1892

YEO SWEE CHOON v. THE CHARTERED BANK.

was guilty of some other offence which is not any of those specifically mentioned in the warrant, as he does not now appear to think that he has been guilty of those offences. For the offence of which the learned Recorder would now convict him he has never been tried with any of the safeguards with which a criminal trial should be surrounded. There has never been anything like a charge formulated; there has never been anything like a finding of guilty of any particular offence, or of this person having been guilty of any series of acts which constituted any particular offence. But what is said is, that his explanation of his conduct is so unsatisfactory that it is impossible to suppose that he was not aware how the business of the firm was being carried on, and upon that a sentence of two years' imprisonment has been passed, without its being found what the particular transaction of the firm is with which he is found to be so implicated as to be guilty of this offence.

Under these circumstances we think that the learned Judicial Commissioner was right on both points; that a reference does lie to this Court upon the whole case; and that when the whole case comes to be looked into, it is apparent from the judgments themselves that this person has never been tried for the offence for which he has been punished in the sense in which a man has a right that his case should be tried before he is subjected to punishment. With these remarks the case will be sent back to the Special Court of Lower Burma.

Attorney for the Insolvent: Baboo *Sittanath Das.*

A. A. C.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1892 July 11.

PANCHANAN BANERJI (PLAINTIFF) v. RAJ KUMAR GUHA (DEFENDANT).*

Bengal Tenancy Act (VIII of 1885), s. 188—Joint proprietors—Arrangement with fractional co-sharer, effect of—Separate tenancy, creation of.

Where a tenant has agreed to allow one of several co-sharer landlords to deal with him as if he were his own tenant, without any regard to the

* Appeal from Appellate Decree No 1241 of 1891, against the decree of A. H. Collins, Esq., District Judge of Jessore, dated the 13th of May 1891, modifying the decree of Babu Koylash Chunder Mukerjee, Subordinate Judge of Khulna, dated the 21st of January 1891.

interests of the other co-sharers, the effect is to create a separate tenancy under such fractional co-sharer, and section 188 of the Bengal Tenancy Act is inapplicable to such a case.

Gopal Chunder Das v. *Umesh Narain Chowdhry* (1) distinguished.

THE plaintiff, a fractional co-sharer in mehal Chuk Bansbaria, sued to recover the sum of Rs. 1,029-7-12 gundas from the defendant, an *osut talukdar*, being the arrears of rent in respect of a 14 annas 8 pie share of the *osut taluk* from 1292 to 1295 B.S. The defendant's predecessors in title, from whom the defendant purchased in 1288, executed in favour of the plaintiff a registered kabuliyat in Choitro 1286 in respect of 661 bighas 3¾ cottahs. Against them the plaintiff obtained a rent decree, in course of execution whereof a solehnama or compromise was entered into on the 17th April 1886 (5th Bysack 1292) between the plaintiff and the defendant, under which solehnama the defendant paid the existing arrears of rent and agreed to pay rent thereafter, upon measurement being made, at the rate of Re. 1 per bigha, for the lands found to be comprised in his tenure. The plaintiff measured the lands in Choitro 1294, when the area of the defendant's land was found to be 711 bighas 4 cottahs. The present suit was brought to recover rent for the above area at the rate of Re. 1 per bigha.

The kabuliyat of Choitro 1286 recognised in express terms the right of the plaintiff to deal with the tenants of the *osut taluk* in respect of his 14 annas 8 pie share, or 661 bighas 3¾ cottahs, without reference to the rights of the other co-sharer landlords.

The defendant contended that the plaintiff, being a fractional co-sharer, could not measure the land or institute a suit to enhance the rent; that he was not bound by his predecessor's kabuliyat of 1286, and was entitled to repudiate the solehnama. He further denied the accuracy of the plaintiff's measurement.

Upon the issue being raised whether the plaintiff, being a fractional co-sharer, was entitled to measure the defendant's land and sue for rent upon the increased area, the Court of first instance held that the defendant was bound by his own voluntary act and solehnama, and also by his predecessor's kabuliyat, and disallowed

(1) I. L. R., 17 Calc., 695.

1892

PANCHANAN BANERJI v. RAJ KUMAR GUHA.

the objection, holding that the decision in *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (1) was inapplicable to the case. The Court further held that it would be inequitable to bind the defendant by an *ex-parte* measurement, and found the quantity of assessable land to be 679 bighas. Deducting certain payments admitted to have been made by the defendant, the Court decreed the plaintiff's claim to the extent of Rs. 867-4½ annas.

