1934.

RANI SONABATI KUMARI v. RAJA KIRTYANAND SINGH.

FAZL ALI AND SAUNDERS, JJ.

only half the costs both in this Court and in the Court below. The other appeals are dismissed with costs and the cross-objections are allowed with costs in proportion to the plaintiffs' success.

Appeal no. 19 allowed in part.

Appeals nos. 20 to 23 dismissed.

Cross-objections allowed in part.

APPELLATE CIVIL.

1934.

January, 12, 15. September, 3.

Before Fazl Ali and James, JJ.

SRINANDAN PRASAD SINGH

v.

MITHAN MAHTON.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 30(*b*), 88, 105 *and* 109—*subdivision of holding; what constitutes—mere notional division of shares, whether sufficient —actual division of holding necessary—co-sharer landlord receiving rent separately from tenants before partition—co-sharer becoming sole landlord after partition, whether bound to treat the holding as subdivided—application under section* 105 *for settlement of rent—application withdrawn—subsequent suit for enhancement under section* 30 (*b*) *instituted after more than fifteen years—section* 109, *whether is a bar to the suit.*

* Appeals from Appellate Decrees nos. 429, 500 and 501 of 1931, from a decision of R. Chowdhury, Esq., Additional District Judge of Bhagalpur, dated the 10th December, 1930, reversing a decision of Babu Damodar Prasad, Munsif of Bhagalpur, dated the 10th August, 1929.

1934.

SRINANDAN PRASAD SINGH v. MITHAN MAHTON.

Where a co-sharer landlord before partition received rent separately from the heirs of the recorded tenant and the other landlords did not consent to the arrangement, there is no effective splitting up of the holding so as to bind the entire body of landlords under section 88 of the Bengal Tenancy Act, 1885. That being so, the co-sharer landlord is not bound to treat the holding as subdivided after partition merely because he becomes the sole landlord of the holding as a result of the partition. A mere undivided parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act.

Section 88 deals with two classes of cases, namely, (*1*) cases where rent is distributed and (*2*) those where the holding is divided. So far as the division of the holding is concerned, what is contemplated by the section is the actual division of the holding into two or more definite units and not a mere notional division of the shares held by the tenants in the holding.

Indrasan Pande v. *Kabutra Kuer*(1), followed.

Where in the year 1905 the plaintiffs applied in the Settlement Court, under section 105 of the Bengal Tenancy Act, for a settlement of rent of a certain holding and the application was subsequently withdrawn and more than fifteen years afterwards the plaintiffs brought a suit in the Civil Court for enhancement of rent under section 30 (*b*) of the Act in respect of the same holding.

Held, (*i*) that the subject-matter of the suit was entirely different from that of the application before the Settlement Officer, inasmuch as the subject-matter of the application was whether the plaintiffs were entitled to claim enhancement under section 30 (*b*) in that particular year whereas the subject-matter of the suit was whether, in view of the rise in the average local prices of the staple food crops during the currency of a different decennial period, the rent was liable to be enhanced;

(*ii*) that, therefore, section 109 of the Bengal Tenancy Act did not bar the suit.

(1) (1929) A. I. R. (Pat.) 237.

Abdul Sattar v. *Rajkishore Sah*(1), *Reshee Case Law* v. *Salis Chandra Pal*(2) and *Purna Chandra Chatterji* v. *Narendra Nath Choudhury*(3), explained.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

G. P. Singh, for the appellants.

S. N. Rai (with him *P. Jha* and *B. N. Rai*), for the respondents.

FAZL ALI, J.—These appeals arise out of three suits which were instituted by the appellants to recover rent for the years 1334 and 1335 in respect of three holdings and for the enhancement of the existing rent of those holdings under section 30(*b*) of the Bengal Tenancy Act. The learned Munsif of Bhagalpur in whose court the suits were instituted decreed them and allowed enhancement at the rate of 4 annas 6 pies in the rupee, but his decision has been reversed on appeal by the learned Additional District Judge who has dismissed all the suits with costs.

