

mortgage of the plaintiffs of the 30th October, 1914, it would be necessary to consider whether the effect of the creation of the tenancies in favour of the defendants first party was to alter the character of the land and whether the tenancies were created in the ordinary course of management and on usual and fair terms and as was pointed out by Mookerjee, J., in *Madan Mohan Singh v. Raj Kishori Kumari* (1), the burden of proof lies on the defendants first party.

The decision of the learned District Judge must therefore be set aside and the case remanded to him for disposal in accordance with the observations made above. Costs will abide the result.

MACPHERSON, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Das and James, JJ.

RAGHUNATH DAS

v.

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August, 11.

Rent suit—some only of joint tenants impleaded—suit, whether maintainable—landlord, whether can obtain a decree for the whole rent—joint promisors, liability of—English law, whether applicable to India—Indian Contract Act, 1872 (Act IX of 1872), section 43—Collector's Land Register, landlord's name recorded in, after institution of suit but before judgment—whether sufficient compliance with law.

A suit for rent against some only of the whole body of recorded tenants is maintainable, and the landlord can obtain a money decree for the whole amount of rent against one or more of such joint tenants whose liability for the rent is joint and several.

*Appeal from Appellate Decree no. 1686 of 1924, from a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Patna, dated the 11th September, 1924, confirming a decision of Babu Jamini Mohan Mukherji, Munsif of Barh, dated the 10th July, 1923.

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Jogendra Nath v. Nagendra Narain(1), *Sir Rameshwar Singh v. Jaydeb Jha*(2), *Sirendra Singh v. Bachu Mahto*(3), *Kesho Prasad Singh v. Shamnandan Rai*(4) and *Hirday Narain Singh v. Jugal Prasad Singh*(5), followed.

Kasikinkar Sen v. Satyendra Nath Bhadra(6), dissented from. *Jageshwari Rai v. Maharaja Kesho Prasad Singh*(7), *Rup Narain Singh v. Jagoo Singh*(8), *Khetter Mohan Pal v. Pran Krishto Kabirai*(9), *Ramtaran Chatterji v. Asmatulla Sheikh*(10), *Ananda Kumar v. Hari Das*(11), *Abdul Rab Choudhury v. Eggar*(12) and *Ahinsa Bibi v. Abdul Kader*(13), distinguished.

Before a joint promisor can resist a suit on the ground that his co-sharer is not impleaded he must show that there was a definite contract that each promisor should not be separately liable.

The English doctrine that before one of two or more joint promisors can be sued on a joint contract it must be ascertained that each of the joint promisors has in addition separately made the same promise to the promisee, is inapplicable to India where the law on the subject is contained in section 43, Indian Contract Act, 1872.

Muhammad Askari v. Radhe Ram Singh(14), followed.

Burns v. Bryan (15) and *King v. Hare*(16), referred to.

A landlord is entitled to a decree for the full share of rent claimed by him even where his name has not been recorded in the Collector's land register under the Land Registration Act before the institution of the suit, provided it is so recorded before the date of the judgment.

Appeal by the defendant.

The suit out of which this appeal arose was instituted for arrears of rent for the years 1326 to 1329. One group of co-sharers in the tenancy was not impleaded in the suit, which was consequently

(1) (1906-07) 11 Cal. W. N. 1026.

(2) (1910) 12 Cal. L. J. 591.

(3) (1920) 54 Ind. Cas. 39.

(4) (1926) 94 Ind. Cas. 24.

(5) (1926) 97 Ind. Cas. 373.

(6) (1910) 12 Cal. L. J. 642.

(7) (1916) 1 Pat. L. J. 190.

(8) (1868) 10 W. R. 304.

(9) (1898-99) 3 Cal. W. N. 371.

(10) (1901-02) 6 Cal. W. N. 111.

(11) (1900) I. L. R. 27 Cal. 545.

(12) (1908) I. L. R. 35 Cal. 182.

(13) (1902) I. L. R. 25 Mad. 26.

(14) (1900) I. L. R. 22 All. 307.

(15) (1867) L. R. 12 A. C. 184.

