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31 C. 783=8 C. W. N. 909.

concealing stolen property, witness No. 17 saw the accused in Hill Tipperah in company with Syedali and Altabali, who are notorious bad characters of the town and witnesses 24, 25 and 26 prove the occurrence of theft cases in Hill Tipperah, in which however there were no sufficient reasons for suspecting accused.

[783] None of the witnesses are shown to have any reason for wishing to injure the accused and it is absolutely certain that the present case is not one of those which has its origin in party feeling. The accused has cited 18 defence witnesses, most of whom are related to him. The others know little or nothing about him beyond the fact that he is now working as a driver of a tikka-gari; it is mainly upon this that they base their opinion as to his character. The defence evidence offers no satisfactory explanation of the general consensus of opinion among the prosecution witnesses that the accused is an associate of thieves and himself a suspected thief. I therefore direct the accused to execute a bond of Rs. 200 with two securities of Rs. 100 each to be of good behaviour for a period of one year. In default he will undergo rigorous imprisonment for that period.

M. Syed Shamsul Huda for the petitioner. The petitioner was only released from jail a few months ago, and it is hardly fair to have proceeded again against him under s. 110 of the Criminal Procedure Code without giving him an opportunity of reforming. The evil reputation he had still follows him. He has not had sufficient time to throw off the slur cast upon him by his imprisonment. The evidence against him was mainly that of general repute. Under the circumstances it would be impossible for a man to acquire a good reputation in so short a time.

PRATT AND HANDLEY, JJ. The petitioner was released from jail on the 26th September 1902, after having undergone one year's imprisonment on failure to furnish security for his good behaviour under section 110 of the Code of Criminal Procedure. About fifteen months afterwards fresh proceedings of the same nature were started against him and in the result he has been again ordered to furnish security to be of good behaviour for a period of one year.

We think that the petitioner has not had a sufficient *locus pœnitentiæ* and that the evil reputation which he had before his imprisonment has still followed him and permeated the evidence of many of the witnesses. We therefore think that the order of the Magistrate dated the 29th February 1904, should be set aside and we order accordingly.

Rule made absolute.

31 C. 786 (=8 C. W. N. 325.)

[786] APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Stevens.

GHOLAM MOHIUDDIN HOSSEIN *v.* KHAIRAN.*

[6th January, 1904.]

Ejectment, partial—Joint estate—Co-sharer landlord, rights of—Service tenure—Fair and equitable rent—Bengal Tenancy Act (VIII of 1885).

Were tenants where originally let into possession of land by all the co-sharers in a zemindari, a co-sharer landlord is not competent to obtain a partial ejectment of the tenants to the extent of his share, unless the tenancy has been determined by all the co-sharers.

Hulodhur Sen v. *Goroo Doss Roy* (1) *Radha Proshad Wasti* v. *Esuf* (2) and *Kamal Kumari Chowdhurani* v. *Kiran Chandra Ray* (3) distinguished.

* Appeal from Appellate Decree No. 1886 of 1901, against the decree of W. H. Lee, District Judge of Purneah dated the 12th of July 1901, reversing the decree of Sasi Bhusan Chatterjee, Subordinate Judge of that District, dated the 29th of August 1900.

(1) (1873) 20 W. R. 126.
(2) (1881) I. L. R. 7 Cal. 414.
(3) (1898) 2 C. W. N. 229.

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(Semble) In the case of a service tenure created by all the co sharers in a zemindari, not governed by the provisions of the Bengal Tenancy Act, a co-sharer landlord is not competent to sue the tenants for fair and equitable rent payable in respect of his share, for failure of service originally performed.

[Ref. 35 Cal. 807=7 C. L. J. 483; 4 N. L. R. 45; 11 I. C. 738; 53. I. C. 243. Dist. 8 A. L. J. 272=21 Cal. 306. Rel on 11 I. C. 696.]

SECOND APPEAL by the plaintiffs Nos. 1 to 3, Gholam Mohiuddin Hossein and others.

