APPELLATE CIVIL.

Before Mukerji and Mallik JJ.

BODORDOJA

v.

AJIJUDDIN SARKAR.*

1929.

Feb. 6.

Ejectment—Joint tenants—Notice—Service—Proof—Ammukhtearnama—Written authority—Oral—Registered post—Presumption—Acknowledgment—Signature by another—Exclusion of part of tenancy lands—Maintainability of suit—Transfer of Property Act (IV of 1882), s. 106.

The law does not say that authority to issue notices to quit must necessarily be given in writing.

An *ammukhtearnama* expressly empowering the agent to sue in ejectment should be construed as implying an authority to issue notice to quit, for the power to sue in ejectment should ordinarily be taken to include power to take such action as may be necessary as preliminaries to the institution of such a suit.

It is not right for an appeal court to go into the question of validity and sufficiency of notice, where this objection was not taken in the written statement and the question did not form the subject matter of discussion in the trial court and was not even mentioned in the grounds of appeal.

If a letter properly directed containing a notice to quit is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business in the post office.

That presumption would apply with still greater force to letters, which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself.

In the case of joint tenants, each is intended to be bound, and it has long been decided that service of notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants.

Harihar Banerji v. *Ramshashi Roy* (1) and *Gresham House Estate Company* v. *Rossa Grande Gold Mining Company* (2) followed.

The notice, in order to give rise to this presumption, must be addressed to all the joint tenants, and where the notice was addressed to one of the joint tenants, the mere service of that notice on the other joint tenants is not sufficient notice to quit according to law.

Bejoy Chand Mahatab v. *Kali Prasanna Seal* (3) explained and distinguished.

*Appeal from Appellate Decree, No. 2199 of 1926, against the decree of Nagendra Nath Bhattacharjee, Subordinate Judge of Dinajpur, dated May 24, 1926, reversing the decree of Monindra Prosad Singha, Munsif of Thakurgaon, dated Aug. 13, 1924.

(1) (1918) I. L. R. 46 Calc. 458. (2) [1870] W. N. 119.
(3) (1925) 29 C. W. N. 620.

If a part of the land of a tenancy is excluded from the notice to quit and from the suit, and of such part the defendants are in possession as tenants under the plaintiff, the plaintiff cannot possibly obtain a decree in the ejectment suit.

Where a notice, addressed to all the joint tenants, was sent by registered post to the joint tenants severally, and an acknowledgment, purporting to have been signed by one joint tenant and received back through the post office, was produced and proved in court,

held that, as the said addressee had not come forward to deny his signature on oath, and, in view of the presumption, which arose upon the circumstances of the case, it must be held that, until that presumption was rebutted, the service of notice upon that addressee had been duly proved.

Held, further, that, applying the *dictum* of the Judicial Committee referred to above, it followed as a matter of course that the other joint tenants had been served with notice.

SECOND APPEAL, by Syed Bodordoja and others, plaintiffs.

This appeal arose out of an ejectment suit, in which the plaintiffs had obtained a decree in the first instance. The defendants Nos. 1 to 4 having preferred an appeal, the lower appellate court dismissed that suit holding that the notices to quit were not legal and had not been served on all the defendants. Its decision on this matter was as follows :—

"The principal defendants are Mahomedans, among whom the joint "family system cannot be presumed to hold sway. A notice upon "a managing member of a joint family has sometimes been looked "upon as a notice to all. But no such presumption can be made in "the present case. None of the defendants had the right to repre- "sent the others, though they were joint tenants. In the circum- "stances, the notice should have been served upon all and, in the "absence of proof of service on some, the suit cannot succeed as an "ejectment suit."

Dr. Jadunath Kanjilal and *Mr. Krishnachaitanya Ghosh*, for the appellants.

Mr. Surjyakumar Guha, for the respondents.

Mr. Birajmohan Majumdar, for the Deputy Registrar, as guardian *ad litem* for the minor respondents.

MUKERJI AND MALLIK JJ. This appeal has arisen out of a suit, which was instituted by the plaintiffs, for recovery of possession on ejectment of the defendants. The trial court decreed the suit on contest as against some of the defendants and *ex parte* against the others.

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It declared the plaintiffs' title to the land and directed that they would recover *khas* possession on evicting the defendants therefrom. The defendants, thereupon, preferred an appeal. The learned Subordinate Judge, who dealt with that appeal, dismissed the plaintiffs' claim, holding, that although he found in favour of the plaintiffs on the merits, the decree of the trial court was to be reversed and the suit dismissed on the ground that notices under section 106 of the Transfer of Property Act were neither sufficient nor properly served.

The plaintiffs have then preferred this Second Appeal and on their behalf the findings of the Subordinate Judge, both on the question of sufficiency of the notices as also on the question of their service, have been challenged in this appeal.

