

Before Mr Justice Kemp and Mr Justice Glover.

J. B. BULLEN AND ANOTHER (DEFENDANTS) v. LALIT JHA AND OTHERS (PLAINTIFFS).*

1869
July 8.

Suit for Rent—Possession by Lessee.

A suit for rent will not lie where the lessee has never obtained possession of the land leased to him.

Mr R. T. Allan for appellants.

Baboo Kali Krishna Sen for respondents.

THE facts sufficiently appear in the judgment of

KEMP, J.—This was a suit for the rent of 1275. The plaintiff alleges that the defendant took a lease of the properties for which the rent is claimed from the year 1274 to the year 1283, at a jamma of rupees, 249, on a kabuliati dated the 20th September 1865. The first Court, on the plea raised by the defendant that he never obtained possession, framed an issue, whether the plaintiff the landlord, had given the defendant possession or not; and after a local inquiry found that the landlord had never given the defendant possession, and that the landlord himself had never been in possession, and therefore dismissed the suit. On appeal, the Judge reversed the decision of the first Court, finding that in a suit for the rent of 1274, the Judge has found that the defendant had signed a lease and had got possession according to his own admission, and therefore was answerable for the rent. It is not disputed that the defendant signed a kabuliati; the real contention on his part is that before the landlord can maintain his action for rent against him, he ought to show that he has given possession to the tenant, but not having been able to show that, he is not entitled to recover any rent. We think that the real issue between the parties is as laid down in the first Court, namely whether possession has been given or not; and we think that it would be highly inequitable to pass a decree against the defendant for rent, unless we are satisfied that he is in possession of the land leased to him. It appears to us very clear that he is not in possession; the local inquiry establishes the fact of non-possession, and all the probabilities of the case support the defendants' contention, for it is not easy to understand why an indigo planter should give up land which he could cultivate at a profit by refusing to pay rent, a rent which is certainly not an excessive one if he were in possession. The Judge alludes to an admission by the defendants' manager Carleton. It appears that Carleton did put in a petition under Act VI. of 1862, applying for permission to measure the estate, and there may have been a recital in that petition that he was in possession; it

* Special Appeal, No. 1012 of 1869, from a decree of the Judge of Saran, dated the 23rd March 1869, reversing a decree of the Officiating Collector of that district, dated the 13th November 1868.

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appears to us very probable that this petition was put in, in the attempt to get possession, but be that as it may, we cannot overlook the fact which has been found on the evidence, that the tenant has not been put in possession. Following therefore the decision in *Hurish' Chunder Koondoo v. Mohinee Mohan Mitter* (1), which has already been followed by us in another case, we reverse the decision of the Judge, restore that of the first Court, and decree this appeal with all costs payable by the special respondents.

Before Mr Justice Norman and Mr Justice E Jackson,

RANI SAMASUNDARI DEBI (PLAINTIFF) v. MESSRS. JARDINE
SKINNER AND OTHERS (DEFENDANTS) *

Joint Ownership—Partition—Costs.

1869
July 13.

IN CASE of joint ownership each party has a right to demand and enforce partition. A shareholder of a Patni Talook can claim and enforce a partition of such Patni Talook as against his co-sharers, but such partition would not affect the liabilities of the parties under their contract with the zemindar.

The costs of the suit as well as for effecting a partition must be borne by each party, as such expenses are not caused by any wrongful act of either party, but by the nature of their tenancy.

Baboo *Srinath Das* and *Mohini Mohan Roy* for appellant.

Mr R. T. *Allan* and Baboo *Bhairab Chandra Banerjee* for respondent.

THE facts sufficiently appear in the judgment of

NORMAN, J.—The plaintiffs hold under a patni lease 13as. 6g. 2c. 2k. of an estate called Taraff Kusba in Rajshahye; and the defendants under a distinct patni granted by co-harers in the zemindari entitled to such fractional share, hold 2as. 13g. 1c. 2k in the same estate Taraff Kusba. The plaintiff sues for partition, alleging that she has suffered inconvenience and loss in consequence of the defendants' attempts to enforce the cultivation on indigo.

The first Court decreed a partition. The Judge reversed this order and dismissed the suit. From this decision the plaintiff appeals. Several cases were referred to by the Judge and one not noticed by him was cited before us: *Banimadhub Bose v. Pearee Lal Mundul* (2); *Mathur Chunder Kurmohar v. Manik Chunder Bungo* (3); *Oomesh Chunder Shaha v. Manick Chunder Bonick* (4); *Gouri Sankar Roy v. Anand Mohan Moitro* (5).

Special Appeal, No. 1581 of 1863, from a decree of the Judge of Rajshahye, dated the 13th March 1868, reversing a decree of the Judge of the Small Cause Court exercising the power of Principal Sudder Ameen of that district, dated the 19th September 1867.

(1) 9 W. R., 582.

(4) 8 W. R., 123.

(2) S. D. A. Rep., 1853, 536.

(5) 9 W. R., 478.

6 W. R., 192.