APPELLATE CIVIL.

Before Newbould and B. B. Ghose JJ.

GANGAMANI BISWAS

v.

RABJA ALI CHAUKIDAR.*

1924

April 9.

Rent Decree—Requisites of—Auction purchaser—Incumbrance, annulment of—Bengal Tenancy Act (VIII of 1885) ss. 148A, 167.

For a plaint to be in accordance with the provisions laid down in section 148A of the Bengal Tenancy Act (applying to East Bengal) the *first* requisite is that the co-sharer landlord should sue for recovery of the rent due to all the landlords, and, *secondly*, if he is unable to find out the dues of the co-sharers, he would be entitled to proceed with the suit for his share only.

Where the plaintiffs sued for their share of the rent alone, stating that a certain amount might be due to the co-sharer landlords and prayed that under certain conditions stated in the plaint a decree for the total amount due might be passed :—

Held, that the plaint was not in accordance with section 148A of the Bengal Tenancy Act, the terms whereof should be strictly complied with, a substantial compliance with the requirements of the section would not be enough to give the auction-purchaser a title to annul incumbrances.

Profulla Chandra Ghose v. *Baburam Mandal* (1) explained.

SECOND appeal by Gangamani Biswas and others, the plaintiffs.

The facts of the case out of which the present appeal arises are as follows : The plaintiffs sued for *khas* possession of some lands on the strength of the auction purchase of a tenure which though originally

* Appeal from Appellate Decree, No. 146 of 1922, against the decree of Jatindra Chandra Lahiri, Subordinate Judge of Backergunj, dated April 9, 1921, affirming the decree of Satish Chandra Chakravarti, Munsif of Barisal, dated Jan. 19, 1920.

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made in the *benami* of a third person was subsequently released by him to the plaintiffs. It was alleged that the auction purchase had been made free from all incumbrances in execution of what had the effect of a rent decree as the plaint had purported to fulfil the requirements of section 148A of the Bengal Tenancy Act, and that the defendant withheld possession from the plaintiffs without any right and in spite of service of notice under section 167 of the Bengal Tenancy Act. The defendant while claiming an under-tenure in the lands denied the service of notice and contended that the rent decree in question having been obtained by a co-sharer landlord for his share of the rent in a suit not framed according to the terms of section 148B of the Bengal Tenancy Act, the plaintiffs were not entitled to avoid any incumbrance. The learned Munsif decreed the ejectment prayed for on the findings that the rent decree in question obtained by a co-sharer landlord, though the prayer in the plaint was a conditional one, had the force of a rent decree properly so called and that notice under section 167 of the Bengal Tenancy Act had been served on the defendant. On appeal by the defendant, it was contended on his behalf that the trial Court's decision was against the weight of evidence and was also contrary to law. The lower Appellate Court held that the defendant was not liable to ejectment as the rent suit had not been framed in strict accordance with the provisions of section 148A and therefore that decree was not capable of execution under the special provisions of the Bengal Tenancy Act, and in consequence the auction purchaser did not get any right to avoid incumbrances. The learned Munsif's decision as to service of notice was affirmed on appeal. The plaintiffs thereupon preferred this second appeal to the High Court.

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Babu Ramesh Chandra Sen for *Babu Gunada Charan Sen* (with him *Babu Someswar Prosad Mukherjee*), for the appellants. The plaint in the rent suit was properly framed in accordance with section 148A of the Bengal Tenancy Act. It states that the total rent for the holding is Rs. 28-2-3 out of which Rs. 25 is payable to the plaintiff's share and Rs. 3-2-3 is payable separately to the share of the co-sharer defendants Nos. 2—5, that the plaintiffs and his co-sharers were realising rent separately, that the tenants were in arrears to the plaintiffs for rent and cesses to the extent of Rs. 48-13 for the years 1316 and 1317. The plaint then goes on to say that the tenants' dues to the co-sharer defendants Nos. 2—5 for the period in suit may amount to Rs. 9-1, but the latter not having joined the plaintiffs in the suit though requested to do so, and they and the tenant defendants having in collusion withheld information as to the actual amount due for their share, the plaintiffs are unable to ascertain what amount is due to the said co-sharer defendants and the plaintiffs therefore joined them as *pro formâ* defendants in the suit and tentatively claimed the amount in suit in their own share and paid the court-fee due thereon. On these allegations plaintiffs prayed for a decree for Rs. 61-0-3, being the amount claimed with damages and for interest for the period of the pendency of the suit, and also prayed for the following additional reliefs, *viz.*, "(*ga*) If the co-sharer defendants pray to the Court to be added as plaintiffs or if they or the tenant defendants declare in Court the amount due in their share, to add the said amount to the claim and pass a decree for the total amount against the tenant defendants after receiving the deficit court-fees on such additional amount; and (*gha*) to grant the

