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The learned author cites several English cases where servants, who have been rightly discharged and have afterwards sued their late masters for wages, have failed to recover anything.

I am, therefore, of opinion that in view of the findings of the court below that the default was committed by the plaintiff and that his master was justified in dismissing him, the plaintiff was not entitled to recover the wages for even twenty days during which he had served. The judgment of the court below, therefore, is not according to law. I allow the revision and set aside the decree of the court below and dismiss the suit. As the applicant professes to have contested the suit mainly on principle, I direct that the parties should bear their own costs of this application and in the court below.

*Application allowed.*

## APPELLATE CIVIL.

1925
*June*, 1.

*Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.*

SHIAM LAL (DEFENDANT) *v.* RADHA BALLABH AND OTHERS (PLAINTIFFS) AND BALMAKUND AND OTHERS (DEFENDANTS).*

*Joint property—Improvement made in good faith by one co-sharer—Partition—Compensation for improvements—Set-off on account of use and occupation by the party claiming compensation.*

In 1911 one *R. C.* purchased a ruined house and spent a considerable sum of money in re-building it. In so doing he apparently acted in the belief that his vendors were the sole owners and that he had acquired a complete title. In 1914, however, some other members of the vendors' family appeared

* First Appeal No. 142 of 1922, from a decree of Ganga Sahai, Subordinate Judge of Muttra, dated the 30th of January, 1922.

and succeeded in obtaining a decree for joint possession of the house, but in that suit the question of what compensation, if any, the purchaser was entitled to was left open. In 1920 the successors in interest of the plaintiffs to the suit of 1914 brought a suit for partition, and in that suit the court directed that the house should be sold and the proceeds divided amongst the parties interested. The principal defendant, who was the representative of the original purchaser, claimed compensation for the money spent on re-building the house, and, being refused compensation, appealed.

*Held* that the defendant's predecessor had acted in good faith and without any intention of embarrassing the other co-sharers in the property, and the defendant was therefore entitled to compensation; but in estimating such compensation the plaintiffs on their side were entitled to some set-off on account of the use and occupation of the house by the defendant.

The principles governing the award of compensation on a partition discussed.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Narain Prasad Ashthana*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—The subject-matter of the dispute in this case is a three-storeyed house situated in the town of Muttra. On the 20th of May, 1911, the site of this house and certain materials were sold by two separate deeds of sale. The site of the house was sold to one Ram Chand or Ram Chandar who is the own brother of the present appellant Shiam Lal. The materials were sold to a man named Jamna Das and were afterwards sold by him to Ram Chandar the man whose name has just been mentioned. The site was sold for Rs. 400 and the materials for Rs. 250.

Both these sale-deeds are printed at pages 21 *et seq* of our record. The vendors were Gopal Das and

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his son Piare Lal. The latter was acting for himself and for his two minor sons.

It appears that after these sales took place, Ram Chandar re-built the house. Then in the year 1914 a suit was filed by Mitthu Lal and others who were members of the family of Gopal Das. This suit was brought in the court of the Additional Subordinate Judge of Muttra on the allegation that the sales made by Gopal Das, his sons and grandsons were not binding inasmuch as the property which had been sold was joint family property. The plaintiffs alleged themselves to be members of a joint family with Gopal Das, and they therefore asked that the deeds of sale might be cancelled and that Ram Chandar might be ejected from the premises.

Ram Chandar defended this suit and raised a variety of pleas. He denied that the family of the plaintiffs and Gopal Das, his vendor, was a joint family. He denied that the property was joint family property and pleaded that he had acquired the whole of these premises from Gopal Das. He set up a defence under section 41 of the Transfer of Property Act and pleaded, moreover, that in no case could he be ejected without payment by these plaintiffs of the sum of Rs. 5,000, the amount which he had spent on the re-erection of the house.

This suit was decreed in the court of the Subordinate Judge of Muttra to this extent, namely, that the plaintiffs were given a decree for joint possession of the premises. That decree was upheld in appeal in this Court by the judgment in F. A. No. 199 of 1916 which was delivered on the 2nd of January, 1919.

Mitthu Lal and his co-plaintiffs having thus got a decree for joint possession, the suit out of which this appeal has arisen was instituted in November, 1920, by

Radha Ballabh and others, some of the successors in interest of the plaintiffs in the earlier suit. The suit is a suit for partition. The learned Subordinate Judge has ordered the sale of the premises and has directed distribution of the sale proceeds according to the shares of the parties. We gather from the judgment of the court below that Shiam Lal, the defendant appellant, now owns 45/72 of the house. Shiam Lal, it may be mentioned, alleged that in a partition arrived at between himself and his brother, Ram Chandar, this house had fallen to his share. It further appears that since the date of the earlier suit Shiam Lal or his brother, Ram Chandar, had been buying in some of the shares of the other co-tenants.

