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the case of *In the matter of Ketabdi Mundul* (1), but the other case cited *Shaik Hussain* v. *Sanjivi* (2) is not to the point. The law prescribes that the compensation may be levied as a fine, but it does not say that imprisonment may be awarded in default of payment, and we are not aware of any provision of law which provides that fines may be levied by means of imprisonment. The ordinary mode of levying fines is laid down in section 386 of the Code of Criminal Procedure. This part of the Joint Magistrate's order therefore is clearly illegal (3).

H. T. H. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

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BAID NATH DAS (DEFENDANT) *v.* SHAMANAND DAS (PLAINTIFF.)*

Succession Certificate Act (VII of 1889), section 4—Right to maintain suit without certificate—Suit on mortgage bond by heir—Suit continued by party substituted for plaintiff who has taken out certificate—Interest at high rate—Penalty—Contract Act (IX of 1879), section 74—Precise sum not named but ascertainable.

A mortgage bond was executed by the defendant in favour of *H*, who died, leaving two sons *J* and *S*, the elder of whom *J* took out a certificate to collect the debts of his father, and instituted a suit on the bond in which he asked both for sale of the mortgaged property and for a personal decree against the defendant. Whilst the suit was pending *J* died, and *S* was allowed to be substituted in his place as plaintiff. A decree was made for sale of the property, but the personal relief was not granted, as it was held to be barred by lapse of time : *Held*, that this was not " a decree against a debtor for payment of his debt " within the meaning of section 4 of the Succession Certificate Act (VII of 1889). *Roghu Nath Shaha* v. *Poresh Nath Pundari* (4) and *Kanchan Modi* v. *Baij Nath Singh* (5) approved. The suit was therefore maintainable notwithstanding that no certificate had been taken out by *S*. *Semble.*—It is doubtful whether that Act would apply at all to

* Appeal from Original Decree No. 193 of 1893, against the decree of Babu Bulloram Mullick, Subordinate Judge of Cuttack, dated the 4th of April 1893.

(1) 2 C. L. R., 507. (2) I. L. R., 7 Mad., 345.

(3) See *Ramjeevan Koormi* v. *Doorga Charan Sadhu*, I. L. R., 21 Calc., 979, *Ed. note.*

(4) I. L. R., 15 Calc., 54. (5) I. L. R., 19 Calc., 336.

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the case of a person who has been substituted as plaintiff for one who, having taken out a certificate, has died pending the suit.

The mortgage bond contained the following stipulations as to interest: "I will pay interest for the said amount at the rate of Re. 1-4 per cent. *per mensem*, and at the end of a year from the date of the bond, I will pay the whole amount of interest due on the principal for that year. If I do not pay the interest in this way at the end of each year, I will be guilty of neglect. You will by instituting suit realize interest upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the bond at the rate of Rs. 3-2 per cent. *per mensem* from the mortgaged property and from me, my heirs, assigns, and representatives and from my other properties. I will continue to pay interest upon the principal for every year from the date of the bond at the end of that year so long as the amount of the bond is not paid. In default of payment you will act according to the conditions stated above. I will repay this money within three months from date and redeem the mortgage property and mortgage bond.....If I fail to pay up the principal money within the said specified time, I will continue to pay up interest upon the principal at the rate of Re. 1-4 per cent. according to the said stipulation in the bond up to the date of the institution of the suit, and from the date of institution of the suit to that of the decree, and from the date of the decree to that of the realization of the amount": *Held*, that the plaintiff was not entitled to the higher rate of interest, it being in the nature of a penalty within the meaning of section 74 of the Contract Act, [*Kala Chand Koyal* v. *Shib Chunder Roy* (1) referred to,] and this was so within the meaning of that section, although no sum was named, because such sum was at once ascertainable.

THIS was a suit on a registered mortgage bond for Rs. 3,000 executed on the 9th April 1880 by the defendant in favour of the plaintiff's father, under which the amount was payable three months after date of the bond. The bond bore interest at the rate of Re. 1-4 *per mensem*, and there was a stipulation in the bond for the payment of the whole interest for the year on the last day of each year from the date of the bond, and on default of such payment that the mortgagee might realize interest "upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the mortgage bond at the rate of Rs. 3-2 per cent *per mensem* from the mortgaged property and from me, my heirs, assigns, and representatives, and from my other properties."

The plaintiff had two sons, Jagadanand Das and Shamanand

(1) I. L. R., 19 Calc., 392.

Das, and on his death in 1885 his son Jagadanand, through his mother and certificated guardian Saraswati Debi, took out a certificate in order to collect his father's debts. 1894 BAID NATH DAS v. SHAMANAND DAS.

