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of onus may not arise having regard to the fact that there is evidence, whatever it is worth, on behalf of the plaintiff and of the defendants.

In those circumstances the case will be remanded to the lower appellate Court and the costs of this appeal will abide the result of the hearing in the Court below.

WORT, J.

JAMES, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

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May, 7, 8, 24.

NIRMAL KUMAR

v.

SURJAN DUSADH.*

Ejectment—resumption, suit for, whether can be maintained by a co-sharer landlord—absence of notice to quit—suit, whether can proceed—declaration, court not bound to grant unless cloud thrown on plaintiff's title.

A suit for resumption cannot be successfully maintained by a co-sharer landlord without the other landlords joining as co-plaintiffs in the absence of anything to show that the other co-sharers intended to determine the grant.

Gopalram Maluri v. *Dhakeshwar Pershad Narain Singh*(1), *Gholam Mohiuddin Hossain* v. *Khairan* (2) and *Ganodannessa Bibi* v. *Maksedannessa Bibi*(3), followed.

*Appeal from Appellate Decree no. 871 of 1926, from a decision of J. Chatterjee, Esq., District Judge of Shahabad, dated the 7th April, 1926, reversing a decision of Pandit Ram Chandra Misra, Munsif of Arrah, dated the 30th April, 1925.

(1) (1908) I. L. R. 35 Cal. 807.
(2) (1904) I. L. R. 31 Cal. 786.
(3) (1911) 11 Ind. Cas. 84.

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Syed Ahmed Sahib Shuttari v. *Magnesite Syndicate*(1), not followed.

Sri Thakurji v. *Hira Lal*(2) and *Dipa* v. *Lalchand*(3), distinguished.

Such a suit cannot proceed in the absence of a notice on the defendant to quit the land before the suit was commenced inasmuch as resumption will not as a rule be ordered unless and until it is clearly shown that the defendant was unwilling or incapable of doing the service required.

Radha Pershad Singh v. *Budhu Dusadh*(4), followed.

It is purely in the discretion of the court to make a declaration claimed and the declaration will not be granted as a rule unless it is shown that a cloud has been thrown on the title of the plaintiff before the suit was instituted.

Appeal by the defendants.

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

S. N. Bose, for the appellants

D. N. Varma, for the respondents.

FAZL ALI, J.—This is an appeal from the judgment and decree of the District Judge of Shahabad reversing the judgment of the Munsif of Arrah in a suit for ejectment brought by the plaintiffs—appellants. The appellants are the proprietors of tauzi no. 3666 in village Agiaon; the defendant no. 6 is the proprietor of tauzi no. 3655. Both these tauzis have been carved out of an estate in which the plaintiff and defendant no. 6 held 8 annas share each. The plaintiffs' case is that the ancestors of the principal defendants had certain jagir lands in the village before it was partitioned and at the time of the partition, these lands were left ijmal between the two tauzis; that the lands were held by the ancestors of the principal defendants on condition of rendering

(1) (1916) I. L. R. 39 Mad. 1049.
(2) (1922) I. L. R. 44 All. 634.
(3) (1922) 68 Ind. Cas. 428.
(4) (1895) I. L. R. 22 Cal. 938.

services as goraits and the defendants also hold them on the same condition and that the defendants having refused to render services any longer, the plaintiffs are entitled to resume the land to the extent of the plaintiffs' share in the village.

The defendants resisted the suit on a number of grounds but their principal pleas were (*1*) that the villages formerly belonged to Kuar Singh and the lands in question were granted to the ancestors of the defendants as reward for past services; (*2*) that when the mauza was re-settled after confiscation, the lands of the ancestors of the defendants were excluded from the settlement.

It appears from evidence that village Agiaon formerly belonged to Kuar Singh. Kuar Singh turned a rebel and the village was confiscated by the Crown. About the year 1860 it was settled with Sundar Rai and others who defaulted in paying the revenue whereupon it was sold and purchased by one Dharam Narain Mukhtar on behalf of Musammat Phuljhari Kuer, the guardian of an infant son, Sant Prasad, and one Jinuar Dass. Sometime later there was a batwara between the purchasers.

