PRIVY COUNCIL.

PRAMADA NATH ROY
v.
RAMANI KANTA ROY.

P.C.*
1907
Nov. 6, 7;
Dec. 11.

[On appeal from the High Court at Fort William in Bengal.]

Co-sharers—Right of one co-sharer to sue for the whole rent making defendants his co-sharers who refuse to join in the suit as plaintiffs—Right to bring whole tenure to sale—Agreement to pay rent to co-sharers separately, effect of—Bengal Tenancy Act (VIII of 1885) ss. 65, 159, 188.

By the express terms of the Bengal Tenancy Act (VIII of 1885) in the event of rent being unpaid, the owners of the zemindari interest are entitled by suit under that Act to bring a patni to sale with the consequences prescribed by the Act. And it is a general rule—a rule not derived from the Bengal Tenancy Act but from the general principles of legal procedure—that a sharer whose co-sharers refuse to join him as plaintiffs can bring them into the suit as defendants and sue for the whole rent of the tenure.

Section 188 of the Act does not preclude such a suit; the filing of a suit not being a thing which the landlord is, under the Act "required or authorized to do," but an application to the Court against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision in the Tenancy Act, but under the general law.

Although an agreement, expressly proved or implied by the conduct of the parties, for the payment of rent to co-sharer landlords separately, may establish the right to sue separately for the shares of rent receivable by the separate share holders, yet such an agreement merely affects the right to sue separately for rent and in no other respect modifies the terms of the holding. The right, therefore, to bring the tenure to sale for arrears of rent remains intact, and also the right of one co-sharer to sue making his co-sharers defendants when they refuse to join as plaintiffs.

APPEAL from a judgment and decree (June 3rd 1904) which affirmed a judgment and decree (December 17th 1900) of the Court of the Subordinate Judge of Rajshahye.

The plaintiff was the appellant to his Majesty in Council.

The principal question involved in this appeal was, whether the appellant as one of the co-sharers in the zemindari interest in

* *Present:* LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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an estate known as Dihi Haloti was entitled to sue for the whole rent due from the patnidars of the said estate making his co-sharers in the zemindari interest parties to the suit as defendants.

In the year 1837 one Raja Ram Chandra was the sole owner of a separate 8-anna share in Dihi Haloti. On 23rd April 1837 he made a patni settlement of his 8-anna share with one Abbott on a yearly rental of Rs. 6,349-6-10. In due course both the zemindari and the patni interests changed hands. In the year 1900 the zemindari interest was held as follows:—the appellant six annas, respondents 14 and 15 one anna, respondents 2, 3 and 16 one anna. The patni interest was held by the remaining respondents, and also by respondent 16 by purchase.

The patnidars paid to the respondent zemindars nearly the whole of the proportion of the rent they were entitled to. They paid no rent at all to the appellant. He gave notice to the other zemindars asking them to join him in a suit for the arrears of rent due, and on their failure to do so he instituted, on 17th April 1900, the suit out of which the present appeal arose, making all the patnidars, and the co-sharer zemindars defendants.

The plaint after setting out the facts above mentioned claimed a decree for the whole rent on the patni amounting to over Rs. 27,000: and in the alternative for the amount due to his own share of the estate.

The only defence which is now material was as follows:—"As the respective predecessors of the plaintiff and of the *pro forma* defendants brought separate suits for arrears of rent, and obtained decrees on account of their respective shares, and also amicably realized the same by separately granting dakhilas in respect of the patni described in the plaint, the suit for arrears of rent brought by the plaintiff in its present form cannot proceed."

The only material issue on this appeal was—"Is the plaintiff who has hitherto received the rents in proportion to his share competent to bring a suit for the whole rent which is due to all the share-holders?" which was a portion of the first issue.

On this issue the holding of the Subordinate Judge was as follows:—

"It appears from the decrees put in evidence by the defendants that the collection of the plaintiff's share is separate. This separated collection therefore

gives rise to the presumption that by some arrangement which has been consented to by the co-sharers and the tenants, separate payment of a particular share of the rent has hitherto been made to the plaintiff. That being so, so long as the arrangement continues, the plaintiff is not competent to sue for the whole rent, even though the co-sharers are made parties to the suit. It is not the plaintiff's case that the arrangement has been put an end to by the consent of all the parties who originally concurred in it. Until this is done, the plaintiff is not entitled to bring a suit for the whole rent."

