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MUSAMMAT BIBI BILKIS v. SHEIKH WAHID ALI.

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ignore the weighty observation of Sir Barnes Peacock in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1).

Having regard to the findings of the Court below that the gift was not perfected by transfer of possession and that the properties although capable of division were never divided or sought to be divided I am compelled to come to the conclusion that the gift offends against the rule of Muhammadan Law as to mushaa and as to transfer of possession. Appeal no. 1511 of 1924 must, therefore, be dismissed with costs.

In regard to appeal no. 1512 it is quite clear that it is concluded by findings of fact on the question of benami. It is also dismissed with costs.

ALLANSON, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Sen and Allanson, J.J.

1927.

Aug., 11.

SHYAM SUNDER NAIK

v.

GOBARDHAN KAMTI.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *Schedule III, Article* 3, *scope of—landlord, suit for arrears of rent by—holding, sale of, in execution of decree—dispossession by auction-purchaser—tenant, suit by, for recovery of possession —Special rule of limitation, applicability of—question of representation, whether a question of fact.*

In order to make the special rule of limitation laid down in Article 3 of the third schedule to the Bengal Tenancy Act, 1885, applicable, it must be shown that it was the landlord who caused or took part in the dispossession of the tenant.

Where, therefore, a landlord institutes a rent suit and, in execution of a decree obtained in that suit, brings the holding to sale, dispossession by the purchaser does not amount to dispossession by the landlord.

*Second Appeal no. 1544 of 1926, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Darbhanga, dated the 3rd September, 1926, affirming a decision of Babu Gopal Chandra De, Munsif, 1st Court of Samastipur, dated the 25th May, 1926.

(1) (1889) I. L. R. 11 All. 460, P. C.

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Krishna Chandra Bagdi v. *Satish Chandra Banerji* (1), *Durgapada* v. *Bhusan Chandra Ghosh* (2) and *Bhadai Sahu* v. *Sheikh Manowar* (3), followed.

Aminuddin Munshi v. *Ulfatunnissa Bibi* (4), distinguished.

In order to obtain a decree for rent binding against the land under the Bengal Tenancy Act, 1885, the landlord must ordinarily implead all the co-tenants and the heirs or legal representatives of a deceased co-tenant, and the question whether one of several co-tenants can be regarded as a representative of the rest is a question of fact and depends on the circumstances of each case.

Chamatkari Dasi v. *Triguna Nath Sardar* (5), followed.

Beradar Singh v. *Raghunanda Mahto* (6), referred to.

Appeal by defendants 1st Party.

One Tabakal Kamti had four sons, Rupan, Dahu, Chhotkan and Jhakri. Jhakri, according to the plaintiffs, had three sons, Hiraman, the eldest, Gobardhan, plaintiff no. 1 and Lalchand, father of plaintiff no. 2. It appeared that the defendants second party as landlords obtained an ex-parte rent decree against Rupan, Dahu and Chhotkan representing the first three branches of Tabakal Kamti's family and Hiraman the eldest son of Jhakri representing Jhakri's branch. In execution of the rent decree the family property consisting of 47 bighas was sold at auction to the defendants first party. The plaintiffs thereupon instituted the suit out of which this appeal arises for a declaration that the decree in the rent suit above mentioned and the sale of the properties aforesaid dated the 8th May, 1916, were not binding upon them and also praying for recovery of possession of one-sixth of the land, being their share of the family property.

The Court of first instance decreed the suit and ordered khas possession of the land to be delivered to the plaintiffs-respondents.

(1) (1915-16) 20 Cal. W. N. 872.
(2) (1916-17) 21 Cal. W. N. 373.
(3) (1920) Pat. 91.
(4) (1908-09) 13 Cal. W. N. 108.
(5) (1912-13) 17 Cal. W. N. 833.
(6) (1920) Cal. W. N. (Pat.) 9.

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On appeal the District Judge confirmed the judgment and decree of the first Court. The defendants first party, that is the purchasers of the property at auction sale, appealed against the decision of the District Judge.

S. M. Mullick and *A. C. Rai*, for the appellants.

Janak Kishore, for the respondents.

SEN, J.—Two points are urged by the learned Advocate on behalf of the appellants. The first is that the suit is barred by the special law of limitation laid down in Article 3 of Schedule III of the Bengal Tenancy Act. It is contended on the authority of *Aminuddin Munshi* v. *Ulfatunnissa Bibi* (1) that inasmuch as the dispossession of the plaintiffs by the defendants first party was brought about as a result of the action of the landlords (the defendants second party) in obtaining a rent decree, Article 3 of Schedule III of the Bengal Tenancy Act must apply to this case. I do not think this contention can prevail. The ruling above referred to no doubt appears to give some support to the proposition contended for but it appears also clear that there were special facts and circumstances in that case which led the Court to come to the conclusion that there was collusion or instigation on the part of the landlord which brought about the dispossession by the purchaser and the decision is clearly made to rest on that ground. In the case of *Durgapada Panja* v. *Bhusan Chandra Ghosh* (2) the case of *Aminuddin Munshi* v. *Ulfatunnissa Bibi* (1) was put forward in support of the proposition that where a landlord institutes a rent suit and in execution of a decree obtained in that suit brings the holding to sale dispossession by the purchaser would amount to constructive dispossession by the landlord but the contention as to constructive dispossession was not accepted by the Court. In the

(1) (1908-09) 13 Cal. W. N. 108. (2) (1916-17) 21 Cal. W. N. 373.

