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crop reaped is in issue between the parties, little evidence may be required to shift the onus on to the defendant, since he knows what he reaped and the plaintiff-landlord does not. But even in such a case there must be some evidence before the burden is shifted; and that evidence must be *prima facie* true. In a suit for arrears of produce rent, as in any other rent suit, the plaintiff's case must be proved or admitted before he can obtain a decree; and the obiter dictum in *Hafiz Zeyauddin v. Jagdeo Singh*<sup>(1)</sup> is far too sweeping. Indeed, it was never meant to imply that in a contested suit for arrears of produce rent the plaintiff might ask for a decree for the full amount of his claim without adducing truthful evidence in support of it, although on the face of it the obiter dictum does bear that construction. The view of the learned Munsif that the onus lay on the plaintiff to prove the rate of outturn is correct. I make these remarks because I was myself a party to the decision cited; but this application has to be allowed on other grounds; and it will be for the learned District Judge to determine whether the finding of fact of the learned Munsif is to be affirmed or not. The appeal is remanded to the District Judge of Saran for disposal according to law. I make no order for costs.

*Rule made absolute.*

## APPELLATE CIVIL.

*Before Jwala Prasad and Rowland, JJ.*

BEPAT SINGH

v.

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June, 7.

*Contract Act, 1872 (Act IX of 1872), sections 69 and 70—  
contribution; suit for—decree for rent passed against two*

\* Appeal from Appellate Decree no. 1080 of 1927, from a decision of Babu Kamala Prasad, Subordinate Judge of Patna, dated the 25th April, 1927, reversing a decision of Maulavi Abdul Aziz, Munsif of Patna, dated the 26th May, 1926.

(1) (1928) I. L. R. 8 Pat. 418.

*lessees—decree satisfied by one in charge of leasehold property—other lessee, whether liable to contribute—onus.*

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A decree for rent in respect of certain thicca property was obtained by the landlord against his lessees, *D* and *J*, and in execution of that decree the property of the lessees was put up for sale. The heirs of *D* (who had since died) deposited the whole amount and got the property released. Thereafter a suit for contribution was brought by the heirs of *D* against *S* for the proportionate amount of the decree payable by the latter.

The defence was, inter alia, that the defendant had no concern with the thicca property and he was, therefore, not liable to contribute. The trial court decreed the plaintiffs' suit modifiedly but on appeal the Subordinate Judge dismissed the whole suit on a finding that the collection was ijmal, and *D* alone was in charge of it and that the plaintiffs' ancestor being in possession of the thicca property and having realised the usufruct thereof, the plaintiffs could not claim anything on account of the amount paid in execution case unless they showed that in so doing they had to pay the amount out of their own pocket which was not covered by the income of the thicca property.

*Held*, (i) that once a decree for rent had been passed against both the lessees it was capable of execution against each or either of them and that *S* was benefited by the payment made by the heirs of *D*;

(ii) that, therefore, the plaintiffs were entitled to a decree under sections 69 and 70 of the Contract Act, 1872, unless it could be shewn affirmatively by the defendants that there was money in the hands of *D* or his heirs on account of the thicca property sufficient to satisfy the decree.

*Ajodhya Singh v. Jamru Lal*(1), *Prosunno Kumar Bose v. Jamaluddin Mahomed*(2) and *Serafat Ali v. Issan Ali*(3), followed.

*Swarnamoyee Debi v. Hari Das Roy*(4), distinguished.

(1) (1910) 14 Cal. W. N. 699.

(2) (1912) 18 Cal. W. N. 327.

(3) (1917) I. L. R. 45 Cal. 691.

(4) (1902) 6 Cal. W. N. 903.

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Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Jwala Prasad and Rowland, JJ.

*S. N. Ray*, for the appellants.

*Atul Krishna Roy* and *Sashi Sekhar Prasad Singh*, for the respondents.

JWALA PRASAD AND ROWLAND, JJ.—This is an appeal by the plaintiffs in a suit for contribution, the plaintiffs having been compelled by execution against their property to satisfy wholly a decree in favour of Saiyid Hasan and others, landlords, in respect of the rent accruing on a temporary tenure granted to Dipan Singh and Shamlal Sahu on the 1st February, 1913. The thica was for 11 years, 1321 to 1331, at a rent of Rs. 375 of which Rs. 40 annually was set off against the initial deposit of Rs. 360 which was made by the lessees and the balance Rs. 335 a year was payable in cash. The landlord's suit was instituted in 1919, claiming rent for four years, 1323 to 1326, and he got a joint decree against Dipan Singh and Shamlal Sahu, and in execution thereof advertised for sale the properties belonging to the heirs of Dipan Singh, who had died in the meantime, and defendant no. 1. In the suit Shamlal had pleaded that he had no concern with the thica but this defence did not avail him. The present contribution suit was brought to recover from Shamlal Sahu and his relatives who are joint with him one half of Rs. 1,737-9-6 paid on the 28th March, 1925, by the heirs of Dipan Singh in satisfaction of the decree towards which Shamlal and his relatives had paid nothing.

