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had no jurisdiction; the appeal lay to the High Court. The memorandum of appeal ought to have been returned to the appellant by the District Judge, and if he had done so, the appellant would have been able to file the appeal here on the same court-fee. In my opinion, therefore, no further court-fee should be required from the appellant.

ROSS, J.

The appellant is entitled to the costs of this hearing.

DAS, J.—I agree.

LETTERS PATENT.

Before Dawson Miller C. J. and Mullick, J.

SRI KANTA PRASAD

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v.

April, 9.

JAG SAH.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 60—*Equity of redemption, right of part owners of, to redeem* —*Redemption, parties to suit for—objection by defendant to joinder—estopped from subsequently pleading non-joinder* —*Escheat—brit tenure, whether can escheat—Practice.*— *Appeal—ground not taken in memorandum of appeal—notice of new ground given to respondent.*

Section 60 of the Transfer of Property Act, 1882, does not debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage.

Ahmad Ali Khan v. *Jawahir Singh*,(1), *Bhikaji* v. *Lakshman*(2), *and Yadali Beg* v. *Tukaram*(3), referred to.

Where, in a suit to redeem a mortgage instituted by some of the owners of the equity of redemption, the defendants oppose an application by the plaintiffs to add the other owners

* Letters Patent Appeal no. 59 of 1920.

(1) S. D. N. W. P. 425.

(2) (1891) I. L. R. 15 Bom. 27 (note).

(3) (1921) I. L. R. 48 Cal. 22; L. R. 47 I. A. 207.

of the equity of redemption, they cannot subsequently challenge the maintainability of the suit on the ground of non-joinder.

A *brit* tenure does not escheat to the Crown on the death of the holder without heirs unless it is shown to be a permanent tenure.

In an appeal in the High Court the appellant is not entitled, without the permission of the Court, to raise a point not taken in the Courts below nor in the memorandum of appeal, even though notice of the fresh point has been served on the respondent.

This appeal arose out of a suit for redemption in respect of a small parcel of land which was said to have been the occupancy holding of one Kunj Behari Das and to have been mortgaged by him in 1852 to the ancestor of the defendants. The estate in which the land fell had, by reason of successive partitions, been parcelled out into a number of other estates bearing different *tauzi* numbers, but the land in suit had remained joint and was the property of the proprietors of the various estates which had been carved out of the parent estate. The plaintiffs represented only some of those proprietors and one of the points raised in this appeal was that unless all the proprietors interested in the land were joined the suit for redemption could not proceed.

Kunj Behari having died without heirs the plaintiffs claimed that the occupancy holding had reverted to the proprietors and that they, as part owners of the equity of redemption, were entitled to redeem the property from the defendants

The Munsif who tried the suit found that the plaintiffs had not succeeded to the right, title and interest of Kunj Behari Das and that the land being not an occupancy holding but a *lakhiraj brit* tenure, the landlords had derived no interest upon the death of Kunj Behari. He held that there had been an escheat to the Crown

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The Subordinate Judge in appeal also came to the same conclusion.

There was then an appeal by the plaintiffs to the High Court and Ross, J., who heard the appeal found that the land was a tenure, but that the onus of proving an escheat being upon the plaintiffs, and there being no evidence of a permanent and absolute interest, the Crown could not claim the land by escheat, and that there had in the circumstances been a reversion to the landlords. He accordingly held that the plaintiffs as representatives of the mortgagors were entitled to redeem the whole property on payment of the sum of Rs. 78-14-0. Ross, J., also made a decree for the payment of mesne profits to the plaintiffs from the date of the institution of the suit, *i.e.*, from the 14th November, 1918.

Harnarain Prasad, for the appellants: The question is whether the plaintiffs have any title to redeem the mortgage. The mortgagor was a tenure-holder—a *brit brahmottardar*—under the plaintiffs and other cosharer landlords. He died leaving no heir. The plaintiffs' case is that the tenure has reverted to them and that they have consequently stepped into the shares of the mortgagor. I submit, on the authority of *Sonet Kooer* v. *Himmut Bahadur* (1), that the tenure escheats to the Crown and not to the landlord. The distinction which the learned Judge draws between the *mukarrari* tenure which was the subject-matter of dispute is *Sonet Kooer* v. *Himmut Bahadur* (1) and this tenure, is that the latter is not shown to be permanent. In the *Guide and Glossary to Survey and Settlement Operations*, *brit* land is described as a rent-free grant for religious service, and in the remark column it is shown to be invariably heritable. It is proved that in the record-of-rights the land is entered as *brit brahmottar*, and inasmuch as it is shown to be heritable and transferable it must be presumed to be permanent. A *brit brahmottar*, like a *mukarrari* tenure, is an absolute alienable interest in land. This