The plaintiffs Nos. 1 to 3, Gholam Mohiuddin Hossein and others, heirs of the late Nawab Syed Atta Hossein of Khagra, represented by A, C. Rolt, Manager, Court of Wards, are the 8 annas 1 odd gunda proprietors of the lands in dispute, consisting of 141 bighas 4 and odd cottas, situate in mouza Saripnikla. The other plaintiffs are executors to the estate of Dharm Chand Lall, who was proprietor of 2 annas 16 and odd gundas share of [787] the lands in dispute. The defendants 2nd party, Asgar Reza and others, are the remaining proprietors. The suit was for partial ejectment of the defendants 1st party, Mussummut Khairan and another, described as the tenant-defendants, or in the alternative, for the determination of a fair and equitable rent to be payable to the plaintiffs, by the tenant-defendants. It was alleged that the property was held jointly by all the co-sharer landlords; that the lands were granted by the predecessors in interest of the present proprietors to the ancestor of the tenant-defendants on service tenure as remuneration for the performance of the service of *furrash*; that they were not at present disposed to perform such services nor did the plaintiffs require their services, that they (the tenant-defendants) were not entitled to hold the lands without consideration, and that a notice calling upon them either to give up the lands or to enter into a settlement at a fair and equitable rent in respect thereof was served on them by the plaintiffs, but that they had not complied with the same.

The defence of the tenant-defendants substantially was a total denial of the plaintiffs' rights. It was alleged that they did not hold any service tenure under the plaintiffs and that they had become absolute proprietors of the lands in dispute by non-payment of rent and non-performance of any service. They also denied service and validity of the notice.

The Subordinate Judge held that the service of notice was not duly proved. He found that at the inception the tenure was not a service tenure and that it bore a fixed rental, but that subsequently it was changed into a service tenure and this state of things continued, till the death of Nawab Syed Atta Hossein, when the Court of Wards called upon the tenants to make a fresh settlement at a much higher rate of rent. He held that the tenant-defendants were entitled to possess the lands at a rate of rent, which he fixed, and the suit was decreed in a modified form accordingly.

Both the plaintiffs and the tenant-defendants preferred appeals to the District Judge, who dismissed the suit. He held that the tenure was *chakran* and as the other co-sharer landlords were not joined as plaintiffs, the suit could not hold good against the tenant-defendants in the present form.

[788] Babu *Ram Charan Mitter*, *Government Pleader*, for the appellants.

Babu *Nalini Ranjan Chatterji* (Moulavi *Mahomed Ishfuk* for Moulavi *Mahomed Seraj-ul-Islam*, with him), for the respondents.

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HILL AND STEVENS, JJ. The appellants before us were the plaintiffs Nos. 1 to 3 in the Court of first instance and are proprietors to the extent of eight annas odd gundas in a parcel of land comprising 141 bighas, which is in the possession of the persons, who have been referred to as the principal defendants in the suit. With the appellants certain other persons joined as plaintiffs, who represented a two annas interest in the same property, and the remaining interest is vested in the *pro forma* defendants. The suit was for what has been described as partial ejectment of the principal defendants, that is to say, the plaintiffs asked for khas possession to the extent of their share in the land jointly with the principal defendants, and there was an alternative prayer that, if the Court should think fit, the principal defendants might be declared liable to pay to the plaintiffs a fair and equitable rent to be determined by the Court.

The plaintiff's case was that the tenant-defendants held the lands in suit in lieu of certain services to be performed by them as *furrashes*; and that as they no longer performed or were disposed to perform these services, they had consequently served upon them a notice calling upon them to quit and give up possession of the land, but they failed to do so; and hence the suit.

In the Court of first instance, the plaintiffs obtained a decree but on appeal, that decree was reversed by the learned Judge and the suit was dismissed.

Here it is contended that the learned Judge was wrong in dismissing the suit: and the points pressed upon us for the appellants were that the learned Judge should have given them a decree for partial ejectment or that, if they were not entitled to that relief, he should have fixed a fair and equitable rent, to be paid to them by the principal defendants for the occupation of the land. It was further contended that if any notice to quit was necessary as a preliminary to the action, the action, the case ought to be [789] remanded for the purpose of having it determined, whether such a notice had not in fact been served upon the principal defendants, since, although the point had been raised in the pleadings, no decision had been arrived at on it by the Court below.

