1928.

KAMAKHYA NARAYAN SINGH v. RAM RAKSHA SINGH

The learned Judges of the High Court came to the conclusion on the facts of this case that the plaintiff's predecessor in title was not willing to recognise the defendants as tenants, and that the suit was barred by the Limitation Act.

Their Lordships are of opinion that this conclusion is correct and that the evidence in this appeal is not sufficient to establish the case which the plaintiff admittedly has to make out in order to succeed, viz., the existence of a tenancy from year to year between the predecessor of the plaintiff as landlord, on the one hand, and the heirs of the mukarraridars as tenants on the other hand.

They are therefore of opinion that this appeal also should be dismissed.

In their Lordships' opinion, all three appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

Solicitor for respondents: *Watkins and Hunter.*

LETTERS PATENT.

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

AJAB LAL MUNDER

v.

NARESH MOHAN THAKUR.*

1928.

March, 26.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 69 *and* 70, *scope of—division of crop and deposit of landlord's share—final order—civil court, jurisdiction of, to pass a decree for rent.*

Where there was a division of the crops by the Subdivisional Officer under section 70, Bengal Tenancy Act, 1885,

*Letters Patent Appeal no. 14 of 1927, from a judgment of Allanson, J., dated the 19th May, 1927, upholding a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 7th May, 1924, affirming a decision of Babu Bijoy Krishna Sarkar, Munsif of Banka, dated the 29th August, 1923.

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and the share of the landlords, who did not appear in the proceedings, was deposited with a third party, but there was no direction that the crops be made over to the landlords,

Held, that the order was nevertheless a final order within the meaning of section 70(5) and was enforceable as a decree, and that the Civil Court had no jurisdiction to pass a decree for rent for the period dealt with by the order of the revenue officer.

The fact that no final order has been made does not in itself entitle the landlord, when proceedings have been taken under section 69, to sue for rent, ignoring the proceedings which have been taken.

Ray Benode Bihari Bose v. *Tokhi Singh* (1) and *Bhuneshwari Kuer* v. *Sukhdeo Singh* (2), followed.

Suraj Prasad Mahajan v. *Karu Singh* (3), not followed.

Appeal by the first party defendants.

S. N. Rai, for the appellants.

S. N. Palit, for the respondents.

DAWSON MILLER, C.J.—This is an appeal under the Letters Patent by the first party defendants in the suit from a decision of Allanson, J., dated the 19th May, 1927, affirming a decree of the District Judge of Bhagalpur which in turn upheld the decision of the Munsif of Banka.

The plaintiff, as trustee of the estate of the late Babu Pran Mohan Thakur, is proprietor of a 4-annas share in mauza Mirjapur Chandravan. The appellants are his tenants holding 50 bighas of land under him in the mauza. The suit was instituted to recover bhaoli rent and damages for the year 1327-F. and nagdi rent and interest for subsequent years the rent having been commuted from the year 1328-F. In this appeal we are concerned only with the bhaoli rent for the year 1327-F. The second party defendants are the plaintiff's co-sharer landlords who,

(1) (1924) 78 Ind. Cas. 465. (2) (1925) 85 Ind. Cas. 566.
(3) (1919) 4 Pat. L. J. 325.

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by arrangement, make separate collection from the tenants. They have not entered appearance and we are not concerned with them in this appeal.

The defence made by the appellants in their written statement is that paddy crop only is grown on the land and that for the year 1327 they applied to the Subdivisional Officer under section 69 of the Bengal Tenancy Act to make division of the crop and that under the orders of the revenue Court the nazir got the crop reaped and threshed and the share of the landlords, who did not appear in the proceedings, was deposited in the custody of Dhirnath Jha and Boli Jha, residents of Barauna and they the appellants are no longer liable. The plaintiffs amongst other points raised by them at the trial questioned the regularity of the proceedings under section 69 of the Bengal Tenancy Act contending that the notice required by section 70(*2*) before making a division of the crop was not served upon them, that they were given no opportunity of being heard by the Collector before passing orders on receipt of the nazir's report under section 70(*4*) and that no final order was in fact passed by the Collector.

It was found as a fact by the District Judge in first appeal that notice was duly served upon the plaintiffs as required by section 70(*2*) and that the plaintiffs' share of the produce as found by the nazir was made over to the custody of the two persons named but he held upon the authority of *Suraj Prasad Mahajan* v. *Karu Singh* (1) that the order passed by the Collector on receipt of the nazir's report was a bad order and could be ignored by a Civil Court as it had no finality. He further upheld the trial Court's finding that the appraisement papers filed by the plaintiffs should be preferred to the nazir's report especially as the crops had not been kept under continuous custody, and allowed a sum of Rs. 279-9-9 together with Rs. 34-15-3 damages at 12½ per cent.

