

1927
 KAMALA
 PRASAD
 SIKUL
 v.
 KISHORI
 MOHAN
 PRAMANIK.

inter se and there was no issue raised for its effective determination.

The result then is that the appeal is no longer maintainable. In that view the appellant's contention as to the propriety of the principle on which mesne profits have been calculated need not be considered.

The appeal is dismissed with costs.

Appeal dismissed.

A. A.

APPELLATE CIVIL.

Before Page and Graham JJ.

RISHEE CASE LAW

v.

GOLAM ALI MIRDHA.*

1927
 Aug. 4.

Rent—Abatement of rent—Bengal Tenancy Act (VIII of 1885), ss. 52, 148A.

One co-tenant is not entitled to an abatement of rent in the absence of the other co-sharer tenants either under the provisions of section 52 of the Bengal Tenancy Act, or the general law.

Bhoopendra Narain Dutt v. Romon Krishna Dutt (1), *Kesho Prasad Singh v. Ramdeni Singh* (2) followed and other cases referred to.

* Appeal from order, No. 417 of 1926, against the order of Atul Chandra Banerjee, Additional Subordinate Judge of Barisal, dated Sep. 10, 1926, reversing the order of Priyabrata Sen, Munsif of Barisal, dated Feb. 13, 1926.

(1) (1839) I. L. R. 27 Calc. 417; (2) (1922) I. L. R. 2 Pat. 183, 188.
 421.

MISCELLANEOUS APPEAL by Raja Reshee Case Law, the landlord plaintiff.

1927

RISHEE
CASE LAW
v.
GOLAM ALI
MIRDHA.

This miscellaneous appeal arose out of a suit to recover arrears of rent against two tenant defendants. One of the tenants did not appear and the other pleaded that he was entitled to an abatement of rent on account of diluvion. There were two other co-sharer tenants who were not made parties to the suit. The trial Court decreed the suit, holding that the contesting defendant was not entitled to an abatement of rent in the absence of the other co-sharer tenants. On appeal the Subordinate Judge set aside the decree, and remanded the case.

Mr. Narendra Chandra Bose and Babu Nalini Chandra Pal, for the appellant.

Babu Satindra Nath Roy Chaudhuri, for the respondents.

PAGE J. This is a suit brought by a co-sharer landlord under section 148A of the Bengal Tenancy Act to recover arrears of rent. The plaintiff has impleaded the two tenants of the land whose names are recorded in the record-of-rights, and has made his co-sharer landlords *pro formâ* defendants. One of the two tenant defendants has not appeared. The other has pleaded that he is entitled to an abatement of rent on account of diluvion. The fact of diluvion has been established. It appears, however, that there are two other co-tenants of the holding who are not parties to the suit, and the plaintiff contended that the contesting defendant is not entitled to an abatement of rent in the absence of the other co-sharer tenants. The trial Court upheld the plaintiff's contention, and passed a decree for the full arrears of rent claimed without abatement. On appeal the

1927
 RISHEE
 CASE LAW
 v.
 GOLAM ALI
 MIRDHA.
 PAGE J.

decree of the trial Court was set aside, and the suit was remanded for the ascertainment of the amount of the abatement to which the defendant was entitled. From that decree the plaintiff has preferred the present appeal.

The case was argued exhaustively before us, and we have no doubt what our decision should be. It is conceded by the appellant that if all the co-tenants are parties an abatement of rent may be claimed by the tenants either in a separate proceeding or in a suit for rent, and by the respondent that if section 52 of the Bengal Tenancy Act is applicable one co-tenant cannot claim abatement in the absence of his co-tenants, and that the present case is covered by the decision of this Court in *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (1). The respondent contended, however, that this is not a suit to which the Bengal Tenancy Act applies, and that under the general law the respondent is entitled to claim proportionate abatement. We are of opinion that section 52 of the Bengal Tenancy Act does apply to the present suit, and that the decision of the trial Court was correct. But if it be assumed, contrary to our opinion, that the present suit is not brought under the Bengal Tenancy Act, but under the general law *Sheik Enayutollah v. Sheik Elahee Buksh* (2), *Nawab Sir Salimullah Bahadur v. Kali Prosonno Parbat* (3), *Kailash Ch. Mitra v. Brojendra K. Chakravarti* (4), that circumstance will make no difference, for we think that the principles laid down in *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (1), would equally be applicable. In that case Banerji J. observed :

(1) (1899) I. L. R. 27 Cal. 417.

(3) (1915) 22 C. L. J. 569.

(2) (1864) W. R. Gap No. Act X

(4) (1925) 29 C. W. N. 1000

“ I may add that, so far as the landlord’s right to claim enhancement or increase of rent is concerned, that right can be claimed only in a suit brought by all the joint landlords. It is true that under the Bengal Tenancy Act that is so under the express terms of section 188 of that Act ; but under the law as it stood before the passing of the Bengal Tenancy Act, the rule was the same, and the rule was based upon considerations of justice. And if that was so, there is no reason why similar considerations should not be given effect to in the converse case of a tenant seeking to obtain against one of several joint landlords’ abatement of rent, though such a case may not be provided for by any express provision of the Tenancy Act applicable to it ”.

In *Maharaja Kesho Prasad Singh v. Ramdeni Singh* (1), Das J. also stated that

“ The only principle which underlies section 188 of the Act is that ‘where two or more persons have a joint right between them, they cannot assert it except jointly.’ That principle is recognized in section 52 of the Act and I quite accept that if two or more co-sharer tenants have a joint right for abatement of rent, they can only assert that right in a suit to which all the tenants are parties ”.

We agree with the above observations, and think that they are based both upon good sense and good law. The decision in *Sivadas Dutt v. Birendra Krishna Dutt* (2), is not an authority to the contrary, for in that case all the tenants of the holding were parties to the suit. See also *Narendra Nath Kuti v. Satyadhan Ghosal* (3).

For these reasons the appeal must be allowed ; the order of the lower Appellate Court set aside, and the decree of the trial Court restored.

GRAHAM J. I agree.

Appeal allowed.

B. M. S.

(1) (1922) I. L. R. 2 Pat. 183, 188. (2) (1925) 41 C. L. J. 330.

(3) (1919) 30 C. L. J. 203.