31 C. 1026 (=8 C. W. N. 923.)

[1026] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

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JNANENDRA MOHAN CHOWDHRY *v.* GOPAL DAS CHOWDHRY.*

[12th and 16th August, 1904.]

Landlord and Tenant—Bengal Tenancy Act (VIII of 1885) s. 88—Division of Tenure —Distribution of Rent—Rent-receipt and jurd, construction of—Consent to a division or distribution of tenure.

A receipt for rent granted by a landlord or his agent, containing no specification of the total *jama* of the taluq, no statement of the area of the taluq, or of the portion of the taluq which was separated and separately settled with the tenant, nor of the share separated, nor containing a recital that the tenant was registered in the landlord's *sherista* as a tenant of a portion of the original holding at a rent which was a portion of the original rent, does not amount to a consent in writing by the landlord to a subdivision of the holding, within the meaning of section 88 of the Bengal Tenancy Act.

Pyari Mohun Mukhopadhya v. *Gopal Paik* (1) distinguished.

An entry in a *jurd* or account which appeared on the face of it to have been written by a servant of a tenant and exhibited payments of rent made in respect of six different *taluqs* by the tenant to the landlord, and which was signed and receipted by a *Sumarnavis* of the said landlord, does not amount to a consent in writing on behalf of the landlord to a division of the tenure or distribution of the rent.

[Appl 10 C. W. N. 216. Ref. (1918) Pat. 210.]

SECOND APPEAL by the plaintiffs, Jnanendra Mohan Chowdhry and another, minors, by their next friend, Rajendra Chandra Das Gupta.

This appeal arose out of an action brought by the plaintiffs to recover arrears of rent of a certain taluq. The plaintiffs alleged that the defendants held a *jama* the rental of which was Rs. 212 3-4 pies, and that they did not pay up the rents for the year [1027] 1303 to *Pous kist* of 1306 B. S., and hence the suit was brought for recovery of the arrears of rent for the said years.

The defendant No. 2 alone appeared and pleaded that he had paid a separate *jama* for his share, and the plaintiffs were wrong in suing him jointly with the other defendants. He further pleaded that he had paid up rent for 1303 and 1304 B. S. In order to prove that the landlord gave his consent in writing to a division of the tenure and distribution of rent, the defendant No. 2 produced amongst other documents a rent-receipt and a *jurd* or account. The rent-receipt, which was dated the 14th Chaitra 1286 (26th March 1880), ran as follows :—

Dakhila on account of rent of attached hissya 2 annas 15 gundas in perganah Sherpore belonging to Shama Sundari Chowdhurani, minor zamindar, under the Court of Wards, the general muktear being Babu Guru Churn Chuckerbutty under the Mymensingh Collectorate, dated 26th March 1880—14th Chaitra 1286 B. S.

	Rs.	A.	P.	G.
Rent of *taluk* Ram Prosad Sarkar Kristapur, &c., through (marfat) Suryyo Kant Acharyya Raja Bahadur through Anando Chunder Nag for 1286 B. S.	27	13	3	10
Road cess and public works cess of the said *taluk*...	10	3	0	0
	38	0	3	10

* Appeal from Appellate Decree, No. 477 of 1902, against the decree of Tej Chandra Mukerjee, Subordinate Judge of Mymensingh, dated Nov. 18, 1901, reversing the decree of Gobinda Chandra Basak, Munsif of that district, dated Feb. 28, 1901.

(1) (1898) I. L. R. 25 Cal. 531.

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The Court of first instance overruled the defendants' plea and decreed the plaintiff's suit, holding that the receipt and the *furd* or account relied on by defendant No. 2 did not amount to such a consent in writing by the landlord as was required by section 88 of the Bengal Tenancy Act, in order to effect a division of the tenure or distribution of the rent. On appeal, the Subordinate Judge set aside the decision of the first Court and dismissed the plaintiff's suit. The plaintiffs appealed to the High Court.

