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for which the plaintiff is entitled to a decree. The appellant is entitled to the costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by the learned Subordinate Judge.

ADAMI J.—I agree.

Order set aside.

APPELLATE CIVIL.

Before Coutts and Ross, J.J.

BALGOBIND MANDAR

v.

DWARKA PRASAD.*

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Feb. 20.

Tenants in Common—Suit by one against the others for joint possession, maintainability of—Tenancy, whether can be created by grant of receipt by landlords' tahsildar—person in undisturbed possession for several years, whether landlord can deny tenancy.

Where a tenant has been inducted on to the land by the 12-annas proprietors, as such part proprietors and not as, or on behalf of the entire body of landlords, the 4-annas proprietors are entitled to maintain a suit for joint possession.

Watson and Company v. *Ramchand Dutt*(1), *Madan Mohun Shaha* v. *Rajab Ali*(2) and *Dakhyayani Debi* v. *Mana Raut*(3) distinguished.

Sat Narayan Singh v. *Awani Prosad*(4), followed.

Radha Prosad Wasti v. *Esuf*(5), referred to.

The mere fact that the landlord's *tahsildar* has granted a receipt for rent is not sufficient to create the relation of landlord and tenant between the proprietor and the grantee of the receipt.

* Appeal from Original Decree No. 174 of 1919, from a decision of Babu Amarnath Chatterji, Subordinate Judge of Bhagalpur, dated the 2nd April, 1919.

(1) (1891) I. L. R. 18 Cal. 10.
(2) (1901) I. L. R. 28 Cal. 223.
(3) (1919) 19 Cal. L. J. 113.
(4) (1919) 51 Ind. Cas. 31.
(5) (1881) I. L. R. 7 Cal. 414.

Debi Dayal Pandey v. *Ram Sakhal Phatak*(1), followed.

The mere fact that a person has been in possession of land for nine years without interference from the landlord does not debar the landlord from denying the existence of a tenancy.

Nityanand Ghose v. *Kissen Kishore*(2), distinguished.

Appeal by the defendants 1st party.

The facts of the case material to this report are stated in the judgment of Ross J.

Susil Madhab Mallick and *Nirsu Narain Sinha*, for the appellants: On the facts as found a suit for joint possession is not maintainable. The plaintiffs are entitled only to receive rent or sue for a partition [Refers to *Watson and Company* v. *Ranchand Dutt*(3), *Madan Mohun Shaha* v. *Rajab Ali*(4), *Dakhyayani Debi* v. *Mana Raut*(5) and *Sat Narayan Singh* v. *Anant Prosad*(6).] In the absence of proof of ouster one tenant in common cannot sue another tenant in common in trespass. He is only entitled to an account. Any co-tenant is entitled to put the land to a lawful use. The mere fact that he is not using the land himself but has let it out to a tenant is immaterial. The appellants are entitled to possession of an undivided 12-annas share in the land. They have established their tenancy by producing a receipt signed by the *tahsildar* of the predecessors in interest of the landlords and furthermore they have been in possession for nine years without any interference by the landlords. The appellants' tenancy was therefore acquiesced in and cannot be challenged now [Refers to *Nityanand Ghose* v. *Kissen Kishore*(2)].

C. C. Das (with him *Jagannath Prasad* and *Bindheswari Prasad*) for the respondents: Plaintiffs are entitled to joint possession. *Watson and Company*

(1) (1921) Pat. 135.

(2) (1864) W. R. (Gap. No.) Act X Rulings, p. 82.

(3) (1891) I. L. R. 18 Cal. 10.

(4) (1901) I. L. R. 28 Cal. 223.

(5) (1919) 19 Cal. L. J. 113.

(6) (1919) 51 Ind. Cas. 31.

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v. *Ramchand Dutt*(1), *Madan Mohun Shaha* v. *Rajab Ali*(2) and *Dakhyayani Debi* v. *Mana Raut*(3) do not apply to this case. The principle enunciated in those cases is applicable only when a co-sharer is acting exclusively on his own or on behalf of all. In *Watson and Company* v. *Ramchand Dutt*(1) one co-sharer wanted to carry on an operation which was inconsistent with interest of the other co-sharer. *Radha Prasad Wasti* v. *Esuf*(4) is applicable to this case and *Sat Narayan Singh* v. *Anand Prosad*(5) is in my favour.

Nityanund Ghose v *Kissen Kishore*(6) has no bearing on the facts of this case.

