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the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the lifetime of Gauhar Bibi.

It is unnecessary to consider the other questions raised in this appeal, and their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and to order the appeal to him to be dismissed with costs. And the respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitor for the respondents: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

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

1885 *April* 8.

NOOR ALI MIAN KHONDKAR (DEFENDANT) *v.* ASHANULLAH (PLAINTIFF.)*

Notice, Substituted service of—Beng. Act VIII of 1869, *s.* 14—*Regulation V of* 1812, *s.* 10—*Evidence of substituted service, Nature of—Burden of proof.*

Proof of the validity of substituted service required by s. 10, Regulation V of 1812, is stricter than that necessary under the terms of s. 14 of Bengal Act VIII of 1869.

Ram Chunder Dutt v. Jogesh Chunder Dutt (1), distinguished.

Where the only evidence in support of substituted service was the statement of the serving peon that he had searched for the tenant and could not find him; *held*, that such evidence was sufficient, under the terms of s. 14 of the Rent Act, to throw the onus upon the defendant to show by cross-examination or otherwise that the search was not properly made.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, one of the Judges of this Court, dated the 20th of June 1884, in Appeal from Appellate Decree No. 782 of 1883, against the decree of Baboo Rajendra Coomar Bose, Additional Sub-Judge of Mymensing, dated the 16th of January 1883, reversing the decree of Baboo Khetter Pershad Mukherji, First Munsiff of Attiah, dated the 19th of March 1882.

(1) 19 W. R., 353; 12 B. L. R., 229.

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THIS was a suit for enhancement of rent. On the part of the defendant, it was urged, among other things, (i) that the service of notice was not good in law; (ii) that the land in question was held under a *pottah* of the 21st Assin 1176 B. S. or more than a century old; (iii) that a uniform rent had been paid for at least a period of twenty years giving rise to the presumption laid down by s. 4 of Bengal Act VIII of 1869.

The Munsiff found that the *pottah* was forged, that there was no reliable evidence to create a presumption under s. 4, that there was nothing wrong with the service of notice, it having been affixed at the usual place of residence after due search.

On appeal the Subordinate Judge held, on the authority of *Ram Chunder Dutt* v. *Jogesh Chunder Dutt* (1), that in order to render valid a substituted service it was incumbent on the plaintiff, under the provisions of s. 14 of the Rent Act, to show, not merely that a search had been made, but also the nature of the search, and that the defendant had actually kept himself out of the way when the notice was affixed to his house. The Subordinate Judge further relied on *Bissonath Sircar* v. *Tara Prosonno Mozoomdar* (2); *Buroda Kant Roy* v. *Raj Churn Burnoshil* (3); and *Rama Rai* v. *Sridhur Pershad Narain Sahai* (4), and set aside the Munsiff's decree.

On appeal by the plaintiff to the High Court, the value of the suit being under Rs. 50, the case came up before a single Judge, Mr. Justice *Field*, who was of opinion that the case of *Ram Chunder Dutt* v. *Jogesh Chunder Dutt* did not apply to the present case, and proceeded to observe: "The law applicable to the service of notice in the present case is to be found in s. 14 of Bengal Act VIII of 1869, and is as follows: 'Such notice * * * shall, if practicable, be served personally upon the under-tenant or ryot. If *for any reason* the notice cannot be served personally upon the under-tenant or ryot, it shall be affixed at the usual place of residence.' Now, the words, *for any reason* can scarcely, I think, be limited to mean when the person to be served is keeping out of the way, because there may be other reasons

(1) 19 W. R. 353; 12 B. L. R. 229.
(2) 22 W. R., 482.
(3) 24 W. R., 381.
(4) 4 C. L. R., 397.

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besides this, which may render the service of the notice impracticable. I think, therefore, that the decision, or rather the observation in the decision of their Lordships in the Privy Council, do not conclude the matter before me in the present case. I have already said that I do not consider the Subordinate Judge was justified in assuming that the peon had failed to make the necessary inquiries, there being no evidence that he had not made these inquiries, and no question being put either to the peon or to the man who went with him to point out the person to be served, to bring those matters out in cross-examination. Both the witnesses declare that there was a search. What the nature of the search was we do not know. A proper cross-examination would have elicited the facts."

He therefore set aside the judgment of the lower Appellate Court on this point, and both the Courts below being agreed on the merits of the case, decreed the plaintiff's claim.

The defendant appealed under s. 15 of the Letters Patent; it was mainly contended on his behalf that there was no *bonâ fide* attempt made to effect personal service of the notice, and it was for the plaintiff to prove why personal service was impracticable; and in support of this contention the following cases were cited:—

Ram Chunder Dutt v. *Jogesh Chunder Dutt* (1); *Bissonath Sircar* v. *Tara Prosonno Mozoomdar* (2); *Buroda Kant Roy* v. *Raj Churn Burnoshil* (3); *Rama Rai* v. *Sridhur Pershad*, *Narain Sahai* (4).