Babu *Jogesh Chandra Roy* (Dr. *Rash Behary Ghosh* and Babu *Mukunda Nath Roy* with him) for the appellants. The receipt, Exhibit B, does not amount to a written consent to a division of the holding or distribution of rent within the meaning of section 88 of the Bengal Tenancy Act. Neither the entire rent of the holding is mentioned nor is there any mention of any proportionate share of rent or lands. The Full Bench, *Pyari Mohun* **[1028]** *Mukhopadhya* v. *Gopal Paik* (1), does not apply to the present case, inasmuch as the receipt in that case contained a recital that the tenant's name was registered in respect of a portion of the original holding at a rent which was a portion of the original rent. There is no such recital in Exhibit B; moreover, there is nothing to show that the Naib who granted the receipt in the present case had any authority to give consent to any division of the tenure or distribution of rent. As regards Exhibit A, it was prepared in the *sherista* of the tenant, though the amount mentioned therein is accepted by the *Sumarnavis* of the landlord. It operates only as a receipt of the money paid. The landlord is not bound by the statements made in it. The rent of the original holding is Rs. 212 and odd annas and the share belonging to the defendant No. 2 is stated in that Exhibit A to be 4½ annas. The proportionate share of the rent in respect of that share would be Rs. 59 and odd, whereas, it is mentioned as Rs. 27 and odd. The *Sumarnavis* cannot be presumed to have authority to consent on behalf of the landlord to such a disproportionate distribution. The lower Appellate Court does not find that the distribution of rent was in respect of any particular share, and all that it finds is that the plaintiffs had recognized the separate liability of the defendant No. 2 for a specific portion of the rent of the holding. This finding does not preclude the landlord from suing all the owners of the holding for its entire rent. Such separate payment of rent as is found does not absolve the defendant No. 2 from his joint liability with the other shareholders of the holding for the entire rent: see *Buloram Paul* v. *Suroop Chunder Gooho* (2), *Gour Mohun Roy* v. *Anund Mundal* (3), *Ranee Lalun Monee* v. *Sonamonee Dabee* (4), *Beni Pershad Koeri* v. *Gobardhan Koeri* (5).

Babu *Dwarka Nath Chakravarti*, for the respondent. The case is concluded by the findings of fact arrived at by the lower Appellate Court. The plaintiffs having received rent separately from the defendant No. 2 for a large number of years, have no right to make him jointly liable with the other shareholders for the entire rent of the holding. The Exhibit A amounts to a consent **[1029]** in writing by the landlord within the meaning of section 88 of the Bengal Tenancy Act. It mentions the share of the defendant No. 2 as also the separate rent payable in respect of it; and as it contains the signature of the *Sumarnavis* of the plaintiffs, it ought to be held that he consented to a division of the

(1) (1898) I. L. R. 25 Cal. 531.
(2) (1874) 21 W. R. 256.
(3) (1874) 22 W. R. 295.
(4) (1874) 22 W. R. 334
(5) (1902) 6 C. W. N. 823.

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holding, although it was prepared in the *sherista* of the defendant No. 2. The objection as to the necessary parties was not made before the lower Appellate Court. If it had been made there, they might have been added as respondents in that Court.

BRETT AND MOOKERJEE, JJ. The plaintiffs-appellant brought a suit against these defendants to recover rents and cesses due in respect of a putni taluq standing in the name of Ray Prasad Sarkar from Baisak 1303 to the Pous kist of 1306. The annual rent for the taluk was stated to be Rs. 212-4-0-1-4, payable in four quarterly kists ; and after making allowance for certain payments made by some of the defendants and adding the sums due on account of cesses, the plaintiffs claimed the sum of Rs. 1,157-13-11-1-2 from the defendants. Defendants Nos. 1 and 3 did not contest the suit. Defendant No. 2, Maharaja Surjya Kanta Acharjya Bahadur alone appeared to oppose the claim of the plaintiffs. He pleaded that out of the taluq bearing a rental of Rs. 212-4-3-1-4 in respect of which rent was claimed, he held a separate jama bearing an annual kaimi mokarari jama of Rs. 27-13-3-1-10 and paying Rs. 10-3-0 as cesses. He pleaded that he had paid the full rent and cesses for 1303 and 1304, and contended that as a separate account had been opened by the plaintiffs for the rent payable by him, the suit against him jointly with the other defendants could not lie. He admitted that Rs. 66-4-4-1-3 only was due as rent and cesses for 1305 and 9 months of 1306, and stated that if the Court was of opinion that the suit was maintainable the plaintiffs might be granted a separate decree against him for that sum.

The question raised by the pleadings of defendant No. 2 was, therefore, whether there had been a division of the tenure by which his share had been separated from the shares of defendants Nos. 1 and 3 so as to render the plaintiff's suit in the form in which it was brought not maintainable. The yearly rental [1030] claimed for the whole taluq was not disputed, nor was it contended that the sum claimed by the plaintiffs was not the arrears of rent actually due from the whole tenure for the years in suit. The evidence on both sides was directed to the point whether or not there had been a division of the tenure.

