APPELLATE CIVIL.

Before Coxe and Ray, JJ.

1913

June 16

ANANDA CHANDRA ROY

v.

ABDULLAH HOSSEIN CHOWDHURY. *

Sale—Contract for sale—Transfer of Property Act (IV of 1882), s. 54—Patni—Rent, liability for — Mere possession without assignment of—Lease, effect of.

A contract for sale, as defined by s. 54 of the Transfer of Property Act, does not of itself create an interest in property, and therefore a mere agreement to buy does not create a liability to pay the rent of the tenure, the subject-matter of the contract for sale.

Cox v. *Bishop* (1) and *Chaturbhuj Morarji* v. *Bennett* (2) referred to.

Mere possession of a *patni* will not render a man liable for rent if the lease has not been assigned to him.

Close v. *Wilberforce* (3), *Sanders* v. *Benson* (4), *Flight* v. *Bentley* (5) and *Walsh* v. *Lonsdale* (6) referred to.

Prosunno Coomar Paul Chowdhury v. *Koylash Chander Paul Chowdhury* (7), *Macnaghten* v. *Bheekaree Singh* (8), *Kasi Kinkar Sen* v. *Satyendra Nath Bhadra* (9) and *Abdul Rab Chowdhury* v. *Eggar* (10) distinguished.

APPEAL by Ananda Chandra Roy, the defendant No. 3.

This appeal arose out of a suit to recover arrears of rent with interest brought by the plaintiff against

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* Appeal from Original Decree, No 513 of 1910, against the decree of Keshori Lal Sen, Subordinate Judge of Dacca, dated May 31, 1910.

(1) (1857) 8 DeG. M. & G. 815.
(2) (1904) I.L.R. 29 Bom. 323.
(3) (1838) 1 Beav. 112.
(4) (1841) 4 Beav. 350.
(5) (1835) 7 Sim. 149.
(6) (1882) L.R. 21 Ch. 9.
(7) (1867) 8 W. R. 428.
(8) (1878) 2 C.L.R. 323.
(9) (1908) 15 C.W.N. 191.
(10) (1907) I.L.R., 35 Calc. 182.

Mr. Weatherall, the estate of Mr. Garth represented by the Administrator-General, and Babu Ananda Chandra Roy.

It appears that by a certain exchange of properties Mir Mohamed Muzzaffar Husain and Mir Mohamed Abdul Rub became owners of certain properties which were leased out to Mr. Weatherall and the late Mr. Garth by a kabuliyat dated 20th Bhadra, 1300. Among other conditions, Messrs. Weatherall and Garth undertook to pay a fixed annual *mukarari patni jamah* of Rs. 3,000 in four equal instalments, promising further, in case of default of any *kist*, interest at the rate of 1 per cent. per month.

After the death of Mir Mohamed Muzaffar Husain and Mir Mohamed Abdul Rub, the plaintiff succeeded to the ownership and possession of the entire properties held by them, and he instituted a rent suit against defendants 1 and 2, suit No. 5 of 1905, at Dacca, and obtained a decree against them which was subsequently confirmed by the High Court.

In the present suit the defendant No. 3 was made a defendant along with the other two defendants, because it came to light in suit No. 344 of 1905 of the Original Side of the High Court that the defendant No. 3 had an equal share in the lease with Messrs. Weatherall and Garth.

Mr. Weatherall did not appear. The Administrator-General and Babu Ananda Chandra Roy appeared and filed written statements. The Administrator-General contested the suit on the ground that no notice was served upon him under section 80 of the Civil Procedure Code, 1908, and the omission was fatal to the suit.

Babu Ananda Chandra Roy contested the suit on the ground that no direct relationship of landlord and tenant ever existed between him and the plaintiff

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or his two predecessors, and as such the plaintiff had no cause of action against him.

The learned Subordinate Judge dismissed the suit as against the Administrator-General, but decreed it against Mr. Weatherall and Babu Ananda Chandra Roy.

Babu Ananda Chandra Roy appealed to the High Court.

Mr. B. Chakravarti, for the appellant, contended that no relationship of landlord and tenant ever existed or exists between the plaintiff and the appellant, and the appellant therefore could not be made liable for the rent of the *patni*. The allegation of the plaintiff that the memorandum of agreement of 1898 (Ex. B) created the relationship of landlord and tenant could not be supported or sustained. The memorandum of agreement could not be construed as a deed of sale. It was, at the highest, an agreement to sell on certain terms to be settled hereafter. It could never have the effect of a sale, since no right under it was transferred or vested in the appellant. No conveyance was executed, therefore no right or interest in the appellant could come into existence: s. 54 of the Transfer of Property Act. *Cox* v. *Bishop* (1) has been followed in India in *Chaturbhuj Morarji* v. *Bennett* (2).

