna Sahay, Subordinate Judge of Chapra, dated the 4th April, 1928, reversing a decision of Babu Bhuban Mohan Lahiri, Munsif of Chapra, dated the 15th February, 1927.

must be shewn that the tenant had left the village in which the holding was situated without making any arrangement for payment of the rent.

Adiluddi Sheikh v. *Fajal Sheikh*(1), followed.

The question as to whether there has been an abandonment or not is a question of fact; but inference drawn from facts found as to whether there was an abandonment or not is a question of law.

Manohar Pal v. *Srimati Ananta Moyee Dassee*(2) and *Aswuni Kumar Dhupi* v. *Har Kumar Ghosh*(3), followed.

Where in a suit by a tenant for possession of his holding it was found that the landlord had settled the land with the defendant after the latter had entered into the land on his own account,

Held, that the suit was not governed by Article 3, Schedule III, Bengal Tenancy Act, 1885.

Sheikh Moharandi v. *Sheikh Asmat*(4) and *Sheikh Eradut* v. *Daloo Sheikh*(5), followed.

Rakhit Mahanta v. *Puddo Bauri*(6) and *Bheka Singh* v. *Nakchhed Singh*(7), distinguished.

Dwarka Chaudhuri v. *Iswari Pandey*(8), *Haran Chandra Barai* v. *Madan Mohan Barai*(9), *Bhadai Sahu* v. *Sheikh Monowar Ali*(10) and *Kedar Nath Mandal* v. *Mohesh Chunder Khan*(11), referred to.

Title passes to the vendee on the execution of the sale-deed although the purchase money may remain wholly or partly unpaid except where there is an agreement that the sale should take effect only if the consideration is first paid.

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(1) (1915) 19 Cal. W. N. 76, s. n.
(2) (1913) 17 Cal. W. N. 802.
(3) (1928) 32 Cal. W. N. 1111.
(4) (1926) A. I. R. (Cal.) 751.
(5) (1893) 1 Cal. W. N. 573.
(6) (1904) 9 Cal. W. N. 54.
(7) (1896) I. L. R. 24 Cal. 40.
(8) (1920) 58 Ind. Cas. 46.
(9) (1920) 25 Cal. W. N. 102.
(10) (1920) Cal. W. N. (Pat.) 91.
(11) (1918) 28 Cal. L. J. 216.

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Raju Mahton v. *Hossaini Mian*(1), *Narain Das* v. *Musammat Dhania*(2), *Bhonu Lal Chowdhury* v. *W. A. Vincent*(3), *Amirthathammal* v. *Periasami Pillai*(4) and *Baijnath Singh* v. *Paltu*(5), referred to.

Appeal by the defendants.

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

C. C. Das and *G. P. Sahi*, for the appellants.

Susil Madhab Mullick and *Ganesh Sharma*, for the respondents.

CHATTERJI, J.—This is a defendants' appeal from the decision of the additional Subordinate Judge of Chapra reversing the decree of the 4th Munsif of Chapra dismissing the suit of the plaintiff for an adjudication of his title and for recovery of possession after redemption of a zarpeshgi of defendant no. 7.

Shortly the plaintiff's case was that the lands in suit formed the holding of one Kheyali Rai who went out on a pilgrimage some time before the recent survey operations entrusting the management of the cultivation and the payment of rent to his gotias defendants 1 to 3 and that during his absence the said defendants in breach of trust got a settlement of the lands from the Bettiah Court of Wards and came to be recorded in the survey as tenants of the holding. Kheyali returned in 1919 and transferred his rights, for good and valid consideration, to the plaintiff by a kebala, dated the 14th August, 1919. Part of the lands was subject to a zarpeshgi for Rs. 60 in favour of defendant no. 7. The plaintiff tendered the money to him but he refused to accept setting up the title of defendants 1 to 3. The plaintiff accordingly brought his suit on the 3rd December, 1926, for an

