
(1904) 06 CAL CK 0003
In the Calcutta High Court
Case No : Appeal No. 99 of 1901

Raja Promoda Nath Roy

APPELLANT

Vs

Raja Ramoni Kant Roy and others

RESPONDENT

Date of Decision : 03-06-1904

Acts Referred:

Citation : (1904) 06 CAL CK 0003

Final Decision : Dismissed

Judgement

Ghose, J.—This is an appeal by the Plaintiff in a suit, in which he sought to recover rent due upon a putni tenure, for the years 1303 to 1306 B.C. The Subordinate Judge having given to the Plaintiff only a partial decree, he has appealed to this Court. It appears that the Plaintiff and the Defendants Nos. 18 to 22 hold between themselves the zamindari interest in an eight annas share of Dihi Haloti, the Plaintiff's share therein being 6 annas, and the said Defendants' share 2 annas. The Defendants Nos. 16-17 are the putnidars of the property under a kabuliyat by which a certain rent was agreed to be paid for the putni. For a number of years, however, at any rate, from the year 1891, the co-sharer zemindars have been recovering their respective shares of the rent separately from the putnidars. Such separate reception of rent is apparently due to some arrangement, consented to by the co-sharers, on the one hand, and the tenants, on the other, and this arrangement still subsists and has not been put an end to. In the year 1896, however, the Plaintiff and one Rani Mina Coomari Bibi brought a suit for the entire rent due upon the putni in respect of the years 1299 to 1302 B.S., and also for a declaration of their 6 annas share in the said rent, making the then co-sharers Defendants. In that suit, the Court, among other matters, held that it was bad for misjoinder of parties and causes of action, and that when the Plaintiff's share of the rent had been previously decreed and collected separately, it was not necessary to join in the suit the co-sharer zemindars, and include in the plaint the rent due to their shares. A decree, however, was given for the Plaintiff's share of the rent, it being found that the collection in respect of his share was separate and he was therefore entitled to recover the rent due for

that share. Subsequently the present suit, was instituted on the 17th April 1900 for recovery of the whole rent said to be due to the Plaintiff and the co-sharer Defendants Nos. 18 to 22, and, in the alternative, for his (Plaintiff) share of the rent for the years 1303 to 1306 B.S., it being alleged in the plaint that though the Plaintiff is entitled to realize his share of the rent separately, yet he is also entitled to sue with the other co-sharers for recovery of the whole rent, but that those co-sharers, though repeatedly asked would not join him in the suit. One of the Defendants, namely, Defendant No. 11, in her defense, pleaded that the judgment in the previous suit was a bar to the present claim for recovery of the entire rent due to the whole body of co-sharers, and that no such suit was maintainable, having regard to the fact that the Plaintiff and the other co-sharers had been in previous years recovering their respective shares of the rent by suits in Court. And it was averred that the share of the rent due to the Defendant No. 22 had been paid up. Defendants Nos. 12 and 16 supported the contentions raised by the Defendant No. 11. Defendant No. 17 denied his liability upon the ground that he had not obtained actual possession of the share of the putni which he had purchased. Defendant No. 21, one of the co-sharer Defendants, put in a written statement refusing to join the Plaintiff in the suit. The other Defendants did not enter appearance.

2. The principal issue raised between the parties was, whether the Plaintiff who had been receiving his share of the rent separately, was competent to bring a suit for the whole rent due to all the co-sharers. The Subordinate Judge has held that he is not so competent, upon the ground that so long as the arrangement come to between all the parties concerned, as to separate payment of rent, continues, it is not open to the Plaintiff to bring a suit for the whole rent, even though the co-sharers are made parties Defendants to the suit. He has, however, held that the Plaintiff is entitled to sue for his share of the rent, and has accordingly given him a decree for such rent.

3. In appeal, on behalf of the Plaintiff it has been contended that the view adopted by the Subordinate Judge is wrong, and that the co sharers having been made parties to the suit, the claim for the entire rent could well be maintained, because the arrangement come to between the parties as to separate payment of rent in respect of their respective shares did not destroy the integrity of the tenure itself.

4. The question which demands our consideration is whether, so long as the arrangement consented to by all parties concerned as to separate payment of rent in respect of the shares of the different co-sharers 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 putni, when the other co-sharers and the tenants object to such a suit ?

5. As bearing upon the question, the learned vakils have called our attention to several cases in this Court.

6. These oases, as I understand them, establish the following propositions : (1) That when the tenant contracts to pay rent jointly to the several co-sharer landlords, one of the landlords 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 has 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 a 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 arrangement for separate collection of rent has been come to, one of the co-sharers may, in spite of the refusal 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.

