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I. L. R., 22 Calcutta, already referred to, the plaintiff would be entitled to a decree to sell the property subject to the prior incumbrances, still, under the circumstances of this particular case, we think we are not called upon to make a decree to that effect; rather we are of opinion that the decree passed by the Court below, giving the plaintiff liberty to redeem the earlier mortgages and then to sell the property subject to the usufructuary mortgage, is equitable and proper.

In this view of the matter we dismiss the appeal, but under the circumstances we think that each party should bear his own costs.

H. W. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

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April 8.

ROBERT WATSON & CO., LD. (DEFENDANTS) *v.* RAM CHAND DUTT AND OTHERS (PLAINTIFFS.) *

Joint Tenancy—Exclusive occupation of the joint lands by some of the co-owners—Suit by the other joint tenants for compensation—Limitation—Limitation Act (XV of 1877), Schedule II, Article 120.

Some of the joint tenants of certain lands took the use and occupation of part of the joint lands, to the exclusion of the other joint tenants, who afterwards brought a suit for compensation for such use and occupation.

Held, that the period of limitation for such a suit was governed by Article 120 of the Limitation Act; and that, therefore, the plaintiffs were entitled to recover compensation for six years.

THE plaintiffs and the defendants jointly owned certain lands. The plaintiffs, four in number, were jointly entitled to a 1 anna 6 gundas 2 couries and 2 krants share; and the plaintiffs 2, 3 and 4 were exclusively entitled to an 8 annas share. The defendants took possession of 4,128 bighas of the joint-lands and cultivated them exclusively. The plaintiffs then instituted a suit against them for the recovery of joint possession, together with mesne profits for the years 1291 to 1293 and for an injunction. This suit was eventually appealed to the Privy Council (see I. L. R., 18 Calc., 10); and the Judicial Committee, on the 25th April 1890, held that, although the plaintiffs were not entitled to either of the remedies they claimed, they were entitled to compensation from

* Appeals from Original Decrees Nos. 329 and 349 of 1894, against the decree of Babu Rabi Chandra Ganguly, Subordinate Judge of Midnapur, dated the 28th of June 1894.

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the defendants for the exclusive use of the lands; and their lordships awarded compensation at the rate of two-thirds of 7 annas per bigha per annum.

On the 25th April 1893, the plaintiffs filed the present suit for compensation in respect of the years 1293 to 1300, amounting to Rs. 9,747-11-0. The defendants pleaded that there was a misjoinder of parties; that part of the claim was barred by limitation; and that, as the plaintiffs had the exclusive enjoyment of certain lands in the zemindari, they were not entitled to any relief, unless a deduction was allowed in respect of those lands. The Subordinate Judge overruled the plea of misjoinder, but held that the claim in respect of the years 1293 to 1296 was barred. As to the remaining plea, he held that that was virtually one of set-off, and could not be entertained under section 111 of the Code of Civil Procedure. He therefore made a decree in favour of the plaintiff for part of the claim, with interest at 12 per cent. per annum on the amount of each year's compensation calculated from the beginning of the year after the year for which such compensation was decreed.

Against this decree both sides appealed to the High Court; and the appeals were heard together.

Babu *Bhowani Charan Dutt* for the defendants.—The suit is bad for misjoinder of parties and of causes of action. [GHOSE, J. —How does that affect the merits?] The plaintiff No. 1 has got a decree for an amount to which he is not entitled under any circumstances.

Next: The claim is barred for the years 1293 to 1296; and, if so, it is also barred for a part of 1297, because the suit was instituted on the 25th April 1893, *corresponding with* Bysack 1300. If this is a suit for compensation *simpliciter*, the amount must be viewed as becoming due at the end of each month. The Bengal Tenancy Act will, therefore, not apply, and the claim is barred. It is the case of both sides that the Tenancy Act does not apply. The act of the defendants in taking exclusive possession as they did was either a misfeasance or a malfeasance; and, under article 36 of schedule II to the Limitation Act, compensation for such an act must be sued for within two years from the commission

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of the misfeasance or malfeasance. Therefore the claim for the year 1297 is barred. But even if that article does not apply, then article 115 will, for there might fairly be said to be an implied contract by the defendants to pay for the exclusive use of the land, and in that case the period of limitation would be three years. The plaintiffs are not entitled to any compensation, nor to any interest thereon; and certainly not, in any case, to interest at 12 per cent.

