APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

1909
May 11.

RAI CHARAN SHAR MAZUMDAR
v.
THE ADMINISTRATOR GENERAL OF BENGAL.*

Diluvion—Alluvion—Eviction by Landlord—Rent, suspension of—New tenants on reformed land.

When land has been lost to a holding by diluvion and subsequently restored by alluvion, and then settled with persons other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

Dhunput Singh v. *Mahomed Kazim Ispahain* (1), *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbogya* (2) and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (3) distinguished.

SECOND APPEAL by the defendants, Rai Charan Shar Mazumdar and another.

These two appeals arose out of two analogous rent-suits on account of arrears of two under-tenures. The defendants claimed reduction of rent on the ground of loss of land for diluvion, and also pleaded that they were entitled to suspension of rent, as reformed lands had been let out by the plaintiff to third persons who were in possession thereof

The Munsif decreed the suits partly, allowing rent at the admitted rates, holding that it lay upon the plaintiff to show what apportionment of rents should be made and that the plaintiff had not done it. In both these cases, the plaintiff appealed. The Subordinate Judge remanded the case for definite findings as to the proper *jama* to be paid by the tenants, holding that the burden of proof is on the

* Appeal from Appellate Decrees, Nos. 916 and 856 of 1907, against the decrees of S. C. Ganguli, Subordinate Judge of Jessore, dated Jan. 10, 1907, reversing the decree of Hem Chandra Mitter, Munsif of Magura, dated March 31, 1906.

(1) (1896) I. L. R. 24 Calc. 296. (2) (1900) I. L. R. 28 Calc 188.
(3) (1907) I. L. R. 34 Calc. 191.

tenants in case of claim for reduction of rent. Another Munsif tried the suit after remand. He dismissed the suits, holding on the authority of *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1) that the tenants were entitled to suspend the whole rent, as they were practically evicted from a portion of the lands. The appeals were heard by another Subordinate Judge. He decreed the appeals in part, holding that the Munsif had no right to allow the case for suspension of rent, as he was restricted by the order of remand to the amount of *jama* only. The defendants appealed to the High Court.

Babu Sarat Chandra Roy Chowdhuri (*Babu Janakinath Pal Sastri* with him), for the appellants. When there is no question that the land reformed is a part of the holding, the landlord must be taken to have dispossessed the tenants from a part, he having settled the same with a third person after reformation. The fact that the land was lost to the holding by an act of God does not affect the principle laid down in *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1), when the land reappeared and became part of the holding: see also *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbogya* (2) and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (3). The principle that the landlord cannot apportion his own wrong applies here as much as it applies to cases of trespass by landlord.

Babu Jogesh Chandra De, for the respondent. The cases cited by the appellant do not apply. The landlord cannot be said in this case to be a wrong-doer.

Babu Sarat Chandra Roy Chowdhuri, in reply.

Cur. adv. vult.

HARINGTON J. I have read the judgment my learned brother is about to deliver and I agree that the decrees of the lower Court should be affirmed subject to the modification which he proposes.

(1) (1896) I. L. R. 24 Calc. 296. (2) (1900) I. L. R. 28 Calc. 188.
(3) (1907) I. L. R. 34 Calc. 191.

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The principal question in the case is whether, when land has been lost to a holding by diluvion and subsequently restored by alluvion and then settled with persons other than the tenants of the holding, the tenant is entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

The question whether an eviction by the landlord of the tenant from a part of the demised premises justifies the tenant in refusing to pay rent for the remainder of the holding he continues to occupy is one on which it is unnecessary for me to express an opinion, for in the present case the tenant is clearly not entitled to a suspension of the rent, because he has not been dispossessed by any tortious act on the part of the landlord, but by the act of God, *i.e.*, the encroachment of the river.

The law regulating the relations between the parties, *i.e.*, the Bengal Tenancy Act, section 52, provides that a tenant shall be entitled to an abatement of rent in respect of any deficiency in area in the holding. The tenant, therefore, ceased to be liable to pay rent in respect of the land diluviated, and the lands ceased to be in the occupation of the tenants, for they had disappeared.

There is no finding of fact that the tenants ever re-occupied the land when it had reformed. If they never re-occupied that land they could not be evicted, because a man can only be evicted from lands which are in his own occupation at the time of the eviction.

In the present case the tenants ceased to occupy or to be liable to pay rent for the lands in question, a long time before the landlords settled the lands with other tenants. The landlords, therefore, by making this settlement did not evict the tenants.

I agree in the orders which my learned brother would make on these appeals.

