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YOUNG C. J.

dismiss the suit. In view of the conflicting decisions of this Court previously parties will bear their own costs throughout.

It would be of great assistance to the people of this Province and to the Courts if legislation were undertaken codifying and, if so desired, amending some portions at least of the Customary Law.

A. N. C.

Appeal accepted.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

MUNSHI AND OTHERS (DEFENDANTS) Appellants,

versus

BELI RAM AND OTHERS (PLAINTIFFS) Respondents.

Letters Patent Appeal No. 58 of 1934.

Absentees — Suit by — for recovery of their shares against the co-sharers in possession — No proof of abandonment or of any overt act by defendants — Limitation — where plaintiffs are the heirs of the original co-sharers — Suit — whether can be decreed for more than the shares of the parties before the Court.

The plaintiffs sued for possession of their share of land alleging that they were the descendants and heirs of persons who were recorded as absentee proprietors. The defendants pleaded that there had been abandonment and that in any case the suit was time-barred. The District Judge on appeal held that there had been no abandonment and that there had been no overt act done by the defendants to the knowledge of the plaintiffs which would render defendants' possession adverse. He, however, dismissed the suit as barred by time on the authority of *Buta Shah v. Murad Ali* (1). There were five plaintiffs in the case including one M. They were all appellants before the District Judge. M. however did not prefer an appeal to the High Court nor was he made a res-

(1) 1929 A. I. R. (Lah.) 276.

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pendent. The Single Judge decreed the suit *in toto* in favour of the four plaintiffs who had appealed, holding that the possession of a co-sharer must be deemed to be the possession of all the co-sharers.

Held, that the suit should have been decreed only to the extent of the shares in the land to which the four plaintiffs (appellants in the High Court) were entitled, as the parties followed custom and were entitled as tenants in common and not as joint tenants, each owning his specific share.

Held also, that the decision of the Single Judge decreeing plaintiffs' suit was correct because the co-sharers in possession were holding on behalf of the absentees and their heirs, no abandonment having been established nor any overt act by the defendants which would make their possession adverse.

Buta Shah v. Murad Ali (1), and *Arora v. Mohra* (2), disapproved.

Letters Patent Appeal from the decree of Jai Lal J., passed in Civil Appeal No. 1128 of 1933, dated 15th March, 1934, reversing that of R. B. Lala Shibbu Mal, District Judge, Gurdaspur, dated 24th April, 1933, who affirmed that of Sardar Gurdial Singh, Subordinate Judge, 2nd Class, Gurdaspur, dated 29th August, 1932, and decreeing the plaintiffs' suit.

SHAMAIR CHAND and CHIRANJIVA LAL AGGARWAL,
for Appellants.

MEHR CHAND MAHAJAN and VISHNU DATTA, for
Respondents.

The judgment of the Court was delivered by—

ADDISON J.—The plaintiffs sued for possession of a one-third share of the land comprised in certain specified field numbers, alleging that they were the descendants and heirs of persons who were recorded as absentee proprietors. On behalf of the defendants it was pleaded that there had been abandonment and that

(1) 1929 A. I. R. (Lah.) 276.

(2) 114 P. R. 1880.

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in any case the suit was time barred. The trial Court and the District Judge on appeal held that there had been no abandonment. The District Judge further found that there had been no overt act done by the defendants to the knowledge of the plaintiffs which would start adverse possession running, but, following *Buta Shah v. Murad Ali* (1), he held that, though an absentee co-sharer himself could recover possession on his return, yet the limitation period allowed to an immediate heir of the absentee was twelve years from the date of the absentee's death. For this reason he held the suit to be barred by time, as had the trial Judge. The suit was therefore dismissed and so was the appeal.

There were five plaintiffs, Beli Ram, Kanshi, Parso, Khazano and Mangtu. These five were appellants before the District Judge as well. Being dissatisfied with the District Judge's decision, the first three plaintiffs and Ram Ditta, Munshi and Phula, the sons of the fourth plaintiff Khazano preferred a second appeal to this Court. Mangtu, the fifth plaintiff and appellant before the District Judge, did not prefer an appeal nor was he made a respondent. The parties follow custom and each one is entitled as a tenant-in-common and not as a joint-tenant to his specific share. The appeal, therefore, could not have been instituted for the benefit of Mangtu even if he had been made a respondent, as it was his duty to appeal against the decision of the District Judge. This was not noticed when the appeal came for hearing before a Single Judge of this Court. He accepted the appeal and decreed the suit *in toto* in favour of the first three plaintiffs and the sons of the fourth plaintiff. This is evidently wrong and the suit should only have been

decreed to the extent of the share in the land to which Beli Ram, Kanshi, Parso and Khazano were entitled. This appeal under the Letters Patent must be accepted to this extent and the decree of the Single Judge of this Court set aside with respect to Mangtu's share. Mangtu has been proved to be alive, for he was served as a respondent in this Letters Patent Appeal which is against the decision of the Single Judge.

