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proceedings. The function exercised by the higher court in upholding the order of the court below or reversing it is beyond doubt a judicial act. Besides, it seems highly improbable that the higher court, when a case under section 195 of the Code of Criminal Procedure comes before it in revision, should not have the power to rectify the mistake, if any, committed by the court below. There are many cases in which the sanction for prosecution obtained by an applicant from the court of first instance is not utilized for the benefit of the public. It is often used as the means of gaining some private object, and that being so, it is highly desirable that the higher court should take away that power from the hands of a private person and give it to the public authorities or institute the complaint itself. This being our view, we are of opinion that the learned Sessions Judge had jurisdiction to take action under section 476 of the Code of Criminal Procedure, because the offence was brought to his notice in the course of a judicial proceeding. We, therefore, reject the application.

Application rejected.

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APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Muhammad Rafiq.

ABDUL AZIZ (PLAINTIFF) v. BASDEO SINGH AND OTHERS (DEFENDANTS)*
Land-holder and tenant—Fixed-rate tenant—Liability of fixed-rate tenants for rent joint and several and not joint merely—Act No. IX of 1872 (Indian Contract Act), section 43.

Held that liability of joint holders of a fixed-rate tenancy to payment of rent is joint and several, and not joint only. The failure, therefore, of the plaintiff in a suit for rent against several fixed-rate tenants jointly to bring upon the record the representatives of a deceased defendant is no bar to the continuance of the suit against the remaining defendants. *Joy Gobind Laha v. Monmolha Nath Banerji* (1) followed. *Muhammad Askari v. Radhe Ram Singh* (2) referred to.

This was a suit for the recovery of rent brought against several joint holders of a fixed-rate tenancy. The suit was dismissed by the court of first instance. The plaintiff appealed to

* Second Appeal No. 311 of 1911, from a decree of J. H. Cuming, District Judge of Jaunpur, dated the 17th of December, 1910, confirming a decree of Mahesh Bal Dikshit, Assistant Collector, first class of Jaunpur, dated the 19th of May, 1908.

(1) (1903) J. L. R., 33 Calc., 580. (2) (1900) I. L. R. 22 Ali, 307.

the District Judge, and during the pendency of the appeal one of the defendants respondents died. The plaintiff appellant failed to apply to the court within the prescribed time to bring on the record the legal representatives of the deceased respondent. The court then held that the appeal was not maintainable against the remaining respondents and accordingly dismissed it. The plaintiff appealed to the High Court.

Mr. W. K. Porter, Babu Surendra Nath Sen and Maulvi Muhammad Ishag, for the appellant.

Mr. A. H. C. Hamilton, Mr. A. E. Ryves, Babu Satya Chandra Mukerji and Dr. Satish Chandra Banerji, for the respondents.

CHAMIER and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of a suit brought against several persons for the rent of a fixed rate holding. The suit was dismissed by the court of first instance, and the plaintiff appealed to the District Judge. While the appeal was pending, one of the defendants respondents died, and the plaintiff appellant failed to apply to the court within the prescribed time to make his heirs respondents in his place. The court then held that the appeal was not maintainable against the remaining respondents, and with reference to a prayer that the court should consider the case under section 5 of the Limitation Act, the court held that that section did not apply to the appeal. The result was that the appeal was dismissed. This is a second appeal by the plaintiff, on whose behalf it is contended (1) that the liability of the defendants to the suit was joint and several and not joint only, and therefore the appeal should have been allowed to proceed against the surviving respondents; (2) that section 5 of the Limitation Act applied to the case. On the first point the case seems to be covered by the decision of the Calcutta High Court in *Joy Gobind Laha v. Menmotha Nath Banerji* (1). That was a suit against several persons for the recovery of the rent of a holding. After an appeal had been filed by the plaintiff, one of the defendants respondents died, and no attempt was made by the appellant to get the legal representatives of the deceased respondent substituted on the record. The remaining respondents objected that the appeal could not proceed. The court held that as the liability of the holders of the tenure was joint

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and several, the appeal could proceed against the surviving respondents, and that it abated only as far as the deceased respondent was concerned. There seems to be no reason for distinguishing between the liability of several holders of a fixed-rate tenure and the liability of several tenants of any other holding. The liability of fixed-rate tenants in respect of the rent of their holding appears to be joint and several. The case is, therefore, on all fours with the case decided by the Calcutta High Court. In this connection, we may refer to the case of *Muhammad Askari v. Radhe Ram Singh* (1), where the court held that the effect of section 43 of the Indian Contract Act was to exclude the right of a joint contractor to be sued along with his co-contractors. We allow this appeal, set aside the decree of the lower appellate court, and remand the case to that court to be restored to the pending file and disposed off according to law. Costs in this Court will be costs in the cause.

Appeal decreed—Cause remanded.

Before Mr. Justice Chamier and Mr. Justice Figgott.

JUGAL KISHORE SAHU AND ANOTHER (PLAINTIFFS) v. KEDAR NATH AND ANOTHER (DEFENDANTS).*

Mortgage—Prior and subsequent mortgagees—Release of part of mortgaged property for less than its value—Suit for recovery of entire balance of mortgage debt from the residue of the mortgaged property.

Held that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. *Mir Busuff Ali Haji v. Panchanan Chatterjee* (2) *Hari Kissen Bhajat v. Velait Hossein* (3) and *Ponmusami Mudaliar v. Srinivasa Nairakan* (4) referred to.

The facts of this case were as follows :—

This was a suit upon a mortgage made in January, 1888, in favour of the predecessor of the appellants. The mortgage covered shares in several villages, including a two anna share in a village called Haria. In May, 1895, the mortgagors sold

* Second Appeal No. 1159 of 1911, from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 3rd of August, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 25th of March, 1911.

(1) (1900) I. L. R., 22 All., 307.

(3) (1910) 15 C. W. N., 800.

(3) (1903) I. L. R., 30 Cal., 755.

(4) (1908) I. L. R., 31 Mad., 333.

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