As regards the sufficiency of the notices, what has been found against the plaintiffs by the Subordinate Judge is that the notices purported to have been signed by certain persons as *ammukhtears* on behalf of certain ladies and that it had not been proved in the case that the persons, who purported to sign on behalf of the said ladies as such *ammukhtears*, had been duly authorised by the said ladies to issue the said notices. The learned Subordinate Judge has found that, upon the evidence in the case, proper execution of the *ammukhtearnamas* had not been duly proved, and furthermore that although in the *ammukhtearnamas* power was given to the *ammukhtears* to sue in ejectment, there was nothing said conferring any authority upon the *ammukhtears* to issue notices to quit. As regards this matter, it is sufficient for us to say that in the written statement that was filed on behalf of the defendants, no question as to the want of a power of this character in the *ammukhtearnamas* or as to the *ammukhtearnamas* not having been duly executed by the ladies appears to have been raised. If it was the defendants' desire to contest the validity of the notices upon grounds such as these, it was clearly their duty to put forward their objection on this head definitely and specifically in the written statement in order that the plaintiffs could have produced necessary evidence

showing due and proper execution of the *ammukhtearnamas* and the fact that the power to issue notices on behalf of the ladies was conferred thereby. Moreover, even if there was any defect in the *ammukhtearnamas* as regards these matters, the plaintiffs could have proved that the notices were issued under authority duly given by the ladies, because the law does not say that such authority must necessarily be given in writing. It may also be mentioned that the power to sue in ejectment should ordinarily be taken to include power to take such action as may be necessary as preliminaries to the institution of such a suit. In view of the fact that the objection was not taken in the written statement and the matter did not form the subject matter of discussion in the trial court and was not even mentioned in the grounds of appeal, which the defendants preferred to the lower appellate court, it was not right on the part of the learned Subordinate Judge to have gone into this question at all.

As regards service of notices, the learned Subordinate Judge has held that the notice that was meant for one Emajudin had not been duly served. Emajuddin, it appears, denied in the written statement that there was any service of notice on him. But he did not appear as a witness and did not adduce any evidence to the effect that the notice meant for him was not received by him. On behalf of the plaintiffs, it was proved that the notice was sent by registered post and an acknowledgment purporting to have been signed by Emajuddin and received back through the post office was produced and proved in the case. On these facts the learned Subordinate Judge should have held that the service of notice upon Emajuddin had been proved in view of the decision of the Judicial Committee in the case of *Harihar Banerji* v. *Ramshashi Roy* (1). In that case, their Lordships, quoting the decision in the case of *Gresham House Estate Company* v. *Rossa Grande Gold Mining Company* (2), observed that, if a letter properly directed containing a notice to quit is proved to have been put into the post

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office, it is presumed that the letter reached its destination at the proper time according to the regular course of business in the post office and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters, which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself. In this particular case, as I have already stated, Emajudin had not come forward to deny his signature on oath and, in view of the presumption, which arises, upon the circumstances of the case, it must be held that, until that presumption is rebutted, the service of notice upon Emajuddin has been duly proved. The learned Subordinate Judge, in our opinion, was wrong in not giving effect to this presumption.

With regard to the service of notices again, the second question that arises is with reference to the notice on Faijannessa. The notice meant for Faijannessa was also sent *per* registered post and served on one Noshan Ali. Noshan Ali has been examined on behalf of the defendants and he has said that he forgot to make over the notice to Faijannessa. The postal peon, who delivered the letter to Noshan Ali, was examined, but he was unable to say that he made over the notice to Noshan Ali at the request of Faijannessa. The learned Subordinate Judge thought that it was the duty of the plaintiffs to go further and to prove that the notice that was served on Noshan Ali had actually reached Faijannessa. He held that her evidence to that effect was not forthcoming and it should be taken that the notice was not served on Faijannessa. The notices that were given in this case were addressed to all the joint tenants and copies of such notice are alleged to have been served upon the joint tenants severally. The Judicial Committee in the case of *Harihar Banerji* v. *Ramshashi Roy* (1), to which reference has already been made, pointed out that in the

(1) (1918) I. L. R. 46 Calc. 458.

case of joint tenants each is intended to be bound, and it has long been decided that service of notice to quit upon one joint tenant is *primâ facie* evidence that it has reached the other joint tenants. In view of the fact that we have found that service of notice to quit upon Emajuddin had been established, applying to the case the *dictum* of the Judicial Committee referred to above, it follows as a matter of course that the other joint tenants including Faijannessa had been served with notice. Our attention has been drawn to the decision of this Court in the case of *Bejoy Chand Mahatab* v. *Kali Prasanna Seal* (1), in which, according to the contention of the respondents, some observations have been made which may be taken to have detracted from the correctness or applicability of the *dictum* to circumstances such as arise in the present case. On examination of the facts of that case, however, it appears that all that has been laid down in that case is that the notice, in order to give rise to this presumption, must be addressed to all the joint tenants and that, where the notice was addressed to one of the joint tenants, the mere service of the notice on the other joint tenants is not sufficient notice to quit according to law. In the present case the notices that were issued were addressed to all the joint tenants. On the question of service of notice also, therefore, the decision of the Subordinate Judge is not correct.

