APPELLATE CIVIL.

1940.

February, 22, 23.

Before Fazl Ali and Meredith, JJ. PANDEY ISHWAR NATH ROY

v.

MAHARAJA FERTAPUDAI NATH SAHA DEO.*

Chota Nagpur Tenure-holders' Rent Account Act, 1929 (Bihar and Orissa Act 1 of 1929), section 11—"tenure" and "rent", occurring in clause (b), meaning of—registration fee under clause (a), whether is to be calculated on the rent of the separated portion—Chota Nagpur Tenancy Act, 1908 (Beng. Act VI of 1908), section 11.

Section 11 of the Chota Nagpur Tenure-holders' Rent Account Act, 1929, provides:

- $\lq\lq$ Where any separate account has been opened, the landlord shall be entitled—
- (a) to levy a fee on the scale laid down in section 11 of the Chota Nagpur Tenancy Act, 1908, for registration, and
- (b) to levy an annual fee for the maintenance of the additional establishment at the rate of two per centum on the rent of the tenure."
- Held, (i) that the registration fee under section 11(a), which is to be levied on the scale laid down in section 11 of the Chota Nagpur Tenancy Act, 1908, is to be calculated on the rent of the portion of the tenure in respect of which a separate account has been opened;
- (ii) that the word "tenure" in section 11(b) means the whole tenure and not the share of the tenure for which separate account has been opened and that the word "rent" includes also the cess.

Appeal by the defendants.

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

The case was heard in the first instance by Agarwala, J. who referred it to a Division Bench.

^{*}Appeal from Appellate Decree no. 1052 of 1938, from a decision of P. C. Chaudhuri, Esq., I.c.s., Additional Judicial Commissioner of Chota Nagpur, dated the 30th June, 1938, modifying a decision of Maulavi Saiyid Abul Khair Mohammad Tahir, Rent Suit Deputy Collector of Ranchi, dated the 15th September, 1936.

On this reference

Rai Paras Nath, for the appellants.

B. C. De, for the respondents.

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MEREDITH, J.—This appeal first came before a PERTAPUBAT Judge sitting singly and has been referred by him NATH to a Division Bench. It is a defendant's appeal and SAMA DEO.

- arises out of a rent suit in respect of a resumable jagir tenure in which the following claims were made:-
- (1) Rent for the four years 1989 to 1992 Sambat at Rs. 75-12-6 per annum.
 - (2) Cess at Rs. $582-0-2\frac{1}{2}$ pies per annum.
- (3) Landlord's registration fee for opening a separate account under section 11 of the Chota Nagpur Tenure-holders' Rent Account Act (I of 1929) at Rs. 13-6-0.
- (4) Landlord's annual fee under the same section of that Act for maintenance of a separate account at Rs. 53-8-0 for the four years.

The case was decreed by the first Court for the rent and for the cess at a reduced amount of Rs. $560-12-4\frac{1}{2}$ pies. The landlord's registration fee and maintenance fee for separate account were claimed against defendant no. 2 on whose behalf a separate account had been opened by the landlord. The first Court held that the amount claimed on these two heads by the landlord was not correct for reasons which I shall presently state and held that whatever was payable had been paid. The suit was, therefore, decreed only as against the remaining defendants nos. 1, 3 and 4 and was dismissed against defendant no. 2.

The landlord appealed in the Court of the Judicial Commissioner. In appeal the reduced figure for cess was accepted as correct by the landlord,

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and no question of the amount of cess now arises. The other two points taken in appeal were with regard to the registration fee and maintenance fee; and, whereas the first Court had decided in favour of the defendants on both these points, the learned PERTAPUDAL Additional Judicial Commissioner decided in favour of the landlord with regard to both of them. Hence the present appeal by the defendants, in which the same two points have been raised. They involve the interpretation of section 11 of Act I of 1929 which runs as follows --

- "When any separate account has been opened the landlord shall be entitled-
- (a) to levy a fee on the scale laid down in section 11 of the Chota Nagpur Tenancy Act, 1908, for registration, and
- (b) to levy an annual fee for the maintenance of the additional establishment at the rate of two per centum on the rent of the tenure."