The suit was brought on the 28th March 1892 for the principal Rs. 3,000, and interest thereon for 11 years 11 months and 12 days from 9th April 1880 to 27th March 1892 at the rate of Rs. 3-2 per cent *per mensem*, Rs. 13,465-10, making in all Rs. 16,465-10; and the plaint prayed that the amount might be decreed to be paid within a fixed time, together with costs of the suit, and that in case of non-payment the mortgaged property should be sold, and the amount realized from the sale proceeds; and if they should be insufficient the balance should be realizable from the defendant and from his property other than the mortgaged property.

The defence was that the suit was not maintainable as the plaintiff's brother had not been made a party; that by the custom in the defendant's family the eldest son was the *malik*; "no one has any transferable right or interest in the family properties; the plaintiff is not entitled to a mortgage decree against the property mortgaged, as it is an ancestral family property, and not transferable"; that the plaintiff was only entitled to interest at the rate of R. 1-4 *per mensem*, the stipulation for payment at the rate of Rs. 3-2 being a penalty and not enforceable by the Court; that the plaintiff was not entitled to a decree for interest for an amount larger than the principal, and that he was not entitled to the other relief prayed for, as in respect of that the suit was barred by limitation, more than six years having elapsed from the date of the bond.

Jagadanand Das died on the 18th August 1892, and on the 4th April 1893 his brother Shamanand who was then a minor was allowed to be substituted in his place as plaintiff.

The judgment of the Subordinate Judge was as follows:—

"The suit of the plaintiff is on a mortgage bond. The execution of the instrument by the defendant and receipt of consideration are not denied by defendant. There is also positive evidence to prove those facts. The contentions of the defendants are:—(1) That the plaintiff Shamanand is not a minor;

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(2) that the rule of primogeniture prevailing in defendant's family bars the sale of the mortgaged property; (3) that without a certificate under the Succession Certificate Act plaintiff is not entitled to a decree.

"In regard to the first plea it is negatived by the evidence adduced by defendant which shows that the plaintiff Shamanand is still a minor. The second objection should also be overruled. There is no evidence worth the name to support the custom set up by the defendant. The mortgage bond on the other hand disproves the custom in the clearest manner and estops defendant from setting it up.

"The third objection is that the suit cannot be maintained without a certificate. The case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1) is an authority for holding that a mortgage debt does not fall within the scope of the Succession Certificate Act. The present suit is based on the rule of survivorship and not succession, and therefore the case of *Venkataramanna* v. *Venkayya* (2) is applicable. Hence I hold that the suit is maintainable without a succession certificate. The personal reliefs claimed in the plaint are barred by limitation and should be disallowed. Let an account be taken of the interest in terms of the mortgage bond. The mortgaged property will be sold if defendant do not pay the principal and interest to be hereafter ascertained and costs within six months from the date the decree is signed."

From this decision the defendant appealed, the only material grounds being that the suit was not maintainable, the plaintiff Shamanand not having taken out a certificate under the Succession Certificate Act, and that the clause in the bond as to interest at the higher rate, and as to compound interest, was a penal clause and effect ought not to be given to it.

Mr. *Barrow*, Babu *Saroda Charan Mitter*, and Babu *Srish Chunder Chowdhri* for the appellant.

Dr. *Rash Behari Ghosh* and Babu *Monomotho Nath Mitter* for the respondent.

The arguments and cases cited are sufficiently noticed in the judgment.

(1) I. L. R., 15 Calc., 54. (2) I. L. R., 14 Mad., 377.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows :—

This was a suit to enforce a mortgage bond. The mortgage was executed in favour of one Harihar Prasad. He died, leaving two sons, Jagadanand Das and Shamanand Das, both of them being minors at the time.

The suit was instituted on the 28th March 1892 by Jagadanand Das against the mortgagor, Baid Nath Das, for recovery of the money covered by the mortgage bond, and he asked that the sum due might be realized by sale of the mortgage property, and he further prayed that, in the event of the mortgage property being found insufficient to liquidate the entire amount, the balance might be recovered from the defendant personally and from his other properties.

We should here mention that Jagadanand Das, who was the elder of the two brothers, stated in his plaint that he was the sole heir of his father, and that he had taken out a certificate of heirship in order to enable him to collect the debts due to his father's estate.

