CALCUTTA HIGH COURT

Naresh Chandra Basu

Vs

Hayder Sheikh Khan

(Mitter ,J.)

07.09.1928

JUDGMENT

Mitter, J.

1. This is an appeal by the plaintiff and arises out of a suit for a declaration of his tenancy right in the disputed land and for recovery of possession of the same.

2. The facts of the case lie within a short compass. The defendants who are two in number and their cosharers had an occupancy holding which carried an annual rental of Rs. 10-4-0 under Nityamani Dasya who sued the defendants Erfen Bibi, Asirennessa Bibi, Chandjan Bibi who are her tenants and whose names are alleged to be recorded in the sherista of Nityamani for arrears of rent in respect of the said holding, obtained a decree in that rent suit (No. 1217 of 1919) and executed the same in Rent Execution Case No. 474 of 1922; the plaintiff purchased the holding in execution of the said decree on 12th September 1922; the defendants were living on the disputed land by the erection of huts and in Falgun 1329 the plaintiff called on them to give up possession of the land by removing the huts therefrom but the defendants refused to vacate. Hence this suit.

3.The defence of defendant 1 substantially is that the decree and the sale referred to in the plaint, are not rent decree and rent sale as all the persons having an interest in the said holding were not parties in the rent suit brought by Nityamani and that consequently only the right, title and interest of those persons, who are parties to the rent suit, passed by the sale.

4. It is common ground that the disputed holding belonged originally to one Bazari Sheikh, father of the defendants who died leaving behind him the defendants Tomez and Adam and Kadam and Gopal Sheikh, his four sons, and two daughters named Arfemassa and Masirunnessa Bibi as his heirs. It has been found that Garaz Bibi, the widow of Gopal, and the sisters of the present defendants were not impleaded in the Rent Suit No.
1217 of 1919. The Munsiff found, that the persons who were defendants in the Rent Suit No.

1217 of 1919 did not represent the entire holding of Rs. 10-4-0 in the books of Nityamani Dasya. The Munsiff found further that none of the two defendants has got any subsisting title to the disputed land. He accordingly decreed the plaintiff's suit declaring his title to 57/80th share in the disputed land and he directed that plaintiff do recover possession of the said undivided share with persons owning the remaining 23/80th share in that land.

5. An appeal was taken by the plaintiff to the Court of the Subordinate Judge of Jessore against the decision of the Munsiff and the learned Subordinate Judge affirmed the decision of the Munsiff subject to this modification that plaintiff will recover possession of 57/80th share in the land in suit jointly with the defendants. The lower appellate Court found that the decree in the rent suit was not a rent decree, that not only the persons mentioned by the Munsiff were not included in the rent suit but also Junmat, the son of Gopal, was not impleaded in that case. The appellate Court found that persons who were parties to the rent suit did not represent the tenancy and the sale was not a rent sale.

6. The plaintiff has appealed against the decision of the Subordinate Judge to this Court and three grounds have been taken in support of this appeal : (i) that there has not been a proper determination of the question of representation of the tenancy in the rent suit by the persons who were parties to the same; (ii) that as the plaintiff obtained symbolical possession through Court on 3rd February 1923, against the defendant that possession is equivalent to actual possession as against them and the defendants who do not pretend that they have any manner of right to the disputed property after the sale cannot resist eviction; (iii) that as there was no appeal by the defendants to the lower appellate Court, the Subordinate Judge was in error in modifing the decree of the Munsiff by directing joint possession of the plaintiff with the defendants to the extent of their 57/80th share.

7. With regard to the first ground taken, the argument of the appellant is put in this way. It is true that the question as to whether the persons who are parties to the rent suit of 1919 represented the tenancy or not is in one sense a question of fact, but at every point in the process of reasoning considerations of law have to be regarded, and consequently the finding that there was not a proper representation of the tenancy could not be accepted as final: see Hyder Khan v. Secry of State [1909] 36 Cal. 1. The following elements which were necessary to be considered in determining the question of representation were not taken into account by the lower appellate Court, (i) the settlement proceeding under Chap. 10, Bengal Tenancy Act, shows that persons against whom the rent suit was instituted were the persons who are recorded as tenants of the holding in the finally published Record-of-Rights; (ii) no step had been taken by the heirs of Bazari Sheikh who were not made parties to the rent suit to set aside the decree of sale; (iii) that no proper weight has been attached to the circumstance that Erphan Bibi and the other sisters of the defendants were not in possession of the disputed holding at the time of the rent sale: (iv) the endorsement on the back of the writ of delivery of possession shows that symbolical possession was delivered to the plaintiff as against the : defendants and the Court of appeal below is in error

in finding notwithstanding this endorsement that symbolical possession was not delivered; (v) it has not been hinted in the present litigation that the arrears claimed in the rent suit were not due in fact or that the decree was erroneous or otherwise unjust in any particular. It is further said that the question as to whether the tenancy was not adequately represented in the rent suit and that the decree made therein did not operate as a rent decree has not been tested with reference to the considerations of the five matters just referred to. In support of this contention reliance has been placed on the decision of the Judicial Committee of the Privy Council in the case of *Ganpat v. Bindubashini*[1] and on the decision in the case of *Sarat Chandra v. Bhibabati*[2]

