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The plaintiff could not object to the decree so far as it affected the defendants Abdul Hye and Syed Wajiruddin. The defendants Mussamut Batulan and Abdul Huq could not have objected to the decree as far as they were concerned, nor as against their co-defendants who accepted their liability. They could not have obtained a reversal of the whole decree under s. 544 of the Civil Procedure Code, for it did not proceed on grounds common to all the defendants. The decree which it is sought to execute is the original decree which became final as against the defendants Syed Wajiruddin and Abdul Hye, when the period for appealing against it had expired. If the plaintiffs had then taken out execution those defendants could not have resisted execution on the ground that an appeal was pending with respect to a part of the decree which did not affect their liability. For even if the High Court had held that the defendants Mussamut Batulan and Abdul Huq were sureties, that would not have cut down the liability of the other defendants as principals.

We think, therefore, that there were separate decrees against each set of defendants, that there was no appeal as against the decree affecting the respondents in this appeal, and that the Judge was right in holding that the application for execution was barred by limitation. We dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Grant.

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JOGESHURI CHOWDHRAIN (DEFENDANT No. 2) *v.* MAHOMED EBRAHIM AND OTHERS (PLAINTIFFS.)*

Suit for arrears of rent—Ejectment—Rent Act (Bengal Act VIII of 1869), ss. 22, 52.

A landlord who sues for arrears of rent, for the whole of one year, and a portion of the next, and also for ejectment, is not entitled to a decree for the latter.

The right to ejectment under s. 22 of the Rent Act (Bengal Act VIII of 1869), accrues at the end of the year, and forfeiture or determination of the tenancy thereupon takes place, but if the landlord sues for subsequent arrears, he treats the defendant as his tenant, and the right acquired under that section must be taken to have been waived.

* Appeal from Appellate Decree No. 313 of 1886, against the decree of C. A. Kelly, Esq., Judge of Dinagepore, dated the 2nd of February 1886, modifying the decree of Baboo Surbessur Mozumdar, Munsiff of Thacoorgai, dated the 18th of August 1885.

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IN this case the plaintiffs sought to recover the rent due in respect of certain jotes held by the defendants for the year 1290 (1883) and the year 1291 (1884) up to the Pous (December) kist and for ejectment. Defendant No. 2 alone contested the suit, and pleaded certain payments on account of the rents claimed, and tender of the balance, and that she was not liable to ejectment. The first Court however, found the issues of fact against the defendant and that the amount of rent claimed was due, and accordingly gave the plaintiffs a decree for the amount with a declaration that if the amount were not paid within 15 days, the defendants should be ejected from the lands in respect of which the arrears were claimed.

Defendant No. 2 thereupon appealed against that portion of the decree which declared her liable to ejectment, and it was argued on her behalf that, because the arrears of rent were not admittedly due for the whole of the year 1291, she was not liable to ejectment in consequence of a decree obtained for the aggregate of those arrears and the arrears due on account of the year 1290.

The lower Appellate Court, however, declined to acquiesce in this contention and confirmed the decree for ejectment of the Court below.

The same defendant now preferred this second appeal to the High Court, and the same objection was urged as was taken before the lower Appellate Court.

Baboo *Issur Chunder Chuckerbati* for the appellant.

Baboo *Mohesh Chunder Chowdhry* for the respondents.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows:—

This appeal arises out of a suit for the recovery of arrears of rent for the year 1290 and for a portion of the year 1291, that is, up to the Pous kist of 1291; and also for ejectment.

The Munsiff awarded a decree in favor of the plaintiff for the arrears of rent proved to be due from the defendant for the period in suit, and also for ejectment, under the provisions of s. 52. On appeal it was contended that the plaintiff, having sued for the rent of a portion of the year 1291, was not entitled to a decree for ejectment. But the District Judge was of opinion that this

argument was untenable. He says: "It seems inequitable that the defendant should be thus protected, merely because the suit for arrears due on account of both years has been brought," * * * * * * * And then, further on, the Judge says: "The Munsiff's order will be so far modified that it will be specified in the decree what the amount of arrears decreed for 1290 are, *plus* the proportionate costs on those arrears, apart from damages decreed, and if the defendant pays in that amount within fifteen days from the date of the decree, execution will be stayed." The same objection has been urged before us here. We are of opinion that the appellant's contention is valid. It is also supported by a decision in the case of *Peer Bux* v. *Mowzah Ally* (1). The facts of that case are, that a suit for ejectment was brought by a landlord against his tenant, alleging that the tenant was liable to be ejected in consequence of his having defaulted to pay the rent of the whole of the year 1267 at the end of that year. It was proved that the plaintiff had distrained for the recovery of arrears of 1268, and recovered a portion of the rent for that year. Upon these facts it was held that the landlord, having received rent for the year 1268 from the tenant, it was a recognition of the tenancy for that year; and therefore the landlord was not entitled to eject the tenant on account of arrears due on account of the year 1267. Applying that principle to this case, we think that the plaintiff is not entitled to claim ejectment at all. He has sued for arrears of rent for a portion of the year 1291, and by that he has admitted that the defendant continued in possession during that portion of the year as tenant; and having admitted that, according to the principle laid down in the case referred to above, the plaintiff cannot treat the defendant as a trespassor, and obtain a decree for ejectment under s. 22 of the Rent Law.

It was contended before us that the contention of the appellant is opposed to the provisions of s. 52, because under that section a landlord has a right to bring a suit for ejectment and for arrears in the same action. But we are of opinion that that is not the proper construction of section 52. Section 52 only lays down the procedure by which the right, which the landlord has under section 22 of extinguishing the tenancy, is enforceable, and

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the claim for rent mentioned therein is the rent on account of which the tenant is liable to be ejected. The Rent Act (Bengal Act VIII of 1869) may be divided into two portions—the first twenty-three sections deal with the substantive law defining the rights of landlords and tenants, and the rest of the Act lays down the procedure by which those rights are to be protected and enforced. Section 22 runs as follows: "When an arrear of rent remains due from any ryot at the end of the Bengali year, or at the end of the month of Jeyt of the Fusli or Willayuttee year, as the case may be, such ryot shall be liable to be ejected from the land in respect of which the arrear is due; provided that no ryot having a right of occupancy, or holding under a pottah the term of which has not expired, shall be ejected otherwise than in execution of a decree or order under the provisions of this Act." The right that is given to the landlord is this; namely, that if any arrears are due at the end of the year, the tenant is liable to be ejected for non-payment of rent for that year,—that is, the landlord has a right to put an end to the tenancy. And the mode of enforcing those rights in the class of cases mentioned in the proviso is given in section 52 of the Act. But forfeiture or determination of tenancy takes place when the tenant defaults to pay the rents due at the end of the year. If the landlord still treats the defaulter as his tenant, the right he has acquired under section 22 must be taken to have been waived. The act of the landlord suing for the rent of the succeeding year would have the effect of an admission that the defendant's possession in that year is that of a tenant. Take the case of a tenant not having a right of occupancy. Under section 22 he is liable to be ejected from his holding without having recourse to any proceeding in a Court of Justice. But if the landlord brings a suit for arrears of rent for the succeeding year against the tenant, before ejecting him, he cannot afterwards eject him in the middle of the year; because by bringing a suit against him for rent for the next year the landlord admits his tenancy.

We, therefore, dismiss the claim of the plaintiff for ejectment. The decree of the lower Appellate Court will be modified accordingly. The appellant is entitled to the costs of this Court and of the lower Appellate Court.

H. T. H. *Appeal allowed.*