(16) (1844) 13 M. & W. 494; 153 E. R. 206;

decreed as a money suit by the Munsif of Barh, whose decision was affirmed on appeal by the Subordinate Judge. One of the defendant tenants came up in second appeal from that decision.

Atul Krishna Ray, for the appellant.

L. N. Singh and *Sarjoo Prasad*, for the respondents.

JAMES, J.—The first ground taken on behalf of the appellant is that the suit ought not to have been decreed, because the plaintiff's name was not entered in the Collector's Land Register when it was instituted; but his name was recorded under the Land Registration Act for the full share claimed by him, before the date of the judgment; and this is sufficient compliance with the law. It is argued in the second place that the plaintiff's collection is not separate, but this point is concluded by the findings of fact of the courts below.

In the third place Mr. A. K. Ray argues that the suit was not maintainable in the absence of certain co-sharers, heirs of the late Anisul Huq. He argues that the suit cannot be maintained otherwise than against the whole body of recorded tenants, unless it is shown that each tenant undertook to be liable for his full share of rent, relying on the decisions in the cases of *Jageshwar Rai v. Maharaja Kesho Prasad Singh*⁽¹⁾ and *Kasikinkar Sen v. Satyendra Nath Bhadra*⁽²⁾. The decision in the former case has been explained by the learned Judges of this Court who decided the case of *Birendra Singh v. Bachu Mahto*⁽³⁾, holding that in a case of this kind the plaintiff may obtain a money decree. The late Mr. Justice Mukherji in *Kasikinkar Sen's*⁽²⁾ case lays down the principle that before one of two or more joint promisors can be sued on a joint contract, it must be ascertained that each of the joint promisors has in addition separately made the same promise to the same promisee. The learned

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Judge points out that in such a case there are in addition to the joint promise which has been made by all of the promisors together, several promises made by each of them separately; and each of the promisors incurs both joint and several liability. He goes on to say that in such a contingency, all or any of the promisors may be sued at the option of the promisee in respect of a joint and several liability, and separate actions may be brought against each; in the event of the death of any of them, the persons representing the deceased are liable jointly and severally with the survivors. The latter part of this proposition certainly follows from the rule in *Burns v. Bryan*⁽¹⁾ which together with the case of *King v. Hoare*⁽²⁾ is cited by the learned Judge in support of it; although the rule in *Burns v. Bryan*⁽¹⁾ cannot apparently have any bearing upon ordinary rent suits under the Bengal Tenancy Act. The decision in *King v. Hoare*⁽²⁾ does not lay down the rule that one of the two joint debtors cannot be separately sued: the rule is that a judgment recovered against one of them is a bar to an action against the other. This rule could apparently have had no application in *Kasikinkar Sen's*⁽³⁾ case, in which no decree had been obtained against any co-sharer other than the appellant himself. But whether it would otherwise have applied to that case or not, the enactment of section 43 of the Indian Contract Act had long ago made the rule in *King v. Hoare*⁽²⁾, with its subsequent development in English cases, inapplicable in India, as was clearly explained by Chief Justice Strachey of the Allahabad High Court in the case of *Muhammad Askari v. Radhe Ram Singh*⁽⁴⁾, which has subsequently been approved by the other High Courts in India. The learned Chief Justice's decision in this matter is clear:

(1) (1887) L. R. 12 A. C. 184.

(2) (1844) 13 M. & W. 494; 153, E. R. 206.

(3) (1910) 12 Cal. L. J. 642.

(4) (1900) I. L. R. 22 All. 307.

“ The result is, first, that the doctrine of *King v. Hoare*⁽¹⁾ and *Kendal v. Hamilton*⁽²⁾ depends on the ordinary right possessed by a joint contractor in England to have all the co-contractors joined as defendants in a suit on the joint obligation; secondly that the rule is not applicable where the liability sought to be enforced is joint and several. That being so, how does the matter stand in India? Section 43 of the Contract Act provides that when two or more persons make a joint promise, the promisees may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise..... This is a clear departure from the English Law and in my opinion excludes the right of a joint contractor to be sued along with his co-contractors.” The learned Chief Justice goes on to say that section 43 “ cuts away the foundation of the English doctrine and makes it inapplicable to India.”