The first Court has wrongly held the appellant liable upon statements made by him in Exhibits 16, 9_1, 9_2 and 13. These statements were neither more nor less than what the appellant thought, and wrongly thought, to be the effect of the memorandum of agreement of 1898 (Ex. B).

The finding of the first Court that the appellant was in possession of the *patni* is not justified by the evidence. But even if the appellant was in possession, the mere fact of possession would not make him liable

(1) (1857) 8 DeG. M. & G. 815. (2) (1904) I. L. R. 29 Bom. 323.

for rent: *Cox* v. *Bishop* (1), *Bagat Tyre Co.* v. *Clipper* (2) and *Ramage* v. *Womack* (3).

The whole suit should have been dismissed, as the Administrator-General was not made a party to the suit according to the requirements of the law, and as the claim against him has been dismissed. The liability for rent in this case was a joint liability, and not a joint and several liability: *see* Ex. 3. Hence the whole suit must fail: *Kasi Kinkar Sen* v. *Satyendra Nath Bhadra* (4), and *Abdul Rab Chowdhury* v. *Eggar* (5). A *patni* can only be created by a registered deed.

Dr. Rashbehari Ghose, for the respondent. The appellant was liable for rent apart from any conveyance, inasmuch as he has been in possession of the properties and has been realizing the profits: *Close* v. *Wilberforce* (6), *Sanders* v. *Benson* (7), *Flight* v. *Bentley* (8), *Walsh* v. *Lonsdale* (9). *Cox* v. *Bishop* (1) is not the law in India, and has not been followed here. *Prosunno Coomar Paul Chowdhury* v. *Koylash Chandra Paul Chowdhury* (10) lays down a different principle. The case of *Cox* v. *Bishop* (1) was not even cited there: *Macnaghten* v. *Bheekaree Singh* (11).

The liability for rent is a joint and several liability, and the plaintiff is entitled to sue anyone of the tenants.

Kasi Kinkar Sen v. *Satyendra Nath Bhadra* (4) is distinguishable, and *Abdul Rab Chowdhury* v. *Eggar* (5) is a wholly different case.

Cur. adv. vult.

(1) (1857) 8 DeG. M. & G. 815.
(2) [1901] 1 Ch. 196.
(3) [1900] 1 Q. B. 116.
(4) (1910) 15 C. W. N. 191.
(5) (1907) I. L. R. 35 Calc, 182.
(6) (1838) 1 Beav. 112.
(7) (1841) 4 Beav. 350.
(8) (1835) 7 Sim. 149.
(9) (1882) L. R. 21 Ch. 9.
(10) (1867) 8 W. R. 428.
(11) (1878) 2 C. L. R. 323

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COXE AND RAY, JJ. This was a suit for rent brought by the plaintiff against Mr. Weatherall, the estate of Mr. Garth represented by the Administrator-General, and Babu Ananda Chandra Roy. The suit has been dismissed as against the second defendant on the ground that no notice was served under section 80 of the Code. It has been decreed against the other two, and the third defendant appeals.

The first and principal point taken on his behalf is that he cannot be made liable at all for the rent. The rent is claimed for a *patni* or *quasi-patni* tenure which was granted by the predecessors of the plaintiffs in 1893 to Garth and Weatherall. The property covered by the *patni* was part of the family property of one Abdul Ali, over which he and his relations had been litigating for years and which had apparently been the subject of numerous execution sales and successful and unsuccessful claims. In 1898 an agreement was arrived at between Garth and Weatherall on the one side and the appellant on the other that the former should sell, and the latter should buy, all the property which at one time belonged to Abdul Ali or his wives and children, and was held or might hereafter be held by Garth and Weatherall. It was stipulated that in order to ascertain the price the first party was to make during Agrahayan 1305 an account of all receipts and expenditure with respect to the property since 1893. This was to be given to the appellant on the 1st of Pous 1305 and if he found it correct he was to endorse it as correct, and, if not, he was to state his objections during that month. In the case of a difference of opinion, the account was to be referred to arbitration during the month of Magh. After the account was settled the appellant was to be liable to Garth and Weatherall from the date of the settlement of the account for one-third of their losses over the property.

The possibility of the account showing a profit was apparently not contemplated. The management was to remain with Garth and Weatherall, but in consideration of certain circumstances the appellant was to be allowed a deduction of Rs. 12,000, and Garth and Weatherall agreed to convey to the appellant a one-third share of the property for the cost price as settled in the foregoing paragraphs, less a deduction of Rs. 12,000. The sale was to take effect from 1st of Magh 1305, even if the execution of the conveyance was delayed, and the appellant was to be entitled to share in the profits and to be liable for his share of the expenses from that date.

