

cannot be executed under section 208, the decree-holder may with the permission of the Deputy Commissioner proceed against any other property moveable or immovable of the judgment debtor, a special procedure adapted from the Code of Civil Procedure being prescribed by section 210(3) for execution in which the decree-holder is not entitled to the highly favourable procedure of section 208.

Finally as the decree was passed under the Act (though it is one not entitled to the most favoured procedure in execution), the application in 1934 was clearly barred under section 181. Even if the decree could have been executed in a Civil Court by transfer, it seems doubtful whether the operation of the more liberal provisions as to limitation obtaining therein would have been attracted.

The appeal fails and is dismissed.

Appeal from Appellate Order no. 316 of 1934.

Mr. B. C. De for the same appellant stated that the respondent no. 1 is dead and he would ordinarily proceed against the others but that if the decision in M. A. 302 of 1934 is against him, he will not press the appeal. Appeal no. 302 has been dismissed. This appeal is accordingly dismissed *ex parte* without costs.

FAZL ALI, J.—I agree.

Appeals dismissed.

LETTERS PATENT.

Before Courtney Terrell, C.J. and Dhaule, J.

KHUBLAL SINGH

v.

ISHRI PRASAD.*

Landlord and Tenant—suspension of rent—dispossession by landlord from one out of ten plots—tenant, whether

* Letters Patent Appeal no. 2 of 1935, from a decision of the Hon'ble Mr. Justice James, dated the 5th December, 1934.

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PRATAP
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MAGPHER-
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entitled to suspension of rent of the entire old holding—splitting up of the holding by the Batwara, effect of on suspension of rent—Estates Partition Act, 1897 (Beng. Act V of 1897), s. 99.

Where before the Collectorate Batwara a tenant held ten plots of land forming one holding under one set of landlords who were in possession of a separate *patti* under an imperfect partition and the landlords dispossessed him from one of these plots and it was held by the Civil Court that the tenant was entitled to suspension of rent of all the plots. At the Collectorate partition the holding was split up and one of the landlords sued for the rent of two plots allotted to his *takhta* including one of the plots of the old holding and the tenant pleaded that he was entitled to suspension of rent.

Held, that the bar of suspension of rent should continue to apply to all the plots of the tenant's old holding, in whichever *pattis* they may have fallen as a result of the Batwara.

The right of suspension of rent arises when a landlord high-handedly dispossesses a tenant from a portion of his holding, but that cannot make it an incumbrance created on the share of that landlord or of a portion thereof within the meaning of section 99 of the Estates Partition Act.

Appeal by the defendant.

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

S. S. Bose, for the appellants.

G. P. Singh, for the respondents.

DHAVLE, J.—The question in this appeal is whether the plaintiff landlord is entitled to the rent of a holding, consisting of two plots nos. 902 and 833, falling in his *patti* by reason of a Collectorate Batwara which came into force from 1335 Fasli. It appears that prior to this Batwara, the tenant had a cash holding consisting—we are told by Mr. Bose—of 10 plots in the *takhta* of one set of landlords under a *pattidari* arrangement among all the landlords apparently of the nature of an imperfect partition, and that out of these ten plots the landlords in

question dispossessed the tenant from one plot. This plot is referred to as no. 844 in the papers, but it is said at the bar that the correct number of the plot may be no. 944. As a result of the dispossession from this plot, it was held by this Court in a second appeal in 1928 that the tenant was entitled to suspension of rent in respect of all the other plots of that holding, including plot no. 902, one of the two plots with which we are now concerned. The tenant defendant, who is the appellant before us, resisted the present rent suit on the ground that the Batwara among the landlords could not affect his rights, especially the right to hold the balance of his old holding free of rent until the plot from which he has been dispossessed is restored to him. This contention was accepted by the trial court, but rejected on appeal by the District Judge on the ground that in the circumstances of the case the bar of suspension of rent could not be successfully pleaded against the present plaintiff, though it may be that the landlord or landlords to whose share plot no. 844 has fallen are not entitled to claim any rent from this tenant till the restoration of that plot to him.

In second appeal James, J., sitting singly, upheld this view with a slight modification. He was of opinion that

“ the penalty of suspension of rent can be enforced only for so much of the holding as may have fallen within the estate allotted to the high-handed co-sharers, or possibly (though on this point he had doubt) for so much of it as may have been allotted to the same estate as the defendant's plot no. 844 from which he was wrongfully dispossessed ”.