With all respect to the eminent Judge who decided *Kasikinkar Sen's* (3) case, it appears to us that he was in error in thinking that it was necessary, before a joint promisor could be separately sued, to find that he had made the promise separately to the promisee. By the provisions of section 43 of the Contract Act, before he can resist a suit in which his co-sharer is not impleaded, he must show that there was a definite contract that each promisor should not be separately liable, which is altogether a different matter.

The next precedent relied upon in *Kasikinkar Sen's* (3) case is the case of *Rup Narain Singh v. Jagoo Singh*⁽⁴⁾ which would have been in point, if it had not been decided before the enactment of the Indian Contract Act. The next case cited is that of *Khetter Mohan Pal v. Pran Kristo Kabirai*⁽⁵⁾, where it was

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(2) (1879) L. R. 4 A. C. 504.

(3) (1910) 12 Cal. L. J. 642.

(4) (1868) 10 W. R. 304.

(5) (1898-99) 3 Cal. W. N. 371.

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held that in a suit for rent of a patni tenure, it was not the duty of the landlord to implead the heirs of a deceased darpatnidar whose names had not been notified to him, with the implication that if he impleads any heirs, he should implead all heirs whose names have been notified to him. The next case cited is that of *Ramtaran Chatterji v. Asmatulla Sheikh*⁽¹⁾, in which one of several joint tenure-holders had executed a kabuliyat for the entire tenure in which the other tenure-holders did not acquiesce; and it was ruled that the tenant who had executed the kabuliyat was not bound in excess of his share and he was not liable for the whole of the enhanced rent agreed upon. It was found as a fact in that case that there was no joint contract, and that the other co-sharers had not undertaken to pay the rent which the first co-sharer had accepted.

The next case relied upon by the late Mr. Justice Mukherji is that of *Ananda Kumar v. Hari Das*⁽²⁾, a case in which several raiyats were sued, but one co-sharer was omitted. The holding was brought to sale in execution of the decree and it was held that the title of the omitted tenant had not passed by the sale; that is to say, the decree was not a rent decree but a money decree. But it is to be remarked that it was not held that the sale was invalid so far as the title of the impleaded tenants was concerned, so that this decision was strictly against the view ultimately taken in *Kasikinkar Sen's*⁽³⁾ case.

The next ruling cited in support of the decision in the case under discussion is that of *Abdul Rab Choudhury v. Eggar*⁽⁴⁾, wherein it was held that where persons liable to pay rent are mutwalis they must all be brought before the court as defendants in a suit for rent, on the ground that they stand in the position of trustees, and since they are trustees they

(1) (1901-02) 6 Cal. W. N. 111. (3) (1910) 12 Cal. L. J. 642.

(2) (1900) I. L. R. 27 Cal. 545. (4) (1908) I. L. R. 35 Cal. 182.

should all be made parties in a suit brought against them as such. The decision would appear to have no bearing on a case where ordinary raiyats holding in joint or common tenancy are sued for rent. The learned Judge in the case under discussion next proceeded to discuss the case of *Jogendra Nath v. Nagendra Narain*⁽¹⁾, wherein it was definitely laid down, in a case in which process had not been served on some of the raiyats, that a suit for rent against some of several joint tenants was maintainable, because they were jointly and severally liable. The learned Judges there pointed out that to hold one of several such tenants to be liable only for his own share of the rent would be directly opposed to the policy laid down in section 88 of the Bengal Tenancy Act. The late Mr. Justice Mukherji remarked that the question raised in *Kasikinkar Sen's*⁽²⁾ case was of an entirely different character, the point being not whether each of the tenants was liable for his share of the rent, but whether they were jointly liable as they asserted or severally liable for the whole rent as the landlord contended; but with all respect to the learned Judge, we are unable to see that the question in *Kasikinkar Sen's*⁽²⁾ case was in any respect different from that in *Jogendra Nath's*⁽¹⁾ case. The learned Judge next discusses the case of *Sir Rameswar Singh v. Jaydeb Jha*⁽³⁾, in which Chatterji and Vincent, JJ., held definitely that it was competent to the plaintiff to maintain his suit against any number of several tenants. Mukherji, J., disposed of this case on the ground that the earlier decisions to which reference was made in the *Kasikinkar Sen's*⁽²⁾ case had not been brought to the notice of the court; but we cannot believe that if these decisions had been brought to the notice of Chatterji and Vincent, JJ., their own decision would have been affected thereby; because these decisions appear to us, with the exception of a single decision of a date before the enactment of the

