

1910

BISHAMBHAR
NATH
v.
GADDAR.

on the question to be decided in this case, I prefer to follow the decision of the Bombay High Court in *Goma Mahad Patil v. Gokuldas Khimji*, which is direct-ly in point. I dismiss the appeal with costs.*

The defendant appealed.

Dr. *Tej Balabdur Sapru*, for the appellant:—

Only such damages as flowed naturally from the wrongful act of the appellant could be assessed against him. That doctrine applied to cases of torts as well as of contracts; *Hadley v. Baxendale* (1). Reference was also made to *Mayne on Damages*, 7th ed., 49, 433, *Mussumat Subjan Bibi v. Sheikh Seriatullah* (2) and *Kissori Mohan Roy v. Harsukh Das* (3). It would not be in the contemplation of parties that the very man in whose custody they were would steal them.

Maulvi *Muhammad Ishaq*, for the respondent, was not called on.

STANLEY, C. J. and BANERJI, J.:—We are of opinion that the view taken by our learned colleague is correct. It is based on the ruling in *Goma Mahad Patil v. Gokul Das Khimji* (4), with which ruling we agree. The cases which have been relied upon by the learned advocate for the appellant appear to us to be distinguishable. The correctness of the decision in the case of *Goma Mahad Patil v. Gokuldas Khimji* has never, so far as we are aware, been questioned. We dismiss the appeal with costs.

Appeal dismissed.

1910

December 12.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

ZIA-UD-DIN AND ANOTHER (PLAINTIFFS) v. MUHAMMAD UMAR AND OTHERS
(DEFENDANTS).*

Landlord and tenant—Co-owners—Receipt for rent collusively given to tenant by one co-owner—Right of the others to sue tenant and remaining co-owner for rent.

W and others were co-owners of a shop which was let to U. The other co-owners, suspecting W's good faith, gave notice to U forbidding him to pay rent to W. They then commenced proceedings for partition of the shop. Subsequently W executed in favour of U a receipt for arrears of rent and for a further

*Second Appeal No. 392 of 1910, from a decree of W. II. Webb, District Judge of Bareilly, dated the 26th of January 1910, reversing a decree of Girraj Kishore Dutt, Subordinate Judge of Bareilly, dated the 29th of June, 1908.

(1) 9 Exch., 341.

(3) (1889) I. L. R., 17 Cal., 436.

(2) (1869) 3 B. L. R., 413.

(4) (1878) I. L. R., 3 Bom., 74.

1910

ZIA-UD-DIN
v
MUHAMMAD
UMAR.

sum alleged to represent rent paid in advance. *Held* that in the above circumstances the co-owners other than W were entitled to sue the tenant and W for their proportionate share of the rent, their allegation being that the receipt referred to above was fictitious and collusive. *Doorga Churn Surma v. Jampa Dassee (1)*, referred to.

The plaintiffs in this case and one Wajih-ud-din were joint owners of a shop which was let to one Muhammad Umar. It was alleged that Wajih-ud-din used to collect the rent. On the 3rd April, 1905, the plaintiffs served the first defendant, Muhammad Umar, with a notice stating that they suspected the good faith of Wajih-ud-din and directing him not to pay the plaintiffs' share of the rent to Wajih-ud-din. Shortly after this notice, on the 24th of April, 1905, the plaintiffs brought a suit against Wajih-ud-din for partition and obtained a preliminary decree on the 29th of July, 1905. The final decree in the partition suit was made by the court of first instance on the 20th of September, 1906. There was an appeal to this Court and the case was remanded for a fresh partition. This partition took place on the 9th of March, 1908. Under it the shop occupied by the defendant fell into the plaintiffs' share. It was after this partition that the suit out of which this appeal has arisen was brought on the 25th of March, 1908. After the preliminary decree for partition made by the court of first instance, Muhammad Umar obtained from Wajih-ud-din, on the 31st of May, 1906, a receipt for Rs. 510, in full payment of the rent due up to that date and for an additional sum of Rs. 609-9-0 for rent in advance. The present suit relates to the period from the 1st of March, 1905, to the 29th of February, 1908. The claim was contested on the grounds that the plaintiffs were not competent to maintain the suit being part owners of the property, and further that payment to Wajih-ud-din was a full discharge for the rent due.

