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execution proceeding of 1925. No doubt Order XXI, rule 37, of the Civil Procedure Code, as amended by the rules of this Court, provides for the issue of notice before issuing a warrant of arrest, but under the rule as it stood in 1925—and this was the rule under which the Bombay High Court passed the order for arrest dated the 14th October, 1925—the issue of notice was discretionary. There is also nothing to show that such notice was issued in the proceeding of 1925. In the circumstances, I do not think the order for arrest passed in that proceeding can be regarded as a " revivor ". However this is a point which is not free from difficulty and in the view which I take of the case it is unnecessary to pronounce any definite opinion on it. I have proceeded on the assumption that the order dated the 14th October, 1925, would operate as a " revivor " so far as Madan Lal is concerned.

In my view the present execution is barred by limitation. I would accordingly allow the appeal and dismiss the execution case as barred by limitation. As there is no appearance on behalf of the respondent, I would make no order as to costs.

DHAVLE, J.—I agree.

Appeal allowed.

K. D.

APPELLATE CIVIL.

1940.

April. 12, 15.

Before Agarwala and Rowland, JJ.

SHYAM JHULAN PRASAD SINGH

v.

SATRUHAN PRASAD SAHI.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 155 *and* 188—*notice under section* 155, *requirements of—notice on behalf of sixteen-annas landlord through Court—notice not*

* Appeal from Appellate Decree no. 992 of 1938, from a decision of Babu Jatindranath Das Gupta, Subordinate Judge of Muzaffarpur, dated the 27th June, 1938, reversing a decision of Babu Anurup Chandra Banerji, Munsif at Hajipur, dated the 18th January, 1937.

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containing demand to vacate holding in the alternative—validity—ejectment suit by a co-sharer landlord—maintainability—section 188—tenancy not determined before suit—plaintiff, whether entitled to a decree for damages—form of decree.

A notice issued under section 155(*1*) of the Bihar Tenancy Act, 1885, on behalf of all the sixteen-annas landlords through Court is valid. There is nothing in section 155 to require that the heading of the notice under sub-section (*1*) of that section should represent it to be from the landlords direct and not from the Court at the instance of the landlords.

The statute does not require that the notice should contain an express demand to quit the land in order to comply with the requirements of section 155(*1*).

Mahommad Yunus v. *Kamla Singh*(1), distinguished.

Such a notice is not defective because at the time it was issued the misuse may have been incomplete whereas at the time of suit it was complete.

A suit to eject a trespasser is not anything that is required by the Bihar Tenancy Act to be done by the landlord and can be maintained by a co-sharer in respect of his own share; but in order to have a cause of action for a suit to eject a tenant as a trespasser, the tenancy must first have been determined by the sixteen-annas landlords.

Lachmi Lal v. *Ganesh Chamar*(2), referred to.

Where a notice under section 155, Bihar Tenancy Act, was served upon the tenant at the instance of all the sixteen-annas landlords, and thereafter a suit for ejectment was filed by one co-sharer landlord, and the other co-sharer landlords were impleaded as defendants second party,

Held, that the suit for ejectment was not maintainable, first, because the notice by the sixteen-annas landlords did not contain a demand that the tenant should vacate the land as an alternative to remedying the misuse and paying the compensation, and, secondly, because the service of the notice had not the same effect as, for instance, the service of a notice under section 49 of the Act.

(1) (1930) A. I. R. (Pat.) 624.
(2) (1932) 13 Pat. L. T. 432.

Golam Mohiuddin Hossein v. *Khairan*(1), *Radha Proshad Wasti* v. *Esuf*(2) and *Shyam Mandal* v. *Satinath Banerjee*(3), referred to.

Held, *further*, that as the misuse complained of was capable of remedy the plaintiff should obtain relief by way of damages.

Gobinda Chandra Basu v. *Kamijuddi Soyal*(4), applied.

Appeal by the plaintiffs.