(1) (1920) 59 Ind. Cas. 171.
(2) (1915) I. L. R. 38 All. 154.
(3) (1922) A. I. R. (Pat.) 619.
(4) (1907) I. L. R. 32 Mad. 325.
(5) (1908) I. L. R. 30 All. 125.

adjudication of his title and for redemption of the zarpeshgi of defendant no. 7 and for possession. The appellants contended that the claim was barred by general and special limitation and that about 16 or 17 years ago Kheyali Rai had left the village and had become a Fakir. They denied that they ever undertook to manage the cultivation or to pay the rents for him and set up a title by adverse possession for more than 12 years. The proprietor had treated the holding as abandoned and had settled the land in suit with the defendants in March, 1917. After Kheyali left his lands were parti for a year and then the defendants took possession. Defendant no. 1 was the heir and representative of Kheyali Rai. The plaintiff's kebala was without any consideration and was a mere device for gambling in litigation.

The learned Munsif held that Kheyali Rai left the village in 1914 and then the land was parti for about a year and in 1916 the defendant no. 1 took possession and on the report of the patwari the Bettiah Raj settled the lands with him on the 26th March, 1917. Kheyali had made no arrangements for the cultivation of his lands or for the payment of the rent. The proprietor had every right in the circumstances to treat the holding as abandoned and the defendants had acquired a good right to the land by the settlement obtained from the proprietor. He held that no consideration had passed for the kebala set up by the plaintiffs; it was invalid and without consideration. As the landlord was instrumental in Kheyali Rai's dispossession the claim of the plaintiff was barred by special limitation under Article 3 of Schedule III of the Bengal Tenancy Act. He accordingly dismissed the suit. On appeal the Additional Subordinate Judge held that Kheyali had left the village in 1912 and rent was being paid on his behalf probably by Nawjad Rai. As the payment of rent had been arranged before he left there was no abandonment and the Bettiah Raj was not entitled to treat the holding as abandoned or to settle the

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lands with the defendants. Kheyali had a subsisting title as also possession when he executed the kebala, Exhibit 5, in favour of the plaintiff who had, therefore, acquired good and valid title. The defendants being third parties had no right to challenge the kebala on the ground of non-payment of consideration and even if any portion of the consideration money was left unpaid the defendants as the reversioners of Kheyali Rai had lost all rights to recover by lapse of time. The special limitation under the Bengal Tenancy Act did not apply as the proprietor never had the intention of causing dispossession and the settlement was based upon a false and misleading report of the patwari. The limitation in the case was that of 12 years and the suit was quite in time. He, therefore, decreed the appeal and the plaintiff's suit. It is against this decree that there is this second appeal by the defendants.

The crucial point in the case is whether there was abandonment by Kheyali; that he had left the village on a pilgrimage is an admitted fact but the disputed question was as to when he left the village and whether he made arrangements while so leaving for cultivation of the land and for payment of the rent. The learned Subordinate Judge had found the point against the defendants. The only question is whether this amounts to such a finding of fact as is binding on us in second appeal. Mr. C. C. Das on behalf of the appellants contended that the learned Subordinate Judge in coming to the said finding has misdirected himself inasmuch as he came to his decision on two statements of Kheyali Rai, Exhibits *1* and *5*, showing the period for which he had gone out. Exhibit *1* was an application by Kheyali to the Bettiah Raj for mutation of his name in place of Nawjad Rai (defendant no. 1) and this application was dated 29th August, 1919. In it he stated that he was out on a pilgrimage for 4 or 5 years. The other statement was contained in the kebala (Exhibit *5*) which is dated 14th August, 1919. In it he stated

