

## APPELLATE CIVIL.

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*Before Das and James, JJ.*

PATHAK HARBANS SINGH

v.

THAKUR JAGDISHWAR DAYAL.\*

*Rent decree—representation, principle of—some only of recorded tenants sued—whether a rent decree—test.*

As an ordinary rule all the tenants of a tenure must be made parties to a suit for rent in order that the decree and the sale in execution of it may have the important consequences described in section 208, Chota Nagpur Tenancy Act, 1908, or Chapter 14 of the Bengal Tenancy Act, 1885.

Where, however, one of a number of tenants is put forward by the rest as their representative he will be regarded as the sole tenant for the purposes of a suit for arrears of rent; and the question whether one of several tenants can be regarded as the representative of the rest depends upon the circumstances of each case and is, if not essentially, at any rate largely, a question of fact.

Therefore, in order to entitle an auction-purchaser to invoke the aid of the principle of representation, he must prove that the tenant sued was the representative of the rest and not that he represented the tenure in relation to the landlord. *Chamat Kumari Dasi v. Triguna Nath Sardar*<sup>(1)</sup>, *Srimati Faizunnessa v. Ram Tarun Chowdhury*<sup>(2)</sup> and *Sushila Sundari Chowdhurain v. Tarak Chandra Roy Chowdhury*<sup>(3)</sup>, followed.

*Netai Behari Saha Pramanik v. Hari Gobinda Saha*<sup>(4)</sup> and *Jeolal v. Gunga*<sup>(5)</sup>, referred to.

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\*First Appeal no. 6 of 1926, from a decision of Babu Ashutosh Mukherji, Subordinate Judge of Palamanu, dated the 17th December, 1925.

(1) (1912-13) 17 Cal. W. N. 833.      (3) (1926) 97 Ind. Cas. 489.

(2) (1921-22) 26 Cal. W. N. 138.      (4) (1899) I. L. R. 26 Cal. 766.

(5) (1884) I. L. R. 10 Cal. 966.

## Appeal by the plaintiffs.

1928-29.

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The plaintiffs appellants sought to obtain a permanent injunction restraining the defendant no. 1 from recovering possession of mauza Maran from them. The facts were these: Defendant no. 1 was the proprietor of Lokiya, Narainpur estate and, as such, proprietor of mauzas Maran, Rouni, Bedra and 8-annas share of Chowreah. His predecessor in title made a khorposh grant of the mauzas enumerated above to the predecessor in title of Moheshanand, the deceased husband of defendant no. 5 and defendants 2, 3 and 4. On the 25th July, 1865, the predecessors in title of Moheshanand and defendants 2, 3 and 4 gave a mokarrari of mauza Maran to the predecessors in title of the plaintiffs. Sometime in 1919 a rent suit, being suit no. 233 of 1919-1920 was instituted by defendant no. 1 against defendants 2, 3 and 4 on the footing of the khorposh grant already referred to. Moheshanand was then dead; but his widow defendant no. 5 was not a party to the rent suit. Defendant no. 1 obtained a decree on the 26th February, 1920. He proceeded to execute the decree and purchased the khorposh villages in execution case no. 227 of 1922-23 for the sum of Rs. 375. Defendant no. 1 sought to obtain possession of the khorposh villages including Maran; and he was clearly entitled to succeed if the decree obtained by him was regarded as a rent decree. The plaintiffs contended that the decree was not a rent decree since defendant no. 5, who was undoubtedly interested in the tenure, was not a party to the rent suit. The Subordinate Judge dismissed the plaintiffs' suit substantially on the ground that the landlord was entitled to ignore defendant no. 5 as she

" never made any attempt to get her name substituted in place of her deceased husband in the sherista of the landlord, defendant no. 1 "

*S. M. Mullick and S. Dayal*, for the appellants.

*Pugh*, for the respondents.

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DAS, J. (after stating the facts set out above, *17th Jan., 1929.* proceeded as follows): In my opinion the decision of the learned Subordinate Judge is erroneous and must be reversed.

It is, I think, well settled that whatever may be required for the purposes of a mere money decree ordinarily all the tenants of a tenure are necessary parties to the suit in order that the decree and the sale in execution of it may have the important consequences described in section 208 of the Chota Nagpur Tenancy Act, or Chapter 14 of the Bengal Tenancy Act. On this general rule an exception has been engrafted which is to the effect that where one of a number of tenants is put forward by the rest as their representative, he should be regarded as the sole tenant for the purposes of a suit for arrears of rent; and that whether one of several tenants can be regarded as a representative of the rest must depend on the circumstances of each case and is, if not essentially, at any rate largely, a question of fact. These propositions will be found fully stated in the judgment of Jenkins C.J. in *Chamat Kumari Dasi v. Triguna Nath Sardar*(1).

