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an account and a finding as to his share of the profits of the partnership, we hold that his present suit is barred.

This is our reply to the reference. In our opinion the respondent is entitled to his costs in all courts.

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FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Aikman. *

SADDU (DEFENDANT) v. BIHARI SINGH (PLAINTIFF).

Land-holder and tenant—Partition—Rights of tenants in respect of house sites in the abadi.

As the result of the partition of a village hitherto forming one mahal into two mahals the occupancy holding of a tenant fell into one mahal owned by one co-sharer, whilst a house which the tenant and his predecessors in title had occupied for a considerable period as appurtenant to the agricultural holding fell into the other mahal owned by the other co-sharer. *Held* that the partition effected no change in the position of the tenant: so long as he continued in possession of his occupancy holding he could not be ejected from his house in the abadi of the village, nor could he be required to pay rent therefor. *Dharam Singh* v. *Bhoolar* (1) followed. *Sundar Lal* v. *Chajju* (2) distinguished. *Panna* v. *Nazir Husain* (3) doubted.

THIS was a suit brought by one of the zamindars of the village Bharatpur, a hamlet of Darihal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house was situated in a portion of the abadi of the village which had fallen into the share of the plaintiff by partition. The defendant cultivated land in another mahal of the same village, under a different proprietor. The plaintiff sought to eject him from his house on the ground that he refused to pay ground rent for the site of the house. The Court of first instance (Munsif of Moradabad) dismissed the suit, but the lower appellate Court (District Judge) reversed this decree and decreed the plaintiff's claim. The defendant appealed to the High Court. Issues were referred to the lower appellate

* Second Appeal No. 961 of 1905 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 20th of July 1905, reversing a decree of Mohan Lal, Munsif of Moradabad, dated the 2nd of March 1905.

(1) Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1901, p. 142.
(3) Weekly Notes, 1902, p. 60.

court, which found that about 30 years ago, that is, about the year 1877, the village lands and sites were divided by perfect partition into two mahals, namely, mahal Chunni and mahal Har Sukh; that at the time of that partition the site of the house occupied by the appellant was allotted to mahal Har Sukh, while the land cultivated by him was allotted to mahal Chunni, and that mahal Har Sukh belongs to the plaintiff, and the other mahal to another proprietor. The Court below further found that before this partition, the house occupied by the defendant was erected, and the land now in his cultivation was held by his predecessor in title; that the defendant and his predecessor in title had occupied the house in dispute for at least 40 years, and that they had been the tenants of the land cultivated by them for at least that period. The Court below also found that, although there was no direct evidence that the site of the house was occupied as part of the contract of tenancy, it might reasonably be presumed that the predecessor of the defendant was permitted by the zamindar to occupy the site to enable him to carry on his cultivation.

On this appeal —

Munshi *Iswar Saran* (for Dr. *Tej Bahadur Sapru*), for the appellant, contended that having regard to the findings on remand the appellant could not be ejected so long as his tenancy was subsisting. Partition between the zamindars could not affect the rights of the tenants—*Dharam Singh* v. *Bhoolar* (1). What all the zamindars in a body could not do, could not be done by the plaintiff alone. A tenant who is allowed to build a house in the abadi for his occupation cannot be turned out so long as he continues to reside in the village and keeps up the house. *Nazir Husain* v. *Shibba* (2), *Raj Narain* v. *Budh Sen* (3), *Sri Girdhariji Maharaj* v. *Chote* (4) and *Dalal* v. *Bhaggu* (5) were cited.

The Hon'ble Pandit *Sundar Lal* (with whom Pandit *Baldeo Ram Dube*) for the respondents :—

The whole question is whether the appellant is entitled to retain the land for ever without paying any rent. It cannot be presumed that the site of the house and the cultivatory holding

(1) Weekly Notes, 1908, p. 123.
(2) (1904) I. L. R., 27 All., 81.
(3) (1904) I. L. R., 27 All., 338.
(4) (1898) I. L. R., 20 All., 248.
(5) (1894) I. L. R., 16 All., 181.

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were granted under one common contract: this allegation, like any other, must be proved by the party making it. The defendant pays rent for the cultivatory holding to the zamindar who now owns that land, but he pays nothing for the use of our land. If both were held under the same contract for payment of one rent, the portion of the rent paid for the use of the site of the house would have been allocated to the plaintiff. This is not so. He is only a licensee of the site of the house, and the license has been legally revoked. The case is governed by the ruling in *Panna* v. *Nazir Husain* (1). If the tenant is a licensee, he can be turned out at any moment. No contract having been proved, it must be assumed that the defendant is merely a licensee.

BANERJI, J.—The suit which has given rise to this appeal was brought by the respondent, who is one of the zamindars of the village Bharatpur, a hamlet of Darihal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house is situated in a portion of the abadi of the village which has fallen into the share of the plaintiff by partition. The defendant cultivates land in another mahal of the same village, under a different proprietor. The plaintiff seeks to eject him from his house on the ground that he refuses to pay ground rent for the site of the house. The Court of first instance dismissed the suit, but the lower appellate Court has reversed the decree of that Court. The defendant has preferred this appeal.

