

privileges of occupancy tenants and it may be that one of these privileges is that he is not entitled to be ejected merely on notice under section 57 of the Orissa Tenancy Act. But no custom has been alleged in the written statement and none could have been investigated by the learned Judge in the court below. His view is that as they are recorded in the Record-of-Rights as occupancy tenants it must be held that they have acquired those rights by custom; but I hold that the defendants could not by custom acquire the status of occupancy tenants. That being so, if they did rely upon any custom as a bar to the plaintiffs' suit, it was for them to allege and prove that custom.

I must allow the appeal, set aside the judgment and decree of the court below and give the plaintiffs a decree for possession. The appellants are entitled to their costs of this appeal.

ADAMI, J.—I agree.

*Appeal allowed.*

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### APPELLATE CIVIL.

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*Before Jwala Prasad and Ross, JJ.*

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DHANUKDHARI SINGH

*v.*

RAMBIRICH SINGH\*

1921

December, 8.

*Hindu Law—Mitakshara, Chapter I, section 1, para 28—Joint family—karta in jail—junior members charged with criminal offence—bond executed to meet expenses of trial, whether binds family property.*

Where a joint Hindu family consisted of the karta and 15 other members, and 4 of the latter executed a bond charging the joint family property in order to raise money to meet the expenses of a criminal case which had been brought against them, the karta being in jail at the time, held, that the family property was bound by the charge.

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\*Appeal from Appellate Decree No. 881 of 1920 from a decision of B. Jatindra Nath Basu, Subordinate Judge of Gaya, dated the 26th, February, 1920, reversing a decision of M. M. Ibrahim, Munsif of Gaya dated the 10th, September, 1919.

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Any member of a joint family is entitled to deal with the family property and to incur debts binding on it provided the act is done in times of distress and for family necessity.  
[See *Inder Chand v. Bidyulhar Pandey* (1), Ed.]

The family property may be charged with a debt incurred for the purpose of defending members of the family in a criminal case.

*Hannamat Mahton v. Sonalkhari Singh* (2), and *Beni Ram v. Man Singh* (3), followed.

*Nathu Rai v. Dinduyal Rai* (4), not followed.

Among Hindus the defence of a member of a joint family is regarded as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one member.

The facts of the case material to this report were as, follows:—

A joint Hindu family consisted of 16 members of whom the defendant No. 1 was the *karta*. In 1906 defendants 2 to 5, who were junior members of the family, were charged with a criminal offence in respect to some of the joint family properties and, in order to meet the expenses of their defence, they executed a mortgage bond on the 5th July, 1906. At that time defendant No. 1 was in jail. The plaintiffs, who were assignees of the mortgage bond, instituted the present suit against the members of the joint family to enforce the bond. The trial court dismissed the suit and the plaintiffs appealed to the Subordinate Judge who decreed the suit.

The defendants appealed to the High Court.

*Lachmi Narayan Singh*, for the appellants.

*Kulwant Sahay* and *Sivanandan Roy*, for the respondents.

JWALA PRASAD, J.—The only point raised in this appeal is that the bond in suit was executed by the junior members of the family, defendants Nos. 2 to 5, and not by the *karta* of the family, defendant No. 1, and consequently it cannot have the effect of creating any charge upon the family property.

Mr. *Lachmi Naryan Singh* contends that the *karta* alone is entitled to charge the family property for a

(1) (1920) 5 Pat. L. J. 744.

(2) (1919) 4 Pat. L. J. 653.

(3) (1912) 1. L. R. 34 All. 4.

(4) (1917) 2 Pat. L. J. 106.

debt incurred by him although the other members do not join in the transaction ; they are deemed to have impliedly consented to it. He, however, concedes that in certain circumstances, such as when the *karta* of the family is abroad, the junior members of the family can incur a debt charging the family property which would be binding upon the other members of the family. In the present case the defendant No. 1 was in jail in connection with some other case and, therefore, the business of the family had necessarily to be conducted by the remaining members of the family. But the rule of Hindu law upon which the act of the *karta* and his dealing with the family property are binding upon the other members of the family does not restrict it to the *karta* alone. It is wide enough to authorize any member of the family to deal with the family property, such as to incur debts, provided the act is done in times of distress and for family necessity. The *Mitakshara* in Ch. I, Sec. 1 para 28 says:—

“ Even a single individual may conclude a donation, mortgage or sale of family immovable property during a season of distress for the sake of the family and especially for pious purposes.”

No doubt for convenience sake and generally the senior member of the family becomes the *karta* and in that position he deals with the family property. Instances, however, are not few in which the junior members deal with the family property during the lifetime of the *karta*. The managing member is one who manages the family business in a joint Hindu family and he has authority also to deal with the family property for the purpose of incurring debts for the family necessity. There is, therefore, no substance in the contention put forward by Mr. *Lachmi Narain Singh*. It has also been urged by him that the family property cannot be charged for the debt incurred in the present case which was for the purpose of defending defendants 2 to 5 in a criminal case. The Lower Court has held that the criminal offence charged against these defendants was in connection with some joint family property. If that is so the defence of the case was for the benefit of the entire family. On the other hand, there are also authorities to the effect that the defence

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of a member of a joint family is regarded among the Hindus as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one member. The solitary case [*Nathu Rai vs. Dindayal* (1)] which may at first sight give support to the contention of Mr. *Lachmi Narain Singh* has been dealt with in the case of *Hanumat Mahto vs. Sonadhari Singh* (2) which has reviewed all the authorities on the point. Apart from the authority of the Hindu Law, Sir Edward Chamier, in the case of *Beni Ram vs. Man Singh* (3), clearly showed that the defence of a criminal is not at all sinful "and according to our system of jurisprudence and practice a man is presumed to be innocent until his guilt is established". Therefore the question whether there existed legal necessity for raising the loan cannot be made to depend upon the result of the trial. This contention is also overruled.

It was faintly suggested as a last straw that the bond was not properly proved. The finding of the court below on this point is conclusive. The appeal is accordingly dismissed with costs.

DAS J.—I agree.

*Appeal dismissed.*

## LETTERS PATENT

*Before Dawson Miller, C. J., and Coultts, J.*

KALI DAYAL

v.

UMESH PRASAD.\*

*Code of Civil Procedure, 1908 (Act V of 1908), section 11*—"between parties under whom they claim"—*decision in suit between landlord and tenant as to area of holding*—*Subsequent suit between landlord and auction-purchaser of the holding*—*whether decision in first suit operates as res judicata*—*Estoppel.*

\* Letters Patent Appeal No. 104 of 1920.

(1) (1917) 2 Pat. L. J. 166.

(2) (1919) 4 Pat. L. J. 653.

(3) (1912) I. L. R. 34 A. J. 4.

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