if she likes, can get her redress by a fresh suit." That would be of little avail, when in the present suit, to which she is a party, an order has been made, the effect of which is to deprive her of her one-fourth share of the estate. What redress could she, in such circumstances, obtain by a fresh suit? None. The Court ought never to have made such an order. The appeal must be allowed with costs, and the case must go back for the accounts to be proceeded with, unless the parties are reasonable and come to terms, and give the widow, defendant No. 3, her proper share of the estate.

I should like to add a word about the form of the preliminary decree. I have often had to notice, and adversely, the almost fanciful form in which decrees in administration suits are framed in the Subordinate Courts. The Subordinate judiciary ought, in decrees in administration suits, to follow the form prescribed in No. 130 of the Fourth Schedule of the Code of Civil Procedure, and not to draw them up in such careless and unsatisfactory terms as they often do. Much time and trouble would be saved, if they adopt, as they are bound to adopt, the prescribed forms, which have been carefully prepared.

MITRA, J. I agree.

Appeal allowed: *Case remanded.*

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32 C. 567 (=3 C. L. J. 141.)

[567] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Holmwood.

GIRINDRA CHANDRA PAL CHOWDHRY *v.* SREENATH PAL CHOWDHRY.*

[22nd February, 1905.]

Landlord and tenant—Co-sharers, suit for rent by—Joint property—Liability for rent.

The plaintiff and the defendants, being some of the co-owners of a zamindari purchased certain holdings under the zamindari and were in occupation of separate portions of them :—

Held, the defendants were not, in the absence of any agreement between themselves and the plaintiff to pay him rent, the tenants of the plaintiff in respect of the lands actually occupied by them and were not liable to pay him rent for the same.

[Dist. 7 C. L. J. 512.]

SECOND APPEAL by the principal defendants, Girindra Chandra Pal Chowdhry and others.

The appeal arose out of a suit for rent or, in the alternative for damages for depriving the plaintiff of the proceeds of the land held and enjoyed by the defendants.

The material allegations in the plaint were as follows :—

The plaintiff owned a 2 annas 5-2-2 share of the zamindari right in certain *mouzas* besides owning certain shares of *putni* and *darputni* interests therein, and the principal defendants Nos. 1 to 5 also owned a 2 annas 5-2-2 share in the zamindari. In the said *mouzas* certain tenants had a number of holdings of which a one-third share was owned by the

* Appeal from Appellate Decree, No. 2733 of 1902, against the decree of J. D. Cargill, Offg. District Judge of Nadia, dated Sept. 25, 1902, affirming the decree of Ram Charan Mullick, Munsif of Meherpur, dated Feb. 15, 1902.

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plaintiff, another one-third was owned by the Defendants Nos. 1 to 5, and the remaining one-third was owned by the defendants Nos. 6 to 10 on the basis of the right of purchase and they had been separately holding possession of the same ; the shares of the plaintiff and the principal defendants in the zamindari and in the holdings being equal, there was [568] no necessity for either party to make payments to the other in respect of the rent of the holdings and their respective debts and dues used to be set off against each other ; the principal defendants, however, having let out their zamindari right in *putni* to the defendants Nos. 13 and 14 in the year 1298, the latter had by suit realized from the plaintiff the rent due in the share of defendants 1 to 5 in respect of the plaintiff's one-third share of the holdings. Under the circumstance the mutual set-off as described above having come to an end, the plaintiff claimed from the defendants Nos. 1 to 5 rent due to the plaintiff's share of the zamindari, *putni* and *darputni* interests in respect of the one-third share of the defendants 1 to 5 in the holdings aforesaid.

The suit was defended by the defendants Nos. 1 to 5, who pleaded, *inter alia*, that as the plaintiff was their co-sharer and as no rent had been settled between them and as no rent had been paid or accepted and no such set-off as alleged by the plaintiff appeared in the accounts of the parties, the suit for rent was not maintainable that as various plots of land in the various *ijmali mehals* belonging to the parties were held *khas*, some by the plaintiff and some by the defendants, the rights and liabilities of the parties could be worked out only in a suit for partition and accounts in respect of all such lands in respect of all the *mehals*. They also denied liability in respect of damages.

The Munsif, who tried the suit, found that the plaintiff, the predecessor of defendants 1 to 5 and the predecessor of defendants 6 to 10, who were three brothers, had jointly acquired the holdings referred to in the plaint, that by the purchase the holdings did not merge, that the relationship of landlord and tenant existed between the plaintiff and the defendants 1 to 5 and that, under the circumstances set out in the plaint, the plaintff was entitled to recover rent from them. He therefore made a decree in favour of the plaintiff except in respect of nine holdings, the particulars of which could not be ascertained.

This decision was affirmed on appeal ; and the defendants 1 to 5 appealed to the High Court.

Babu *Nilmadhab Bose* (Babu *Haraprasad Chatterjee* with him) for the appellants. The plaintiff and the defendants being co-sharers [569] in the zamindari as well as in the tenant's interest, the suit which is one for rent cannot lie ; previous suits of this description have failed and the granting by the defendants 1 to 5 of a *putni* in respect of their share in some only of the villages in the zamindari cannot have changed the position. The parties are separately in *khas* possession of various other plots of land and their rights *inter se* can be worked out only by taking the thing as a whole in a suit for account or partition.

Dr. *Rash Behary Ghose* (Babu *Prasanna Chandra Roy* and Babu *Braja Lal Chuckerbutty* with him) for the plaintiff-respondent. The difference made by the granting of the *putni* is this, before the *putni* neither did I pay any rent to the defendants nor did they pay rent to me, now I am compelled by the putnidar to pay rent. *A* and *B* are co-sharers and each has purchased a holding in the zamindari ; neither would pay rent to the

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other as each would be entitled to an equal amount; but, if *B* sold his zamindari interest to a third party and continued in possession of the holding, *A* would have to pay rent to the purchaser and *B* would have to pay rent to *A*; formerly rent due by *A* was set off against rent due by *B*; now no set off exists. The relationship of landlord and tenant between the parties existed *ab initio*; the purchase of the holdings had not the effect of destroying them.