7. 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 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?

8. 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 a case of this kind, if such a plea is raised, it would necessitate an enquiry as between the tenant Defendants 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.

9. The learned vakil for the Appellant has, among other cases, relied upon the case *Peary Mohan Bose v. Kedar Nath Roy* 3 C.W.N. 271 : s.C. ILR 26 Cal. 409 (1899), decided by a Full Bench of this Court, and the case of *Jibun Krishna Roy v. Broja Lall Sen* 7 C.W.N. 425; ILR 30 Cal. 550: s.c. L.R. 30 IndAp 81 (1903). In the first-mentioned case, the question referred to the Full Bench was whether, when two parties contract with a third party, a suit by one of the two making the

other a co-Defendant, ought to be dismissed, because the Plaintiff has not proved that the co-Defendant had refused to join as co-Plaintiff; and it was held that the suit should not be dismissed simply upon that ground. On looking at the paper-book in the case, I find that the suit there was a suit for rent, and the question was raised whether, having regard to the provisions of sec. 188 of the Bengal Tenancy Act, it could proceed. And this Court decided that the said question should be left open for decision on remand. That case, however, in my opinion, is no authority upon the question which arises in this case : the arrangement which was come to between the parties concerned in this case does not seem to have existed in that case.

10. In the other case a decree for rent having been obtained under the Bengal Rent Act (VIII of 1869) by some of the co-sharers against the Defendants, the tenure was sold, and it was held, having regard to the provisions of sec. 4 of that Act, that it was a sale only of the right, title and interest of the judgment-debtor. It was thrown out in the course of the judgment that, to make the tenure itself liable to sale in execution, the special procedure required by the Act would have to be adopted, and all the co-sharers would have to be made parties to the suit. That case is hardly an authority for a broad proposition like this 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 party Defendants.

11. But it is said that the arrangement between the parties as to separate payment and reception of rent 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.

12. No doubt, the original lease has not been put an end to by the arrangement that has been 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, 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 observations of Garth, C.J., in the case of Guni Mahamad v. Moran ILR 4 Cal. 96 (1879), 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.

13. It has however been said that the exact terms of the arrangement come to between the parties do not appear on 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, anyone of the co-sharers, after such an arrangement as was come to between the parties in this case and which still subsists, 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.

14. 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.

15. 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 Bold, Prem Chand Naskar v. Mokshada Debi ILR 14 Cal. 201 (1887), Jugobundhu Pattack v. Jadu Ghose Alkushi ILR 15 Cal. 47 (1887), Durga Churn Mandal v. Kali Prosonna Sircar 3 C.W.N. 586 (1899). And in the case of Beni Madhab Rai v. Jaod Ali Sikdar ILR 17 Cal. 390 (1890), 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 of rent in respect of his share, the tenure or holding is attached, such an attachment is an attachment contemplated by sec. 170 of the Bengal Tenancy Act, so as to prohibit a claim being preferred by a third party under sec. 278 of the Code of Civil Procedure. And it was held that the attachment was not an attachment as contemplated by the said sec. 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. Sec. 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 sec. 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 zamindari 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 Peary Mohan Bose v. Kedar Nath Roy 3 C.W.N. 271 : s.c. ILR 26 Cal 409 (1899) 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 sec. 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 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.

16. Before I conclude, I should state that the learned vakil for the Respondents in the course of his argument, contended that the question raised on the present suit is barred by the rule of res judicata, having regard to the judgment in the previous suit of 1896, to which I have already referred. But I do not think this position can be maintained.

17. In the result, however, I am of opinion that the decree made by the Subordinate Judge is right and that this appeal should be dismissed with costs.

18. I regret, however, that my learned brother takes a different view and, necessarily, the case shall have to be referred to one, or more of other Judges, as the Chief Justice might appoint.

Geidt, J.

19. I regret that I am unable to agree in the conclusion at which my learned brother has arrived.

20. The object of the Appellant in suing for the entire rent, and making his co-sharers Plaintiffs 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 the tenants and the landlords, the tenants, for some nine years before suit, have been paying rent to the landlords separately in proportion to the latter's share in the property and he has accordingly held that as that arrangement 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.

21. The Bengal Tenancy Act by sec. 65 makes the rent a first charge on the tenure, and by Chap. 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 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.

22. 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 decree for their own separate share 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 tenant 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 the payment only, and to my mind cannot affect as to any other matter, rights and liabilities arising out of the kabuliyat 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 Peary Mohan Bose v. Kedar Nath Roy 3 C.W.N. 271 : s.c. ILR 26 Cal. 409 (1899) that if some of their number refuse to join in bringing a suit for the rent due in respect of the entire tenure the others can bring the suits on condition of making them parties. To hold otherwise would, it seems to me, be to 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.