The defendant in his written statement pleaded that the suit was not maintainable, because the plaintiff had not joined his brother as co-plaintiff in the suit, and that the interest sought to be recovered by the plaintiff, namely at the rate of Rs. 3-2, was a penalty, and could not therefore be allowed. He further set up a custom that prevailed in his family, under which he alleged no member of the family was entitled to mortgage the family property.

It appears that pending this suit Jagadanand Das died on the 18th August 1892. Thereupon, his brother Shamanand Das, who was still a minor, through his mother and guardian, asked to be substituted as a plaintiff in the place of his deceased brother. Some other persons, who are half brothers of Harihar Prasad, also applied to be made plaintiffs in the suit, but it is sufficient to dismiss their application by stating that the Court below held that it was beyond time, and therefore it could not be acceded to. So far as Shamanand Das was concerned the Subordinate Judge allowed him to be substituted as plaintiff in the case in the place of his brother Jagadanand Das, he being of opinion that, being a

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minor, his (Shamanand's) application was not barred by the Law of Limitation.

The Subordinate Judge, upon the case coming up for trial, dealt with the contentions that were then raised before him, and he states that the contentions were—*first*, that the plaintiff Shamanand was not a minor; *secondly*, that the rule of primogeniture prevailing in defendants' family was a bar to the sale of the mortgaged property; and, *thirdly*, that without a certificate under the Succession Act, the plaintiff was not entitled to a decree. He negatived all these objections, and held that the plaintiff was entitled to a decree charging the mortgaged property for the satisfaction of his claim, but that the personal relief claimed in the plaint against the defendant could not be allowed, as it was barred by the Law of Limitation. In regard to the question of interest that was raised before him, the Subordinate Judge held that the plaintiff was entitled to claim interest upon the principal only at the rate of Re. 1-4 as agreed upon, and not the higher interest of Rs. 3-2, but that he could recover interest at that rate upon the interest accruing upon the principal, that is to say, that he was entitled to compound interest at the higher rate of Rs. 3-2 mentioned in the bond. We observe, however, that the decree that was drawn up under the signature of the Subordinate Judge allows interest at the higher rate upon the principal from the date of the institution of the suit.

Against this decree the defendant has preferred this appeal.

The first point that has been discussed before us by the learned Vakil for the appellant is that Jagadanand Das, the original plaintiff, was not entitled to sue without joining his brother, Shamanand Das.

As to this matter, it is sufficient to say that, though it was raised in the written statement, it was not insisted upon at the trial before the Subordinate Judge, nor has it been raised in the petition of appeal presented to this Court. It raises simply a question of non-joinder of parties, but it does not really affect the merits of the case, more particularly when upon the death of Jagadanand Das, Shamanand Das has been substituted as plaintiff in his place, and the suit has been allowed to proceed at his instance.

The next ground that has been raised before us on behalf of the appellant is that the plaintiff was not entitled to get a decree without a certificate of succession as provided by section 4 of the Succession Certificate Act.

As to this matter, it appears that, although a decree was asked for by the plaintiff both against the mortgaged property and against the debtor personally, still the only decree that was pronounced by the Court below was a decree against the mortgaged property. No relief was granted against the defendant personally. Section 4 of the Succession Certificate Act VII of 1889 provides:

"No Court shall—

(*a*) Pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof; or (*b*) proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt;" and so on.

The question here is whether the decree that has been passed by the lower Court is a decree against "the debtor for payment of his debt." This question seems to have been considered in two cases before this Court. In the case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1), where the question was raised with reference to the language of section 2 of Act XXVII of 1860, Wilson, J., in delivering the judgment of the Court, observed as follows: "The words of the section are that 'no debtor of any deceased person shall be compelled in any Court to pay his debt to any person' without a certificate. It seems to me that this is limited to suits against a 'debtor,' and can have no application to a suit against a purchaser of a mortgaged property, who is in no sense a debtor; *secondly*, it seems to me that the words are limited to cases in which a Court is asked to 'compel a debtor to pay,' that is to say, to make a personal decree against the debtor. To me it seems to have no application to a suit such as the present."

The Act which the learned Judges had then to consider was no doubt an Act different from that with which we are concerned in

(1) I. L. R., 15 Calc., 54.

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the present case; but it will be observed that the language of section 2 of Act XXVII of 1860, so far as the question which arises in this case is concerned, is very similar to the provisions of section 4 of the Succession Certificate Act.