A decree was accordingly made in favour of the plaintiff for his share of the arrears of rent due.

An appeal by the plaintiff to the High Court was heard by GHOSE and GEIDT JJ. who differred in opinion the former supporting the decree of the Subordinate Judge, and the latter being of opinion that it ought to be reversed. The material portions of the judgments were as follows:—

GHOSE J. The question which demands our consideration is whether, so long as the arrangement consented to by all the parties concerned as to separate payment of rent in respect of the shares of the different co-shares continues, and is not put an end to, is it competent to the plaintiff to bring a suit for recovery of the whole rent due upon the patni, when the other co-sharers and the tenants object to such a suit?

"As bearing upon this question, the learned vakils have called our attention to several cases in this Court. These cases, as I understand them, establish the following propositions, that when the tenant contracts to pay rent jointly to the several co-sharer land-lords, one of the land-lords cannot demand from the tenant his share of the rent separately, unless an arrangement to that effect has been come to, and that in such a case the proper remedy is to bring a suit for the entire rent making the other co-sharers party defendants, if they refuse to join in the suit, (2) that when an arrangement for separate payment of rent to the several co-sharers in respect of their respective shares have been come to, it is competent to any of the co-sharers to sue to recover his share of the rent, (3) that such an arrangement does not put an end to the original lease of the tenure, and that it does not entitle one of the co-sharers to sue for enhancement of the rent of the tenure or bring a suit for kabuliyat on enhanced rent without joining the other co-sharers as party defendants. But in no case that I know of, has it been decided, that even when an arragement for separate collection rent has been come to, one of the co-sharers may, in spite of the refusals of the other co-sharers to join in the suit, maintain a suit for recovery of the whole rent due upon the tenure, if he only makes those co-sharers party defendants.

"If there was no such arrangement as was come to between the parties concerned in this case, the plaintiff might have brought a suit for recovery of the entire rent due upon the tenure, making the other co-sharers defendants, such a suit being regarded as a suit on behalf of the whole body of co-sharers. But the

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question is, would the same rule apply when such an arrangement has been come to, and, under it, for several years together the co-sharers had been receiving or recovering by suits, their respective shares of the rent separately? Is it competent to one of the co-sharers to ignore that arrangement, and sue for recovery of the entire rent, in spite of the refusal of the other co-sharers to join in the suit?

"It will be remembered that some of the defendants say that the share of the rent due to one of the co-sharers has been paid up. Whether that co-sharer accepts this plea or not, we do not know. But it is obvious that in cases of this kind, if such a plea is raised, it would necessitate an enquiry as between the tenant defendant and the co-sharer defendants, whether the rent said to have been paid has really been paid; and supposing it be found upon enquiry that the rent due to the other co-sharers has been paid, the decree that should have to be made in the suit would really be a decree for the plaintiff's share of the rent. Such a decree could hardly be regarded as a decree in respect of the rent due upon the whole tenure.

After referring to the cases of *Pyari Mohun Bose* v. *Kedar Nath Roy* (1) and *Jiban Krishna Roy* v. *Brojo Lal Sen* (2), and distinguishing the former as being no authority upon the question arising in the present case because the arrangement come to between the parties here did not exist in that case, and the latter as being no authority for the broad proposition that whatever might have been the arrangement come to between the parties a suit for recovery of the whole rent may be maintained by one of the co-sharers if only the other co-sharers are made parties defendants," the judgment continued.

"But it is said that the arrangement between the parties as to separate payment and reception of rents is only as to the method in which the rent is to be paid, and does not affect the rights and liabilities of the parties as arising out of the lease which still remains joint, and that therefore any of the co-sharers is entitled to sue for the entire rent making the other co-sharers party defendants if they refuse to join in the suit. No doubt the original lease has not been put an end to by the arrangement that was come to between the parties as to separate payment of rent; and if the co-sharers agree they might jointly maintain a suit for recovery of the whole rent. But it will be observed that the contract to pay one entire rent to the co-sharers has been so far modified that the co-sharers are entitled to demand and recover their respective shares of the rent, and the tenants are likewise entitled to pay their rent separately to the co-sharers in proportion to their respective shares. And so long as that arrangement subsists and has not been put an end to (as the plaintiff himself maintains in the plaint) it would not,

(1) (1899) I. L. R., 26 Calc. 409.
(2) (1903) I. L. R. 30 Calc. 550; L. R. 30 I. A., 81.

