(1910) 03 CAL CK 0051

Calcutta High Court

Case No: None

Ram Ratan Kapali and Others		APPELLANT
	Vs	
Aswini Kumar Dutt and Others		RESPONDENT

Date of Decision: March 15, 1910

Citation: 6 Ind. Cas. 69

Hon'ble Judges: Teunon, J; Mookerjee, J

Bench: Division Bench

Judgement

1. The substantial question of law which calls for decision in these appeals relates to the assessment of mesne profits of property sold for arrears of revenue, and is of a somewhat novel character. The circumstances under which the claim for mesne profits is made by the decree-holders are not the Subject of controversy between the parties. On the 25th of September 1894, the respondents purchased an estate at a sale for arrears of revenue. They at first commenced an action for recovery of possession of some of the lands comprised in the estate, on the allegation that the intermediate tenure, set up by the persons in possession, was not binding upon them as purchasers at a sale for arrears of revenue. This suit was decreed on the 2nd March 1900, and on appeal to this Court, the decree of the Court of first instance was affirmed on the 24th March 1905. On the 12th April 1905, the purchasers commenced the present action for recovery of possession of lands not comprised in the previous suit, upon the allegation that the intermediate tenures, setup by the defendants, were either fictitious or had been created after the date of the Permanent Settlement, and were consequently inoperative against them as purchasers of the entire estate at a revenue sale. The suit was decreed on the 19th December 1905, and it was found that the tenures, though genuine, were not proved to have been in existence at the date of the Permanent Settlement. On the 14th March 1906, the decree-holders obtained delivery of possession, and subsequently on the 30th July 1906, asked for assessment of mesne profits. The Court below has made a full investigation into the claim, and has made a decree -in favour of the plaintiffs, by which mesne profits have been awarded jointly against all

the defendants on the basis of the rent payable by the actual cultivators. The defendants judgment-debtors have now appealed to this Court and on their behalf the decision of the District Judge has been assailed substantially on four grounds, namely, first, that the mesne profits up to the date of the decree for possession should have been calculated on the basis of the rent payable by the tenure-holders of the first degree, who held immediately under the defaulting proprietors; secondly, that the mesne profits, both for the period antecedent and subsequent to the decree for possession, should have been assessed separately in respect of different under-tenures of the same degree, as also in respect of subordinate tenures of different degrees, and that the decree should have specified the separate liability of each under-tenure-holder; thirdly, that as some of the judgment-debtors have been released from liability, the effect is to release all the judgment-debtors; and, fourthly, that in any event, as some of the judgment-debtors have been released from liability on receipt of specified sum from them, the remaining judgment-debtors cannot be made liable jointly and severally for the balance of the entire debt.

2. In support of the first of these contentions, it has been argued by the learned Vakil for the appellants, that the effect of a sale for arrears of revenue, is not ipso facto to avoid all incumbrances and under-tenures but only to make them voidable; till a decree has been made in a suit for annulment of the under-tenures and for recovery of the lands, the possession of the under-tenure-holders is not wrongful, and the purchaser at the revenue sale is consequently not entitled to claim by way of damages tor use and occupation any sum in excess of what represents the rent payable by the under-tenure-holders. In our opinion this contention is partially sound. The case of Titu Bibi v. Mohesh Chunder Bagchi 9 C. 683 shows conclusively the fallacy of the assumption that the effect of a sale for arrears of revenue is ipso facto to avoid all encumbrances and under-tenures. An encumbrance or under-tenure is not ipso facto avoided by the sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale. As pointed out in the cases of Kamal Kumari Chowdhuraniv. Kiran Chandra Roy 2 C.W.N. 229. Mufez-ud-din v. Korban Ali Chowdhury 31 C. 393 : 8 C.W.N. 115 and Mir Wazir-nd-din v. Lala Dewaki Nandan 6 C.L.J. 472 , the law does not require any not ice as a necessary preliminary to a suit to avoid an under-tenure, but the option of the purchaser may be exercised by the institution of a suit within the time allowed by law. In the case before us where no notice was given by the purchaser before the commencement of the suit for ejectment, we must hold that the tenure was not annulled till the date of the institution of the suit, that is, the 12th April 1905. We are unable to accept as well founded the contention of the appellants that the tenure was not annulled till the date of the decree made in the suit for ejectment. There is no authority in support of this view, which is clearly opposed to principle, because unless it is assumed that there was a cause of action at the date of the institution of the suit, no decree for ejectment could be made therein. We must hold, therefore,