In addition to oral evidence the defendant No. 2 relied on two documents to prove that there had been a division of the tenure. These were a receipt dated the 14th Chaitra 1286 (26th March 1880) for a sum of Rs. 38-0-3-10 granted in favour of defendant No. 2 by Gopi Kanto Moitra, naib of the plaintiffs, and a *furd* or account dated the 30th Chaitra 1304 (11th April 1898) which appeared on the face of it to have been written by Peary Lall Makhan, a servant of defendant No. 2 and exhibited payments of rent for the year 1304 made in respect of six different taluks by the defendant No. 2 to the plaintiffs, and which was signed and receipted by Gopal Chandra Neogy, *Sumarnavis* of the plaintiffs.

The Munsif rejected the oral evidence of defendant No. 2 as meagre and unsatisfactory, and he held, following the decision of this Court in the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (1), that the receipt and the *furd* relied on by defendant No. 2 did not amount to such a consent in writing by the landlords as was required by section 88 of the Bengal Tenancy Act in order to effect a division of the tenure or distribution of the rent which was in law binding on them. He accordingly found that the plea of defendant No. 2 failed and that the suit in its

(1) (1888) I. L. R. 10 Cal. 155.

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present form could be maintained. With regard to the plea of payment made by the defendant No. 2, he held that payment of rent by him for one year only had been proved, and that the sum so paid had been deducted from the total rent due for the years in suit and had not been claimed by the plaintiffs. Making allowance for a further payment of Rs. 38-4-1-3 subsequently admitted by the plaintiffs, the Munsif gave the plaintiffs a decree for Rs. 1,038-0-6 against all the three defendants jointly with costs.

Defendant No. 2 alone appealed, and on appeal the Subordinate Judge set aside the judgment and decree of the Munsif, and dismissed the plaintiff's suit with costs.

[1031] The plaintiffs have appealed to this Court. The Subordinate Judge held that the receipt and the *furd* relied on by defendant No. 2 amounted to a written consent on the part of the landlord as required by section 88 of the Bengal Tenancy Act, to a division of the tenure and distribution of the rent, and therefore that the plaintiffs should have brought two distinct and separate suits against the contending defendant and the co-defendants. The Subordinate Judge further held that the two documents, the receipt dated the 14th Cheyt 1286 and the *furd* dated 30th Chaitra 1304, with the other evidence led to a strong inference "that at least for the last 21 or 22 years the contending defendant had been paying his quota of the rents of this tenure separately to the landlord and getting separate acknowledgments of payments from him and without any objection on the part of the landlord."

The only other documentary evidence referred to by the Subordinate Judge are two *talab bakis* for 1301 and 1305 filed by the plaintiffs, in which the defendant No. 2 seems to have been entered as paying a certain sum as rent for the taluq separate from defendants 1 and 3. The Subordinate Judge's conclusion seems to have been based on an inference drawn from all these circumstances and from the improbability that the plaintiff's agents would have signed the receipt or the *furd* if there had not been a division of the tenure. In another passage in his judgment the Subordinate Judge says: "It is sufficient for the defendant to show that the plaintiff has recognized his separate liability for a specific portion of the rent of a certain tenure, and having proved such recognition of the plaintiff, I think the plaintiff cannot again treat the defendant's liability for rent of the whole tenure as joint."

For the appellants it has been contended that the construction which the Subordinate Judge has placed on the receipt and the *furd*, and the manner in which he has treated the evidence for the purpose of enabling him to construe those documents is wrong in law:—that the documents do not amount to a consent in writing by the landlords to a division of the tenure and a distribution of the rent: and that he erred in dismissing the plaintiffs' suit. Further, even if he was right in holding that defendant No. 2 **[1032]** had made out his case, the Subordinate Judge ought not to have dismissed the plaintiffs' claim as against defendants 1 and 3 who had never appeared to contest the suit.

For the respondent it has been urged that the view of the law taken by the Subordinate Judge is correct, and it has further been suggested that his finding that there had been a consent in writing given by the landlord was a finding of fact based on the two documents and on the rest of the evidence, and that it is not open to this Court to interfere with that finding in second appeal.