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

The case was in the first instance heard by Rowland, J. who referred it to a Division Bench by the following judgment:

ROWLAND, J.—The plaintiffs-appellants are some of the co-sharer landlords of a holding consisting of two plots, nos. 1120 and 1121, held by the defendants first party as an occupancy raiyati holding. The defendants second party are the other co-sharer landlords. The suit was brought to eject the defendants first party from the holding on the ground referred to in section 25(*a*) of the Bihar Tenancy Act, for having used the land comprised in the holding in a manner rendering it unfit for the purposes of tenancy, that is to say, by constructing three houses, not for agricultural purposes but for subletting, and by digging a ditch. Notice in accordance with section 155, sub-section (*1*), was said to have been served through the Munsif's Court on behalf of the predecessor of the plaintiffs and defendants second party, who was the 16-annas landlord. The compensation demanded was Rs. 50. The Munsif found that three houses had been constructed and a ditch excavated, and that the construction and excavation had been a misuse of the land in a manner rendering it unfit for the purposes of tenancy. He held that the measure of compensation should be Rs. 20, and he passed a decree for ejectment unless the defendants first party paid compensation and restored the land to its original condition within three months by removing the houses and filling up the excavation.

On appeal the Subordinate Judge held that the construction of two of the houses had been for legitimate agricultural purposes and had not been a misuse, but the construction of the third house and excavation of the ditch were a misuse. He, however, dismissed the suit on two grounds: first, that the notice served on the defendants first party was not in accordance with law and, therefore, the suit was barred by section 155(*1*). Secondly, he held, that section 188 required such a suit to be brought by all the landlords as plaintiffs, and the present

(1) (1904) I. L. R. 31 Cal. 786.
(2) (1881) I. L. R. 7 Cal. 414.
(3) (1916) I. L. R. 44 Cal. 954.
(4) (1905) 16 Cal. L. J. 127.

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suit, having been brought by some of the co-sharer landlords, was not maintainable.

The *points arising in second appeal are*: *first, whether under* section 155 the suit for ejectment was barred, on the ground of failure of the notice to conform to the requirements of that section; secondly, whether the suit for ejectment, at the instance of some co-sharers, is not maintainable in face of section 188; and thirdly, if the plaintiffs are disentitled to the remedy of ejectment, whether the whole suit including the claim for compensation can be dismissed.

The notice is required to be served in accordance with rule 3 of the Government rules under the Act, which can be found at page 700 of Mr. B. K. Sen's edition of the Bihar Tenancy Act. No defect is shown in the manner of service; but it is said that the notice is invalid, (*a*) because it is expressed to be a notice from the Court and not from the landlord, (*b*) because in specifying the particular misuse and demanding compensation, it did not demand, in the alternative, that the defendants should vacate the holding, and (*c*) because in the notice it is said that the defendants were beginning to build the houses and dig the ditch; but in the suit these misuses are said to be complete.

Points (*a*) and (*c*) are for decision on the terms of the section. As to point (*b*) reference is made to *Mahomad Yunus* v. *Kamla Singh*(1) where it is said " The law requires that the notice must set out the misuse complained of and must ask the defendant to remedy the misuse within a specified time and to pay a reasonable compensation; in default to quit the land ". The question arises whether the last words of this observation are *obiter dicta* and whether they can be supported.

As regards the application of section 188, the defendants rely on the Privy Council decision in *Jatindra Nath Chowdhri* v. *Prasanna Kumar Banerjee*(2) and the plaintiffs on a decision of this Court in *Lakshmi Lal* v. *Ganesh Chamar*(3) and of the Calcutta High Court in *Haripria Devi* v. *Ram Churn Myti*(4). It is argued for the respondents that the Patna decision is not in point, because in that case the tenancy had already been terminated by notice before the suit was brought; whereas a notice under section 155 does not result in determining the tenancy until the end of the suit—*vide Shyam Mandal* v. *Satinath Banerjee*(5). In the present case it is pointed out that the notice demanded compensation and remedy and did not demand, in the alternative, that the tenant should give up the land and such a notice, it is said, even if it gave a cause of action for the suit could not itself terminate the tenancy. *Gholam Mohiuddin Hossein* v. *Khairan*(6) is cited for the proposition that in order to justify any individual co-sharer in seeking to eject the tenants it must be shown that the tenancy held under all the co-sharers has been determined by