I think, be competent to one of the co-sharers to ignore and to practically annul that arrangement and sue to recover the whole rent. Such a course if allowed might lead to difficulties and injustice. In this connection, I may refer to the observation of Garth, C. J. in the case of *Guni Mohomed* v. *Moran* (1) decided by a Full Bench of this Court. Referring to an arrangement like that which was come to between the parties in this case, he observed as follows:—'Such arrangements are by no means unusual, and they may be evidenced either by direct proof, or by usage from which their existence may be presumed. But in either case, they are perfectly consistent with the continuance of the original lease of the entire tenure; and the same consent of all the parties by which the arrangement was originally created, may at any time put an end to it. So long as it continues, however, it has been constantly held in this Court, and must be considered now as well-established law, that each co-sharer may bring a separate suit against the tenant for his share of the rent. But in the absence of such an arrangement it is equally clear that no such suit can be maintained.

"It has however been said that the exact terms of the arrangement come to between the parties do not appear in this record, and that it cannot be said that by agreeing to the arrangement as found by the Court below the co-sharers consented to forego their statutory rights to hold the tenure liable for the whole rent. No doubt they did not mean to abandon such statutory rights, and as already stated, if they agree, they might bring a joint suit for the entire rent, and having recovered a decree might bring the putni to sale under the Bengal Tenancy Act, but I am not prepared to say that any one of the co-sharers after such an arrangement as was come to between the parties in this case, and which still subsist, can, notwithstanding the refusal of the other co-sharers to join in it, maintain such a suit; nor can I think it can rightly be held that the failure on the part of the tenant to pay the rent due to any of the co-sharers entitles the latter to proceed upon the original lease, and sue for recovery of the entire rent with a view to bring to sale the whole tenure.

The question was discussed in the course of the argument before us whether a suit brought by one of the co-sharers for recovery of the entire rent, the other co-sharers being made party defendants, is a suit under the Bengal Tenancy Act It has been held in certain cases that a decree obtained by one of the several co-sharers for a share of the rent is not a decree under the Bengal Tenancy Act, and that proceedings in execution thereof can only be taken in accordance with the provisions of the Code of Civil Procedure, and that in execution of such a decree the whole tenure cannot be sold: see *Prem Chand Nuskur* v. *Mokshoda*(2), *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi*(3) and *Durga Charan Mandal* v. *Kali Prasanna Sarkar*(4). And in the case of *Beni Madhub Roy* v. *Jaod Ali Sircar*(5) decided by a Full Bench of this Court where the question was raised whether, if in execution of a decree obtained by a fractional co-sharer for arrears rent in respect of his share, the tenure or holding is attached, such an attachment is an attachment contemplated by

(1) (1878) I. L. R. 4 Calc. 96.
(2) (1887) I. L. R. 14 Calc. 201.
(3) (1887) I. L. R. 15 Calc. 47.
(4) (1899) I. L. R. 26 Calc. 727.
(5) (1890) I. L. R. 17 Calc. 390.

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section 170 of the Bengal Tenancy Act, so as to prohibit a claim being preferred by a third party under section 278 of the Code of Civil Procedure. And it was held that the attachment was not an attachment as contemplated by the said section 170. In delivering the judgment of the Court, Petheram, C. J., among other matters, observed as follows:—'In our opinion the answer to that question must be answered in the negative. Section 170 of the Bengal Tenancy Act gives certain privileges to persons who have taken proceedings under that Act for the purpose of recovering their rents, and section 188 says that where several persons are joint landlords and when anything under this Act is authorized to be done, they must all join in doing it. That shows, in our opinion, that where landlords are seeking to take the benefit of this Act, they must act in concert, and where one of several co-sharers in a zemindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country and independently of the Bengal Tenancy Act.' And in the case of *Pyari Mohan Bose* v. *Kedar Nath Roy*(1) upon which so much reliance was placed by the learned vakil for the appellant, this Court left open for decision the question, whether having regard to the provisions of section 188 of the Bengal Tenancy Act, the suit by one of the co-sharers could proceed. It may, perhaps, be gathered from these cases, that where a suit for rent is brought by the whole body of landlords, but not otherwise—it is a suit under the Bengal Tenancy Act, and if a decree in such a suit is obtained, the entire tenure or holding, as the case may be, may be sold. But it is not necessary to express any opinion upon this question in this case. It is sufficient to say here that, all the co-sharers do not 'all join' or 'act in concert' with one another, but that one of the co-sharers, in spite of the arrangement as to separate payment of rent, and in spite of the opposition of, at least, some of the other co-sharers, insists upon a decree being made for the entire rent with a view to bring the whole tenure to sale. Such a decree cannot, I think, be made."