Now, clearly this is not a sale. In the first place, there is no ascertained price. In the second, it is clearly not a sale but a contract for sale, as defined in section 54 of the Transfer of Property Act, 1882, which does not of itself create any interest in the property. It is, therefore, contended by learned counsel for the defendant appellant, on the authority of *Cox* v. *Bishop*(1) which has been followed in this country [*Chaturbhuj Morarji* v. *Bennett*(2)] that under this agreement the appellant cannot be held liable for the rent of the tenure of which a share was covenanted to be sold.

The Court below has held that the appellant is liable because in the opinion of the learned Subordinate Judge he has admitted that one-third of the tenure is his. The first of these alleged admissions is in a deposition taken in another suit in March 1905. The appellant said then that he was a dormant partner with Garth and Weatherall to the extent of a one-third share, that it was agreed between them in 1898 that the three should have equal shares in whatever rights and liabilities were created since 1893, that

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from 1893 to 1897 Garth and Weatherall were managers on his behalf, and finally that his right as an owner was of the same nature as Garth's and as Weatherall's. Next, in an affidavit of January 1906 he said that in Garth's estate, Weatherall and he himself were entitled to the property in equal shares, and that it was acquired on the joint account of Garth, Weatherall and himself. In a plaint, in 1907, the appellant pleaded that he owned and possessed a one-third share in the property as an undisclosed and dormant partner.

Finally, in a deposition in 1910, he said that it was arranged in 1897 that he was to become a dormant partner to the extent of one-third in all the property of Garth and Weatherall. It does not appear to us that these admissions really go beyond the agreement. It is not alleged that the appellant had any right to the property before the agreement, and his statements, therefore, that Garth and Weatherall were managers of the property on his behalf from 1893 to 1897 and that the property was acquired on the joint account of Garth, W. Weatherall and himself, show that he was not stating or intending to state the historical facts, but was giving what he understood to be the effect of the agreement. And even if these statements are taken to be admissions of ownership, they cannot give the appellant any title. The property is said to have been conveyed to him, but it could only be conveyed by a registered instrument, and the only registered instrument is the agreement, which is certainly not a conveyance and passed no interest in the property. There is no evidence whatever that the appellant collected any rent from the under-tenants. Reference has been made to a statement in his deposition which runs: "I did not get any profits direct from this *patni* as such; if what I got as profits included profits of that

patni, then I got the same." This somewhat obscure statement has not been cleared up, but it certainly does not prove that the appellant received the profits of the *patni* as a full owner of the one-third share. It appears also that on one occasion he paid some of the money demanded as rent. He says that he merely advanced it for Garth and Weatherall, and there is no reason for rejecting this explanation.

It appears to us, therefore, that the appellant cannot possibly be regarded as the purchaser of a one-third share of the tenure. He may have been paid something in general conformity with the terms of the agreement, but this is not proved. On these findings it cannot be held that there is any relation of landlord and tenant between the plaintiff and him.

It is argued that as the appellant is obtaining the profits of the *patni*, he must in all fairness pay the rent. But we cannot regard it as proved that the appellant is obtaining the profits. Even if he be in possession, the case of *Cox* v. *Bishop*(1) which was followed in *Ramage* v. *Womack*(2), and *Bagot Tyre Company* v. *Clipper Co.*(3) is clear authority that mere possession will not render a man liable for rent, if the lease has not been assigned to him. The English cases cited by the learned vakil for the respondent, *Close* v. *Wilberforce*(4) *Sanders* v. *Benson*(5), *Flight* v. *Bentley*(6) and *Walsh* v. *Lonsdale*(7) would not justify fixing the appellant in this case with liability for the rent. In the first and fourth cases the question of privity between the original landlord and the subtenant did not arise, the circumstances of the second were very different, and the third has been overruled.

(1) (1857) 8 De. G. M. & G. 815.
(2) [1900] 1 Q.B. 116.
(3) [1901] 1 Ch. 196.
(4) (1838) 1 Beav. 112.
(5) (1848) 4 Beav. 350.
(6) (1835) 7 Sim. 149.
(7) (1882) L.R. 21 Ch. 9.

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The fourth case has been often followed in India, and may be the law here, but it does not really affect the present question.

It has been argued that the English law really is inapplicable in this country, and that we must be guided by the decisions of the Indian Courts. As we have observed, however, the case of *Cox* v. *Bishop*(1) has been followed in India, and there is no Indian case which would make the appellant in this case liable. The case of *Prosunno Coomar Paul Chowdhury* v. *Koylash Chunder Paul Chowdhury*(2) dealt with an entirely different question. In *Macnaghten* v. *Bheekaree Singh*(3), it was held that a mortgagee of a lease, who had foreclosed, was liable for the rent. But obviously the defendant in this case has a far inferior position to that of a mortgagee who has foreclosed, so that the circumstances are not at all analogous to those of the case in question.

It appears to us, therefore, that no relation of landlord and tenant exists between the plaintiff and the appellant, and the suit must accordingly fail. But as other points have been argued, we will refer to them briefly.

