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APPELLATE CIVIL.

31 C. 703=8 C. W. N. 320

We think the lower Appellate Court has misunderstood the *ratio decidendi* of the case of *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (1) In that case the zemindar defendant seems to have been put in actual possession of the lands by Government, and, while in that position, to have let the lands to the tenant defendants. The plaintiff in that suit did not at first come to terms with him. In the course of that suit it was settled on what terms the plaintiff was to obtain possession of the lands, and when that was done, it was too late to turn out the tenant defendants, for they had been accepted as tenants by the *de facto* landlord. The case is quite different in the present suit. The zemindar defendant seems to have accepted the tenant defendants as his tenants and to have taken rent from them *mala fide*. It has been found by both Courts that he had no right to do this under the terms of the pottah he had granted to the putnidar, against whom he had no further claim, and of which terms he must have been well aware. The tenant defendants may have acted *bona fide*, but the zemindar defendant did not. The case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (2) is the leading case on the subject. It made a great encroachment on the strict [706] law, according to which a landlord, who has no title, can give no title to a third person and a person, who has a title, can give a title to another only for as long as his own title endures. But in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (2) and the cases in which it has been followed, the *de facto* zemindar was litigating with another or was deprived of his title as the result of a subsequent litigation. It could not be expected that he would let his lands lie fallow, and it would be hard on the raiyats, if they were afterwards ejected, when it was found that he had no title. Hence they were held to have acquired the status of tenants. But it never was intended to be laid down that a person knowing that he had no title could induct persons into the lands of others and that the persons so inducted could not be evicted by the rightful owners. This has been laid down in no case. If this were the law, then any outsider could constitute any other person the tenant of any landlord and deprive such landlord of all right of letting his own land. This cannot be allowed. We therefore consider the decree of the lower Appellate Court in these cases to be wrong. We set it aside and restore the decree of the first Court. This order carries costs.

Appeal decreed.

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31 C. 707.

[707] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Bodilly and Mr. Justice Staley.

NEPAL CHANDRA GHOSE *v.* MOHENDRA NATH ROY CHOWDHURY.*

[20th April, 1904.]

Landlord and tenant—Suit—Rent—Co-sharer landlord—Variance between pleading and proof—Converting suit of one nature into one of a different nature.

* Appeal from Appellate Decree No. 196 of 1901, against the decree of Jogendra Nath Roy, Additional Subordinate Judge of 24-Pergunnahs, dated the 12th November 1900, reversing the decree of Kally Prosanno Roy, Munsiff of Basirhat, dated the 25th January.

(1) (1900) 4 C. W. N. 814. (2) (1893) I. L. R. 20 Cal. 708.

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When a landlord sues for the entire rent of a holding, but it is found that he is entitled only to a share of the rent, the suit must be dismissed, unless his co-sharer landlords are made parties to it, or an arrangement is proved between the landlords and the tenant that the latter should pay each landlord his proportionate share of the entire rent.

Guni Mahomed v. *Moran* (1) followed.

[Foll. 42 I. C. 452=2 Pat. L. W. 227.]

SECOND APPEAL by the defendants, Nepal Chandra Ghose and another.

The plaintiff, Mohendra Nath Roy Chowdhury, instituted a suit for the recovery of arrears of rent amounting to Rs. 105-12-6 pies, on the allegation that within his zemindari the defendants held a *jama* of about 11½ bighas of land at an annual rent of Rs. 6-14 annas in cash, besides certain quantities of paddy. Rent was claimed for the years 1303, 1304 and 1305 B.S.

The defendants contended that the plaintiff owned only the 4 annas of the *maliki* interest, the other shares being owned by the sons of one Kailash Nath Ghose and one Bama Sundari, who were not parties to the suit; that the plaintiff had brought the suit on the fraudulent allegation that he had the sole right; that they, the defendants, held under the *ijaradar* and were not liable to the plaintiff for rent; and that the holding was now held by one [708] Chandra Nath Chowdhury, who had purchased the defendants' interest at an auction sale.

The Munsif dismissed the suit, holding that the plaintiff had failed to adduce satisfactory evidence of realisation of rent. As to the admitted 4 annas share of rent of the plaintiff, he observed "Plaintiff did not claim share of rent of his share, in proper way."

