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of Civil Procedure for suits and execution proceedings in suits govern suits brought under the provisions of Chapter IV of the Transfer of Property Act. We are, therefore, prepared to hold that the sale which was carried out under Chapter XIX of the Code of Civil Procedure, was a sale to which the provision of section 310A are expressly made applicable and the decision of the lower appellate court is not open to question on this account. We were referred to several cases of the Calcutta and Bombay High Courts. Both of those courts have made special rules and the case decided by those courts differ, therefore, from the present case. Over and above this we should not be inclined to interfere unless it was absolutely necessary, seeing that the decree-holder has got his money and all that he is entitled to, in the interests of justice. He has endeavoured to take advantage of technical procedure in order to retain the mortgaged property, instead of being satisfied with the money due under the mortgage-bond. We dismiss the appeal with costs.

*Appeal dismissed.*

## FULL BENCH.

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March 22.

*Before Mr. Justice Sir George Knox, Mr. Justice Aikman and Mr. Justice Griffin.*

NAJIB-ULLAH (DEPENDANT) v. GULSHER KHAN AND ANOTHER  
(PLAINTIFFS).\*

*Act (Local) No. II of 1901, (Agra Tenancy Act), section 32—Division of occupancy holding—Suit for declaration of right—Suit maintainable.*

A suit for a declaration of right to a share in an agricultural holding is maintainable and is not forbidden by the provisions of section 32, Agra Tenancy Act, 1901, *Ashiq Husain v. Asghari Begam* (1) followed. *Ashley Lal v. Janhi Prasad* (2) overruled.

THE facts of this case are as follows :—

One Imam Bux, the father of the parties, was possessed of an occupancy holding of considerable extent. He died before the present Tenancy Act came into operation. He left him surviving a widow and four sons. Under the Muhammadan law the plaintiffs were entitled to 14 *sikams* out of 32 *sikams*, and

\* Appeal No. 48 of 1908 under section 10 of the Letters Patent,

(1) (1907) I. L. R., 30 All., 90.

(2) (1903) I. L. R., 29 All., 66.

and they brought the present suit for a declaration of their right to that share. The Court of first instance decreed the plaintiffs' claim. The lower appellate court held that having regard to the provisions of section 32 of the Tenancy Act 1901, the suit could not be brought and accordingly dismissed it. The plaintiff appealed to the High Court. RICHARDS, J., set aside the decree of the lower appellate Court and remanded the suit.

The defendants appealed under section 10 of the Letters Patent. The appeal was referred to a Full Bench by STANLEY, C. J., and BANERJI, J.

Dr. *Tej Bahadur Sapru*, for the appellants:—The court was not competent to grant a declaration of the plaintiffs' right to the occupancy holding as that would directly defeat the provisions of section 32 of the Tenancy Act. In the Rent Act of 1881, there was no provision corresponding to section 32 of the present Act; this section was taken from the Bengal Tenancy Act (VIII of 1885) with a view to protect the landlord against any division of the tenancy. The landlord is entitled to look upon the holding as a single undivided one so that his right to collect rent may not be injuriously affected. Joint tenants cannot during the jointness of their tenure say that each of them has so much share in it and no more, and pay rent to the landlord accordingly. *Achhey Lal v. Janki Prasad* (1).

The effect of a declaration would be a division of the holding. Section 32, clause 2, says: "No suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained." If a share of one of several joint tenants be declared, it may affect the distribution of rent within the meaning of that section. There is no uniformity in the rulings upon this point. *Ashiq Husain v. Asghari Begum* (2) is against the appellant, but in this case the earlier ruling was not cited. *Ayub Ali Khan v. Mashuq Ali* (3), and *Ajudhia Singh v. Ram Dayal Upadhia* (4) were referred to. Division in section 32 may mean either actual physical division or definement of interest. The legislature meant that the integrity of a

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(1) I. L. R., 29 All., 66.

(2) I. L. R., 33 All., 90.

(3) Weekly Notes, 1908, p. 281.

(4) Weekly Notes, 1908, p. 8.

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holding should be strictly preserved and no attempt should be allowed to be made to break it either physically or otherwise. Maxwell on the Interpretation of Statutes, 4th Edition, p. 176. Moreover, such a declaration is practically useless. Section 42 of the Specific Relief Act is a discretionary section and the aid of this section should not be invoked for an infructuous object.

Mr. *Abdul Raof*, for the respondents:—The object of section 32 is that so far as the relation of landlord and tenant is concerned it must remain intact. The first clause of the section says that no division of a holding or distribution of the rent in respect thereof shall be binding on the landlord. It does not prevent the division of the holding in any event. Clause 2 of the section should not be read as laying down a different rule. *Achhey Lal v. Janki Prasad* (1) does not apply to a case where the parties are Muhammadans. Referring to section 22, he submitted that where the tenancy devolves upon many persons and any one of them gets possession thereof to the exclusion of others, the excluded persons will be without any remedy. A declaration of title cannot militate against the objects of section 32. *Ashiq Husain v. Asghari Begam* (2).