One of the claims made by the defendant appellant Shiam Lal in this suit for partition was that he was entitled to claim from the plaintiffs a sum of Rs. 5,500 on account of improvements which he had made on the property. The Subordinate Judge came to the conclusion that it might be inferred that he had spent a sum of Rs. 5,000 on rebuilding these premises. Compensation, however, was refused to Shiam Lal on the ground that he and his predecessor, Ram Chandar, were only trespassers and that he laid out the money at his own risk.

It is this finding which is contested here and it is argued on behalf of Shiam Lal that the judgment of the court below is erroneous. It is said that in these partition proceedings he is entitled in equity to compensation for the money he laid out in restoring these premises.

On the other side it has been argued that this question of compensation is no longer open in view of the findings which were come to in the earlier suit of 1914 to which we have referred.

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A copy of the judgment of the Additional Subordinate Judge in that earlier suit is to be found at page 27 of our record. In that case the learned Subordinate Judge was asked to hold that the plaintiffs could not recover possession of the premises without paying to Ram Chandar the money which he had laid out in rebuilding the house. The learned Subordinate Judge refused to decide this question. He stated that at that stage it was not necessary to decide this issue but that subsequently in a partition suit, if the rules of equity would allow, Ram Chandar would be entitled to receive compensation for repairs and improvements effected by him.

When the case came up to the High Court the same plea was again raised on behalf of Ram Chandar, and this Court agreeing with the judgment of the court below, was of opinion that Ram Chandar could not demand that the plaintiffs in that suit should pay him money for compensation as a condition precedent to their getting a decree for possession.

We have considered carefully the judgments in this earlier suit and we are of opinion that there is no solid foundation for the argument that the question of this claim to compensation as now raised is *res judicata* between the parties. All that was held in the earlier case was that Ram Chandar, who was then in possession of the house, could not insist that the plaintiffs should pay him compensation before they were entitled to get joint possession. It seems to us that the question of any compensation which might be allotted at the time of partition was left open in these earlier proceedings.

We have now to consider what the law is regarding a claim of this kind. We have been referred in the course of argument to a treatise by a learned

American author, " Freeman on Co-tenancy and Partition." According to this learned author the law is as follows :—We quote from paragraph 509 at page 678 of the book :—

" The fact that a co-tenant has located upon a particular portion of the lands of the co-tenancy and has enhanced its value by making improvements or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a court charged with the duty of making a partition. . . . The law declines to compel one co-tenant to pay for improvements without his authorization but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises the fruits of his expenditure and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners (whose labour and money have been thus inseparably fixed on the land) so far as can be done consistently with an equitable partition."

Continuing in paragraph 510 the learned author quotes the opinion of the Supreme Court of the State of New York in the following language :—

" Where one tenant-in-common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant-in-common to an allowance on a partition in equity for the improvements made on the premises it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements and their refusal. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property and not for embarrassing his co-tenants

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or encumbering their estate or hindering partition. But if one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land, because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case the improver stands as mere volunteer and cannot without the consent of his co-tenant lay the foundation for charging him with improvements."

From the above statement of the principles which govern the award of compensation on partition it is apparent that the real difficulty arises in those cases where, as here, the property is not susceptible of physical division. In the present instance we find that the house in dispute, although of three storeys, is not a large house, and as the co-sharers are many it would be quite impossible to make any physical division of the premises and so the learned Judge has been obliged to resort to the provisions of the Partition Act of 1893 and to direct a sale with the further direction that the sale proceeds are to be divided between the interested parties.

It is laid down in the above statement of the law that it is essential that the person claiming compensation should have acted in good faith. In the present case we think it may fairly be said on behalf of Shiam Lal or his predecessor that he acted in good faith in the sense contemplated, that is to say, he made the "improvements" honestly for the purpose of improving the property and not in order to embarrass the other co-tenants or to encumber their estate or to hinder partition. He had no such object in view, for

apparently he was under the impression that by the purchase made in the year 1911 he had become the owner of the whole of the estate. The law as stated in the quotation made above relates to claims for compensation on account of "improvements." In this present case it is we think possible to say that the matter stands on a somewhat different footing, for if carefully examined it seems to us that what have been called improvements in the course of the trial were really repairs. It is clear on all hands that when the appellant's predecessor bought these premises the property was in ruins. There is evidence to show that a long time before the purchase was made the house had been a three-storeyed house. When Ram Chandar bought in the year 1911 the two upper storeys had disappeared—there was only the lowest storey and that was in ruins, and it is quite clear that as matters then stood the property was quite useless and unprofitable. It may be mentioned here that Gopal Das and the other members of the very large family to which he belonged did not reside in Muttra; some of them we are told resided in the Aligarh District and others of them at Calcutta, and it seems reasonable to suppose, and there is evidence to that effect, that these people, being absentees, had neglected these premises and allowed them to fall into decay. We find then that Ram Chandar buys these premises in a state of ruin and thereby becomes a co-tenant. He spent a sum of money in reinstating the premises and making them fit for occupation. Having regard to all these circumstances we think that he may fairly be held entitled to some compensation for reinstatement. He has, by the money he has laid out, converted this building into something which is of use and which can bring in profit. In the state it stood when he purchased it was worth little or nothing at all.