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case of *Krishna Chandra Bagdi* v. *Satish Chandra Banerji* (1) it was again laid down that " it was not the design of the Bengal Tenancy Act to deprive a tenant of the rights that he otherwise possesses against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant ". On this ground the theory of constructive dispossession was rejected. In the case of *Bhadai Sahu* v. *Sheikh Manowar* (2) it was clearly laid down that the Court " will not favour the allegation of constructive dispossession in support of a plea that a suit is barred by Article 3 of Schedule III to the Bengal Tenancy Act; it must be shown on clear evidence that the landlord himself was the party who dispossessed the tenant ". Many other decisions might be cited but I refrain from doing so, as the point appears to have been clearly settled by decisions of this Court that in order to make the special rule of limitation laid down in the Bengal Tenancy Act applicable it must be shown by clear evidence that it was the landlord who caused or took part in the dispossession of the tenant.

The next point urged is that the only member of Jhakri's branch sued was Hiraman; but that he was the sole recorded tenant, or at any rate that he was sued in a representative capacity and that the plaintiff's share was, therefore, liable. It is admitted that the plaintiffs were not made parties to the suit. The onus was, therefore, rightly placed on the defendants to show that Hiraman was sued in a representative capacity so as to make the rent decree binding on the plaintiffs' shares. There were several ways of proving this. First, it could have been proved that Hiraman's name alone was recorded in the sherista of the maliks after the death of Jhakri. It might also have been proved by showing that Hiraman had been in fact put forward by the

(1) (1915-16) 20 Cal. W. N. 872. (2) (1920) Cal. W. N. (Pat.) 91.

plaintiffs as their representative. No attempt has been made by the defendants to produce the papers from the landlord's sherista to prove that Hiraman was recorded as the sole tenant nor have they succeeded in proving that Hiraman was put forward as the representative of the plaintiffs. Thus it appears quite clear that the defendants have failed to discharge the onus which lay on them.

It is, however, contended by the learned Advocate for the appellants that the mere fact that P. W. no. 2 admitted that Hiraman was the karbari of the family and paid the rent would suffice. In support of this proposition the learned Advocate relies on the ruling in the case of *Beradar Singh* v. *Raghunanda Mahto* (1). In that case it was laid down that if a landlord desires to obtain a decree good against the land under the Bengal Tenancy Act he must ordinarily (apart from any question of representation) implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. In the course of the judgment there is an observation at page 10, upon which the appellants rely, in the following terms, "There is no doubt that all the tenants not having been made defendants no rent decree can be passed unless it is shewn that Chhatarpati Mahto was the karta of the family and was entitled to act on behalf of the other recorded tenants." On the strength of this observation, it is contended that inasmuch as in the present case it was admitted by one of the plaintiffs' witnesses that Hiraman was the karbari of the family and paid the rent that was sufficient for the purpose of showing that the rent decree would bind all the co-tenants. This contention is not tenable. The question of representation is entirely one of fact. Whether one of several tenants can be regarded as a representative of the rest must depend on the circumstances of each case [*Chamatkari Dasi* v. *Triguna Nath Sardar* (2)]. In the present case the defendants have not proved that Hiraman was the only recorded

(1) (1920) Cal. W. N. (Pat.) 9. (2) (1912-13) 17 Cal. W. N. 833.

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tenant nor is there any proof of the fact that he was put forward as the representative of the other tenants. The question of representation was fully gone into in the court of first instance and that Court came to the conclusion that there was absolutely no evidence on the side of the defendants on either of the two points, namely, whether Hiraman's name appeared as the sole recorded tenant in the sherista of the maliks or whether he was put forward by the plaintiffs as their representative. In view of these findings it is impossible to proceed upon the solitary statement of one of the plaintiffs' witnesses which could not possibly be conclusive on the point.

The appeal must be dismissed with costs.

ALLANSON, J.—I agree.

Appeal dismissed.

PRIVY COUNCIL.

1927.

Oct., 18.

RANI CHATTRA KUMARI DEVI

v.

W. W. BROUCKE.*

Bengal Tenancy Act (VIII of 1885), section 74—Recoverable Rent—Actual Rent—"Malguzari"—Abwabs—Specified additional Payments.

A patta of villages stated that they were let

"at a consilidated jama of Rs. 15,581, being the malguzari, road and embankment cesses, dues to priests (mahal uprobiti), and expenses of obtaining acquittance receipts (farag karach), etc."

A schedule gave for each village the amounts under each of the above and other specified heads, the total being described as "annual rent" (jama eksala). The execution clauses of the patta and of the corresponding kabuliat referred to the Rs. 15,581 as the jama.

*Present: Viscount Dunedin, Lord Shaw, Lord Sinha and Sir Lancelot Sanderson.