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of the property on the death of the widow. Consequently, it appears to me that this is not a suit which in any sense will come under the words of art. 142, and that frees us from the necessity of considering how far this article and the Act of 1871 would operate, regard being had to the time of the widow's death, because it appears to me that the plaintiffs are not persons entitled to possession of the property on the death of the widow. I think, therefore, this appeal fails, and must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

LOOTFULHUCK (PLAINTIFF) *v.* GOPEE CHUNDER MOJOOMDAR (ONE OF THE DEFENDANTS).*

1880 *April* 13.

Co-Sharers of Land—Arrangement for Separate Payment of Rent—Separate Suit for Arrears of Rent—Liability of Tenant acquiescing in arrangement for separate payment.

Where, on the consent of all the shareholders, landlords, a tenant in an undivided property has agreed to pay the different sharers the rent of the tenure in proportion to their respective shares, and can be and has been sued for the rent of a particular share, it is not open to such tenant to cease from paying the proportionate fraction of the rent due in accordance with his agreement, except on the consent of the owner of that particular share.

Where co-sharers in an undivided property acquiesce in a decision declaring one of their number the owner of a recognized share in such property, it is not open to a tenant (who had previously agreed to pay his rent in accordance with the shares of the respective part-owners) to refuse payment of the proportionate share of the rent claimed by such co-sharer as the owner of the recognized share, simply on the ground that he had never before paid rent so proportioned to such co-sharer.

THIS was a suit to recover the sum of Rs. 1,612-3-6, being arrears of rent due for the years 1874 to 1876 (1281 to 1283 B. S.)

* Appeal from Appellate Decree, No. 2266 of 1878, against the decree of F. McLaughlin, Esq., Officiating Judge of Noakhally, dated the 20th August 1878, reversing the decree of Baboo Mathura Nath Gupto, Subordinate Judge of that district, dated the 23rd March 1878.

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The plaintiff represented himself as part-owner to the extent of 13 annas 1 ganda 2 cowries 3 kraunts of a certain jote, in which the holdings for which the rent was alleged to be due were situate. The plaintiff included among the defendants to the suit the tenants of the holdings, the remaining part-owners of the undivided jote, as well as the present respondent, who was a mortgagee in possession of some of the lands for which the rent was alleged to be due. The plaint alleged that the proportion of the rent sued for had hitherto been under separate collection.

In their written statements all the defendants denied that the plaintiff was part-owner of the share of the jote as stated by him in the plaint, and stated that he was in fact part-owner only to the extent of 9 annas 12 gandas 2 kraunts. The mortgagee-defendant further alleged, that he had been always ready or willing to pay the plaintiff rent in proportion to the share such defendant stated the plaintiff held in the jote, but the plaintiff had refused to accept the same.

The Court of first instance found on the facts that the plaintiff had established his claim as part-owner of the jote to the extent alleged by him in the plaint, and thereupon gave him a decree for the full amount of the rent claimed.

The mortgagee-defendant alone appealed against this judgment to the lower Appellate Court. The learned Judge was of opinion that this defendant was not bound to pay his rent fractionally a single hour longer than he chose to do so, and cited *Anu Mundul* v. *Sheikh Kamalooddeen* (1) and *Guni Mahomed* v. *Moran* (2) in support of this view. The Court was further of opinion that the plaintiff having admitted that this defendant had never previously paid rent to the plaintiff as claimed in the suit, the defendant was entitled to refuse payment of such rent; and for these reasons set aside so much of the decree of the Court below as related to the claim made against the defendant.

The plaintiff appealed to the High Court.

(1) 1 C. L. R., 248. (2) I. L. R., 4 Calc., 96.

Baboo *Doorga Mohun Das* for the appellant.

Baboo *Rajendro Nath Bose* and Baboo *Chundra Madhub Ghose* for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J. (who, after stating the facts of the case, proceeded as follows):—The ground taken by the Judge is, that this "defendant as tenant is not bound to pay his rent fractionally a single hour longer than he chooses so to do." And he supports this proposition by quoting a passage in the judgment of Mr. Justice Ainslie sitting alone in the case of *Anu Mundul* v. *Sheikh Kamalooddeen* (1). He also refers to some remarks of the Chief Justice in the Full Bench case of *Guni Mahomed* v. *Moran* (2). It appears to us, however, that the remarks in the Full Bench case of *Guni Mahomed* (2) cannot be understood as supporting the view taken by the Judge that a tenant-defendant can, at his option, decline to pay to a part-owner of property the fractional share of rent which he has previously been paying to him. It seems to us that, when on the consent of all the shareholders, landlords, a tenant in an undivided property has agreed to pay to the different sharers the rent of the tenure in proportion to their respective shares, and can be and has been sued for the rent of a particular share, it is not open to him, without the consent of the owner of that share, to cease paying in accordance with his contract. It is only, as the Full Bench puts it, by the consent of all the parties by which the arrangement was originally created that it can at any time be put an end to.