Babu *Nilamadhub Bose*, in reply. The analogy of sale does not apply to *putni*; it is difficult to see how the grant of the *putni* could make us tenants of the plaintiff.

[MACLEAN C. J. Suppose there was no *putni*, would the plaintiff be entitled to sue you for rent ?]

No. *Kalee Pershad* v. *Lutafut Hossein* (1); here there was no engagement to pay rent, express or implied.

MACLEAN C. J. This is a suit for the recovery of rent, and in order to enable the plaintiff to succeed in such a suit, he must substantiate that the relation of landlord and tenant subsists between the defendants and himself. The facts of the case are not substantially in dispute. We find a zamindari owned by several co-sharers, who, or as we were told towards the close of the argument, some only of whom—it makes no real difference in [570] the result—brought up certain holdings held under the zamindari. The plaintiff is one of these co-sharers, and he is also one of the co-purchasers of the holdings. The defendants Nos. 1 to 5, who are the real defendants in the case, are other of the co-sharers of the zamindari and also amongst the co-purchasers of the holdings. Each of the zamindari co-sharers appears to have been in occupation of separate portions of the zamindari property.

Pausing here for a moment, could the plaintiff in such circumstances have successfully sued the defendants Nos. 1 to 5 in respect of his share of the rent for that portion of the zamindari property, which was actually in the occupation of those defendants ? In other words, are those defendants the tenants of the plaintiff in respect of the land so occupied ? I think the answer must be in the negative. We do not find here, as sometimes happens, an agreement by the co-sharers amongst themselves, that the occupying shareholder should pay separately for the land he occupies, a fixed sum by way of rent to his co-proprietor. There is no element of that sort in the case before us. No doubt the co-sharer can, in a properly constituted suit, recover his share of the profits of the land, but I do not think he can do so in a suit framed on the footing of landlord and tenant, for that relation does not seem to exist between the parties. What then has happened to entitle the plaintiff to maintain successfully such a suit ? It appears that in 1891 the defendants Nos. 1 to 5 granted a *putni* of some of the villages comprised in the zamindari, and it is said, and so the District Judge holds, that the fact of the grant of this *putni* by defendants Nos. 1 to 5 has the effect of converting them into tenants of the plaintiff as regards his shares of the lands included in the *putni*. This is rather a startling proposition, and one for which no authority can be found in any Court in India. I, with all respect, fail to appreciate this argument, and when I put my difficulty to the learned and experienced pleader, who conducted the case for the respondent, he practically—I do not think I am doing him any injustice—conceded that it was very difficult to support the judgment on that ground, which is the basis of the judgment

(1) (1869) 12 W. R. 418.

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of the lower Appellate Court. If then we eliminate the *putni* element, what remains ?—Only the position I have adverted to before, from which it is apparent that the plaintiff [571] cannot sustain the present action. For these reasons I think that this appeal must be allowed and the plaintiff's suit dismissed with costs in all Courts.

HOLMWOOD J. I agree.

Appeal allowed.

32 C. 572 (=1 C. L. J. 255.)

[572] CIVIL RULE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Holmwood.

GANGA CHARAN BHUTTACHARJEE *v.* SHOSHI BHUSHAN ROY.*

[14th February, 1905.]

Appeal—Bengal Tenancy Act (VIII of 1885), s. 153—Order setting aside sale—High Court—Revision, power of—Civil Procedure Code (XIV of 1882), s. 622.

An order setting aside a sale in execution of a decree decides a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto, and is therefore appealable under s. 153 of the Bengal Tenancy Act (VIII of 1885), although it was made by an Officer specially authorized under the section, in a suit for rent valued at less than fifty rupees.

In deciding whether an order is appealable under that section, the point for consideration is not what the decree in the suit decided, but what the order decided.

Monmohini Dassi v. Lakhinarain Chandra (1) distinguished.

Where a Court rejects an application under ss. 244 and 311 of the Civil Procedure Code on the ground that the applicant had no *locus standi*, the case would not fall within s. 622 of the Code.

[Fol. 32 Cal. 957 (F. B.)=9 C. W. N. 721=1 C. L. J. 476.]

RULE granted to Ganga Charan Bhuttacharjee under s. 622 of the Civil Procedure Code.

A *ryoti* holding, the subject-matter of these proceedings, was originally held by one Uma Charan Shaha under Shoshi Bhushan Roy, the decree-holder, opposite party. It was sold in execution of a money decree and was purchased by Ganga Charan Bhuttacharjee the petitioner, on the 24th May 1900, who it appears obtained possession in the course of the year. The landlord Shoshi Bhusan Roy obtained a decree for rent in respect of the holding against Sarada Sundari, the judgment-debtor, opposite party, on the 12th May 1902, and in execution of the decree the holding was put up [573] for sale and was purchased by the decree-holder, Soshi Bhushan, on the 18th May 1903. The sale to Soshi Bhushan was confirmed on the 9th July 1903.

The petitioner, Ganga Charan Bhuttacharjee, instituted the present proceedings on the 22nd July 1903 for setting aside the sale of the 18th May on the ground of fraud and irregularity resulting in substantial injury.

The decree-holder contended that as the holding was not transferable by law or custom, the petitioner had acquired no interest therein by his purchase, and that consequently he had no right or *locus standi* to maintain

*Civil Rule No. 3489 of 1904.

(1) (1900) I. L. R. 28 Cal. 116.