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Before the Single Judge, the question of abandonment was not raised, and it was admitted before him that there was no overt act of those in possession which amounted to notice to the plaintiffs that the possession of the former had become adverse to the latter. He, therefore, held [see *Beli Ram v. Munshi* (1)], that the possession of one co-sharer must be deemed to be the possession of all other co-sharers, and in order to defeat the title of absentee co-sharers, it was for the co-sharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of the other co-sharers. This means that he disapproved of the decision in *Buta Shah v. Murad Ali* (2), and did not follow it.

Before us, an attempt was made to argue that abandonment had been established. In the settlement of 1890 it was recorded that certain persons were absentees and that the co-sharers in possession were holding the land on behalf of them and that the absentee-owners would be entitled to be restored to possession on their return by paying losses and the value of improvements. In 1904, however, the co-sharers in possession applied to the revenue authorities to strike off the names of the absentee-owners and this was done by mutation in 1908. An attempt was made to serve the absentee-owners by letters but these letters

(1) I. L. R. (1934) 15 Lah. 907.

(2) 1929 A. I. R. (Lah.) 276.

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were not delivered as apparently the owners, whose names were given in the settlement record of 1890, had died. There are authorities of this Court that an absentee cannot take advantage of an agreement in his favour if his conduct has been such as to evince an intention to relinquish the ownership of the land which once belonged to him. But the question of abandonment is primarily one of fact and for that reason as well as for the reason that this was not raised before the Single Judge, it cannot be agitated before us.

This leaves the question of adverse possession. On the finding that there had been no abandonment and that the co-sharers in possession were holding on behalf of the absentees, it necessarily follows that the decision of the Single Judge is correct; for there was no overt act done by the co-sharers in possession to the knowledge of the absentees, this being also admitted before the Single Judge. This means that the suit was properly held to be within time unless the decision in *Buta Shah v. Murad Ali* (1), is correct. This decision appears to be based on *Arora v. Mohra* (2), and certain other decisions. In that case the absentees whose names were recorded had died and their sons brought a suit more than twelve years after their death. It was held that the suit was barred by limitation as the recorded absentees had died twelve years before suit. These decisions, however, do not appear to us to be correct. If the co-sharers in possession were holding on behalf of the absentees and no abandonment was established, it necessarily follows that they were also holding on behalf of their heirs after their death unless some overt act is proved. In

(1) 1929 A. I. R. (Lah.) 276.

(2) *114 P. R. 1880.

the present case, it is admitted that there was no overt act. We, therefore, endorse the decision of the Single Judge.

For the reasons given, we accept the appeal only to the extent of Mangtu's share in the land in suit and dismiss the suit so far as it refers to his share. This is a suitable case in which the parties should bear their own costs throughout and we so direct.

A. N. C.

*Appeal accepted in respect
of Mangtu's share only.*

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

JIWAN SINGH (DEFENDANT) Appellant,

versus

RADHA KISHAN (PLAINTIFF)
NARAIN KISHEN PURI } Respondents.
(DEFENDANT)

1937
Feb. 1.

Letters Patent Appeal No. 80 of 1936.

*Indian Limitation Act (IX of 1908), Arts. 16, 96, 120 —
Limitation — for suit for recovery of money paid twice by
mistake.*

R. K. borrowed Rs.5,000, in February, 1919, from J. S. and M. C. and repaid the amount to J. S. alone in May, 1919. In 1925 J. S. and M. C. sued for recovery of Rs.7,700 which was decreed to the extent of one half in favour of M. C. as J. S. had not been authorised to receive payment of the other half on behalf of M. C. In October, 1932, M. C. executed his decree to the extent of Rs.1,200, and thereon R. K. instituted the present suit for recovery of this amount from J. S., who objected that the suit was barred by limitation under Art. 96 of the Indian Limitation Act.

Held, that whether there is an obligation to pay or whether there is a case which falls within s. 70 of the Contract