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interest created is permanent, neither does it say anything about transferability. The matter, therefore, is open for consideration whether the holding is transferable; and I use the word "holding" because both the Lower Courts have held that the interest created by the lease is not a tenure. The Lower Appellate Court should in my opinion have considered the question whether, having regard to the terms of the contract between the parties and any other matters that might have been brought forward with regard to the incidents of similar holdings in the neighbourhood, the holding was transferable or not. If it holds that it was transferable irrespective of the question whether the right created by the lease is an occupancy right or not, the suit should be dismissed; but, if it finds otherwise, the suit should be decreed.

I agree with my learned brother that the interest created by the lease is not one covered by section 18 of the Bengal Tenancy Act.

Appeal allowed; Case remanded.

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[965] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

ABDUL AZIZ MOLLA *v.* EBRAHIM MOLLA.*

[9th June, 1904.]

Suit—Civil Procedure Code (Act XIV of 1882), s. 373—Withdrawal of suit—Costs, a condition precedent to bringing a fresh suit—Rules of the Supreme Court, 1883, Order 26—Statement contrary to proprietary interest—Evidence Act (I of 1872), s. 32 cl. 3—Landlord, payment of.

Where a suit has been withdrawn under s. 373 of the Civil Procedure Code with liberty to bring a fresh suit on payment of costs, a subsequent suit in respect of the same cause of action is not *ab initio* void, if the costs are not paid before its institution.

Subsequent payment of costs cures the irregularity.

A statement by a landlord, who is dead, that there was a tenant on the land is a statement against his proprietary interest and admissible under cl. 3, s. 32 of the Evidence Act (I of 1872).

[**Ref.** 14 C. L. J. 105=15 C. W. N. 998=10 I. C. 6; 19 C. L. J. 529=23 I. C. 210; 44 I. C. 79=3 Pat. L. J. 63; 36 I. C. 1003; 15 C. L. J. 7=17 C. W. N. 108=13 I. C. 120; 64 I. C 788. **Dist.** 33 Mad. 258.]

SECOND APPEAL by defendants Abdul Aziz Molla and others, minors by their mother and guardian Autoonnessa.

This appeal arose out of an action brought by the plaintiffs to recover joint possession of certain lands on declaration of title thereto. The allegation of the plaintiffs was that Moniruddi Mollah, predecessor of the plaintiffs as also of the defendants, acquired *jamai* right in respect of the disputed land from one Alimuddi, father of the defendants Nos. 14-15; that the said Moniruddi Mollah was in possession of the said lands for more than 12 years, and on his death in 1302 B.S. they and the defendants inherited the property and were in possession of the same; that they were dispossessed by the defendants on the 15th Bhadra 1306 B.S. (31st August 1899) by taking away cocoanuts from the trees on the land. The defendants pleaded that the land in suit was divided into two

* Appeal from Appellate Decree No. 1780 of 1902 against the decree of Jadunath Ghose, Subordinate Judge, of 26th May 1902, reversing the decree of Sarat Chandra Sen, Munsif of Narail, dated the 27th January 1902.

portions, the southern portion of which was [966] acquired by Enatulla, son of the said Moniruddi and the predecessor of defendants Nos. 1 to 4; that Moniruddi did not acquire the land and had no right and possession therein; that after the death of Enatulla the defendants Nos. 1 to 4 inherited the southern portion, and that the northern portion of the plot had been in possession of the landlord, and that the defendant No. 4 subsequently acquired *jamai* right in that portion; and that the suit was barred by limitation.

It appeared that the plaintiffs previously brought a suit against the defendants on the same cause of action, but they applied for and got permission from Court to withdraw from the said suit with liberty to bring a fresh suit on payment of costs. The present suit, however, was instituted without payment of costs, but the defendants' pleader accepted it afterwards. The Court of First Instance partially decreed the plaintiffs' suit. On appeal the learned Subordinate Judge varied the decree of the First Court; and made a decree in favour of the plaintiffs with respect to the southern portion of the land in dispute.

