

## APPELLATE CIVIL.

*Before Chatterjea and Pearson JJ.*

NARENDRA CHANDRA LAHIRI

v.

MANINDRA CHANDRA NANDI.\*

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Jan. 27.

*Rent—Entire rent, suspension of, whether applicable where trespasser in possession of portion of lands at time of demise.*

Where the defendant was already in possession (though wrongful) of 225 bighas for several years, and he was aware that another 19 bighas was in the wrongful possession of one H., and, notwithstanding which, defendant agreed to pay rent to plaintiff for the entire holding of 244 bighas from the beginning of the Bengali year, though the lease commenced on 16th Jaista 1321 B. S., indicating an intention that the liability of the defendant to pay rent in respect of the 225 bighas, which was in his possession already, did not depend upon the delivery of possession of the other 19 bighas :—

*Held.* that, under the circumstances, the entire rent should not be suspended, and that the defendant was liable to pay proportionate rent in respect of the 225 bighas of land in his possession.

SECOND APPEAL by Narendra Chandra Lahiri, the defendant.

The facts appear in the judgment of Babu Jatindra Chandra Lahiri, Subordinate Judge of Rangpur, the relevant portion being as follows :—“The tenancy in defendants’ favour was created by a decree which was passed on compromise on the 30th May 1914 in Title Suit No. 854 of 1912. It appears that one Govinda Keli Munshi had a jote of Rs. 200 comprising 244 odd bighas of land. The plaintiff (The Hon’ble

\* Appeal from Appellate Decree, No. 2747 of 1919, against the decree of Jatindra Chandra Lahiri, Officiating Subordinate Judge of Rangpur, dated Aug. 4, 1919, modifying the decree of Pannalal Bose, Munsif of Kurigram dated May, 4, 1918.

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Maharaja Sir Manindra Chandra Nandi Bahadur, K.C.I.E.), purchased that jote but found a portion thereof in the defendant's possession and another portion was that of Helaluddin and Rahimannessa. He therefore instituted the said suit against the defendant in respect of the portion possessed by him, but, as a result of the compromise, let out to him the entire area of 244 bighas including the area wrongfully possessed by the other trespasser. Thus it is seen that the defendant accepted the demise with full knowledge of the said trespasser's possession of a small portion of the demised area. Far from recovering that area he appears to have lost a further area on account of encroachments made by the trespasser." The trial Court and the Court of first appeal did not apply the principle of total suspension of rent in the present case. The defendant thereupon preferred this appeal from Appellate Decree to the Hon'ble High Court.

*Babu Nagendra Nath Ghose and Babu Jatindra Nath Sanyal, for the appellant.*

*Babu Ram Charan Mitter, Babu Ram Chandra Majumdar, Babu Dwarka Nath Chakravarti, Babu Hemendra Nath Sen, Babu Jyoti Prosad Sarbadhicari and Babu Sarat Kumar Mitter, for the respondent.*

*Cur. adv. vult.*

CHATTERJEA AND PEARSON JJ. This appeal arises out of a suit for rent. It appears that the plaintiff purchased a jote of 244 bighas 18 cottahs 14 chitaks at a sale for arrears of rent, but found that 225 bighas was in the possession of the defendant and the rest in the possession of one Helaluddin and others. He thereupon brought a suit for declaration of his title

to and khas possession of the 225 and odd bighas in the possession of the defendant against him. The suit was compromised, and under the compromise the defendant took a lease of the entire land 244 bighas 18 cottaks 14 chitaks at a rent of Rs. 200 from the plaintiff from the year 1321 B. S. It is stated in the solehnama that the defendant would pay mesne profits for the 225 bighas of land which were in his possession for the years 1317 to 1320 at the rate of Rs. 184 per year, that being the proportionate rent payable in respect of the lands which were in his possession. A decree was accordingly passed upon the solenama. It is found that the defendant did not obtain possession of the 19 and odd bighas of land which were in the possession of Helaluddin. The Courts below held that the entire rent should not be suspended and gave the plaintiff a decree for proportionate rent in respect of the 225 bighas in the possession of the defendant, and disallowed the rent for the 19 bighas and odd which were not in his possession.

The defendant has appealed to this Court, and it is contended that the plaintiff having failed to deliver possession of the 19 and odd bighas of land, there should be suspension of the entire rent.

There is no doubt that where the lessor has evicted the lessees from a part of the land demised the entire rent is suspended [see the cases on the point collected in *Sarada Prosud v. Rai Monmatha Nath* (1)]. In the present case, however, there is no question of any eviction by the lessor or by anyone claiming under him or by his procurement.

The question is whether the plaintiff not having delivered possession of the 19 bighas of land which was in the wrongful possession of a third party, the entire rent should be suspended.

(1) (1914) 19 C. W. N. 870, 871.

