APPELLATE CIVIL.

Before Rankin C. J. and B. B. Ghose J.

TANWANGINEE DEBI

v.

ABHAYACHARAN SARDAR.*

1929

May 1.

Landlords—Co-sharers—Proforma *defendants—Rent—New assessment—Decree* —Res judicata—*Co-defendants—Bengal Tenancy Act (VIII of 1885), s. 148A.*

To hold that a case under section 148A of the Bengal Tenancy Act would operate as a new assessment of rent between co-defendants would be carrying the law further than there is authority for doing.

The decision as regards the rate of rent in a suit brought by a co-sharer landlord, who proceeds with it for his share of rent only under section 148A, cannot operate as binding on the other co-sharer landlord, who is joined as defendant with the tenant.

When a co-sharer landlord, who has obtained his proper share of the rent, is joined as a defendant in a suit for rent by his co-sharer for his undisputed share and no relief is asked for as against the defendant landlord, he need not take any interest in the litigation between the co-sharer plaintiff and the tenant.

It cannot be said that any issue was raised as between the tenant-defendant and the landlord-defendant, which was decided in any previous suit brought by the co-sharer landlord under the provisions of section 148A.

The only advantage which a co-sharer landlord gets, when he obtains a decree for his share under the provisions of that section, is as regards the remedies for enforcing it, that he can proceed to execute the decree in the same manner as if the decree had been obtained by the sole landlord or the entire body of landlords.

APPEAL by Sreemati Tanwanginee Debi, defendant No. 1.

The facts of the case, out of which this appeal arose, will appear in the following extract from the judgment of the trial court:—

"Plaintiffs, who are owners of 12 annas share of a *howla* under the Sundar-
" bans portion of this district, sue defendants Nos. 1 to 5 as tenants for recov-
" ery of rent of a *ganti* recorded in *Khatian* No. 36 of *mouza* Hodda, in the
" presence of the remaining co-sharer landlord, defendants Nos. 6 to 13 and
" of some other defendants Nos. 14 to 22, presumably as heirs of former
" tenants. The claim for rent is on account of 2,143 *bighas* and odd
" *cottas*, after excluding therefrom 9 *bighas* as sacred places, and
" rent is claimed at the rate of 11 annas 1½ pies per *bigha*, on the basis

*Appeal from Original Decree, No. 237 of 1927, against the decree of Jadu Nath Majumdar, Subordinate Judge of Khulna, dated July 30, 1927.

" of *kabuliyat*, executed by original lessee, Taran Mandal in 1312 B. S. " The claim is for rents from 1329 to 1332 B. S. at Rs. 1,483-13-9 " per annum for sixteen annas share and cesses at Rs. 154-8-3 and " damages at 25 per cent., and plaintiffs claim 12 annas share of this " sum namely, Rs. 6,143-14-6, with a prayer for adding the claim due to the " remaining 4 annas co-sharers on payment of additional court-fees, if this " share be found to be due. The suit is contested solely by defendant No. 1. " All the other tenant-defendants or co-sharer landlords do not contest, " although they appear to have been duly summoned. The case set up by the " defendant No. 1 is mainly that there was a previous rent suit by the co- " sharer defendant No. 6, Basantakumari Devi, against the defendants "(not the present defendant) in which the tenants pleaded that the land " included within the *ganti* was less than the land mentioned in the *kabuliyat*, " there was a local enquiry in the course of the trial and the land was found " on measurement to be less and the rent payable at the *kabuliyat* rate was " held to amount to Rs. 1,228-9-10½ pies for the entire tenancy. Plaintiffs " were parties to this rent suit and so they cannot claim rent at the *kabuliyat* " rate. Moreover, these very plaintiffs sued the defendant No. 1 and other " tenant-defendants for rent in rent suit No. 1 of 1923 at this rate of " Rs. 1,228-9-10½ pies for the years 1325 to 1328 B. S. and after the trial " got an *ex parte* decree against other tenant-defendants, but the suit was " dismissed against defendant No. 1. Plaintiffs are, therefore, estopped " from claiming rent again at the old *kabuliyat* rate and the decree in the rent " suit by Basantakumari Devi, co-sharer landlord, operates as *res judicata*. " It is next alleged that, as the former rent suit was dismissed against " defendant No. 6, plaintiff is not entitled to claim any rent until the " decision in the former suit is set aside."

" Next it is alleged that the claim for certain *kists* of 1329 is barred under " Order II, rule 2, as the claim was not included in the previous rent suit " No. 1 of 1923. Lastly, it is alleged that the claim for cesses and damages " is excessive and unjust. Defendant No. 6 also alleges that the area of the " *jama* in suit is not 717·22 acres and, even if the plaintiffs can show some- " thing, it is incorrect."

The trial court, having decreed plaintiff's suit, the defendant No. 1 preferred this appeal to the High Court.

