

LETTERS PATENT.

Before Dawson Miller, C. J. and Foster, J.

CHANDERCHOOR DEO

v.

BANWARI LALL.*

1926.

June, 1.

Landlord and Tenant—recognition by some only of the co-sharers, effect of—suit for possession by other co-sharers—proper decree, what should be.

In a suit by a co-sharer landlord for possession of a holding on the ground that he had not consented to a transfer to new tenants, the proper decree should be a decree for joint possession with the tenants to the extent of the plaintiff's share.

Hoosain Mahomed v. Fakir Mahomed(1), *Gajadhar Ahir v. Munshi Bhikari Lal*(2) and *Radha Kishun v. Bhagwat Prasad*(3), referred to.

A landlord who has in fact recognised the tenants cannot afterwards turn them out on the ground that his recognition alone was not that of the whole body of landlords and therefore was not binding either upon himself or his co-sharers.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

S. Saran and *L. K. Jha*, for the appellants.

Anand Prasad, for the respondents.

DAWSON MILLER, C. J.—The original plaintiff, Babu Kunj Lal, was a co-sharer landlord of a separate

*Letters Patent Appeal no. 15 of 1925, from a decision of Adami, J., dated the 1st February, 1926, setting aside a decision of M. Ihtisham Ali Khan, Subordinate Judge of Monghyr, dated the 19th December, 1922, which modified a decision of Babu Raghunandan Prasad, Munsif, 2nd Court of Begusarai, dated the 28th May, 1921.

(1) (1909) 10 Cal. L. J. 618.

(2) (1913-14) 18 Cal. W. N. 1011.

(3) (1917) 38 Ind. Cas. 72.

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takhta bearing tauzi no. 8205 in mauza Mohammadpur Raghunath. He had an interest to the extent of a one-third share in that estate. The other two-third share belong to the parties who were originally the defendants second party and the defendants third party in the suit, the interest of the defendants third party having passed to the defendants second party. The suit was instituted by Babu Kunj Lal to recover possession of a certain holding in the village from the defendants first party who had purchased the holding at a sale in execution of a money decree against the original tenants who are the defendants fourth party in the suit. It appears that after the purchase in execution by the first party or principal defendants their tenancy was recognised by the co-sharer landlords of the plaintiff but was not recognised by the plaintiff himself. The plaintiff therefore brought the present suit claiming to oust the purchasers from possession on the ground that they had not been recognised by the whole body of landlords and were therefore not entitled to remain in possession as there is in the village no custom of transferability without the consent of the landlord.

After the suit was instituted the defendants third party, the co-sharer landlords, who had at that time acquired the whole of the remaining interest were transferred from the category of defendants to the category of plaintiffs. Therefore at the time when the suit was tried all the co-sharer landlords were on the record as plaintiffs. The claim made by the original plaintiff was for recovery of khas possession as well as for mesne profits of the whole holding. Alternatively he claimed for possession of his share, that is to say a third share jointly with the principal defendants, the purchasers.

The Munsif before whom the case came for trial decreed the plaintiffs' suit with costs, declared the plaintiffs' title in respect of the disputed land and ordered that they should recover possession by

dispossession of the defendants together with wasilat to be ascertained later on.

On appeal the Subordinate Judge varied the decree of the Munsif to this extent that the added plaintiffs who were originally the defendants second party were not to get possession of anything and that the principal defendants, the purchasers, were to remain in possession of two-thirds of the land in suit as tenants under the added plaintiffs Harish Chandra and Banwari Lal on payment of rent.

