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evidence on the record to support the contention of the defendants that there was a total failure of crops in consequence of the neglect of the landlords to maintain the irrigation system in good order. The learned Advocate for the appellants contends that, though he had given no such certificate in the memorandum of second appeal, he is entitled to raise this point now, because such a certificate has been given by him in the memorandum of appeal filed under the Letters Patent. This argument is, however, clearly fallacious. The appellants can succeed in these appeals only if they can show that the judgment of Dhavle, J. in second appeal is not correct, but on the case stated before us it is clear that Dhavle, J. was right in refusing to allow the appellants to raise the point before him in the absence of a certificate required by the rules. It is obvious that we cannot entertain in these appeals any point which the appellants were not competent to raise in second appeal.

As all the grounds raised on behalf of the appellants have failed, I would dismiss these appeals with costs. There will be only one set of hearing fee in both the appeals.

HARRIES, C. J.—I agree.

S.A.K.

Appeals dismissed.

APPELLATE CIVIL.

Before Harries, C. J. and Fazl Ali, J.

SHEIKH MOHAMMAD MURTAZA

v.

CYRIL INDERNATH DEY.*

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September, 1, 4: 5, 13.

Chota Nagpur Tenancy Act, 1876 (*Beng. Act VI of* 1876), *sections* 11, 208 *and* 211—*tenure-holder's transferee—failure*

*Appeal from Appellate Decree no. 718 of 1936, from a decision of F. F. Madan, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, Ranchi, dated the 11th June, 1936, confirming a decision of Babu Gobind Saran, Munsif of Palamau, dated the 29th June, 1935.

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to obtain registration in landlord's serishta, effect of—second proviso to section 211, meaning of—suit against recorded tenure-holders—transferees not made parties—decree and sale—sale, whether one under section 208—estate managed under Chota Nagpur Encumbered Estates Act, 1876 (Act VI of 1876)—owner represented in appeal by manager—death of owner—heirs not brought on record within time—appeal, whether abates.

Failure to comply with the provisions of section 11 of the Chota Nagpur Tenancy Act, 1908, does not entail forfeiture of rights in the tenure.

This rule, as laid down in *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(1), is not confined to the case of an heir, but applies to transferees generally.

Faridpur Loan Office, Limited v. *Nirode Krishna Ray*(2), *Manki Kanak Ratan* v. *Sundar Munda*(3) and *Karunamai Pandey* v. *Pradhan Ram Sewak Lall*(4), followed.

The effect of the second proviso to section 211 of the Chota Nagpur Tenancy Act, 1908, merely is that the claim under that section cannot succeed before the Deputy Commissioner if the claimant is not registered in the office of the landlord, but there is nothing in the section to suggest that the non-registration will also defeat the claimant in the suit which he is authorised to bring under section 211, clause (2), of the Act. There is also nothing in the section to show that the transferee's failure to get himself recorded in the landlord's serishta shall in every case, and as a matter of law, amount to a representation to the landlord that, in any suit which may be brought by him for recovery of rent, he is to assume that the transferee is represented by the old tenants.

Jagdishwar Dayal Singh v. *Pathak Dwarka Singh*(1), relied on.

Sham Chand Koondoo v. *Brojonath Pal Chowdhry*(5) and *Jitendra Nath Ghose* v. *Monmohan Ghose*(6), distinguished.

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1928) I. L. R. 56 Cal. 462.
(3) (1938) 20 Pat. L. T. 346.
(4) (1938) S. A. 760 of 1937 (Unreported).
(5) (1873) 21 W. R. 94.
(6) (1930) 34 Cal. W. N. 821, P. C.

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Where, therefore, the landlord brought a suit for rent without impleading the transferees of the tenure-holders who had parted with their interest in the tenure before the institution of the suit and it was found that the transferees had not been recorded in the landlord's serishta:

Held, that the decree obtained in the suit was not a rent decree and the sale held in execution of the decree was not a sale under section 208 of the Act, so as to affect the interest of the transferees in the tenure.

