1881

KALYTARA CHOWDHRAIN v. RAMCOOMAR GOOPTA.

learned colleague is the right construction. It seems to me that the Legislature never intended to discard one of the most important elements in the publication of a sale-proclamation, —*viz.*, the affixing a copy of the order of proclamation of sale on a conspicuous part of the property to be sold. Section 289, as originally drafted, by its terms, limited the making of the proclamation to "the spot where the property is attached," so it was to correct this apparent limitation that the Amending Act extended the mode of making the proclamation by adding the words "and a copy thereof shall be fixed up in the Court-house, and in the case of land paying revenue to Government, also in the Collector's office." These additional words, or at least the substance of them, is to be found in s. 274; and it is evident that, by supplying them to s. 289, the Legislature simply intended to prescribe the adoption of precisely the same mode of making the proclamation of sale as it had previously prescribed in s. 274, for making attachment of immoveable property.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1881
May 6.

REASUT HOSSEIN AND ANOTHER (PLAINTIFFS) *v.* CHORWAR SINGH AND OTHERS (DEFENDANTS).*

Covenant—Forfeiture—Breach of Covenant—Joinder of Plaintiff—Co-Sharers—Mokurari.

Where it is optional with several joint lessors to avail themselves of a condition of re-entry upon breach of certain covenants, one or more of the lessors cannot insist upon a forfeiture without the consent of the others.

Held, therefore, in a suit which was brought for the cancellation of a mokurari lease, and the recovery of *seer* possession, on the ground of forfeiture for breach of covenant, that all the co-sharers should join as plaintiffs; and that as some of the co-sharers, who were made defendants, appeared and opposed the cancellation of the lease, the suit must be dismissed.

THIS was a suit brought by the plaintiffs for the cancellation of a mokurari lease, which had been granted by one Mussa-

* Appeal from Original Decree, No. 298 of 1879, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Patna, dated the 30th June 1879.

1881

REASUT HOSSEIN v. CHOWAR SINGH.

mat Noorun, their predecessor in title, and for the recovery of *seer* possession of the land comprised in the lease. There were two sets of defendants,—the Singh defendants, and the Hossain defendants. The Singh defendants were the successors in title of the persons to whom the mokurari lease was granted. The Hossain defendants were those co-sharers who would not join as plaintiffs. The suit was based on the following passage in the kabuliat granted by the Singh defendants' predecessors.

"We shall not default any instalment. If any instalment is defaulted, then we shall pay the salaries of the sazawals, motsuddee, and the peon (who may be deputed by the *Sarkar*), according to the list furnished by the *Sarkar*, together with interest on the defaulted instalment. If, notwithstanding the appointment of a sazawal, we fail to pay the rent of the *Sarkar* in full at the end of the year, then the said *Sarkar* shall be at liberty to take *seer* possession of the said mouza, and we, the declarants, shall have no claim in respect of the mokurari right to the said mouza. All the ordinary and extraordinary expenses incurred under the orders of the local authorities, Civil, Criminal, and Nizamut Courts, and Kanongoes, salaries of Chowkeedarees, &c., shall be paid by us, the declarants. The *Sarkar* shall have no connection whatever with the same. We shall not take possession of minhaee lands. We shall not, by our acts of oppression, force the tenants to run away. We shall not cut down fruit-bearing and non-fruit-bearing trees. We shall not allow any portion of the lands appertaining to the said mouza to be taken possession of by any other person. We shall not allow any extraordinary *pyne* or *negar* to be opened in the lands of the said mouza. If such things take place, then the said *Sarkar* shall have power to cancel the mokurari lease and take *seer* possession. In that case, we, the declarants, shall have no claim to the mokurari right, nor shall we have any cause to raise any contention."

The plaintiffs alleged that, notwithstanding the stipulations above set out, the Singh defendants had cut down and appropriated certain trees; that they had oppressed and driven off the land certain tenants whose names were given; that they had taken possession of certain lands not included in the mokurari lease, and allowed other lands, which were included in it, to be seized by the neighbouring proprietors; that they had allowed a new *pyne* and a new *negar* to run into the lands of a neigh-

1881

REASUT HOSSEIN v. CHOKWAR SINGH.

bouring mouza; and that they had not paid their rent. The Hossain defendants did not enter any appearance. The Singh defendants denied the allegations of the plaintiffs, and, in addition, two of them, who had bought the interest of one of the plaintiffs' co-sharers (thus becoming themselves co-sharers with the plaintiffs) protested against the cancellation of the mokurari lease.

The Subordinate Judge found that every one of the plaintiffs' allegations were false; that they had forged documents to support their case; and he dismissed the suit with costs. The plaintiffs appealed to the High Court.