that he had gone out for some seven years and from these two statements the learned Subordinate Judge came to the finding that Kheyali had gone out some time in 1912 disagreeing with the Munsif who had held that Kheyali had gone out in 1914 and had given reasons for his finding. It was contended that though the earlier statement was that contained in Exhibit *5*, yet Exhibit *1* was the later statement and, at any rate, the two being contradictory the learned Subordinate Judge was not justified in giving preference to the statement in Exhibit *5* as he had given no reasons why the statement in Exhibit *1* had been discarded and which statement did justify the finding of the learned Munsif that Kheyali had left in 1914. It was also urged that the learned Munsif had gone into details and had come to his finding on an appreciation of the oral and documentary evidence in the case and the learned Subordinate Judge in appeal had not displaced any of those findings though the judgment was one of reversal. He accordingly urged that the matter is one which is open to be challenged even in second appeal. Now, it appears that the learned Subordinate Judge had not based his findings merely on the two statements, Exhibits *1* and *5*, but he gave other reasons also. He came to hold that there was nothing to show that Kheyali was in the village from 1912—18 and the counterfoils of the Bettiah Raj (Exhibit *4*) did show payment of rent in respect of the holding during the years 1320—1322 Fs., i.e., from 1913 to 1915, and that made it clear that arrangement for payment of rent had been made by him before he left. The plaintiff had led oral evidence about the arrangement for the payment of rent. The patwari had concealed the fact of rent being paid for those years while making his report and as Nawjad Rai was the nearest reversioner it must have been he who paid the rent in question. The patwari had made a misleading report colluding with the defendant no. 1 who is a peon in the service of the Raj. If Kheyali had left the village for good

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intending not to return it was only likely that Nawjad Rai (defendant no. 1) would apply at once to get his name mutated in respect of the holding. The revisional survey operations were soon to begin and it was considered wise and proper to take advantage of the situation and this was the reason which prompted the patwari to make this false and belated report only to accommodate Nawjad Rai. The mutation in the name of Nawjad Rai had been effected after concealing the true state of things from the Bettiah Raj. The conduct of Nawjad Rai as evidenced by Exhibit *2*, a petition of the same date, was also significant. Kheyali had asked for a mutation of his own name and for the removal of the name of Nawjad Rai, and Nawjad Rai was so much ashamed of his imprudent behaviour and was so full of the idea of the trust that he had abused that he yielded at once and filed the petition, Exhibit *2*, admitting Kheyali's statements and agreeing to his name being recorded. Under the circumstances it cannot be urged that the learned Subordinate Judge had come to his findings arbitrarily in the absence of any evidence in support, nor can it be contended that he had not taken the findings of the Munsif into consideration in coming to his own findings. I would hold accordingly that the matter is concluded by the finding of fact and as a matter of fact there was no abandonment by Kheyali.

As to whether there has been an abandonment or not within the meaning of section 87 is in each case a question of fact as held in *Manohar Pal* v. *Srimati Ananta Moyee Dassee*(1). At the same time the inference from facts found as to whether there was abandonment or not is a question of law as held in *Aswini Kumar* v. *Har Kumar Ghosh*(2). In order that there might be an abandonment under section 87 of the Bengal Tenancy Act, there must be a finding

(1) (1913) 17 Cal. W. N. 802. (2) (1928) 32 Cal. W. N. 1111.

that the tenant had left the village in which the holding was situated without making any arrangement for payment of the rent [*vide Adiluddi Sheikh* v. *Fajal Sheikh*(1)]. In this case the facts did show that Kheyali had made arrangements for the payment of rent during his absence on pilgrimage. Accordingly there was no abandonment within the meaning of section 87 of the Bengal Tenancy Act.