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Indian Contract Act, to have no direct bearing upon the point at issue in *Sir Rameswar Singh's*⁽¹⁾ case. Mukherji, J., then proceeded to justify his decision on two grounds, the first being that the omitted defendants might subsequently deny that rent was payable at the rate then claimed by the landlord, and he could not pronounce judgment against the defendant who was on the record, in view of the fact that he might find difficulty in obtaining contribution from his co-sharers. In the peculiar circumstances of *Kasikinkar Sen's*⁽²⁾ case, where the first defendant was held bound by an entry in the Road Cess return, while the suit against the other tenant-defendants was dismissed, there might have been some justification, on the strength of the ruling in the case of *Ramtaran Chatterji v. Asmatulla Sheikh*⁽³⁾ for a decree limited to the defendant's share of the rent, though we do not agree that such a course would have been justified, far less that such an argument afforded justification for the dismissal of the whole suit. The second independent ground taken by the learned Judge was that the tenancy was an ancestral one, the tenants in occupation were representatives of the original tenant, and that it could not be assumed, even if one of the several joint tenants was liable for the whole rent, that on his death everyone of his heirs would be liable for the whole rent. In support of this view that the heirs really constitute one body the learned Judge cites the case of *Ahinsa Bibi v. Abdul Kader*⁽⁴⁾, wherein a suit was instituted by the legal representatives of a deceased partner in a trading partnership against the surviving partners and representatives of the other deceased partner for an account; but nothing in the decision in that case appears to us to be properly applicable to occupancy raiyats succeeding to their ancestral holding and inheriting the right to occupation of the holding with the ancestor's liability to pay rent. It appears

(1) (1910) 12 Cal. L. J. 591.

(2) (1910) 12 Cal. L. J. 642.

(3) (1901) 02, 6 Cal. W. N. 111.

(4) (1902) I. L. R. 25 Mad. 26,

to us therefore that the decision in *Kasikinkar Sen's*(¹) case cannot be taken as affording authority for the view that the liability of co-sharers of an ordinary holding to pay rent to the landlord is not joint and several; and we consider that the correct view was expressed by the Acting Chief Justice of the Calcutta High Court and Sharfuddin, J. in *Jogendra Nath Roy's*(²) case, and Chatterji and Vincent, JJ., in *Sir Rameswar Singh's* case (³).

For ourselves we are bound by the decision of this High Court in the cases of *Kesho Prasad Singh v. Shamnandan Rai* (⁴) and *Hirday Narain Singh v. Jugal Prasad Singh* (⁵) in which it was held that a decree for the whole amount of rent can be passed against one of several co-tenants. The decree of the lower court in the present case is expressly a money decree and not a rent decree; and there does not appear to be any ground for holding that the decision of that court was not correct. The decree of the lower court is accordingly affirmed and the appeal is dismissed with costs.

DAS J.—I agree.

S. A. K.

Appeal dismissed

APPELLATE CRIMINAL.

Before Kulwant Sahay and Allanson, JJ.

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Criminal Procedure Code, 1898 (Act V of 1898), sections 297 and 298—charge to the Jury—failure to set out in the charge the explanation of law, whether amounts to misdirection—retrial, whether necessary—witness, description of whether forms part of the deposition on solemn affirmation.

*Criminal Appeal no. 138 of 1927, from a decision of T Luby, Esq., I.C.S., Sessions Judge of Patna, dated the 28th June, 1927.

(1) (1910) 12 Cal. L. J. 642. (3) (1910) 12 Cal. L. J. 591.

(2) (1906-07) 11 Cal. W. N. 1026. (4) (1926) 94 Ind. Cas. 28.

(5) (1926) 97 Ind. Cas. 373.