Baboo *Hari Mohun Chackrabatti* for the appellant.

Baboo *Rashbehari Ghose* and Baboo *Basant Coomar Bose* for the respondent.

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

GARTH, C.J.—In this case I entirely agree with the learned pleader, who has argued the case for the appellant, that if the question before us had been merely one of fact this Court would not have been justified in interfering with the finding of the

(1) 19 W. R., 353; 12 B. L. R. 239.
(2) 22 W. R., 482.
(3) 24 W. R., 381.
(4) 4 C. L. R., 397.

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lower Court. We have always in this Bench adhered most strictly to that rule. Unless we could see that the lower Court had either committed some error of law, or had been under some misapprehension of law, we have always refused to interfere.

But it seems to me that, in this case, the judgment of the Subordinate Judge has proceeded upon a misapprehension of the law.

The question was, as to whether the notice of enhancement was properly served under s. 14 of the Rent Law (Bengal Act VIII of 1869); and it seems that two witnesses were called to prove the proper service. One was the peon who was employed to serve it, and the other was the person who had to identify the defendant and the house in which he lived.

The first of these witnesses stated in evidence that *after search* he was unable to find the defendant; and, therefore, he effected the service by posting up the notice on his house. This witness, it appears, was not cross-examined as to this fact; his evidence was supported by the other witness whom I have mentioned; and when the defendant himself was called, he does not say that he was at home when the service was effected, nor, in fact, does he profess to know where he was at that time. This is not a case, therefore, where the defendant has tried to prove that the service was irregular; and the only objection taken to the evidence was, that the peon did not sufficiently explain the nature of the search which he made to find the defendant. If there had been any real reason for supposing that the search was not properly made, and that no sufficient pains were taken to discover the defendant, and serve him personally, that ought surely to have been made the subject of cross-examination.

The Munsiff found upon this evidence that the service was sufficient; but the view of the Subordinate Judge was this. In the first place he seems to have thought that it was necessary, in cases of this kind, that the witness who came to prove the notice should not only show that he had made search for the defendant, and could not find him, but that he should also go on to explain the various means, which he had taken to find him.

In this, he would seem to have dealt with the proof more

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strictly than the law requires; but if that had been the sole ground upon which he based his finding, I should have doubted whether we ought to interfere; but what he afterwards goes on to say serves to satisfy us that the Subordinate Judge was under a misapprehension of the true meaning of s. 14 of the Rent Law, under which the service of the notice was made, and that his decision was more or less based upon that misapprehension.

He has referred, in support of his view, to the judgment of the Privy Council in a case of *Ram Chunder Dutt* v. *Jogesh Chunder Dutt* (1).

In that case the suit was brought to enhance the rent of a tenant; and one defence to the suit was that no notice of enhancement had been served. The case was appealed to the Privy Council, and was decided in the defendant's favor upon other grounds. But at the close of their judgment these words occur:—

"Their Lordships desire to say, that they have great doubt whether the evidence sufficiently shows that the notice to enhance was properly served. If it had been necessary to determine that point, the evidence must have been necessarily looked at to see if any presumption could have been raised that Ram Charan Dutta was keeping out of the way at the time when it was attached to the door. Their Lordships are of opinion that in case of substituted service, that is, service substituted for the personal service which the Statute requires, wherever it is prescribed, the Courts should take care to be satisfied that the condition on which alone substituted service is good, exists, namely, that the person who ought to be served is keeping out of the way."

It does not appear from this report in the Weekly Reporter, to what provision, as regards the service of notice, their Lordships were alluding, but from the report of the same case, in 12 B. L. R., 229, it appears that the enactment to which they referred was Regulation V of 1812, s. 10. From that report it appears that Mr. *Leith*, the Counsel for the plaintiff, relied upon that enactment only.

(1) 19 W. R., 353; 12 B. L. R. 229.

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Section 9 of the Regulation provides that no cultivator or tenant of land shall be liable to pay enhanced rent, unless under some written engagement with his landlord, *or unless a formal written notice has been served upon him to pay enhanced rent;* and then s. 10 provides, that until such notification has been duly served, no greater rent shall be exigible by process of distress, nor recoverable by suit in Court, than the cultivator or tenant was bound to pay under his previous engagement; and then it goes on to say as regards the service of the notice that—

"In all practicable cases the required notification shall be served personally on the tenant; *but if he shall abscond, or conceal himself, so that it cannot be served personally upon him,* it shall be affixed at his usual place of residence."

