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MUHAMMAD DIN MIAN v. MUSAMMAT ATIRAJO KUER.

WORT, J.

the facts before me is a case which could not possibly succeed.

I might add in connection with Order I, rule 8, that the matter is not cured by the learned Judge having given leave under Order I, rule 8, of the Civil Procedure Code to the plaintiffs to bring this action. I have already said that the case has nothing to do with that Order or rule, that special damage was necessary in order to enable the plaintiffs to succeed and as they have not proved this their action must necessarily fail. On the question of Order I, rule 8, I make special reference to the case of *Adamson* v. *Arumugam*(1) which I have already referred to.

In the circumstances the appeal is allowed and the plaintiffs' action is dismissed with costs throughout to the appellants.

Appeal allowed.

APPELLATE CIVIL.

Before Macpherson and Khaja Muhammad Noor, JJ.

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Jan. 21, 22.
Feb. 10.

BISWANATH MISSIR

v.

RAM PRASAD TEWARI.*

Co-sharer—in possession of lands in excess of his share—possession, whether can be disturbed—partition suit necessary—suit for possession against co-sharer, whether maintainable—Hindu widow in possession of husband's estate, whether entitled to make raiyati settlement—test.

* Appeals from Appellate Decree nos. 928 and 970 of 1929, from a decision of F. F. Madan, I.C.S., District Judge of Muzaffarpur, dated the 5th March, 1929, affirming a decision of Mr. Nut Bihari Chatterji, Subordinate Judge of Motihari, dated the 27th July, 1928.

(1) (1886) I. L. R. 9 Mad. 463.

Where a co-sharer landlord is in possession of lands of the joint estate in excess of his share, his possession cannot be disturbed unless the other co-sharers bring a suit for partition of all the lands comprised in that estate.

Midnapore Zamindary Company, Ltd. v. *Naresh Narayan Roy*(1), *Watson* and *Company* v. *Ramchund Dutt*(2), *Rai Baijnath Goenka* v. *Ajablal Jha*(3) and *Durga Charan Acharjee* v. *Khundkar Enamul Huq*(4), followed.

A co-sharer landlord cannot maintain a suit for possession against his co-sharers.

Varada Pillai v. *Jeevarathnammal*(5) and *Manji* v. *Ghulam Muhammad*(6), distinguished.

Ram Harakh Pandey v. *Chunni Singh*(7), not followed.

Ordinarily a Hindu widow in due course of management of her husband's estate is entitled to make a raiyati settlement provided that the transaction is *bona fide* and is not intended to defraud the reversioners, or does not in any way depreciate substantially the value of her husband's property.

Raghubir Singh v. *Jethu Mahton*(8), distinguished.

Appeal no. 928 by defendants 1st party and Appeal no. 970 by defendants 2nd party.

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

Permashwer Deyal and *Jadubans Sahay*, for the appellants.

Sambhu Saran and *Aditya Narain Lal*, for the respondents.

KHWAJA MOHAMMAD NOOR, J.—These two appeals arise out of the same suit instituted by the plaintiff-respondents for the recovery of possession of some

(1) (1924) I. L. R. 51 Cal. 631 (635), P. C.
(2) (1890) I. L. R. 18 Cal. 10, P. C.
(3) (1916) 33 Ind. Cas. 371.
(4) (1917) 27 Cal. L. J. 441.
(5) (1919) I. L. R. 43 Mad. 244, P. C.
(6) (1920) I. L. R. 2 Lah. 73.
(7) (1923) A. I. R. (All) 446.
(8) (1922) I. L. R. 2 Pat. 177.