that the tenure was annulled with effect from the date of the commencement of the suit, and that for the period antecedent thereto, the plaintiffs as purchasers at revenue sale, are entitled only to such sum as represents the rent payable by the tenure-holder of the first degree; obviously a decree for this sum can be made only against such of the defendants as held the tenures directly under the defaulting proprietors and not against all of them jointly and severally. The first ground taken on behalf of the appellants must, consequently, succeed in part.

3. In support of the second contention of the appellants, it is argued that in respect of the mesne profits which have accrued daring the pendency of the suit for possession from the date of its institution to the date of delivery of possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees, should have been separately assessed. In support of this proposition, reliance has been placed upon the cases of Fazil Mohamed Mundul v. Raj Coomari Debee 6 W.R. 113, Collector of Bograh v. Shama Sunkur Mojomdar 6 W.R. 230, Sreeputty Roy v. Loharam Roy 7 W.R. 381, Krishna Mohun Basak v. Kunj Behary Basak 9 C.L.R. 1, Krishna Ram v. Rukmini Sewak Singh 9 A. 22 and Hari Saran Maitra v. Jotindra Mohan Lahiri 6 C.W.N. 393. It has been argned, on the other hand, on behalf of the respondents decree-holaers, that the liability of the wrong doers is joint and several and in support of this proposition, reliance has been placed upon the cases of Ganesh Singh v. Ram Raja 12 W.R. 38 (P.C) : 3 B.L.R. 44, Jhoonkee Paurey v. Ajoodhya Doss 19 W.R. 218, Shama, Sunker Chowdhry v. Sree Nath Banerjee 12 W.R. 354, Ram Chunder Surmah v. Ram Chunder Pal 23 W.R. 226 and Mudun Mohun Singh v. Ram Dass Chuckerbutty 6 C.L.R. 357. No useful purpose would be served by an analysis and examination of each of these decisions, because not one of them is directly in ppint. No doubt, the liability of wrong doers in tort is, as a general rule, joint and several; bat it cannot be laid down as an inflexible rule that in every case of tort, the Court is bound to pass a joint decree against the wrong doers making each jointly and severally liable for the whole amount decreed In cases of combination, like that of Ganesh Singh v. Ram Raja 12 W.R. 38 (P.C) : 3 B.L.R. 44, where rioters as members of a common assembly plundered a house, or, Shama Sunker v. Sree Nath 12 W.R. 354, where trespassers had colluded to keep the true owner out of possession of his property, or Jhoonkee Paurey v. Ajoodhya 19 W.R. 218, where a tenant-in-common had been excluded by the joint action of the defendants from his property which had been divided as a spoil amongst them, or, Ram Chunder Surmah v. Ram Chunder Pal 23 W.R. 226, where intermediate tenure-holders had combined wrongfully to keep an auction-purchaser out of possession, it is just and reasonable that the tort-feasors should be held jointly and severally liable for the damage sustained by the injured party. In cases, however, where there is no combination, and where, as in'' Krishna Mohun v. Kunj Behary 9 C.L.R. 1, Mudun Mohun Singh v. Ram Dass Chuckerbutty 6 C.L.R. 357, the injury to the plaintiff, though wrongful in the sense that it is an infraction of his legal rights, has been caused in good faith, or in assertion of an