The learned Munsif relying upon the survey record-of-rights wherein the lands in suit were described as jagir goraiti and upon certain other circumstances decreed the suit. As to the point raised by the defendant that the lands in question were excluded from settlement in 1860 he disposed of the matter as follows—

"The lands were no doubt treated as lakhiraj as no rent was payable for them at the time and so they would not be assessed like the other lands for purposes of revenue. As the proprietor had no income from the land they were not required to pay any revenue on account of these lands and so they were not taken into account for determining the amount of revenue to be fixed and so were excluded from consideration. But it does not follow from this that the zamindar or the farmer did not acquire rights incidental to the proprietary right in the mauza in which the lands were included. Rather the 'Bandobasti paper' shows that the lands were held on condition of service as Gorait, a description whereof we have seen as given in the settlement report. In short the papers simply show that the lands were not

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taken into consideration for purposes of determining the amount of revenue."

The learned District Judge reversed the decision of the Munsif on appeal and came to the finding that the presumption of correctness with regard to the survey record-of-rights had been rebutted in the case; that the settlement with Sundar Rai and others did not include the lands in suit; that the plaintiffs had failed to establish that the condition as to the performance of service was annexed to the grant or that "there was a clear condition attached thereto that the non-performance of the service would entitle the plaintiffs to treat the tenure as forfeited".

Now, if these findings of fact had been properly arrived at by the learned District Judge, they would have been binding on us in second appeal and the appeal would have been dismissed on that ground alone. It is, however, urged by the learned Advocate for the appellant that the learned District Judge has committed several errors of record and has also misconstrued one of the most vital documents in the case, namely, Exhibit A2, Rubakari of the Collector of Shahabad dated the 18th April, 1861, confirming the auction-sale of the village which had been purchased by Dharam Narain Mokhtar for Musummat Phuljhari and Jinuar Das. The passage in which the learned District Judge deals with Exhibit A2 and which has been severely commented on by the learned Advocate for the appellants runs as follows:—

"On the other hand the appellant relied on a Rubacar Exhibit A2 dated 18th April, 1861, which sets forth that the previous holders Sundar Rai and others, with whom a temporary settlement had been effected on the property having been confiscated by the Government, when Babu Kuar Singh, the former owner had turned out a rebel, the mauza was again put to sale when Sundar and others defaulted in paying revenue under Regulation IX of 1825 and the purchaser was one Dharam Narain Mokhtar for Phuljhari Kuer as guardian of her infant son, Sant Prasad, as also one Jinuar Dass. *But it expressly declared that the two purchasers were to have no rights to the "Hakiat Lakhraj and Mokarari and Jagir, etc.",* which had been found to subsist on proper inquiries made on previous occasions."

Now, the learned Advocate for the appellant contends that there is no express declaration in this

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document that the two purchasers were to have no rights to the Hakiat Lakhraj and Mokarari and Jagir, etc.; and the contention does not appear to be wholly unfounded because all that the document says is this—

"Therefore the condition with the auction-purchasers is that whatever patta was fixed and whatever title accrued on account of Lakhraj mokarrari and jagir, etc., and was and is in the possession of any body up till now, all those titles and effects will remain in force according to the prevailing law and the rukkar of the Superintendent of Settlement irrespective of this auction-sale."

Then again the following passage is cited to show that the learned District Judge has committed a serious error of record:

"Then there was a Batwara between the purchasers a few years later and Exhibit B an abstract of the Batwara Register, clearly showed that Wagujasti jagir with an area of 8 bighas 6 kathas and 15 dhurs were excluded from the partition and the names of Sanehi, the ancestor of the appellants and of Juri and another, were noted as 'having their lands' including the suit lands as "jagir wagujasti".

Now, the document has been placed before us and we do not find that the ancestors of the appellants and of Juri and another were noted as having their lands including the suit lands as jagir wagujasti.