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pieces of zerat and bakasht lands. The facts are these:—In village Parorha one Musammat Balkeshi Kuer held 4-annas share, another 4-annas was held by Musammat Bhagwati Kuar, and 1-anna 4-pies by Biswanath Missir and others, the defendants first party in this suit. The remaining shares belong to third parties and we are not concerned with them in the present litigation. The 4-annas share of Bhagwati Kuar was acquired by Bishwanath Missir and others, defendants first party, and thus they became owners of 5 annas 4 pies in the village. During the Revisional Survey as well as at the time of the Cadastral Survey, 9 bighas of land in the said village was recorded as zerat in the possession of Musammat Balkeshi Kuar and 5 bighas bakasht malikan was also recorded to be in her possession. About November, 1921, Balkeshi surrendered 7 bighas and odd of the zerat lands in favour of her co-sharers, the defendants first party, by a deed dated the 19th November, 1921. She also settled 3 bighas 15 cottahs of the bakasht lands with Dharichhan Kurmi, defendant no. 5 and the lease recites that Balkeshi received a nazrana of Rs. 800. Subsequently Balkeshi who was holding only a widow's estate in the share died and was succeeded by Babaji Missir and others, the reversioners of her husband. The said share afterwards fell into arrears of Government revenue and was sold by auction to one Kesho Prasad, who, in his turn, sold it to the plaintiffs under a kebala dated the 9th September, 1924. The plaintiffs thus became the proprietors of the 4-annas share of the village formerly held by Balkeshi Kuar. It seems that the plaintiffs wanted to take possession of the zerat lands which Balkeshi had surrendered in favour of Bishwanath Missir and of the bakasht land which she had settled with Dharichhan. There was a criminal case under section 145 Criminal Procedure Code and plaintiffs were unsuccessful. Thereupon they instituted the present suit for recovery of possession of the aforesaid lands with mesne profits. Their case in the plaint

was that the surrender and the lease relied upon by the defendants were fraudulent and sham, and the recitals contained therein were incorrect and wrong and no nazrana was paid for the settlement. They alleged that Balkeshi Kuar continued in possession of the land till she died and subsequently it came into possession of the reversioners. They further alleged that they were dispossessed in consequence of a proceeding in the section 145 case referred to above.

I must at the outset note that in this case there was a misjoinder of parties and causes of action. Two different sets of defendants in no way connected with one another, were sued in one suit. However, as the suits have been tried and decided it is not necessary to consider the point further.

The defendants first party, the Missirs, contended that the zerat lands though recorded in the name of Balkeshi Kuar only, were the joint property of the proprietors of 9-annas 4-pies, and as after the revisional survey they were prepared to institute suits for the correction of the entry in the record-of-rights, Musammat Balkeshi Kuar surrendered in their favour the possession of the zerat land to the extent of their share, and they have been in possession of it as part proprietors of the village. This is recited in the deed of surrender also. Similarly the Kurmi defendants contended that the bakasht land was settled with them by Balkeshi Kuar and that they, being settled raiyats of the village, had acquired a right of occupancy therein.

The defendants first party, the Missirs, also question the plaintiffs' title and right to bring the suit on the ground that the revenue sale and subsequent sale to the plaintiffs were fraudulently brought about by one of the reversioners in order to deprive the other reversioners of their share.

The trial Judge decreed the suit holding that the plaintiffs were *bona fide* purchasers of the share of

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Balkeshi Kuar and the revenue sale and the subsequent sale to the plaintiffs were valid, and that the surrender of the zerat land in favour of the defendants first party and the settlement of bakasht land with defendants second party were sham transactions and were not given effect to and that Balkeshi Kuar remained in possession of the lands till her death. On appeal the learned District Judge reversed the above findings of the trial Judge but dismissed the appeal. He held that the revenue sale and the purchase by Kesho Lal and subsequent sale by Kesho to the plaintiffs were fictitious and fraudulent and that the surrender and the lease relied upon by defendants first and second parties were given effect to and they were in possession of the land in question but that such a surrender and settlement were beyond the powers of a Hindu widow and they could be questioned and ignored by the plaintiffs. He, therefore, upheld the decree of the trial Court, though on altogether different grounds.

The defendants have now preferred these second appeals. Second Appeal no. 928 of 1929 is on behalf of the defendants first party and Second Appeal no. 970 of 1929 is on behalf of defendants second party. There are some special features in the two appeals but before I come to them I like to dispose of the points which are common.

I do not propose to discuss the question of the *bona fides* or otherwise of the revenue sale and subsequent purchase by the plaintiffs. The trial Court held them to be *bona fide;* the learned District Judge held otherwise. Neither party has addressed us on this point and in my opinion the determination of this question is unnecessary for the purposes of this case.

