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of her husband on her death. This view is confirmed by a judgement of their Lordships of the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (1). On the finding that the widow got the property on private partition, the appeal must stand dismissed.

We may, however, mention that the argument of the learned vakil for the appellants, that in case she had obtained this property in lieu of maintenance there would be a limited estate with a vested remainder, cannot be accepted. As observed by their Lordships of the Privy Council in the case referred to above, a mother at the time of the partition has no share as a co-parcener. She is only entitled to maintenance and if a share is given to her on partition, it is given to her by way of provision for her maintenance, and when the necessity for maintenance ceases, the property will revert to the estate from which it was taken. It seems to us that the principle underlying the two cases is the same, and it is impossible to hold that the widow has got a limited estate with a remainder in the sons. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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GIRDHARI LAL (PLAINTIFF) *v.* GOBIND RAI (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 164 *and* 201(3)—*Suit for profits—Presumption—"Shall presume."*

If the conditions laid down in section 201(3) of the Agra Tenancy Act, 1901, are fulfilled, the presumption raised is irrebuttable and conclusive, and the court is not entitled to go

* Second Appeal No. 479 of 1925, from a decree of H. Beatty, Additional Judge of Saharanpur, dated the 9th of December, 1921, confirming a decree of Rahman Bakhsh Qadri, Assistant Collector, first class, of Saharanpur, dated the 2nd of July, 1923.

(1) (1912) I.L.R., 34 All., 234.

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into any such question as whether the plaintiff and defendant are members of the same joint family of which the defendant is the *karta*. *Durga Prasad* v. *Hazari Singh* (1), and *Sheo Narain* v. *Bela Rai* (2), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. *M. L. Agarwala*, for the appellant.

Pandit *Narmadeshwar Prasad Upadhiya*, for the respondent.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for profits under section 164 of the old Agra Tenancy Act against a *lambardar*. The plaintiff's name is recorded as proprietor of a specific area of land with a specific share of the profits. The defendant is admittedly a *lambardar* of the village. The parties are brothers. The courts below have dismissed the suit on a finding that the family is joint, and that a member of a joint Hindu family has no right to claim profits from the *karta* of the family.

In our opinion, it was not open to the courts below to go into the question of the jointness or the separation of the parties. The plaintiff repudiated the suggestion that he was a member of a joint Hindu family. His name was recorded as a proprietor in the revenue papers for the years for which the profits were claimed. Under section 201, clause (3), if the plaintiff is recorded as having the proprietary right entitling him to institute a suit under the provisions of Chapter XI, the court shall presume that he has this right. The defendant's plea that the plaintiff has no such right because the family was joint, should not have been allowed to prevail.

It was held by a Full Bench of this Court in the case of *Durga Prasad* v. *Hazari Singh* (1), that the words "shall presume" in the section mean irrebuttable and

(1) (1911) I.L.R., 33 All., 799. (2) (1922) I.L.R., 44 All., 616.

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conclusive presumption. The learned vakil for the respondent relies on an unreported case decided by SUNDER LAL, J., namely, *Dharam Singh* v. *Ratti* (1). That case no doubt helps him. We are of opinion that the learned Judge's view that the presumption merely meant that the recorded co-sharer had a proprietary right and did not mean that he had a right to institute a suit for profits, was not correct. Reading clause (1) with clause (3), it is obvious that the presumption relates to the existence of the proprietary right entitling the recorded co-sharer to institute a suit for profits under Chapter XI of the Act. The view of the Single Judge is contrary to that subsequently expressed by a Bench of this Court in the case of *Sheo Narain* v. *Bela Rai* (2), where it was held that the presumption was nonetheless applicable because the parties to the suit may be members of a joint Hindu family. As remarked above, we think that the question of jointness should not at all have been gone into.

We may note that the learned District Judge has relied on the fact that an entry in the *wajib-ul-arz* for a previous period indicates that the defendant collects rent as the manager of a joint Hindu family. This *wajib-ul-arz* not being for the years in suit, cannot override the entry in the *khewat*. It is also possible that a family may be joint in the year for which the *wajib-ul-arz* has been prepared and may become separate afterwards. Under these circumstances the presumption under section 201, as interpreted above, stands.

We accordingly allow this appeal and setting aside the decree of the courts below remand the case under order XLI, rule 23, to the court of first instance through the lower appellate court for the determination of the correct amount of profits due to the plaintiff.

Appeal allowed and cause remanded.

(1) (1917) S.A., No. 443 of 1913, decided on the 1st of March, 1917.
(2) (1922) I.L.R., 44 All., 616.