

(1918) 03 PAT CK 0012

In the Patna High Court

Case No : Letters Patent Appeal No. 113 of 1917

Srikishun Prasad Panjiar

APPELLANT

Vs

Musammat Jeohasi Kuer

RESPONDENT

Date of Decision : 20-03-1918

Acts Referred:

Citation : (1918) 03 PAT CK 0012

Final Decision : Dismissed

Judgement

Sir Thomas Fredrick Dawson Miller, Kt., C.J.—The plaintiff, who is a co-sharer malik of Mauza Chak Sobhi alias Babhanjawan, instituted a rent suit against the defendant as tenant in respect of a holding said to comprise 5 bighas 1 cottah 13 dhurs for the years 1318 to 1321 F.S. The plaintiff's collection was separate from the other co-sharers and he claimed as his share the annual sum of Rs. 13-3-3 out of a total jama of Rs. 20-5-0. In addition to the 4 years' rent amounting to Rs. 52-13-0 he also claimed Rs. 13-3-3 on account of damages and interest until realisation.

2. The defendant, who is the widow of Deo Narain Singh, contended that the total rental according to the survey khatian was not Rs. 20-5-0 but Rs. 19-1-3 and further that her late husband Deo Narain, who was the original holder, sold a part of the holding to Uma Singh whose proportion of the total rent amounted to Rs. 10-4-0, leaving a balance of Rs. 8-13-3 payable for the part retained by Deo Narain. At the trial before the Munsif the survey khatian was accepted as showing the total rental and it was proved by a co-sharer malik with the plaintiff and by Sheonandan Raut, who acquired Oma Singh's interest, that the holding had been split up and that Uma Singh or his successors had in fact been paying Rs. 10-4-0 annually in respect of their portion of the holding, and the only question was whether this distribution of the rent was binding on the landlord. The Munsif found that it was and ordered that the plaintiff should recover his proportion of the Rs. 8-13-3 payable in respect of that part of the holding which had not been transferred together with proportionate costs and damages. The

Sub-ordinate Judge in a somewhat perfunctory judgment upheld this decision and on appeal to a single Judge of this Court the case was remanded for the Subordinate Judge to determine the Question whether the division of the holding had been made with "the express consent in writing" of the landlords or their authorised agent within section 88 of the Bengal Tenancy Act. The learned Subordinate Judge on remand dealt with the evidence and came to the conclusion that the section had been complied with. The learned Judge of this Court who remanded the case upheld that view, holding that there was sufficient evidence to support the finding. The plaintiff being dissatisfied with that decision now brings this Letters Patent Appeal and contends that the evidence was not sufficient to warrant the finding that "the express consent in writing" of the landlord had been obtained. Before 1907 the section in question did not contain the word "express" before the words "consent in writing", nor did it contain the words which follow after the words "consent in writing", and the question we have to determine is whether the evidence is sufficient to prove that the division of the holding or the distribution of the rent payable in respect thereof was made with "the express consent in writing" of the landlord or his duly authorised agent in that behalf. It was conclusively proved that the holding had been split up, as contended for by the defendant, and that for several years the landlords had been in the habit of collecting the rent payable for the transferred portion from Uma Singh and subsequently from his successors-in-title, and further the survey khatian showed two khatahs one in the name of Deo Narain and the other in the name of Uma Singh but the jama of Rs. 19-1-3 was not apportioned in the survey records. Rent receipts in respect to the portion of the rent then payable by Uma Singh were produced for the years 1309, 1313, 1314, 1315 and 1319 F.S. They show an annual rent of Rs. 10-4-0 payable by Uma Singh and subsequently by his successors and Uma Singh is described in the first one as vendee. The first one is signed by Hardeo Panjiar, the plaintiff's father, as well as by Ramasis Pandey his agent. The others are signed by Ramasis only. They further show that the holding of Uma Singh was 3 bighas 1 cottah 12 dhurs, which is a portion only of the total holding of 5 bighas 1 cottah 13 dhurs. They also show that the plaintiff's share of the Rs. 10-4-0 rent was Rs. 6-10-4, the balance Rs. 3-9-8 being that of his co-sharers. The receipt for the year 1319 is for one of the years in respect to which the rent in this suit is claimed. Moreover, this receipt acknowledges payment of a further sum of Rs. 6-10-4 as arrears presumably for the year 1318, It would appear, therefore, that in regard to the first two years for which rent is claimed in this suit the plaintiff has already received payment for Uma Singh's portion and on this ground alone he ought not to be allowed to recover it a second time from the present defendant. No evidence was called by the plaintiff to rebut the presumption that arises from the rent receipts and I think it may legitimately be inferred from the receipt of 1319 that the arrears therein acknowledged were for the previous years. This, in my opinion, disposes of the plaintiff's claim for the first two years so far as Uma Singh's portion of the rent is concerned. As to the rest of the claim it remains to consider whether compliance with the section has been sufficiently proved. A

