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of his creditors. We set aside the order of discharge and direct that, upon the appellant supplying the necessary funds, notice be issued in the Gazette notifying the setting aside of the order of the District Judge and the cancelment of the order of discharge. We direct that an inquiry into the insolvent's means do proceed, the appellant having such opportunity as we have shown by this judgment that we think he ought to have had, and after such inquiry the District Judge will make such order in the matter of the insolvency as, having regard to the views expressed in our judgment, would be proper for him to make.

The appellant will be entitled to recover the amount of the costs of this appeal against any estate, if any, as shall be discovered, can be realized in the insolvency.

Appeal allowed and further inquiry directed.

H. T. H.

Before Mr. Justice Pigot and Mr. Justice Gordon.

PERGASH LAL (DEFENDANT) *v.* AKHOWRI BALGOBIND SAHOY AND OTHERS (PLAINTIFFS).*

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Rent suit—Landlord and tenant—Co-sharers, suit by one of several, for separate share of rent, or, in alternative, for whole rent due if more than share claimed should be found due.

The plaintiffs, some of the co-sharers in certain land, instituted a suit against a tenant and the remaining co-sharer P, alleging that the tenant held under a pottah granted by all the co-sharers; that rent was due from him for the period in suit; and that they had ascertained from P that he alleged that he had received his share of the rent for that period from the tenant, and that he refused to join as plaintiff in the suit. They accordingly prayed (*a*) for a decree for the amount of their share of the rent against the tenant; (*b*) if it should appear that any part of P's share of the rent remained unpaid, the requisite extra Court-fee might be received and a decree made for the whole of the arrears in favour of themselves and P, and that the latter might, if he consented, be made a co-plaintiff; (*c*) that if it appeared that P had realized more than his share of the rent, a decree might be made against him for the excess and against the tenant for the balance. The plaint also asked for costs and further relief. The tenant contested the suit and submitted that it was in effect a suit for plaintiffs' share of the rent only and could not therefore be main-

* Appeal from order No. 335 of 1889 against the order of J. Crawfurd, Esq., District Judge of Gaya, dated the 7th of August 1889, reversing the decree of Gopee Nath Maytay, Munsiff of Gaya, dated 15th December 1888.

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tained. He further pleaded that the plaintiffs and P were members of a joint Hindu family, of which P was the manager, and that, under arrangement with the latter, he had applied the rent due under the pottah towards the liquidation of debts due under bonds in P's name, but for which the joint family were liable.

The first Court dismissed the suit on the preliminary issue that it was in substance a suit for a specific share of the rent by some only of the co-sharers, and that, there being no agreement by the tenant to pay the co-sharers their respective shares of the rent separately, such a suit would not lie.

Held (upholding the order of the lower Appellate Court), that the order of the first Court was wrong. The suit, as framed, was necessarily a suit in the alternative; and as the plaintiffs were necessarily not aware whether any portion of P's share of the rent was due or not, but believing that none was due, they could only claim their share, asking to have the plaint amended so as to include the whole rent due if it should appear that anything was due to P, and thus bring the suit within the rule that, in the absence of special agreement between a tenant and co-sharers to pay their rateable proportion of the rent, a suit by one of the co-sharers must be for the entire rent due, making his co-sharers defendants if they refuse to join as plaintiffs. The prayer of the plaint fully provided for this, and the suit should have been tried on its merits and the plaint amended if the facts proved showed that any rent remained unpaid and due to P, as asked for by the plaintiffs.

THE plaintiffs and the defendant No. 2, Akhowri Rambharose Lal, were the mokuraridars of a 4-anna share in mouza Barowan Anrudpore, and the defendant No. 1, Pergash Lal, who was the appellant, was the lessee of that share under a registered pottah, dated the 29th November 1878. The suit was for the recovery of the sum of Rs. 450, principal and interest, from the defendant No. 1, being the arrears of rent of the plaintiffs' 3 annas 4 dams share out of the 4 annas share so owned by the plaintiffs and defendant No. 2, the remaining 16 dams share belonging to the defendant No. 2.