The defendant appealed. Upon the issue above mentioned, the lower Appellate Court observed as follows:—

"It is urged in appeal that the plaintiff, being a fractional co-sharer, cannot maintain the suit for additional rent for excess land, and the ruling of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (1) is relied upon. The Lower Court has disallowed this plea on the grounds that the plaintiff collects his rent separately, and that the defendant, having agreed in the solehnama to pay the additional rent after measurement, cannot be now allowed to repudiate his agreement. I am of opinion that the Lower Court is wrong in the view taken by it. The defendant undoubtedly agreed to pay the additional rent, but that does not validate the suit. The ruling above quoted is based on the principle that where there are several co-sharers in an estate no one of them can effect any change in the area or rental or conditions of any tenancy held under them. If this suit is allowed, the effect will be that the original tenancy of the defendant will be altered, and the area of that tenancy will be altered by the act of a fractional co-sharer behind the back of the other co-proprietors. It is distinctly laid down in the ruling above quoted that the right of the several co-sharers to realize their rent separately stands on quite a separate footing, and that such an arrangement gives rise to no change in the tenancy or in the area of the tenure, but is merely an arrangement by which rent can be conveniently paid. I am of opinion, therefore, that the suit for additional rent cannot be maintained by the plaintiff. I do not think that the agreement in the solehnama can give the plaintiff a right which the law says he has not got. If hereafter the suit is properly brought, it will be a matter for consideration whether the defendant will be bound by the solehnama. The plaintiff has

(1) I. L. R., 17 Calc., 695.

1892

PANCHANAN BANERJI v. RAJ KUMAR GUHA.

also under section 188 of the Tenancy Act no right as co-sharer to cause the tenure to be measured. As the tenure has been measured by the Court at the instance of the plaintiff in this suit, and as the measurement before made by plaintiff himself was not acted on, it appears that the remarks of the Lower Court do not apply. It is distinctly laid down in *Moheeb Ali* v. *Ameer Rai* (1) that fractional co-sharers cannot measure or proceed under section 158 or section 90 of the Tenancy Act. I think, therefore, that the plaintiff's suit must fail for the above reasons so far as he has claimed additional rent."

Upon the view taken by him of this issue, the learned District Judge considered it unnecessary to decide the other issues in the case, and gave the plaintiff a decree for Rs. 580-4, being the rent due upon the previous area for the year 1295.

From this decision the plaintiff appealed to the High Court.

Dr. *Troylukhyanath Mitter* and Baboo *Lal Behary Mitter* appeared for the appellant.

Baboo *Jogesh Chunder Roy* appeared for the respondent.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

We think the District Judge has committed an error in holding on the strength of the decision cited by him *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) that this suit is not maintainable. The present case is, we think, clearly distinguishable from that case. It is based on a kabuliyat executed by the defendant, and looking at that document as a whole, the effect of it clearly was to create a separate tenancy under the plaintiff. The kabuliyat sets out the total area of the land, the area which proportionately would belong to the plaintiff; and the defendant stipulates to pay the plaintiff rent for that area. It gives the plaintiff a right to measure the land, and the defendant undertakes to pay increased rent for any increase that may be found over the area for which rent is paid, and he is entitled to a deduction for any diminution in the area. It is quite obvious that in the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) there was no such agreement. In that case there was a mere undertaking

(4) I. L. R., 17 Calc., 538. (5) I. L. R., 17 Calc., 695.

1892

PANCHANAN BANERJI v. RAJ KUMAR GUHA.

by the tenant to pay to each of the landlords their proportionate share of the rent, and it was held that the effect of that arrangement was not to split up the tenancy, or create a separate tenancy under each of the landlords. Here the tenant, by his own act, has given the plaintiff the power to deal with him as if he was his tenant alone, without any regard to the interests of the co-sharers, and should the defendant be subjected to separate suits, at the instance of the co-sharers, either with reference to enhanced rent or measurement, he has no reason to complain.

The District Judge has dismissed the case, but the ground on which he has done so does not dispose of the questions which were raised. We think it is necessary here to notice one of them, and that is the solehnamah, which the defendant executed some few years after the kabuliyat, in execution of a decree on which the tenure had been attached. That solehnamah states the rent to be less than that specified in the kabuliyat; but it contains an agreement by which, on the measurement of the tenure, the defendant would be liable to pay a higher rent for any increase, with effect from the year 1291, than he would be liable to under the agreement. Now, the plaintiff did not set up this solehnama. He rested his case, as set out in the plaint, entirely on the kabuliyat. The plaint makes no reference to the solehnamah. The defendant set up the solehnamah, and contended that he was only bound to pay as rent the amount therein specified. What he wishes to do is to take advantage of the solehnamah as regards the amount of rent payable, repudiating the terms which would make him under certain circumstances liable to pay a higher rent than he would be required to pay under the kabuliyat. It is quite clear that he cannot be permitted to set up a case like that. The solehnamah must be taken as a whole or not at all. In our opinion the objection which the defendant took, that the document was inadmissible, must prevail.

The case must go back to the District Judge to be decided according to the claim as set out in the plaint, *viz.*, with reference to the rent specified in the kabuliyat, to the area as found on measurement, and to the amount of rent which may be due in accordance with its terms.

A. A. C. *Case remanded.*