(1) (1919) 4 Pat. L. J. 325.

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for the produce rent of 1327-F. passing a rent decree for that amount. The decree was affirmed by Allanson, J., on second appeal to this Court.

In the case of *Suraj Prasad Mahajan* v. *Karu Singh* (1) it was found that the amin deputed to make the division in that case acted without jurisdiction in selling the crop, but apart from this the Court held that the order by the Collector stating that the proceeds of the sale of the landlord's share not having been accepted the balance after deducting the amin's costs had been deposited in the treasury and the case disposed of was not a final order as it did not direct payment of the amount to anyone, and as it lacked finality was not such an order as was contemplated by section 70(*5*) of the Bengal Tenancy Act. Therefore it was held that the order being bad and not enforceable as a decree the suit for rent was not barred. In the result the appeal was remanded to enable a decision to be come to as to the amount due to the landlords.

With great respect to the learned Judges who decided that case, I cannot take the same view as to the scope and purport of sections 69 and 70 of the Bengal Tenancy Act. In my opinion the fact that no final order has been made does not in itself entitle the landlord where proceedings have been taken under section 69 to sue for rent ignoring the proceedings which have been taken. I consider that the intention of the Act was that where the circumstances mentioned in section 69(*1*), clause (*a*) or (*b*), arise, then, upon the application of either party interested, the Collector may take the matter into his own hands and make an appraisement or division of the crop through such officer as he thinks fit. Under section 70(*2*), before such appraisement or division is made, notice must be served on each of the parties informing them of the time and place at which the appraisement or division will be made. If either party fails to attend, as in

(1) (1919) 4 Pat. L. J. 825.

the present case, the officer appointed may proceed ex parte under section 70(2). The officer, after making his appraisement or division, must submit his report of the proceedings to the Collector who, under sub-section (4), shall consider the report and after giving the parties an opportunity of being heard, and after making such enquiry, if any, as he may think necessary, shall pass such orders as he thinks just. Then, under sub-section (5), subject to his power to refer questions in dispute to a Civil Court for decision, his orders shall be final and on application to a Civil Court may be enforced as a decree.

I apprehend that whilst proceedings are pending under these sections it would be a complete answer to any suit brought by the landlord for rent to plead that the matter was the subject of adjudication by the Collector. It is urged, however, that the proceedings before the Collector have ended and no final order has been passed. If that is so, then it seems to me that the proper course is for the plaintiffs to apply to the Collector to pass a final order which would enable them to receive their share of the produce from the persons in whose custody it has been deposited. No such application has been made and in my opinion until it is made, or until the plaintiffs can shew that they have attempted and failed to get their share, they cannot invoke the assistance of this Court, and the Court has no power to ignore the whole proceedings and try the case afresh as a rent suit. There is no default on the part of the defendants. I consider, however, that the order passed by the Collector had the effect of affirming the action taken by the nazir and deciding that the crop had been properly divided between the parties. It only remained for the plaintiffs to apply to the Collector for an order for delivery to them of their share from the persons with whom it had been deposited, even if they were not entitled to do so without such order. There was nothing, so far as I can see, to prevent them from taking this course.

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If, on the other hand, they were dissatisfied with the nazir's report, they should have applied to the Collector to be given an opportunity of being heard. This also they did not do. This suit is not brought to set aside the proceedings taken before the Collector; it is a suit for rent and before it can succeed it must be shewn that the defendants are in default. They plead that they have discharged their liability by obtaining a division of the crop under the procedure laid down in sections 69 and 70 of the Bengal Tenancy Act. The plaintiffs' share has been set apart and there is nothing more to be done by the defendants to enable the plaintiffs to get possession of it. The defendants are, in my opinion, no longer liable. They were entitled to their share which they took and it is not shewn that they have interfered with the share awarded to the landlord nor are they any longer concerned with it. The matter rests between the plaintiffs and the Collector. If the case of *Suraj Prasad Mahajan* v. *Karu Singh* (1) stood alone no doubt we should be bound to follow it, but more recent cases in this Court have taken a different view. In *Bhuneshwari Kuer* v. *Sukhdeo Singh* (2), decided by Jwala Prasad and Kulwant Sahay, JJ., it was laid down that where there is a simple division of the crops held under the batai system, as here, each party is entitled to receive from the Collector who takes possession of the crops his share therein. The party taking his share from the Collector will not be liable to the opposite party for that party's share. If a party does not choose to take his share it will remain in deposit with the Collector. The judgment then points out that the only order the Collector can pass in such a case is to order the deposit of the share to the credit of the party entitled. In the present case the nazir's report which the Collector accepted shews that the landlords' share was deposited with third parties as the landlords were not present to take it.

