PRIVY COUNCIL.

FAQIR BAKHSH (PLAINTIFF) *v.* MURLI DHAR AND OTHERS (DEFENDANTS.)

P.C. 1931 *January*, 13.

[On Appeal from the Chief Court of Oudh.]

Landlord and tenant—Lease—Merger—Lessee acquiring share in leased property—Account—Transfer of Property Act (IV of 1882), section 111.

By section 111 of the Transfer of Property Act, 1882, a lease is determined by merger when the interests of the lessee and the lessor in the whole of the property becomes vested in the same person in the same right. Consequently a lease of shops in Lahore is not merged upon the lessee acquiring a share only in property which includes the shops, and in accounts between the lessee and owners of the remaining shares the lessee is accountable in respect of the shops only for the rent reserved by the lease, and not for the estimated annual value thereof.

Decree of the Chief Court of Oudh reversed.

APPEAL (No. 12 of 1930) from a decree of the Chief Court of Oudh (December 15, 1927) reversing a decree of the Subordinate Judge of Mohanlalganj, Lucknow, which affirmed a decree of the second Munsif, Lucknow.

The suit was instituted by the appellant for an account of his share of the rents and profits of certain property in Lucknow, of which he had acquired a 2 anna, 1 pie, 11 kirant share by purchase in 1921, the defendants being owners of the remaining share under an earlier purchase. The question arising was whether in taking the accounts the appellant was chargeable in respect of three shops in his occupation, and which formed part of the property, the rent reserved by a lease granted to him before his purchase, or the estimated rental value apart from the lease. The Chief Court reversing the lower Court's decree had taken the latter view

*Present: Lord MACMILLAN, Sir JOHN WALLIS and Sir GEORGE LOWNDES.

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The facts appear from the judgment of the Judicial Committee.

1930. November 27. *Wallach*, for the appellant.

The respondents did not appear.

THE judgment of their Lordships was delivered by Lord MACMILLAN :—

The plaintiff in this suit, Shaikh Faqir Bakhsh, and the defendant Murli Dhar, are joint proprietors *pro-indiviso* of a property in the city of Lucknow known as Rahimganj, on which a large block of shops has been erected. The entire property was formerly owned by one Khuda Bakhsh, but it is now held in the proportions roughly of one-eighth and seven-eighths by the parties mentioned, who acquired their respective shares in it by purchase. When the plaintiff bought his one-eighth share on the 1st of April, 1921, the defendant Murli Dhar had already acquired his seven-eighths share. At the time when the latter purchased his share of the entire property, a portion of it, consisting of three shops, was in the occupation of the plaintiff as tenant under a lease at a monthly rent of Rs. 14-8, and this lease was current when the plaintiff himself purchased the remaining one-eighth share of the entire property.

In the present proceedings the plaintiff, now the appellant asks that an account be taken of the income of the entire property for the period from the 1st of October, 1922 to the end of February, 1925 (or 1926—the date is variously stated) in order that his share thereof may be ascertained and paid to him. He claims that in the account the revenue from the portion of the property in his own occupation, being the subjects comprised in his lease, should be entered at the monthly rent of Rs. 14-8 payable under the lease. The defendant Murli Dhar contends that the plaintiff, having become a *pro-indiviso* proprietor of one-eighth of the entire property and suing as a co-sharer for an account of the revenue

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of the entire property, is not entitled to found upon the lease in question and must bring into the account as the return on the subjects comprised in the lease and occupied by him, not the stipulated rent of Rs. 14-8, but the reasonable profits of these subjects, which he estimates at not less than Rs. 350 per month. The real issue in the case is raised by these rival contentions.

The Second Munsif, Lucknow, before whom the matter came in the first instance, found in favour of the plaintiff by a judgment, dated the 29th of November, 1926, which on appeal was affirmed by the Subordinate Judge, Mohanlalganj on the 29th of March, 1927. In both courts the view was taken that the acquisition by the plaintiff of a one-eighth share of the entire property did not operate an extinction of his rights as a tenant of a portion of the property, and that the plaintiff was accordingly entitled to continue to claim the benefit of the lease and to bring into the account as the income of that portion the rent payable under the lease.

On an appeal being taken to the Chief Court of Oudh the decision of the courts below was reversed and the case was remitted to the court of first instance "for a determination of the true profits of the whole property, including the three shops of which the plaintiff claims to be a tenant and for calculation on this basis of the amount due to or by the plaintiff as the case may be." The present appeal is against this judgment and has been heard by their Lordships *ex parte*.

The question of law upon which the decision of the case depends relates to the effect on the plaintiff's lease of his acquisition of a *pro indiviso* one-eighth share of the entire property. If the lease was not thereby abrogated it was admittedly valid and subsisting throughout the period of the account claimed.

