APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Ghose.

1885. May 21.

KOWSULLIAH SUNDARI DASI, AND ANOTHER (DEFENDANTS) *v.* MUKTA SUNDARI DASI AND OTHERS (PLAINTIFFS).*

Admission made by one co-sharer evidence against the others—Evidence Act (I of 1872), s. 18.

In a suit between a zemindar and his *ijaradars* for rent, a person, who was one of several *jotedars* in the mehal, was called as a witness for the zemindar, and admitted the fact that an arrangement existed whereby he and his *co-jotedars* had agreed to pay rent to the zemindar direct; this suit was decided in favor of the zemindar.

The *ijaradars* then brought a suit against the *jotedars*, amongst whom was the witness abovementioned, to recover the sum which the *jotedars* ought to have paid to the zemindar direct, and which the *ijaradars* had been decreed to pay. The *jotedars* disclaimed all liability to pay rent to the *ijaradars*; in this suit the evidence given by the *jotedar* in the zemindar's suit was received as evidence on behalf of the plaintiffs against all the defendants. *Held*, that the evidence was admissible.

THIS was a suit for arrears of rent. The zemindar of Sultanpore had given an *ijara* lease of his *mehal* to Mukta Sundari Dasi and others. There was a *jote jumma* in the *mehal* held by four co-sharers. Default having been made in the payment of rent on account of this *jote* the zemindar brought a suit against the *ijaradars* for the amount. In that suit the *ijaradars* resisted the claim, on the ground that they had nothing whatever to do with the said *jote*, the tenants being by an arrangement, directly under the zemindar. The *ijaradars*, however, failed in their contention, and had to satisfy the decree obtained against them by the zemindar. The *ijaradars* therefore brought this suit against the *jotedars*—(1) Durga Churn Ghose, (2) Kowsulliah Sundari Dasi, (3) Annoda Sundari Dasi, (4) Shyama Sundari Dasi. Defendants Nos. 2 and 3 alone filed written statements describing themselves as 5-annas

* Appeal from Appellate Decree No. 2389 of 1883, against the decree of F. J. G. Campbell, Esq., Officiating Judge of Furridpore, dated the 8th of May 1883, reversing the decree of Baboo Jagut Durlav Mozumdar, Rai Bahadur, Subordinate Judge of that District, dated the 13th of September 1881.

and 2-annas sharers respectively of the *jote*, and contending that they by arrangement were the *khas* tenants of the zemindar disclaimed all liability to the plaintiffs whom they had never acknowledged as their landlord. The written statement also alleged that defendant No. 1, a co-sharer to the extent of a 2-anna share, was on unfriendly terms with the female defendants and largely indebted to the zemindar in whose favor he had deposed in the former suit. The Subordinate Judge disbelieved the arrangement set up by the plaintiffs and dismissed the claim. On appeal the District Judge, mainly relying, it would seem, on the admission made in the evidence of one of the present defendants (defendant No. 1) who was a witness on behalf of the zemindar in the suit between the zemindar and the *ijaradars*, that he and his co-sharers had paid rent to the zemindar under an arrangement between them and the plaintiffs, decreed the plaintiffs' claim. It was contended by the defendants on appeal to the High Court that the admission in the evidence of one of the *jotedars*, made in the former suit in which none of them were parties, could not be accepted as legal evidence against the others.

Baboo *Girja Sunkur Mojoomdar* for the appellants.

Baboo *Issur Chunder Chackrabati* for the respondents.

The Court (GARTH, C.J., and GHOSE, J.) delivered the following judgments:—

GARTH, C.J.—In this case the plaintiffs took an *ijara* lease from the zemindar of certain property, in which was included a tenure, which had been held by the defendants at a certain rent for a great many years.

The plaintiffs' case was that, under an arrangement which they made with the defendants some time ago, the defendants were to pay, and have always paid, their rent and cesses to the zemindar instead of to the plaintiffs, and that these payments had always been received by the zemindar on the plaintiffs' account and placed to their credit.

This being the arrangement, the plaintiffs say that the defendants in breach of it did not pay to the zemindar the rents or cesses, which they ought to have paid for the years 1283 to 1287, and consequently the zemindar brought a suit against

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the plaintiffs to recover those rents and cesses, and recovered the amount.

This suit was then brought by the plaintiffs to recover from the defendants the sums which, according to the arrangement, they ought to have paid to the zemindar; and the lower Appellate Court has held that the arrangement relied upon has been proved, and that the plaintiffs are entitled to recover the sums claimed from the defendants.

But it has been contended by the appellants (amongst other things) that, in coming to this conclusion, the lower Appellate Court has admitted and acted upon certain evidence, which was not legally admissible.

It appears that in the suit, which was brought by the zemindar against the plaintiffs, one of the defendants was called as a witness on behalf of the zemindar, and spoke to the existence of the arrangement, on which the plaintiffs rely upon. This deposition made in the former suit has been given in evidence in this suit, and received by the Court below.

It is contended by the defendants that this was wrong. It is said that the statement of one of the defendants might have been received as an admission *against himself only, but not as against the other defendants.*

I think, however, the lower Court was right. Where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence as against the others.

The rule is thus laid down in *Taylor on Evidence*, Vol. I, 1st edition, p. 489, s. 525:—

"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered."

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[See also *Kemble* v. *Farren* (1); *Lucas* v. *De la Cour* (2)]

The principle of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the others; and this rule, as I take it, is enacted, though in a somewhat concise form, in s. 18 of the Indian Evidence Act.

As this is the only point of law raised which is worthy of notice, I think that the appeal should be dismissed with costs.

GHOSE, J.—I concur in dismissing the appeal, as I think there was sufficient evidence in point of law to justify the finding of the Courts below.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

MALCHUS (PLAINTIFF) *v.* BROUGHTON AND ANOTHER (DEFENDANTS.)

1885 *June 2.*

Will—Construction—Charitable gift—Cy près doctrine—Lapse.

A testator directed his executor to set apart a sum of Rs. 7,000 to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of Armenian or other Christian religion. The testator died in 1867. In 1864, the St. Paul's School, Calcutta, was removed to Darjeeling. In the St. Paul's School, Calcutta, the fees for day-scholars and day-boarders were Rs. 8 and Rs. 10 respectively. In the St. Paul's School, Darjeeling, there were no day-scholars nor any day-boarders; and the cost of a regular boarder would be about Rs. 400 per annum.

Held, that the gift did not lapse, being a general charitable bequest, and that under the circumstances it must be executed *cy près.*

ON the 20th day of June 1859, Nicholas Isaac Malchus, an Armenian inhabitant of Calcutta, made and published his last will and testament, whereby, after making several pecuniary and other bequests, he directed as follows in the 5th clause of his will:—

"I direct my executor to invest the sum of Company's rupees seven thousand in the purchase of Company's paper and to

(1) 3 C. & P., 623. (2) 1 M. & S., 249.