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MUSSAMUT LAKHU KOWAR v. ROY HARI KRISHNA SING.

"mokurrari istemrari" lease protected for ever a tenant from enhancement; they say, "if it can be shown that the defendants' sub-tenure is a 'mokurrari istemrari' there is an end of the matter."

I refer to this case merely because it was made use of in the argument before us.

I would reverse the decision of the Additional Judge and restore that of the Sudder Ameen, with costs of all Courts on the special respondents.

KEMP, J.—I concur in this judgment.

Before Mr. Justice Macpherson and Mr. Justice E. Jackson.

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July 8

GANGA NARAYAN DAS AND OTHERS (DEFENDANTS) *v.* SARODA MOHAN ROY CHOWDHRY (PLAINTIFF.)*

Suit for Rent—Co.-Sharers—Enhancement—Proof of Receipts.

A landlord, one of several co-shares cannot sue a tenant of the joint estate for his separate share of the rent, unless the tenant has paid or agreed to pay to him separately.

In decreeing enhanced rent, it is necessary to specify distinctly on which of the grounds stated in the plaint enhancement is allowed.

To prove receipts it is not necessary to produce the writer of them. The ryot can prove his own receipts

Baboo *Mahendra Lal Shome* and *Kedar Nath Chatterjee* for appellants.

Baboo *Srinath Das* and *Ramesh Chandra Mitter* for respondent.

THE facts are sufficiently set out in the judgment of

MACPHERSON, J.—I think that this case ought to be remanded in order that it may be tried *de novo* by the Judge, whose present decision is in various respects defective, The plaintiff sues as one of several joint proprietors to recover a certain

* Special Appeal, No. 102 of 1869, from a decree of the Officiating Judge of Rungpore, dated the 18th November 1868, affirming a decree of the Deputy Collector of that district, dated 29th July 1868.

proportion of rent which he says is payable by the defendants in respect of lands occupied by them. The co-sharers are not parties to the suit. The defendants have throughout pleaded that as the plaintiff holds this property jointly with others the present suit is bad in the absence of the co-sharers. The first Court held that the proprietors were in the habit of making collections separately, and therefore that the suit would lie.

The Judge upon this part of the case simply says :—"There "is no doubt about the extent of the plaintiff's interest; and "there are several precedents to the effect that a shareholder "can sue to enhance the rent, if his share is definitely known "and his title is not contested." The law, as laid down by the Judge here, is correct only to a certain extent. If the plaintiff can prove that the defendants have heretofore recongnized him as being the proprietor of a particular share of the property, and have paid to him separately a certain proportion of the rent, then no doubt the suit will lie against them, without the other joint proprietors being made parties. But, unless the plaintiff either proves that the defendants have paid their rent to him separately, or proves an express agreement on their part to pay to him separately, the suit will not lie in the absence of the other shareholders. The Judge must consider carefully what the facts are with reference to this part of the case.

The next point on which the judgment of the lower Appellate Court is defective is as to the reasons for which, in the Court's opinion, the defendants are liable to pay rent at an enhanced rate for the year 1274. The defendants denying their liabilty to have their rents enhanced, the judgment should say distinctly on which of the grounds on which enchancement is claimed by the plaintiff the enchancement is decreed. It is not enough for the lower Court to find generally that the plaintiff is entitled to rent at an enchanced rate; there must be a distinct finding as to the ground on which he is so entitled.

With reference to the contention of the defendants that they have a right of occupancy, it appears to me that the Judge has quite misconceived the nature of the evidence necessary to be adduced by the defendants in order to prove certain *dakhilas* and other documents put in by them. The Judge says :—"I

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"am obliged to concur with the Deputy Collector that the "receipts filed are not properly proved by the the best evidence "*i. e.*, that of the writers, when alive in all cases." The Judge apparently labors under the impression that, when the writer of a document is alive, the document cannot be proved save by the evidence of that writer; at any rate, that it is the duty of the person who propounds the document to bring the writer before the Court. But there may be many people who can prove a document quite as well as the writer of it; and a person who wishes to put a document in evidence is under no sort of obligation to call the writer as his witness, if he has any other sufficient means of proving what he wants.

In the case of a receipt granted to a ryot, whether the writer of the receipt be or be not alive or producible, it would be *primâ facie* quite sufficient if the ryot were to depose that he himself, on paying his rent, had received the receipt from the zemindar's gomasta to whom he paid his rent, and that the gomasta gave it to him, saying that it was a receipt for the rent so paid. So also it would be sufficient if he swore he saw the zemindar or gomasta sign the receipt, or if he were to produce a witness (by which term I do not mean one whose name appears in the document as attesting its execution) who deposed that the receipt was written and signed by the gomasta in his presence. The evidence of the writer of a paper is not necessarily any better evidence than would be that of other persons who can of their own knowledge speak to such facts as will satisfy the Court that the document is really what it purports to be.

The lower Appellate Court does not seem to have wholly discredited the documents produced by the defendants. On the contrary the Jndge says:—"I do not entirely concur with "the Deputy Collector in his remarks on the *dakhilas* * * * "they are simply not proved." It appears to me therefore that the Court must, in re-trying the case, be very careful to see that it does not reject, as being unsupported by evidence, documents which are, in fact, supported by good legal evidence: of the weight to be attached to the evidence before him, the Judge will, of course, form his own opinion.

The judgment of the Judge is reversed, and the case is

remanded to him, in order that it may be tried and decided anew with reference to the above remarks.

The appellants will get their costs of this appeal.

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JACKSON, J.—I concur in the remarks of Mr. Justice Macpherson, and in remanding the case for a fresh decision.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

MOHAN CHAND KANDU (PLAINTIFF) v. AZIM KAZI CHOWKIDAR (DEFENDANT.)* 1869 June 12

Suit against the Representatives of a Deceased Person—Limitation.

Where the defendants in a suit died before the plaint against him was filed, and the suit was sometime after carried on against his representatives, the time during which the suit was being prosecuted *bonâ fide* against the dead man, may be deducted in calculating the period of limitation against his representatives.

See also 13 B L. P 154

THE following case was submitted by the Judge of Small Cause Court of Jessore for the opinion of the High Court :—

"This was an action brought on a bond alleged to have been executed by the defendant on the 29th Falgun 1271, corresponding with 11th March 1865, for rupees 11, re-payable with interest at 37½ per cent. per annum in Magh 1272, corresponding with February 1866.

"The plaint was filed on the 8th February instant, and the trial was fixed for the 24th or 14th Falgun 1275, on which day it appeared, from the evidence of the peon who went to serve the summons, that the defendant had died about a year before the filing of the plaint, and the plaintiff's pleader thereupon applied to the Court under section 104, Act VIII. of 1859, to substitute the legal representatives as defendants, but this I refused to do, as it appeared to me that the suit would be barred as against them under the ruling in the case of *Rajkishoree Dassee* v. *Bodunchunder Shaha* (1).

"It is urged by the plaintiff's pleader, that as his client was not aware that the defendant had died before the filing of the plaint,

* Reference from the Judge of the Small Cause Court of Jessore.

(1) 6 W. R., 298.