The two points raised with regard to the interpretation of this section are, (1) whether the word "tenure" as used in section 11 means the whole tenure or the share of the tenure for which the separate account has been opened; and, (2) whether the word "rent", as used in that section, namely, in prescribing a fee at two per centum on the rent includes also the cess; that is to say, whether the fee is to be two per centum on what might perhaps be called the "primary rent" alone or two per centum on the amount of rent plus cess.

Taking first the meaning of the word "tenure" as used in the section, it is pointed out that section 11 of Act I of 1929 has been amended by Act XIV of 1939 which provides that for section 11 of the said Act the following section shall be substituted, namely, 11(1)—

- "When any separate account has been opened, the landlord shall be entitled to levy-
- (a) a registration fee of two per centum on the annual rent of the share in respect of which such account has been opened; and
- (b) an annual fee for the maintenance of additional establishment at the rate mentioned in clause (a)."

This Act is of course not applicable to the present case; but it is said that it clarifies the Act of 1929 and makes clear what was intended in section 11 in that Act. It certainly does make it clear that since the passing of the Act of 1939 these fees will be MAHARAJA estimated not on the rent of the whole tenure, but Pertapudat on the rent of the share in respect of which the separate account is opened. But I am unable to hold that that is a mere clarification of the old section. On the contrary, it appears to me clear that when the Act of 1929 prescribed a fee of two per centum on the rent of the tenure, it meant the rent of the tenure as a whole.

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No doubt section 3 (xxvii) of the Chota Nagpur Tenancy Act defines "tenure" as "the interest of a tenure-holder '', and section 4(c) of Act I of 1929 provides that words and expressions used in this Act and not otherwise defined have the same meaning respectively as in the Chota Nagpur Tenancy Act of 1908. Nevertheless it seems to me clear that where the word "tenure" is used in the Act of 1929 without qualification it means the whole tenure. That is clear from the fact that wherever reference is made to the portion of the tenure in respect of which a separate account has been opened, that separate portion is spoken of in clear terms as the share of the tenure, as for example, in section 12 of the Act of 1929. The same inference is to be derived from the definition of "fractional share" and "registered co-sharer" in section 4 of the Act. Section 4(a) defines fractional share as a share consisting of a fraction of a whole tenure. Section 4(b) says that registered co-sharer means a co-sharer in a tenure whose name has been registered in the office of the landlord under section 11 of the Chota Nagpur Tenancy Act, 1908. It is quite clear here that where the word "tenure" is used, it is used as meaning the whole tenure.

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Again section 6(1) of the Act plainly shows that where the word "tenure" is used, it means the whole tenure.

Our attention has been drawn to the terms of section 11 of the Chota Nagpur Tenancy Act, the material portion of which runs as follows:—

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- (1) When any tenure or portion thereof is transferred by succession, inheritance, sale, gift or exchange, the transferre or his successor-in-title shall cause the transfer to be registered in the office of the landlord to whom the rent of the tenure or portion is payable.
- (2) The laudlord shall, in the absence of sufficient reason to the contrary, allow the registration of all such transfers.
- (3) Whenever any such transfer is registered in the office of the landlord, he shall be entitled to levy a registration fee of the following amount, namely:—
- (a) when rent is payable in respect of the tenure or portion—a fee of two per centum on the annual rent thereof: provided that no such fee shall be less than one rupee or more than one hundred rupees, and
- (b) when rent is not payable in respect of the tenure or portion—a fee of two rupees."

It is argued that in sub-section 3(a) of the above section the words "a fee of two per centum on the annual rent thereof "must be taken as referring either to the rent of the tenure or the rent of the portion transferred, as the case may be; and, therefore, in the case of the transfer of a portion of a tenure for which a separate rent is payable, the fee payable under this section is two per centum of the annual rent not of the whole tenure but of the portion transferred. That contention appears to me quite correct. Section 11 does seem to contemplate that where rent is payable separately for a portion of a tenure, and only that portion is transferred, then the fee shall be paid on the annual rent of that portion. The argument, however, will apply only to sub-section (a) of section 11 of the Act of 1929. I do agree with the learned Advocate for the appellants that when section 11(a) states that a fee is to be levied on the scale laid down in section 11 of the Chota Nagpur

