APPELLATE CIVIL.

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

A. W. INGLIS

v.

SARJU PRASAD MISSER.*

1923.

December 21.

Co-ownership—profits appropriated by one co-owner—liability of latter for interest—Interest Act, 1839 (Act XXXII of 1839).

Where a co-owner has appropriated the profits of the joint property for a number of years the court is entitled on equitable grounds to award interest against him.

Watson and Company v. *Ramchund Dutt*(1), *Watson and Company* v. *Ramchund Dutt*(2), *Haro Prasad Roy* v. *Shama Prasad Roy*(3), *Alagappa Chettiar* v. *Muthukumara Chettiar*(4), *Collector of Ahmadabad* v. *Lavji Mulji*(5), *Hamira Bibi* v. *Zubaida Bibi*(6), *Myhammaden Abdul Saffur Rowther* v. *Hamida Bivi Ammal*(7), *Miller* v. *Barlow*(8), *London Chatam and Dover Railway Company* v. *South Eastern Railway Company*(9) and *Khetra Mohan Poddar* v. *Nishi Kumar Saha*(10), referred to.

Appeal by the defendant.

This appeal arose out of a suit for partition of *mauza* Anar which was instituted before the Subordinate Judge of Darbhanga on the 6th July, 1910 (which corresponds to 1317, *Fasli*), and finally decreed on the 22nd September, 1916, by a order entitling the plaintiffs to recover possession of the lands allotted to their share. The 1st party defendant, Mr. A. W. Inglis, who held an one-anna proprietary

*First Appeal No. 15 of 1921, from a decree of Babu Akhouri Nityanand Singh, Subordinate Judge of Darbhanga, dated the 4th October, 1923.

(1) (1891) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110.
(2) (1896) I. L. R. 23 Cal. 799.
(3) (1878) I. L. R. 3 Cal. 654, P.C.
(4) (1918) I. L. R. 41 Mad. 316.
(5) (1911) I. L. R. 35 Bom. 255.
(6) (1916) I. L. R. 38 All. 581.
(7) (1919) I. L. R. 42 Mad. 661.
(8) (1871) 3 P. C. C. 733.
(9) (1893) A. C. 429.
(10) (1917-18) 22 Cal. W. N. 488.

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share in the *mauza* was for a time in sole possession of the whole of it by virtue of leases taken from time to time from his remaining co-sharers. Between the years 1308 and 1314, *F.S.*, the plaintiffs acquired various shares in the *mauza* totalling 5-annas, 18-*gandas*, 1-*kauri*, 2-*krants* and 15-*reyns* and the leases in respect thereof, granted by the plaintiffs' predecessors, expired on various dates between 1309 and 1314. The plaintiffs also purchased from two proprietors named Pitambar Lal Kanth and Bodh Krishna Kanth an 1-anna, 10-*gandas* share on the 6th of *Assin*, 1314. The lease of that share in favour of the defendant 1st party expired in the year 1321 and the plaintiffs, therefore, did not become entitled to *khas* possession of it till 1322. The preliminary decree in the partition suit, which was passed on the 21st September, 1911, contained the following direction :

> " Plaintiff's right to the extent of 7-annas 1-*ganda* 1-*kauri* 2-*krants* 15-*reyns* share in the village Pygambarpur is hereby declared; and it is ordered that two *pattis* be formed in respect of the plaintiff's share, one of 5-*annas* 12-*gandas* 1-*kauri* 2-*krants* 15-*reyns* and another of 1-*anna* 10-*gandas*."

Pygambarpur was another name for 'Anar. It was also declared that the plaintiffs were entitled to mesne profits.

On an appeal being preferred by the defendant to the High Court at Calcutta, it was held that the plaintiffs were entitled not to mesne profits but to an ordinary account as between co-owners in a partition suit. Another point decided by the High Court was that in respect of a block comprised in *Schedule C* of the plaint measuring 147 *bighas* 10 *kathas* 11 *dhurs* the defendant was entitled to a right of occupancy to the extent of 10-*annas* 1-*ganda* 2-*kauries* and 5-*reyns*. The High Court directed that this block should be divided into two sub-blocks, one representing the portion in which the defendant had a right of occupancy, and the other representing an interest of 5-*annas* 18-*gandas* 1-*kauri* 2-*krants* and 15-*reyns*, in which the defendant had no right of occupancy, and they directed

that the sub-blocks, instead of being partitioned among the various co-sharers, should be sold by auction and the sale proceeds rateably divided. That sale took place on the 15th July, 1916, and both sub-blocks were purchased by the plaintiff.