Where a respondent, who was the owner of an estate managed under the Chota Nagpur Encumbered Estates Act, 1876, and was represented in the appeal by the manager appointed under the Act, died and his heirs were not substituted within the prescribed period, *held* that the appeal abated notwithstanding the fact that the management of the estate continued to vest in the manager who was already on the record.

Hukum Chand v. *Rao Bahadur Singh*(1), referred to.

Appeal by the plaintiffs.

The appeal was in the first instance heard by Agarwala, J. who referred it to a Division Bench.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

B. C. De (with him *M. Azizullah* and *L. K. Chaudhuri*), for the appellants.

G. C. Mukherjee (with him *K. P. Upadhaya* and *Thakur A. D. Sinha*) and *Government Pleader*, for the respondents.

FAZL ALI, J.—The facts in so far as they are material to this appeal may be briefly stated as follows:—

It appears that in the district of Palamau there is a tenure which was formerly held by defendants nos. 9 to 11 and the father of defendant no. 8 under defendant no. 7, the superior landlord. In this tenure defendants 1 to 6 acquired 12-annas interest before 1927 and 1-anna interest after 1927 and the

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plaintiffs acquired the remaining 3-annas interest after 1928. In 1927 defendant no. 7 brought a suit for recovery of rent against defendants 9 to 11 and the father of defendant no. 8; and, in execution of the decree passed in that suit, the tenure was sold and purchased by a benamidar of the plaintiffs in 1928. Defendants 1 to 6 thereupon deposited the decretal amount and the sale was set aside. In 1930 defendant no. 7 brought another suit against defendants nos. 9 to 11 and father of defendant no. 8 for the rent of the years 1984 to 1987 Sambat. The suit was decreed and in execution of the decree the tenure was sold again and this time it was purchased by defendant no. 1. The plaintiffs then brought the present suit to recover possession of their share, their case being that the decree obtained by defendant no. 7 was not a rent decree inasmuch as the suit had been brought without impleading the plaintiffs, defendants nos. 1 to 6 and certain other persons who were necessary parties to the suit and accordingly the sale held in execution of the decree did not affect their share. The Courts below did not accept the plaintiffs' contention and dismissed the suit. They held amongst other things that inasmuch as neither the plaintiffs nor the defendants 1 to 6 were recorded as tenants in the landlord's sherista, the latter was entitled to sue the persons who were so recorded and that these persons must be deemed in the eye of law to have represented the plaintiffs and other tenants in the suit. The plaintiffs have accordingly preferred this second appeal.

Before dealing with the points raised on behalf of the plaintiffs I wish to dispose of a preliminary objection raised on behalf of the respondents. The objection is that the appeal has abated, because the plaintiffs failed to substitute within the time prescribed by law the heirs of defendant no. 7 who had died sometime after the appeal was filed but before it was heard. On a reference to the record it appears that the appeal was filed on the 21st September, 1936,

and defendant no. 7 died on the 19th December, 1937, after notice of the appeal had been served on him. The Court was informed of the death of this defendant on the 31st October, 1938, and on the 16th November, 1938, the appellants filed an application in which after stating that they had come to know about his death for the first time on the 31st October, 1938, they prayed that the delay in making the application might be excused and his heirs be substituted in his place. On the 15th December, 1938, the appeal was put up for hearing before Agarwala, J. who after hearing the parties passed the following order:—

"Let the record be amended by substituting for the name of Kuar Jagatmohan Nath Sahi Deo, the names given in paragraph 8 of the petition for substitution.

Mr. De states that this will serve his purpose but the legal effect of this amendment will be considered at the time of the hearing."

On 13th February, 1938, Agarwala, J. referred this case to a Division Bench.