Babu *Sib Chandra Palit* for appellants. This suit is barred by the provisions of clause (2), s. 373, Civil Procedure Code. The plaintiffs were allowed to withdraw their previous suit with liberty to bring a fresh suit on payment of all costs to the defendants. This means that the payment of costs was a condition precedent to the institution of the present suit. The costs having been paid after the institution of the suit, the said order was not complied with and therefore there was no payment at all. The payment cannot be made after the institution of the suit, as that will render the order of the Court nugatory. The permission to withdraw was conditional, and that condition must be complied with.

No one appeared for the respondent.

GEIDT AND MOOKERJEE, JJ. This is an appeal by some of the defendants in a suit to have the plaintiffs' right by inheritance declared in respect of a share of certain land. The Subordinate Judge on appeal has decreed the suit with respect to the southern portion of the land in dispute.

[967] Two objections are taken in this appeal.

The first objection is founded on the fact that the plaintiffs had brought a previous suit with respect to the same plot of land against these defendants. That suit was withdrawn, and permission was given to the plaintiffs to bring a fresh suit on payment of the defendants' costs. At the time when the present suit was instituted these costs had not been paid; but it appears that they were paid to the defendants pleader before the suit came on for trial.

The objection, therefore, taken by the learned pleader for the appellant is that as the plaintiffs had not complied with the order passed in the former suit that they were to pay the defendants' costs, the suit was bad *ab initio*, and ought to have been dismissed on that ground.

The provisions of law dealing with the consequences of withdrawal of a suit are to be found in section 373 of the Code of Civil Procedure. If that section were not in existence there is no other provision of law by which a plaintiff after withdrawing a suit would be precluded from bringing a fresh suit, in respect of the same cause of action. Now, what is the effect of section 373 as regards the bringing of fresh suits? The second paragraph lays down (I only quote the words that are necessary for the discussion of this point) that, if the plaintiff withdraws from the suit without the permission of the Court, he shall be precluded from

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bringing a fresh suit for the same matter. Therefore, the only persons who are *prima facie* precluded from bringing a fresh suit are those who withdraw from the former suit without permission to bring a fresh suit on the same cause of action. Now, in the present case the plaintiffs had received such permission and the second paragraph of section 373 does not therefore stand in their way.

But it is said that there was an express order that the plaintiffs should pay the defendants' costs. We have not the order on the record. We may take it that the payment of costs was meant by the order to be a condition precedent to the bringing of a fresh suit.

But then the question arises, Does that necessarily make the suit void *ab initio*, and will not the subsequent payment of the defendants' costs cure the undoubted irregularity ?

[968] There is no express provision by the Indian Legislature as to the consequences of such a course of conduct. But we have referred to the rules of the Supreme Court, 1883. Order 26, rule 4, runs as follows: "If any subsequent action shall be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action, the Court or a Judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid."

We think that the rule there laid down would be a fair rule for the Courts in this country to follow, in the absence of any statutory enactment in the matter, and that though a Court would be warranted in refusing to proceed with a suit like this when the facts are brought to its notice that the plaintiff had not complied with the order requiring payment of costs, yet there is nothing in the law to show that a suit instituted under such circumstances is bad *ab initio* and must *ipso facto* be dismissed, if the payment ordered is made after its institution.

The next point taken in this appeal is that the learned Subordinate Judge has admitted in evidence a statement in a plaint filed in another suit instituted 20 years or more previously.

One of the questions that the learned Subordinate Judge had to try in this case was whether the land in dispute had belonged to Moniruddi.

Now, the former suit was one in which the landlord of the property now in dispute had instituted a suit regarding the property lying immediately to the south of that with which we are dealing in the present case. In the statement of the boundaries of that suit, Moniruddi was given as the name of the tenant holding the land immediately to the north of the land in dispute in 1877, and the Subordinate Judge has used that statement as showing that the land was then in occupation of Moniruddi and as disproving the allegation made by the defendants that the land had been let to somebody else.

