

It is common ground that the word "childless" means "sonless," and the appellants maintain that on the death of Ram Kishore, who was sonless, his estate devolved, in terms of the above provision, on Ram Narain and his brother Kunj Bihari, both of whom had sons then living.

In their Lordships' opinion, however, it is clear that the benefit of the devolution under that provision is confined to "us three men," that is, to the three parties to the agreement, who were Shankar, Lal Narain and Lachmann. It is a condition that the party taking the benefit of the provision should have a living heir, but no right to take is conferred on such heir. In that view Ram Narain could claim no right under the agreement, and the appellants' alternative claim also fails.

Their Lordships will accordingly humbly advise His Majesty that the appeals should be dismissed with costs and that the decrees of the High Court of the 30th January, 1929, should be affirmed.

Solicitors for appellant's representatives: *W. W. Box & Co.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

## APPELLATE CIVIL.

*Before Courtney Terrell C.J. and Luby, J.*

MUSAMMAT LAL/TAPATI KUER

v.

NARAIN MAHTON.\*

*Joint debtors—appeal by some—liability reduced by agreement between creditor and appealing debtors—benefit*

\* Appeal from Original Order no. 282 of 1933, from an order of Babu Brajendra Prasad, Subordinate Judge of Patna, dated the 15th July, 1933.

1934.

RAM  
NARAIN  
CHAUDHURY  
v.  
PAN  
KUER.

LOLD  
THANKER-  
TON.

1934.

August, 30,  
September,  
8, 6.

1934.

MUSAMMAT  
LALTADEVI  
KUER

v.

NARAIN  
MAHTON.

*whether accrues pro tanto to all—Code of Civil Procedure, 1908 (Act V of 1908), Order XLI, rule 4.*

Where a number of judgment-debtors are under a joint liability to pay a definite sum of money and a new contract is entered into between the creditor and some of the judgment-debtors, liable under the original decree, whereby the liability is reduced to a lesser amount or where the original decree is modified by the Court on appeal by some of the judgment-debtors, by virtue of the provision of Order XLI, rule 4, Code of Civil Procedure, 1908, the reduction or modification enures pro tanto for the benefit of all the judgment-debtors.

*Bhawani Koer v. Darsan Singh*(1), followed.

Appeal by the decree-holder.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

*B. P. Sinha*, for the appellant.

*Sarju Prasad*, for the respondents.

COURTNEY TERRELL, C.J.—This is an appeal from a decision of the Subordinate Judge of Patna allowing an objection to an execution proceeding.

The suit out of which the execution proceedings arise was brought by the plaintiff against 12 defendants for possession of certain property and for mesne profits. An appearance was entered by defendants 2 and 5 and by the minor defendants under a guardian ad litem. A decree was granted by the Subordinate Judge for a sum of between six and seven thousand rupees. A certain controversy has taken place before us as to the construction of this decree. We are satisfied that it is a joint and several decree against all of the defendants notwithstanding that the substantial defence was offered by defendants 2 and 5. It may be that the decree was wrongly passed against those defendants other than defendants 2 and 5. As to that I desire to express no opinion. The fact

(1) (1911) 14 Cal. L. J. 354.

remains that the defendants other than defendants 2 and 5 neither contested the suit nor did they appeal from the decision nor did they ask for any modification of the form of the decree so as to exempt them from liability. But defendants 2 and 5 preferred an appeal which ultimately came up before this Court, and before this Court the appeal was settled and a consent decree was passed in the following terms :

" In this appeal the parties have come to terms. It has been agreed that the defendants appellants will pay to the plaintiff the sum which has been decreed in the mesne profits proceedings plus court-fee on the sum of Rs. 4,036 which is the estimated amount of mesne profits antecedent to the suit on which court-fee was paid."

That is to say, the amount of the decree was reduced from what it had originally stood at to the lesser sum mentioned in the agreed terms. The question arises as to what, if any, the effect of this modification has been upon the liability of the defendants other than those who appealed. The plaintiff sought to put the decree as modified into execution against some of the defendants other than those who had appealed. They objected to the execution, contending that the original decree had by consent been set aside, that they had been released from liability under that original decree and that the new decree had substituted a liability for a modified sum of the two defendants who had appealed. This contention was acceded to by the learned Subordinate Judge in the execution proceedings, and from his decision the plaintiff has appealed to this Court.