It appears that at the time when defendant no. 7 died his estate was being managed under the Chota Nagpur Encumbered Estates Act (VI of 1876) and he was represented in the appeal by a manager appointed under the Act. In *Hukum Chand* v. *Ran Bahadur Singh*(1) the Privy Council dealing with the status of a manager appointed under the Act has pointed out that he "is in the eye of the law fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office." The position in law therefore was that after the death of defendant no. 7 the management of the estate continued to vest in the manager who was already on the record and he was the only person who could under section 21B of the Chota Nagpur Encumbered Estates Act represent the heir or heirs of defendant no. 7 (the new holders) in the appeal. Such being the case, it is argued on

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behalf of the appellants that no question of abatement arises in the appeal and all that was necessary for them to do was to ask for a formal amendment of the memorandum of appeal by introducing the names of the heirs of the deceased defendant.

In my judgment the answer to this argument is provided by section 21B of the Chota Nagpur Encumbered Estates Act which is the very section on which the appellants rely. That section runs as follows:—

> "During the period of management—
>
> (1) every suit or appeal by the holder shall be instituted in his name by the Manager;
>
> (2) in every pending suit or appeal in which the holder is plaintiff or defendant, the Manager shall be named as the representative of the holder for the purposes of suit or appeal; and no application in any such suit or appeal shall be made to the Court on behalf of the holder except by the Manager;
>
> (3) no person other than the Manager shall be ordered to sue or to be sued as next friend or guardian, or be named as guardian of the holder for a pending suit; and
>
> (4) the Court, upon application by the Manager or by any party to a suit, may order that the plaint or memorandum of appeal be amended so as to conform with the requirements of clause (1), or that the Manager be named as the representative of the holder as required by clause (2) of this section."

It is to be noted that under this section the suit or appeal is to be instituted in the name of the holder and it is he who is to be described as plaintiff or defendant. No doubt the holder cannot be represented by any other person than the manager nor can he make any direct application so long as the management of the estate is vested in the manager. The fact, however, remains that the manager can figure in the suit or appeal only as a *representative* of the holder and *not as a principal*. Thus at least technically the substitution of the heirs of defendant no. 7 was necessary and such substitution not having been made in time, the appeal abated as against defendant no. 7. The fact, however, remains that

the heirs of defendant no. 7 could not be represented in the appeal otherwise than through the manager who was already on the record and for that reason and also because I fully believe the statement made by the plaintiffs in their affidavit, dated the 16th November, 1938, I am of the opinion that this is a proper case for setting aside the abatement assuming that it has not been set aside already by the order passed by Agarwala, J. on the 15th December, 1938.

In the application made by the appellants on the 16th November, 1938, which was in substance an application for setting aside the abatement, they have clearly stated that they came to know of the death of defendant no. 7 for the first time on the 31st October, 1938. This statement is supported by an affidavit which I have no reason to disbelieve. It is stated in a counter-affidavit filed on behalf of the respondent that a co-sharer of the plaintiff had attended the sradh ceremony of defendant no. 7 after his death and from this we are asked to infer that the plaintiffs must have known about the death of defendant no. 7 long before the 31st October, 1938. In my opinion such an inference is wholly unwarranted. There is no statement in the counter-affidavit that the co-sharer of the plaintiffs actually informed them either of the death of defendant no. 7 or his having attended his sradh. I am also not prepared to believe that in spite of being aware of the death of defendant no. 7 the plaintiffs did not deliberately take any action to substitute his heirs. In my opinion the plaintiffs have made out a strong case for excusing the delay in making their application for substitution and the abatement should be set aside.

The next point to be decided is the main question in the appeal, viz., whether the sale impugned by the plaintiffs affected their share in the tenure in dispute. It is common ground that at the time when the suit for rent was brought, the defendants of that suit had parted with their interest and

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the tenure was in possession of the plaintiffs and defendants 1 to 6. That being so, the present case in my judgment is governed by the decision of the Privy Council in *Jagadishwar Dayal Singh* v. *Pathak Dwarka Singh*(1). In that case a landlord had brought a suit for rent without impleading the widow of one Maheshanand, one of the tenants, who had died before the institution of the suit and it was found that this widow had neither been recorded in the landlord's sherista nor had she paid any rent to the landlord as a tenure-holder. Notwithstanding these facts the Privy Council held that the decree obtained in that suit was not a rent decree and the revenue court had no jurisdiction to order a sale of the property under section 208 of the Chota Nagpur Tenancy Act. Their Lordships referred in the judgment to section 11 of the Chota Nagpur Tenancy Act which runs as follows:—

"When any tenure or portion thereof is transferred by succession, inheritance, sale, gift or exchange, the transferee or his successor in title shall cause the transfer to be registered in the office of the landlord to whom the rent of the tenure or a portion is payable."