The defendants contended that though Shamlal's name appeared in the lease he had nothing to do with the thica property. It was further contended that part of the decretal amount included costs of the appeal incurred by Dipan Singh only and for this the

defendants cannot be liable, that the defendants other than Shamlal Sahu are not liable because they were not lessees or parties to the suit for rent, and that the rate of interest was excessive.

The learned Munsif disallowed certain items, thereby reducing the claim to Rs. 830-14-13½ dams; in other respects he allowed the claim of the plaintiffs.

The lower appellate Court has dismissed the whole suit with costs on a finding that the collection was ijmal and Dipan Singh alone was in charge of it. The lower Court observes that the plaintiffs' ancestor being in possession of the thica property and having realised the usufruct of that property, they cannot claim anything on account of the amount paid in execution case unless they show that in so doing they had to pay the amount out of their own pocket which was not covered by the income of the thica property. The fact that there is a joint decree would not preclude the defendants from setting up the plea of non-liability.

In second appeal it is argued that the finding of fact arrived at by the Subordinate Judge does not support his decision; that when a rent decree had been passed jointly against Dipan and Shamlal, it was not open to Shamlal to plead that he was not liable to contribute. It seems incontestable that once a rent decree had been passed against both the lessees it was capable of execution against each or either of them and that the property of Shamlal could have been taken in execution and Shamlal benefited in being relieved of that liability when the decree was satisfied by Dipan's heirs.

The authorities cited by the Subordinate Judge are not exactly in point and mostly date from before the passing of the Contract Act. The principles applicable to the case which is at present before us

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were laid down in *Ajodhya Singh v. Jamru Lal*(1), *Prosunno Kumar Bose v. Jamaluddin Mahomed*(2) and *Serafat Ali v. Issan Ali*(3). The decision in *Swarnamoyee Debi v. Hari Das Roy*(4) relied upon by the learned Advocate on behalf of the respondents does not apply, inasmuch as that was a case where the defendant was kept out of possession of the property wrongfully by the plaintiff co-sharer, whereas in the present case according to the finding of the Court below Dipan Singh, the plaintiffs' ancestor, was in charge of the property under an arrangement between him and Shamlal and the collection was ijmal. The plaintiffs have a right to contribution in respect of the amount payable by the defendants under the landlord's decree both under section 69 as well as section 70 of the Contract Act.

In our opinion the defence cannot defeat the plaintiffs' claim unless it is shewn affirmatively that there was money in the hand of Dipan or his heirs, the plaintiffs, on account of the thica property sufficient to satisfy the decree. The Subordinate Judge is wrong in laying it on Dipan's heirs to prove that they had to pay out of their own pocket the amount which was not covered by the income of the thica property in their hands. The remedy of Shamlal and his family was in a suit for accounts against Dipan.

In the result the decision of the Subordinate Judge must be set aside and that of the Munsif restored so far as it refers to issue no. 1 of the original suit.

On the second issue as to the amount of interest the Munsif held that 24 per cent. claimed by the plaintiffs was not excessive. The Subordinate Judge held that if he had decreed the suit he would have

(1) (1910) 14 Cal. W. N. 699.

(2) (1912) 18 Cal. W. N. 327.

(3) (1917) I. L. R. 45 Cal. 691.

(4) (1902) 6 Cal. W. N. 903.

allowed interest at not more than 12 per cent. as being the commercial rate of interest. No argument has been addressed to us against this finding of the Subordinate Judge.

The third issue was whether the minor defendants are liable and on this issue the Subordinate Judge held that defendants 3 to 5 were liable along with defendant no. 1 but only to the extent of their share in the joint family property and that defendant no. 2 Rangi Sahu was not liable. This finding has not been attacked in second appeal and is, therefore, affirmed.

The result is that the appeal is allowed in part, the decision of the lower appellate Court reversed, and the suit decreed modifiedly in accordance with the findings. The interest will be at 12 per cent. per annum up to the date of the suit and thereafter at 6 per cent. per annum up to the date of realization.

The plaintiffs will get their costs proportionate to the amount of the claim decreed.

*Appeal allowed in part.*

## APPELLATE CIVIL.

*Before Ross and Rowland, JJ.*

GANGA BISHUN MARWARI

v.

LALA RAGHUNATH PRASAD.\*

*Execution—agreement to pay decretal amount by instalments—decree-holder, whether entitled to proceed on terms of agreement—limitation—terminus a quo—agreement acted upon—judgment-debtor, whether estopped from saying that original decree should be executed—agreement that in default*

\* Appeal from Appellate Order no. 121 of 1930, from a decision of H. R. Meredith, Esq., i.c.s., District Judge of Manbhurn, dated the 21st of March, 1930, modifying an order of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 6th of April, 1929.

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