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RAMNATH TOLAPATTRO v. DURGA SUNDARI DEBI.

to be decided by the Judge. Had the District Judge come to the same conclusion as the Subordinate Judge, the question we now decide need not have been raised at all; and it would have been better that it should not have been raised except under real necessity.

Appeal allowed.

Before Mr. Justice L. S. Jackson and Mr. Justice Tottenham.

1878
June 7.

JADU DASS (PLAINTIFF) *v.* SUTHERLAND AND ANOTHER (DEFENDANTS).*

Co-sharers,—Suit by one, for Separate Share of Rent—Parties.

A co-sharer, on the allegation that a tenant, in collusion with the rest of the co-sharers in the estate, had withheld the payment of his rent (hitherto paid jointly to all the co-sharers), brought a suit for the recovery of his share of the arrears of rent, making the tenant and all the colluding shareholders defendants in the suit. *Held*, that such suit was maintainable.

Doorga Churn Surma v. *Jampa Dassee* (1) followed.

THIS was a suit for the recovery of arrears of rent. In this case the plaint stated that the plaintiff and the second and succeeding defendants had, under the will of the plaintiff's father, become the joint owners of certain lands; that the first defendant had, on the 27th Kartick 1276, B. S. (11th November 1869), and again on the 2nd Aughran of the same year (16th November), taken leases of portions of those lands, but had failed to pay rent for the years 1873 to 1876; that the plaintiff had applied to the second and succeeding defendants to join him in a suit to recover the rent so due, but that they, acting in collusion with the first defendant, had refused to become parties to such suit. The present suit was thereupon instituted to recover the plaintiff's share of the rent due for those years, the other co-sharers being made *pro forma* defendants in the suit.

Appeal from Appellate decree, No. 221 of 1878, against the decree of C. D. Field, Esq., Judge of Zilla East Burdwan, dated the 15th of December 1877, reversing the decree of Baboo Radha Kissen Sen, Munsif of Raneegunge, dated the 29th of June 1877.

(1) 12 B. L. R., 289; S. C., 21 W. R., 46.

The first defendant in his written statement alleged that the second and succeeding defendants, purporting to act under authority given them by the will, had removed the plaintiff from the office of Mohunt, which he held at the time the leases were made; and that no present right of suit, therefore, accrued to the plaintiff; that during the years 1280 and 1281 (1873-74), when the plaintiff was still in office, he, in conjunction with the second and succeeding defendants, had agreed to certain abatements being made in the amount of rent due on the leases; that in the year 1282 (1875) still further abatements had been agreed to by one Horeedas, the successor in office to the plaintiff; and that an ekrar to that effect was executed between the parties. A preliminary objection was taken on behalf of the first defendant to the suit, on the ground that the plaintiff, being only the holder of a fractional share of the lands, could not sue for the recovery of his share of the rent, and an issue to this effect was accordingly raised at the first hearing. It was admitted on both sides that the plaintiff and his co-sharers, the *pro forma* defendants, had together granted each of the leases, and had also hitherto jointly collected the rent.

The Court of first instance thought there was sufficient evidence to show collusion between the first defendant and the *pro forma* defendants, and on the authority of *Jagadamba Dasi* v. *Haran Chandra Dutt* (1), *Gunga Gobind Sen* v. *Gobind Chunder Doss* (2), and *Doorga Churn Surma* v. *Jampa Dassee* (3) held, that the suit was maintainable. The lower Appellate Court held there was no proof of collusion; but was further of opinion that, even if collusion had been established, the proper remedy was a suit for damages against the colluding parties, and not a suit for rent. For these reasons the Court reversed the decision of the lower Court.

The plaintiff appealed to the High Court.

Baboo *Rash Behary Ghose* and Baboo *Juggut Chunder Banerjee* for the appellant.

(1) 6 B. L. R., 526 note. (2) 11 B. L. R., App., 31.
(3) 12 B. L. R., 289; S. C., 21 W. R., 46.

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JADU DASS v. SUTHERLAND.