controversy leading to some difference of opinion as to whether rent receipts could in any case constitute "the consent in writing" prescribed by the section was finally set at rest by the decision of the Calcutta High Court in *Pyari - Mohun Mukhopadhyaya v. Gopal Paik* 25 C. 531 : 2 C.W.N. 375 : 13 Ind. Dec. (N.S.) 352. The rent receipts in that case were granted by the landlord's gomashtha and contained a recital that the defendant's name was registered in the landlord's sherista as tenant of a portion only of the original holding at a rent less than the original rent. It was held that this fulfilled the requirements of the section as then existing. In 1904 the case of *Jnaendra Mohan Chowdhry Vs. Gopal Das Chowdhry*, came before the Calcutta High Court. In that case the rent receipts contained nothing beyond an acknowledgment of the receipt of a certain sum from the defendant as rent of a certain taluq. There was nothing to show that the rent was paid in respect of a portion only of the holding or that the defendant's name had been registered in the landlord's sherista as tenant of a divided portion. In fact the receipt showed nothing from which any inference could be drawn as to the division of the original holding or the landlord's consent. The Court held that such a receipt could not be taken as a fulfillment of the conditions of the section. It was laid down that payment by the tenant and receipt by the landlord of a portion of the original rent even extending over a number of years could not in itself afford evidence of the written consent of the landlord to a division of the holding, so as to substitute a new contract in place of the old. The facts of those two cases are separated by a wide gulf. In the first case the facts were clearly sufficient to show a written consent by or on behalf of the landlord; in the second they were just as clearly insufficient for that purpose. The case now under consideration comes midway between the two, and bears more resemblance to the later case of *Abinash Chandra Chowdhury v. Purananda Khan* 21 Ind. Cas. 420 : 18 C.L.J. 174 decided by the High Court at Calcutta in 1913. In that case several tenants were sued jointly for the rent of a putni tenure. They objected that the suit was not maintainable against them jointly on the ground that the original rent had been apportioned to each of them in separate shares. They produced rent receipts granted to the tenants separately, which showed the total rent and the portion allotted to each for their respective shares. The Court found on this evidence that there had been a sub-division of the tenure and a distribution of the rent consented to by the landlord. That case was decided after the amendment of the Bengal Tenancy Act in 1907 and once it is conceded that the granting of a rent receipt by the landlord or his agent may amount to "express consent" within the meaning of the section, it is only a question of determining what are the elements necessary to constitute such consent. It seems to me that the principle underlying these cases is that the mere acknowledgment of receipt of rent less than the total Jama, without any indication that it is in respect of a portion only of the holding, cannot constitute a consent to a division of the holding even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding, this may be a sufficient acknowledgment to bind the landlord. The present case is very near the

line and although the conclusion to which I have come has been arrived at with some hesitation, I think on the whole the finding of the learned Subordinate Judge was justified by the proved facts of the case. The present receipts clearly show that Uma Singh's proportion of rent was paid in respect of a named area which was less than the total area of the holding, and the first in point of date which was signed by the landlord as well as by the agent described Uma Singh as vendee. This seems to me to amount to an acknowledgment in writing that the holding had been divided and a proportionate rent allotted to Uma Singh. The plaintiff's co-sharer Dhurendhar also supported the defendant's case and the fact that the plaintiff was endeavouring to recover from the defendant rent clearly proved to have been already collected from Uma Singh's successors, although perhaps not a material factor in determining the question under consideration, is one which leads me to believe that the present decision will not work an injustice on the landlord. In arriving at this decision I would point out that there is no intention of disagreeing in any way with the judgment of this Court in the recent case of Wyatt v. Sheo Gobind Sahu 36 Ind. Cas. 777 : 1 P.L.J. 414; 3 P.L.W. 88. The facts of that case bear no resemblance to the facts of the present case. It was there admitted that the transfer was a benami transaction and that all along the transferor was treated as the tenant of the land. The remarks as to the authority of the landlord's patwari in that case could have no application to the present where the landlord himself was a signatory to one at least of the rent receipts. It was contended that section 188 of the Bengal Tenancy Act rendered the consent of one co-sharer landlord nugatory, unless it were proved that he was authorised by the remaining landlords to act on their behalf. It is difficult to see how section 188 can have any application to a case like the present where the landlords have separate collection of their share of rent; but however that may be, the evidence of Dhurendhar was enough to show that the act of the plaintiff or his predecessor was authorised by the other co-sharer. In my opinion, this appeal should be dismissed. It has been brought to our notice that the decree of the first Court does not carry out the directions contained in the Munsif's judgment. If that is so, we have power under Order XLI, rule 33, to set it right. The decree will, therefore, be modified and in lieu thereof it will be decreed that the plaintiff do recover from the defendant a sum equal to the plaintiff's share, viz., thirteen-twentieths of Rs. 8-13-3 for the four years in question together with 12½ per cent per annum interest to date of suit and 6 per cent thereafter until realisation. There will be no modification of the orders for costs in the lower Courts and save as above mentioned this appeal will be dismissed without costs, the respondent not having appeared.