It is urged by the learned pleader for the appellant that this statement is not admissible in evidence. The landlord who instituted the suit of 1877 is now dead, but it is said that the statement as to the present holding of the land on the northern boundary **[969]** does not come within any of the clauses of section 32 of the Evidence Act.

It appears to us, however, that when the plaintiff in that suit who was admittedly the landlord of the land now in suit, made a statement that her land had been let to Moniruddi, she did make a statement contrary to her proprietary interest. She admitted thereby that she had parted with some at least of her entire proprietary rights in the land, namely, the right to possession, and though it did not affect her pro-

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prietary interests, whether Mopiruddi or some one else was a tenant, still the statement must be taken as a whole, and the statement as a whole being in derogation of the proprietary interest, we are of opinion that any part of that statement is admissible under clause 3, section 32 of the Evidence Act. We are supported in this view by the judgment of Sir Richard Couch, C. J., reported in *Raja Leelanund Singh* v. *Mussammat Lukhputtee Thakoorain* (1). The statement there made in evidence was a statement by the landlord that the rent of a settlement ghatwal had been increased from Rs. 74 to Rs. 101. Now *prima facie* that particular statement was a statement not against his pecuniary interest, but rather in his favour ; but Sir Richard Couch ruled that the statement must be taken as a whole, and taken as a whole, it disclosed that there was a ghatwal on the land, and that therefore the landlord did not enjoy the whole of the proprietary rights, which he would otherwise enjoy. That case seems to us similar to the one with which we are now dealing. The statement that there was a tenant on the land, namely, Moniruddi, was a statement against the landlord's proprietary rights, and therefore admissible under clause 3, section 32 of the Evidence Act. 31 C. 965.

The objections therefore fail, and the appeal is dismissed without costs, as there is no appearance on behalf of the respondents.

Appeal dismissed.

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31 C. 970 (=9 C. W. N. 32.)

[970] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

UJALBI BIBI *v.* UMAKANTA KARMOKAR.*

[6th July, 1904.]

Limitation—Adverse possession—Co-sharer—Joint property.

Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer, until there has been a dis-claimer of the latter's title by open assertion of hostile title on the part of the former.

Baroda Sundari Deby v. *Annoda Sundari Deby* (2) and *Ittappan* v. *Manavikrama* (3) followed.

[**Dist.** 4 A. L. J. 473=1907. A. W. N. 195 ; 39 I. C. 579 ; **Foll.** 35. Cal. 961; **Ref.** 3 O. L. J. 279.]

SECOND APPEAL by the plaintiff No. 1, Ujalbi Bibi.

One Ataulla, owner of the *jote* in dispute, died in 1259 B.S., leaving behind him his widow Bhendar Bibi and two daughters, Amirannessa and Ujalbi, the plaintiff No 1. Amirannessa was married to one Amirulla, and died in 1284 B.S., leaving two daughters, Rahimannessa and Karimannessa, the plaintiffs Nos. 2 and 3. Amirulla subsequently died and Bhendar Bibi died in 1302 B.S.

Uma Kanta Karmokar, the defendant No. 1, took a mortgage of the disputed property from Amirulla and Enayutulla, the defendant No. 3 and husband of the plaintiff No. 2, and in execution of a decree obtained on his mortgage, purchased it on the 7th September 1888.

Appeal from Appellate Decree No. 282 of 1902, against the decree of Aswini Kumar Guha, Subordinate Judge of Rungpore, dated Sept 20, 1901, modifying the decree of Annada Prosad Bagchi, Munsif of Rungpore, dated Feb. 25, 1901.

(1) (1874) 22 W. R. 231.
(2) (1898) 3 C. W. N. 774.
(3) (1897) I. L. R. 21 Mad. 153, 166