It appears that the holdings which are the subject-matter of the present suits originally belonged to two persons, namely, Ram Sahay and Kishun Mahto, whose heirs and descendants are the defendants in these suits. One of the pleas upon which the suits were contested by the defendants was that each of the three holdings in question had been partitioned sometime before the years 1325 into two equal halves between the descendants of Ram Sahay and Kishun Mahto and that the plaintiffs had agreed to the division of the holdings and accepted rents from the two sets of defendants separately. This plea was not accepted by the learned Munsif but it was accepted by the learned Additional District Judge who held that two separate suits should have been instituted

(1) (1929) 127 Ind. Cas. 570.
(2) (1929) I. L. R. 57 Cal. 118, P. C.
(3) (1925) I. L. R. 52 Cal. 894, F. B.

1934.

SRINANDAN PRASAD SINGH v. MITHAN MAHTON.

FAZL ALI, J.

in respect of the two subdivided portions of each holding. In arriving at the decision that the holding had been split up as contended by the defendants the learned Additional District Judge has relied upon a series of rent receipts (exhibits A to A41) which are said to have been granted by the plaintiffs to the two sets of defendants between the years 1326 and 1333; certain summonses issued in 1919 in certain rent suits which were alleged to have been instituted by the plaintiffs against some of the defendants upon the basis that the holding had been subdivided; a receipt (exhibit B) which purports to have been granted on behalf of the plaintiffs on the 1st Fagun, 1334, and which contains a recital that the rent for which the suits had been brought had been paid by the defendants; the oral evidence adduced by the defendants and a recital said to be contained in some of the rent receipts which was to the effect that the holding had been split up. The learned Additional District Judge has also referred to certain so-called admissions made by some of the plaintiff's witnesses but as I shall presently show he has entirely misconstrued these statements.

Now, the material findings of the learned Additional District Judge are that the plaintiff had accepted rent from the two sets of defendants upon the basis that the holding had been split up and that the holdings in question had been in fact partitioned by the defendants. The learned Additional District Judge, however, overlooked certain important facts which had been duly emphasised by the learned Munsif, namely, that at the time when the receipts (exhibits A to A41) were granted, the plaintiffs were mere co-sharer landlords, that there was no proof on the record that the alleged subdivision of the holding had been assented to by the remaining co-sharer landlords and that there had been a partition since of the village under the Estates Partition Act and in the partition records the subdivision of the holding was not recognised and the holdings in question were

treated as entire holdings. Section 88 of the Bengal Tenancy Act clearly lays down that a division of a tenure or holding or distribution of the rent payable in respect thereof shall not be binding on the landlord, unless it is made with his express consent in writing or with that of his agent duly authorised in that behalf. A landlord in this section obviously means the entire body of landlords and, as the learned Munsif has pointed out in his judgment, there is nothing on the record to show that any of the landlords other than the plaintiff consented to a division of the holding or to the distribution of the rent in respect thereof. The true position thus was that the plaintiffs who were mere co-sharer landlords before the partition had done what they could to accommodate the defendants by receiving rent separately from the heirs of Ram Sahay and Kishun Mahto, but as the other landlords did not consent to the arrangement, there was no effective splitting up of the holding in the sense in which it would be binding upon the entire body of landlords under section 88. Meanwhile the partition proceedings began and each of the holdings in question were allowed by the parties to be treated as one holding and allotted to the estate of which the plaintiffs became the sole landlords. Now, if there was no effective splitting up of the holding as required by section 88 of the Bengal Tenancy Act before the partition so as to be binding upon the entire body of landlords, I do not think that the plaintiffs were bound to treat the holdings as subdivided after the partition, merely because the plaintiffs became the sole landlords as a result of the partition. The matter may here be examined a little more closely. The first question is whether there was any actual division of the holding by metes and bounds. The learned Munsif has very pertinently referred to the fact that one of the defendants who gave evidence in the case stated in his evidence that he could not say which portion of each of the holdings in question and which plot had been allotted to each

1934.

SRINANDAN PRASAD SINGH v. MITHAN MAHTON.