Babu *Sarat Chandra Dutt* for the plaintiffs.—The lower Court was wrong in considering that the compensation to which the plaintiffs were entitled was rent. The defendants are admittedly co-owners with the plaintiffs, not their tenants; and they are so declared by the Privy Council in the former suit. The claim is for use and occupation; or else it is a matter of account. There is no period of limitation specially provided for such a claim; and therefore article 120 applies, giving six years as the period. Under the former law it was expressly held that six years was the period of limitation—*Debnath Roy Chowdhry* v. *Gudadhur Dey* (1). Clearly neither article 36 nor article 115 can apply.

Again, the defendants stand in a confidential relation towards the plaintiffs, and are subject to the same interposition of a Court of Equity as express trustees in a matter of account—Story's Equity Jurisprudence (Ed. 1892), section 466. If this is so, the period of limitation is six years—*Saroda Pershad Chattopadhya* v. *Brojo Nath Bhuttacharjee* (2) followed in *Hemangini Dassi* v. *Nobin Chand Ghose* (3).

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

The plaintiffs and the defendants are co-sharers in a joint estate. The defendants took possession of, and exclusively cultivated, 4,128 bighas of the joint lands. Thereupon the plaintiffs brought a suit for the recovery of joint possession with mesne profits and for an injunction.

After trial in the Courts in India, the case went up to the Privy Council, and the Judicial Committee (see I. L. R. 18 Calc., 10)

(1) 18 W. R., 132.

(2) I. L. R., 5 Calc., 910. (3) I. L. R., 8 Calc., 788.

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held that the plaintiffs were not entitled to either of the two remedies claimed by them, but that they were entitled to recover from the defendants compensation by reason of the exclusive use of the lands by the defendants, and the benefit derived by them; and they accordingly awarded to the plaintiffs compensation at the rate of two-thirds of 7 annas per bigha a year, that being commensurate with their share of the *ijmali* lands.

We might here mention that the mesne profits that were claimed in that case were in respect of the years 1291 to 1293 Pous Amli; the present suit is for compensation for the years 1293 to 1300 Cheyt.

It would appear that all the plaintiffs are jointly entitled to 1 anna 6 gundas 2 cowries 2 krants share of the property; and that the plaintiffs Nos. 2 to 4 are exclusively entitled to an 8 annas share; and they joined in bringing the present action for compensation in respect of their shares.

The main points raised by the defendants in their defence in the Court below were: (1) misjoinder of parties; (2) limitation as to a portion of the claim; and (3) possession of certain lands in the zemindari being enjoyed exclusively by the plaintiffs, they were not entitled to any relief until and unless deduction was allowed in respect of the income of those lands.

The Court below disallowed the plea of misjoinder; it held that, so far as the claim in respect of the years 1293 to 1296 was concerned, it was barred by the law of limitation; and that the plea as to the plaintiffs being in possession of certain other lands being practically a plea of set-off could not be entertained under section 111 of the Code of Civil Procedure; the result being that the suit was decreed for a portion of the claim, with interest at the rate of 12 per cent. per annum upon the amount of compensation of each year calculated from the beginning of the year next to that for which such compensation was allowed.

Against this decree, both parties have appealed to this Court. The appeal No. 349 is by the plaintiffs, and the other appeal No. 329 is by the defendants.

The first contention that has been raised before us by the learned vakil for the defendants is that the suit should have been dismissed for misjoinder of parties. We are unable to give effect

to this contention, because, looking at section 578 of the Code of Civil Procedure, it seems to us that the error on the part of the lower Court, if there was any error in this connection, did not affect the merits of the case. It is quite clear that the plaintiffs were, as between themselves, entitled to compensation to the extent of 9 annas 6 gundas 2 cowries 2 krants share, though there is, so to say, a definition of shares as between themselves, all the plaintiffs being jointly entitled to 1 anna 6 gundas 2 cowries 2 krants, while the three plaintiffs 2 to 4 are entitled to an eight annas share exclusively. The joinder of these two sets of parties in the same suit could not, and did not, as it seems to us, affect the merits of the case; and we are not prepared to say that the error, if there was any, on the part of the Court below in allowing the suit to be presented upon one and the same plaint, is such as affects the merits of the case.

The learned vakil for the defendants has contended that under article 115, schedule II, of the Indian Limitation Act, the period of limitation in respect of a claim like this is three years; and, therefore, the suit, so far as it seeks to recover compensation for the year 1297, is barred by limitation.

