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CHANDI PRASAD NANDI v. RAGHUNATH DHAR.

The Sudder Ameen held, that the decree was barred by lapse of time, as no effectual step had been taken by the decree-holder within three years from the 27th September 1860 to 30th August 1864, which was confirmed by the Judge, on appeal.

An application was made for a review of the judgment, and the Judge held, that the decree was not barred by lapse of time, as the period during which the decree remained under attachment, should be deducted from the calculation of the three years' limitation. He accordingly decreed the appeal.

The judgment-debtor appealed to the High Court, on the ground that the period, during which the decree remained under attachment, should not have been deducted from the calculation of the period of three years.

Baboo *Mati Lall Mookerjee* for appellant.

None for respondent.

The judgment of the Court was delivered by

BAYLEY, J.—We consider that the period for which the decree was under attachment, and was consequently in a state in which the decree-holder could exercise no due diligence, nor take any effectual proceedings in furtherance of his decree, has been properly deducted by the lower Appellate Court.

The appeal is accordingly dismissed.

Before Mr. *Justice Norman and Mr. Justice E. Jackson.*

FAKIRUDDIN MOHAMMED AHASAN (PLAINTIFF) *v.* MR C. J. PHILLIP'S (DEFENDANT)*

1869
May 8

Stipulation in Lease—Collections by Sezawal—Continuing Liability of Tenants.

It was stipulated in defendant's lease that, on his failing to pay any instalment of the rent, plaintiff might appoint a sezawal to collect direct from the under-tenants.

Held, that the appointment of such a sezawal did not determine defendant's lease, and that he was still liable for any deficiency in the rent after the sezawal's collections were credited.

IN this case plaintiff sued defendant as izardar under an agreement by which defendant agreed to pay an annual rent of rupees 1,246 in certain instalments, and in which it was stipulated that, on failure to pay any one of the instalments, plaintiff should appoint a sezawal to collect the rents from ryots, defendant paying the sezawal's salary. In Aswin 1273 (September 1866) plaintiff appointed a sezawal, who collected rupees 919-5. A sum, of rupees 100

*Special appeal, No 2970 of 1868, from a decree of the Judge of Rajshahye, dated the 12th June 1868, modifying a decree of the Deputy Collector of that district, dated the 7th March 1868.

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was also paid by defendant for that year. This left a balance of rupees 226-11, which amount, *plus* sezawal's wages (rupees 245), plaintiff sued to realise. Defendant's contention was that, as he had been deprived of possession by the appointment of a sezawal, he was not liable for any deficit in the collections.

The Judge held that the defendant was not liable for any arrears accruing subsequently to Aswin 1273, when the lease was virtually determined by the appointment of a sezawal. It was (he held) for plaintiff to show clearly that the collections made under his orders did not include any on account of prior months. This he had not done; and crediting the collections to the eralier kists of the year in due order, the Judge found that up to Aswin there had been no deficiency in the rent for which defendant could be held liable. The cases relied on by the judge were of *Mr. J. Dalrymple* v. *Bhajan Saha* (1) and *Anundmoyi Debya* v. *KhirodhurHoldar* (2).

Mr R *E Twidale* for appellant.

Baboo *Iswar Chandra Chuckerbutty* for respondent.

On special appeal, the following judgment was delivered by

NORMAN, J.—The Judge is wrong, and there must be a remand. The case is an exceedingly simple one. The defendant took a lease from the plaintiff from 1270 to 1275, at a rent of rupees 1,200 a year. There was a provision in the lease that, if the rents were not paid, the plaintiff would be at liberty to appoint a sezawal and make the collection himself, and the defendant was to appoint a person to see that the collections were duly made, and the accounts properly kept by the sezawal.

The rents of 1273 not having been paid, the plaintiff appointed a sezawal and made considerable collections.

(1) *Before Mr. Justice Raikes, Mr. Justice Bayley, and Mr. Justice Steer.* MR J. DALRYMPLE (PLAINTIFF) *v.* BHAJAN SAHA (DEFENDANT)

" In this case the plaintiff sued to recover a balance of rent, on the averment that his lessee having defaulted, he appointed a sezawal to collect the rents, and the sum now claimed is the difference between the amount collected by the sezawal and the amount of rent as per the lessee's kabuliat. The Judge has held that, as the sezawal was allowed to keep possession of the tenure for several years until the expiry of the lease, the tenant cannot be held responsible for any deficiency in the collections whilst under the management of the plaintiff's agent, the sezawal. The Judge quotes the precedent of this Court at page 757 of the decision for 1857 in support of this view. The special appeal is, that the lease itself specially provided for the management of the tenure in the mode adopted by plaintiff on the occurrence of any default on the part of the lessee; that therefore the precedent is not in point, and the Judge's decision wrong.

We have referred to the leasee, which, in the usual terms provides for the deputation of a sezawal; 'as allowed by law,' on the occurrence of a balance; and as the law only contemplates such occupation of the proprietor during the current year, we hold the lessee cannot be considered as contemplating more. We reject the appeal with costs.

(2) 2 W. R., Act X. Rul., 46.

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The Judge supposes that, by the appointment of a sezawal, the plaintiff evicted the defendant and turned him out of the land demised; consequently he held that the plaintiff could not be made liable for the arrears of rent which accrued subsequently to the appointment of the sezawal in the month of Aswin 1273; and as the collections made by the sezawal exceeded the amount of rent due up to that date, the Judge was of opinion that there was nothing in respect of which the plaintiff was entitled to a decree in this suit. We think that in this suit, which is a suit for rent under Act X. of 1859, the plaintiff is entitled to a decree for arrears of rent, at the rate of rupees 1,200 per annum, as claimed in his plaint From the total rents which were originally due must be deducted what the plaintiff has received on account of those rents. In order to see what was the amount realized by him and applicable to the satisfaction of his claim, we must take not the gross rents collected from the ryots by the sezawal, but the net profits, that is to say, the realization less what in this case called the "wages of the sezawal," or, in other words, the cost of collection. The ultimate balance of the account is the rent due to the plaintiff.

The two cases referred to by the Judge do not show that a lease is avoided by the appointment of a sezawal. In the latter case, which was an Act X suit, the plaintiff sought to make the defendant responsible for fraudulent conduct on the part of the sezawal who had apparently embezzled rents collected by him. In the case in 1862, the plaintiff had kept a sezawal for a length of time, and treated the tenure as having been resumed by him.

In the present case the sezawal was making the collections under the inspection of the defendant himself; and it is clear that, by the original contract, the parties intended to treat the interest of the defendant as continuing, notwithstanding the appointment of the sezawal.

The case is remanded to be re-tried with reference to the above remarks. The appellant will get his costs of this appeal.

Before Mr. Justice Loch and Justice Mitter.

SHIB JATON ROY (PLAINTIFF) *v.* PANCHANAN BOSE AND OTHERS (DEFENDANTS.)*

1869
May 10.

Declaratory Decree—Act VIII. *of* 1859, *s.* 15.

Where a defendant resists the plaintiff's title, he cannot afterwards object that a suit for a declaratory decree will not lie.

SEE ALSO 15 B.L.R. 82

THE plaintiff sued, under section 15 of Act VIII. of 1859, for a declaration of his right and title to certain lands, which he stated had been wrongly surveyed in villages not belonging to him, but of which he was still in possession.

*Special Appeal, No. 1371 of 1868, from a decree of the Judge of Jessore, dated the 11th March 1868, reversing a decree of the Subordinate Judge of that district, dated the 29th December 1867.