MOOKERJEE J. These are appeals on behalf of the defendants in two actions for arrears of rent. The substantial defence to the claim was that large quantities of land appertaining to the tenancies had been washed away by the river Hanu,

that after reformation, the plaintiff had settled them with third parties, that such conduct on the part of the landlord fell within the description of eviction, that consequently the entire rent was suspended and the claim of the plaintiff could not be sustained.

The Court of first instance overruled these objections and made a decree for the amount, which, according to the admission of the defendants, was proportionate to the quantity of land still in their occupation. Upon appeal, the Subordinate Judge directed an enquiry into the question of the quantity of land which had been washed away and of which the defendants had lost possession. After remand, the Court of first instance held that the plaintiff was not entitled to succeed at all, inasmuch as the defendants had been evicted from a part of their tenancies. Upon appeal, the Subordinate Judge reversed this decision on the ground that the Court of first instance had no jurisdiction to decide any point which had not been expressly referred to it, and in this view made a decree for rent in respect of the lands in the actual occupation of the defendants.

The defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on the ground that, upon the facts found, there has been an eviction of the defendants from a part of the demised premises and consequently a suspension of the entire rent. Two minor points have also been urged, namely, *first*, that the decree of the Court of appeal below contains a clerical error and that the amount decreed is more than what is really due; and, *secondly*, that the costs of the local investigation by which the actual area of the lands in the occupation of the defendants was determined ought not to have been thrown entirely upon the tenants who have been successful in their contention that in any view there must be an abatement of rent.

In support of the first contention, reliance has been placed upon the cases of *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1),

(1) (1896) I. L. R. 24 Calc. 296.

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Harro Kumari Chowdhrani v. *Purna Chandra Sarbogya* (1), and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (2). In the first of these cases, it was ruled upon a review of the earlier decisions in this Court, as well as the decisions in the cases of *Upton* v. *Townend* (3), *Edge* v. *Boileau* (4), and *Neale* v. *Mackenzie* (5), that if a tenant is evicted by his landlord from part of the demised premises, the entire rent is suspended. In the second case, it was ruled that the same principle is applicable, even though the tenure, from a part of which the tenant has been evicted, was created under a lease under which the rent was reserved at a certain rate per bigha. In the third case, it was held that, although in the case of a partial eviction for which the landlord is responsible, the entire rent is suspended, if the partial eviction has been caused by an act of a stranger, the rent is only abated *pro tanto*. Let it be assumed on the authority of these cases that if a tenant has been evicted by his landlord from a part of the demised premises, the entire rent is suspended. But the question remains, whether a tenant can be said to be evicted by his landlord within the meaning of this rule when he loses possession in the first instance by reason of an act of nature, namely, as in this instance, the action of a river, and subsequently upon reformation of the land, the landlord settles it with a stranger. In order to determine whether the rule ought to be extended to a case of this description, the principle upon which it is founded requires examination. The reason was stated in old cases to be that the landlord ought not to be encouraged to injure his tenant whom by the policy of the feudal law he ought to protect. The reason given in modern cases is that the landlord cannot be permitted to apportion his own wrong. The older reason will be found set forth in Bacon's Abridgment, Ed. 1832, Vol. VII, p. 62, where it is stated that "no man may be encouraged to injure or disturb his tenant in his

(1) (1900) I. L. R. 28 Calc 188.
(2) (1907) I. L. R. 34 Calc. 191.
(3) (1855) 17 C. B. 30; 104 R. R. 562
(4) (1885) 16 Q. B. D. 117.
(5) (1836) 1 M. & W. 747; 46 R. R. 478.

possession whom by the policy of the feudal law he ought to protect and defend." The later reason will be found set forth by Chief Justice Hale in *Hodgkins* v. *Robson* (1), in which he stated that "if the lessor enters into a part by wrong, this would suspend the whole rent, for in such a case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." The reason for the rule was investigated by Mr. Justice Holmes in *Smith* v. *McEnayne* (2), where the learned Judge refers not merely to the two reasons just mentioned, one based on considerations partly of a feudal nature and the other on the ground that the landlord cannot apportion his own wrong, but also to the following statement by Lord Chief Baron Gilbert in his Treatise on Rents at page 178: "Because by the demise, every part of the land was equally chargeable with the whole rent, therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This indeed may be a good reason why the whole rent service shall be suspended, if the lord or lessor disseizes, or ousts his tenant or lessee of any part of the land, because there is a wrongful act to which the tenant consented not, and if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law." If these reasons for the rule are borne in mind, can it be contended on any intelligible principle of law that it should be extended to cover a case where the tenant in the first instance loses possession of part of the demised premises by an act of nature which neither he nor his landlord could control. It cannot be suggested that this is a case in which the landlord by his own wrong has withdrawn a part of the land demised and ought not consequently to recover rent either on the lease or outside of it for the occupation of the residue. Nor can it

(1) (1667) 1 Vent. 276. (2) (1897) 170 Mass. 26; 24 Am. S. Rep. 270.

