

(1929) 01 CAL CK 0025
In the Calcutta High Court

Idol Sree Brindaban Chandra Thakup Jiu by his Shebait Hari
Prosanna Barman

APPELLANT

Vs

Nishapatisai

RESPONDENT

Date of Decision : 18-01-1929

Acts Referred:

Citation : 120 Ind. Cas. 149

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Judgement

Mukerji, J.—This appeal has been preferred from the decree of the Subordinate Judge of Burdwan affirming on appeal that passed by the Munsif, fourth Court, Burdwan. The appeal arises out of a suit for rent. The plaintiff instituted the suit for rent for recovery of paddy rent for two years, namely, 1330 and 1331 at the rate of two Maps one Sali of paddy per annum with cesses and damages. The suit was instituted on the allegation that the defendant's tenancy consisted of two plots of land. The defence set up was that of the two plots,—Nos. 1 and 2 mentioned in the plaint, No. 2 did not form a part of the tenancy but a different plot of which the plaintiff was in possession of a part of it instead, and so the rent should be suspended. It was also pleaded on behalf of the defence that under an arrangement between the parties the defendant was in possession of plot No. 1 only for which he had to pay only half the rent. The trial Court held that plot No. 2 of the plaint did not appertain to the jama and that the other plot of the jama which was not mentioned in the plaint was in the landlord's possession, but as there was sub-division of the jama the defendant was not entitled to get any suspension or abatement of rent and the defendant, therefore, was liable to pay half the rent. The learned Munsif, therefore, made a decree in favour of the plaintiff at the rate of half the rent claimed; namely, for two Maps, one Sali of paddy as rent for the two years in suit together with cesses and damages. Calculating the price at a certain rate and on the basis of a certain standard, to which it is not necessary to refer as no objection has been taken thereto here, the learned Munsif gave the plaintiff a decree for Rs. 25-1. anna

and 7 pies together with proportionate costs and interest at 6 per cent per annum. This decree, as I have already stated, has been affirmed on appeal by the Subordinate Judge.

2. The learned Subordinate Judge has not thought it necessary to go into the question as to whether plot No. 2 of the plaint appertained to another jama or not, or whether the other plot which the defendant said formed part of this tenancy was one in respect of which the plaintiff had dispossessed the defendant, because he found that there was sub-division of the jama and that in consequence thereof the defendant was liable to pay half the rent claimed in the suit for being in possession of plot No. 1. It is this finding on the question of sub-division which both the Courts below have arrived at and recorded in their judgment that is challenged before me in this second appeal.

3. At the outset it should be observed that the question whether there has been a division of the tenancy such as is recognised by Section 88 of the Bengal Tenancy Act or not is a question not of fact but of law, and looking at the matter as one of law and not of fact, one has got to see what are the facts that have been found as justifying an inference of law to the effect that there has been a sub-division within the meaning of Section 88 of the Bengal Tenancy Act. Now the learned Subordinate Judge has drawn this inference from the contents of three counterfoil receipts. Added to these may be mentioned two Thokas which are on the record and which were also relied upon by the learned Munsif. On examining these documents it seems to me that far from supporting any case of sub-division within the meaning of Section 88 of the Bengal Tenancy Act the said documents point to a contrary conclusion. The three counterfoil receipts show the name of the tenant as one Sonatan Shau deceased and the total rental as two Maps one Sali. In one of the rent receipts one Map ten gandas was entered as having been realised gujrat Hemangini Dasi marfat one Bibhuti Banerji. In the second counterfoil it was stated that one Map ten gandas was realised gujrat Hemangini Dasi. The third counterfoil receipt shows that one Map ten gandas of paddy was realised gujrat Pashupati Shau: who was probably some predecessor of that defendant, marfat Hemangini Dasi. The Subordinate Judge made a distinction between the words gujrat end marfat in these rent receipts and was able to hold that Hemangini and Pashupati were persons from whom rents were separately realised on account of the shares payable by them. This finding need not be disputed for the present purposes. He has also recorded a finding to the effect that the gomashta's authority to grant such receipts has not been questioned by the plaintiff. These two findings of the Subordinate Judge, if accepted, come to this that the gomashta and for the matter-of that the landlord, the plaintiff, realised rents from Hemangini and the predecessor of the defendant separately for the shares of rent payable by them. This, however, by itself, fails far short of what is requisite to constitute a sub division within the meaning of Section 88 of the Bengal Tenancy Act. Section 88 says that a division shall not be binding on the landlord unless it is made with his express consent in writing or with that of his agent duly authorised in that behalf. From the contents