Mr. C. C. Das in the next place contended that the claim of the plaintiff is barred by the special limitation under Schedule III, Article 3 of the Bengal Tenancy Act. He urged that in the circumstances it ought to have been held that it was the Bettiah Raj who had effected the dispossession of Kheyali Rai by settling the land with the defendants in March, 1917. The report of the patwari might have been false and misleading but all the same the proprietor, the Bettiah Raj, had acted on it and had ordered the settlement in the name of the defendant no. 1 and the question is one which is quite apart from the finding on the question of abandonment. He relied on *Bheka Singh* v. *Nakchhed Singh*(3) to show that Article 3 of Schedule III of the Bengal Tenancy Act, prescribing a limitation of two years, is not restricted to suits against the landlord alone; it applies to a suit brought against a tenant with whom the land was settled by the landlord. He referred also to *Rakhat Mahanti* v. *Puddo Bauri*(3) to the same effect. The defendant no. 1 has been set up as a tenant by the landlord and if the dispossession is by him it is one really by the landlord and the limitation would be the special limitation provided in the Bengal Tenancy Act. The learned advocate for the respondent urged that these cases had no application on the facts. The defendants' case was that they entered into possession after Kheyali had left. They had created a zarpeshgi on the 25th April, 1916,

(1) (1915) 19 Cal. W. N. 76, s. n.
(2) (1896) I. L. R. 24 Cal. 40.
(3) (1904) 9 Cal. W. N. 54.

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in favour of defendants 4 and 6 and the father of defendant no. 5 and that was before the holding came to be settled with them by the Bettiah Raj in March, 1917, so that the dispossession was by them in the first instance and they had tried to make their title good by getting the patwari submit a false and misleading report and on the basis of that they had succeeded in obtaining the settlement. The proprietor had been kept from the knowledge of the real state of things through the devices and machinations of the defendants colluding with the Raj patwari and consent given under such circumstances was no consent at all. The defendants had not waited for the orders of the Bettiah Raj in effecting the settlement and it could not be said that the Raj had at all dispossessed the tenant Kheyali Rai. The article does not apply where the landlord is not responsible for the dispossession. The cases in support are: *Dwarka Chaudhuri* v. *Iswari Panday*(1); *Haran Chander* v. *Madan Mohan*(2); *Bhadai Sahu* v. *Sheikh Monowar Ali*(3); *Kedar Nath* v. *Mohesh Chunder*(4). He referred to *Sheikh Moharamdi* v. *Sheikh Asmat*(5) where it was held that where in a suit by a tenant for possession of his holding it was found that the landlord had no hand in the ouster and he recognised the defendant as a tenant after he had entered into the land on his own account and had kept the plaintiff out of possession, the suit was not barred by the two years' rule of limitation under Article 3, Schedule III. To the same effect is *Sheikh Eradut* v. *Daloo Sheikh*(6) where it was held that a suit brought by an occupancy raiyat to recover possession of his holding in which the landlord is no party, and there is nothing on the record to show that the landlord had any hand in the ouster of the plaintiff, is governed by 12 years' limitation, though the defendant might claim to hold under the

(1) (1920) 58 Ind. Cas. 46.
(2) (1920) 25 Cal. W. N. 102.
(3) (1920) Cal. W. N. (Pat.) 91.
(4) (1918) 28 Cal. L. J. 216.
(5) (1926) A. I. R. (Cal.) 751.
(6) (1893) 1 Cal. W. N. 573.

same landlord. In *Rakhat Mahanta* v. *Puddo Bauri*(1) there was an admitted finding that the landlord had set up the defendants to dispossess the plaintiff and is, therefore, distinguishable. The case of *Bheka Singh* v. *Nakchhed Singh*(2) is also distinguishable as the facts of the present case are quite different. I hold accordingly that the Subordinate Judge was right in holding that the case is governed by the rule of 12 years' limitation and not by the special limitation provided for by the Bengal Tenancy Act in Schedule III, Article 3.

