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and there is no sufficient ground for holding it to be what it did not purport to be, namely, a mortgage.

Under these circumstances their Lordships will humbly advise Her Majesty that these appeals be dismissed, and the judgment be affirmed. The appellant must pay the costs of the appeals; but as they have been consolidated, there will be only one set of costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Wilkinson.

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May 3.

ABDOOL HOSSEIN (PLAINTIFF) *v.* LALL CHAND MOHTAN DASS (DEFENDANTS.)*

Beng. Act VIII of 1869, *s.* 38—*Measurement of Land—Fractional proprietor—Parties.*

A part proprietor of an estate is competent under s. 38 of Beng. Act VIII of 1869 to apply for measurement of its lands after making the remaining proprietors parties to the proceedings.

Mr. *Twidale* and Moonshi *Serajul Islam* for the appellant.

Baboo *Ras Behary Ghose* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (MITTER and WILKINSON, JJ.) which was delivered by

MITTER, J.—The question in this appeal is, whether a part proprietor of an estate is competent under s. 38 of Beng. Act VIII of 1869 to apply for measurement of its lands after making the remaining proprietors parties to the proceeding. The plaintiff in this case had a fractional share in a certain estate. He applied for measurement of its lands under the aforesaid section, making his co-sharers defendants, alleging that they had colluded with the tenants. His application was allowed by the Collector. On appeal the District Judge, relying upon a ruling of this Court,

* Appeal from Appellate Order No. 281 of 1882 against the order of H. Beveridge, Esq, District Judge of Patna, dated the 31st August 1882, reversing the order of C. Vowell, Esq., Collector of that District, dated the 22nd April 1882.

in *Baba Chowdhry* v. *Abedooddeen Mahomed* (1) has reversed the order of the lower Court, holding that it had no jurisdiction to order a measurement on the application of a fractional owner of an estate.

It is contended before us that the ruling quoted is not applicable, inasmuch as it is not clear from it that all the proprietors were made parties in that case.

It seems to us that this contention is well founded. It does not appear from the report of the case cited that all the proprietors of the estate were parties to it. In another case—*Ishan Chunder Roy* v. *Busaruddeen* (2), in which this question was raised and discussed, the learned Judge said: "It is contended that here the co-sharer proprietor has been made a party to the suit, and, therefore, the Court having all the parties before it is not prevented from dealing with the rights of the parties, and determining whether the lands can be measured or not; we are not prepared to say that there are not cases in which co-sharer proprietors being made parties to the suit the right of the plaintiff to measure the lands may not be determined, but we think that under the special circumstances of this case it is unnecessary to determine this point."

It is clear that in this decision too the point now before us was not determined. The application of the plaintiff was dismissed upon certain special circumstances which are not applicable to this case. The same reservation was made in the case of *Moolook Chand Mundul* v. *Modhoo Soodun Bachuspútty* (3).

The point, therefore, comes up for decision before us for the first time. In *Chuni Singh* v. *Hera Mahata* (4), a question similar to the present was discussed and decided. That question was whether a suit for arrears of rent at enhanced rate brought by all the shareholders will lie, notice under s. 14 of Beng. Act VIII of 1869 having been issued at the instance of some of the persons entitled to the rent. The majority of the Judges on the Full Bench decided this

(1) I. L. R., 7 Calc., 69.
(2) 5 C. L. R., 132.
(3) 10 B. L. R., 398, note: 16 W. R., 126.
(4) I. L. R., 7 Calc., 633.

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question in the affirmative. It appears to us that the reasons given by the learned Judges in that case will equally apply here, and will warrant us in deciding this question in favor of the plaintiff. Referring to the injustice of not allowing a part proprietor to make an application for the notice of enforcement being issued at his instance alone in a case where his co-sharers would not join him, Garth, C.J., said: "The reason of their refusing to join may be that they are colluding with or influenced in some way by the tenant. Are these recusants to be allowed to deprive their co-sharers of the means of enforcing their just dues or, on the other hand, to drive them to expensive, tedious, and inconvenient alternation of a butwara? I think not. The simple and obvious remedy for such a state of things is to allow the co-sharers, who wish to sue, to do so, by making the recusant co-sharers defendants in the suit. The Court will thus have all the parties before it and the means of doing justice between them." In another part of his judgment His Lordship says: "The notice is to be given to the person in receipt of the rent, which is the phrase used generally in the rent law, as signifying the landlord or landlords, and I think that those persons who are entitled to sue as landlords have also the right under this section to give the necessary persons notice."

These reasons equally apply to a fractional shareholder of an estate applying for measurement on the ground that his co-sharers have refused to join him. If the co-sharers are made parties, the tenants can have no reasonable ground of complaint. The proceedings will have the effect once for all of settling all questions regarding the measurement between themselves and all the landlords. As regards the question of costs, if it appears that the necessity for the application arose, not from the recusancy of the tenants, but of the co-sharers, the latter will be made liable for them.

We are, therefore, of opinion that the decision of the lower Court upon this point is erroneous. We accordingly set it aside, and remand the case to be tried upon the other points.

Appeal allowed and Case remanded.