imperfect title, the strict rule of joint and several liability cannot justly be enforced. The principle of law, which holds all persons concerned in the commission of a tort liable therefor without regard to the part taken therein by them, so long as their acts are not separate and independent, is far reaching and efficacious: that principle is that persons who act in concert or combination to commit the wrong which actually results in damage to person or property, must each be held liable for the entire damages, no matter what part one may take, so long as there is concerted action. As has been well said in Place v. Minister 65 N.Y. 89, "designing men cannot be allowed to put forth a supple tool to do their bidding, knowingly take the profits of concocted wrong, remain silent, and go unwhipped of justice." In '' cases, therefore, in which the controlling general principle, namely, that where acts of several persons by design, or by conduct tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable. The rule of joint liability, therefore, which as appears from the case of Badrengam v. (sic) dekne (1302) Y.B. 30 : Edw. 1106, referred to in the judgment of this Court in Harihar Pershad v. Bholi Pershad 6 C.L.J. 383 at. p. 390, was adopted in England as early as the beginning of the fourteenth century, and may be regarded as based on sound principle when applied to cases of combinations or conspiracies, must be applied with some limitations, otherwise, as pointed out by Lord Herschell in Palmer v. Wick (1894) A.C. 318 : 6 R. 245 : 41 L.T. 163, it ceases to be a principle of justice or equity, or even of public policy. The same view was indicated by Best C.J. in Adamson v. Jarvis (1827) 4 Bing. 66 : 29 R.R. 503 : 12 Moore P.C. 124 : 5 L.J. (O.S.) C.P. 68 and by Peacock, C.J., in Sreepati v. Loharam 7 W.R. 381. A similar view was taken by this Court in Hari Saran v. Jotindra Mohun 6 C.W.N. 393, which was not questioned when the case was taken before the Judicial Committee, Jotindra Mohun v. Guru Prosonno 31 I.A. 94 : 31 C. 597. If new we apply these principles to the case before us, what is the position? The plaintiffs are the purchasers of an estate at a sale for arrears of revenue; the defendants are tenure-holders of different grades who held possession of the property under the defaulting proprietors; till the plaintiffs had made their election andindicated to the de-defendants that they did not want any portion of the rents payable by the actual cultivators to be intercepted by the under-tenure-holders, the defendants were entitled to remain in occupation and to exercise their rights over the property. When the suit for ejectment was commenced, the defendants set up in good faith an intermediate tenure which, however, was found to be inoperative against the plaintiffs purchasers at a sale for arrears of revenue, as it was not established to have been created before the time of the Permanent Settlement. A decree for ejectment was consequently made against them, but there is no foundation for any suggestion that the defendants had combined or conspired to keep the plaintiffs out of possession. Consequently, they cannot, in justice, be made jointly and severally liable for the mesne profits, which must be apportioned according to the liability of the various defendants. Thequestion, therefore, arises, what is the principle upon which such apportionment should be made. The obvious answer is

that the liability should be apportioned according to the share of the profits intercepted by each defendant. An application of this principle may be illustrated by a concrete example: assume that before the revenue sale, X, the proprietor of the estate, had under him successively tenure-holders of different degrees A, 13, C, the last of whom was the immediate landlord of an occupancy ryot, who paid rent at the rate of Rs. 100 per annum. Suppose that C paid rent to B, at the rate of Rs. 60 per annum, B paid rent to A at the rate of (sic). 35 perannum and A paid rent to X at the rate of Rs. 20 per annum. It is obvious that if all the intermediate tenures were annulled, X would be entitled to receive direct from the occupancy ryot, Rs. 100 per annum out of which sum Rs. 40 was intercepted by C, Rs. 25 by B, and the remainder Rs. 35 constituted the sum, received by A, out of which he retained a profit of Rs. 15. If, however, X recovers possession by ejectment of A, B and C, he should in justice receive as mesne profits, Rs. 35 from. A, Rs. 25 from B, and Rs. 40 from C. To put the matter in another way, each tenure-holder of different degree should be made liable to the purchasers of the estate, for the amount of profits retained by him, which is equivalent to the net amount intercepted by him out of the sum payable by the occupancy ryot. We have made no allowance in the illustration for any reasonable deduction that may have to be made on account of collection or other similar charges. In order to apply this principle to the case before us, we have first to determine under-tenures of the second degree under the tenure, immediately subordinate to the proprietary interest, and we have next to determine the under-tenures of successive degrees, under each under-tenure of the second degree. The holders of each of these under-tenures must pay to the plaintiffs respondents the net amount of profits made by them out of the rents payable by the occupancy ryots. The result, therefore, is that the second ground upon which the decision of the District Judge is assailed, must prevail.