The argument which seems to have been put forward before the Privy Council was that the failure of the widow of Maheshanand to have her name entered in the landlord's sherista as provided by section 11 along with the fact that she had never paid rent to the landlord or been recognised by him as a tenure-holder entitled him to proceed with the sale of the tenure under section 208 without joining her as a defendant. Their Lordships overruled this contention and observed as follows:—

"Their Lordships agree with the High Court. No such sanction as forfeiture of right in the tenure in respect of failure to comply with the provisions of section 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in sub-section (4)."

(1) (1933) I. L. R. 12 Pat. 626, P. C.

It is contended by the learned Advocate for the respondent that this decision cannot govern the present case, first, because in this case it has been found as a fact by the Courts below that the plaintiffs were represented in the rent suit by the persons who were sued as tenants and, secondly, because the case before the Privy Council was one affecting a person claiming an interest in a tenure by succession and not as a transferee.

The first point admits of a simple answer. The finding of the Judicial Commissioner as to the representation of the plaintiffs in the rent suit is based on the following two grounds only: (*1*) that the purchase of the tenure by the plaintiffs in the sale held in 1928 in execution of the decree passed in rent suit of 1927 raised the inference that they had no objection to the suit having been brought against defendants 9 and 10 and father of defendant no. 8; and, (*2*) that their failure to get their names recorded in the landlord's sherista raised the presumption that they were willing to be represented by the persons who stood recorded as tenure-holders in the landlord's office.

In my opinion neither of these two grounds can be supported in law. The plaintiff's purchase at the sale of 1928 is wholly irrelevant because at that time they had no interest in the tenure and, that being so, it is meaningless to say that either in the suit of 1927 or in the execution proceedings which followed the decree passed therein they had allowed themselves to be represented by the old tenants. The second ground is equally untenable because if that is a good ground, the decision of the Privy Council should have been quite different in *Jagdishwar Dayal Singh's* case(1).

The next point to be decided is whether the decision of the Privy Council in *Jagdishwar Dayal Singh's* case(1) applies to the case of a transferee.

(1) (1933) I. L. R. 12 Pat. 626, P. C.

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So far as this point is concerned, the learned Advocate for the respondents relies strongly on certain observations made by Couch, C. J. in *Sham Chand Koondoo* v. *Brojonath Pal Chowdhry*(1), a case decided under Act X of 1859. The observations were to the following effect:—

"It appears to me taking sections 105 and 106 together with proviso, that it was intended that the zamindar should be at liberty to treat as the holder of the tenure, and the person whom he might sue for arrears of rent, the person who is registered in his book as the owner, unless any one could show that there had been a transfer and that there was sufficient cause for its non-registration."

The learned Advocate for the respondents contends that because section 211 of the Chota Nagpur Tenancy Act corresponds exactly to sections 105 and 106 of Act X of 1859 the rule laid down by Couch, C. J. applies fully to a case governed by the former Act and in support of his argument has referred us to the following observation made by Sir George Lowndes in delivering the judgment of the Judicial Committee in *Jitendra Nath Ghose* v. *Monmohan Ghose*(2):—

"Before the Act of 1885 (The Bengal Tenancy Act) came into force, the duty was laid specifically upon the transferee of a tenure to see that his name was recorded in the landlord's sherista, and it may well have been that, if he failed without reason to do this, he could not be heard to object to a decree passed against the recorded tenants, even though their interest in the tenure had in fact ceased. But the Act of 1885 made a radical change in this respect."

According to the learned Advocate for the respondent these observations show that the rule

(1) (1873) 21 W. R. 94.
(2) (1930) 34 Cal. W. N. 821, P. C.