There is, however, another ground on which the Judge allows the appeal of the defendant—namely, that given in para. 12,—that "plaintiff admits defendant has never yet paid at the rate claimed, but avers he ought to." But, as appears from para. 7 of the same judgment, the claim of the plaintiff to a 13-anna odd share of the rent is founded on a right in himself to a 9-anna odd share, and to the remaining 4 annas odd share in right of his mother under an assignment of it by her to him.

(1) 1. C. L. R., 248. (2) I. L. R., 4 Calc., 96.

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In other words, he sets up the right of his mother to the rent of a 4-anna odd share, which right has now passed to him; and clearly if there has been a separate attornment on the part of the tenant in respect of this 4-anna odd share, he is entitled, upon the assignment, to claim that share, together with his own share as previously existing. As we understand the judgment of the Courts below, the first Court distinctly held that the share of the plaintiff was as claimed by him, 13 annas 1 ganda 6 cowries of 8 annas,—that is, 9 annas odd his own, and 4 annas odd in right of his mother's separate share. And the Judge on appeal does not find otherwise. He simply says, that the evidence as to the plaintiff's mother having made over her share to him is "miserably weak." We must, therefore, take it that the plaintiff on the one hand proved the right to his own share and the right of his mother to the share assigned by her to him, while the defendant on the other hand failed to prove the case set up by him that the property was held by the different co-sharers in shares different from those alleged by the plaintiff. The co-sharers not having appealed against the judgment of the first Court, must be understood to have acquiesced in the decision that the share of the plaintiff on this property is as he states, 13 annas odd. This being so, the question arises whether it is open to the defendant No. 22 in his position of tenant to dispute the right of the plaintiff to a 13-annas-odd share of the rent, simply on the ground that he has never yet paid to him agreeably to that share. It must be observed that this defendant never resisted the claim of the plaintiff on the ground taken for him by the Judge, that he was at liberty to decline payment of a fractional share of the rent. His objection had reference solely to the extent of the plaintiff's share. This point had been found against him, and the right of the plaintiff to a 4-anna odd share over and above his original 9 annas odd share had been established to the satisfaction of all the co-sharers. It does not, therefore, as it seems to us, lie in the mouth of the tenant-defendant to dispute the right of the plaintiff to obtain rent on account of these two amalgamated shares. We are supported in this view by the decision passed on the 15th January 1880 in Special Appeal, No. 661 of 1879, in a case very similar to the pre-

sent one, viz., *Gunganarain Sirkar* v. *Sreenath Banerjee* (1). The learned Judges there held, that the only persons interested in raising the question of shares,—namely, the co-sharers,—having acquiesced in the plaintiff's statement, the tenant-defendant runs no risk of being called upon to pay again any part of the share adjudged to the plaintiff. We think that when the issue of the right of the plaintiff to the share claimed by him has been fairly raised and determined, and the co-sharers have acquiesced in that determination, the present defendant cannot be allowed to avoid his liability to pay the rent due upon such share, on the ground that he has never before recognized such to be the share of the plaintiff. In this view, we set aside the judgment of the lower Court, and restore and affirm that of the first Court, with costs of this Court and of the Court below.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Maclean.

CHUNDEE CHURN ROY (PLAINTIFF) *v.* SHIB CHUNDER MUNDUL (DEFENDANT).*

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April 30.

Easement—Fishery—Prescription—Profit à Prendre—Limitation Act (XV of 1877), ss. 3 and 26—User.

The word 'easement,' as used in the Limitation Act 1877, has, by force of the interpretation-clause (s. 3), a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon the land of another. An easement, therefore, under the Indian law, embraces what in English law is called a *profit à prendre*,—that is to say, a right to enjoy a profit out of the land of another.

A prescriptive right of fishery is an 'easement' as defined by s. 3 of the Act, and may be claimed by any one who can prove a 'user' of it,—that is to say, that he has of right claimed and enjoyed it without interruption for a

* Appeal from Appellate Decree, No. 1176 of 1879, against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 1st March 1879, reversing the decree of Baboo Promothonath Banerjee, Munsif of Jehanabad, dated the 15th February 1878.

(1) *Ante*, p. 915.