(1) (1876) I. L. R. 1 Cal. 391; L. R. 3 I. A. 92.

tenure moreover, has been handed down from generations from which fact its permanent character can be inferred. In section 26, Bengal Tenancy Act, there is a provision as regards occupancy-rights reverting to the landlord on failure of heirs, but the statute is silent with regard to a tenure.

(2) My next contention is, that the plaintiffs being admittedly cosharer landlords, they simply occupy the position of co-mortgagors. Unless and until, therefore, the other mortgagors are made parties to the suit for redemption, the plaintiffs obviously can have no title to redeem the mortgage although I objected to the plaintiffs' application for impleading them as parties because the application was put in several months after the suit was instituted.

(3) My third point is that the plaintiffs are not entitled to redeem the entire mortgage. The plaintiffs are entitled to redeem only their share as they cannot redeem the share of others against the wish of the mortgagee who has also acquired a share in the equity of redemption. I rely on *Munshi* v. *Daulat* (1).

(4) Lastly, the learned Judge has decreed the suit with mesne profits which he ought not to have done. The suit was for redemption and the mortgage money was never tendered. The question of mesne profits does not arise from the date of deposit of the mortgage money.

K. P. Jayaswal, for the respondents: The Allahabad view as expressed in *Munshi* v. *Daulat* (1) is based on cases which the Calcutta High Court has read differently in *Protap Chandra Dhar* v. *Peary Mohan Dhar* (2) and *Baikantha Nath Dey* v. *Mahesh Chandra Dey* (3). *See also Ghose, Vol. I, pages 247-249.* In the Courts below the defendants took the position of mortgagees only. They never claimed as mortgagors to redeem the mortgage. If they are held

(1) (1907) I. L. R. 29 All. 262. (2) (1917-18) 22 Cal. W. N. 806.
(3) (1917-18) 22 Cal. W. N. 128.

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entitled to redeem the property, the equities will be adjudicated in a contribution case between us. As they did not put this point in issue, the Courts below could not decide it. They have not even taken up this point in the grounds of appeal to this Court.

On the question of escheat, it is enough to point out that the *Survey Glossary* itself states that a *brit* tenure cannot be permanent or "absolute" as the Privy Council described the land in *Sonet Kooer* v. *Himmut Bahadur* (1), inasmuch as the tenure is conditioned and limited by service.

On the question of mesne profits, in the plaint it was alleged that redemption was demanded by the plaintiffs and refused by the defendants. This allegation was not denied in the written statement; hence the decree for mesne profits was correct.

S. A. K.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

In appeal before us three points have been taken. The first point is that the proprietors of all the estates who own a proprietary interest in the land in suit should have been joined and that the suit cannot proceed in their absence. It appears however that on the 23rd August, 1919, an application was made by the plaintiffs to implead the absent proprietors. The defendants opposed that application and on the 8th September, 1919, the Munsif declined to grant the prayer. In these circumstances it does not appear to me reasonable that the defendants should be allowed to urge the ground of non-joinder. Seeing that this was a suit for redemption the Court would certainly have added the absent proprietors but for the opposition offered by the defendants. They cannot now be allowed to attack the Court for doing the very thing which they wanted it to do.

(1) (1872) I. L. R. 1 Cal. 301 : L. R. 3 I. A. 207.