B.K. Mullick, J.

3. I agree with the judgment which has just been delivered. I desire only to add a few observations on the matter urged before us.

4. The learned Vakil who appears on behalf of the plaintiff-appellant before us contends in the first place that the rent receipts upon which the learned Munsif

and the Subordinate Judge and the learned Judge of this Court found that a division of the holding had taken place were not binding upon him.

5. Now it is found as a fact that one of these receipts Exhibit A-1, dated the 7th Sraban 1309 F.S., was signed by the plaintiff's father and by his gomashta Ram Asis and was given to Uma Singh's brother while four other receipts for the years 1313, 1314, 1315 and 1319 F.S. were signed by the gomashta only and were given to Uma Singh or his on sharers. All these receipts, if believed, would tend to show that the plaintiff agreed to recognise the transfer of an area of 3 bighas 1 cottah 12 dhurs at a rental of Rs. 10-4-0 inclusive of cesses. The finding of fact as to the signatures is conclusive, but the plaintiff contends in regard to the receipts given by the gomashta that the servant in question had no authority to recognise any sub-division of the tenancy and that the defendant has not discharged the burden which rests on him to prove such authority.

6. Now the case of Suduman Jamadar and Others Vs. Behari Mahton and Another and Gopal Mahton and Another is clear authority for the proposition that where a landlord repudiates the authority of a gomashta to give a receipt which recognises the sub-division of a tenure or holding, the onus of proof is ordinarily upon the landlord inasmuch as the relations between himself and his servant are a matter peculiarly within his knowledge u/s 106 of the Indian Evidence Act.

7. The learned Vakil for the appellant, however, relies upon the case of Wyatt v. Sheo Gobind Sahu 36 Ind. Cas. 777; 1 P.L.J. 414; 3 P.L.W. 88, in which there are observations to the effect that if a patwari gives a receipt recognizing a division of a tenancy, the onus of proof is upon the tenant and not upon the landlord. That case, however, was decided in reference to its own facts, which showed that the patwari concerned was not a person ordinarily entrusted with the duty of recognizing divisions of holdings. In my opinion, this case does not conflict with the long line of decisions which have held that in regard to receipts given by gomashtas the onus of showing that the gomashta had no authority to recognizes a distribution of rent or division of tenancies lies upon the landlord. In the case now before us this point as to the want of authority in the gomashta Ram Asis was never raised and as neither party has given evidence the Courts below have rightly assumed that the gomashta had authority to bind his principal.

8. With regard to the receipt Exhibit A-1, which has been found to have been signed by the father of the plaintiff and by the gomashta, it only states that a sum of Rs. 5-2-0 has been paid by Uma Kuer, the vendee, and as it omits to mention the area for which this rent is paid it is inconclusive if taken alone; but taken with the other receipts it tends to corroborate the case of the defendant. It is true the Record of Rights does not show two separate holdings. It merely shows that Deo Narain and Uma Singh were joint tenants though occupying separate parcels of land. There was, however, evidence in the shape of the rent receipts upon which it was competent for the learned Munsif and the Subordinate Judge to come to the conclusion that the plaintiff had recognized a division. In my opinion these receipts have been correctly construed and are binding upon

the plaintiff.

9. The learned Vakil for the plaintiff next urges that even if the rent receipts are otherwise binding, they do not operate to have that effect as they do not conform to the conditions of section 88 of the Bengal Tenancy Act.

10. Now the law previous to 1907 was that a division of a tenure or holding or the distribution of rent payable in respect thereof shall not be binding on the landlord unless made with his consent in writing. In 1907 the word "express" was added and it is, therefore, now necessary to decide what is meant by "express consent."

11. The learned Vakil has not been able to show any authority for his contention that the law has been substantially changed and that the current of decisions of which the case of *Pyari Mohun Mukhopadhyaya v. Gopal Paik* 25 C. 531 : 2 C.W.N. 375 : 13 Ind. Dec. (N.S.) 352 is a type has been in any way overruled. In my opinion "consent in writing" may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. It has been held that if a receipt shows the total area of the holding and the area of the share transferred and the rent distributed thereon, then that is sufficient consent in writing; *Jnaendra Mohan Chowdhry Vs. Gopal Das Chowdhry*, . If this is so, I see no reason why a receipt showing the area of the transferred portion and the rent paid therefore should not also be sufficient to constitute express consent within the meaning of section 88.

