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by the courts below is correct; the appeal is accordingly dismissed with costs.

We think that it would be appropriate for the execution court to see that in drawing up the proclamation of sale the particulars mentioned therein include reference to any litigation that may at the time be pending as regards the property sought to be sold, so that the auction purchasers may not be deceived or taken unawares. For such a purpose the decree-holder might well be asked to point out whether any such litigation is pending or not.

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*Before Mr. Justice Harries and Mr. Justice Rachhpal Singh*

CHHATTAR SINGH (DEFENDANT) *v.* AJUDHIA PRASAD AND OTHERS (PLAINTIFFS)*

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*Agra Tenancy Act (Local Act III of 1926), section 226—Suit for profits against lambardar—Lambardar holding a cattle market on common land at his own expense—Income derived from such market whether divisible among the co-sharers—Presumption—Whether lambardar must be presumed to have started the market for the benefit of all the co-sharers—Co-owners—Profitable use of common land by one co-owner.*

Every co-sharer in a village which is held jointly has a right to take possession of and put to a profitable use any uncultivated piece of common land which is not occupied by some other person, and if he does so, the right of the other co-sharers is to insist that he should pay to the proprietary body a fair rent for such land but they have no right to insist that the entire income derived by him from such land by his own labour and expense should be divided between them. The position is exactly the same when such co-sharer happens to be lambardar of the village. So, where the lambardar had at his own expense and labour started a cattle market on certain common land, it was *held* in a suit for profits against the lambardar that the co-sharers were not entitled to any share of the profits derived by him from the cattle market, but only to a fair rent for the land used by him.

*Second Appeal No. 731 of 1933, from a decree of Ganga Nath, District Judge of Aligarh, dated the 3rd of February, 1933, modifying a decree of Dhanraj Singh, Assistant Collector, first class of Etah, dated the 3rd of March, 1932.

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There is no presumption, whenever a lambardar starts any profitable use or venture on a piece of unoccupied common land at his own expense, that he does so for the benefit of the entire coparcenary body; in fact the presumption is all on the other side.

Mr. *Shiva Prasad Sinha,* for the appellant.

Mr. *Kamta Prasad,* for the respondents.

HARRIES and RACHHPAL SINGH, JJ.:—These are two connected appeals arising out of a suit for settlement of accounts and profits. The plaintiffs and the defendants are co-sharers in Sitalpur. Ajodhia Prasad, Kamta Prasad and Anwar Singh, plaintiffs, instituted a suit against Chhattar Singh and Ganga Prasad, lambardars, for profits under section 226 of the Agra Tenancy Act. The suit was decreed by the trial court. Against that decree an appeal was preferred to the court of the District Judge, who modified the decree of the trial court and reduced the amount decreed by a certain sum of money. Both sides have preferred appeals against the decision of the learned District Judge.

The usual pleas which are generally taken in suits of profits and accounts were taken in the case before us. At this stage, however, it is not necessary to refer to any one of those pleas. The dispute between the parties relates to the profits of a cattle market said to have been started by Chhatar Singh, one of the two lambardars of the village.

The plaintiffs in paragraph 5 of their plaint stated that a cattle market is held in the village from 1336 Fasli on the grove, which is held jointly by the co-sharers, but the plaintiffs have not been paid the income of their share, and they claim to be entitled to get a share out of the income from this cattle market.

The defendant in paragraph 5 of the written statement stated that about 2½ years ago he had started, with the permission of the Collector, a cattle market on his own grove No. 735 at a considerable cost, and he denied

the right of the plaintiffs to get any share in the income of this cattle market.

One of the issues framed by the trial court was whether the plaintiffs were entitled to get a share in the income from the cattle market held in plot No. 735. The learned Assistant Collector did not take into consideration the plea of Chhatar Singh to the effect that he had the right of a grove-holder in plot No. 735. This is a point which should have been considered. If it be found that Chhatar Singh, defendant, has the right of a grove-holder in plot No. 735, then it is not easy to understand on what ground the co-sharers in the village can claim any share in the profits of a cattle market which might be held in that grove. The position of a grove-holder, according to the Agra Tenancy Act, is analogous to that of a tenant. He has every right to make use of the grove, which he holds, in any manner he likes. If he starts a cattle market in his grove and derives profits, the co-sharers in the village have no right whatsoever to a share in those profits.

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The learned District Judge has confirmed the findings of the learned Assistant Collector without going into the question referred to above.

After hearing the learned counsel appearing on both sides we are of opinion that before these appeals can be finally disposed of, it is necessary to remand the case to the lower appellate court. One of the questions which requires determination is whether the cattle market is held exclusively on plot No. 735, and whether that plot is held by Chhatar Singh, lambardar, as a grove-holder. If the finding on this issue be in the affirmative, then the plaintiffs' claim for a share in the profits of the cattle market must fail. The second question which requires determination in this case is to find out what are the plots, in addition to No. 735, on which the cattle market is held. The third question which is to

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be considered is whether the plaintiffs are entitled to a share in the income derived from this source, because some common land is being used for the purpose of the cattle market.

