

joint debtors, who made the new contract could discharge the entire joint liability by paying off the reduced sum to which his liability had been reduced by means of the new contract, that is to say, some of the joint debtors could only pay off their liability by paying one sum; others of the joint debtors could obtain release not only for themselves but for all others by paying a lesser sum, which result is of course ridiculous. In either case whether we treat the new liability as the result of a modification of the entire original decree by the Court by virtue of its power under Order XLI, rule 4, or whether we treat the case as a release by the creditor of two out of a number of jointly liable debtors, the benefit must accrue to the entire body of debtors. It is, therefore, open to the creditor to pursue his execution for the joint debt against any one of the original joint debtors, but the sum for which he may pursue that execution is limited to the amount by which the debt was modified by consent on appeal to this Court.

In my opinion, the view of the learned Subordinate Judge in execution was erroneous and should be set aside. This appeal succeeds, and the respondents must pay costs.

LUBY, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Luby, JJ.

MUSAMMAT BIBI SAIDA

v.

DUKHI GOPE.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 25 and 155—landlord, whether entitled to an absolute decree for ejectment in cases of irremediable misuse.

* Appeal from Appellate Decree no. 28 of 1932, from a decision of D. P. Sharma, Esq., I.C.S., Additional District Judge of Monghyr, dated the 29th September, 1931, affirming that of Babu Shivanandan Prasad Singh, Munsif, 1st Court, Monghyr, dated the 16th January, 1930.

1934.

MUSAMMAT
LALTA PATI
KUER

v.
NARAIN
MAHTON.

COURTNEY
TERRELL,
C. J.

1934.

September,
26.

1934.

MUSAMMAT
FIBI
SAIDA
v.
DUKHI
GOPE.

Whether the misuse complained of is remediable or not, the landlord is not entitled to an absolute decree for ejection under section 155 read with section 25, Bengal Tenancy Act, 1885.

Clause (4) of section 155 clearly indicates that the decree in either case cannot be executed if compensation is paid. If the misuse is remediable, it must be remedied also, but the payment of compensation is essential in every case whether the misuse or breach is remediable or not. If the tenant complies with the requirement of clause (4), that is to say, if he pays the compensation fixed by the court and remedies the misuse or breach, if it is remediable, the decree cannot be executed.

Prasad Singh v. Rampratap(1), followed.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

Khurshed Husnain (with him *Neyamatullah* and *Syed Ali Khan*), for the appellants.

N. C. Ghosh and *K. Dayal*, for the respondent.

KHAJA MOHAMAD NOOR, J.—This second appeal arises out of a suit instituted under section 155 of the Bengal Tenancy Act for ejecting the defendant from his holding on the ground that he has used it in a manner which rendered it unfit for the tenancy. The misuse complained of was that the defendant through his transferees caused erection of some houses on 10 kathas of land out of the holding which is of 10 bighas.

The trial court gave the plaintiffs a decree for ejection with a condition that if the defendant pays to the plaintiffs Rs. 100 as compensation the decree

(1) (1894) I. L. B. 22 Cal. 77.

1934.

MUSAMMAT

BIBI

SAIDA

v.

DUKHI

GOPE.

KHAJA

MOHAMMAD

NOOR, J.

would not be executed. This decree of the trial court has been confirmed in appeal by the learned District Judge of Monghyr. The trial court came to the conclusion that the misuse was incapable of remedy as the defendant transferred portion of the holding to third parties and gave them the right to erect buildings, and it was beyond the power of the defendant to get the buildings removed. The plaintiffs in their grounds of appeal before the learned District Judge challenged this finding; but it appears from the judgment of the lower appellate court that it was conceded before it that under the circumstances of the case the misuse was not capable of remedy. The appeal was dismissed, and the plaintiffs have preferred this second appeal.

It has been contended on their behalf that as according to the finding of the courts below the misuse was irremediable an absolute decree for ejectment ought to have been passed, and not a decree conditional on non-payment of the compensation fixed. The learned Advocate has argued that section 25 of the Bengal Tenancy Act gives the landlord an absolute right of ejectment if the tenant uses the land of his holding in such a way as to render it unfit for the purposes of the tenancy and section 155 of the Act prescribes the mode of enforcing that right. In my opinion the contention is not sound. The plain reading of the two sections makes it perfectly clear that the landlord has got no absolute right of ejectment. Section 25 is for the protection of the tenant and prescribes that a tenant shall not be liable to ejectment except in execution of a decree passed under the provisions of the Act. Section 155 prescribes the nature of the decree in an ejectment suit brought by the landlord on the ground of misuse. It starts with prescribing that notice must be given to the tenant who has misused the land. The notice must, as has been held in several Calcutta cases which I do not propose to discuss, ask the tenant to remedy the

1934.

MUSAMMAT

BIBI

SAIDA

v.

DUKHI

GOPE.

KHAJA

MOHAMAD

NOOR, J.

misuse or breach if it is capable of remedy and in any case to pay compensation. The learned Advocate contended that the words "in any case" meant whether the tenant remedied the misuse or not. In my opinion it means "in every case", as has been held in the case of *Prasad Singh v. Rampratap*⁽¹⁾, and whether the misuse or breach is remediable or not compensation must be asked for and this notice is the sine qua non for institution of the suit. If compensation is not asked for, notice is defective and a suit will not lie. It is obvious that if the legislature intended to give to the landlord an absolute right of ejection in case of irremediable misuse or breach, they would have provided for a notice in that term; but the notice required to be given to a tenant is a notice asking him to remedy the misuse if it can be done, and whether it can be done or not to pay up compensation. Clause (4) of section 155 again clearly indicates that the decree cannot be executed if compensation is paid. If the misuse is remediable, it must be remedied also. Paying of compensation is essential in every case whether the misuse or breach is remediable or not. If the tenant complies with the requirements of sub-clause (4), i.e., if he pays the compensation fixed by the court and remedies the misuse or breach, if it is remediable, the decree cannot be executed. In my opinion, the plaintiffs were entitled to compensation only under the circumstances of the case. The decree passed in the case is the only decree which can be passed, and the appeal fails. I would dismiss it with costs.

LUBY, J.—I agree.

Appeal dismissed.

(1) (1894) I. L. R. 22 Cal. 77.