Ross, J.—This is an appeal by the defendants 1st party. The plaintiffs are the owners of 4-annas share in Mauza Sarauni Kalan. The defendants 2nd party are the owners of the remaining 12-annas and the defendants 1st party are said to be tenants. The suit relates to 143 *bighas* of land which was formerly under water but became fit for cultivation in 1314. The present plaintiffs were not then proprietors in the village. They purchased the share of two Marwaris, Kedar Mal and Nemraj in 1321. Certain proceedings in partition were started in 1907 but were never completed. The defendants 1st party are said to have taken possession of the land in suit in 1317 without any legal right so far as the plaintiffs' share is concerned, and the suit has been brought for recovery of possession or for possession jointly with defendants 1st party and defendants 2nd party with mesne profits.

The defence of the defendants first party was that settlement of the land in suit was taken from all the proprietors at an annual rental of Rs. 174-2-15 gandas, in 1316 and that since then these defendants have been in possession as tenants. It was further

(1) (1891) I. L. R. 18 Cal. 10.
(2) (1901) I. L. R. 28 Cal. 223.
(3) (1919) 19 Cal. L. J. 113.
(4) (1881) I. L. R. 7 Cal. 414.
(5) (1919) 51 Ind. Cas. 31.
(6) (1864) W. R. (Gap. No.) Act X, Rulings, p. 82.

alleged that the plaintiffs' predecessors had granted a receipt for rent to the defendants and that in the partition papers these defendants were recorded as tenants of the land. Of the defendants second party, the owners of 8-annas share, in their written statement acknowledged the tenancy of the defendants first party and the owner of the remaining 4-annas did not enter appearance. It may, therefore, be taken that as regards 12-annas share the defendants first party are recognized as tenants.

The learned Subordinate Judge found that there had been no settlement with the defendants first party by the plaintiffs' predecessors. He further found that there was no proof that rent had been actually received by them and that in any case the receipt granted by their *tahsildar* was not a recognition of any tenancy. He consequently held that the plaintiffs were entitled to a decree for joint possession of a 4-annas share in the land in dispute with the defendants first party and to mesne profits.

Two main grounds have been taken in appeal. It is contended, in the first place, that on the facts found the plaintiffs are not entitled to a decree for joint possession, and that their only remedy is to receive rent or a partition. Reliance is placed on the decisions in *Watson and Company* v. *Ramchand Dutt*(1), *Madan Mohun Shaha* v. *Rajab Ali*(2), *Dakhyayani Debi* v. *Mana Raut*(3) and *Sat Narayan Singh* v. *Anant Prosad*(4). The argument briefly is that as to the rights which one tenant in common has against another tenant in common who has taken possession, the rule is that unless there is actual ouster, no action of trespass will lie, but only an account. The principle is that the co-tenant is doing nothing but what is lawful in putting the land to the use for which it is intended, namely, the production of crops. It is further argued that it

(1) (1891) I. L. R. 18 Cal. 10.
(2) (1901) I. L. R. 28 Cal. 223.
(3) (1919) 19 Cal. L. J. 113.
(4) (1919) 51 Ind. Cas. 31.

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is immaterial whether the co-tenant does this by raising the crops himself or by letting the land to a tenant.

Now, the defendants first party in this case allege that they took settlement from all the proprietors. This has been found against them. It is found that they took settlement only from the 12-annas landlords. It is not alleged that the 12-annas landlords settled the land with them as 16-annas landlords. Consequently, as to 4-annas of the holding, they have no settlement at all and there is no authority for saying that in such circumstances the 4-annas landlord, who has not made any settlement, is not entitled to a decree for joint possession. The decision in *Watson's* case(1) does not support any such proposition. In that case the essential facts were that one of the tenants in common was in actual occupation of part of the estate and cultivating it as if it were his separate property; and that the other tenant in common attempted to come upon the property in order to carry on operations inconsistent with the course of cultivation in which the former had been engaged. Neither of these elements is present here. Similarly in the case of *Madan Mohun Shaha* v. *Rajab Ali*(2) the co-sharer landlord who had made the settlement had been in exclusive possession of the tank, the subject-matter of the suit, and had settled it as having been in exclusive possession. The same principle is to be found in *Dakhyayani Debi* v. *Mano Raut*(3) where the landlord who made the settlement had taken possession of the land, apparently without any protest by his co-sharers, and in the ordinary course of management had made the settlement with the plaintiff. Moreover, all that was decided in that case was that the plaintiff had the status of a *raiyat*, and that is not disputed in the present case. On the other hand, the decision in *Sat Narayan Singh* v. *Anant Prosad*(4) is against the appellants' contention. The cases on the subject were there discussed and it

(1) (1891) I. L. R. 18 Cal. 10.
(2) (1901) I. L. R. 28 Cal. 223.
(3) (1919) 19 Cal. L. J. 113.
(4) (1919) 51 Ind. Cas. 31.

was held that one remedy open to the co-tenant was a decree for joint possession. And in the case of *Radha Prosad Wasti* v. *Esuf*(1), it has been held that no man has a right to intrude upon *ijmali* property against the will of the co-sharers or any of them. It is argued that the defendants first party have the right to the possession of an undivided 12-annas share in the land in suit. This is true, but it is in no way inconsistent with a decree for joint possession in favour of the plaintiffs. In my opinion, therefore, the first contention fails.