On appeal, the Subrodinate Judge held that there was no doubt that the plaintiff was entitled to recover from the defendants 4 annas share of rent, if Chandra Nath had not acquired the holding by purchase. The case was remanded for a finding as to whether Chandra Nath had purchased the defendants' holding and whether the plaintiff was bound to recognise him. The Munsif having found that Chandra Nath had not acquired any right by his purchase of the holding, which was not transferable, the Subordinate Judge decreed the suit for 4 annas share of the rent, holding that there was no proof that the plaintiff was entitled to recover the entire rent.

Dr. *Ashutosh Mukerjee* (Babu *Biraj Mohan Mozumdar* with him), for the appellants. The suit ought to have been entirely dismissed. *Guni Mahomed* v. *Moran* (1), lays down that a suit brought by a co-sharer landlord for rent is not maintainable, without making the other co-sharers parties thereto, in the absence of any arrangement between the co-sharer landlords and the tenant that the latter should pay each co-sharer his proportionate share of the entire rent. Such an arrangement has not been alleged or proved in the present case, nor could an issue on the point be framed and decided, on the pleadings.

Babu *Sarat Chandra Roy Chowdhury*, for the respondent. It is not open to the other side to raise the point now, as no issue was joined on it. If that had been done, the arrangement referred to in the case of *Guni Mahomed* v. *Moran* (1) might have been proved. The relief granted to the plaintiff by the lower Appellate Court was not inconsistent with, but only less than the relief claimed in the suit.

Dr. *Ashutosh Mookerjee*, in reply.

(1) (1878) I. L. R. 4 Cal. 96; 9 C. L. R. 371.

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31 C. 707.

[709] MACLEAN, C. J. In this suit the plaintiff claimed the whole 16 annas of the rent. It turned out that, at the most, he was entitled only to a 4 annas share, and a decree has accordingly been given for such share. The defendants appeal.

Their contention is that the plaintiff is not entitled to a decree even for that share. It is argued that the plaintiff sued originally for the whole 16 annas share, but is found entitled only to a 4-anna share of the rent, that his co-sharer landlords are not co-plaintiffs nor defendants, that there is no allegation or proof of any arrangement between the landlords and the tenants that the tenants should pay each co-sharer his proportionate share of the entire rent and that, in the absence of any such arrangement, the suit is not maintainable. This contention is supported by the decision of a Full Bench of this Court, *viz.*, *Guni Mahomed* v. *Moran* (1).

A suit originally of one nature has been converted into a suit of an entirely different nature. As I have pointed out the plaintiff originally claimed 16 annas of the rent. It was found that he was only entitled to 4 annas; but as there was no arrangement between the co-sharers landlords and the tenants as to the payment to each co-sharer of his proportionate share of the rent, I do not see how the suit can be maintained.

In respect to the argument that the question as to the plaintiff's right to receive separately 4 annas of the rent was not put in issue or decided, the answer is that suggested by the learned vakil for the appellant, that the suit being for the whole 16 annas share, it was incumbent on the plaintiff, in the absence of his co-sharers, to show that he was entitled to the entire 16 annas. The suit is not based on the footing of his only being entitled to 4 annas of the rent. I think, therefore, that the suit must fail and be dismissed with costs throughout, the judgment of the Court of Appeal below being reversed.

BODILLY, J. I concur.

STALEY, J. I concur.

Appeal decreed.

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31 C. 710 (=1 Cr. L. J. 797.)

[710] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

EMPEROR *v.* LUCHMUN SINGH.*

[26th and 27th April, 1904.]

Extortion—Confinement—Abetment—Evidence—Appeal—Court—Misjoinder—Indian Penal Code (Act XLV of 1860) s. 347—Criminal Procedure Code (Act V of 1898), s. 428.

A Head constable in charge of a police outpost agreed to drop proceedings against K, who had been arrested on a certain charge on condition that K paid to him a sum of money. The Head constable sent away K in charge of two chowkidars to procure the money.

In order to effect this object the chowkidars subsequently confined K at various places and maltreated him.

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* Criminal Revision No. 330 of 1904, made against the order passed by W. Teunon, Sessions Judge of Cuttack, dated the 26th of February 1904.

(1) (1878) I. L. R. 4 Cal. 96; 2 C. L. R. 371.