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plaintiffs other reliefs to which they may be entitled in the just decision of the Court; (*una*) If it transpires that any portion of the plaintiffs' dues have been realised by the plaintiffs' co-sharers, to pass a decree therefor with proportionate costs as against the co-sharer defendants." I submit that this plaint is exactly in accordance with section 148A of the Bengal Tenancy Act. The plaintiff could not be expected to say anything more than he did in view of the allegation as to the co-sharer defendants being in collusion with the tenants and withholding all information. Section 148A could not have meant that a plaintiff, who has no knowledge as to the exact position between his co-sharers and the tenants who are in collusion, must go on to make a statement as to what he believed to be due or not to be due to the co-sharer from the tenants. Some reasonable interpretation must be given to section 148A. The words "where a co-sharer landlord . . . . . has instituted a suit to recover the rent due to all the co-sharer landlords in respect of an entire tenure or holding" must mean the rent which he *knows* to be due, and not the entire rent for the holding. See *Profulla Chandra Ghose* v. *Baburam Mandal* (1), *Brohmananda Nath Deb Sircar* v. *Hem Chandra Mitra* (2) and *Nanda Lal Chowdhuri* v. *Kala Chand Chowdhuri* (3). The plaintiff in this case sued for the whole of the arrear which to his information was due, *viz.*, his share of the rent, and also prayed that if the co-sharers claimed that any portion of the rent due to them was in arrear, that might be included in the plaint and additional court-fees taken. This certainly was a suit for rent due to all the co-sharer

(1) (1921) 34 C. L. J. 462, 464. (2) (1914) 18 C. W. N. 1016, 1019.
(3) (1910) 15 C. W. N. 820.

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landlords. The plaint might have been better drafted and the prayers transposed. But it is well known that in this country pleadings are not artistically drawn, and Courts should not refuse proper relief on the ground of inartistic drafting of a plaint. The intention was certainly quite clear to bring the suit according to section 148A of the Bengal Tenany Act, and I submit that the allegations in the plaint did comply with the requirements of that section. The Court of Appeal below has relied upon the case of *Rai Baikuntha Nath Sen Bahadur* v. *Ramapati Chatterjee* (1). That case is distinguishable, for there the plaintiffs did not pray that if any rent was due to the co-sharer that amount should be added to the plaint and additional court-fees taken as in the present case, but only prayed that he may be allowed to amend the plaint. In this case the plaint itself contains all the allegations and there is no necessity for amendment. The case reported in *Ram Dhyan Singh* v. *Pradip Singh* (2) where the essential requirements of a plaint framed under section 148A are discussed, also supports my contention. To hold that the present plaint is not in accordance with section 148A would be to reduce that section to a puzzle sprung upon litigants by the Legislature.

Babu Suresh Chandra Taluqdar, for the respondent. The plaint in the rent suit was not in accordance with section 148A of the Bengal Tenancy Act. That section lays down that when a co-sharer landlord entitled to recover his share of the rents separately has instituted a suit for the entire rents due to him and his co-sharer, and is unable to ascertain the amounts due to the co-sharer impleaded as *pro formâ*

(1) (1917) 27 C. L. J. 101. (2) (1918) 4 Pat. L. J. 500.

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defendant, he may be allowed to proceed with the suit in respect of his share and the decree so obtained would operate as a rent decree. The words "has instituted" and "proceed with the suit" are quite significant and the section applies only to those cases where the plaint states that the suit is for the entire rents. The prayers made in the plaint in question were exactly the same as made in the case of *Ram Dhyan Singh* v. *Pradip Singh* (1) where it was held that the case was not governed by section 148A of the Bengal Tenancy Act. The present suit in question was not for recovery of the whole rent of the tenure but for the plaintiff's share only. The claim in respect of the co-sharers' share was only a claim in the alternative and was not really the subject of the claim as laid. The plaintiff should at least have stated that he believed that nothing was due to the co-sharers. Instead of that there was a conditional prayer for including their share if this transpired in Court, and for paying additional court-fees thereon. The landlord did not state that the arrears claimed by him represented the entire arrears due for the tenure. His primary allegations and prayer were in respect of the arrears due in his share and the additional prayer for including any arrears which his co-sharers might or might not choose to prove, did not invest this suit with the character of a suit for the entire rent. This distinction is not merely a technical one for in order to destroy a valuable incumbrance, the plaintiff must show a strict application of the procedure prescribed by the law.

Babu Ramesh Chandra Sen, in reply.