GUPTE, J. The object of the appellant in suing for the entire rent and making his co-sharers defendants is to obtain a decree that will enable him to bring to sale the tenure itself. The Subordinate Judge has, however, found that under an arrangement between tenants and landlords, the tenants for some nine years before suit have been paying rent to the landlords in proportion to the latter's share in the property, and he has accordingly held that as the arangement still subsists the plaintiff is unable to obtain a decree of the nature which he seeks, and that all he can get is a decree for his own separate share of the rent, a decree which will enable him to bring to sale only the right, title and interest of the judgment-debtor and not the tenure itself.

"The Bengal Tenancy Act by section 65 makes the rent a first charge on the tenure, and by chapter XIV provides a method by which the landlords after obtaining a decree for the rent can bring the tenure itself to sale in satisfaction of their decree.

This Court, however, has in numerous cases held that in order to bring the tenure itself to sale all the landlords must be parties to the suit, and that the rent sued

(1) (1899) I. L. R. 26 Calc. 409.

for must be rent due in respect of the entire tenure and not in respect of a portion due to any particular shareholder. Both these conditions have been fulfilled in the present case, and it is conceded that if there had been no such arrangement as that to which I have referred the plaintiff would have been entitled to the decree sought for. The question thus arises whether that arrangement precludes the plaintiff from obtaining the relief for which he sues.

"We have no evidence of the terms of the arrangement, and the Subordinate Judge has inferred its existence from the fact that the co-sharer landlords have obtained decrees for their own separate shares of the rent. I will assume that the inference is well founded and that an arrangement of the kind found by the Subordinate Judge exists, but I am unable to hold that the arrangement amounts to more than this—that the tenants have agreed to pay separately to the various landlords the fractions of the rent proportioned to their respective interests in the property, and that the landlords have agreed to accept the rent paid in this manner. The arrangement is one as to the method of payment only, and, to my mind, cannot affect, as to any other matter, the rights and liabilities arising out of the *kabuliat* under which the tenants hold. The integrity of the tenure is not impaired; the landlords are still joint landlords; and, if so, they are competent to join as plaintiffs in suing for the rent of the entire *putni*. It would seem to follow on the authority of the decision in *Pyari Mohan Bose* v. *Kedar Nath Roy*(1), that if some of their member refuse to join in bringing a suit for the rent due in respect of the entire tenure the others can bring the suit on condition of making them parties: To hold otherwise would, it seems to me, destroy the integrity of the tenure without creating separate tenures in respect of each co-sharer landlord; and the result would be that each individual co-sharer landlord would lose the right conferred by law of holding the tenure itself as security for the rent. It is no doubt competent for any one to contract himself out of the rights conferred by law, unless that course is expressly forbidden; but in such cases the contract must be clear and definite, and the parties must know and understand its terms. Can it be said that in agreeing to receive separately the amount of rent proportioned to their respective shares the landlords consented to forego the statutory right of holding the tenure as security for the rent, a right which each individual landlord is entitled to enforce by suing for the entire rent due, provided that he adds as parties to his suit, those co-sharers who refuse to join in bringing the suit? Such a result, it appears to me, was not in contemplation of the parties nor is it a consequence in any way implied or involved in the arrangement.