The court of first instance (Subordinate Judge of Bareilly) held that no payment had actually been made, and that the receipt of the 31st May, 1906, was collusively given. Upon appeal the District Judge dismissed the suit altogether. The plaintiffs appealed to the High Court.

Mr. A. H. C. Hamilton, Mr. B. E. O'Connor and *Maulvi Shaft-uz-zaman*, for the appellants.

1910

ZIA-UD-DIN
v.
MUHAMMAD
UMAR.

Mr. S. A. *Haidar* and Babu *Latit Mohan Banerji*, for the respondents.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit brought by the plaintiffs appellants for recovery of arrears of rent against the first defendant who is the tenant of a house and shop belonging to the plaintiffs, and the defendant *Wajih-ud-din*. *Wajih-ud-din* owns a small share in the shop, but it is alleged that he used to collect the rent. On the 3rd of April, 1905, the plaintiffs served the first defendant, *Mubammad Umar*, with a notice stating that they suspected the good faith of *Wajih-ud-din* and directing him not to pay the plaintiffs' share of the rent to *Wajih-ud-din*. Shortly after this notice, on the 24th of April, 1905, the plaintiffs brought a suit against *Wajih-ud-din* for partition and obtained a preliminary decree on the 29th of July, 1905. The final decree in the partition suit was made by the court of first instance on the 20th of September, 1906. There was an appeal to this Court and the case was remanded for a fresh partition. This partition took place on the 9th of March, 1908. Under it the shop occupied by the defendant fell into the plaintiffs' share. It was after this partition that the suit out of which this appeal has arisen was brought on the 25th of March, 1908. After the preliminary decree for partition made by the court of first instance, *Muhammad Umar* obtained from *Wajih-ud-din*, on the 31st of May, 1906, a receipt for Rs. 510, in full payment of the rent due up to that date and for an additional sum of Rs. 609-9-0 for rent in advance. The present suit relates to the period from the 1st of March, 1905, to the 29th of February, 1908. The claim was contested on the grounds that the plaintiffs were not competent to maintain the suit, being part owners of the property, and further that payment to *Wajih-ud-din* was a full discharge for the rent due.

The court of first instance held that no payment had actually been made and the receipt of the 31st of May, 1906, was collusively given. Upon appeal the learned District Judge, without going into the various pleas raised by the appellant before him, held that the suit was "fundamentally bad" and that the plaintiffs as part owners of the property let to the defendant could not sue him for any portion of the

1910

 ZIA-UD-DIN
 v.
 MUHAMMAD
 UMAR.

rent. In view of the circumstances of this case this opinion of the learned Judge is in our judgement erroneous. The plaintiffs served the defendant, Muhammad Umar, with a notice, forbidding him to pay their share of the rent to Wajih-ud-din. If in spite of this notice the defendant paid the rent to Wajih-ud-din, he did so at his own risk. It is manifest that if any payment of the plaintiffs' share of the rent was made to Wajih-ud-din after the issue of the notice referred to above, in spite of the plaintiffs' protest and at a time when partition proceedings were going on, such payment was made in collusion with Wajih-ud-din. This collusion is further manifest from the fact that payment is alleged to have been made not only for arrears of rent but also for rent in advance, a circumstance which is highly improbable. Under these circumstances the plaintiffs were entitled to maintain the suit after making Wajih-ud-din a defendant to it. This case is similar to the case of *Doorga Churn Surma v. Jampa Dasse* (1), decided by a Full Bench of the Calcutta High Court. The learned counsel for the respondent has cited a number of cases, which in our opinion are distinguishable, inasmuch as in those cases no notice was issued to the tenant directing him not to pay the rent to the plaintiffs' co-sharer, nor was there any collusion in those cases between the tenant and such co-sharer.

We accordingly allow the appeal, set aside the decree of the court below and restore that of the court of first instance. The appellant will have his costs in this Court and in the court below.

Appeal allowed.

(1) (1873) 12 B. L. R. 289.