FAZL ALI, J.

branch of the family. The learned District Judge has ignored this statement altogether and indeed he observes that in his opinion the question of actual division of the holding by metes and bounds between the co-sharer tenants is not of much importance for determining whether there was really a subdivision of the holding under section 88 of the Bengal Tenancy Act. In my opinion this view of the learned District Judge is erroneous in law. Section 88 speaks of a *division* of a tenure or holding and, as has been pointed out in *Indrasan Pande* v. *Kabutra Kuer*(1), a mere undivided parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act. It is to be remembered that section 88 deals with two classes of cases, viz., (*1*) cases where rent is distributed and (*2*) those where the holding is divided. It appears to me that so far as the division of the holding is concerned what is contemplated by section 88 is the actual division of the holding into two or more definite units and not a mere notional division of the shares held by the tenants in the holding. If that were not so, the landlord would have considerable difficulty in giving particulars of the subdivided holdings when he proceeds to bring separate suits for rent under section 148A of the Bengal Tenancy Act in respect of the new holdings. It appears to me, therefore, that the first premise formulated by the learned District Judge was not correct.

The learned Judge has held in the alternative that even if it were assumed that the division of the holding by metes and bounds was a condition precedent to its subdivision under section 88, there was satisfactory evidence on the record in the shape of admissions of the witnesses examined by the plaintiffs to prove that there was such a division of the holdings between the two branches. The admissions that he relied upon consisted of certain statements made by the plaintiffs' witnesses nos. 1 and 2. These statements, however, are merely to the effect that the rental of the

(1) (1929) A. I. R. (Pat.) 237.

defendants was split up upon their promising to execute an ekrarnama which was never executed. This statement did not amount to an admission that there was a final and unconditional splitting up of holdings so as to permanently bind the plaintiffs but the learned Judge has treated these statements as amounting to some such admission. It appears to me that the mere fact that the plaintiffs tried to accommodate the defendants by accepting rent separately from the heirs of Ram Sahay and Kishun Mahto before the partition or even the fact that in the suits that they brought as co-sharers they sued these parties separately in consequence of some provisional arrangements arrived at by them, is not sufficient to compel them to treat the holdings as split up when in the partition to which the defendants as tenants were parties, they did not contend that the holding had been split up and allowed the holdings in question to be allotted to the plaintiffs' estate as entire holdings. In one of the appeals (S. A. 429) the holding as it originally stood was 10 bighas odd bearing a rental of Rs. 25 odd but by partition only 7 bighas odd have been allotted to the plaintiffs' estate bearing a rental of Rs. 19. Section 81 of the Estates Partition Act lays down that no holding shall be split up for the purpose of a partition unless it is reasonable to do so in order to effect an equitable partition and that when it is proposed to split up a tenure or holding and apportion the rent thereof as aforesaid, the Deputy Collector shall cause a notice to be served on the tenants concerned and after hearing the objections, if any, may order that the tenure or holding be split up and that the rent thereof be apportioned as aforesaid. I think that it may be assumed that before the splitting up of this holding notices must have been served upon the tenants by the partition Deputy Collector, but there is no proof that any objections were raised on behalf of the defendants to the effect that even the 7 bighas odd which were allotted to the plaintiffs' estate by partition had been

1934.

SRINANDAN PRASAD SINGH v. MITHAN MAHTON.

FAZL ALI, J.

split up among the defendants into two parcels of land. It appears to me, therefore, that the learned Judge was wrong in the circumstances of the case in holding that two separate suits were necessary to recover rent for the lands covered by each of the present suits and that the suits of the plaintiffs were liable to be dismissed on that ground. As I have shown, the findings on which the learned Judge has based this conclusion are vitiated by errors of law and as the present litigation has been going on for a long time and the issues which have not been legally determined by the learned Judge can be decided by us, we have considered it unnecessary to remand the case.

It may be stated that during the hearing of the appeal while the advocates for the parties were discussing certain terms of compromise the plaintiffs offered to treat the holding as already subdivided if the respondents supplied the particulars as to the lands in possession of the two sets of defendants. The defendants, however, failed to furnish such particulars though the case had to be postponed from time to time at the request of the learned Advocate for the respondents to enable them to furnish such particulars.