On second appeal to this Court the case was heard before Mr. Justice Adami who reversed the judgment of the Subordinate Judge and restored that of the Munsif. I ought to add that the appeal to this Court was brought by the added plaintiffs that is to say the co-sharer landlords of the two-thirds interest in the property. The original plaintiff was apparently content with the decision of the Subordinate Judge which awarded him joint possession with the tenant purchasers of a one-third share in the holding. The reasons which induced the learned Judge of this Court to overrule the decision of the Subordinate Judge and restore that of the Munsif were that the effect of the Subordinate Judge's decision would be to split up the holding, the result of which would be that the plaintiff no. 1 would be in khas possession of a one-third share while the principal defendants would be tenants of the other two-thirds share paying rent, he assumed, to the added plaintiffs. This position he considered was an impossible one and great difficulties would arise because under the Bengal Tenancy Act rent receipts must be granted by all the landlords and in the same way the recognition to be effective must be a recognition by the whole body of landlords, and as in the present case only two out of the three landlords had recognised the principal defendants as tenants he considered that he must hold that such a recognition could not amount to a consent of the landlords to a transfer of the holding, a consent which must be made by the entire body in order to make it good.

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No authorities appear to have been cited to the learned Judge when the case came before him in second appeal. I cannot help thinking that there is a great deal to be said for the view taken by Mr. Justice Adami in this case, and had this been a case of first impression I am not at all sure that the difficulties which he pointed out would not have appeared to me insuperable, but a number of authorities have been referred to us in which it has been held that in similar circumstances, where a co-sharer landlord sues for possession on the ground that he has not consented to a transfer to new tenants the proper decree to make is a decree for joint possession with the tenants to the extent of the plaintiff's share. The cases in which this principle appears to have been laid down are *Hossein Mahomed v. Fakir Mahomed*⁽¹⁾, a decision of Sir Lawrence Jenkins, Chief Justice of the Calcutta High Court and Mookerjee, J., and the case of *Gajadhar Ahir v. Munshi Bhikari Lal*⁽²⁾ also a decision of two Judges of the Calcutta High Court in which again joint possession to the extent of an eight-annas share was awarded to the plaintiff in somewhat similar circumstances. There are other cases, for example *Radha Kishun v. Bhagwat Prasad*⁽³⁾ which is a decision of this Court. In the present case it has been pointed out that the plaintiff and his co-sharers were collecting their rents separately, and this possibly may account for the fact that there had been recognition by some of the co-sharer landlords and no recognition on the part of the others but the appellants themselves recognised the defendants as their tenants. The original plaintiff having obtained a decree in his favour in the lower appellate court to the extent of his one-third share was content with that decision and he is not an appellant before us to-day nor was he an appellant in the appeal before Adami, J. I think that in these circumstances we should be slow to allow the appellants who have recognised the tenants as their

(1) (1909) 10 Cal. L. J. 618.

(2) (1913-14) 18 Cal. W. N. 1011.

(3) (1917) 38 Ind. Cas. 72.

tenants to turn round and join with the original plaintiff in an endeavour to oust those whom they have recognised from their tenancy even to the extent of their own share. I am not aware of any case similar to the present in which the landlords who had in fact recognised the tenants afterwards endeavoured to turn them out on the ground that their recognition alone was not that of the whole body of landlords and therefore was not binding either upon themselves or upon their co-sharers. I am inclined to think even apart from the decisions I have referred to that in a case like the present we should not allow the co-sharer landlords who have recognised the tenants to endeavour afterwards to go back upon their word and endeavour to turn them out even from their own share in the tenancy although their co-sharers are raising no objection. In these circumstances it seems to me that the decision of the learned Judge must be set aside and the decision of the Subordinate Judge restored. This appeal will be allowed with costs. The appellants are also entitled to the costs of the appeal before Adami, J.

FOSTER, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Foster, J.J.

CHANDRESHWAR PRASAD NARAIN SINGH

v.

BISHESHWAR PRATAP NARAIN SINGH.*

1926.

April, 13.

Evidence Act, 1872 (Act I of 1872), sections 32, 33, 65 and 158—public document, secondary evidence of—section 65 inapplicable when original lost or destroyed—opinion of court upon character of witness, whether admissible—statement of case for opinion, admissibility of—probate, whether proof of

* Appeal from Original Decrees nos. 39 and 152 of 1923.