(1) (1919) 4 Pat. L. J. 325.
(2) (1925) 6 Pat. L. T. 419; 85 Ind. Cas. 566.

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The liability of the tenants was then at an end. They cannot be sued for the landlords' share. In the case of *Ray Benode Behari Bose* v. *Tokhi Singh* (1) the Collector passed orders to the effect that the khesra was fair and should be accepted and the landlord's share, if not accepted, might be sold and deposited in the treasury; and by a subsequent order he recorded that the sale proceeds had been deposited and the case disposed of. My learned brother, with whose decisions Das, J., agreed, in that case held that such orders were final and entitled the landlord to withdraw the money and dismissed his suit claiming rent. If and in so far as there is any conflict between the decisions in *Suraj Prasad Mahajan* v. *Karu Singh*(2) and the two later cases above referred to, in my opinion the later cases should prevail.

The learned Judge of this Court before whom the case came on second appeal felt himself bound by *Suraj Prasad Mahajan's* case (2) and being of opinion that no final order had been passed affirmed the decision of the District Judge. In my opinion it can make no difference whether the orders of the Collector are in form such as can be enforceable as a decree. It cannot reasonably be disputed that the intention of the order was to direct that the landlords were entitled to that part of the crop which had been set apart and deposited on their account. It might have been a better course for the Collector to have directed that their share, if not accepted, should be sold and the proceeds paid into the treasury. Had any application been made by the plaintiffs to get possession of their share no obstacle would have been placed in their way. Had a further order of the Collector been necessary for this purpose it was for them to approach the Collector. The fact that they did not do so and that they made no attempt to obtain possession of their share, which was all they were entitled to, gives

(1) (1924) 78 Ind. Cas. 465. (2) (1919) 4 Pat. L. J. 325.

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them no right to proceed against the defendants who are in no way in default, and in my opinion this action cannot be maintained.

A further point was raised which went to the validity of the proceedings before the Collector. It was said that they had no opportunity of raising objections to the nazir's report before the Collector under section 70(4). The sub-section does not require that notice shall be served on the parties to appear and take objections. The only notice required under the section is that prescribed in the sub-section (2) which was duly served.

Allanson, J., whose decision is now under appeal, considered this question and I agree with him when he says,

> "When notice has been issued under sub-section (2) both parties must be presumed to be aware of the proceedings and it is the duty of any party having any objection to the action of the officer who has made the division or appraisement to go without undue delay to the Collector."

It was further argued that as it was found by the trial Court and affirmed in the lower appellate Court that the proceedings on the spot in connection with the crop were very unsatisfactory and that the plaintiffs' takhmina papers and evidence were preferable to the nazir's report as to the quantity of the crop we are bound by this finding. The question of the accuracy of the nazir's report was a matter which could be questioned by objection taken before the Collector and if the parties or either of them after due notice of the proceedings did not raise any objections to the report at the proper time I consider that they are not entitled to do so by a suit of this nature. The proper tribunal to consider such objections was the revenue Court.

In my opinion this appeal should be allowed. The judgment and decree affirming those of the lower Courts will be set aside and the suit dismissed in so far as it claims rent for the year 1327-F. The

appellants are entitled to the costs of their appeal here and in each of the lower appellate Courts. The plaintiffs are entitled to the costs of the suit in the trial Court in proportion to their success.

Ross, J.—I agree.

Appeal allowed.

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APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, JJ.

RANI RIKHI NATH KUARI

v.

RANGOO MAHTO.*

1928.

March, 28.

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 41, 42 *and* 139—*lessee, whether becomes trespasser after expiration of lease—registered lease for a term—non-occupancy raiyat, ejectment of, after termination of lease—section* 41(*d*)—*suit in the Civil Court—section* 139(4), *whether a bar.*

Upon the expiration of the term of a lease, the lessee becomes a trespasser unless the landlord chooses to treat him as a tenant for a fresh period.

Mahanth Jagarnath Das v. *Janki Singh* (1), *Nathuni Ram* v. *Raja Paresh Nath* (2), followed.

A non-occupancy raiyat who has been inducted under a registered lease for a term is liable to ejectment after the termination of that period, under section 41(*d*), Chota Nagpur Tenancy Act.

Under section 139(4) of the Act,

"All suits and applications to eject any tenant of agricultural land or to cancel any lease of agricultural land..... shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act and shall not be cognizable in any other court, except as otherwise provided in this Act."

Held, that section 139(4) does not bar the jurisdiction of the Civil Court to entertain a suit under section 41(*d*) for the

*Appeal from Original Decree no. 252 of 1924, from a decision of M. Saiyid Muhammad Zarif, Subordinate Judge of Hazaribagh, dated the 23rd June, 1924.

(1) (1922) I. L. R. 1 Pat. 340. (2) (1909-10) 14 Cal. W. N. 297.