Now it is plain that when the defendant Murli Dhar acquired his seven-eighths of the entire property he did so

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subject to the subsisting lease of the three shops in question which formed part of the property and during the subsistence of the lease he could look for no other return from these three shops than his seven-eighths share of the stipulated rent of Rs. 14-8. When the plaintiff in turn acquired the remaining one-eighth share of the entire property, did this entitle the defendant Murli Dhar to disregard the lease and to claim seven-eighths, not of the rent under the lease, but of the estimated annual value of the three shops comprised in the lease? This claim could be justified only if the effect of the plaintiff's acquisition of one-eighth share of the entire property was to operate a merger of his tenant right in his property right and so to extinguish his lease. Their Lordships are of opinion that there was no such merger. The plaintiff acquired only a one-eighth proprietary interest in the three shops as part of the whole property, while his tenant right extended to the three shops in their entirety. His right of occupation of the three shops in question with his co-proprietor Murli Dhar depended on the subsistence of the lease. The matter, however, is put beyond dispute by the terms of section 111 of the Transfer of Property Act (IV of 1882), upon which the learned Second Munsif very properly founds his judgment. That section enumerates in eight paragraphs the various modes in which

> "a lease of immovable property determines."

and the enumeration is exhaustive. The only paragraph relating to determination by merger is as follows :—

> "(*d*) In case the interest of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right."

As the learned Second Munsif points out,

> "The fusion of interests required by law is to be in respect of the whole of the property."

There was no such fusion in the present instance.

Their Lordships observe that in the judgment of the Chief Court of Oudh no reference is made to section 111 of the Transfer of Property Act. The learned Judges of that Court, in reversing the decision of the

lower courts, put the case thus:—"Faqir Bakhsh has brought this suit as a co-sharer. The question whether he is or is not a tenant of three shops is immaterial for the purpose of this suit. As a co-sharer he can claim his proportionate share of the profits of the whole property, but these profits must be the real profits of the property." Their Lordships find themselves unable to follow this reasoning. If the lease, as their Lordships hold, is in a question with Murli Dhar a valid and subsisting lease, then in any accounting between the parties the rent under the lease is necessarily the measure of the contribution which the let subjects ought to make to the divisible revenue of the entire property.

It remains to notice a plea of estoppel which figures largely in the pleadings and is fully dealt with in the two first courts. It appears that in 1921 Murli Dhar, claiming to be proprietor of the entire property, brought an action against the present appellant, seeking to eject him from the premises of which he was in occupation. The latter pleaded in answer his tenancy right and also that he was in possession of the property in suit in the capacity of a co-sharer, and that the relation of owner and tenant did not exist as between him and Murli Dhar. He was allowed to add a plea that he was "not simply a tenant of the property in suit" and that he could not be dispossessed by Murli Dhar unless and until the property in suit was allotted to Murli Dhar after partition. The learned Munsif, South Lucknow, held that the claim to eject the present appellant could not succeed in view of his dual position both as a co-sharer of the property in suit and as a permanent tenant thereof, and the Subordinate Judge at Lucknow upheld this decision, resting his judgment, however, solely on the ground, which he found sufficient, that the present appellant as a co-sharer in the property could not be ejected therefrom. In the present proceedings Murli Dhar sought to make out that the appellant by his allegations in the previous suit had

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in effect renounced his tenancy right and was now barred from asserting it. This plea was rejected both by the Second Munsif and by the Subordinate Judge and was disregarded in the judgment of the Chief Court of Oudh. Their Lordships are of opinion that there is no substance in the contention. A plea founded on the Limitation Act has also properly been repelled.

The result is that their Lordships will humbly advise His Majesty that the judgment of the Chief Court of Oudh be reversed and the judgment of the Second Munsif, Lucknow, as affirmed by the Subordinate Judge, Mohanlalganj, be restored. The appellant will have his costs here and below.

Solicitors for appellant :—*T. L. Wilson & Co.*

FULL BENCH.

Before Mr. Justice Wazir Hasan, Chief Judge, Mr. Justice Muhammed Raza and Mr. Justice Bisheshwar Nath Srivastava.

1930 *May*, 7.

SHYAM BEHARI (APPELLANT) *v.* MUSAMMAT MOHANDEI (RESPONDENT).*

Civil Procedure Code (Act V of 1908), order XXXIV, rule 6—Personal decree under order XXXIV, rule 6, when obtainable—Decree for sale on foot of mortgage—Property not sold under that decree under order XXXIV, rule 5—Application for personal decree under order XXXIV, rule 6 where no sale in pursuance of order XXXIV, rule 5, whether maintainable.

Held, that on an interpretation of order XXXIV, rule 6 of the Code of Civil Procedure, there can be no doubt that an application for a personal decree under that rule is not maintainable unless a sale in pursuance of order XXXIV, rule 5 of the Code of Civil Procedure has as a matter of fact taken place.

*Second Civil Appeal No. 348 of 1929, against the decree of I. M. Qidwai, District Judge of Gonda, dated the 7th of September, 1929, confirming the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 27th of April, 1929.