As I have said, in my opinion, the original decree was clearly a decree for the joint and several liability of all the defendants. The consent decree in this Court may be treated from either of two points of view. In the first place, it may be treated as a modification by the Court of the original decree for the benefit of all the body of persons liable under that decree whether they had or had not appealed. This Court has power to do that under Order XLI, rule 4. It may, on the other hand, be treated as a contract

1934.

MUSAMMAT  
LALTADEVI

KURR

v.

NARAIN  
MAHTON.COURTNEY  
TERRELL,

C. J.

1934.  
 MUSAMMAT  
 LALTA PATI  
 KUER  
 v.  
 NARAIN  
 MAHTON.  
 COURTNEY  
 TERRELL,  
 C. J.

between the plaintiff on the one hand and two out of the persons originally liable on the original decree for a modification of the joint liability of these two persons. In either case, in my opinion, the result is the same. If the latter point of view be the correct one, then the matter may be treated thus. It is immaterial what was the original cause of action in the suit; for that cause of action has been substituted a monetary decree, and the original cause of action is at an end and is gone. We now have the case of a creditor to whom a number of persons are under a joint liability to pay a definite sum of money; a new contract is entered into between the plaintiff and two of the many persons originally liable under the original decree whereby the liability is to be reduced from the original amount to a lesser amount. Then the correct view of the law in my opinion is that that reduction enures pro tanto for the benefit of the persons originally liable as well as for the benefit of the persons actually parties to the contract. This view of the law is supported by reference to the judgment of Mukherjee, J. in *Bhawani Koer v. Darsan Singh*<sup>(1)</sup> in which after an elaborate examination of the authorities he holds that where one of joint debtors makes a new arrangement with the creditor by which the amount of the joint liability is reduced, it reduces the amount of the joint liability of the other persons as well as himself. If this were not the law, an anomalous state of affairs would arise. It is conceded that there was originally a joint liability and the liability can only remain as a joint liability. In the case of a joint contractual liability or a joint liability under a decree for money it is open for any one of the joint debtors to discharge the joint liability of the entire body of debtors by paying up the amount of the decree. If, therefore, the reduction in the amount of the liability only affected two of the joint debtors, the difficulty would arise that any one of the

(1) (1911) 14 Cal. L. J. 354, 358.

joint debtors, who made the new contract could discharge the entire joint liability by paying off the reduced sum to which his liability had been reduced by means of the new contract, that is to say, some of the joint debtors could only pay off their liability by paying one sum; others of the joint debtors could obtain release not only for themselves but for all others by paying a lesser sum, which result is of course ridiculous. In either case whether we treat the new liability as the result of a modification of the entire original decree by the Court by virtue of its power under Order XLI, rule 4, or whether we treat the case as a release by the creditor of two out of a number of jointly liable debtors, the benefit must accrue to the entire body of debtors. It is, therefore, open to the creditor to pursue his execution for the joint debt against any one of the original joint debtors, but the sum for which he may pursue that execution is limited to the amount by which the debt was modified by consent on appeal to this Court.

In my opinion, the view of the learned Subordinate Judge in execution was erroneous and should be set aside. This appeal succeeds, and the respondents must pay costs.

LUBY, J.—I agree.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Khaja Mohamad Noor and Luby, JJ.*

MUSAMMAT BIBI SAIDA

v.

DUKHI GOPE.\*

*Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 25 and 155—landlord, whether entitled to an absolute decree for ejectment in cases of irremediable misuse.*

\* Appeal from Appellate Decree no. 28 of 1932, from a decision of D. P. Sharma, Esq., I.C.S., Additional District Judge of Monghyr, dated the 29th September, 1931, affirming that of Babu Shivanandan Prasad Singh, Munsif, 1st Court, Monghyr, dated the 16th January, 1930.

1934.

MUSAMMAT  
LALTAPATI  
KUER

v.  
NARAIN  
MAHTON.

COURTNEY  
TERRELL,  
C. J.

1934.

September,  
26.