The learned Judge of the Court below has found upon issues referred to him that about 30 years ago, that is, about the year 1877, the village lands and sites were divided by perfect partition into two mahals, namely, mahal Chunni and mahal Har Sukh; that at the time of that partition the site of the house occupied by the appellant was allotted to mahal Har Sukh, while the land cultivated by him was allotted to mahal Chunni, and that mahal Har Sukh belongs to the plaintiff, and the other mahal to another proprietor. The learned Judge has further found that before this partition, the house occupied by the defendant was erected, and the land now in his cultivation was held, by his

(1) Weekly Notes, 1902, p. 60.

predecessor in title; that the defendant and his predecessor in title have occupied the house in dispute for at least 40 years, and that they have been the tenants of the land cultivated by them for at least that period. The learned Judge also holds that, although there is no direct evidence that the site of the house was occupied as part of the contract of tenancy, it may reasonably be presumed that the predecessor of the defendant was permitted by the zamindar to occupy the site to enable him to carry on his cultivation. Upon these findings, which must be accepted in this appeal, it is clear that the house of the defendant is appurtenant to his agricultural holding. So long therefore, as that holding subsists, he is not liable to be evicted from his house. It is true that since the partition of the village, he holds his agricultural holding under a different proprietor from the owner of the abadi in which his house lies, but a partition between co-owners cannot injuriously affect the rights which he possessed before the partition took place. This was the view held in *Dharam Singh* v. *Bhoolar* (1). The learned advocate for the respondent has referred us to two rulings of this Court, which, he contends, support the case of the respondent. Those are the cases of *Sundar Lal* v. *Chajju* (2) and *Panna* v. *Nazir Husain* (3). The first case is clearly distinguishable from the present. In that case a tenant had his dwelling house in one village and his cultivatory holding in another. It was found that he held the land occupied by his dwelling house as a licensee from the plaintiff. It was held that the license could be and had been revoked. The other ruling is no doubt to some extent in favour of the respondent. But with great respect I feel myself unable to follow it. That was a suit by the zamindar to eject certain agricultural tenants from the site of their houses in the abadi on the allegation that t' ey were trespassers and had recently built on land which had lapsed to the zamindar. It was found that the allegation of trespass was false; and that the houses in dispute had been built about 25 years before suit with the implied permission of the then zamindars at a cost of at least Rs. 300. It was held that the defendants were not tenants

(1) (Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1901, p. 43.
(3) Weekly Notes, 1902, p. 60.

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of the land on which their houses stood and that they were not even licensees. If, as found in that case, the defendants built their houses with the implied permission of the zamindars, I fail to see why they could not be regarded as licensees. The grant of a license may be express or implied from the conduct of the grantor (section 54, Act V of 1882), and if there was an implied grant by the owner of a right to do something on his property which would, in the absence of such right, be unlawful, the right so granted would be a license (section 52). In the present case however the defendant is not a licensee merely of the site of his house. He holds it as an appurtenant to his agricultural tenancy and cannot be ejected during the existence of his tenancy. I would allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance, dismissing the suit with costs.

KNOX, J.—I agree with the view taken by my brother Banerji, and also in the order proposed by him. As pointed out by him in his judgment, the learned advocate for the respondent based much of his argument upon the case of *Panna* v. *Nazir Husain* (1). I was one of the judges who decided that case, and as the result of the further argument addressed to us in this case I think that the view taken in that appeal is open to question. It will, however, be sufficient to consider this when a case similar to that arises. In the present case, as pointed out by my brother Banerji, the occupation of the house by the defendant was and is appurtenant to his agricultural holding, and so long as the holding subsists, he is, in the absence of any provision to the contrary, entitled to occupy the house until the agricultural holding is determined.

AIKMAN, J.—I agree with my learned colleagues in thinking that the appeal must succeed.

The appellant is an occupancy tenant in the village of Dharihal. In a partition made at the instance of the co-sharers, his agricultural holding fell to one co-sharer, whilst the site of the house in which he and his predecessors in title had lived for at least forty years fell to the lot of another co-sharer, namely, the plaintiff respondent. The latter demanded ground rent from the appellant for the site of the house, and on the appellant's refusal

(1) Weekly Notes, 1902, p. 60.

to pay, instituted the suit out of which this appeal arises, asking that the defendant be ejected from the site and ordered to remove the materials of the house within a time to be fixed by the Court, or that the plaintiff may be given possession of those materials at a price to be fixed by the Court. The Munsif dismissed the suit. On appeal it was decreed by the District Judge. The defendant comes here in second appeal.

It is clear that the demand of the plaintiff for ground rent was not based on any contract to pay ground rent. The amount of rent which the plaintiff demanded was, it is true, not a large amount, but it was an amount arbitrarily fixed by him. In my opinion the *onus* lies on him to prove that he is entitled to demand ground rent from the defendant, and this he has failed to discharge.

It may, I think, be taken as settled law that before the partition the zamindars as a body could neither have demanded ground rent from the defendant or his predecessor in title, nor have ejected him from his house, and I fail to see how by effecting a partition amongst themselves, they could acquire a right which they did not previously possess when the village was undivided. This view is in accordance with that expressed by Blair J., in *Dharam Singh* v. *Bhoolar* (1) which decision was affirmed in Letters Patent Appeal.

If the view adopted by the learned District Judge were approved, it would place in the hands of zamindars a powerful weapon against their tenants, and would go far to nullify all the enactments of the Legislature for securing fixity of tenure to agricultural tenants.

I may add that I entirely agree with my brother Banerji in his observations regarding the case of *Panna* v. *Nazir Husain* (2), relied on by the learned advocate for the respondent. With all respect for the learned Judges who decided that case, I do not think the decision was right.

BY THE COURT.—The appeal is decreed, the decree of the Court below is set aside, and that of the Court of first instance restored with costs both here and in the Court below.

Appeal decreed.

(1) Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1902, p. 60.