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We may say at once that in our opinion the suggestion is unsound. The question which we have to determine depends entirely on the construction of the document Ex. B. which is the receipt dated the 14th Chaitra 1286 (26th March 1880); and we have to decide whether that document is a consent in writing by the landlord sufficient to comply with the provisions of section 88 of the Bengal Tenancy Act. The question is one of law and not one of fact, and in second appeal it is open to this Court to entertain it.

The *furd* Ex. A, on which the defendant No. 2 also relies, bears date the 30th Chaitra 1304, that is to say a date subsequent to the period for which a portion of the rents claimed by the plaintiffs in this suit are admitted to be due. That document, supposing it be admitted to be a consent in writing on the part of the landlord, could not be accepted as evidencing a division of the tenure prior to 1303 so as to bar the present suit.

We are not however prepared to hold that the entry No. 3 in the *furd* together with the signature of the *Sumarnavis* in acknowledgment of receipt of the sums mentioned in the document amounts to a consent in writing on behalf of the plaintiffs to the division of the tenure or distribution of the rent. The *Sumarnavis* does not appear to have been the Collector of rents of the plaintiffs, nor does it appear that he had any authority or that it was any part of his duty to consent on behalf of the landlords to a division of the tenure. There is nothing to prove that he knew anything about the tenure, or held any position other than that of a clerk whose duty it was to satisfy himself that the sum paid to him corresponded with the amount for which he gave the receipt. Even if he referred to other papers in the office he cannot be held by so doing to have acquired any authority to give a written [1033] consent to a division of the tenancy which would be binding on the landlords.

The document Ex. B, *viz.*, the receipt bearing date the 14th Chaitra 1286 (26th March 1880), is the really important document for the purpose of the suit. It runs as follows:—

"Dakhila on account of rent of attached hissya 2 annas 15 gundas in parganah Sherpore belonging to Shama Sundari Choudhurani, minor zamindar, under the Court of Wards, the general moktear being Babu Guru Charan Chakravarty under the Mymensingh Collectorate, dated the 26th March 1880—14th Chaitra 1286.

	Rs.	A.	P.	G.
Rent of taluq Ram Prosad Sircar Kristnapur, &c., through (marfat) Surja Kanta Acharja Raja Bahadur through Ananda Chandra Nag for 1286.	27	13	3	10
Road cess and public works cess of the said taluq	10	3	0	0
	38	0	3	10

Total thirty-eight Rupees three pies and ten krantas only."

This document we observe contains no specification of the total *jama* of the *taluk*, no statement of the area of the taluq or of the portion of the taluq which was separated and separately settle with Raja Surjya Kanta, nor of the share separated. It is on the face of it nothing more than an ordinary receipt for a certain sum paid as rent on account of the taluq by the Raja.

In the case of *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1) it was no doubt held by Full Bench of this Court that a receipt given by the

(1) (1898) I. L. R. 25 Cal. 531.

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landlord or by his duly authorized agent in the form of the receipt given in that case amounted to a consent in writing by the landlord to a division of the holding and a distribution of the rent payable in respect thereof within the meaning of section 88 of the Bengal Tenancy Act. The receipt referred to in that case however contained a recital that the tenant was registered in the landlord's *sherista* as a tenant of a portion of the original holding at a rent which was a portion of the original rent. The receipt in the present case contains no such recital, and fails to fulfil the conditions under which the receipt in that case was held to amount to a consent in writing by the landlord to the division of the holding. We have no hesitation in holding that the receipt (Ex. B) **[1034]** dated the 14th Chaitra 1286 does not amount to a consent in writing by the landlords within the meaning of section 88 of the Bengal Tenancy Act. This indeed was the view of the Subordinate Judge.

He however seems to have held that a document which failed on the face of it to comply with the provisions of section 88 of the Bengal Tenancy Act could by means of other evidence be construed to amount to a document which complied with those provisions. This too is the view contended for by the learned pleader for the respondent. In our opinion the view is unsound. The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old. It should therefore be complete in itself and embody distinctly the terms of the new contract. Should it fail to do so, the principle laid down in section 91 of the Evidence Act would apply and extraneous evidence to prove the terms of the contract would be inadmissible.

But apart from this we have to look at the evidence which appears to have been relied on for the purpose of construing the receipt into something which it was not on the face of it.