Mr. Jogeshchandra Ray, for the appellant. The defendant held 2,134 *bighas*. The plaintiffs are 12 annas co-sharer landlord. There is no question of encroachment, though these very same lands had been previously measured and found to be 1,700 *bighas*, but now the settlement operations show these lands to be more than 1,700 *bighas*. See the judgment in the previous rent suit, where the present co-sharer plaintiff had been made *pro forma* defendant.

[B. B. GHOSE J. That judgment is binding on the then co-sharer plaintiff only. But the then *pro forma* defendants can sue upon the *kabuliyat* of 1905.]

They don't say in the plaint that that measurement was a mistake. There must be finality in these

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matters. If the suit is for any increase in area, then I shall argue that such a suit must be by all the co-sharer landlords.

[RANKIN C. J. Your predecessor was a defendant in the previous suit.]

See *Gopi Nath Chobey* v. *Bhugwat Pershad* (1).

[B. B. GHOSE J. They cannot under section 11 of the Code of Civil Procedure.]

The rent was based on the basis that it was 1,700 *bighas*. See *Baidya Nath De Sarkar* v. *Ilim* (2). This is substantially a suit for increased rent for increase in area. *Dwarka Dakai* v. *Mathur Lal Majumdar* (3).

[RANKIN C. J. That is a well-known principle accepted throughout the Bengal Tenancy Act.]

Mr. Sharatchandra Ray Chaudhuri, for the respondent. Reads section 148 of the Bengal Tenancy Act. So far as *res judicata* is concerned, it was a decision of the Munsif.

Mr. Jogeshchandra Ray, in reply. Unless that previous rent decree were binding on them, they would not have filed an application for rehearing the case on the grounds that the summons had not been served on the *pro forma* co-sharer defendants.

RANKIN C. J. In this case, the plaintiffs are the 12 annas co-sharer landlords and they bring their suit for rent for 1329 to 1332 B. S. to the extent of their share, basing their claim upon the terms of a *kabuliyat* of the 23rd November, 1905. The terms of that *kabuliyat* are to this effect: the area, which is being let or settled, is 2,134 *bighas*. The tenant states that he had been in possession of that land before from the landlord's predecessor. The rate of rent is 11 annas $2\frac{1}{2}$ *gandas per bigha* and, on the 2,134 *bighas*, the *jama* is Rs. 1,483. There is a clause in the *kabuliyat* to this effect: "If it becomes necessary "to make any survey from the Government or from "your *sarkar*", that is the landlords, "I shall be present

(1) (1884) I. L.R. 10 Calc. 697. (2) (1897) I. L. R. 25 Calc. 917.
(3) (1913) 18 C. W. N. 942.

"in person and shall cause the survey to be made and "I shall pay the costs of survey. If, on measurement, "the area be found to be less, I shall get abatement; if "there be increase, then I shall pay rent separately at "the aforesaid fixed rate".

In this case, the first thing that happened was a suit framed under section 148A of the Bengal Tenancy Act and brought by the 4 annas landlords in 1918. The present plaintiffs were parties defendants in that suit. But the present plaintiffs took no interest in the suit and, in the end, what happened was that the 4 annas landlords were met by a defence, on the part of the tenant, that the area in his possession was less than the amount mentioned in the *kabuliyat*. Thereupon, by a process of reasoning, which does not seem to be altogether water-tight, a local investigation was ordered and it was found that the area was, in fact, 1,700 *bighas* and no more—upon which basis the 4 annas landlords got a judgment for their share of the rent on the footing that the total rent must be reduced from Rs. 1,483, mentioned in the *kabuliyat* to Rs. 1,228. The first question and the most important question to be considered in this case is what is the effect in law of that decision. Mr. Ray, who appears for the defendant-appellant, contends before us that the effect in law as between defendant and defendant in that suit was that there was a fresh settlement or assessment of rent and that the position was just as though a suit had been brought and a reassessment of the rent had been arrived at, which was binding upon the parties. Mr. Ray Chaudhuri, who appears for the plaintiffs respondents, contends on the other hand that, while it is true that the present plaintiffs were parties to that suit, they were parties for the purposes of section 148A of the Bengal Tenancy Act only and that the judgment in that suit—whether it is right or wrong—is not, as between his clients and the tenant, any assessment of rent upon a new basis: the judgment may be made binding between the tenant and 4 annas landlord, but as between the 12 annas co-sharers and