The learned District Judge has decreed the plaintiffs' suit entirely on the ground that the surrender of zerat in favour of the defendants first party and the settlement of bakasht with the defendants second party were beyond the powers of Balkeshi Kuar, who

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only held a widow's interest in the 4-annas share of the village. Elaborate arguments have been addressed to us on behalf of both sides on this point. Mr. Parmeshwar Dayal on behalf of the appellants contended that the right to ignore, or set aside the alienation by a Hindu widow is the personal right of a reversioner, and cannot be exercised by his heir or by an assignee, and he argued that as Babaji Missir and others, who had succeeded Balkeshi Kuar as the reversioners of her husband, did not question her aforesaid transactions, they cannot now be questioned by the plaintiffs who are the representatives of the purchaser of the share at a revenue sale. On the other hand Mr. Sambhu Saran on behalf of the respondent contended that the right of the reversioners to ignore an alienation of a Hindu widow can be exercised by the purchaser of the estate at a revenue sale as well as by the assignee of the reversioners. Various decisions have been cited by both parties but I do not propose to discuss them. In my opinion the question of the right of alienation by a Hindu widow and a right of a reversioner or his successor or assignee to ignore that alienation does not arise in this case. This was not the basis of the plaintiffs' suit. They based their suit on the allegation that the lands in dispute were in possession of Balkeshi up till the time of her death and were then in possession of the purchaser at the revenue sale. Therefore the suit was not one for ignoring or setting aside the alienation by Balkeshi. The defendant had no opportunity to meet such a case. If this had been the basis of the suit, it would have been open to the defendants to prove the legal necessity, etc., the usual defences which could lawfully be set up in a case in which the plaintiffs seek to ignore or set aside the alienation by a Hindu widow. A new case was started before the learned lower appellate Court, and, in my opinion, the learned judge was in error in allowing this matter to be gone into for the first time in appeal. In short the learned District Judge has decreed the suit on a

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ground which was not raised in the plaint, nor met in the written statement nor agitated before the trial Court.

I now take up the special points of each appeal separately. I first deal with appeal no. 928 of 1929 which is on behalf of defendants first party. In this case Balkeshi Kuar surrendered a portion of the zerat in favour of her co-sharer landlord and according to the finding of the learned District Judge the defendants first party have been in possession of it since the date of the surrender. This surrender can by no stretch of imagination be called an alienation of the property by a Hindu widow. There is no compulsion on a Hindu widow to go on cultivating the zerat and bakasht lands herself, or if there are other co-sharers in the village not to make over the land to them proportionate to their share, if she finds that she is actually cultivating such lands in excess of her due share in the estate. By surrendering a portion of the zerat land in favour of the defendants first party she has in no way diminished her 4-annas share of the village. I am, therefore, clearly of opinion that the question of alienation by a Hindu widow does not arise in a case like this. The defendants do not claim in the land in dispute any higher right than that of co-sharer landlord. In the case of *Midnapore Zamindary Company, Ltd.* v. *Naresh Narayan Roy*(1) their Lordships of the Privy Council have laid down that " Where lands in India are so held in common by co-sharers each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot

(1) (1924) I. L. R. 51 Cal. 631 (635), P. C.

agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them." The observation is based upon an earlier decision of the Privy Council in *Watson and Company* v. *Ramchund Dutt*(1). In *Rai Baijnath Goenka* v. *Ajablal Jha*(2) this Court held that where a co-sharer is in possession of *kamat* lands in excess of his share under a private arrangement between the co-sharers, he is not liable to account for profits to the co-sharer who has the land less than what he was entitled to. In *Durga Charan Acharjee* v. *Khundkar Enamul Huq*(3) Mookerjee, J. held that if a defendant "who was interested in all the lands of the estate, was by a mutual arrangement with his co-sharers, placed in exclusive occupation of the lands as representing his share, that arrangement cannot equitably be disturbed by the plaintiffs, unless they seek a partition of all the lands comprised in the estate." If the land including the disputed land in possession of the defendants first party are in excess of their share (5-annas 4-pies) they will be liable to pay to the plaintiffs compensation for the same, or they will on partition, be liable to give up such portion of it as is in excess of their share. The learned District Judge is in error in thinking that the entry of possession of Balkeshi Kuar in respect of the zerat land shows that it was her exclusive property. Such a possession is not an ouster of the co-sharers.

Mr. Sambhu Saran contended that the defendants first party and their vendor Bhagwati Kuar were not

(1) (1890) I. L. R. 18 Cal. 10, P. C.

(2) (1916) 33 Ind. Cas. 371.

(3) (1917) 27 Cal. L. J. 441.

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entitled to any zerat land in this village and that by some private arrangement zerat land in another village were allotted to them in lieu of their share of the zerat land of this village. This may be so but we have no material before us to come to any conclusion on this point. These are the matters which will be gone into in a properly framed partition suit which, I understand, is now pending or which may subsequently be brought by any of the co-sharer landlords. In the present suit, as I have said, the position is that one co-sharer landlord has instituted a suit for ejectment against another co-sharer landlord, who is in possession of a portion of the zerat land. This, in my opinion, he cannot secure without instituting a partition suit. The plaintiffs' remedy was to bring such a suit and when the suit is brought it will be decided whether or not the defendants first party are entitled to have any zerat land in this village, or, if so, to what extent and how much of the zerat land in their possession they should give up in favour of the proprietor of the 4-annas share. So also the defendants first party may in a proper suit be liable to pay compensation to the plaintiffs.

