

APPELLATE CIVIL.*Before Das and Ross, JJ.*

RAGHUNANDAN SAHA

v.

KUMAR KAMAKHYA NARAYAN SINGH.*

1928.

Aug., 8, 14.

Landlord and tenant—suit for ejectment—plea of permanent istimrari mukarrari—suit dismissed—subsequent suit for rent—plea of adverse possession—landlord and tenant, relationship of, whether proved—estoppel—relationship not admitted—Record-of-rights—entry in favour of plaintiff—Revenue court, whether has jurisdiction to try the suit.

The defendants were the successors of the grantees of an istimrari mukarrari lease of the properties in suit from the predecessor of the plaintiff. These leases, which the defendants had maintained conveyed permanent heritable interests, had been held to be leases for life only. For a number of years after the death of the original grantees their successors continued to pay rent for which they obtained receipts from the plaintiff's predecessor in the name of the old lessees, but eventually they declared that they would pay no more rent unless they were recognized as permanent tenure-holders. Payment of rent thus ceased in the year 1900; and in 1904 notice to quit was served upon the defendants without effect. This notice was repeated in 1915 and 1917 after which the lessor brought suits in ejectment in 1919 which also failed. In the ejectment suits, however, the plea of the defendants was that they had for more than twelve years asserted and claimed a permanent istimrari interest and openly continued in possession to the knowledge of the ancestor of the plaintiff as permanent istimrari mukarraridars. The plaintiff then brought the present suits for rent and the defence was, *inter alia*, that the notice to quit in 1904 had put an end to the

*Appeals from Appellate Decrees nos. 981 of 1927 and 1074-76 and 440 of 1926, from decisions of F. G. Rowland, Esq., r.o.s., Judicial Commissioner of Chota Nagpur, dated the 10th February, 1926, and 24th May, 1927, reversing decisions of Babu Sarbari Kantia Gupta, Deputy Magistrate, Hazaribagh, dated 30th June, 1923; and of K. C. Ritchie, Esq., Subdivisional Officer of Chatra, dated 9th October, 1926, respectively. In nos. 1074 to 1076, from his decision, dated the 16th of April, 1926, affirming a decision of Babu S. C. Mukharji, Rent Suit Deputy Collector of Hazaribagh, dated the 27th of January, 1925.

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tenancy and since then there had been no relationship of landlord and tenant.

Held, that the assertion made in the written statement in the suit for ejectment was sufficient proof of the relationship of landlord and tenant and that it was not open to the defendants to plead that the notice to quit had terminated the relation of landlord and tenant.

Abhey Gobind Chaudhury v. Bijay Gobind Chaudhury (1), followed.

Held, further, that where the Record-of-rights shows the relationship of landlord and tenant, the entry was a sufficient basis for a suit in the Revenue Court for rent under the Chota Nagpur Tenancy Act, although such relationship may not have been admitted.

Appeal by the defendants.

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

Pugh (with him *B. C. De*), for the appellants.

Sir Sultan Ahmed (with him *S. M. Mullick* and *A. B. Mukharji*), for the respondents.

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Ross, J.—These are appeals against decrees of the Judicial Commissioner of Chota Nagpur in suits brought by the respondents against the appellants for rent. In all the cases the facts are the same. The defendants are the successors of the grantees of *istimrari mukarrari* leases of the properties in suit from the predecessor of the plaintiff. These leases, which the defendants maintained to convey permanent heritable interests, have been held to be leases for life only. For a number of years after the death of the original grantees their successors continued to pay rent and they got receipts from the plaintiffs' predecessor in the name of the old lessee, but eventually they declared that they would pay no more rent unless they were recognized as permanent tenure-holders. In this way payment of rent ceased in the year 1900; and in 1904 the tenants applied for mutation of their

names in the landlords' papers. In 1904 notice to quit was served upon them without effect; and this notice was repeated in 1915 and 1917. Then came suits in ejectment in 1919 which failed.

The ground upon which the learned Judicial Commissioner has granted a decree for rent is that the defendants had never claimed to hold the land free of rent, but had always taken the position that they were permanent tenure-holders; and in his opinion any title that they may have acquired by prescription against their landlords is this title to a limited interest. It is contended on behalf of the appellants that the stage of assertion and counter-assertion has passed and it is the duty of the Court now to ascertain the facts; and it is argued that the facts are plain. There was a lease for life to the original grantee followed by a lease from year to year to his successors until they ceased to pay rent or at the latest until the Raja served them with a notice to quit. This, it is contended, put an end to the tenancy in 1904 and since then there has been in fact no relation of landlord and tenant; and whatever the defendants may have asserted in defence to the suit in ejectment, they were in fact trespassers and nothing more. Consequently after the lapse of 12 years from the period fixed by the notice to quit the plaintiffs' right to the property was extinguished under section 28 of the Limitation Act. See also *In re Jolly Gathercole v. Norfolk* (1).