"A further consideration which brings me to the same conclusion is this that, when one of the parties breaks an arrangement like this which modifies a prior written contract, any of the other parties should be at liberty on the occasion of each breach of the arrangement to revert to their rights under the original contract. The tenants who agreed to pay to the plaintiff separately his share of the rent have broken their agreement. As the consideration for the agreement fails, the plaintiff, in my opinion, should have the option, on any such occasion, of enforcing his rights under the *kabuliat*, and that option should not be denied to him, because on previous occasions he has failed to exercise it.

(1) (1899) I. L. R. 26 Calc. 409.

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"It is suggested that if the above view be adopted, a difficulty would be felt in a case like the following:—Suppose that three landlords A, B and C, are in the habit of collecting their rents separately, and that the tenant has paid B and C their shares of the rent. When A sues the tenant for arrears of rent, how could it be said that the arrears were due in respect of the whole tenure; they would be due only in respect of A's share. It appears to me that there is no real difficulty about the matter and that it makes no difference whether A, B and C have been collecting rent jointly or separately. If the tenant has paid B and C their shares of the rent, then whether A has been in the habit of collecting his share of the rent separately or not, the arrear may be regarded in one light as the amount due in respect of A's share, and in another light it may be regarded as the amount due in respect of the whole tenure after deducting the amounts paid to B and C. The difficulty, if there be a difficulty, is one of words only and not of substance.

"Additional support is lent to the view which I take by a consideration of the reasons which have led to the rule that before a tenure can be sold for arrears of rent, all parties must be joined in a suit for those arrears. Those reasons hav been indicated by their Lordships of the Privy Council in *Jiban Krishna Roy* v. *Brojo Lal Sen*(1) where they say:—"The provisions of the Rent Law were devised "for the protection of all parties interested in the tenure, and they would be "defeated if fractional co-sharers were allowed to evade them by the method adopted "in this case." That was a case under the former Rent Law, Bengal Act VIII of 1869, but the remarks are equally applicable to the procedure prevailing under the Bengal Tenancy Act. A joint landlord who has obtained a decree for rent without making his co-sharers parties can bring to sale not the tenure or holding, but only the right, title and interest of his judgment-debtor. It would be unjust that the rights of his co-sharers should be affected by proceedings to which they are no parties. But there is no injustice in selling the tenure itself in satisfaction of the charge for rent, when the co-sharers are made parties to the proceedings for the realization of arrears due in respect of the whole tenure, because the co-sharers are thus furnished with an opportunity of asserting their own rights and protecting their own interests. That opportunity has been afforded in the present suit to the co-sharer landlords and they have no ground of complaint if the plaintiff on his part is afforded the remedy allowed to him by law of treating the holding as security for the rent.

"The view of the Subordinate Judge is that till all the landlords join in bringing a suit for rent, no such decree as the plaintiff seeks can be passed. Not only is this view, as it appears to me, opposed to the decision in *Pyari Mohan Bose* v. *Kedar Nath Roy*(2) to which I have already referred, but the injustice to which it may lead is exhibited in the circumstances of the present case, where one of the *putnidars* is also a co-sharer landlord. This person will of course never join the plaintiff in bringing a suit which may end in the sale of his *putni* interest, and if the view of the Subordinate Judge be correct, the plaintiff by reason of the arrangement inferred from his past conduct will never be able to enforce the right, conferred on him by law, of holding the tenure as security for the rent.

(1) (1903) I. L. R. 30 Calc. 550; L. R. 30 I. A. 81.
(2) (1899) I. L. R. 26 Calc. 409.

"For the reasons set forth above, I am of opinion that the Subordinate Judge is wrong in not giving the plaintiff a decree for the rent as due in respect of the entire tenure and that the appeal should be decreed with costs in both Courts."

The two Judges differing in opinion, the case was referred under section 375 of the Civil Procedure Code to BRETT J. who, after setting out the facts of the case and referring to the contentions of the parties, and the authorities cited in support of them, said as to the contention in support of the appeal that as the defendants set up the agreement as a bar to the plaintiff's obtaining the relief he sought, the onus rested on them of proving what the agreement was, and that by it the plaintiff agreed to relinquish any of the rights which he had under the original lease.