It is evidently to that enactment that their Lordships refer, when they say, in their judgment, that it must be shown *that the tenant is keeping out of the way to avoid service.*

Now it is important to note that the language of this condition is very different from that of s. 14 of the Rent Law. That section enacts that "such notices (that is to say, notices to enhance) shall be served by order of the Collector, in whose jurisdiction the lands are situated, upon the application of the person to whom the rent is payable; and shall, if practicable, be served personally upon the under-tenant or ryot; *and if for any reason the notice cannot be served personally* upon the under-tenant or ryot, it shall be affixed at his usual place of residence."

Under s. 10 of the Regulation of 1812 the substituted service can only be resorted to "*when the tenant absconds or conceals himself, &c,*" whereas under s. 14 of the Rent Law, the substituted service may be made, "*if for any reason the notice cannot be served personally.*"

And there is doubtless good reason for this difference in the two enactments. Under the Regulation of 1812 the mere service of the notice to pay enhanced rent of itself rendered the tenant liable to pay the enhanced rent mentioned in the notice; whereas, practically speaking, the notice given under s. 14 of the Rent Law only enables the landlord to bring a suit against the tenant to establish his right to the enhanced rent, and in that

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suit the question whether any and what enhancement ought to be allowed, is duly considered and tried.

In the first case, therefore, there is every reason why personal service should be a condition precedent to the enhancement, and should not be dispensed with, *except in the case of the tenant absconding, or concealing himself*, or in the words of the Privy Council, *keeping out of the way to avoid service*; whereas in the last case, where the notice is merely a preliminary step to bringing a suit, it was probably thought reasonable that personal service of it should be unnecessary, if, *for any reason*, the tenant could not be personally served.

Whether this was the view of the Legislature or not, it is certain that the language of the two enactments is very different; and it is obvious that the lower Appellate Court has made a mistake in applying to this case, where the question arose under s. 14 of the Rent Law, the more stringent rule which was laid down by Regulation V of 1812.

The mistake, however, was one for which the Subordinate Judge might well be excused, for in the report of the Privy Council case in the Weekly Reporter, it does not appear to what enactment their Lordships were referring; and we find, moreover, that in more than one instance in the High Court this decision of the Privy Council seems to have been misinterpreted in the same way.

In the present case it appears to us that the fact of the tenant not being found, although search was made for him, was a sufficient reason *primâ facie* for affixing the notice at his place of residence. The witnesses were not cross-examined as to the sufficiency of the search, and the defendant, though called as a witness, does not pretend to say that he was at home at the time, or that notice might have been served upon him personally.

It is probable that but for the misapprehension of the law, into which the Subordinate Judge has fallen, he would have agreed with the Munsiff as to the sufficiency of the notice; but speaking for myself the only doubt I have had is, whether the learned Judge who decided this case ought not to have remanded it to the Court below, pointing out to the Subordinate Judge the mistake which he had made, and directing that the case should be retried.

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But my learned brother thinks—and I am disposed to agree with him—that this course would be almost superfluous; because, if we were to send the case back to the Subordinate Judge, with the observations which we have already made, we cannot doubt but that he will find the notice to have been sufficient.

We think, therefore, that the learned Judge was right in the view which he took, and that this appeal should be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Field and Mr. Justice Grant.

KALI CHANDRA SINGH AND ANOTHER (PLAINTIFFS) *v.* RAJKISHORE BHUDDRO (ONE OF THE DEFENDANTS.)*

1885 *May* 13.

Co-sharers in an undivided estate—Suit for enhancement of a proportionate share of the rent by one Co-sharer—Collection of rents separately.

A, an eight-anna sharer in an undivided estate, who collected his portion of the rent separately, brought a suit upon notice issued by himself against a tenant in which he made the other co-sharers parties defendants to recover arrears of rent at an enhanced rate in proportion to his share.

Held, that such a suit was not maintainable, unless it could be shown that the co-sharers had refused to join as plaintiffs.

Bidhu Bhusun Basu v. *Kamaraddi Mundul* (1), distinguished.

THE plaintiffs, who were the owners of an eight-anna share of an undivided estate, brought this suit for enhancement of rent in proportion to their share. The other co-sharers were made parties (defendants) in the suit. It was not disputed that the rents in the plaintiffs' share were paid separately; but the contention was that the suit could not be maintained at the instance of the plaintiffs alone who were owners of a fractional share of the estate in which the holding was situate. The Munsiff held that *Gopal* v. *Macnaghten* (2) did not apply, and relying on the

* Appeal from Appellate Decree No. 2748 of 1883, against the decree of Baboo Rajendra Coomar Bose, Additional Subordinate Judge of Mymensingh, dated the 5th of July 1883, affirming the decree of Baboo Anand Nath Mozoomdar, Munsiff of Netrocona, dated the 1st of September 1882.

(1) I. L. R., 9 Calc., 864.
(2) I. L. R., 7 Calc., 751.