

(1866) 09 CAL CK 0010
In the Calcutta High Court
Case No : Special Appeal No. 3109 of 1865

Banee Madhub Ghose

APPELLANT

Vs

Thakoor Doss Mundul

RESPONDENT

Date of Decision : 11-09-1866

Acts Referred:

Citation : (1866) 09 CAL CK 0010

Judgement

Sir Barnes Peacock, Kt., C.J.—First, as to whether the Court should remand the case in order to ascertain whether any enquiry is necessary as to the fact of the possession of the widow, and for an investigation of the extent of the share held by her. It appears that the tenant held originally under four brothers, of whom Gobind Monee's husband Sreekissen was one. They were a joint family, and the tenant was paying rent to them jointly. I should have thought myself, though it is unnecessary in this case to express any decision upon the point, that where rent is received by a joint family the tenant is not liable to be sued by each member of the joint family for a separate share of the rent. But if the estate is severed by partition, and, instead of being a joint estate, becomes separate estates, then the rent would be apportioned in respect of the several allotments, and each member would be entitled to sue for his separate share of the rent in respect of the lands allotted to him on partition. In this case there was no allegation that the widow, after her husband's death, had ever succeeded to, or obtained possession of, her husband's share in the property, either jointly or separately. The tenant said that it was the custom of the family for the elder member to collect the rents, but he did not admit that the widow was ever in separate collection of her husband's share of the rent. The Judge having found that the widow had no power under her husband's will to grant a putnee we do not think that the Judge was wrong in not finding whether she was in possession or not. If the plaintiff had alleged that the widow obtained separate possession of her husband's share of the rent, and that being in separate possession of her husband's share she granted a putnee to the plaintiff, and that he as grantee of the putnee had the right to collect the rent which the widow had previously

collected, the case might have been different. But even if the widow had been in receipt of her husband's share of the rent, that is to say, if after her husband's death the tenant had paid rent to her, speaking for myself alone, I should have been of opinion that neither she, nor her grantee, would be entitled in this suit to receive the rent after the will of her husband was established and her title disproved. According to English law if a man takes land from another as his tenant he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently coming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took; for example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the land-lord left a will, the tenant in a suit for subsequent arrears of rent would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to prima facie evidence. It is, like all prima facie evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can. Therefore, even if it has been proved that the widow in this case, after her husband's death, received one-fourth of the rent, that would not estop the tenant from afterwards proving that the husband had left a will by which he had devised his share of his estate to other persons in trust to apply a portion of the rents in a particular manner, and to pay over the residue to his widow. Therefore, speaking for myself alone, I should say that even if it had been proved that the widow had once or oftener received her husband's proportion of the rent, the tenant would not be estopped from setting up this will in answer to a charge by her or by any person claiming through her to continue to receive such share of the rent See Act I of 1872, ss. 115 & 116. When the Judge found, as he did, that the husband left a will under which the widow had no power to alienate the property, he in effect found that the plaintiff who claimed through an alienation by the widow had no title. It was unnecessary therefore for him to go on and inquire whether the widow ever had been in receipt of the rent, or to enter into an investigation as to the share held by her. The first question must be answered in the negative.

2. As to the second question whether the Division Bench ought to hold that the widow was entitled to collect separately the rents of the whole of her husband's share upon the assumption that she was in legal possession of her husband's share as an admitted joint proprietor in possession.

3. There was no admission that the widow ever was in possession of her husband's share of the rent, and no proof of it. Her prima facie title as heir to her husband was rebutted by her husband's will, and as I have already stated, I should have thought that when, upon the death of a member of a joint family, his interest in a joint estate passes to another as his representative, as for

instance, when there is a joint family consisting of four brothers, one of whom dies leaving a son, or without issue leaving a widow, the son or the widow, as the case may be, is not entitled to sue separately for the share of the deceased member of rent reserved jointly. But I am speaking for myself alone, and I do not think it necessary to express any decisive opinion on that point now, because I think we may determine this case upon another point, namely, that as the will was proved, and the widow had no power under it to convey her husband's share of the property, the plaintiff had no right to sue for any part of the rent.

4. That part of the third question, by which it is asked, what orders should be given as to the share claimed by one of the intervenors to have been devised to him by the husband of Gobind Monee, the answer is, that the intervenor not having proved that he was in receipt of the rent up to the time of the commencement of the suit, he is out of Court. But although the intervenor is out of Court, still the plaintiff is bound to prove his title, and the will being proved shows that he had no title.

5. Then as to whether this Court, upon the finding of the lower Appellate Court, and on the devisee's admission of not having taken out a certificate, ought to consider that the devisee is not in possession of the share said to have been conveyed to him, it appears to us that, in a suit for rent by a devisee under a will, it is not necessary for him to obtain a certificate of will. A landlord dies having granted a lease to a tenant, and devises his estate to another person, that person has a right to come into the Collector's Court and to sue for the rent as representative of the original landlord. He is not bound to obtain a certificate, and the Collector is competent to try his title. The Collector being the Civil Court for the purpose of trying actions for rent, he has power to try whether the person who claims the rent as legal representative of the landlord is the legal representative or not. A devisee who has not obtained a certificate is not out of possession. He has not a right to collect the debts due to the testator, but it is not contended that the devisee in this case claims to collect any thing due to the testator. He only claims to collect the rents due since the death of the testator, for which the testator could never have sued. A devisee under a will can sue for rent without obtaining possession. The will gives him the same right as the testator had. We think that there is no necessity to remand the case to try any further issues.

6. It appears that in point of fact there was a will made by the widow's husband, by which the plaintiff's title is disproved. That is an answer to his claim to the rent. The special appeal must be dismissed, and the decision of the Judge affirmed with costs.

1 See *Donzelle v. Kadarnath Chuckerbutty*, 7 B.L.R., 720; and Act I of 1872, ss. 115 and 116.