The second argument is on the merits of the case. It is contended that from the conduct of the parties it should be inferred that all the proprietors consented to the settlement, especially in view of the facts that the *tahsildar* of the plaintiffs' predecessors granted a receipt and that the defendants first party were in undisturbed possession for 9 years. Now, with regard to this receipt, the learned Subordinate Judge has found, in the first place, that there is no satisfactory proof that any payment of rent was actually made, and this finding has not been attacked on appeal. The evidence is reduced to the uncorroborated statement of a single witness and in the circumstances of this case, in view of the relations of the parties, it is difficult to accept such evidence as sufficient. But even if this receipt is taken to be a receipt for money actually paid, it does not lead, in my opinion, to any inference that a tenancy exists between the plaintiffs and the defendants first party. It is argued that the defendants do not rely upon this receipt as a recognition of their tenancy in the sense in which the transfer of a non-transferable holding is required to be recognized; but I can see no difference. The receipt is relied upon as binding the landlord through the act of the *tahsildar* and preventing him from denying the relationship of landlord and tenant. Now, the receipt granted by a *tahsildar* cannot have that effect. In *Debi Deyal*

(1) (1881) I. L. R. 7 Cal. 414.

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Pandey v. *Ram Sakhal Pathak*(1) the law on this subject was considered and the rule was deduced that where the *tahsildar* has not authority from the landlord, his act in granting a receipt cannot amount to recognition.

From the fact that the defendants' occupation of the land was acquiesced in without remonstrance for 9 years, it is argued on the authority of *Nityanund Ghose* v. *Kissen Kishore*(2) that the defendants must be treated as tenants. That was a suit by the landlord claiming rent and the execution of a *kabuliyat* from a person who had occupied land within his *zamindari*, and it was held that a tenancy existed and that the tenant must comply with the requirements of the tenancy. The ground of the decision is that it is not open to a person occupying land to plead in answer to a claim for rent that he is a trespasser [*See* In re: *Hallett's Estate*(3).] But there is nothing to prevent the landlord from taking this plea. Consequently no tenancy can be inferred here.

Much was made of the failure of the plaintiffs to produce their collection papers. Evidence was given that these papers had been stolen, and it was contended that the evidence was insufficient That may be so, but it is for the plaintiffs to say what papers they will produce. The defendants never sought discovery of these papers and no inference can be drawn against the plaintiffs from their non-production.

The entries in the *batwara* papers are referred to in the written statement and it was argued that these raise a presumption of a tenancy. But evidence has been given by plaintiffs' witness Bachu Lal Das, *tahsildar*, that the name of Balgobind Mandal is not in these papers and that the lands in suit are recorded as *gair mazrua* of the *maliks*. The *batwara khesra* itself is not produced and there is no evidence to support the allegation in the written statement. Indeed it

(1) (1921) Pat 135.

(2) (1864) W. R. (Gap. No.) Act X Rulings, p. 82.

(3) (1880) 13 Ch. D. 626 (727).

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ROSS, J.

seems doubtful on the whole evidence whether the defendant No. 1 is a *bonâ fide* tenant at all. He is related to one of the defendants second party, Madan Mandal. There is evidence on both sides that for all settlements made since 1314 *kabuliyats* have been executed: but in the present case no *kabuliyat* is produced. The crops are left at Madan Mandal's *katchery* and in all probability Balgobind is merely his nominee. Therefore on the merits also it seems to me that the appeal must fail.

I would dismiss this appeal with costs

COUTTS, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Coutts and Ross, J.J.

CHANDRIKA RAM KAHAR

v.

KING-EMPEROR *

1922.

Feb. 23.

Evidence Act, 1872 (Act I of 1872), section 32—gestures made by wounded person, admissibility of—interpretation of gestures, whether opinion of witnesses as to, admissible—First Information—whether information lodged by another is admissible when first informant's statement is not recorded—first informant, necessity for examining.

Where a woman whose throat had been cut, made, in answer to questions put to her by the Sub-Inspector, certain gestures from which the latter inferred that she accused her husband of the assault, *held*, that the gestures were admissible in evidence under section 32 of the Evidence Act, 1872, but that the opinion of witnesses as to the meaning of the gestures was not admissible.

Queen-Empress v. *Abdullah*(1), followed.

* Death Reference Case No. 3 of 1922 and Criminal Appeal No. 15 of 1922, from a conviction and sentence passed by W. H. Boyce, Esq., Sessions Judge of Singhbhum, dated the 1st February, 1922.

(1) (1885) I. L. R. 7 All. 385, F. B.