The judgment of the learned Judge is not very clear, I confess, to my mind, as to the actual nature of the relation subsisting between the principal parties to the suit; but the Subordinate Judge has given a history of the tenant-defendants' tenure, which has, I think, only to a very slight extent been dissented from by the learned Judge, the difference between them being that, while the Subordinate Judge arrived at the conclusion that in its inception the tenure was held at a pecuniary rent and was afterwards by consent of parties converted into a service tenure, the learned Judge has found that it was from the beginning a service tenure and has so continued down to the present time. Whether, as the plaintiffs assert, there had been any discontinuance on the part of the tenant-defendants of the service for the rendering of which they had been permitted to hold possession of the land, there has been no finding. But we must take it, in the absence of a finding to the contrary, that the tenure being of the nature found by the Lower Appellate Court, the principal defendants were and are willing, if indeed the point be really material, to render the services, in consideration of which they have held the land, if they be called upon to do so. But the learned Subordinate Judge has indicated an explanation of the present attitude of the plaintiffs towards them, pointing out that on the death of one of the

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co-sharers in the zamindari, the estate passed into the hands of the Court of Wards and that the Court of Wards being of opinion that the services rendered were not a fair equivalent for the value of the land held, endeavoured to get something of a higher value from the tenants, and that its attempt has led to the present difficulty.

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Reverting to the questions, which, as I have stated, were raised before us, the learned vakil for the appellants founded his contention that his clients were entitled to a partial ejectment upon three cases, which he cited to us. The first was the old case of *Hulodhur Sen* v. *Gooroo Doss Roy* (1). Then he referred to the case [790] of *Radha Prosad Wasti* v. *Esuf* (2) and lastly to the case of *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy* (3). These cases, however, all of them, are cases in which an individual co-sharer has let a person into the possession of the land as tenant without the consent of the co-sharer seeking to eject that person from the land: and we think upon that ground they are distinguishable from the present case, because, as we understand the judgments of the Courts below with respect to the position of the parties, the defendants were originally let into possession of the land as tenants by all the co-sharers in the zamindari; and it appears to us that, in order to justify any individual co-sharer in seeking now to eject them, it must be shown that the tenancy so created by all the co-sharers has been determined by all of them, and the law will not permit a single co-sharer to take separate and independent action, such as has been taken by the plaintiffs in this case, for the purpose of determining even so far as his own share is concerned a tenure or tenancy, which has been created by the common consent of all the co-sharers. The law is clearly so laid down in the case of *Radha Prosad Wasti* v. *Esuf* (2), to which I have already referred, at page 417 of the report. It seems to us, therefore, that there being no evidence of the determination of this *chakran* tenure by the common consent of the co-sharers, who now represent the original creators of the tenure, and the tenancy being therefore still a subsisting tenancy, it is not competent to the plaintiffs to maintain a suit for ejectment of the respondents.

In this view, it is unnecessary that we should consider in detail the other points raised on behalf of the appellants, for the judgment of the Lower Court may be maintained upon the principle to which I have just referred. But we may add, I think, that this case, not being governed by the provisions of the Bengal Tenancy Act, but being referable to what I may call for the sake of convenience the common law of the country, it is difficult to perceive upon what footing it would be competent to the Court to grant the relief secondly claimed by the plaintiffs, namely, the fixing as between them and the tenant-defendants, a fair and [791] equitable rent, which would be in effect to create a new contract of tenancy between them. However, it is sufficient, for the purpose of this appeal, to say that on the ground we have already mentioned, we think that the judgment of the Court below should be maintained: and we accordingly dismiss the appeal with costs

Appeal dismissed.

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(1) (1873) 20 W. R. 126.
(2) (1882) I. L. R. 7 Cal. 414.
(3) (1898) 2 C. W. N. 229.