"Taking first the question of onus it has been contended for the respondents, and in my opinion rightly, that an agreement is evidenced as much by act as by any verbal or documentary evidence. In the plaint itself the agreement is admitted, and the plaintiff claims under it to be entitled to recover separately his fractional share of the rent. When the agreement was admitted no burden lay on the defendants of proving it. It is also admitted that the landlords and tenants by their own acts have admitted the existence of this agreement since 1891 by the receipt and payment of fractional shares of the rent. But it has been argued that the receipt of his fractional share of the rent by the plaintiff does not operate as a relinquishment of the right which there was under the original lease to bring the tenure to sale in satisfaction of a decree for arrears of rent, and it is urged that the defendants were bound to prove that there was an agreement by which the plaintiff consented to relinquish that right. In my opinion the contention cannot be sustained. The agreement was entered into for the mutual convenience of the landlords and tenants, and all parties to that agreement are bound by its legal consequences. The tenants are precluded from objecting to suits, being brought separately by the different co-sharers for recovery of their fractional shares of the rents and the plaintiff and his co-sharer having benefited by being able to sue separately for their rent must be held equally to be bound by what this Court has held to be the consequence of such an agreement, and what are their rights and disabilities in such a suit. This Court has held that in such a suit, brought by a co-sharer for his fractional share of the rent, he is not entitled to make his share of the rent a charge on the tenure, and is not entitled to sell the tenure in satisfaction of a decree obtained for his share of the rent. It is not necessary for the defendants to prove in this case that the plaintiff agreed to that which was the necessary legal consequence, so far as he was concerned, of the agreement. Further there appears in this case to be no ground for the suggestion that the agreement was personal or limited in time.

"The next contention that the agreement was voidable after the tenant had failed to pay his share of the rent to the plaintiff is in my opinion equally untenable. The agreement was completed and was not merely executory, and it was binding on

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the parties from the time it was made. The failure of the tenant to pay the fractional share of the rent to the plaintiff gave to the plaintiff a cause of action to sue for recovery of that share. The contention that the agreement was voidable on the tenant's failure to pay the plaintiff's share of rent would apply as well to the original lease as to the subsequent agreement, and it could hardly be argued that the failure of the tenant to pay the fractional share of the rent to the plaintiff entitled the plaintiff to avoid the putni lease.

"The argument which is based on the provisions of section 159 of the Bengal Tenancy Act has no application to this case, unless the plaintiff be held to have a right, in spite of the agreement, to bring a suit for the full rent by making his co-sharer landlords parties to the suit.

"The hardship which has been pointed out may exist, but the question is whether it is not, as the learned pleader for the respondent contends, one of the disadvantages incidental to joint ownership. So long as the co-sharer landlords and the tenant do not agree that the fractional rents for their shares be paid separately to the different co-sharer landlords, the whole body of landlords labour under the disadvantage that they must all join in a suit to recover the rent from the tenant, and the tenant has the advantage of not being harassed by numerous suits. After an agreement has been come to, the landlords have the advantage of being able to recover their fractional shares of the rent separately, and the tenant submits to the consequent disadvantage of the risk of harassment from several suits. In execution of a decree obtained by all the landlords in a joint suit the tenure can be sold. In execution of a decree obtained by a fractional co-sharer for his share of the rent, only the right, title, and interest, of the tenant can be sold. These are some of the advantages and disadvantages arising out of joint ownership and the contention based on the ground of hardship has not in my opinion any force. The contention that section 188 of the Bengal Tenancy Act does not apply to the right which the landlords had all along to sell the tenure for arrears has no force in the face of the series of decisions of this Court and seems to be based on a misconception.

"The misconception appears to arise out of the assumption that the plaintiff as a fractional co-sharer landlord has the full rights of the whole body of landlords, and amongst them the right to make the rent a charge on the tenure and sell the tenure in satisfaction of a decree for recovery of the rent. Individually the plaintiff cannot enforce such a right, though the whole body of landlords collectively can. It can hardly, therefore, be argued that the plaintiff has been deprived of a right which belonged to him individually.

