

CALCUTTA HIGH COURT

Kashi Kinkar Sen

Vs

Satyendra Nath Bhadro

(Mookerjee, C.J Sharf-Ud-Din, J.)

02.09.1910

JUDGMENT

Mookerjee, C.J

1. This is an appeal on behalf of the first defendant in a suit for arrears of rent. In the original Court, the suit was commenced against three defendants, on the allegation that they held the lands of the tenancy jointly, and were bound to pay rent to the plaintiff for his share in the superior interest at the rate of one rupee five annas per year with cases in four equal installments. It was further alleged that an equal amount was payable to the co-sharer landlords who were joined as the fourth and fifth defendants. The tenants defendants resisted the claim substantially on the ground that rent was payable to the entire body of landlords at the rate of 12 annas 16 gundas a year. Upon these pleadings the issue was raised, what was the amount of rent and cases payable by the defendants to the entire body of landlords? The defendants produced rent receipts for previous years in support of their allegation. The plaintiff, on the other hand, produced a road-cross return purporting to have been filed on behalf of the first defendant which apparently supported the rate alleged by the plaintiff. The Court of first instance held that the first defendant was bound by the admission contained in the road-cess return filed by his officer on his behalf, but that it was not binding upon the other tenant defendants. In this view, the Court made a decree for the entire rent at the rate claimed by the plaintiff against the first defendant alone, and dismissed the suit against the other tenant defendants. Upon appeal by the first defendant, this decision has been affirmed by the Subordinate Judge. The first defendant has now appealed to this Court, and on his behalf the decree has been assailed on the ground that he alone could not be made liable for the whole rent, while the suit was dismissed as against the other defendants who were admittedly jointly interested in the tenancy and were in joint occupation of the lands. This position has been strenuously contested on behalf of the landlord and it has been argued broadly that joint tenants are jointly and severally liable and any one or more of them may be sued by the landlord at his discretion and rendered liable for the whole rent. We are not prepared to accept this as an accurate statement of the law, and we are of opinion that even if the principle were recognized as sound, it could not be applied in the circumstances of the present case.

2. When a landlord A creates a tenancy in favour of B and C jointly, whether each is liable for the entire rent must depend upon the intention of the parties, for as was pointed out in the case of *Mahomed Ishaq v. Akram-ul-Huq*¹, the question whether a contract is joint or several or joint and several is a question of construction dependent upon the intention of the parties to the contract. This position is not affected by Section 43 of the Indian Contract Act which lays down the general rule that one of several joint promisors may be compelled to perform the whole of the promise subject to a right of contribution among themselves. To put the matter in another way, to determine whether the promise is joint or several, we have to ascertain not only whether several persons have joined in making a promise to the same person, but also whether at the same time each of them has in addition made the same promise separately to the same promisee. In such a case there are, in addition to the joint promise which is made by all of the promisors together, several promises made by each of them separately, and each of the promisors incurs both a joint and several liability. In such a contingency, all or any of the promisors may be sued at the option of the promisee in respect of a joint and several liability and separate actions may be brought against each; in the event of the death, of any of them, the personal representatives of the deceased are liable jointly and severally with the survivors [*Laws of England*, Ed. by Lord Halsbury, Volume VII, Section 693 ; *King v. Hoare*² *Info Jeffery*³ *Burns v. Bryan*⁴ Tested in the light of these principles, can it be affirmed as an inflexible rule of law that in every case in which A lets out land jointly to B and C. there is a promise by B and C that each of them will be responsible for the whole rent ? The answer should, in our opinion, be in the negative, as is obvious from judicial decisions which have been treated as good law for many years past. Thus in *Hoop Narain Singh v. Jaggo Singh* 10 W. R. 304, it was ruled that a suit for rent due from several ryots, on account of a holding which has been let out to them, cannot be properly and legally brought against one of them, but must embrace all of them as defendants. In *Kheller Mohan Pal. v. Ram Kristo Kabiraj*⁵ it was assumed as well settled that upon the death of the original tenant, the landlord would be bound to sue so many at any rate of the heirs as have notified their names to him. In *Rum Taran Chatterjee v. Asmatullah Sheikh*⁶ where one of several joint tenants had executed a qabuliat in favour of the landlord for the entire tenure and it was proved that the other tenants did not acquiesce in this and were in no way bound thereby, it was ruled that the tenant who had executed the qabuliat was not bound in excess of his share, and was not liable for the whole rent. The cases of *Ananda Kumar v. Hari-dass*⁷ and *Abdul, Rob v. Eggar*⁸ also tend to the same conclusion. The case of *Jogendra Nalh v. Nagendra Narain*⁹ is, however, relied upon as an authority for the contrary view. No doubt, the learned Judges in that case made the observation that joint tenants are jointly and severally liable for the rent, but this could not have been intended as an universal proposition of law, as is clear from the reason given for the conclusion, namely, that to hold that joint tenants are only liable each for his own share of the rent would be directly opposed to the policy which underlies Section 88 of the Bengal Tenancy Act. The question raised before us, however, is obviously of an entirely different description: the point raised before us is not whether each of the three tenants is liable for his share of the rent but whether they are jointly liable as the assent or severally liable for the whole rent as the landlord