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laid down by Couch, C. J. has been approved by the Privy Council and he contends that this is an additional ground for applying it to the present case.

A reference to section 211 will show that this provision corresponds more or less to Order XXI, rule 58, of the Code of Civil Procedure. Clause (*1*) of the section states that if before the date fixed before the sale of any tenure or holding in pursuance of section 208 a third party appears before the Deputy Commissioner and alleges that he and not the person against whom the decree has been obtained was in lawful possession or had some interest in the tenure or holding when the decree was obtained, the Deputy Commissioner shall examine such party and if he sees sufficient reason for so doing and if such party deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale and shall after taking evidence adjudicate upon the claim. Then follow two provisos to the section. The first proviso states that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed; and the second proviso runs thus:—

> "Provided also that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner."

It appears to me that the effect of the two provisos is that in the summary enquiry which the Deputy Commissioner is required to hold under section 211 the claimant can be put out of Court at once if it appears either that his claim was designedly or unnecessarily delayed, or that he is not registered in the office of the landlord and there was no sufficient cause for non-registration. The effect of the second proviso is merely this that the claim cannot succeed before the Deputy Commissioner if the claimant is not registered in the office of the landlord, but there is nothing in the section to

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suggest that the non-registration will also defeat the claimant in the suit which he is authorised to bring under section 211, clause (2) (which corresponds to Order XXI, rule 63). There is also nothing in the section to show that the transferee's failure to get himself recorded in the landlord's sherista shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants. The view that section 211 cannot bear the meaning attributed to it by the learned Advocate for the respondent is confirmed by the decision of the Privy Council in *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(1) wherein their Lordships considered both sections 11 and 211 of the Chota Nagpur Tenancy Act. In dealing with section 11 they expressly dealt with the case of a transferee and observed as follows:—

"No such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of section 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in sub-section (4)."

These observations show that their Lordships decided the case before them on a broad ground and did not intend to draw a distinction between a transferee and an heir. Further the rule laid down in that case has been applied by the Calcutta High Court as well as by this Court to protect transfers in several cases—[*see Faridpur Loan Office, Limited* v. *Nirode Krishna Ray*(2); *Manki Kanak Ratan* v. *Sundar Munda*(3) and *Karunamai Pandey* v. *Pradhan Ram Sewak Lall*(4), decided by a Division Bench of this Court on the 19th December, 1938.]

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1928) I. L. R. 56 Cal. 462.
(3) (1938) 20 Pat. L. T. 346.
(4) (1938) S. A. no. 760 of 1937 (unreported).

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In my opinion the sale impugned by the plaintiffs was not a sale under section 208 of the Chota Nagpur Tenancy Act because all the tenure-holders were not represented in the suit. The sale, therefore, did not affect the plaintiffs' three-annas share in the tenure and they are accordingly entitled to a decree for possession so far as that share is concerned.

I would, therefore, allow this appeal, reverse the decision of the Courts below and direct that a decree be passed declaring that the plaintiffs' three-annas share is not affected by the sale, and that they are entitled to recover possession of that share. The plaintiffs will be entitled to costs in the Courts below as well as in this Court as against respondent no. 1 (the principal contesting defendant); but so far as respondents nos. 7(*a*) to 7(*g*) are concerned, there will be no order for costs because the plaintiffs have failed to establish that the sale brought about by defendant no. 7, the predecessor in interest of these defendants, was tainted with fraud.

HARRIES, C. J.—I agree and have nothing to add.

S. A. K.

Appeal allowed.

FULL BENCH.

Before Harries, C.J., Fazl Ali and Agarwala, JJ.

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August, 9. September, 11, 26.

LACHMESHWAR PRASAD SHUKUL.

v.

GIRDHARI LAL CHAUDHURI.*

Federal Court Appeal—Privy Council Appeal—Code of Civil Procedure, 1908 (Act V of 1908), Order XLV, rules 7(1) and 17—High Court, whether has power to extend time to deposit printing cost in such appeals beyond the limits

*In the matter of Federal Court Appeals nos. 10, 14 and 17 of 1939.