NEWBOULD AND GHOSE JJ. This appeal is by the plaintiffs and arises out of a suit for possession of

(1) (1918) 4 Pat. L. J. 500.

certain land by avoiding an encumbrance under section 167 of the Bengal Tenancy Act. The whole question depends upon the fact whether the suit in execution of the decree under which the plaintiffs purchased the property was a rent suit coming within the provisions of section 148A of the Bengal Tenancy Act so as to bring into operation all the rights which a purchaser obtains at a sale in execution of a rent decree under that Act.

We have been led through the plaint in the rent suit the material portion of which is contained in paragraphs 4 and 6. In paragraph 4 the plaint stated that the rent in arrears due to the plaintiffs alone, who were co-sharer landlords was a certain amount and it also stated that the tenant defendants' dues to the co-sharer defendants Nos. 2 to 5 for the period in suit may amount to a certain amount. In paragraph 6 it was stated that on account of information having been withheld from the plaintiffs the plaintiffs tentatively claimed the amount due in their own share and paid court-fees thereon. There was a prayer (*g*) which ran thus :—"If the co-sharer landlords defendants pray to the Court to be added as plaintiffs or if they or the tenants defendants declare in Court the amount due in their share, to add the said amount to the claim and pass a decree for the total amount against the tenants defendants after receiving the deficit court-fees on such additional amount." It is contended that this plaint was in accordance with the provisions laid down in section 148A of the Bengal Tenancy Act applying to East Bengal. This section requires that the co-sharer landlord should institute a suit to recover the rent due to all the co-sharer landlords in respect of an entire holding, and it is also necessary that all the remaining co-sharers should be made parties to the suit, and if he is unable to ascertain what rent is due for the

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whole tenure or holding owing to the refusal or neglect of the tenant or of the co-sharer landlords to furnish correct information the plaintiff co-sharer landlord shall be entitled to proceed with the suit for his share only of the rent. The first requisite is that the co-sharer landlord should sue for recovery of the rent due to all the landlords, and, secondly, if he is unable to find out the dues to the other co-sharers he would be entitled to proceed with the suit for his share only.

In the present case the plaintiffs sue for their share of the rent alone, and they state that a certain amount might be due to the co-sharer landlords and the prayer is that under certain conditions stated in prayer (*ga*) a decree for the total amount due might be passed. This in our opinion is not in accordance with section 148A of the Act. Several cases have been cited before us of which we need mention only the last, which is the case of *Profulla Chandra Ghosh* v. *Baburam Mandal* (1), on which the learned vakil for the appellants contends that the plaint in this case should be considered to be one in accordance with section 148A. But in all those cases the learned Judges clearly point out that the plaintiff brought the suit for the entire rent which he believed to be due for the holding when he brought his suit. We do not think that the plaintiffs in the present case framed their suit in that way. It has been contended before us that it is in substance in compliance with the requirements of section 148A. But having regard to the fact that these special provisions of the Bengal Tenancy Act enable the purchaser to defeat the right of a person who was no party to the rent suit we think that substantial compliance with the requirements of the section, assuming it to be so, would not be enough to give the auction purchaser a title to annul the incumbrance, but the terms of the

(1) (1921) 34 C. L. J. 462.

section should be strictly complied with. As that has not been done in this case we are of opinion that the judgment of the lower Appellate Court is right and the appeal must be dismissed with costs.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before Newbould and B. B. Ghose JJ.

OFFICIAL TRUSTEE OF BENGAL

v.

BENODE BEHARI GHOSE MAL.*

1924

April 11.

Appeal—Summary dismissal—Review—Ex parte restoration—Paddy rent—Money value, whether to be calculated as in lease or according to market rate—Civil Procedure Code (Act V of 1908) O. XLI, r. 11. and O. XLVII, r. 4 (a).

Where an appeal was at first summarily dismissed under Order XLI, rule 11 of the Code of Civil Procedure, and then on the appellant's application for review the same Bench cancelled that order and directed that the appeal should be heard, this last order being passed *ex parte* ;

Held, that this procedure which had been followed in numerous cases in the High Court for over 40 years should not be changed though departed from in one or two solitary instances.

Janoki Nath Hore v. *Prabhasini Dasee* (1) followed.

Abdul Hakim Chowdhury v. *Hem Chandra Das* (2) dissented from.

Where a lease contained the following clause "settling as rent thereof Rs. 87 in cash and 2 bishas 5½ aris of *gula* paddy *or* its price Rs. 45-8 as., total Rs. 132-8 as :—

Held, that the use of the word "or" distinguished that lease from many others which had been considered in reported cases, and the tenant

*Appeal from Appellate Decree, No. 178 of 1922, against the decree of Kali Prasanna Sen, Subordinate Judge of 24-Perganas, dated Sep. 19, 1921, affirming the decree of Biman Behari Sarkar, Munsif of Barasat, dated Feb. 26, 1920.

(1) (1915) I. L. R. 43 Calc. 178. (2) (1914) I. L. R. 42 Calc. 433.