(1) (1930) A. I. R. (Pat.) 624.
(2) (1910) I. L. R. 38 Cal. 270, P. C.
(3) (1932) 13 Pat. L. T. 432.
(4) (1892) I. L. R. 19 Cal. 541.
(5) (1916) I. L. R. 44 Cal. 954.
(6) (1904) I. L. R. 31 Cal. 786.

all of them. It is said that the earlier Calcutta decision is not applicable because that was a suit not based on the general relations of landlord and tenant but on a specific clause in a contract of lease. It also does not appear that the tenant in that case was an occupancy raiyat. The appellants have also relied on *Gobinda Chandra Basu* v. *Kamiruddi Soyal*(1) which, however, appears distinguishable as although the cause of action for the suit was misuse of the holding, the relief sought was not ejectment but only remedy of the misuse and compensation.

Lastly, if the claim to eject the tenant is barred by section 188, it remains to be considered whether the entire suit must be dismissed or whether the plaintiffs should get, as in the case just cited, a decree for remedying the misuse and for compensation. The entire suit failed in *Rai Kamaleswari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur*(2), the correctness of which may need to be examined.

I am of opinion that the case involves the determination of points of law which should be decided by a Bench of two Judges.

. On this reference

Ganesh Sharma, for the appellants.

G. P. Singh and *Lal Narayan Sinha*, for the respondents.

ROWLAND, J.—The plaintiffs-appellants are some of the co-sharer landlords of a holding consisting of two plots, nos. 1120 and 1121, held by the defendants first party as an occupancy raiyati holding. The defendants second party are the other co-sharer landlords. The suit was brought to eject the defendants first party from the holding on the ground referred to in section 25(*a*) of the Bihar Tenancy Act, for having used the land comprised in the holding in a manner rendering it unfit for the purposes of tenancy, that is to say, by constructing three houses, not for agricultural purposes but for subletting, and by digging a ditch. Notice in accordance with section 155, sub-section (*1*), was said to have been served through the Munsif's Court on behalf of the predecessor of the plaintiffs and defendants second party, who was the 16-annas landlord. The compensation demanded was Rs. 50. The Munsif found that three

(1) (1905) 16 Cal. L. J. 127.
(2) (1905) 2 Cal. L. J. 369.

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houses had been constructed and a ditch excavated, and that the construction and excavation had been a misuse of the land in a manner rendering it unfit for the purposes of the tenancy. He held that the measure of compensation should be Rs. 20, and he passed a decree for ejectment unless the defendant first party paid compensation and restored the land to its original condition within three months by removing the houses and filling up the excavation.

On appeal the Subordinate Judge held that the construction of two of the houses had been for legitimate agricultural purposes and had not been a misuse, but the construction of the third house and excavation of the ditch were a misuse. He, however, dismissed the suit on two grounds; first, that the notice served on the defendants first party was not in accordance with law and, therefore, the suit was barred by section 155(*1*). Secondly, he held that section 188 required such a suit to be brought by all the landlords as plaintiffs, and the present suit, having been brought by some of the co-sharer landlords, was not maintainable.

The points arising in second appeal are: first, whether under section 155 the suit for ejectment was barred, on the ground of failure of the notice to conform to the requirements of that section; secondly, whether the suit for ejectment, at the instance of some co-sharers, is not maintainable in face of section 188; and, thirdly, if the plaintiffs are disentitled to the remedy of ejectment, whether the whole suit including the claim for compensation can be dismissed.