Now it may be that the defendants might have acquired some sort of interest by adverse possession by which they would have been under no obligation to pay rent to the plaintiff; but that has never been their case and the suit in ejectment failed not because of a title by adverse possession in the defendants, but by reason of Article 139. The record-of-rights published in 1910 shows the defendants as *istimrari mukarraridars*. Their plea

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(1) (1900) 2 Ch. 616.

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in the suit in ejectment was that they had for more than twelve years asserted and claimed their permanent istimrari mukarrari interest and openly continued in adverse possession to the knowledge of the ancestor of the plaintiff as permanent istimrari mukarrari. This assertion was made more than once in their written statement and, in my opinion, it is not open to the defence to change their ground now and say that they are not liable to pay any rent at all. The rent that is claimed is the mukarrari rent. In *Abhoy Gobind Chaudhury v. Bijay Gobind Chaudhury* (1) a deposition by the defendant in a previous suit admitting the relation of landlord and tenant was considered sufficiently strong prima facie proof of the relationship, and no further proof was required. The position taken by the defence has to be taken into consideration in deciding this case. It is one of the facts which have to be looked at and it cannot be got rid of merely by saying that the time of assertion and counter-assertion has gone; for aught we know, the attitude of the plaintiff may have been determined by the position taken up by the defendants. It was long after the notice to quit had expired that they got themselves recorded in the record-of-rights as istimrari mukarraridars. They took the position that the notice to quit had no effect upon them and they cannot now turn round and say that the notice to quit terminated the relation of landlord and tenant.

A point was taken on behalf of the appellants that the Revenue Court had no jurisdiction to try these rent suits because the relation of landlord and tenant was not admitted. The record-of-rights showed this relationship and that in my opinion is a sufficient basis for a suit in the Revenue Court for rent. If it had turned out that in fact the relationship did not exist, then the suit would have failed on the merits; but in fact it succeeds on the merits and there seems to be no question of want of jurisdiction.

(1) (1868) 9 W. R. 162.

In my opinion these suits were rightly decided by the Judicial Commissioner and the appeals must be dismissed with costs.

DASS, J.—I agree.

Appeals dismissed.

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APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

KAMTA SINGH

v.

CHATURBHUJ SINGH.*

1928-29.

Dec., 12,
13, 14, 17,
Jan., 14.

Mortgage—marshal, right to—contribution, suit for—Transfer of Property Act, 1882 (Act IV of 1882), sections 56 and 82—purchaser of portion of mortgaged property with a covenant to pay entire charge—payment of entire mortgage-debt—purchaser making payment—whether entitled to claim contribution from purchasers of other portions—right of debtor to marshal—document varying rent payable under a registered lease, whether requires registration.

The right to marshal is available to a purchaser of a portion of property mortgaged with a covenant against encumbrances, as against the purchaser of the other portion who has, under the sale-deed, taken upon himself the burden of the entire mortgage-debt, and the latter, if he discharges the entire debt, is not entitled to claim contribution from the former.

Barnes v. Raester (1), Flint v. Howard (2), Stronge v. Hawkes (3), Jones-Farrington v. Forrester (4), Darby's Estate, Rendall v. Darby (5), Ker v. Ker (6), Mower's Trusts, In re (7) and Aldridge v. Forbes (8), referred to.

*Appeal from Original Decree no. 104 of 1925, from a decision of Babu Narendra Nath Chakraverty, Subordinate Judge of Monghyr, dated the 30th of November 1924.

(1) (1842) 1 Y. & CCC. 401; 62 E. R. 944.

(2) (1893) 2 Ch. 54.

(3) (1859) 4 De. G. & J. 632; 45 E. R. 246.

(4) (1893) 2 Ch. Div. 461.

(5) (1907) 2 Ch. 465.

(6) (1864) Ir. Rep. 4 Equity. 15.

(7) (1869) L. R. 8 Equity, 110.

(8) (1889) 4 Jurist. 20; 9 L. J. (Ch.) 37.