The next question is whether the rent is liable to be enhanced. The learned Additional District Judge has dismissed the claim for enhancement on the ground that it is barred under section 109 of the Bengal Tenancy Act. It appears that in the year 1905 the plaintiffs applied in the Settlement Court under section 105 of the Bengal Tenancy Act for a settlement of rent of the three holdings which are the subject-matter of the present appeals. The applications, however, were subsequently withdrawn. The learned District Judge has, relying upon the decision of the Judicial Committee of the Privy Council in *Reshee Case Law* v. *Satis Chandra Pal*(1) and the

(1) (1929) I. L. R. 57 Cal. 118, P. C.

decision of a Full Bench of the Calcutta High Court in *Purna Chandra Chatterji* v. *Narendra Nath Choudhury*(1), held that the present suit is barred under section 109 of the Bengal Tenancy Act. In my opinion the learned Additional District Judge has misunderstood the effect and scope of these decisions. Section 109 of the Bengal Tenancy Act provides that subject to the provisions of section 109A a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject-matter of an application made, suit instituted or proceedings taken under sections 105 to 108. All that the Judicial Committee of the Privy Council decided in *Reshee Case Law* v. *Satis Chandra Pal*(2) was that where an application was made under section 105 of the Bengal Tenancy Act and subsequently withdrawn whether with or without permission to bring a fresh suit, and even if the withdrawal was before the evidence had been heard, the same subject was barred by the provisions of section 109 of the Act. The question, therefore, is whether the subject-matters of the present suit and the application made in the year 1905 are the same. A reference may be made here to section 113 of the Bengal Tenancy Act which provides that when the rent of a tenure or holding is settled under Chapter X, it shall not, except on the ground of a landlord's improvement or of a subsequent alteration in the area of the tenure or holding, be enhanced, in the case of a tenure or an occupancy holding or the holding of an under-raiyat having occupancy rights, for fifteen years, and, in the case of a non-occupancy holding or the holding of an under-raiyat not having occupancy rights, for five years; and no such rent shall be reduced within the periods aforesaid save on the ground of alteration in the area of the holding, or on the ground specified in section 38, clause (*a*). It is clear that under this section the rent of an occupancy holding may be enhanced after a period of 15 years from

1) (1925) I. L. R. 52 Cal. 894, F. B.
2) (1929) I. L. R. 57 Cal. 118, P. C.

1934.

SRINANDAN PRASAD SINGH v. MITHAN MAHTON.

FAZL ALI, J.

the date on which its rent is settled under Chapter X. It is conceded on behalf of the respondents that if the application made by the plaintiffs in the year 1905 before the Settlement Officer had been disposed of on its merits, that is to say, if the Settlement Officer had either enhanced the rent or declined to enhance it, the plaintiffs would not have lost the benefit of the section and could have claimed enhancement after a period of 15 years; but it is also contended that merely because they withdrew their petition, they have been barred for all time to come from exercising their right to claim an enhancement of rent under section 30(*b*) of the Bengal Tenancy Act. To this latter proposition I am unable to assent. In my opinion the subject-matter of the present suit is entirely different from the subject-matter of the application made before the Settlement Officer in the year 1905. The subject-matter of that application was whether the plaintiffs were entitled to claim enhancement under section 30(*b*) in that particular year, whereas the subject-matter of the present suit is whether, in view of the rise in the average local prices of the staple food crops during the currency of the present term (1918-1927), the rent is liable to be enhanced. It has been held in *Abdul Sattar* v. *Rajkishore Sah*(1) that section 109 will not bar the maintainability of a suit under section 7 merely because the defence taken by the defendant in the suit is the same as the objection taken by him to a previous application under section 105 and that where in an application under section 105 of the Bengal Tenancy Act for enhancement of rent the defendant contended that the rent of the tenure was fixed and was not liable to enhancement and the application was withdrawn, and more than 15 years afterwards the landlord sued for enhancement under section 107 of the Bengal Tenancy Act and the defendants raised the same objection, the suit could not be held to have become barred under

(1) (1929) 127 Ind. Cas. 570.

section 109 of the Bengal Tenancy Act. In that case the decisions of the Full Bench of the Calcutta High Court and of the Judicial Committee of the Privy Council were both explained and it was pointed out that the question which was material to be considered was whether the subject-matter of the suit was the same as the subject-matter of the application. In my opinion, therefore, the plaintiff is entitled to enhancement; and the only question is at what rate the enhancement should be allowed. The learned Munsif allowed enhancement at the rate of 4 annas 6 pies in the rupee, but having regard to the present conditions and particularly to the serious economic depression, we think that it would not be fair to allow enhancement at that rate. In course of the hearing of this appeal the plaintiffs expressed their willingness to accept enhancement at the rate of half an anna in the rupee upon the existing rent and we think that in the circumstances of the case enhancement should be allowed at that rate.