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That question was not directly decided in any of the cases cited before us. In the cases of *Hurish Chunder Koondoo v. Mohinee Mohun Mitter* (1), and *Bullen v. Lalit Jha* (2), the tenant did not obtain possession of the demised land at all, and it was held that he was not liable to pay rent. In *G. Narayanaswami v. Yerramilli* (3), it was held that where the lessor does not put the lessee in possession, but there is no obstruction or likelihood of obstruction to the lessee taking possession of the same, and he neither tries nor requests the lessor to put him in possession, the lessee is bound to pay rent. In that case the learned Judge (sitting singly) observed: "But if the land is already in possession of a third person to the knowledge of both the lessor and the lessee I should be inclined to hold that it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee. The lessee in that case appears not to have obtained possession of the land demised at all, and the observations were *obiter*. In *Annada Prosad Mukhopadhyaya v. Mithura Nath Nag* (4) the lessee was prevented from taking possession of a portion of the demised land by another lessee to whom the said portion was demised by a subsequent lessee. One of the Judges, Chitty J. was of opinion that there was no eviction properly so called, of the lessee by the landlord, while Vincent J. was of opinion that there was eviction of the first lessee by the second by the procurement of the landlord. The land in that case was in the Sunderbans; there was a dispute as to the boundaries of the lands let out to the two lessees respectively, and the landlord was found not to have

(1) (1868) 9 W. R. 582.

(2) (1869) 3 B. L. R. App. 119.

(3) (1910) I. L. R. 33 Mad. 499; 501.

(4) (1909) 13 C. W. N. 702.

acted *mala fide*. The lessee (under the first lease) so far from repudiating the lease kept possession of the remaining portion and even paid rent subsequently to the creation of the second lease, and it was held by both the learned Judges that the lessee could not ask for a suspension of the whole rent and was bound to pay proportionate rent. Chitty J. in that case observed :— ‘It may be questioned how far the technicalities to be found in the English Law should be allowed to affect the relations of landlord and tenant in this country. In one respect the principle underlying the English decisions appears to be inapplicable to the present case.

Eviction is regarded as a wrong done by the landlord to the tenant, for which the former is to be penalised.

Here not only, as I have said, was there no eviction properly so called, but there is no proof of *mala fides* on the landlord's part. It may be that by a careless statement of boundaries in the two *pottas* lands which should be included in the defendant's holding are also included in those of Rasik Lal Dutta. But that is all that can be alleged against the plaintiff. On the facts of this case as admitted and as found by the lower Appellate Court, I think that the defendant has no defence to the plaintiff's suit for rent.”

In the case of *Manindra Chandra Nandy v. Narendra Nath Lahiri* (1) (which was between the same parties as in the present case) Fletcher J. appears to have taken a different view. He pointed out that the case of *Stokes v. Cooper* (2) relied upon by Chitty J. had been disapproved of in *Smith v. Raleigh* (3) and also in another case, *Reeve v. Bird* (4), and that in England there is no difference

(1) (1919) 23 C. W. N. 585.

(3) (1814) 3 Camp. Rep. 513.

(2) (1814) 3 Camp. Rep. 514 (note). (4) (1834) 1 M. L. R. 31, 36.

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between the case where the landlord has ousted the tenant from a portion of the holding and the case where the landlord has let out the property to the lessee having already put an earlier and prior lessee in possession of it, and referred to the case of *Neale v. Mackenzie* (1).

Those cases however are *distinguishable* from the present, as the lessee in those cases could not obtain possession, nor could the lessor deliver possession by reason of the lessor having granted a lease in favour of a third person in respect of a portion of the land demised to the lessee in question. The defendant in the present case pleaded that the plaintiff was in possession of the 19 bighas by letting out the same to Helaluddin. That case has not been accepted by the Courts below. The learned pleader for the appellant however referred to a passage in Halsbury's Laws of England, Vol. 18, page 485, where it is stated "where part of the premises is held by a third person rightfully claiming under a title adverse to the lessor, so that the lessee cannot obtain possession, the result is the same as in the case of unlawful eviction by the lessor, and no part of the rent is recoverable." *Holgagte v. Kay* (2). Reference was also made to section 108(b) of the Transfer of Property Act which provides that in the absence of contract to the contrary the lessor is bound on the lessee's request to put him in possession of the property. It is pointed out that the defendant in the written statement stated that he had requested the plaintiff to put him in possession of the land. The question, however, does not appear to have been gone into in either of the Courts below.

It is unnecessary in the present case to consider the broad question whether ordinarily the entire rent should be suspended when the lessor is unable to

(1) (1836) 1 Meeson & Welsby 747. (2) (1844) 1 Car. & Kir. 341.

deliver possession of a portion of the land demised whatever might be the reason for his inability and whether the view taken by Chitty J. in the case of *Annada Prosad Mukhopadhyaya v. Mathura Nath Nag* (1), that the English rule should not be applied to this country is correct.

The present case is not an ordinary case of settlement, where the lessor has to deliver possession of the land demised to the lessee. The defendant was already in possession (though wrongful) of 225 bighas for several years, and as stated above, 19 bighas of land was at the date of the solenama, in the possession of Helaluddin. The solenama was executed on the 30th May 1914, corresponding to the 16th Jaistha 1321, but the tenancy in respect of 244 bighas was to be operative retrospectively from the beginning of 1321: *i.e.*, 1st Baisak 1321. The defendant took a settlement of the entire 244 bighas though he was perfectly aware that a portion of it, *viz.*, 19 bighas was in the wrongful possession of a third party. These indicate an intention that the liability of the defendant to pay rent in respect of the 225 bighas, which was in his possession already, did not depend upon the delivery of possession of Helaluddin. The plaintiff never put any obstruction in the way of defendants recovering possession, and there is no question of *mala fides* on the part of the plaintiff. We think that in the circumstances of the case, the Courts below were right in holding that the entire rent should not be suspended, and that the defendant is liable to pay proportionate rent in respect of the 225 bighas of land in his possession.

The appeal is accordingly dismissed. Each party to bear his own costs.

G. S.

*Appeal dismissed.*

(1) (1909) 13 C. W. N. 702.

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