"We come lastly to the important question in the case which may be stated as follows:—The agreement having been made between the whole body of landlords, and the tenant and acted on for the last 10 years and more, is it now open to the plaintiff to avoid that agreement without the consent of his co-sharer landlords, or can he allow that agreement to continue and yet, in spite of its existence, bring a suit for the full rents of the tenure, by making his co-sharer land lords parties to the suit, so as to entitle him in satsfaction of a decree obtained in that suit to bring the tenure itself to sale? In my opinion that question must be answered in the negative. The agreement was one made between the body of landlords on one

side and the tenant on the other, and one out of the several persons contracting on the one side cannot alone cancel or avoid the agreement. The agreement can only be rescinded by the contracting parties, that is to say the whole body of the landlords who jointly form one of the parties on one side and the tenant on the other, and one of the landlords without the consent of the rest is not entitled to rescind it. Hardship may result to the plaintiff from this circumstance, but on the other hand hardship and inconvenience would result to the rest of the landlords and to the tenants if at any time any one of their number were able to annul the agreement. It is not suggested that the plaintiff entered into the agreement without full knowledge of its effects, and until that agreement is legally rescinded he is bound by it. If the other co-sharers refuse to rescind the agreement it is open to the plaintiff to take such legal steps as he may be advised to avoid its consequences.

"The mere failure of the tenants to pay the plaintiff his share of the rent would not itself entitle him alone, or even jointly with his co-sharers, to rescind the agreement. The general rule is that the refusal or omission of one of the contracting parties to do some thing which the contract binds him to do, will not entitle the other party to rescind the contract unless the acts and conduct of the party who makes default show an intention to abandon and wholly to refuse performance of his part of the contract. In this case it has not been proved that the tenant had an intention to abandon the agreement.

"For the above reasons, I agree with Mr. Justice Ghose in holding that the view taken by the Subordinate Judge is right and that his judgment and decree should be confirmed. The appeal will therefore be dismissed with costs.

On this appeal,

J. R. Atkin K. C. and *DeGruyther*, for the appellant, contended that under the circumstances of the case he was entitled to sue for the whole rent due on the tenure, and that the suit had been properly framed. The arrangement for the collection of rent separately by the co-sharer landlords was no bar to the statutory right of the appellant to sue in such a manner as would enable him to bring the tenure itself to sale for arrears of rent: and there was no agreement proved which deprived him of the ordinary right which he had under the lease to bring a suit to recover the full rent of the tenure making such of his co-sharers defendants as refused to join in the suit as plaintiffs, or affected the rights he had under the Bengal Tenancy Act (VIII of 1885). The only conditions necessary to support the right to bring the tenure to sale were that all the co-sharer landlords must be parties to the suit, and the rent sued for must be rent due in respect of the whole tenure; and both those conditions existed with regard to the present suit, which, it was submitted, was therefore

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maintainable. Reference was made to *Guni Mahomed* v. *Moran*(1); Bengal Act VIII of 1869 sections 22, 29 and 64; *Jiban Krishna Roy* v. *Brojo Lal Sen*(2); Bengal Tenancy Act, sections 65, 159, 161 and 162; Bengal Act VII of 1868, section 11; and Act XI of 1859, sections 6, 10 and 13.

C. W. Arathoon, for the respondents, contended that for the reasons given in the judgments of Mr. Justice Ghose and Mr. Justice Brett, there being an arrangement for separate collection of rent, no suit for the whole of the rent of the tenure could be maintained; and one co-sharer landlord could not sue alone and make defendants the others who refused to join as plaintiffs. The only decree that could be given in the present suit was one for the appellant's own share of the rent, and that had rightly been given by the Subordinate Judge and affirmed by the High Court. Reference was made to the Bengal Tenancy Act, sections 65 and 188; *Shekh Naimuddin* v. *Srimanta Ghose*(3); *Rajnarain Mitter* v. *Ekadasi Bag*(4); *Beni Madhub Roy* v. *Jaod Ali Sircar*(5); and *Gopal Chunder Das* v. *Umesh Narain Chowdhry*(6).

Atkin K.C. replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This appeal raises a question upon the construction and effect of the Bengal Tenancy Act, a short question, but one which may be of considerable importance wherever that Act applies.