Only one material point remains to be dealt with and that may be disposed of at once. The learned Additional District Judge states in his judgment that the plaintiffs have not impleaded the other co-sharer landlords and, therefore, their suit cannot be entertained as rent suits. The learned District Judge, however, in an earlier portion of his judgment, while he was reciting the facts of the case, has stated that the plaintiffs were landlords of a separate patti formed by the Collectorate batwara and allotted to them; and, as the learned Munsif has pointed out, Register D which has been filed in the present suit shows that the plaintiffs are the exclusive landlords of the estate which has been formed as a result of the partition. Thus they are fully competent to sue for rent as well as for the enhancement of the rent in the present suit and there is no question of non-joinder of parties.

1934.

SRINANDAN PRASAD SINGH v. MITHAN MAHTON.

FAZL ALI, J.

I would, therefore, allow the appeals with costs and set aside the decree of the learned District Judge. So far as the claim for rent is concerned, I would restore the decree of the Munsif and so far as the claim for enhancement is concerned, I would vary the decree passed by the Munsif by allowing enhancement at the rate of half an anna in the rupee.

JAMES, J.—I agree entirely.

It appears to be clear that there was never any actual division of this raiyati holding. The learned Munsif perceived this from the fact that the defendant who gave evidence in the case was unable to specify the plots which had been allotted to him in the so-called division. The learned Additional District Judge discussing this point did not deal with the evidence of the defendants, but based his decision on statements made by the plaintiffs' witnesses, taken out of their context, which read as a whole supported the view of the learned Munsif, and explained how it happened that before the Collectorate partition these landlords granted receipts which appeared to indicate that a division of the holding had taken place. It appears that the defendants quarrelled among themselves and set about dividing up their holding, obtaining the landlords' consent to this proposed partition, on condition that an ekrarnama was to be executed by the tenants. No such ekrarnama was executed; and when the landlords' estate was partitioned by the Collector, and it became necessary for the preparation of the record-of-rights for that partition, to specify the plots in possession of the raiyats, notice was issued to the defendants; but the holding was surveyed as one holding with their tacit acquiescence. It is impossible in the circumstances to say that there has been a subdivision of this holding; or that the landlords' willingness to recognise such a subdivision when it was originally proposed amounts to a recognition under section 88 of the Bengal Tenancy Act of a subdivision which did not in fact take place.

In *Raja Reshee Case Law* v. *Satis Chandra Pal*(1) the Judicial Committee of the Privy Council accepted the decision of the Full Bench of the Calcutta High Court in *Purna Chandra Chatterji* v. *Narendra Nath Choudhury*(2) as authority for the proposition that the provisions of section 109 of the Bengal Tenancy Act barred a subsequent civil suit in a case in which the earlier claim under section 105 was based on an alleged excess of area. A person presenting a petition under section 105 states under sub-section(4) of that section what particular rule laid down in the Act for guidance of civil courts he desires to have applied for the settlement of fair and equitable rent of the holding in question. In the case before the Privy Council it appears that section 52(1) (*a*) of the Bengal Tenancy Act was thus called in aid; and the subject-matter of the subsequent suit was precisely the same as the subject-matter of the application under section 105. In a case where section 32 of the Bengal Tenancy Act is thus called in aid, a subsequent civil suit cannot deal exactly with the same subject-matter. In the present suit for enhancement the court had to determine under section 32 of the Bengal Tenancy Act the effect of the rise in prices during the decennial period 1918 to 1927. The effect of the rise in prices between 1918 and 1927 could not possibly have been the subject-matter of an application made under section 105 in the year 1905: and consequently, although that application in 1905 may have been withdrawn with or without permission to institute a fresh suit, the effect of the provisions of section 109 could not be in such circumstances to bar a suit based on a rise in prices in subsequent years.

Appeals allowed.

(1) (1929) I. L. R. 57 Cal. 118, P. C.

(2) (1925) I. L. R. 52 Cal. 894, F. B.