contends. Our attention has also been drawn to the case of Ramessur Singh v. Joydeb Jha 6 Ind. Cas. 387(Supra) in which the case of Jogendra Nath v. Nagendra Narain 11 C.W.N. 1026(Supra) was treated as an authority for the broad proposition that the landlord may maintain a suit for rent against any number of several joint tenants. The earlier decisions, to which we have referred, were, however, not brought to the notice of the Court, and, in our opinion, the rule was stated in too comprehensive terms. We may add that even if it could be laid down that ordinarily a landlord may make one of several joint tenants responsible for the whole rent, the doctrine would be inapplicable to the present case for two special reasons. In the first place, the landlord has brought his suit against all the three tenants, as against one he has got an admission in favour of the rate of rent asserted by himself; as against the other two, he has no evidence to prove the rate and cannot possibly obtain a decree at a rate higher than the rate admitted by them. Under such circumstances, he cannot obviously be permitted to obtain a decree for the whole rent against the first defendant and ask for a dismissal of the suit as against the others. If this decree were maintained, in a suit for contribution by the first defendant against his co-sharers, the position of the former would be one of considerable embarrassment. The first defendant would be liable to satisfy the claim of the landlord at one rate, and then possibly find himself unable to recover anything from his co-sharers except at a very much smaller rate; this would be clearly unjust. In the second place, the tenancy is admittedly an ancient one and the tenants in occupation are the representatives of the original tenant. Now, even if it be assumed that one of several joint tenants is liable for the whole rent, it does not follow by any means that when land is let out by A to B, upon the death of B, every one of his heirs is liable for the whole rent. As was pointed out in the case of Ahinsa Bibi v. Abdul Kaler 25 M. 26 at p. 35(Supra), the heirs really constitute one body and cannot be treated necessarily as persons who have made joint and several promises.

3. The result, therefore, is that this appeal must be allowed, the decrees of the Courts below discharged and the suit dismissed with costs in all the Courts. The effect of this decision will be that the question of the rate at which rent is payable will remain open; all that we decide is that the plaintiff is not entitled at his pleasure to sue any one of the three defendants and obtain a decree against him alone for the entire rent.

Cases Referred.

16 C.L.J. 558 at p, 567 : 12 C.W.N. 84
213 M. and W. 494 at p. 505
3(1871) L.R. 7 Ch. App. 178
4(1887) 12 A.C. 184
53 C.W.N 371
66 C.W.N. 111
727 C. 545 : 4 C.W.N. 608
835 C. 182 : 12 C.W.N. 160
911 C.W.N. 1026