The plaintiff thereafter made an application for the assessment of the compensation to which he had been held entitled. A commissioner was appointed and he found that the total area appertaining to the share of the plaintiffs, of which the defendant was in possession, amounted to 220 *bighas* 5 *kathas* and 17 *dhurs*. Out of this area 6 *bighas* 9 *kathas* and 13 *dhurs* were found to be non-assessable; 9 *bighas* 19 *kathas* 10 *dhurs* were found to be *parti* or waste; 6 *bighas* 11 *kathas* and 1 *dhur* were occupied by a tank; 197 *bighas* 5 *kathas* and 11 *dhurs* were ordinary culturable lands; and 3 *bighas* 18 *kathas* and 3 *dhurs* were lands in possession of occupancy-*raiyats*. The commissioner assessed the 197 *bighas* 5 *kathas* 11 *dhurs* at Rs. 12 *per bigha*; he assessed the tank at Rs. 75 *per annum*; and the *parti* or waste lands he assessed at Rs. 2-8-0 *per bigha*; for the 3 *bighas* 8 *kathas* 5 *dhurs* in the possession of the *raiyats*, he allowed the *khatian* rent. In the result he allowed a total sum of Rs. 12,951-3-3, inclusive of interest, as compensation due to the plaintiffs from the year 1311 to 1323. In the earlier proceedings a question arose as to whether compensation was claimable in respect of any period previous to the suit and it was decided that the claim was good for a period of six years. A question also arose with regard to the 1-*anna* 10-*gandas* share which the plaintiffs had purchased from the Kanths and the lease in respect of which expired in 1321. The defendant was in possession of this share in 1322 and 1323 and the plaintiffs claimed compensation for those years. The defendant objected that an award as to this share could not be made in the suit as in 1317, when the suit was instituted, the defendant was in possession of this share as lessee and the plaintiff was not entitled to *khas* possession. The Subordinate

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Judge disallowed the objection and accepted the commissioner's assessment of Rs. 190-11-0 in respect of it.

In regard to the assessment of the plaintiffs' remaining interest of 5-*annas* 18-*gandas* 1-*kauri* 2-*krants* 15-*reys*, the Subordinate Judge modified the commissioner's assessment by disallowing the sum of Rs. 22-8-0 *per annum* which the commissioner allowed for the *parti* lands.

The defendant appealed and objected to the Subordinate Judge's decree. The plaintiffs filed a cross-objection taking exception to the low assessment of the tank and the exemption of the *parti* lands.

Sultan Ahmed (with him *P. C. Mitter*), for the appellant.

Susil Madhab Mullick and *H. Prasad*, for the respondent.

DAWSON MILLER, C. J.—In this case I had prepared a judgment dealing with the questions in dispute in the appeal and had arrived at the same conclusion as my learned brother Mullick, J. Since then I have had an opportunity of perusing the judgment prepared by him. I agree with him in the conclusions he has arrived at, but as he has dealt with some of the points, more especially the question of interest, more fully than I have thought fit to do I need only say I concur in the judgment about to be delivered.

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

Taking the appeal of the defendant first, it is clear that no objection can be taken to the commissioner's assessment of the 197 *bighas* 5 *kathas* 11 *dhurs* of culturable land. The plaintiffs adduced evidence showing that lands of similar quality were let out to tenants at Rs. 20 *per bigha*. The defendant declined to produce any of his account books and contented himself by giving evidence that the land was liable to annual flood and that it should be assessed at the

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ordinary rate paid by occupancy-*raiyats*, which was about Rs. 3 *per bigha*. The Subordinate Judge has declined to accept the figure given by the plaintiffs on the ground that the lands are of varying quality, and he agrees that allowance should be made for bad years and that the commissioner's estimate of Rs. 12 *per bigha* is fair and equitable. We have heard nothing from the learned Counsel, appearing for the appellant, to lead us to hold that the learned Subordinate Judge's finding is wrong.