Mr. Pugh, appearing on behalf of the respondents, contended that the question is not whether the tenant sued can be regarded as the representative of those who are not sued but whether the tenant sued represents the tenure in relation to the landlord. I am unable to agree with this contention. I think that the decision of Jenkins C.J. in the case to which I have referred and the decision of Mookherji J. in *Srimati Faizunnessa v. Ram Taran Chowdhury*(2) are conclusive. It was laid down by Mookherji J. in the latter case that in order to entitle the execution purchaser to invoke the aid of the principle of representation enunciated in the case of *Netai Behari Saha Pramanik v. Hari Gobinda Saha*(3) which followed the rule recognised in *Jeolal v. Gunga*(4), it is not sufficient

(1) (1912-13) 17 Cal. W. N. 833. (3) (1899) I. L. R. 26 Cal. 766.  
(2) (1921-22) 26 Cal. W. N. 138. (4) (1884) I. L. R. 10 Cal. 966.

to show that the landlord has chosen to obtain a decree for rent against one out of several heirs; but it has to be established that all the tenants have held out one of them as their representative in their transactions with the landlord. In *Sushila Sundari Chowdhurain v. Tarak Chandra Roy Chowdhury*<sup>(1)</sup> it was held by the Calcutta High Court that when one of the recorded tenants is dead, the landlord must proceed either against the recorded tenants including the one who is dead if he is not aware of the fact that he is dead, or against the recorded tenants who are in actual occupation of the tenure. It was contended in that case that the heirs of the deceased tenant were bound to notify their succession under section 15 of the Bengal Tenancy Act; and, not having done so, were not entitled to take the point that the decree was not a rent decree. It was held by the Calcutta High Court that the omission to notify their succession did not affect their interest in the tenure. The question then which I have to consider in this appeal is whether defendants 2, 3 and 4 were put forward by defendant no. 5 as her representatives in her transactions with the landlord.

Now on this point only one answer is possible. It is clear, in the first place, that defendant no. 1 knew that Moheshanand was dead. He did not make him a party to the rent suit. It is also clear that he knew that Moheshanand left a widow for it is his definite case in the written statement that defendant no. 5 did not inherit her husband's khorposh property on two grounds; first on the ground that under a family custom khorposh grants are resumable on the failure of male heirs in the male line; and, secondly, on the ground that defendant no. 5 during the lifetime of her husband lost her chastity and after his death left her husband's residence and was living an immoral life elsewhere. I may point out that defendants 2, 3 and 4 have throughout maintained the

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DAS, J.

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 (1) (1926) 97 Ind. Cas. 489.

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position that defendant no. 5 has no interest in the tenure. It appears from the evidence of Kamta Prasad, the son of Rajkumar Lal, defendant no. 2, that defendants 2, 3 and 4 induced defendant no. 5 to execute a deed of surrender in their favour; and that there was a suit by defendant no. 5 for setting aside the deed of surrender; and that in the result a decree has been passed in favour of defendant no. 5 setting aside the deed of surrender. It follows therefore that defendants 2, 3 and 4 have all along contested the claim of defendant no. 5 to any interest in the tenure and it is idle to contend that defendant no. 5 could possibly have put forward defendants 2, 3 and 4 to represent her in her transactions with the landlord.

Now, so far as defendant no. 1 is concerned, his case is that a family custom excludes defendant no. 5 from any share in the khorposh properties; but no such family custom has been established in this case. There is no doubt whatever that defendant no. 1 under the family custom will be entitled to resume the khorposh properties on failure of heirs male; but the contingency has not happened yet; for the line is still in existence, and, as I have shown, defendant no. 5 has obtained a decree as against defendants 2, 3 and 4 declaring her interest in the khorposh properties. So far as the other question raised by defendant no. 1 is concerned, all that I need say is that there is absolutely no evidence that defendant no. 5 "lost her chastity during the lifetime of her husband". I have no doubt whatever that the whole object of the rent suit was to deprive defendant no. 5 of any share in the tenure. It follows therefore that the decree obtained by defendant no. 1 as against defendants 2, 3 and 4 was not a rent decree and could not be executed as such. Now, if this be so, it is not disputed that the interest of the plaintiffs under the transaction of the 25th July 1864 cannot be affected as a consequence of the ex-parte decree of the 26th February 1920.

Another point was taken by Mr. Pugh on behalf of the respondents. He contended that as the sale

took place under section 208, section 214 operates so as to bar a suit to set aside or to modify the effect of such a sale. But section 214 provides that a suit is maintainable on the ground of want of jurisdiction. Now if I am right in saying that a rent suit could not be instituted against defendants 2, 3 and 4, then it must follow that the Deputy Commissioner's Court had no jurisdiction to pass a rent decree against defendants 2, 3 and 4.

I would allow the appeal, set aside the judgment and the decree passed by the Court below and decree the plaintiffs' suit with costs in both the Courts.

JAMES, J.—I agree.

*Appeal allowed.*

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## APPELLATE CRIMINAL.

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*Before Jwala Prasad and James, JJ.*

MATHURA TEWARI

*v.*

KING-EMPEROR.\*

1929.

Jan., 14,  
15, 16, 17.

*Criminal Trial—prosecution, duty of, as to examination of witnesses—statement before committing magistrate, retracted in court of session—Code of Criminal Procedure, 1898, (Act V of 1898)—statement recorded under section 164, whether corroboration of testimony admitted under section 288—conviction, whether can be sustained on evidence admitted under section 288—corroboration.*

Per James, J: The previous statement of a witness recorded under section 164, Code of Criminal Procedure 1898.

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\*Criminal Appeal no. 195 of 1928, from an order of G. J. Monahan, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 7th August, 1928.