Mr. Bose, who appears for the tenant appellant, has urged that the batwara being no more than an adjustment of the proprietary interests for revenue purposes, there is no reason why the tenant's right to suspension of rent should be at all affected by it. Section 99 of the Estates Partition Act provides for the transfer of patni or other tenures, leases or any other encumbrances created by individual proprietors

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on their shares or portions thereof to the lands finally allotted to them in partitions made by the Collector; but Mr. Bose has contended that the tenant's dispossession from plot no. 844 cannot properly be regarded as an encumbrance created by the evicting landlords. This contention seems irresistible. Mr. Gendhari Prasad Singh, who appears for the landlord respondent, has in order to meet it only referred to section 81 of the Act, which provides that no holding shall be split up for the purposes of a partition under the Act unless it is reasonably necessary to do so in order to effect an equitable partition and that before splitting up a holding the tenant must be notified and his objections heard. But this clearly does not entitle the tenant effectively to insist in the Batwara proceedings that his holding shall or shall not be divided in a particular way, nor has Mr. Singh been able to refer us to any provisions in the Estates Partition Act from which it can be gathered that the Collectorate batwara ought to be regarded as operating to deprive the tenant of his right to suspend payment of rent for the balance of his holding. It is true that the right arose because one set of landlords high-handedly dispossessed him from a portion of the holding, but that does not make it an encumbrance created on the share of those landlords or of a portion thereof. Even if it were to be regarded as an encumbrance, there may, moreover, be no lands to which it could be transferred on the lines laid down in section 99 of the Act. The view of the District Judge that the penalty of suspension of rent can be enforced only for so much of the holding as may have fallen within the estate allotted to the high-handed co-sharers may possibly work no injustice in some cases; but it is obvious that the tenant will have lost his entire right to suspension of rent if those co-sharers contrive to have the whole holding allotted to other co-sharers. The alternative to which James, J. referred though not without some hesitation, namely, that the penalty of suspension of rent

can be enforced for so much of the holding as may have been allotted to the same estate as the plot from which the tenant defendant was wrongfully dispossessed, is liable to a similar criticism. It is by no means inconceivable in cases of this kind that no other plot out of the old holding may be assigned to the landlord to whom the plot in question is allotted. It seems to me that the correct way of approaching the matter was indicated by an observation that fell from my Lord the Chief Justice during the course of the argument. Prior to the batwara it was by an arrangement among the landlords that the holding fell within the takhta of the high-handed co-sharers. These co-sharers thus represented the entire body of landlords in one sense, and the dispossession of the tenant from a part of his holding has, by reason of its conversion into bakasht and its treatment as such at the batwara, benefited all the landlords. A rent suit on the basis of the batwara is thus a matter between an innocent tenant and a landlord who has benefited from the high-handed action of a co-sharer. It would therefore not be unfair if the bar of suspension of rent were to continue to apply to all the plots of the tenant's old holding, in whichever pattis they may have fallen as a result of the batwara. It is true that this may operate unequally between the various landlords, but if it does do so, the landlords themselves are to blame for it. We know in the present case that the claim to suspension of rent was advanced before the batwara allotment, and it has now been ascertained that the order of the High Court allowing the suspension came after the actual partition. The landlords thus took their allotments subject to the result of the second appeal pending in the High Court, and it does not seem at all unfair in the circumstances that the tenant, having done nothing to lose his right to suspension of rent, should in the present rent suit pay rent for that part only of the present holding which did not form part of the old holding in respect of which he was entitled to

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1935. suspension. James, J. observed that the difficulty of enforcing against the plaintiff the penalty of suspension of rent on account of dispossession was increased by the fact that there was nothing on the record to indicate the rents chargeable for the two plots in suit; but this difficulty has now been overcome by means of inquiries made by the parties.

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I would accordingly allow this appeal and modify the decree in favour of the landlords by confining it to the rent of plot no. 833 only. We know from Mr. Gendhari Prasad Singh that this plot was assessed in the batwara proceedings at Rs. 2-14-6 besides cess; and there is no dispute before us that there is no reason why the tenant appellant should not pay rent for this plot.

The appeal succeeds in respect of the rent of plot no. 902 only. I would allow the tenant appellant proportionate costs in all the courts, and direct the decree of the lower court to be corrected accordingly.

COURTNEY TERRELL, C.J.—I entirely agree.

Appeal allowed.

Decree modified.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Dhavle, J.

MUSAMMAT DAIWATI KUER

v.

MUSAMMAT TUNKI KUAR.*

Pleadings—inconsistent pleas by parties, when entertainable—suit for declaration that plaintiff's father was the last surviving member of the joint family and for possession—alternative claim to a moiety if her father be found to have

* Appeal from Original Decree no. 110 of 1932, from a decision of Babu Narendra Nath Chakravartti, Subordinate Judge of Patna, dated the 21st December, 1931.

1936.

August 12.
January, 24.