Mr. Sambhu Saran contended that a suit for possession against a co-sharer landlord is maintainable. He relied upon *Varada Pillai* v. *Jeevarathnammal*(1), *Manji* v. *Ghulam Muhammad*(2) and *Ram Harakh Pandey* v. *Chunni Singh*(3). The first two cases have no application to the facts of the case. In the Madras case the question decided was that under certain circumstances the possession of a co-sharer may be adverse. This does not arise in the present suit. In the Lahore case the suit was for joint possession of a piece of land which was in possession of a co-sharer who asserted exclusive title and denied the title of other co-sharers. This also is not the case

(1) (1919) I. L. R. 43 Mad. 244.
(2) (1920) I. L. R. 2 Lah. 73.
(3) (1928) A. I. R. (All) 446.

here. The defendants do not deny the plaintiffs' title and they claim no higher right than to remain in possession as co-sharers. In fact they alleged joint possession with Balkeshi Kuar. The Allahabad case is somewhat similar. It was held that the plaintiff who was in sole possession of a piece of khudkasht land and was dispossessed by his co-sharers was entitled to be restored to possession. The facts of this case are not clear from the judgment which is of a single judge. The land was said to be the sole khudkasht of the plaintiff of which there is no evidence in this case. For these reasons I am unable to follow it.

I now come to appeal no. 970 of 1929 which is on behalf of the defendants second party. In this case the latter relies upon a settlement made by Musammat Balkeshi Kuar. Ordinarily a Hindu widow in due course of management of her husband's estate is entitled to make raiyati settlement provided that the transaction is *bona fide* and is not intended to defraud the reversioners, or does not in any way depreciate substantially the value of her husband's property. Nothing like this is either alleged or proved in this case. In this case land measuring 3 bighas 15 cottahs has been settled on an annual rent of Rs. 23, but the question of adequacy of rent has not been gone into. The defendants claimed to be settled raiyats of the village and as such they have a right of occupancy in the land for the time being held by them. In my opinion the defendants have acquired a right of occupancy under a settlement from the widow, and they are not liable to be evicted. Though this was a settlement by a co-sharer, other co-sharers do not object to it. If the rent fixed is inadequate the plaintiffs can, on a proper suit, have a fair and equitable rent settled for the land, ignoring the rent fixed by the widow. Mr. Sambhu Saran relied upon *Raghubar Singh* v. *Jethu Mahton*[1] but in that case the widow had granted a mokarrari of an occupancy holding.

(1) (1922) I. L. R. 2 Pat. 177.

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That is quite different from granting a lease of bakasht land to a raiyat. The appeals are allowed and it is ordered that the plaintiffs' suit be dismissed with costs throughout. Only one set of costs will be allowed for the trial Court, and it will be distributed between the defendants first party and second party to the proportion of Rs. 1,432 and Rs. 772.

MACPHERSON, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Macpherson and Dhavle, JJ.

1931.

April, 14.
May, 20.

THAKUR KHITANARAIN SAHI

v.

SURJU SETH.*

Chota Nagpur Encumbered Estates Act, 1876 (*Ben. Act VI of* 1876), *sections* 12 *and* 12A—*property restored to holder under section* 12, *sub-section* (*1*) *or* (*3*)— *section* 12A, *bar imposed by, whether applies to involuntary sales—released property, whether can be sold in execution of money decree without the sanction of the Commissioner—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 60.

The Chakla estate comprised of, inter alia, villages Chakla and Dadu, in which *T* was interested to the extent of eight annas, was from 1906 to 1920 administered under the provisions of the Chota Nagpur Encumbered Estates Act, 1876. In 1920 it was released from the provisions of the Act (except section 12A) and the enjoyment and possession of the property was restored, under the provisions of sub-section (*1*) or (*3*) of section 12, to *T* who was the holder thereof when the application to bring it under management was made in 1906.

* Appeal from Original Order no. 3 of 1931, from an order of Mr. Amanat Hussain, Deputy Magistrate-Subordinate Judge of Palamau, dated the 18th September, 1930.