

(1880) 07 CAL CK 0008

Calcutta High Court

Case No: None

Kasheekishore Roy
Chowdhry

APPELLANT

Vs

Alip Mundul and
Another

RESPONDENT

Date of Decision: July 22, 1880

Citation: (1881) ILR (Cal) 149

Hon'ble Judges: Prinsep, J; Morris, J

Bench: Division Bench

Judgement

Prinsep, J.

Mr. Bose has endeavoured to show that this suit does not fall within the terms of the case referred to the Pull Bench; and he argues, that an expression of opinion which goes beyond that case is an obiter dictum, and is not binding on this Division Bench.

2. It appears to me, however, that the judgment of the Full Bench is directly in point, and we are bound to apply it to the present case. The case referred to the Pull Bench was thus stated: "Whether the ijaradar of a co-sharer of an entire estate, who has for some time realized his rent separately in respect of his share, can sue to enhance the rent of that share separately without joining the other co-sharers of the tenure? "The judgment of the Full Bench declared, "that that question should be answered in the negative." It also declared, that "the Rent Law does not contemplate the enhancement of a part of the entire rent, and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure."

3. The grounds upon which the judgment of the Pull Bench proceeded are thus stated:

The entire tenure was originally held by the tenant under all the cosharers at an entire rent; but by some arrangement amongst themselves, consented to by the

co-sharers on the one hand and by the tenant on the other, the latter had been in the habit of paying a portion of the rent to each cosharer in respect of his separate share; 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." Although in accordance with the practice of this Court I have always followed this rule, I have done so, with an expression of my own opinion in dissent from it, because it seems to me that the separate payment of rent to each of several co-sharers constitutes a separate tenancy, so far as regards each of the landlords, which, would entitle each, if not otherwise debarred, to claim an enhancement of the rent payable to him separately.

4. Mr. Bose has referred to two cases, -one *Troylochotaran Chowdhry v. Muthoora Mohun Dey* [W. R. (1864), Act X Rule, 41] decided by Morgan and Shumbhoo Nath Pundit, JJ., and the other decided by Peacock, C.J., and Jackson, J. [W. E., (1864), Act X Rule, 41 note] which were not quoted in the argument before the Full Bench, and are in conflict with its judgment. And I have already on a previous occasion referred to these cases.

5. A point, however, arises in the case now before us, which apparently was not considered by the Judges who formed the Full Bench, and that is under what authority the notice of enhancement required by Section 14 of the Bent Law should be issued, where one of several co-sharers alone desires to enhance the rent of a tenant. Previous service of a notice of enhancement alone confers the right to sue for rent at an enhanced rate, and therefore, unless a proper notice has been served, no suit of the nature contemplated by the Full Bench could properly be brought. The enhancement must extend to the entire holding of the tenant, or this can be effected only in the presence of all the co-sharers. One sharer would not be competent to issue a notice of enhancement of the rent of the entire tenure, nor could he, under the terms of the judgment of the Full Bench, issue notice of enhancement of the rent due on his own particular share except with the consent of his co-sharers previously obtained.

6. If that consent be withheld, he cannot, as held by the Full Bench, put an end to the original contractor modify the terms of the arrangement under which separate payments of particular shares of rent were made.

7. Mr. Bose could not contend that, in the present suit, in which plaintiff demands an enhanced rate on the particular share of rent due to him alone, the other co-sharer, who is joined as a defendant, would be entitled also to claim the same rate on her share, for the notice of enhancement served by the plaintiff on the defendant-tenant claims only the rate due on his own share, calculated on what would be due on the entire tenure. Plaintiff, as the proprietor of only a share, could

alone not demand more. If he could not do that, he could not bring the present suit on the ground assigned by the Full Bench to substitute a separate contract for rent at an enhanced rate on his share of the property, for the original contract still subsisting, under which rent was paid in one lump sum on the entire tenure. He must first establish his right to a separate contract to recover rent separately on his individual share, he will then be in a position to serve a notice of enhancement of that rent, and after that to sue to enforce his rights at the rates claimed. Until this is done, so long as any of his co-sharers refuse to join with him, the plaintiff cannot assert his rights separately.

Morris, J.

8. I too am of opinion that, on the authority of the decision of the Full Bench in the case referred to, this appeal must be dismissed. Their Lordships, as I understand their judgment, considered that, without the rescission of the original contract in respect to the entire rent, for which purpose all the parties to it must be before the Court, a single sharer in a joint undivided tenure cannot sue to raise the rent of his share, even though hitherto, by an arrangement which has been concurred in by all the contracting parties, he has been paid separately his quota of the stipulated rent.

9. Here the judgment, as an expression of opinion of the Full Bench on the point referred to it, may be said to end. But it by no means follows, as has been argued by Mr. Bose, that when, in a suit of this kind, a sharer has made his co-sharer a party, and so brought all the parties to the original contract before the Court, a fresh apportionment of the rent can at once be made, and a new contract entered into in the terms desired by the sharer-plaintiff. As justly observed by their Lordships if the original lease of the entire tenure is cancelled, or put an end to by the consent of all the parties, the co-sharers and the tenant are at liberty to enter into any fresh contracts which the law allows." Here, under the Rent law in force, one of the parties to the original contract,-namely, the tenant,-can hardly be said to be a consenting party to its rescission. Enhancement of rent is a condition incidental to his tenure of the land, but he can fairly claim a strict fulfilment of all the requirements of the law before any enhancement of rent can be imposed upon him. The law, Section 14, Beng. Act VIII of 1869, directs that no under-tenant shall be liable to pay any higher rent for the land held by him unless a written notice shall be served on him at a time and in a manner specified by order of the Collector on the application of the person to whom the rent is payable. It seems to me, therefore, to follow as a necessary corollary of the judgment of the Full Bench, that the person to whom the rent is payable is not the single sharer, the plaintiff in the suit, but all the sharers in the tenure. If the original contract as to the entire rent cannot be broken and a new contract entered into without the presence of the co-sharers, this is so because the tenure continues one and the same as a joint property, the only difference between the new contract and the old being a modification in the amount of rent to be paid by the tenant. If, therefore, the rent of one sharer can only be raised by a

re-adjustment of the entire rent of the tenure, then clearly the notice of enhancement prescribed by the Act is defective, if it be not served on the application of all the co-sharers in the tenure. It is quite conceivable that a sharer in a joint undivided tenure may be unwilling to raise the share of the rent which has hitherto been paid to him separately, and yet not object to his co-sharer, in a suit brought for the purpose, raising his quota of rent in a certain proportion on his share.

10. But inasmuch as the re-adjustment of the rent to which he agrees disturbs the terms on which the tenant holds the tenure equally from him and his co-sharer, it is necessary, before any such re-adjustment of rent can be made, that he, as well as his co-sharer, should sign the notice and apply to have it served upon the tenant. So again, in any fresh adjustment of the rent by which he desires to raise his quota of rent to the level of that of his co-sharers, such co-sharer must, I conceive, join with him in the notice to be served on the tenant. No doubt, a new and separate tenancy is created by the new contract of lease, but from the very nature of the case the contracting parties continue the same, and the tenure remains as before, a joint undivided property. In this view the suit of the plaintiff" must fail, because the notice of enhancement required by law has not been served on the tenant on the application of all the persons to whom the rent is payable. The appeal is dismissed with costs.