The notice is required to be served in accordance with rule 3 of the Government rules under the Act, which can be found at page 700 of Mr. B. K. Sen's edition of the Bihar Tenancy Act. No defect is shown in the manner of service; but it is said that the notice is invalid, (*a*) because it is expressed to be a notice from the Court and not from the landlord, (*b*) because in specifying the particular misuse and

demanding compensation, it did not demand, in the alternative, that the defendants should vacate the holding, and (*c*) because in the notice it is said that the defendants were beginning to build the houses and dig the ditch; but in the suit these misuses are said to be complete.

The notice which had been served on the tenants had been issued on behalf of the sixteen-annas proprietor, Babu Jagat Nandan Prasad Singh, predecessor of the plaintiffs and pro forma defendant. It was issued through the Court and served in accordance with rule 3 of the Government Rules under the Bihar Tenancy Act in the manner prescribed for the service of the summons on a defendant under the Code of Civil Procedure. The Subordinate Judge thought it was defective because the notice actually served is headed as being a notice from the Court and not from the landlord; the landlord's name, however, appears on the heading as the applicant at whose instance the notice is issued. There is nothing in section 155 to require that the heading of the notice should represent it to be from the landlords direct and not from the Court at the instance of the landlords and this supposed defect seems to me to be imaginary. It is not necessary to read into the section words that are not there.

There are no words in section 155 to require that a notice under this section should demand of the tenant in the alternative that he should vacate the holding; but in *Mahommad Yunus* v. *Kamla Singh*(1) there is an observation to this effect: "The law requires that the notice must set out the misuse complained of and must ask the defendant to remedy the misuse within a specified time and to pay a reasonable compensation; in default to quit the land". The last words of this observation seem to be obiter as the appeal failed on the ground that the Subordinate Judge had found as a fact that service of the notice

(1) (1930) A. I. R. (Pat.) 624.

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had not been established. I do not think that the statute requires that the notice should contain an express demand to quit the land in order to comply with the requirements of section 155(*1*). I shall however have to return later to the effect of a notice in which this demand is absent.

ROWLAND, J.

I do not think that the notice was defective because at the time it was issued the misuse may have been incomplete whereas at the time of suit it was complete. If there was a misuse before the service of the notice which would entitle the plaintiff to have compensation and remedy of the misuse, they can hardly lose this right because the misuse is subsequently enlarged. If the plaintiff is entitled to a decree to remedy the partial injury, it will obviously be impossible for the defendant to comply with that decree unless he remedies the whole of the enlarged misuse which has taken place up to the time of the suit. I am, therefore, of opinion that the grounds on which the Subordinate Judge has held the notice to be defective and unfit to form a foundation for a suit under section 155 are erroneous.

The next question is whether the suit for ejectment at the instance of some co-sharers is not maintainable in face of section 188 of the Bihar Tenancy Act. It is settled law that a suit to eject a trespasser is not anything that is required by the Act to be done by the landlord and can be maintained by a co-sharer in respect of his own share; but in order to have a cause of action for a suit to eject the defendant as a trespasser, the tenancy must first have been determined and the tenancy must be determined by the sixteen-annas landlords. It has been held in *Lachmi Lal* v. *Ganesh Chamar*(1) that when the sixteen-annas landlords being raiyats had given their under-raiyats a notice to quit, that fact terminated the tenancy and a suit in ejectment could be maintained by some co-sharers only. But here we have to see

(1) (1932) 13 Pat. L. T. 432.

whether the notice which was served had terminated the tenancy before the institution of the suit and there are two difficulties in the way of holding that it could so terminate the tenancy. The first is that in the notice itself there is not contained a demand that the tenant should vacate the land as an alternative to remedying the misuse and paying the compensation demanded; that is to say, there was not an expression in the notice on behalf of the sixteen-annas landlord of an intention to terminate the tenancy. It has been held in *Gholam Mohiuddin Hossein* v. *Khairan*(1), following an earlier decision in *Radha Proshad Wasti* v. *Esuf*(2), that a tenancy must be determined by all the co-sharers before one of them can sue for khas possession in respect of his share. Secondly, the service of a notice under section 155 has not the same effect as, for instance, the service of a notice under section 49. As has been held in *Shyam Mandal* v. *Satinath Banerjee*(3) the tenancy continues in operation till the failure of the tenant to comply with the decree made under section 155 within the term prescribed thereby. The contention of the appellants before us that the tenancy came to an end on the expiry of the time given by the earlier notice under section 155 cannot be accepted. That being so, the plaintiffs are not entitled to maintain a suit for ejectment in face of the provisions of section 155 of the Bihar Tenancy Act.

