CIVIL REVISION.

Before Suhrawardy and Graham JJ.

YUSUF

v.

JYOTISHCHANDRA BANERJI.*

1931

July 27, 29.

Landlord and Tenant—Ejectment—Sub-tenant, if a necessary party to suit, and if bound by decree against tenant—Cases of forfeiture, termination by notice and surrender, difference between—Estoppel—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 35, 97—Indian Evidence Act (I of 1872), s. 116.

A sub-tenant of a lessee is not a necessary party to a suit for ejectment brought by the superior landlord.

When a landlord obtains a decree for ejectment on forfeiture or determination of the lease by notice against his tenant, the latter's sub-tenants, licensees or servants in actual possession of the premises are "persons bound by the decree" within the meaning of rule 35 of Order XXI of the Code of Civil Procedure.

Minet v. *Johnson* (1) and *Ramkissendas* v. *Binjraj Chowdhury* (2) followed.

Ezra v. *Gubbay* (3) commented on.

A valid notice to quit not only determines the original demise, but any sub-lease which the tenant might have made, provided the sub-tenant has no right independent of the right of his lessor. But a lessee by a voluntary surrender of his lease cannot prejudice the right of the under-lessee.

Mellor v. *Watkins* (4) and *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (5) referred to.

CIVIL RULE obtained by the sub-tenant Sheikh Yusuf.

The facts are stated fully in the judgment.

Panchanan Ghosh for the petitioner.

Seetaram Banerji and *Prakashchandra Basu* for the opposite party.

SUHRAWARDY J. This revision case arises out of an execution proceeding following upon a decree in ejectment The property in suit is a house in Kidderpur in the suburbs of Calcutta. The plaintiff decree-holder obtained a decree in ejectment against his tenant by serving a notice upon him to quit.

*Civil Revision, No. 1481 of 1930.

(1) (1890) 63 L. T. 507.
(2) (1923) I. L. R. 50 Calc. 419.
(3) (1920) I. L. R. 47 Calc. 907.
(4) (1874) L. R. 9 Q. B. 400.
(5) (1920) I. L. R. 48 Calc. 605.

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When he attempted to take possession of this property in execution of the decree, it was found that there were several sub-tenants under the defendant. All the other tenants vacated, but the petitioner, who has a *birhi* shop in a small room on the premises, refused to vacate. Thereupon, the decree-holder applied to the court for police-help for delivery of *khâs* possession, by ejecting the petitioner. The petitioner, thereupon, made an application to the executing court under section 151, Code of Civil Procedure, in which he urged that he could not be evicted in execution of the decree against his lessor, but that the proper procedure to be followed by the decree-holder was that under Order XXI, rule 97, Code of Civil Procedure. On the suggestion of court, the decree-holder filed an application also under Order XXI, rule 97, but he, at the same time, contended that no application under that rule was necessary in the case, as the petitioner was bound by the decree. The learned Munsif, thereupon, proceeded to determine the question as to whether the petitioner could be ejected in execution of the decree against his lessor or it was incumbent upon the decree-holder to proceed under Order XXI, rule 97. After considering the facts of the case and the law, the learned Munsif ordered that the decree-holder should be allowed to take *khâs* possession of the disputed property with the help of police. Against this order, the present Rule has been obtained, on the ground that the executing court had no jurisdiction to order eviction of the petitioner except by proceeding under Order XXI, rule 97 and the following rules, as the petitioner was a person other than the judgment-debtor in possession of the property.

The decree under execution is a decree for delivery of possession of immoveable property and was being executed under Order XXI, rule 35, under which possession of the property shall be delivered, if necessary, by removing any person bound by the decree who refuses to vacate the property. The question, therefore, that falls for determination is

whether the petitioner is a person bound by the decree. If he is not so, the only remedy open to the decree-holder is to proceed under Order XXI, rule 97. If he is so, he is liable to be evicted in execution of the decree under rule 35. The learned advocate for the petitioner argues that the words "any person "bound by the decree" are synonymous with "judgment-debtor." In my judgment, the words include judgment-debtor as well as any person who may be held under the law as bound by the decree. "Judgment-debtor" is defined in section 2 (*10*), Code of Civil Procedure, as meaning any person against whom a decree has been passed or an order capable of execution has been made. If the scope of rule 35 is limited only in respect of the person against whom a decree has been passed or an order capable of execution has been made, then it would have been much easier to use the expression "judgment-debtor" in the rule instead of the descriptive clause "any person bound by the decree." It is also suggested that the expression is used to include a transferee *pendente lite*, as hinted in a reported case, but provision has been made in rule 102 for such a transferee. It may include a person who may have come into possession after the institution of the suit and the legal representative of the judgment-debtor, but need not be confined to such persons only.

Now, it has to be seen whether the petitioner is a person who is bound by the decree. Under section 115 of the Transfer of Property Act, he being a sub-lessee, his interest ceased with the forfeiture of the lease and he ceased to have any tangible right to the property. It seems to me that it would be unreasonable to force a landlord to make in a suit for ejectment against his lessee all the under-lessees or even persons under such under-lessees, who may be in actual possession, parties to the suit, the nature of which may change from a simple suit for ejectment on forfeiture or determination of the lease. So far as the landlord is concerned, the possession is with his lessee. The possession of the lessee may be by

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his occupying the premises himself or by his allowing other persons to occupy the premises on his behalf, either as sub-lessees or licensees or as servants. It would be most oppressive to insist upon the landlord to make all such persons parties to a suit. For instance, in the case of a house in Calcutta, which is popularly called "mansion" or "court," there may be some 150 sub-tenants in occupation of different portions of it. The owner, if the view urged by the petitioner is accepted, will have to make all these persons parties in a suit for ejectment against his lessee. Take another common instance of a market or *bâzâr* held under lease. If the owner seeks possession of it by ejecting the lessee, it will be absurd to hold that he must make every squatter or stall-holder party to the suit.