12. If, therefore, section 88 had been applicable to the present case, I think that the rent receipts filed by the defendant would have been sufficient to show that the plaintiff had given his express consent in writing to a division of the tenancy.

13. But, in my opinion, section 88 has no application to a co-sharer landlord who is still joint with his co-owners.

14. That section enacts under what conditions a division of a tenure or holding is binding upon the landlord. It obviously refers to a sole landlord or the entire body of joint landlords where there are more landlords than one; for as was held by Rampini, J., in *Kunja Behari Singh v. Mussammat Roshan Koer* (see unreported decision in Second Appeal No. 28 of 1897) one co-sharer cannot bind his other co-sharers by any act of his own without authority to do so. It would seem that the earliest enactment bearing upon this point was section 27, Act X of 1859, which required landlords to give effect to all divisions of transferable tenures but at the same time provided that no division was to be binding upon a landlord without his written consent. Section 88 of the present Act reproduced and amplified the proviso by including within its scope the division of holdings. The object of the Legislature in both enactments was to protect the landlord's security against unauthorised divisions by the tenant. Therefore, it seems reasonable to suppose that divisions which would not bind the whole body of landlords do not come within the scope of the enactments.

15. In this view section 83 could only apply when the contract between a co-sharer and the tenant has the effect of creating a separate tenure or holding.

16. Now it is, in my opinion, settled that even when a tenant executes a kabuliyat agreeing to pay a co-sharer landlord his share of the rent separately and also agreeing that this co-sharer shall be competent to deal with him as if he were his sole landlord, the contract though it may create a separate tenancy cannot create a separate holding; for a holding being defined in the present Bengal Tenancy Act as a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy, the undivided share of one co-sharer landlord in the holding cannot be a parcel within the meaning of the definition, *Hurry Churn Bose Vs. Rajah Runjit Singh*, *Parbatty Debya Vs. Mathura Nath Banerjee and Others*, . As has been pointed out by Banerji, J., in the former of these two cases, the position is otherwise in respect; of an undivided share in a tenure which is not required by definition to consist of a separate parcel or parcels.

17. Therefore in the case now before us Deo Narain's tenancy under the plaintiff was not a holding and it follows that section 88 which deals with the division of holdings cannot apply. Even if Deo Narain had contracted to treat the plaintiff in all respects as his sole landlord, section 88 would not be a bar to the operation of that contract.

18. The learned Vakil for the appellant next contends that section 188 of the Bengal Tenancy Act prohibits the plaintiff from recognizing without the consent of the other co-sharers the transfer to Uma Singh and the consequent distribution of the rent. In my opinion this section has no application whatsoever. There is no provision in the Tenancy Act which requires a landlord to recognize a distribution of rent. He is certainly authorised to do so, but that authority is derived not from the Act but under the general law as an incident to the ownership of property.

19. Therefore, if neither section 88 nor section 188 applies, the question arises what is the effect of the plaintiff's recognition of Uma Singh as Deo Narain's transferee. Section 178, which is the only section which restricts a tenant's power of contract with his landlord, does not in any way operate as a bar here, and, therefore, it was perfectly competent to the plaintiff to recognize the transfer and the distribution of rent so far as his share was concerned. Again as section 88 does not apply, his consent in writing, whether express or implied, was unnecessary. The defendant is entitled to prove the contract by any legal evidence she pleases and to enforce it. Here she has proved express consent in writing.

20. The defendant, therefore, is only liable for the balance of the rent after deduction of the sum due from Uma Singh.

21. But there is another ground which, in my opinion, is fatal to the plaintiff's claim. Having recognized the transfer to Uma Singh the plaintiff cannot, even if section 88 had been applicable, be permitted to say that the distribution is not binding upon him merely because the formalities of the section were not

complied with. The principle of *Maddison v. Alderson* (1883) 8 A.C. 467 : 52 L.J. Q.B. 737 : 49 L.T. 303 31 W.R. 820 : 47 J.P. 821 have been applied to this country by their Lordships of the Privy Council in 19 CWN 250 (Privy Council) , where their Lordships cite with approval the following observations of the Chancellor: "The matter has advanced beyond the stage of contract and the equities which arise under the stage which it has reached cannot be administered unless the contract is regarded."

22. The underlying principle is one of universal application, namely, that equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. Therefore, having acted upon the contract with Deo Narain as disclosed by the rent receipts, the plaintiff cannot take advantage of the defects, if any, in the form in which his consent was signified to Uma Singh so as to bar the enforcement of the contract. In my opinion to support him in such a plea would be to support that which amounts to a fraud.