The respondents have then drawn our attention to two passages in the judgment of the Subordinate Judge, which are somewhat in conflict with each other and, from a perusal of which, the conclusion may not unreasonably be arrived at to the effect that the notice as well as the suit excluded a portion of the tenancy which is in the occupation of the defendants. One of these passages runs in these words :—" Derajtulla's " land must have been in regard to a portion of it on " the north of the District Board road.....The " suit is for eviction from the land lying to the south " of District Board road. The plaintiffs' case is 2 " *bighas* 12 *cottahs* of land lying to the south of the

(1) (1925) 29 C. W. N. 620.

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"road was let out. But this cannot be possibly true, "as I have seen, that Derajtulla had also some land "to the north of the road and his brother Muzafar's "*baitakkhana* was situated there." The other passage runs in these words:—"The plaintiffs have "sued for all the lands in the possession of Deraj- "tulla's heirs as appertaining to the *jote*, but they have "understated the area. They have resorted to this "understatement with two objects in view. They would "not admit that any land of Derajtulla lay to the "north of the District Board road and had been "acquired by Government. In the next place they "thought it necessary to minimise the area of the "land to make it appear that the land could not have "been let out for agricultural purposes." What exactly was the finding of fact of the Subordinate Judge on this question, we are not in a position to appreciate. If it was only an understatement in the area, the whole of the land forming the subject matter of the tenancy having been included, the defect in the notice or in the suit would not be fatal to the plaintiff's case. It has been held in the case of *Shama Charan Mitter* v. *Uma Charan Haldar* (1), that where a notice to quit stated the area of the defendant's holding to be 1 *biga* 5 *chittaks*, but the true area was $1\frac{3}{4}$ *cottahs* less and no boundaries were given, it was not a defect which would make the notice bad in law. But if it be a fact that a part of the land of this tenancy was excluded from the notice and from the suit and of such part the defendants are in possession as tenants under the plaintiff, the plaintiff cannot possibly obtain a decree in the suit.

The question whether the notice and the suit covered the entire tenancy or whether they have left out a part of it, which is in the defendants' occupation, will have to be reinvestigated; and in view of the fact that it was not specifically raised in the pleadings and there is not much indication in the judgment of the trial court showing that it was canvassed there, we think that, while we shall make an order for

(1) (1897) 2 C. W. N. 106.

remand to the lower appellate court for a proper investigation of that question and for a clear finding on it, we shall give the parties an opportunity to adduce such further materials as they may desire to do in connection with this question. All other questions that arose in the suit have now been concluded and the question referred to above is the only question that will be left open for consideration by the learned Subordinate Judge. On arriving at his finding on that question, he will proceed to dispose of the appeal in accordance with law.

Costs of this appeal will abide the result.

Appeal allowed: case remanded.

G. S.

CRIMINAL REVISION.

Before Suhrawardy and Mukerji JJ.

SIDH NATH AWASTHI

v.

EMPEROR.*

1929.

Feb. 11.

Autrefois Acquit—*Principle, when can be extended to other cases—Criminal breach of trust, when a second trial should not proceed*—Chalan, *if a second one is competent—Seizin on transfer, if of the whole matter—Criminal Procedure Code (Act V of 1898), s. 403.*

There may be cases to which, though section 403 of the Code of Criminal Procedure does not strictly apply, yet on the principle underlying that section, a second trial should not be allowed to proceed.

Where a *chalan* was submitted against the accused to the effect that he had committed criminal breach of trust in respect of a gross sum but the trial was held with respect to only three particular items out of it, a second trial with respect to three other items included in the gross sum should not be allowed to proceed.

Inam-ullah v. *King-Emperor* (1), *Emperor* v. *Jhabbar Mull Lakkar* (2), *Bishun Das Ghosh* v. *King-Emperor* (3), *Jaliram Alom Ganburah* v. *Rajkumar Umar Singh* (4) and *Surja Kanta Bhattacharjya* v. *King-Emperor* (5) referred to.

*Criminal Revision, No. 1054 of 1928, against the order of S. A. Latif, Additional Chief Presidency Magistrate, Northern Division, Calcutta, dated Sep. 26, 1928.

(1) (1905) 2 A. L. J. 673.
(2) (1922) I. L. R. 49 Calc. 924.
(3) (1902) 7 C. W. N. 493.
(4) (1900) 5 C. W. N. 72.
(5) (1919) Cr. Rev. 934 of 1919, decided on 28th Nov.