Tenancy Act, that must mean that the fee will be levied on the rent of the portion of the tenure in respect of which a separate account has been opened. But the position is quite different as regards subsection (b). Sub-section (b) says clearly that the MAHARAJA annual fee is to be paid at two per centum on the Pertapudat rent of the tenure and that in my view can only mean Saha Deo. the rent of the whole tenure. The position has of course now been altered by the Act of 1939: but for Mereputh. the present case, as I have said, we are concerned only with the Act of 1929. I would, therefore, hold that with regard to the registration fee under subsection (a) it is to be calculated on the rent of the separated portion as in the case of section 11 of the Chota Nagpur Tenancy Act, but in the case of the annual maintenance fee, it is to be calculated on the rent of the whole tenure.

I come now to the second question—whether rent includes cess. I have already pointed out that under section 4(c) of the Act of 1929 words and expressions not defined are to have the same meanings as in the Chota Nagpur Tenancy Act. In section 3(axiii) of the Chota Nagpur Tenancy Act rent has been defined as follows:-

"Rent means whatever is lawfully payable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant, and includes all dues (other than personal services) which are recoverable under any enactment for the time being in force as if they were rent."

In other words, wherever the expression "rent" is used in the Chota Nagpur Tenancy Act and consequently in Act I of 1929, it is to be read not in the limited sense of primary rent, but as such rent plus other dues recoverable as if they were rent. Under section 47 of the Cess Act cess is recoverable as if it were rent. Cess is therefore one of the dues referred to, and where the expression "rent" is used, it must be taken to include cess. That really disposes of the question. This interpretation of the

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section involves nothing absurd or inequitable. The landlord is expressly given the fee to compensate him for having to employ extra establishment for extra NATH ROY clerical and collection work. That work is equally involved whether he is collecting rent or cess. PERTAPUDAT therefore, only reasonable to assume that when compensation is provided to him for this extra work, it was intended to be given to him whether the extra work was involved by the collection of primary rent or of other dues such as cess which involve just the same trouble and expense. Where both stand on the same footing in these respects, as rent and cess do, there can be no equitable reason for discriminating between them.

> Here also an argument has been based on the terms of section 11 of the Chota Nagpur Tenancy Act. It is pointed out that under sub-section 3(b)of that section a fee of two rupees is prescribed where rent is not payable in respect of the tenure or portion of the tenure; and it is argued that this implies that the word "rent" was used as not inclusive of cess, which is payable even in the case of rent-free land. We are not, however, entitled to assume that there are no cases where no cess is payable by a tenure-holder. There are no materials before us on which such a conclusion could be based. The argument is therefore inconclusive.

> Having regard both to the definition of rent and to the equities of the matter, I have no doubt that the word "rent" as used in section 11 of the Act of 1929 was intended to include cess and the fee of two per centum is to be calculated upon the amount of rent plus cess.

> These are the only two points which arise in this appeal, and the appeal fails except with regard to the registration fee, which should be calculated not on the whole rent plus cess but on the quarter share of defendant no. 2 for which the separate account has

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been opened. The appeal, in my opinion, should be allowed only to that extent, and having regard to all the circumstances of the case, the parties should pay their own costs.

FAZL ALI, J.-I agree.

Appeal allowed in part.

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Meredith,

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

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January, 23, 24, 25, 26, 29. February, 28.

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Code of Civil Procedure, 1908 (Act V of 1908), section 1.1—res judicata between co-defendants—test— partition suit—conflict of interest between co-defendants—decision not necessary in order to give relief to plaintiff—decree, whether operates as res judicata.

Although in an ordinary case a finding on an issue as between co-defendants is not res judicata unless it is necessary to give relief to the plaintiff and there is a conflict between such defendants, the decree in a partition suit stands on a different footing.

When defendants in a partition suit pray for a partition of their share, then before such relief can be given to them their share must be ascertained. In such a case there is obviously a conflict of interest between the defendants and between that particular defendant and the plaintiff, and each of the defendants stands in very much the same position as the plaintiff.

Where, therefore, in a partition suit one of the defendants asked for the separation of his share which necessitated the

^{*}Appeal from Original Decree no. 211 of 1986, from a decision of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 27th July, 1936.