8. On the other hand it is argued for the respondent that as Exs. 3 and 3-A show that the recorded tenants are the persons against whom the decree was obtained and Ex- B shows that the defendants Julmat and Erfan are the tenants, the landlord knew at some point of time that Julmat, son of Gopal, was interested in the tenancy and that Nityamani knew that there were tenants other than those against whom the rent decree was obtained. It is pointed out that the Record-of-Rights have not been filed in the ease. It is also urged that the name of the original tenant Bazari Sheikh appeared in the sherista of Nityamani so that it is not a case where the names of the persons who were parties to the rent suit were recorded as tenants in the sherista of Nityamani so that it could not be said that the suit was brought against the recorded tenants. It is strenuously urged that the questions as to whether the tenancy was adequately represented or not is a question of fact and it is not permissible to me sitting in second appeal to interfere with the said finding.

9. After giving my most anxious consideration to the case I think the contention of the respondent must prevail. Both the Courts below have concurrently found on evidence before them that the parties to the rent suit did not adequately represent the tenancy and by this finding of fact I am bound in second appeal. It is not said that there was no proper evidence before the lower appellate Court to sustain the finding on this part of the case. I am unable to see how the defendants can be estopped from contending that the decree was not a rent decree or that the sale was not a rent sale. In the case in *Sarat Chandra v. Bibhabati* [3]the sale was not set aside for a number of years. Ram Narayan and Lakshmi Narayan the two brothers of Tara Prosad were joined as defendants. The interest of Ram Narayan as a cosharer of the tenancy was identical with that of his nephews. The evidence showed that the defendants were aware of the suit, the decree and the execution proceedings. Although many years elapsed since the decree was made and the sale was held, no endeavour had been made to reopen the proceedings. In those circumstances the Court held that there was an adequate representation of the tenancy in the rent suit. The facts of this case are not similar to those of the present. Here the family is a Mahomedan family and it could not be said that the brothers and sisters were members of the same family. The first ground, therefore, taken by the appellant, fails.

10. In support of the second ground reliance has been placed on the decision of the Judicial Committee of the Privy Council in the case of *Sundar v. Parbati*[4] and it is argued on the authority of that decision that the plaintiff being a cosharer to the extent of 57/80th share are entitled to

evict the defendants who are mere trespassers. An examination of the case before the Judicial Committee will, however, show that in that case the widows were in lawful possession of the property of their deceased husband and it was held that they have an estate or interest therein in respect of their possession notwithstanding that under an adoption or a will by the deceased husband a preferable title thereto might exist. It was said by their Lordships that they (the widows) were entitled to maintain their possession against all new-comers except the only person who can plead a preferable title but as the possible claimants were not in the field each of the widows could divide the joint estate between them. This case is no authority for the, proposition that whore a plaintiff brings a suit in ejectment he can get a decree for possession of the whole of the lands from which he seeks ejectment although he may be entitled to a lessar share in the said lands. All that the case decides is that a cosharer of joint property can maintain possession of the whole of the joint property as against a trespasser. Reference has also been made to Article 343 of Freeman on Co-tenancy and partition in which the author states that a cosharer of joint property can recover possession of the whole of the joint property from a trespasser and not merely to the extent of his share therein. But the same learned author points out that there is a respectable body of authority even in America, the opposite way and it is held in some of the States that a cosharer can only recover joint possession even as against the trespasser to the extent of his share in the joint property. The true rule is laid down in the decision in the case of *Doe Hellyer v. King*[5] where Baron Parke said that a tenant-in-common is entitled to recover possession as against a trespasser only to the extent of his share. This was the view which was adopted by the majority of the Court. Baron Parke said: I' am, therefore, of opinion, that the lessors of the plaintiff being tenants-in-common with other persons are not entitled to a verdict for the whole of the premises though they might recover less.

11. Baron Parke and Baron Alderson took a view different from Baron Platt who said:
Now a tenant-in-common is the owner of the whole estate in common with his co-tenants; therefore as soon as he has proved his right to the possession in common with others and that the defendant having no such right is a wrong-doer as against him, he is, in my opinion, entitled to a general verdict for the purpose of recovering possession of the whole.

12.The view of Baron Platt is the view contended for by the appellant but as Baran Platt was in the minority the appellant cannot rely on his view as his opinion did not prevail.

13. In this view I think the second ground taken fails and the lower appellate Court was right in granting a decree to the plaintiffs for joint possession with the defendants to the extent of the plaintiffs' 57/80th share.

14. I now proceed to deal with the third ground. Although there was no appeal by the defendants it was open to the lower appellate Court to make a decree which would be proper in the circumstances of the case under Order 41, Rule 33, Civil P.C. The decree of the Munsif directing that plaintiff should have joint possession with the other cosharers who were not parties to the

suit does not seem to be in accordance with law. The lower appellate Court has put the decree in the right form. There is no substance in this ground also.

15. All the grounds fail and the appeal will be dismissed with costs.

Cases Referred.

1A.I.R. 1920 P.C. 1
2A.I.R. 1921 Cal. 584
3A.I.R. 1921 Cal. 584
4[1890] 12 All. 51
5[1851] 6 Ex. 791