A question similar to this came for consideration incidentally in England in *Geen* v. *Herring* (1), where the plaintiff had made all sub-tenants parties to an action for recovery of a house. The court disallowed the costs of serving all the sub-tenants with writs or notices, on the ground that it was not necessary to make the sub-tenants parties to the action. In delivering the judgment of the court of appeal, Stirling L.J. observed: "It was not disputed, "and I think rightly so, by the counsel for the "plaintiff that the action for recovery of these houses "would have been well brought against Herring" (the lessee) "alone, without joining his weekly tenants." The position will be more intolerable, if a person, in the position of the decree-holder in this case, is compelled, on resistance being offered by each of the sub-tenants, to bring a suit for possession of this property against each of them. A valid notice to quit not only determines the original demise but any under-lease which the tenant might have made, Foa on the Law of Landlords and Tenants, 6th edition, 683. The petitioner, therefore, is a person who has no right to remain on the land and whose right, if any, came to an end along with that of his lessor. Where

(1) [1905] 1 K. B. 152.

he is a necessary party in an action of ejectment against his lessor, as in the case of *Minet* v. *Johnson* (1), the only remedy open to a person who has been evicted in execution of a decree against his lessor is to bring an action for being reinstated in possession under Order XII, rule 25 of the Rules of the Supreme Court, provided he has any right independent of the right of his lessor. In *Minet's* case (1), Lord Esher M.R. observed: "In pursuance of a writ of possession "the sheriff turns out of possession the persons on the "premises and delivers possession to the plaintiff. If "Hartley (the sub-tenant) were a tenant of Johnson's "of course he must go out; therefore to support his "complaint now he must say that he had some "independent right of his own." This is an authority for holding that a person in the position of the petitioner in this case must go out under the decree passed against his lessor. In *Great Western Railway Company* v. *Smith* (2), a distinction was made which was adopted in *Mellor* v. *Watkins* (3), between forfeiture and surrender. Mellish L.J. in his judgment in the court of appeal (3) observed: "It is "a rule of law that if there is a lessee, and he has "created an under-lease, or any other legal interest, "if the lease is forfeited, then the under-lessee, or the "person who claims under the lessee, loses his estate "as well as the lessee himself; but if the lessee "surrenders he cannot, by his own voluntary act in "surrendering, prejudice the estate of the under-lessee "or the person who claims under him." The latter proposition of law has been accepted in this Court in the Full Bench decision in *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (4).

There are two decisions of this Court, which have to be considered in this connection. The first is *Ezra* v. *Gubbay* (5), in which some opinion was expressed that, where an under-tenant was not made a party to an action in ejectment, the decree-holder could not

(1) [1890] 63 L. T. 507.
(2) (1876) 2 Ch. D. 235, 253.
(3) (1874) L. R. 9 Q. B. 400.
(4) (1920) I. L. R. 48 Calc. 605.
(5) (1920) I. L. R. 47 Calc. 907.

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proceed to eject him in execution of the decree. That was the case of a decree obtained upon forfeiture of a term and the question arose at the time when an application for execution was made and a sub-tenant intervened. This fact would bring the case within the principle of the English law under Order XII, rule 25 of the Rules of the Supreme Court in England. *Ezra's* case (1) was subsequently considered and distinguished in *Ramkissendas* v. *Binjraj Chowdhury* (2), where it was definitely held by the learned Judge that, in an action in ejectment, a sub-tenant need not have been made a party and a decree obtained against his lessor was binding upon him. *Ezra's* case (1) was distinguished probably on the ground that it was a case of forfeiture, though I do not see the force of the distinction. Both these cases were decided by learned Judges sitting on the Original Side and are not binding upon us. But, I am of opinion that the view taken in the latter case of *Ramkissendas* (2) is in accordance with the law. A decree in ejectment passed against a lessee at the instance of a lessor is not only binding upon the lessee but also upon his sub-tenants, provided they have no right independent of the right of their lessor in the demised premises. The learned Munsif, in my opinion, has taken the correct view of the matter.

The petitioner, as under-tenant, is, moreover, bound by the estoppel against his lessor, under section 116, Evidence Act. He is estopped from denying the title of the opposite party or setting up any title of his own in these proceedings having come into possession under the tenant. (Woodroffe's Evidence Act, 9th Edition, page 909).

Then there is another fact which should not be overlooked. It appears from the order sheet of the learned Munsif that, by his order of the 18th November, 1930, he ordered the petitioner to deposit a sum of Rs. 240 in court by the 21st November, 1930,

(1) (1920) I. L. R. 47 Calc. 907. (2) (1923) I. L. R. 50 Calc. 419.

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in order to have a stay of proceedings for delivery of possession. This he did not do, but, on the other hand, on the 24th November, 1930, moved an application here and obtained this Rule suppressing the order of the Munsif, dated the 18th November, 1930. It was possible that, inspite of the order of the Munsif, we would have issued the Rule; but he should have brought the matter to the notice of this court. Not having obeyed the order of the Munsif, the petitioner is still in contempt and is not entitled to be heard.

The Rule is discharged with costs. Hearing-fee three gold mohurs.

GRAHAM J. I agree. In my judgment, the law is against the petitioner, nor do I find any merits in his case such as would justify us in interfering in the exercise of our powers in revision. Admittedly, the petitioner is a sub-tenant in occupation of the premises and is dependent upon his lessors for such right as he may be possessed of. His lessors' right has been determined, by due course of law, so that it follows as a necessary consequence that the petitioner has no longer any right to continue in possession of the property.

Rule discharged.

A. A.