of these three documents can it be said that there was consent in writing to the division of the holding? That is the question which has to be considered in the present case. The Thokas on which the learned Munsif relied show that the tenancy was recorded with Sonatan Shau the deceased as the tenant. The arrears of rent are mentioned in the Thokas as being two Maps one Sali per year and on the credit side realisation of rent separately from Pashupati and some other person whose name is not quite legible is entered, it being shown that one Map ten gandas of paddy were realised from each of them. These documents all go to indicate that the tenancy was being treated by the landlord as one tenancy in the name of the deceased tenant Sonatan Sbau and even if the Thokas be taken as constituting a rent roll for the purpose of the proviso to Section 83 there is nothing to indicate that there was any consent to divide the holding or distribute the rent payable among the different tenants. Sepa-Tate realisation from the two tenants may have been made only for the sake of convenience. If it be found, as it has been found in the present case, that in all these papers the rental was mentioned as being one undivided rental and the area of the tenancy as one undivided whole in respect of a tenancy standing in the name of one tenant who was deceased, I am unable to hold that merely because there has been separate realisation of rent any inference can be drawn to the effect that there was a sub-division which would come within the purview of Section 88 of the Bengal Tenancy Act. As authority for the view I take I may refer to (*Jour Mohun Roy v. Anund Mundul* 22 W.R. 295, *Ruheemuddy Akun v. Poorno Chunder Roy* 22 W.R. 336. A point similar to this came up for consideration before this Court in the case of *Jnanendra Mohan Chowdhury v. Gopal Das* 31 C. 1026 : 8 C.W.N. 923. In that case relying upon the decision in the case of *Moharani Beni Pershad Kozri v. Goberdhan Kari* 6 C.W.N. 823, it was held that when a holding is in occupation of several tenants at one entire rental the fact that the landlord's Tahsildar has accepted from the various tenants proportionate parts of the rent does not bind the landlord to recognise a separation of the tenancy in the absence of evidence to connect the landlord with the receipt of any proportionate share of rent by the Tahsildar. In the present case the authority of the gomashtha not having been questioned, it may be conceded that the plaintiff landlord did in point of fact accept from the two tenants proportionate parts of the rent due from them. But then the next passage in that judgment runs in these words: "Even then if the inference be accepted that rent has been paid separately by defendant No. 2 and received by the landlord for a long series of year.?, that in itself is not sufficient to constitute a division of the tenure and what is in itself insufficient to denote a division of the tenure can hardly be accepted as sufficient to supply the defect in the receipt in the present case." Beyond the documents to which I have referred and which are not sufficient to establish that there was a division of the tenancy, there is nothing else in the present case to show that there was such a division. It was never the plaintiff's case in his plaint that there was a sub-division of the holding and in fact this suit was instituted on the footing of the tenancy having been undivided one with an entire rental payable by the defendant.

4. I am accordingly of opinion that the decree of the Subordinate Judge should be set aside and that the case should be sent back to his Court so that he may now proceed to deal with the other two questions that arise in connection with it and which were left open in view of the finding on the question of sub-division that is to be found in the said judgment. The said two questions are first whether plot No. 2 mentioned in the plaint or some other plot not mentioned therein appertains to the jama in suit, and second, whether the defendant has been dispossessed by the plaintiff in respect of any portion of the land which forms part of his jama. On the findings that he may happen, to come to in connection with the aforesaid two questions will depend the ultimate decision of the suit. The learned Subordinate Judge will deal with the appeal finally after determining the aforesaid questions and any other questions that may possibly arise.

5. Costs of this appeal will abide the result.