4. The third ground raises the question of the liability of the judgment-debtors other than those that have been released from the claim of the decree-holders. It appears that before the suit was commenced, the plaintiffs entered into a compromise with some of the tenure-holders, and subsequent to the commencement of the action, on the 11th February and 12th March 1906, they gave up their claims against some other under-tenure-holders upon payment by them of certain sums as damages. Under these circumstances, it has been argued by the learned Vakil for the appellants that the release of some of the tort-feasors from the claim of the plaintiffs, operates in law as a release of every judgment-debtor. In support of this proposition, reliance has been placed upon the case of Cock v. Jennor (1615) Hobart 66, where it was ruled that a release granted to one joint tort-feasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor or other joint debtor, because the cause of action which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. From this principle, there has been deduced the rule adopted in Brinsmead v. Harrison L.R. 7 C.P. 547 : 41 L.J.C.P. 190 : 27 L.T. 99 : 20 W.R. 784 that a judgment in an action against one of

several joint tort-feasors, is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. This result, however, has been attacked on the ground that it is based upon technical rules of English jurisprudence, and is not consistent with principles of justice, equity and good conscience and in Lovejoy v. Murray (1865) 3 Wallace 1 and In re Atlas 93 U.S. 302, the Supreme Court of the United States, unanimously held, upon an elaborate review of all the authorities, that a judgment against one joint tort-feasor does not by itself bar a recovery against the others but satisfaction of such a judgment is a bar. In England also the tendency has, been to restrict the operation of the rule by a refined distinction between a release and a covenant not to sue. Thus in Duck v. Mayen (1892) 2 Q.B. 511 : 62 L.J.Q.B. 69 : 4 R. 38 : 67 L.T. 547 : 41 W.R. 56 : 56 J.P. 23, it was ruled that a covenant not to sue one of two joint tortfeasors, does not operate as a release of the other from liability. Wg are, therefore, not prepared to adopt without any limitation the principle of the Common Law that the release of one joint wrong-doer operates as a release of all. On the other hand, we are of opinion that the more reasonable and logical rule is that a release of one without any intention to release the other joint tortfeasor, but only as a partial satisfaction, discharges the others only pro tanto [Snow v. Chandler 10 N.H. 93 : 34 Am. Dec. 140; Seither v. Philadelphia 125 Pa. 397 : 11 Am. St. Rep. 905]. No doubt, it may be contended with some show of reason that the act of the injured party should be taken most strongly against himself, and that if he releases one joint wrongdoer, it furnishes strong, if not conclusive, evidence that he has been satisfied for the wrong; this theory, indeed, is the foundation of the rule, which is of ancient origin, that an absolute release of One joint tort-feasor operates as a discharge of all. If, however, the release cannot be considered to be of such import as to be in full satisfaction, the rule ought not to be held applicable. The view we take is supported by the decision in Jugurnath Singh v. Sheikh Ahmedoollah 8 W.R. 132. The third ground taken on behalf of the appellants cannot consequently be supported. We may add that, as we have held on the second ground that the liability in the present case, is not joint and several, it would in this view be unnecessary to consider whether the release of one joint tort-feasor operates as a release of all, because admittedly that doctrine can apply, if anywhere, only in cases of joint liability.

5. The fourth ground taken on behalf of the appellants is to the effect that as the plaintiffs have released some of the wrong doers from liability, their claims against the others have been split up by their own conduct, and that consequently a joint decree ought not to be passed against all the defendants. This contention is obviously well-founded, and is supported by the case of Biseswar Tewari v. Kailash Bani 2 Hay 299. It is not necessary, however, to deal with this point further, as we have already held upon the second ground that the decree ought to specify separately the extent of liability of each under-tenure-holder.

6. The result, therefore, is that these appeals must be allowed, the orders of the Courts below set aside, and the cases remanded to the Court of first instance, to be

dealt with on the lines indicated in this judgment. The Court will be at liberty to take such further evidence as may be needed to elucidate any of the questions which require investigation. There will be no order as to costs.