Mr. Parmeshwar Dayal who appears for the respondent has referred us to certain provisions of Regulations VIII and XIX of 1793 and to certain observations of the Judicial Committee in the case of *Forbes* v. *Meer Mohammad Tuquee*(1) and contends that the conclusions arrived at by the learned District Judge are correct. But in view of the errors of record which have been shown to have been committed by the learned District Judge we would have felt obliged to remand the case to the lower appellate Court had it not been for the fact that in our opinion the appeal is liable to be dismissed on two preliminary grounds which arise on the plaintiffs' own case. One of the grounds is that the plaintiffs being maliks of only one of the two tauzis to which the lands in suit appertain and the proforma defendant no. 6 not

(1) (1870) 13 Moo. I. A. 438.

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having joined them as a co-plaintiff in the case, the suit for resumption is liable to be dismissed on that ground alone. Now, it has been held in a series of decisions by the Calcutta High Court that a suit for ejectment cannot be successfully maintained by a co-sharer landlord only without the other landlords joining as co-plaintiffs if the tenancy which was created at its inception by all the landlords jointly has not been determined by all of them. [See *Gopal-ram Mohuri* v. *Dhakeshwar Prashad Narain Singh*(1); *Gholam Mohiuddin Hossein* v. *Khairran*(2); *Ganodanessa Bibi* v. *Maksedannessa Bibi*(3)]. In the case of *Gholam Mohiuddin Hossein* v. *Khairan*(2) which was also a case in which a co-sharer landlord wanted to eject certain tenants from lands said to have been held by them on service-tenure, the learned Judges in dismissing the suit made the following observations:—"It appears to us that in order to justify any individual co-sharer in seeking now to eject them (the tenants) it must be shown that the tenancy so created by all co-sharers has been determined by all of them and the law will not permit a single co-sharer to take separate and independent action such as has been taken by the plaintiffs in the case for the purpose of determining, even so far as his own share is concerned, a tenure or tenancy which has been created by the common consent of all the co-sharers".

The learned Advocate for the appellant has, however, pointed out to us that the view taken in this matter by certain other High Courts is not quite the same as the view taken by the Calcutta High Court and reliance is placed on *Syed Ahmad Sahib Shuttari* v. *Magnesite Syndicate*(4), *Sri Thakurji* v. *Hira Lal*(5) and *Dipa* v. *Lal Chand*(6). It may be mentioned that

(1) (1908) I. L. R. 35 Cal. 807.
(2) (1904) I. L. R. 31 Cal. 786.
(3) (1911) 11 Ind. Cas. 84.
(4) (1916) I. L. R. 39 Mad. 1049.
(5) (1922) I. L. R. 44 All. 634.
(6) (1922) 68 Ind. Cas. 428.

in the first of these cases one of the reasons given by Seshagiri Ayyar, J. for not following the decision of the Calcutta High Court is to be found in the following passage: "The view of the Calcutta High Court that the English decisions do not apply to India may be traceable to the suggestion thrown out by Mr. Justice Rampini in the course of the argument in *Gopal Ram Mohuri* v. *Dhakeswar Prashad Narain Singh*(1) that under the Bengal Tenancy Act a fractional shareholder is not entitled to maintain an action in ejectment against the joint lessee. So far as we are aware this principle is not recognised in the tenancy legislation of this Presidency; nor has our attention been drawn by Counsel to any provision to that effect".

In *Sri Thakurji* v. *Hira Lall*(2) and *Dipa* v. *Lal Chand*(3), the person sought to be ejected was considered to be a trespasser and, as has been pointed out in some cases, a distinction is to be drawn between suits brought to eject a trespasser and those brought to eject a tenant. [Vide *Gopal Ram Mohuri* v. *Dhakeswar Prashad Narain Singh*(4); *Ganodannessa Bibi* v. *Maksedannessa Bibi*(5) and *Dhanoo Lal* v. *Ramlal*(6)]. It may also be observed that the cases which have been cited by the learned Advocate for the appellant are not cases relating to lands held in service-tenure. Besides, as has been pointed out in a number of cases, the Patna High Court will not ordinarily depart from a long course of decisions of the Calcutta High Court [See *Haji Abdul Gani* v. *Raja Ram*(7) and *Shaikh Khoda Bukhsh* v. *Bahadur Ali*(8)]. I am, therefore, inclined to follow the decisions of the Calcutta High Court and hold that the

(1) (1908) I. L. R. 35 Cal. 807.
(2) (1922) I. L. R. 44 All. 634.
(3) (1922) 68 Ind. Cas. 428.
(4) (1908) I. L. R. 35 Cal. 807.
(5) (1911) 11 Ind. Cas. 84.
(6) (1918) 45 Ind. Cas. 496.
(7) (1916) 1 Pat. L. J. 232, F. B.
(8) (1918) 3 Pat. L. J. 285 (286).