From the entries in the two *talub bakis* and the *furd* Ex. A, the inference has been drawn by the Subordinate Judge that the landlord had for 21 or 22 years received rent separately from the defendant No. 2 for his share in the taluq. Even supposing that we could accept the view that the facts support the inference which we do not, of what value is it to support the construction the Subordinate Judge has placed on the receipt? It was distinctly held by this Court in the case of *Buloram Paul* v. *Suroop Chandra Gooho* (1) that separate payments of rents by different tenants of one tenure did not vary the nature of the tenure. In the case of *Gour Mohun Roy* v. *Anund Mondul* (2) it was also held that the fact of some of the joint occupiers of a joint tenure paying portions of the rent due from all, corresponding with the shares for which the joint occupiers are liable, cannot prevent the zemindar from suing them all or making all answerable for the joint debt; and a similar view was taken in the case of *Rani Lalun Monee* v. *Sonamonee Dabee* (3). This view has never been dissented from and **[1035]** in the case of *Moharani Beni Pershad Koeri* v. *Gobardhan Koeri* (4) decided in 1902, it was held that when a holding is in occupation of several tenants at one entire rental the fact that the landlord's tehsildar has accepted from the various tenants proportionate parts of the rent does not bind the landlord to recognize a separation of the tenancy in the absence of evidence to connect the landlord with the receipt of any proportionate share of the rent by the tehsildar.

Even then if the inference be accepted that rent has been paid

(1) (1874) 21 W. R. 256.
(2) (1874) 22 W. R. 295.
(3) (1874) 22 W. R. 334.
(4) (1902) 6 C. W. N. 823.

separately by defendant No. 2 and received by the landlords for a long series of years, that in itself is not sufficient to constitute a division of the tenure, and what is in itself insufficient to denote a division of the tenure can hardly be accepted as sufficient to supply the defect in the receipt in the present case.

Beyond the receipt and the inference drawn from the *furd* of the year 1898 and the other evidence already referred to there is no evidence to prove that the landlord gave his consent in writing to the division of the tenure which has been pleaded by defendant No. 2 in his defence to the present suit. The receipt in our opinion fails to comply with the provisions of section 88 of the Bengal Tenancy Act, or to amount to a consent in writing by the landlord to the division of the tenure; and the inference fails to support the view that the tenure had been divided. The receipt then gains no greater value from the inference, and the conclusion at which the Subordinate Judge has arrived is not one which we are able to support.

We hold that the conclusions of the Munsif are correct, and that the defendant No. 2 has failed to prove that there was any division of the tenure with the consent of the landlord which would relieve him from liability jointly with the other defendants for the whole rent of the tenure. We accordingly set aside the judgment and decree of the Subordinate Judge and restore the judgment and decree of the Munsif in the plaintiff's favour. The appeal is decreed with costs.

Appeal allowed.

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31 C. 1036 (=8 C. W. N. 880.)

[1036] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

HALIMANNISSA CHOWDHRANI *v.* SECRETARY OF STATE FOR INDIA.*

[5th August 1904.]

Sale for arrears of Revenue—Revenue Sale Law (Act XI of 1859) ss. 6, 38 and 58—Public Demands Recovery Act (Bengal Act VII of 1868), s. 11—Sale under s. 11 of Act VII (B.C.) of 1868—Arrears of rent due to a Dakhal situated in a Government khas mehal—Highest bid offered by the defaulter's agent—Collector's closing the bid and purchasing the property at that bid, legality of.

A *dakhal* situated in a Government khas mehal fell into arrears, and it was advertised for sale under Act XI of 1859 pursuant to the provisions of s. 11 of Act VII of 1868 (B.C.)

Before the sale the agent of the defaulter offered to deposit the arrears, but the Collector refused to receive the money. The Collector began with a bid of one rupee; the agent of the defaulter followed with a bid of ten rupees, but the Collector enquired whether any one was willing to increase the bid, and as no one came forward, the Collector forthwith closed the bid and declared that he had purchased the property on account of Government on the bid of ten rupees, under s. 58 of the Revenue Sale Law (Act XI of 1859), inasmuch as that bid was insufficient to cover the arrears realizable.

Upon a suit to set aside the sale:—

Held, that the sale was bad, inasmuch as the procedure followed by the Collector and the purchase made by him were not in accordance with the provisions of s. 58 of Revenue Sale Law (Act XI of 1859).

[Dist. 46 I. C. 447=22 C. W. N. 769=28 C. L. J. 51.]

APPEAL by the plaintiff, Halimannissa Chowdhrani.

* Appeal from Original Decree, No. 402 of 1902, against the decree of H. Walmsley, District Judge of Noakhali, dated July 23, 1902.