The learned Assistant Collector in his judgment says: "There is no doubt that Chhatar Singh manages the market, but it is not clear that he does so in his individual capacity and not as a lambardar representing the whole coparcenary body. A cattle market of a village is ordinarily the source of income of the whole coparcenary body unless the lambardars prove their exclusive right to it." At another place the learned Assistant Collector says: "I think the income from the cattle market is the village income and not the income of the lambardars alone, unless they prove satisfactorily that it is exclusively their own." The learned District Judge appears to agree with this view. He in his judgment says: "Plot No. 735 appertains to the zamindari and all the co-sharers have rights according to their shares in it. Consequently, there is no reason why the lambardar, who is responsible for the management of the property and who started a market in it, should appropriate all the profits himself. I agree with the finding of the lower court and find the point against the appellant."

We wish to state that we find ourselves unable to agree with this proposition. It is true plot No. 735, which is a grove, appertains to a zamindari, but it does not follow that if the grove-holder holding that plot invests money in order to increase its income, then other co-sharers in the village become entitled to get a share in it. We also emphatically disagree with the view that whenever a lambardar starts a cattle market or any other profitable venture of this nature, then there is a presumption that he does so for the benefit of the entire coparcenary body. In our opinion the presumption is all on the other side. Every co-sharer in a village held jointly has a right to take possession over any unculti-

vated piece of land, which is not cultivated by some other person. The right of the other co-sharers is to insist that he should pay rent to the proprietary body through the lambardar like any other tenant. But there is nothing in the provisions of the Agra Tenancy Act under which co-sharers can insist that the entire income derived by the co-sharer taking possession over a piece of land should be divided between them. The position is exactly the same when a vacant piece of land is utilised by a co-sharer who happens to be a lambardar of the village. If he takes possession over an unoccupied piece of land and starts a cattle market or any industry of that kind by investing money, then he does so for his own benefit. If a co-sharer in a village opens an indigo factory or any other factory on a vacant piece of joint land it cannot possibly be contended that he started the factory for the benefit—to use the words of the learned Assistant Collector—"of all the coparcenary body". There appears to be no reason why such a presumption should be made when the industry or a new venture is started by a co-sharer who occupies the position of a lambardar. There may be cases in which a co-sharer after taking possession over a piece of land would invest large sums of money with the result that an ordinary piece of land, which in other hands would not yield an income say of Rs.10 a year, would yield Rs.500 yearly as profit. In a case like this it would be unreasonable to hold that all the co-sharers of the village are entitled to get a share in the new venture started by a co-sharer. The learned Assistant Collector in his judgment says: "Chhatar Singh appears to have given no notice of his exclusive right to the cattle market before starting it. As a lambardar, he started the market and as such its income should go rateably to all the co-sharers." This, in our opinion, is not a correct view. If a co-sharer in a village takes possession over a joint piece of land and utilises it for his own purposes, then it can never be

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said that as he had given no notice that he was going to use the land exclusively for his own purpose, so the crop of that land would be liable to be distributed rateably among the other co-sharers. The position of the co-sharer lambardar is exactly the same. We may be permitted to make a reference to some of the observations made by their Lordships of the Privy Council in *Lachmeswar Singh* v. *Manowar Hossein* (1), which are as follows:

"For the parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that, even in the time of the bridge, there has been any obstruction at the landing places. It is not alleged that the defendant's proceedings have prevented anyone else from setting up a boat for himself or his men, or even from carrying strangers for payment. So far from inflicting any damage upon the joint owners, the defendant has supplied them gratuitously with accommodation for passage. All that is complained of is that he has expended money in a certain use of the joint property, and has thereby reaped a profit for himself. But property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or risk for that purpose.

Now in this case the High Court has not granted any injunction, but it has made a declaration with respect to the possession and profits of the ferry, and has directed an account of the profits accordingly. But if the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession, as was done by the Watsons in the case cited. By the defendant's acts they have lost nothing, and have received some substantial convenience. It will be time enough to give them remedies against him when he encroaches on their enjoyment."

That was a suit in which one of the co-sharers owning a two-anna share had started a ferry, on joint property,

(1) (1891) I.L.R., 19 Cal., 253 (263, 265).

which was yielding a considerable amount of income. The plaintiffs in that case were the owners of the remaining fourteen-anna share in the village. They instituted a suit for profits and claimed that as the ferry was run on the joint property owned by them and the defendant, so they were entitled to a share in the profits. Their Lordships of the Privy Council repelled that contention for the reasons mentioned above. In our opinion, those reasons are applicable to the case before us. It appears to us that a co-sharer is perfectly entitled to invest money in a piece of land in a village, and would be entitled to all the profits derived from that source, subject to this limitation that he would be liable for payment of the rent of the land used by him, like any other co-sharer or tenant in that village. But there can be no law under which the co-sharers in the village can become entitled to share in the income which a co-sharer may get by investing his money or through his own labour and exertion.

For the reasons given above it appears to us that the courts below did not approach the case in the manner in which it should have been approached. They were not warranted in making a presumption, as they have done, that as the market was started by the lambardar, so he must have started it for the benefit of all the co-sharers. It will be seen from a perusal of the plaint that no such case was set up by the plaintiffs themselves. In the circumstances, we are of opinion that the learned Judges of the courts below were not right in starting with a presumption in favour of the plaintiffs. It is because of this that we consider it necessary to remand the case to the lower appellate court for fresh findings, which should be given after keeping in view the observations which we have made in this case.

[Appropriate issues were then framed and sent down to the lower appellate court for return of findings.]