Mr. C. C. Das finally contended that in this case the learned Munsif had come to clear finding on the evidence that no part of the consideration had passed; that the kebala on which the plaintiff relied was invalid being without consideration. The learned Subordinate Judge on appeal had not directed his attention to the evidence but had decided it on the ground that no third person had the right to question payment of consideration made by the beneficiary of a deed to the executant thereof. The defendant no. 1 being the next reversioner was not a mere stranger and had every right to challenge the bona fides of the kebala said to have been executed by Kheyali Rai. Rs. 900 was stated to have been the consideration out of which Rs. 640 went to satisfy the previous dues of the plaintiffs on *bahikhata* and all this evidence was found to be unreliable by the learned Munsif. It was next stated that Rs. 200 had been paid in cash to Kheyali Rai as he was about to go out on another pilgrimage. The evidence relating to this had also been found to be unreliable and as for the rest of Rs. 60 payable on the zarpeshgi of the defendant no. 7 it was the admitted case that it had not been paid even up to the date of the suit so that no part of the consideration had passed. He submitted that the transaction was only sham and nominal and was not intended to transfer title and accordingly mere

(1) (1904) 9 Cal. W. N. 54.
(2) (1896) I. L. R. 24 Cal. 40.

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execution and registration of the deed of sale does not necessarily indicate the transfer of ownership. Where neither the deed of sale nor possession of the property sold is delivered to the vendee and no consideration passes, the mere registration of the deed of sale does not operate to pass the title to the vendee [*vide Raju Mahton* v. *Hossaini Mian*(1)]. The learned advocate for the respondent replied that the title passes on the execution and registration of the deed though the purchase money may remain wholly or partly unpaid except where there is an agreement that the sale should take effect only if the consideration is first paid and no such point was either taken or proved in the case. Reference may be made to *Narain Das* v. *Musammat Dhania*(2); *Bhonu Lal Chowdhury* v. *W. A. Vincent*(3) and *Amirthathammal* v. *Periasami Pillai*(4).

It has also been held that after the completion of the sale by the registration of the instrument of transfer the purchaser can maintain a suit against the vendor for possession of the property sold notwithstanding non-payment of the purchase money [*vide Baijnath Singh* v. *Pattu*(5)]. On registration of the sale deed the vendee takes a good title although the deed contains fictitious entries in respect of part of the alleged purchase money. The plaintiff had produced Exhibit 5, the original kebala, which he got from Kheyali who had also the subsisting title to the land conveyed. Even if any part or the whole of the consideration remained unpaid the vendor had his appropriate remedies for recovery thereof by suit or by enforcing the statutory charge under section 55(4) (*b*) of the Transfer of Property Act.

On the facts of the present case and the state of the evidence I am disposed to hold that the learned

(1) (1920) 59 Ind. Cas. 171.
(2) (1915) I. L. R. 38 All. 154.
(3) (1922) A. I. R. (Pat.) 619.
(4) (1907) I. L. R. 32 Mad. 325.
(5) (1908) I. L. R. 30 All. 125.

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Subordinate Judge was right and the contention of the learned Counsel on behalf of the appellant cannot succeed. These being all, the contentions raised are found against the appellants. The appeal accordingly is dismissed with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Terrell, C. J. and Dhavle, J.

MAHARANI JANKI KUER

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

1930.

July, 28.

Income-tax Act, 1922 (Act XI of 1922)—royalties for preparing bricks, whether assessable to income-tax.

Sums received on account of royalties for preparing bricks are assessable to income-tax just as royalties on quarries or royalties on coal.

On the assessee's land there was a quantity of earth which was suitable for brick-making and licenses were granted to brick-makers to erect brick kilns upon the land in question and to take away brick earth and use it for the making of bricks. The assessee received remuneration in respect of the licenses which were granted at a rate of rent.

Held, that the income so derived was taxable.

Secretary of State in Council of India v. *Sir Andrew Sooble*(1) and *Roberts* v. *Lord Belhaven's Executors*(2), distinguished.

*Miscellaneous Judicial Case no. 119 of 1928. Reference under section 66(2) of the Income-tax Act of 1922, made by the Commissioner of Income-tax, Bihar and Orissa, dated the 1st November, 1928.

(1) (1903) Ap. Cas. 299 (303). (2) (1925) 9 T. C. 506.