The only other objection taken by the appellant against the decree is as regards interest. The Subordinate Judge has awarded interest at 6 *per cent.* as part of the compensation due to the plaintiffs. It is argued that as the plaintiffs are not entitled to mesne profits and as there was no demand by the plaintiffs for delivery of possession, interest cannot be allowed. An attempt was made by the respondents to show that a demand was in fact made, but there is no reliable evidence of this; and the question is one of law, namely, whether a co-owner who has appropriated the profits of the joint property for a number of years, is liable to refund anything more than the actual amount of such profits. A co-sharer's liability to pay compensation was decided by their Lordships of the Privy Council in *Watson and Company* v. *Ramchund Dutt* (1) and in a subsequent suit for compensation, interest was awarded for a period anterior to that suit but subsequent to the former suit [*Watson and Company* v. *Ramchund Dutt* (2)]. The question, however, is whether interest is allowable here for the period anterior to the suit. The relevant portion of Act XXXII of 1839 runs as follows:

"It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable by virtue of some written instrument at a certain time, or if payable

(1) (1891) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110.
(2) (1896) I. L. R. 23 Cal. 799.

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otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. Provided that interest shall be payable in all cases in which it is now payable by law."

In *Haro Persad Roy* v. *Shama Persad Roy* (1) their Lordships of the Privy Council considered the question whether these words did not debar the Court from giving interest on mesne profits. The suit was for recovery of possession and mesne profits by a younger brother against his elder brother in respect of his share of the family property which had been previously separated by private partition. Their Lordships pointed out that the proviso in the Interest Act referred to the state of the law and practice in India independently of the Statute and in regard to earlier cases cited before them in which interest on mesne profits had been allowed for a period anterior to the suit, they observed that they were far from saying that these cases had been wrongly decided. It was clear that in their Lordships' opinion interest could be granted on equitable grounds though in the circumstances of the case before them they gave interest only from the date of the institution of the suit.

Next we find that while in cases of restriction section 144 of the present Civil Procedure Code makes provision only for proper orders as regards payment of interest or damages, the principle has been applied to cases where money deposited in Court has been withdrawn by one party on an undertaking to repay the amount but without any undertaking to pay interest [*Alagappa Chettiar* v. *Muthukumara Chettiar* (2)].

In a land acquisition case where one party had withdrawn the amount allowed as compensation by the Land Acquisition Court and the amount was afterwards reduced on appeal, the Court in exercise of its inherent powers directed the payment of interest over the excess [*Collector of Ahmadabad* v. *Lavji Mulji* (3)].

(1) (1878) I. L. R. 3 Cal. 654, P.C.
(2) (1918) I. L. R. 41 Mad. 316.
(3) (1911) I. L. R. 35 Bom. 255.

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In *Hamira Bibi* v. *Zubaida Bibi* (1) a Muhammadan widow was allowed to take possession of her husband's estate in order to satisfy her dower debt with the income of it, and there was no agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower. It was held by their Lordships of the Privy Council that on equitable considerations she was entitled to some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal rights to exact payment of her dower on the death of her husband; and such compensation for forbearance to enforce a money payment was best calculated on the basis of an equitable rate of interest.

In *Muhammaden Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2) the plaintiff, a Muhammadan lady, sued for her share on taking accounts of the business which was carried on by her father while he was alive and which was continued by her brothers, the defendants, after his death, the amount due to the plaintiff being utilized by her brothers. It was contended that there was no established practice as to interest being payable to a Muhammadan lady claiming interest on an unascertained sum of money due to her as her family business. It was held following the decision of their Lordships of the Privy Council in *Miller* v. *Barlow* (3) to the effect that Indian Courts are Courts both of law and of equity that the Court was competent to award as damages interest not covered by the Act. The learned Judges also drew attention to the observation of Lord Herschell in *London Chatham and Dover Railway Company* v. *South Eastern Railway Company* (4) to the effect that the hands of the Courts in England were tied as to awarding interest on equitable grounds by previous

(1) (1916) I. L. R. 38 All. 581.
(2) (1919) I. L. R. 42 Mad. 691.
(3) (1871) 3 P. C. C. 733.
(4) (1893) A. C. 429.

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decisions; and they decreed interest in the suit before them on the ground that there was no such course of decisions in this country.

In *Khetra Mohan Poddar* v. *Nishi Kumar Saha* (1) the plaintiff had supplied cloth to the minor defendant's father and sued for the recovery of the value of the cloth on adjustment of accounts and for interest on the said sum. One of the questions raised was whether the minor was liable for interest. The Court, having regard to the long time during which the plaintiff had been kept out of the money, awarded interest at 6 *per cent* as damages. They were of opinion that interest could be given in cases where it was not recoverable either under contract or the provisions of the Indian Interest Act.