Mr. *Orr* and Baboo *Omernath Bose* for the respondents.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts, proceeded as follows):—The first question taken before the District Judge on the defendants' appealing, that the plaintiff had been dismissed from his post of Mohunt, failed. The second ground was, that the suit could not be maintained, and the Judge decided this point in favour of the appellants. Mr. Field refers to no authority but that of his own decisions. This is a question which has been repeatedly before the High Court, both the Full Bench and Division Benches, and it would have been well if he had examined authorities which are equally binding upon him and upon other Judges in these provinces. Two cases have been brought to our notice to-day, and they are cases with which we are familiar. One was decided by a Full Bench—*Doorga Churn Surma* v. *Jampa Dassee* (1). In that case the head-note is:—"A suit by a co-sharer for arrears of rent which she had heretofore received in proportion to her share, but which she alleged now to be withheld by the ryot in collusion with the other co-sharers, who were also made defendants, was held to be properly maintainable." The learned Chief Justice, in referring the case to the Full Bench, says :—"The plaintiff in this suit is one of three co-sharers in an eight-anna share of rent payable by a ryot, Doorga Churn Surma, and she brought a suit against him and the other co-sharers for her share of the rent, alleging that they were colluding with him. Doorga Churn Surma's defence was, that he never paid any rent to the plaintiff, and he had been paying rents to the agents of Gour Chand and Lall Chand, the other defendants," and so on.—The learned Judges delivered different judgments, but in my own judgment in that case I find these observations:—"The owners, it is true, have been accustomed to collect the rents jointly (at least I understand that to be the finding) and by a joint agent; but the parties who have been made defendants along with the ryot had subsequently taken

(1) 12 B. L. R., 289; S. C., 21 W. R., 46.

from the ryot, with his consent, their own separate shares of the rents, and the suit which the plaintiff brought, was in effect a suit to recover an arrear, which arrear corresponded with her own share of the rent, which the ryot had vexatiously and collusively refused to pay. That amount still remained unpaid, and the plaintiff being entitled to it, it seems to me that she was justified in bringing this suit, making at the same time the other co-sharers parties as defendants. In point of fact, the conduct of the defendant was not that of a ryot who complained of being subjected to several suits in respect of one claim, it was that of a ryot entering into a collusion with two out of three co-sharers for the purpose of depriving the third." Mr. Justice Glover thinks that, under the circumstances of the case, the suit was maintainable, and for the reasons given by Justices Kemp and Jackson. Mr. Justice Pontifex says:—"Under the circumstances of this case, I think there is no doubt whatever that this suit is properly maintainable"—and the learned Judge goes further, and says:—"As at present advised, I am not prepared to say, when a ryot is holding under co-sharers but not under a written contract, that one of the co-sharers cannot sue separately for his share of the rent if he makes the other co-sharers defendants;" and the learned Chief Justice concurs. In another case decided only six months after—*Tara Chunder Banerjee* v. *Ameer Mundul* (1)—we find the learned Chief Justice, Sir Richard Couch, saying in page 395:—"Nor does he suggest that he has already paid all the rent except what would be receivable by the plaintiff as his share. Such a case might occur, and then it would probably be open to the co-sharer, who had not been paid, to sue, asking to have the balance which remained unpaid, and to the whole of which he would be entitled, paid to him. That is not the case here." So that the learned Chief Justice, probably adverting to what had been held in the Full Bench case, recognized a state of circumstances in which a plaintiff would be allowed to maintain a suit, to which his co-sharers as well as the tenants were parties defendants, for his share of the rent, and particularly in cases where the amount for which the suit is brought in fact represents the

(1) 22 W. R., 394.

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unpaid balance of rent. Now, apart from the other peculiar circumstances of the present case, that is exactly what has occurred here. We find that if the amount of remission, which the co-sharers other than the plaintiff had consented to, be treated as payment (and of course it must be taken as a payment in respect of their interest only, the plaintiff not having agreed to it), then the amount which the plaintiff may claim will represent the amount of unpaid balance to which he himself is entitled; and the circumstances besides were very peculiar. The principal defendants had obtained from the other co-sharers a remission of their rent, and this remission being obtained during an interval of time when the present plaintiff had been ousted from possession of his share on the ground that he had been dismissed or expelled from his office of Mohunt, the person who dismissed him joined with the other co-sharers in granting the remission. That being so, there really seem to be circumstances in the case which might have justified the bringing of this suit, even if the coincidence which I have mentioned between the amount paid and the amount of unpaid balance did not exist, and under any circumstances I should have thought the preferable course to take would be to allow the plaintiff to amend his plaint so as to make the suit for the whole amount of rent. Taking this view of the case, we think that the judgment of the District Judge is erroneous, and, in so far as it reverses the judgment of the Munsif, it ought to be set aside, and the judgment of the Munsif restored with costs.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

1878
Aug. 2.

NICHOLLS AND OTHERS (PLAINTIFFS) *v.* WILSON (DEFENDANT).

Guarantee—Appropriation of Payments.

In consideration that the plaintiffs would advance a certain sum to a limited company, two of the directors agreed that the plaintiffs should repay themselves the amount "from the first moneys received by them on account of the said company," and each of them agreed to hold himself personally responsible