The facts of the case are not in dispute, and are simple. In the year 1837 the then owner of the zemindari interest in an 8-anna share in Dihi Haloti created a putni tenure in those 8 annas in favour of one Abbott, at a rent reserved. The zemindari and the putni interests both underwent subsequent devolutions, and at the time, which is now material, the present plaintiff-(appellant) held 6 annas of the zemindari interest, respondents 14 and 15

(1) (1878) I. L. R. 4 Calc. 96.
(2) (1903) I. L. R. 30 Calc. 550; L. R. 30 I. A. 51.
(3) (1901) 6 C. W. N. 124.
(4) (1899) I. L. R. 27 Calc. 479, 483.
(5) (1890) I. L. R. 17 Calc. 390.
(6) (1890) I. L. R. 17 Calc. 695, 697.

held 1 anna, and respondents 2, 3 and 16 one anna. The putni interest was held by the remaining respondents, and also by respondent 16. The last-mentioned, therefore, was interested both in the zemindari and in the putni. The putni rent fell into arrear so far as the share which should have come to the appellant was concerned.

The appellant thereupon brought the present suit on the 17th April 1900 in the Court of the Subordinate Judge of Rajshahye. He made the putnidars defendants, and he joined as co-defendants his co-sharers in the zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. But the plaint asked in the alternative for a decree for the plaintiff's share of the rent.

The Subordinate Judge refused to make a decree under the Bengal Tenancy Act for the whole putni rent, and gave a decree only for the plaintiff's share of the rent. On appeal, the case came before two Judges of the High Court, Ghose and Geidt JJ., who differed in opinion, Ghose J. holding that the view of the Subordinate Judge was correct, Geidt J. being of the contrary opinion. In consequence of this difference the case was referred to a third Judge, Brett J., who agreed with Ghose J., with the result that the appeal was dismissed. Against that decision the present appeal has been brought, and it lies upon their Lordships to determine which of the views taken by the learned Judges ought to prevail.

Section 65 of the Bengal Tenancy Act enacts that:—

"Where a tenant is a permanent tenure-holder . . . he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

Section 159 and the following sections provide the means and procedure for so bringing the tenure to sale, and for the cancellation of incumbrances thereupon. The only other section which it is necessary to refer to is section 188, which says that:—

"Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them."

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By the express terms of the Bengal Tenancy Act, in the event of rent being unpaid, the owners of the zemindari interest are entitled, by suit under that Act, to bring a putni to sale, with the consequences prescribed by the Act. And it is a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants, and sue for the whole rent of the tenure. This must apparently be the law applicable to the present case, unless there be something to exclude the case from the operation of these general rules

For the purpose of this exclusion, what was relied on was this: it was said that, by express or implied agreement between the zemindars and the putnidars, the shares in the putni rent of the several zemindars were to be paid, and so far as they were paid at all, were, in fact, paid separately; and it was contended that that agreement, on the one hand, entitled the separate zemindars to sue for their separate shares, and to bring to sale the right, title, and interest of the putnidars, but, on the other hand, either precluded the zemindars altogether from obtaining a decree under the Bengal Tenancy Act for the rent as a whole, or at any rate prevented one of the zemindars from doing so by making his co-sharers defendants.

This was the contention which prevailed with the Subordinate Judge and with two out of the three Judges in the High Court.

The evidence of the alleged agreement consisted of certain decrees, which seemed to show that the shares of the rent had been from time to time separately recovered. It has long been held in Bengal that agreement, either expressly proved or implied by the conduct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate shareholders; and their Lordships have no inclination to question that course of rulings.

But it has been equally clearly laid down in Bengal that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding; and their Lordships think that this is clearly a sound view of the law. And it appears to their Lordships to be

sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that the right to bring the tenure to sale for arrears of rent remains intact, and also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs.

It only remains to notice section 188 cited above. It was suggested in argument that this section precludes a suit under the Act, for the aggregate rent of the tenure, unless all those entitled to share in the rent join as plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of both Courts in India should be discharged, and that instead thereof it ought to be declared that the appellant is competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit, that the case ought to be remitted to the High Court to take the necessary steps for the disposal thereof on the footing of the above declaration, and that the respondents who defended the appeal to the High Court ought to pay the costs thereof, and that the costs in the Court of the Subordinate Judge ought to be dealt with by that Judge on the above footing.

The respondents who defended this appeal will pay the costs of it.

Appeal allowed.

Solicitors for the appellant: *Downer & Johnson.*

Solicitors for the Moitra respondents and for Ramani Kanta Roy: *T. L. Wilson & Co.*

J. V. W.