Dr. *Tej Bahadur Sapru* replied.

The following judgments were delivered:—

AIKMAN, J.—This appeal has been referred to a Bench of three Judges on account of conflicting decisions of this Court upon the main question which arises in the appeal. That question, shortly stated, is whether a co-sharer in an agricultural holding is barred by the provisions of section 32 of the Tenancy Act from maintaining a suit for declaration of his rights in the holding. In the case *Achhey Lal v. Janki Prasad* (1), it was held that a suit of this nature could not be maintained having regard to the provisions of the section quoted. In the cases *Ashiq Husain v. Asghari Begam* (2), and *Ayub Ali Khan v. Mashuq Ali Khan* (3), a different view was taken and it was held that the section does not preclude a plaintiff from obtaining by suit a declaration of his right to a share in a holding. In the last two cases it does not appear that the decision in *Achhey Lal v. Janki Prasad* was cited and no reference is made to it in either of

(1) (1906) I, L. R., 29 All., 66.

(2) (1907) I, L. R., 30 All., 90

(3) Weekly Notes, 1908, p. 281.

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these cases. Section 32 (1) does not forbid the co-sharers in a holding dividing the holding or making a distribution of the rent amongst themselves. It merely declares that such division or distribution shall not be binding on the land-holder unless it is made with his consent. Sub-section (2) enacts that no suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any Civil or Revenue Court. In the case, *Achhey Lal v. Jamki Prasad*, it was observed that a Civil or Revenue court should not entertain a suit or other proceeding which has the effect of causing the division of a holding. With this observation I entirely agree, and if I were of opinion that a declaratory decree as to his rights obtained by one co-sharer in a holding against the other co-sharers would necessarily result in a division of the holding or a distribution of the rent, I should have no hesitation in accepting the view expressed in the case last mentioned. But it appears to me that a declaration as to his rights obtained by one co-sharer against the other co-sharers does not and cannot effect any division of the holding or distribution of the rent thereof. Notwithstanding such a declaration the holding would remain as before a single holding and the co-sharers would continue jointly responsible to the land-holder for the rent. No doubt, if having got his declaration the plaintiff attempted on the strength of it to sue for an actual division of the land or a distribution of the rent, his suit would be barred by the provisions of section 32 (2). To hold that a co-sharer in a holding, who is deprived by the other co-sharers of the whole or a portion of his interest therein cannot maintain a suit for a declaration of his rights would amount to a denial of justice, as, so far as I can see, he would have no other remedy. Section 22 provides that when an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant dies, his interest in the holding shall devolve on his male lineal descendants in the main line of descent. Under this section if a tenant dies leaving two sons, his sons become co-sharers in the holding. If one son usurps the whole holding to the exclusion of his brother, the law could never have intended that in such a case the latter should be left entirely without a remedy. The court of first appeal held that the present suit, which was brought by the

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plaintiffs respondents, not for an actual division of the holding, but for a declaration against their co-sharers as to the extent of their interest therein, was not maintainable having regard to the provisions of section 32 and the ruling in *Achhey Lal v. Janki Prasad*. Our learned colleague whose judgment is under appeal sustained the plea that the court of first appeal was wrong in so holding and remanded the case for trial on the merits under section 562 of the former Code of Civil Procedure. In the appeal before us the ground taken is that "the suit being one virtually for division of an occupancy holding is barred by section 32 of the Agra Tenancy Act." In my opinion the suit is in no sense, virtually or otherwise, a suit to divide a holding. I concur in the judgment of our learned colleague except in one respect only, namely, his attempt to distinguish the case relied on by the court of first appeal. For these reasons I would dismiss the appeal with costs.

GRIFFIN, J.—I have nothing to add to the judgment of my learned brother AIKMAN and I concur in the order proposed by him.

KNOX, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice Richards and Mr. Justice Griffin.*

JAMNA DAS, (DECREE-HOLDER) v. RAMAUTAR PANDE AND OTHERS  
(JUDGMENT-DEBTORS)\*

*Act No. IV of 1882 (Transfer of Property Act), section 90—Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage money part of sale consideration—Personal liability of purchaser—Sale of mortgagee rights.*

A mortgaged certain property to B and sub-mortgaged certain other property by the same deed. He subsequently sold the whole of this property to C and left with him the bulk of the sale consideration for redemption of the mortgage and sub-mortgage. B obtained a decree for sale of the mortgaged property, but not of the sub-mortgaged property. The proceeds of the sale of the mortgaged property proving insufficient, the decree-holder applied for

\* First Appeal No. 158 of 1907, from a decree of Shah Amjad-ullah, Subordinate Judge of Mirzapur, dated the 16th April 1907.

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