It was urged that the suit ought to have been dismissed altogether when it failed against the Administrator-General. A cross-objection has been put in that the suit ought not to have been dismissed against the Administrator-General. The Administrator-General, however, has not been made a party and this cross-objection must necessarily be rejected, even if it could be urged against a co-respondent at all. Reference has been made to the decisions *Kasi Kinkar Sen* v. *Satyendra Nath Bhadra*(4)

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(2) (1867) 8 W.R. 428.
(3) (1878) 2 C.L.R. 323.
(4) (1910) 15 C.W.N. 191.

and *Abdul Rab Chowdhury* v. *Eggar* (1), and it has been argued that the liability for rent is merely a joint liability; and that when the suit fails against one of the joint promissors, it must fail against all.

The case of *Abdul Rab Chowdhury* v. *Eggar* (1) however, was quite a different case, and that of *Kasi Kinkar Sen* v. *Satyendra Nath Bhadra* (2) is distinguishable. That was a case of the heirs of a promisor, and it might well be held that they had no several responsibility. But reading the *kabuliyat* in this case with section 43 of the Contract Act, we have no doubt at all that Garth and Weatherall were severally as well as jointly liable for the rent, and that, if the appellant had become a tenant of the landlord and bound by that *kabuliyat*, he also would have been severally liable.

Next it is urged that the plaintiff is not entitled to bring this suit at all, inasmuch as his co-sharers have not been made parties. It appears to us that there is a good deal of force in this objection. The plaintiff relies on the fact that in a former suit the co-sharers put in a petition disclaiming their interest, and also on a deed of release executed in his favour after the time of the institution of the suit. It is difficult to see how these documents could avail to give the plaintiff a title to the whole rent at the time of the institution of the suit. We observe, however, that the plaintiff asked for leave to make the co-sharers parties long before the hearing of the case, and if we thought it necessary to decide this point we should think it only just to give him another opportunity of bringing the co-sharers into the suit.

Finally it is argued that the defendants are entitled to a deduction from the rent on the ground that a

(1) (1907) I. L. R. 35 Cal. 182. (2) (1910) 15 C. W. N. 191.

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portion of the property leased by the *patni* was a *shikmi* taluk. The estate in which it was included was sold for arrears of revenue in 1903, and the *shikmi* taluk was annulled. It was said on the other side that this revenue-sale was fraudulent, but as this point was not taken in the Court below and as a plea of fraud ought always to be made in the clearest and most definite manner, we did not allow this objection to be taken in this Court. Now, the evidence on this point leaves little doubt of the facts. The Nawab of Dacca, Sir Salimullah, is a gentleman whose evidence can be unreservedly accepted. He says that he gave the proprietors of the *shikmi* verbal notice. Afterwards a proposal was made to him at Calcutta for the payment of the rent, which clearly meant the continued recognition of the *shikmi*, but he refused it point blank. Subsequently in 1907, or 1908, he did take the rent and gave a receipt. The receipt is produced, and recites that the tenures have not been annulled and that the rent has been received. This receipt is dated the 10th June 1907, but we feel some difficulty in accepting this date. Sir Salimullah says that the receipt was read over to him, but it is difficult to feel certain that the date was mentioned in such a way as to attract his attention. The difficulty is caused by the fact that the plaintiff has filed a letter from the appellant dated the 30th June, and it is clear from that letter that on the 30th June the appellant, who would certainly have known the facts, thought that no receipt has been granted. One passage in the letter runs: "If you will write a letter to the Nawab Bahadur—pressing him to finish the transaction, which he has virtually finished, by granting the receipt—I hope every other thing will be finished satisfactorily." The letter shows that the writer hardly ever uses commas, preferring to use dashes where

most people use commas, and the words between commas in the above abstract are clearly parenthetical. The importance of the date lies in the fact that the Nawab's estate was taken over by the Court of Wards two or three months later, after which time he could not have either annulled or recognised the tenure. Sir Salimullah's statement that he thinks that the receipt was given some time in 1907-08 thus becomes somewhat significant.

Now, evidence is given, which is not in any way rebutted, that possession of the lands of these *shikmis* was taken in 1903, and the rent thereafter collected direct from the cultivators. This fact, taken with Sir Salimullah's statement that he gave the proprietors verbal notice, shows that the *shikmis* were annulled in 1903, and it is very doubtful whether they could be re-created in 1907 by a mere recital in a receipt, at any rate to the prejudice of the *putnidars* under the *shikmi*, who must have been prevented from collecting their rents. We think, therefore, that the appellant might fairly ask for a reduction of his rent proportionate to the property of which he has been deprived. It is not necessary, however, to say more than this in the view that we take of the whole case.

In our opinion, the appeal must succeed, and the suit be dismissed against the appellant with costs of all Courts.

S. K. B. *Appeal allowed.*