In my opinion interest should be given in this case on equitable grounds. The defendant has had the use of the rents and profits in respect of the share of the plaintiffs for many years and it is obvious from the course which this litigation has taken that he has left no stone unturned to prevent the plaintiffs from taking possession. As he is the owner of an indigo factory it is presumed that he is a man of ordinary business habits and that he invested the money for his own benefit.

In these circumstances, I think the order granting interest as damages must be affirmed. The rate being only 6 *per cent.* is certainly fair.

This disposes of the appellant's contentions and there remains for consideration only the cross-objection referred by the plaintiffs.

The first point is as regards the assessment of the tank, for which the plaintiffs claim Rs. 300 *per annum*. The defendant called witness Mitan Momin to prove that the tank was never settled with any fisherman. For the plaintiffs a witness named Ramkissun Misser deposes that he happened to be present at the

(1) (1917-18) 22 Cal. W. N. 486.

defendant's factory when the settlement of the tank was made in 1322, *F.S.*, and that the rent agreed was Rs. 300. A witness named Jokhan Mallah, for the plaintiffs, also deposes that in 1318 he and his co-sharers paid Rs. 300, in 1320 Rs. 400, in 1321 Rs. 400, in 1322 Rs. 300 and in 1323 Rs. 400 for a lease of the tank. The commissioner saw the tank and assessed Rs. 75 *per annum* as the value of the fish taken from it. The learned Subordinate Judge has accepted this finding and declined to rely upon the evidence of Ramkissun Misser and of Jokhan Mallah. Jokhan Mallah states that he received a *patta* each year, but no *pattas* are produced and his explanation, that he gave them back to the defendant, cannot be accepted. There is also no reliable evidence that this tank has been let every year or produced fish worth Rs. 300 every year and that the commissioner was wrong in taking Rs. 75 as a fair average price for good and bad years. It is true that the defendant has not produced his account books to show what was the profit, if any, but the Subordinate Judge has evidently considered it prudent to reject the testimony of Ramkissun Misser, who appears to be a chance witness, and of Jokhan Mallah who does not appear to be very convincing, and to accept the commissioner's estimate which was formed after local investigation. In these circumstances, I do not think it would be proper to disturb the Subordinate Judge's finding on this point.

Then, as regards the *parti* or waste lands, the Subordinate Judge has disallowed the commissioner's estimate of Rs. 2-8-0 *per bigha*. The land only measures 9 *bighas* and odd and the amount is trifling. The commissioner found some of the lands under cultivation at the time of his visit to the locality and he appears to have been considerably influenced by the reasonable attitude of the plaintiffs with regard to this part of the case. The plaintiffs claim that in any case these lands could always have been used for pasture, but there is no evidence of this; nor is there any evidence that the lands have been regularly

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cultivated since 1911. The commissioner found crops on plots 570 and 571, but that was in 1917; and there is nothing to show that the lands were cultivated or capable of producing any profit before that date. I think, in the circumstances, sufficient reason has not been shown for setting aside the learned Subordinate Judge's finding that the plaintiffs are not entitled to any compensation for this small area.

The result, therefore, is that the appeal and the cross-objection are both dismissed with costs.

Appeal and Cross-objection dismissed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

1924.

January 4.

KUMAR KAMAKSHYA NARAYAN SINGH

v.

SURAJNATH MISRA.*

Chota Nagpur Tenancy Act, 1908 (*Ben. Act VI of* 1908), *section* 14—"*successor*" *and* "*resumption*", *meaning of*—*limitation.*

The word "successor" in section 14 of the Chota Nagpur Tenancy Act, 1908, includes not only a successor *de jure* but also a successor *de facto*.

The word "resumption" in the same section means nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter. The institution of a suit for resumption amounts to such a demand.

The happening of an event which entitles the landlord to resume a tenure does not render it necessary for the tenure to be resumed by the landlord in order to prevent limitation running against him.

Appeal by the plaintiff.

This litigation was concerned with 7·68 acres and 8·57 acres of lands lying in *mauza* Chepa Kalan which

*Appeal from Appellate Decree No. 1469 of 1921, from a decision of H. Foster, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 6th May, 1921, confirming a decision of Maulavi Ali Karim, Munsif of Hazaribagh, dated the 25rd February, 1920.