23. 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 arrangement. 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 kabuliyat, and that option should not be denied to him because on previous occasions he has failed to exercise it.

24. 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 rent 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 share 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.

25. 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 these arrears. These reasons have been indicated by their Lordships of the Privy Council in *Jiban Krishna Roy v. Brojo Lall Sen* 7 C.W.N. 425; ILR 30 Cal. 550: s.c. L.R. 30 IndAp 81 (1903) where they say. "The provisions of the Kent 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 Act VIII (B.C.) 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-debtors. 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.

26. 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 *Peary Mohun Bose v. Kedar Nath Roy* 3 C.W.N. 271: s.c. ILR 26 Cal. 409 (1899) 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.

27. 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 appeals should be decreed with costs in both Courts.

Brett, J.

28. The appeal came on for hearing before a Division Bench of this Court consisting of Mr. Justice Ghose and Mr. Justice Geidt and as those learned Judges have differed in opinion on a point of law the appeal has been referred to me under sec. 575, C.P.C., for hearing.

29. The plea in bar to the suit appears to have been argued at the hearing before this Court, but on this point there does not appear to have been any difference of opinion between the learned Judges. It has been argued before me that that plea should have been allowed. The contention is that in the previous suit (No. 7 of 1896) which was also a suit for the recovery of arrears of rent, the Plaintiff claimed as he has claimed in the present suit, to be entitled to a decree for the full rents due to him and his co-sharers, who were made pro forma Defendants in that suit; that his claim was disallowed, and a decree was granted for his share only of the rent; and that as there has been no appeal against that decision it has become final and operates as *res judicata* and "bars the present suit. I do not think that the contention is sound. The former suit was for rents due for years different from those in the present suit and the conditions under which the claim was then made were not necessarily the same. The issues 3 and 7 which were framed in that suit were not identical with the issues framed in the present suit. In that suit the Plaintiff appears to have prayed for a declaration of his title to a 6 annas share in the rents and for a further declaration that the amount decreed in his favor would be a charge on the tenure. These are not the points in issue in the present case, and the decision on them does not attempt to determine what is the real question for decision in the present suit. I hold therefore that this plea in bar fails.

30. The real dispute in this case is a narrow one. It has not been disputed before

me that when a lease has been granted by several co-sharer landlords and that lease stipulates for the payment of a certain sum as rent, the tenant is ordinarily bound to pay that rent to the whole body of landlords jointly. None of the co-sharer landlords can claim to be entitled to recover separately from the tenant a share of the rent proportionate to the share which he or they may hold in the estate and therefore a suit to recover the rent of the tenure from the tenant must be one to which all the landlords are parties. No one or more landlords who hold a share in the estate can bring a separate suit for his or their share in the rent of the tenure. But if any of the co-sharer landlords refuse to join as Plaintiffs then a suit can be brought by the rest to recover the whole rent of the holding making pro forma Defendants those landlords who refuse to join as Plaintiffs.

31. It is also not disputed that in such last-mentioned suit the provisions of sec. 65 of the Bengal Tenancy Act, would apply, that the rent would be treated as a first charge on the tenure and therefore that the tenure itself could be sold in execution of the decree.

32. It is further admitted that if in the case of such a lease there be an agreement between the body of landlords on their side and the tenant or tenants on their side that the rent shall be paid to each co-sharer landlord or body of co-sharer landlords in shares proportionate to the shares which they as landlords hold in the estate, then each co-sharer or body of co-sharer can recover that share of the rent from the tenant, and any payment so made by the tenant will be binding on the rest of the landlords. This right the co-sharer landlord can enforce, if necessary, by suit and he can obtain a decree for his share of the rent without making his other co-sharers parties.

33. It is however admitted that, in a series of decisions of this Court and by the Privy Council in the case of *Jiban Krishna Roy v. Brojo Lall Sen* 7 C.W.N. 425; ILR 30 Cal. 650 : s.c. L.R. 30 IndAp 81 (1903) it has been held that to a suit brought as above by a co-sharer landlord for his share of the rent of the tenure sec. 65 of the Bengal Tenancy Act does not apply and the rent cannot be treated as charge on the tenure so as to enable the landlord in satisfaction of his decree to sell up the tenure. All that can be sold in satisfaction of a decree for a fractional share of the rent of the tenure is the right, title and interest of the tenant in the tenure.