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The next point is whether the plaintiffs are entitled to redeem the whole mortgage. It is said that the defendants are the cosharers of the plaintiffs in the land in suit and that if the plaintiffs have succeeded to the mortgagor's interest, the defendants too have succeeded to that interest jointly with them to the extent of their share. It is, therefore, contended that the mortgage has been extinguished to the extent of the proprietary interest of the defendants and that the plaintiffs cannot be allowed to redeem the whole mortgage. Now the law on this point is contained in section 60 of the Transfer of Property Act, and it has been recently explained by the Privy Council in *Mirza Yad Ali Beg* v. *Tuka Ram* (1). There is nothing in section 60 to debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage. Indeed some earlier cases, following *Ahmad Ali Khan* v. *Jawahir Singh* (2) have laid down that the mortgagor is bound to offer to redeem the whole. The matter is further complicated in cases where the property is joint and indivisible and the transferee of a portion of the equity of redemption cannot point to any defined share as his. The Bombay High Court have held that one of several coparceners may redeem the whole property leaving it to the mortgagee who has purchased a portion of the equity of redemption to have his rights ascertained and defined in a suit for partition [*Bhikaji* v. *Lakshman* (3)]. I think, therefore, there can at least be no objection to a suit by a part owner of the equity of redemption for the redemption of the whole mortgage, and it is for the mortgagee to object to such redemption so that the equities might be investigated. No objection was however made by the defendants at any stage of the present case in the Courts below; nor was the objection taken in the memorandum of appeal before Ross, J., or in the memorandum of appeal before us. The ground is now taken for the first time by

(1) (1921) I. L. R. 48 Cal. 22; L. R. 47 I. A. 207.
(2) S. D. N. W. P. 425.
(3) (1891) I. L. R. 15 Bom. 27 (note).

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notice served upon the respondents to-day, notwithstanding the rule of this Court which prescribes that additional grounds to a memorandum of appeal can only be taken with the permission of the Court. The ground involves a mixed question of fact and law, and, in my opinion, it is impossible to investigate it at this late stage. The defendants therefore cannot be allowed to urge that a part of the mortgage security has been extinguished and that the decree for the redemption of the whole is wrong.

The third point is the substantial point which was argued before Ross, J. It was urged before him that the Crown got no title to the property by escheat. Ross, J., found that the property was the *brit* tenure of Kunj Behari. The Subordinate Judge in the Court of first appeal had found that the property was the rent-free tenure of Kunj Behari Das under the *maliks* of the village and he apparently considered that such a finding was sufficient to justify an escheat. Ross, J., however, correctly points out that there could be an escheat only of an absolute hereditary *mukarrari* tenure and that although the tenure here might be hereditary and rent-free there was no evidence that it was permanent. Our attention has been drawn to the glossary of terms used in the Survey and Settlement proceedings in Bihar and Orissa which shows that a *brit* tenure is a service-tenure and it is urged that this definition is sufficient to allow an inference of permanency to be raised. In my opinion the inference if any is exactly the other way. A service-tenure is not necessarily permanent and until the plaintiffs can show that Kunj Behari held the land in perpetuity they cannot succeed. In our opinion the judgment of Ross, J., on this point was right and the landlords were entitled to the reversion of the land upon the death of Kunj Behari Das. The decree therefore for redemption should, in my opinion, be maintained.

A point was taken as to that part of the decree which directed the assessment of mesne profits. It was contended that the plaintiffs were not entitled to

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mesne profits from the date of the suit. The plaint, however, contains an allegation that before the suit the plaintiffs had tendered the redemption money several times to the defendants. That allegation is not denied in the written statements and in the circumstances the plaintiffs are entitled to mesne profits which they assess at Rs. 10 from the date of the suit. The result, therefore, is that the appeal is dismissed with costs.

DAWSON MILLER, C.J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller C. J. and Mullick, J.

W. H. MEYRICK

v.

DIPA PANDEY.*

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Bengal Tenancy Act, 1885 (Act VIII of 1885), section 29—consolidation of holdings—enhancement of rent, limits of—payment of illegal enhancement for several years, whether operates to estop tenant from subsequently objecting.

Where two separate holdings at specific and definite rentals are consolidated into one holding the rent of the consolidated holding cannot be enhanced beyond what is permitted by section 29 of the Bengal Tenancy Act, 1885.

Raj Kumar Sarkar v. *Faizuddi Tarafdar*(1), distinguished.

A claim for rent being a recurring claim it is open to the tenant at any time to take objection on the gound that the claim contravenes the provisions of the law.

Appeal by the plaintiffs.

This appeal arose out of a suit for rent from the year 1324 to the 10-annas *kist* of 1327, *F.S.*, in respect

* Letters Patent Appeal no. 90 of 1923.

(1) (1915) 22 Cal. L. J. 81.