The question remains whether the suit ought to be entirely dismissed or whether the plaintiffs should get some relief by way of damages. We may get some assistance from the decision in *Gobinda Chandra Basu* v. *Kamijuddi Soyal*(4). This was a suit brought by a co-sharer landlord against a raiyat in which there was no prayer for ejectment; but the relief sought was to compel the defendant to fill up a tank which he

(1) (1904) I. L. R. 31 Cal. 786.
(2) (1881) I. L. R. 7 Cal. 414.
(3) (1916) I. L. R. 44 Cal. 954.
(4) (1905) 16 Cal. L. J. 127.

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had dug in the mal lands of the holding and in the alternative for damages. A suit of this nature, it was held, was not one which the whole body of landlords was required or authorised to bring under the Bengal Tenancy Act and it was held that section 188 was no bar to the maintainability of the suit for the above reliefs.

ROWLAND, J.

We have then to consider the form of decree that should be passed. Section 155(2) requires the decree in every suit under the section to declare whether the misuse or breach is in the opinion of the Court capable of remedy. As may be seen from the decisions in *Afiladdi* v. *Satis Chandra Banerjee*(1) and *Musst. Bibi Saida* v. *Dukhi Gope*(2) the measure of compensation may be affected by the finding; the judgments of both the Courts below are defective in that there is no specific finding on this point; but it seems to have been assumed that the misuse is capable of remedy and we proceed on that footing, the assumption not having been challenged before us. It would seem then that the plaintiffs ought to have a decree requiring the defendant to remedy the misuse to the extent that misuse has been found by the lower appellate Court; that is to say, by filling up the ditch and removing the third of the three houses which have been erected. The decree must also provide a measure of damages and here the Subordinate Judge has not given us the necessary finding. The Munsif had assessed the damage consisting of erection of three huts and digging of a ditch at Rs. 20, but the Subordinate Judge has not found how much of this damage is referable to the one hut and the ditch. To avoid the inconvenience of a remand the parties have left this matter to the Court and we assess the damage at Rs. 15 of which the plaintiffs as eight-annas cosharers are entitled to recover one-half. The time allowed for the defendant for complying with the Court's order and bringing the compensation money into Court will be three months from this day. In

(1) (1916) 29 Cal. L. J. 40.
(2) (1934) I. L. R. 14 Pat. 279.

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default the plaintiffs will be entitled to have the misuse remedied by the Court at the cost of the defendants and to execute the decree for the amount of damages. The plaintiffs will get half their costs of the first Court and the defendants will get half their costs in the lower appellate Court. Parties will bear their own costs of the second appeal.

AGARWALA, J.—I agree.

Appeal allowed in part.

K.D.

APPELLATE CIVIL.

Before Harries, C.J. and Chatterji, J.

1940.

April, 30.
May, 1.

TARA PRASAD BALIASEY

v.

BAIJNATH PRASAD BALIASEY.*

Arbitration—Code of Civil Procedure, 1908 (*Act V of* 1908), *Schedule II, paragraphs 5 and* 17—*agreement to refer —refusal to act by one or more of the named arbitrators—no provision in agreement for such a case—Court, power of, to make a reference under paragraph* 17— *paragraph* 5, *applicability of.*

There is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case the Court cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators certain other persons.

In such a case the agreement becomes void and of no effect and the Court has no jurisdiction, under paragraph 17(*4*) of the Second Schedule to the Code of Civil Procedure, 1908,

*Appeal from Original Order no. 252 of 1939, from an order of Babu B. Dhar, Subordinate Judge of Deoghar, dated the 9th August 1939.