He has further argued that the act of the defendants in taking exclusive possession of the *ijmali* lands was an act either of malfeasance or misfeasance, falling within the purview of article 36 of the Limitation Act; and, therefore, if the limitation prescribed by that article be applicable, the plaintiffs' claim for the years 1297-1298 is barred. We do not, however, think that either of these contentions can be sustained. Article 115 runs thus: "For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, the period of limitation is three years, when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases." Now, was there any contract on the part of the defendants when they entered into possession of the *ijmali* lands—contract either express or implied? We are unable to see how there could be any contract of the kind, having regard to the position occupied by the two parties, as has been declared by their Lordships of the Judicial Committee in the previous case. It will be found on a reference to the judgment of the Privy Council that their Lordships regarded the parties

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as tenants in common, one of them being in the actual occupation of a portion of the joint lands, and being engaged in a proper course of cultivation of that portion as if it were his separate property; and they held that the plaintiffs were neither entitled to get joint possession of the lands which were in the exclusive possession of the defendants, nor to a decree for injunction. What they thought the plaintiffs were entitled to was simply compensation in respect of the exclusive use and benefit enjoyed by the defendants in respect of the lands in their possession.

In this view of the position of the two parties, it seems to us that article 115 can have no application; nor do we think the other article referred to by the learned pleader for the appellant (article 36) is applicable; for when the defendants, being tenants in common with the plaintiffs, exclusively occupied portions of the *ijmali* lands, they could not be regarded as doing any act of malfeasance, misfeasance or nonfeasance, within the meaning of that article. These two articles, Nos. 115 and 36, being left out, we have to see whether there is any other article in the Limitation Act applicable to this case. The learned vakil for the appellant has failed to point out to us any such article; and it seems to us, as has been contended by the learned vakil for the plaintiffs, that the only article which may be taken to apply to this case is article 120 which prescribes a period of six years. We think, therefore, that the contention of the defendants, namely, that three years' limitation is applicable to this case, cannot be supported.

We ought here to mention that the Subordinate Judge, in holding that the limitation applicable to this case is three years, evidently proceeded upon the idea that the defendants occupied the position of tenants to the plaintiffs, and, therefore, as between landlords and tenants, the limitation applicable was three years. We are, however, unable to accept that position as correct. Having regard to the view expressed by the Judicial Committee, to which we have already referred, the defendants could not be regarded as occupying the position of tenants to the plaintiffs. They were tenants in common with the plaintiffs; but they had exclusive enjoyment of certain *ijmali* lands, and were therefore

bound to pay to the plaintiffs compensation for such exclusive use and enjoyment.

The next ground that has been raised before us on behalf of the defendants is one as to interest. The Court below has allowed the plaintiffs interest at the rate of 12 per cent. per annum from the end of each year. We think that under the circumstances of this case, having regard especially to the fact which appears upon the evidence, namely, that the plaintiffs also are in possession of certain *ijmali* lands (the area or situation is not clear), it would not be right and proper to give the plaintiffs interest upon the compensation allowed at the high rate of 12 per cent. per annum. We reduce the interest to 6 per cent. per annum.

These are the only points that have been raised and discussed before us by both sides; and they being disposed of, the result would be that the appeal of the defendants No. 329 should be dismissed, except as regards the rate of interest; while that of the plaintiffs (No. 349) should be partially allowed, it being decreed that save and except the claim for the years 1293 and 1296 (from Assin to Cheyt) the plaintiffs will be entitled to recover compensation from the defendants for the rest of the period comprised in the suit, with interest at the rate of 6 per cent. per annum from the end of each year.

The parties will be entitled to their costs in proportion to the amounts decreed and disallowed.

H. W.

Before Mr. Justice Ghose and Mr. Justice Gordon.

AGHORE NATH CHUCKERBUTTY AND ANOTHER (PLAINTIFFS) *v.* RAM CHURN CHUCKERBUTTY AND ANOTHER (DEFENDANTS.) *

1896 *May* 28.

Execution—Sale—Purchase, by pleader, of client's interest—Duty of pleader—Code of Civil Procedure (Act XIV of 1882), section 317—Specific Relief Act (I of 1877), section 42.

At a sale in execution of a decree against the plaintiffs, the pleader who had acted for the plaintiffs purchased their property with his own money, but in the name of his mohurrir, and for a very inadequate sum.

* Appeal from Original Decree No. 197 of 1894 against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Midnapore, dated the 30th June 1894.