Moonshee *Serajul Islam* for the appellants.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Amarendronath Chatterjee*, and Mr. *Sandel* for the respondents.

The judgment of the Court (GARTH, C.J., and MCDONELL, J.) was delivered by

GARTH, C. J.—The plaintiffs in this suit are some of the representatives in title of one Bibi Noorun, who granted a mokurari lease to the defendants' predecessors in title, so long ago as the 25th Bysack 1232.

The suit is brought to eject the defendants from the property upon the ground that they have been guilty of certain breaches of covenant; and that, consequently, under a condition of re-entry contained in the lease, they have forfeited their tenure. The other representatives of Bibi Noorun's interest, who are co-sharers with the plaintiffs in her estate, are averse to bringing this suit, and consequently they have been made defendants.

The Court below has dismissed the suit on several grounds, and amongst others, that the defendants have not been guilty of the breaches of covenant with which they were charged.

From this decision the plaintiffs have appealed; and we think that we may dismiss the appeal upon this one ground only, that one or more of several joint lessors have no right to take advantage of a forfeiture against the will of their co-

lessors. The law is opposed to forfeitures; and unless we find that the right now claimed by the plaintiffs is clearly conferred upon them by the mokurari lease, we ought not to allow them to enforce it.

At the time when the lease was granted, Bibi Noorun was the sole owner of the property, and as such the sole lessor. Since that time her estate has descended to several persons, who are all joint owners of her interest, and jointly entitled to the rent of the mokurari. They are also jointly entitled to the benefit of the covenants and of the condition of re-entry upon breach of those covenants, and it is optional with them all, whether they will take advantage of the condition or not.

The lease contains several covenants on the part of the mokuraridars, and then comes the forfeiture clause in this form: "If such things take place, then the *Sarkar* shall have power to cancel the mokurari lease and take *seer* possession." It is clear, therefore, that the lease does not become void upon breach of any of the covenants; but the lessor, or her assigns, may take advantage of the condition or not as they think proper.

Under these circumstances, by the English law, not only would one or more of the joint lessors have no right to take advantage of the condition without the consent of the others, but if the joint lessors had, by agreement, made a partition of their shares, the condition would be at an end, because only those entitled to the lessor's interest in the whole property could avail themselves of it (see *Wright* v. *Burroughes* (1) and *Dumpor's Case* (2), and cases there cited).

Whether a voluntary partition in this country would have the same effect, we are not called upon in this case to decide. But, quite apart from English law, it seems to us that, according to the just and reasonable construction of a condition of this kind, where it is optional with several joint lessors to avail themselves of the condition or not, one or more of those lessors cannot legally insist upon a forfeiture without the consent of the others. The case of *Alum Manjee* v. *Ashad Ali* (3), to

(1) 3 C. B., 699. (2) Sm. L. C., 7th ed., 41. (3) 16 W. R., 138.

1881

REASUT HOSSEIN v. CHORWAR SINGH.

which we were referred in the course of the argument, appears to be in point; but we think that no authority is required for such a position.

The appeal must be dismissed with costs; but we allow one set of costs only.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881 *March* 23.

INDER PERSHAD SINGH (PLAINTIFF) *v.* CAMPBELL (DEFENDANT).*

Breach of Contract—Impossibility to perform a portion arising after Execution—Suit to cancel such portion—Contract Act (IX of 1872), s. 56—Specific Relief Act (I of 1877), chaps. iv and v.

A contract was entered into between the plaintiff and the defendant, by which the plaintiff agreed to cultivate indigo for the defendant, for a specified number of years, in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a sub-tenant only. Subsequently, during the continuance of the contract, the plaintiff lost possession of those lands, through his immediate landlord having failed to pay the rent, and having been in consequence ejected therefrom by the owner. In a suit by him, under the above circumstances, to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part,—

Held, that such a case came within the provisions of cl. 2, s. 56 of Act IX of 1872 (Contract Act), and that the mere fact that the plaintiff could have paid up the debt due by his immediate landlord and so retained possession of the land, was not sufficient to constitute such an omission or neglect on his part as to take it out of the provisions of that section.

Held also, that chap. iv of Act I of 1877 (Specific Relief Act) did not apply to such a case, but that the plaintiff was entitled to the relief he sought under s. 40 of that Act, inasmuch as the contract was evidence of different obligations,—*viz.*, to cultivate indigo in different villages.

THIS was a suit brought by the plaintiff to have a portion of a contract entered into between him and the defendant declared void, and to have the contract rescinded to that extent,

* Appeal from Appellate Decree, No. 1735 of 1879, against the decree of W. Dacosta, Esq., First Subordinate Judge of Mozuffurpore, dated the 14th May 1879, reversing the decree of Baboo Gopinath Mattey, Munsif of Hajeepore, dated the 27th June 1878.