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be suggested that this is a case in which the lessor discharges a part of the land from the burden and charges the rest with the rent which issues out of the whole land. It is further worthy of note that under section 52 of the Bengal Tenancy Act, the Legislature has provided that, in a contingency of this description, the tenant would be entitled to proportionate abatement of rent. The abatement, therefore, when it first commences is not due to the action of the landlord, nor is it claimed by the tenant by reason of reduction in the area of the tenancy caused by a wrongful act of the landlord. This is, therefore, manifestly a case to which it would be unjust on principle to extend the rule, which, it may be observed, has been adopted in England not without considerable divergence of opinion. For instance, in *Stokes* v. *Cooper* (1) it was ruled by Chief Justice Dallas that the whole rent was not suspended, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on *quantum meruit*. This was stated as the law in standard treatises on the law of landlord and tenant subsequently published, and was accepted as the correct view by the Court of King's Bench in Ireland in *Grand Canal Company* v. *Fitzssimons* (2). It was not till Baron Parke questioned the decision of Chief Justice Dallas in *Reeve* v. *Bird* (3) that the tide turned, and the point was finally settled in *Upton* v. *Townend* (4). It would not be right to extend the application of a rule of this description which may often operate harshly, to cases to which the principle on which it is founded is clearly inapplicable. If a contrary view were maintained, there might be manifest hardship and injustice, for instance, when land has been diluviated and reformed, it is often a matter of considerable difficulty even for Courts of Justice to determine whether the land which has re-appeared is a reformation on the old site. If, under circumstances like these, the landlord lets out the newly formed land to a stranger at the risk of the entire

(1) (1814) 3 Camp. 514 (n); 14 R. R. 829 (n).
(2) (1828) 1 Hud. & Br. 449.
(3) (1834) 1 C. M. & R. 31, 36.
(4) (1855) 17 C. B. 30.

suspension of the rent of the former tenant, he may be unjustly punished when there was no intention on his part to commit any wrongful act: *Henderson* v. *Mears* (1). It is clear, therefore, that the principle invoked by the defendants, namely, that as the landlord is responsible for the partial eviction of his tenant from the demised premises, there is a suspension of the entire rent, has no application to this case. The principal ground taken on behalf of the appellants must consequently be overruled.

The next ground taken on behalf of the appellants is that although the Subordinate Judge held in his judgment that the defendants were entitled to abatement of rent for the lands originally diluviated and now no longer in their possession, they have not been granted this relief by reason of a clerical error in the decree. This contention is well-founded. The amin, who made the local investigation and whose return was accepted by the Subordinate Judge, stated that in suit No. 909 out of which appeal No. 856 arises, the total quantity of land was 8 khadas and odd, of which 8 kanis and odd had been washed away and the remaining 8 khadas and odd is in existence out of which the defendants have been dispossessed from two kanis. The quantity of land, therefore, in the possession of the defendants is the difference between these two, namely, 6 khadas and odd. The decree, however, has been drawn up on the footing that the defendants had in their possession 8 khadas and odd. Similarly in suit No. 911, out of which appeal No. 916 arises, the defendants are in occupation of 14 khadas and odd less 3 khadas and odd, that is, about 10 khadas and odd. But the decree has been drawn up on the assumption that they are in occupation of 14 khadas and odd. The learned vakil for the respondent conceded that any clerical error in the decree due to miscalculation must be corrected. This will accordingly be done.

Lastly, it is pointed out that, by an oversight of the Court below, no order has been made as to the costs of the local investigation which were deposited in the first instance by the

(1) (1859) 1 F. & F. 636.

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defendants, and the burden of the whole of these costs ought not to be thrown upon them. This contention also cannot be resisted. The position taken up by the defendants in the Court of first instance was that the plaintiff was not entitled to the whole of the amount claimed as rent, because a substantial portion of the lands had been diluviated. This defence has succeeded, and the plaintiff has got a decree for only a portion of the amount originally claimed. It is right, therefore, that the defendants should get a portion at any rate of the costs incurred by them in successfully substantiating their defence. In the circumstances of the case, the costs of the local investigation should be borne equally by the parties. As the whole of these costs appears to have been deposited by the defendant, the decree will provide that they will be entitled to credit for one-half of this amount as against the plaintiff.

Subject to the two amendments mentioned, the decrees of the Courts below will be affirmed, and these appeals dismissed. As the substantial question raised by the appellants has been decided against them and as the amendments in the decree now made might have been secured by an application to the Court below, the appellants must pay the respondent his costs of these appeals.

S. M. *Appeals dismissed.*