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present suit is liable to be dismissed because the other landlord of the other tauzi has not joined as a co-plaintiff and because, even assuming that the land in suit is held on the conditions narrated by the plaintiffs, there is nothing to show that the other co-sharer has any intention to determine the grant.

The next ground on which the plaintiffs' suit fails is that, as pointed out by the District Judge, the plaintiffs did not serve upon the principal defendants any notice to quit the lands before the suit was commenced and a resumption will not as a rule be ordered unless and until it is clearly shown that the defendants were unwilling or incapable of doing the service required. In fact this was one of the grounds on which a decree for ejectment was refused by the Calcutta High Court in the case of *Radha Prashad Singh* v. *Budhu Dushad*(1). The learned Advocate for the appellants, however, says that even though the suit for ejectment may fail, they are entitled to the declaration claimed by them in clause (*i*) of paragraph 11 of the plaint which runs as follows:—

"As mentioned in the plaint it may be adjudicated that the disputed land belongs to the plaintiffs and the defendant no. 6 in their proprietary interest and is joint and that it was in charge of the ancestors of the defendants nos. 1 to 5 on condition of their rendering Goraiti service and that the disputed land is service Goraiti jagir land of defendants nos. 1 to 5 and their ancestors and they have continued to be in possession of the same and used to render Goraiti service to the plaintiffs and the defendant no. 6 jointly".

It must, however, be remembered that it is purely in the discretion of the Court to make the declaration claimed and the declaration will not be granted as a rule, unless it is shown that a cloud had been thrown on the title of the plaintiff before the suit was instituted. The plaintiffs in this case say in paragraph 10 of the plaint that the cause of action in this suit accrued on the 30th Jeth, 1330, Fasli when a verbal notice was given to the defendants 1 to 5 to do the work of Goraits and they declined to do that work or give up possession of the disputed jagir land. It has,

(1) (1895) I. L. R. 22 Cal. 938.

however, been found as a fact by the lower appellate Court that the defendants had never refused to do the legitimate work of the duties of the gorait and it has also been found that the plaintiffs never gave any notice to the defendants to quit the land. In these circumstances I do not think it is necessary that the appeal should be remanded to the lower appellate Court merely for the purpose of determining the abstract question as to whether the plaintiffs are entitled to the declaration claimed in paragraph 11 of the plaint.

The appeal, as I have said, fails on certain preliminary grounds and is, therefore, dismissed with costs.

CHATTERJI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and James, JJ.

PANDEA MUNDA

v.

LADURA MUNDA.*

Chota Nagpur Tenancy Act, 1908 (Beng. Act VI of 1908), section 74A, scope of—headmanship not held in conjunction with land, whether covered by the section.

Section 74A, Chota Nagpur Tenancy Act, 1908, lays down:

> "(a) Where a tenancy which in accordance with custom is held by a village-headman, has for any reason been vacated, any three or more tenants holding land within the said tenancy, or the landlord, may apply to the Deputy Commissioner to determine the person who in accordance with custom should be village-headman entitled to hold the tenancy.....".

Held, that the sub-section contemplates not only those cases in which the headmanship is held in conjunction with land but also those in which the land is not so held.

Appeal by the defendant.

*Appeal from Appellate Decree no. 1487 of 1926, from a decision of Babu Pramatha Nath Bhattacharji, Subordinate Judge of Ranchi, dated the 7th July, 1926, confirming a decision of Babu Lakshmi Narayan Patnaik, Munsif of Khunti, dated the 23rd April, 1925.