The plaint stated that the 4 annas mokurari right had been let out in *ticca* by them and the defendant No. 2 to defendant No. 1 under a joint pottah and kabuliyat, dated the 29th November 1879, at an annual jama of Rs. 579, and on a zurpeshgi of Rs. 1,900 payable with interest, the term of the *ticca* extending up to the year 1295 F.; that the lease provided that the plaintiffs and defendant No. 2 should receive out of the *sair* jama the sum of

Rs. 150 only every year till 1294 F., and the sum of Rs. 296-5 in the year 1295 F., the rest of the money being credited in payment of the zurpeshgi; that the plaintiffs had realized their share of the rent up to the year 1291 F.; that, with a view to save trouble attending joint collections and to avoid mutual disagreements, the plaintiffs had asked the defendant No. 1 to pay their share of the rent separately and gave him a notice, dated the 25th February 1885, stating that, according to the terms of the lease, he should, from the year 1292 F., make a set off on account of the *satua* zurpeshgi, and out of the balance pay the defendant No. 2 his proportionate share of the rent and pay the plaintiffs' share to the plaintiff No. 1, Akhowri Balgobind Sahoy, but that the defendant No. 1 took no notice of such instructions and sent no reply to the notice; that, notwithstanding the notice, defendant No. 1 had, at the instigation of defendant No. 2, paid no rent to the plaintiffs from the year 1292 F. to the year 1294 F., and that the sum of Rs. 450 for their share of the rent for three years and interest thereon was due to them.

The plaint went on to state that, as the pottah was joint and defendant No. 2 did not join in the suit, and as he on being asked alleged that he had received his share of the rent from defendant No. 1, the plaintiffs had made him a defendant.

The prayer of the plaint was to the following effect:—

(*a*) For a decree for the sum of Rs. 450 on account of arrears of rent and interest thereon for the years 1292—1294 F. against the defendant No. 1.

(*b*) That in case the defendant No. 2 should allege that the whole or any part of his share of the rent was unpaid and was willing to join in the suit as plaintiff, or if the Court held that under the circumstances of the case the plaintiff had no right in law to bring a separate suit for their share of the rent, they prayed that the extra Court-fees required might be received, and that a decree might be passed for the whole of the arrears of rent in favour of them and defendant No. 2, and that the defendant No. 2 might, if he were willing, be made a co-plaintiff.

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(c) That, if it should appear that defendant No. 2 had realized more than his share of the rent, a decree might be passed against him for the excess and against defendant No. 1 for the balance.

(d) That the defendant against whom the decree might be made should be ordered to pay the costs of the suit; and

(e) That the plaintiffs might be granted any other relief which the Court might hold they were entitled to.

Defendant No. 1 alone contested the suit, defendant No. 2 not appearing at all. In his written statement defendant No. 1, *inter alia*, contended that as he admittedly held the *ticca* under a joint pottah and kabuliyat, and the shares of the plaintiffs and the defendant No. 2 were not therein defined, the suit could not proceed. He alleged that the plaintiffs and the defendant No. 2 were members of a joint Hindu family amongst whom there had been no partition, and that the shares of the plaintiffs could not therefore be ascertained, and they had no right to claim a 3 annas 4 dams share of the rent as they had done. He stated that defendant No. 2 had managed all the joint family matters, and that the plaintiffs had acknowledged and ratified his acts and were therefore bound thereby; that defendant No. 2 had, prior to the lease, taken loans from him and others, the proceeds of which had been applied to joint family purposes, and that, in respect of such loans, he had executed bonds in his favour as well as the others from whom he had so borrowed money; that after the lease had been executed defendant No. 2 had borrowed from him Rs. 2,050 upon various bonds, carrying interest at Re. 1-8 per cent. per month, which he had spent on the joint family; and that he in good faith had, at the request of defendant No. 2, applied the rent payable under the lease towards liquidation of the amount due to him under the bonds, and that the whole of the rent due under and up to the end of the lease had, under an arrangement with defendant No. 2, been so applied and nothing was due to the plaintiffs or defendant No. 2 on account of such rent, but that, on the contrary, the plaintiffs and defendant No. 2 were owing money to

him. He alleged that the suit was brought by the plaintiffs in collusion with defendant No. 2 to defraud him, and denied the plaintiffs' right to give him the notice they had, and contended that such notice could not affect their rights or his liability under the lease and give them the right to demand payment of their share of the rent separately; but, even if it could otherwise be held to do so, that he had, prior to the receipt thereof, entered into the said arrangement, as to the appropriation of the rent, with defendant No. 2, and he could not therefore be affected by it or prejudiced by the fact that he had taken no notice of it. He submitted therefore that the suit should be dismissed.

The Munsiff upon these pleadings, without going into the merits, held that the suit was not maintainable and dismissed it. His grounds for doing so were that it was an admitted fact that there had been no arrangement between defendant No. 1 and the plaintiffs, under which the former had agreed to pay their share of the rent separately, and that the plaintiffs had never realized their share separately; that the suit was, in substance, not to recover the whole rent, making defendant No. 2 a party, but for a specific amount in respect of a particular share, and that, applying the rulings in *Jodoo Shat* v. *Kadumbinee Dassee* (1) and *Prem Chand Nuskur* v. *Mokshoda Debi* (2) such a suit would not lie.