34. It has further been held by a Full Bench of this Court in the case of *Guni Mahamad v. Moran* ILR 4 Cal. 96 (1879) which was followed in the case of *Gopal Chunder Das v. Umesh Narain Chowdhury* ILR 17 Cal. 695 (1890) that an arrangement under which the fractional shares of the rent are paid separately to the different co-sharers does not give rise to a separate tenancy or to the presumption that, there has been a cancellation or determination of the original lease.

35. The narrow question on which the parties are at issue in this case is what is the result on the rights of parties under the original lease of such a subsequent agreement by which fractional shares of the rent are paid to the co-sharer

landlords in proportion to their shares. For the Appellants it is contended that such an agreement does not affect the right which any co-sharer landlord had under the original lease and that in spite of that agreement it is open to him to bring a suit and to recover the full rent for the holding of making parties Defendants to the suit any of his co-sharer landlords who refuse or fail to join as Plaintiffs and it is further open to him in execution of a suit to make the whole tenure liable for the rent decreed and to sell up the tenure in satisfaction of the decree, or in other words that the provisions of sec. 65 of the Bengal Tenancy Act applies to such a suit.

36. It is also urged on the authority of the decision of a Full Bench of this Court in the case of Peary Mohan Bose v. Kedar Nath Roy 3 C.W.N. 271 : s.c. ILR 26 Cal. 409 (1899) that it was not necessary for the Plaintiff to prove that the co-sharers had refused to join as Plaintiffs before he could bring a suit to recover the full rent, making them joint Defendants. This last point has not been disputed before me. It has only been contended for the Respondents and in my opinion rightly that the decision has no application to the matter in dispute in this appeal.

37. For the Respondents it is urged that so long as such an agreement subsists it is binding on each and all of the co-sharer landlords and the tenants who were parties to it, that such an agreement can only be determined by the consent of all the contracting parties, that so long as it exists all the parties are bound by it and that it precludes a co-sharer landlord from acting in contravention to it and from bringing a suit to recover the full rent of the tenure from the tenants even though in the suit he makes all the landlords parties. So long as that agreement subsists he can only bring a suit for his fractional share of the rent and in execution of a decree obtained in such a suit he cannot bring the tenure to sell on the ground that the rent is a first charge thereon.

38. It is on this point of law that the two learned Judges of the Division Bench have differed.

39. In support of the appeal it has been contended that as the Defendants set up the agreement as a bar to the Plaintiffs obtaining the relief he seeks the onus rests on them of proving what the agreement was or that by it the Plaintiff agreed to relinquish any of the rights which he had under the original lease. It is suggested that it may have been a personal agreement or one limited in time. The next point taken is that even supposing there was such an agreement then when the tenant refused to pay the fractional share of the rent due under it to the Plaintiff, it became voidable at the option of the Plaintiff and the Plaintiff was entitled to avoid it and fall back on his rights under the original contract. It is further contended that from the provisions of sec. 159 of the Bengal Tenancy Act it is clear that a tenure can be sold in execution of a decree for arrears due in respect thereof, and that as in this suit the Plaintiff seeks to recover rent due in respect of the tenure, the tenure itself can be sold in execution of the decree. It is pointed out that one of the co-sharer landlords (Defendant No. 22) is the

purchaser of a share in the putni, and that it is not to be expected that he will ever consent to join in a suit in which the putni itself can be sold in execution of the decree. It is therefore argued that it cannot have been the intention of the law that because of an agreement once entered into by the Plaintiff and his co-sharers to recover separately their fractional shares of the rent the Plaintiff should be for ever deprived of the right which he had under the original lease to make the rent a first charge on the tenure and to sell the tenure in execution of a decree for the recovery of arrears of rent. Lastly, it is suggested that sec. 188 of the Bengal Tenancy Act only applies to the case of new privileges conferred by that Act and not to rights which the landlords had prior to its enactment.

40. Taking first the question of onus it has been contended for the Respondent, and in my opinion rightly, that an agreement is evidenced as much by acts 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 Defendant 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 a fractional share 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 consequence. 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 the Court has held to be the consequences 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.

41. 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, not merely executory, and it was binding on 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 the rent would apply as well as 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 sec. 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.

42. 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 sec. 188 of the Bengal Tenancy Act does not apply to the right which the landlord 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.

43. 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.

44. 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 it is 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 landlords parties to the suit, so as to entitle him in satisfaction 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 tenants 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 tenants 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 hardships and inconveniences 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 consequence.

45. The mere failure of the tenants to pay the Plaintiff his share of the rent would not of 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 something which the contract binds him to do will not entitle the other party to rescind the contract unless the act 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 tenants 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.