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We have decided, therefore, that in the circumstances to which we have referred, the defendant appellant is entitled to some compensation, and we now proceed to determine what the amount of that compensation should be.

There is no very definite evidence on this point on the record but in his own statement which is to be found at page 11 of the record Shiam Lal stated that he had spent Rs. 5,000 or Rs. 6,000 in restoring these premises. This restoration, he said, had taken place some ten years before the date on which he was giving his evidence. That would fix the date of the restoration in or about the year 1912. Obviously Shiam Lal was not able to produce any detailed account of his expenditure on these particular premises. It seems from his deposition that at that time he built three other houses as well and that he had spent some Rs. 25,000 in erecting all four. He called two witnesses, Parbhu Lal and Munshi Abdullah, one of whom is a contractor and the other a sub-overseer, and these men were examined with reference to an estimate which is printed at page 38 of our record and marked Ex. A. It may be mentioned here that both these men were called as witnesses in the earlier suit of 1914 and that this very estimate was produced in that case. Both these men who have some pretensions to be experts and who drew up this estimate jointly, fixed the cost of rebuilding these premises at Rs. 5,480. Of course when all is said and done this is an estimate only. They themselves have no direct knowledge of the money that was actually spent in rebuilding the house. It was on these materials that the court below came to the conclusion that in all probability Shiam Lal's predecessor, Ram Chandar, had spent about Rs. 5,000 in reinstating the property now in dispute, and all things considered, we are of opinion that the

conclusion of the Subordinate Judge is substantially correct. We should, therefore, be prepared to allow Shiam Lal a sum of Rs. 5,000 by way of compensation, but there is another fact which is to be taken into account and that is that Shiam Lal and his predecessor, so far as we can see, have had the exclusive use of these premises for a considerable period. We do not know on the present state of the record whether the plaintiffs who are now seeking partition have received from Shiam Lal any profits accruing since the time when they were admitted to joint possession under the decree of this Court. We may refer in this connection again to paragraph 510 of Freeman's book where, dealing with the question of compensation for improvements, the author says :—

"The co-tenant against whom the improvements are charged will therefore be charged not with the price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements."

We feel, therefore, that we must allow these plaintiffs some set-off on account of the use and occupation of these premises by the appellant and his predecessors. No definite material is to be found on the record but we think, having regard to the value which is put upon the premises and to the probable rent which a building of this description would bring in, we shall not be doing the defendant any injustice if we hold that during the period of his occupation he has recouped himself to the extent of Rs. 1,000. Deducting this sum of Rs. 1,000 from the Rs. 5,000 just mentioned we come to the conclusion that the appellant is entitled to compensation to the extent of Rs. 4,000 from the sale proceeds. The decree of the

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court below, therefore, is modified and it is now declared that on sale of these premises the defendant appellant will be entitled to deduct Rs. 4,000 out of the sale proceeds. The balance can then be distributed amongst the various co-owners in proportionate shares. As regards costs we leave the parties to pay their own costs in both the courts.

*Decree modified.*

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1925
*June*, 8.

*Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.*

BRIJ RAJ AND OTHERS (PLAINTIFFS) *v.* RAM SARUP AND OTHERS (DEFENDANTS).*

*Guardian* ad litem—*Suit by minor defendant to avoid the effect of proceedings taken against him on the ground of negligence of his guardian* ad litem—*Nature of the negligence which would entitle minor to a decree.*

"Gross negligence," which may be interpreted as culpable neglect of the interests of a minor defendant, on the part of his guardian *ad litem* will entitle the minor to the avoidance of proceedings undertaken against him. But it is not every kind of negligence nor every degree of negligence which will render proceedings otherwise regular and proper liable to be reopened. It must be such negligence as leads to the loss of a right which, if the suit had been resisted with due care, must have been successfully asserted. It is not sufficient to show that the guardian *ad litem* absented himself; it must also be proved that there was an available good ground of defence which was not put forward owing to the default of the guardian *ad litem* to appear at the trial. Or, to put the matter differently, the nature of the duty demanded from the guardian *ad litem* may vary according to the nature of the case in which he is called upon to act. An omission to defend or to raise a particular plea or to call certain evidence might in the circumstances of a particular case amount to negligence or to a breach of the duty which was owing by the guardian *ad litem* to the infant in that case. In different

* First Appeal No. 88 of 1924, from a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 22nd of November, 1923.