The plaintiffs appealed, and the lower Appellate Court reversed that decision and remanded the case for trial on its merits.

The material portion of the judgment of the District Judge was as follows:—

"The Munsiff threw out the suit relying on the rulings in *Jodoo Shat* v. *Kadumbinee Dassee* (1) and *Prem Chand Nuskur* v. *Mokshoda Debi* (2). The first of these rulings decided that, in the absence of any arrangement with a tenant, a co-proprietor could not sue for her share of the entire rent. The latter ruling held that a suit might proceed in which what was claimed was the entire rent, the other co-proprietors being made defendants. This is settled law, and it seems to me that the question in this case, where no

(1) I. L. R., 7 Calc., 150. (2) I. L. R., 14 Calc., 201.

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arrangement with the tenant is alleged, is whether the suit can proceed where what is claimed is the entire rent so far as unpaid. The principle applicable seems to me to be exactly the same as applied in the cases last mentioned above. The difficulties in the way of deciding the case seem to be these: The decision in the suit as to the exact amount of rent in arrears will not be binding as between defendant No. 2, who has not appeared, and defendant No. 1. What is there to prevent the former in a suit, similar to this, again suing the latter, with the allegation of a different state of facts? The solution of the difficulty seems to me to be in the pleadings in the suit. Defendant No. 1 does not allege that the plaintiffs have claimed anything short of the whole arrears. He says he has paid the whole rent, and that there is nothing in arrear. If this statement be false, he has to thank himself for any inconvenience he may subsequently suffer.

"Some only of the co-proprietors being plaintiffs in the suit, the defendant No. 1 is put in a worse position than if all had been plaintiffs, because he may be deprived of the right of set off which he might possibly have a right to claim as against all and not as against some only. The answer to this is that in the present suit what is claimed is not really a set off. What is alleged is a payment to defendant No. 1. The fact that such payment was made by way of writing off the interest due under certain bonds standing in the name of defendant No. 2 does not affect the case. It has been repeatedly held that payment to one of several co-proprietors is a good defence to a suit for rent.

"It seems to me that the suit is brought in the only form possible under the circumstances. The plaintiffs express their willingness to sue for the whole rent due, whatever it is, but ask only for what, according to their information or view of the facts, remains unpaid. The question whether in a rent suit they are entitled to join a claim against a co-sharer for money received on their account is not one which has to be decided at present. All that I now find is that the Munsiff was wrong in throwing out the suit on the ground stated by him. I therefore set aside his decree and remand the case for decision on the merits."

Against this order of remand defendant No. 1 now appealed to the High Court.

Baboo *Kali Kissen Sen* for the appellant.

Baboo *Jogendro Chunder Ghose* for the respondents.

The judgment of the High Court (PIGOT and GORDON, JJ.) was as follows:

We think this appeal must be dismissed. We quite agree with the view taken by the learned District Judge in this case, and it is unnecessary for us to do more as to the nature of the case than say that we agree with the District Judge. It may, however, be desirable to add this, that the suit, as framed, is necessarily a suit in the alternative. The plaintiffs are necessarily not aware whether any portion of the share of the rent to which the defendant No. 2 is entitled has or has not been satisfied by the first defendant in favour of the defendant No. 2. They believe that that has been done and, if so, there is no rent due except that part of it which admittedly falls to their, the plaintiffs' share; but if a portion of the rent additional to what would constitute the plaintiffs' share of it remains unpaid, or if the whole of the rent remains unpaid, the plaintiffs ask that the plaint shall be amended accordingly and the suit brought into conformity with the rule that, in the absence of special agreement between the tenant and the co-sharers to pay their rateable proportion of the rent, a suit by one of the co-sharers must be for the entire rent due, making his co-sharers defendants if they will not join as plaintiffs. The prayer in the plaint entirely provides, we think, for the evidence disclosing non-payment of a part of the rent, and should it appear in the course of the hearing that a portion of the rent remains unpaid by the defendant in addition to an amount equal to the plaintiffs' share of the rent, the suit ought to be amended, as the plaintiffs' in their alternative prayer ask that it should be. We add this rather *ex abundanti cautelâ*, because, in truth, what the District Judge has said means in effect that such is the character of the suit. We agree with the District Judge and dismiss the appeal with costs.

Appeal dismissed.

H. T. H.