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the tenant it is not a judgment, which operates as a fresh assessment. In my opinion, the view pressed upon us by Mr. Ray Chaudhuri is to be preferred. When one looks at the purpose of section 148A of the Bengal Tenancy Act, one finds that its purpose is this—to enable a co-sharer landlord to get the advantage of the right to sell the holding notwithstanding that he is unable to get his co-sharers to join with him as plaintiffs in instituting a suit. The section is intended to deal with cases, in particular, where the plaintiff cannot find out whether rent is due to the other co-sharer landlords, whether it has been paid or whether it has not been paid, and the consequence is that he may bring his suit asking for the whole of the rent, but, in the end, limiting himself to proceed with his suit for his share only and to get the right to sell the holding. In the present case, if it be assumed, for the sake of argument, that the present plaintiffs, who were defendants in the previous suit, had been in receipt of their proper proportion of the rent at the *kabuliyat* rate, then, when the 4 annas landlords joined them as defendants, we are to ask ourselves—did they, by staying away and taking no part in that litigation, run the risk that the judgment obtained by the 4 annas co-sharers would operate as against them as a new assessment of the rent of the holding. I am not prepared to say that it would so operate. It seems to me that, in a case under section 148A of the Bengal Tenancy Act, to hold that it would operate as a new assessment of rent between co-defendants, would be carrying the law further than there is any authority for doing.

The question then arises—is this matter carried any further by the fact that, in 1927, the present plaintiffs brought a suit against, among others, the present defendant. In that suit, they set out that the area of the land was 2,143 *bighas*, that is, the *kabuliyat* figure; but they did say that the rent was Rs. 1,228, which was the figure fixed in the 4 annas landlords' suit of 1918. They explained, however, in the plaint in that case that they were not served in

the suit of 1918, that the proceedings took place behind their back and that the plaint was filed on the assumption that, until the decree was set aside, it was binding on the parties. I have given already my reasons for thinking that this view, that the decree in the suit of 1918 is binding upon these plaintiffs in the sense that it reassessed the rent so as to be binding upon them, is wrong. But this plaint, so far from being an adoption of what took place in the suit of 1918, was made upon the footing that the suit of 1918 produced a wrongful result as against the plaintiffs and that they were determined to set it aside if they could. In my judgment, the position is this: the fact of this suit of 1927 adds nothing to the argument that the decree in the suit of 1918 operated as a reassessment of the rent. It appears to me that there is nothing to show that the plaintiffs—if it be true in fact, that the tenant is in occupation of the whole of the area mentioned in the *kabuliyat*—should not get the *kabuliyat* rent. In my opinion, the reasoning of the learned Judge of the trial court is somewhat precarious by reason of the fact that he puts the case on the assumption that the previous decree was a reassessment of the rent and that the present claim can be made as for a fresh reassessment of the rent in view of the result of the measurement of the district settlement proceedings. If that were the right view, as at present advised, I think that Mr. Ray's answer would be good, namely, that the plaintiffs cannot get a reassessment upon the ground of increase of area on the basis of remeasurement without all the landlords being plaintiffs. In my judgment, the present plaintiffs are not in the position of having to assert a claim to reassessment of the rent on the basis of the measurement at the district settlement proceedings. It appears to me that, when the matter is examined, they are entitled to stand upon their ordinary right as landlords under the *kabuliyat* of 1905.

I think, therefore, that this appeal fails and must be dismissed with costs.

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GHOSE J. I am of the same opinion. In my judgment, the decision as regards the rate of rent in a suit brought by a co-sharer landlord, who proceeds with it for his share of the rent only under section 148A of the Bengal Tenancy Act, cannot operate as binding on the other co-sharer landlord, who is joined as defendant with the tenant. When a co-sharer landlord, who has obtained his proper share of the rent, is joined as a defendant in a suit for rent by his co-sharer for his undisputed share and no relief is asked for as against the defendant landlord, he need not take any interest in the litigation between the co-sharer plaintiff and the tenant. There is no provision in the law under which any plea set up by the tenant-defendant is to be served on the defendant landlord. If the tenant-defendant, in the suit brought by a co-sharer landlord, says that the rate of rent is not so much as is alleged by the plaintiff, the defendant-landlord has no means of knowing that such a plea has been urged, nor is there any procedure by which a defendant-landlord can fight the tenant-defendant on that single issue. Under such circumstance, it cannot be said that any issue was raised as between the tenant-defendant and the landlord-defendant, which was decided in the suit brought by the co-sharer landlord under the provisions of section 148A of the Bengal Tenancy Act. The only advantage which a co-sharer landlord gets, when he obtains a decree for his share under the provisions of that section, is as regards the remedies for enforcing it, that he can proceed to execute the decree in the same manner as if the decree had been obtained by the sole landlord or the entire body of landlords. It would be extending the scope of that section to say that the decree would have the binding effect as if it was obtained by the entire body of landlords, in the same manner if the defendant landlord had also been a plaintiff in the case and all the findings in the judgment in the suit would operate as against the defendant landlord. The result may be anomalous, as in this case, that one co-sharer landlord gets under the

decree a different rate of rent from what the other co-sharer landlords would be entitled to. But there are anomalies in the Bengal Tenancy Act and this possible anomaly cannot be made a reason for holding that the decree should be binding upon the defendant-landlords.

Appeal dismissed.

G. S.