In a more recent case, *Kanchan Modi* v. *Baij Nath Singh* (1) where the question as to the construction of section 4 of the Succession Certificate Act came to be discussed, this Court observed as follows:—

"Section 4 says: 'No Court shall pass a decree against a debtor for payment of his debt,' and so on. A mortgagee might ask for a decree against the person of the debtor, but the Court is not bound to make a personal decree; it might, if the facts permit, make a decree only against the property mortgaged by the defendant; and in the circumstances of the present case it was quite open to the Court of first instance—in fact, it was its duty—to refrain from making a personal decree and to pass a decree charging the property in the hands of the defendants, second party, for satisfaction of the claim of the plaintiffs. The relief that the plaintiffs asked for in the suit was not for recovery of the debt, but as observed by Sir Barnes Peacock in the Full Bench decision in *Sarwar Hossein Khan* v. *Gholam Mahomed* (2), it was a suit for the recovery of an interest in immoveable property. The question that the learned Judges had to decide in that case was no doubt a different question. It was one of limitation, but we take it, as it has always been understood in this Court, that a suit to enforce a charge against immoveable property is a suit for the recovery of an interest in immoveable property; and if that be the correct view to take, it seems to be obvious that the plaintiffs were entitled, notwithstanding the absence of a certificate under the Succession Certificate Act, to sustain the decree that had been pronounced in their favour by the Court of first instance, that being a decree charging the immoveable property in the hands of the second party defendants."

There, no doubt, no personal relief was asked for against the mortgagor, and the decree that was allowed by the Court below was a decree against the mortgaged property in the hands of the

(1) I. L. R., 19 Calc., 336. (2) B. L. R., Sup. Vol., 879; 9 W. R., 170.

assignee of the mortgaged premises, but still the question that we have to decide in this case came, though incidentally, to be considered by the Judges who dealt with that case.

In the case of *Janki Ballav Sen* v. *Hafiz Mahomed Ali Khan* (1) a somewhat different view seems to have been adopted ; but it will be observed upon a consideration of that case that the precise question which we have to decide in the present case was not then discussed.

In the present case, no decree was passed by the Court below against the debtor personally, and the only relief that has been granted by that Court to the plaintiff is a relief against the property mortgaged ; and though no doubt the property is liable to be sold only in the event of the defendant failing to pay the money due under the mortgage by the time fixed by the Court, it could hardly be said that that is a decree against the debtor for payment of his debt, properly so called. We are inclined to think that the construction put upon the words of section 2 of Act XXVII of 1860, which are in effect very similar to section 4 of the Succession Certificate Act, by Wilson, J., in the case to which we have already referred, is the right construction, and may be adopted in the present case.

There was another view which was presented to us by the learned Vakil for the respondent with reference to section 4 of the Succession Certificate Act, and that is that it has no application to a case like the present where the original plaintiff had obtained a certificate under the Succession Certificate Act, and another person was, during the pendency of the suit, substituted in his place as the heir of the deceased plaintiff. It is perhaps not necessary, in the view that we have already expressed, to decide this question, but it seems to us that it is extremely doubtful whether the Legislature ever intended that this section should apply, not only to a case where a person claims to recover money under the title of succession to the original creditor, but also to a case, where, upon the death of that person during the pendency of the suit, some other person is substituted in his place as plaintiff in the cause.

(1) I. L. R., 13 Calc., 47.

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We therefore overrule the contention of the defendant on this head.

The third objection that was raised before us was in regard to the interest allowed by the Court below. The words of the mortgage bond, so far as they bear upon this matter, are as follows:—

"I will pay interest for the said amount at the rate of Re. 1-4 per cent. *per mensem*. And at the end of a year, *i.e.*, 365 days, from the date of the mortgage bond, I will pay the whole amount of interest due on the principal for that year. If I do not pay the interest in this way at the end of each year, I will be guilty of neglect. You will by instituting suit realize interest upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the mortgage bond at the rate of Rs. 3-2 per cent *per mensem*, from the mortgaged property and from me and from my heirs, assigns and representatives and from my other properties. I will continue to pay interest upon the principal for every year from the date of the mortgage bond at the end of that year as long as the amount of the mortgage bond is not paid. In default of payment you will act according to the condition stated above. I will repay this money within three months from date and redeem the mortgaged property and mortgage bond. I will get the payments of interest or of principal endorsed (as often they will be made) on the back of the mortgage bond. I will take no separate receipt or releases, nor will produce any (in evidence.) If produced they will be at once rejected by the Court as inadmissible. If I fail to pay up the principal money within the said specified time I will continue to pay up interest upon the principal at the rate of Re. 1-4 per cent according to the said stipulation in the bond up to the date of the institution of the suit, and from the date of institution of the suit to that of the decree, and from the date of the decree to that of the realization of the amount."

As already mentioned, the Court below has held that the plaintiff is not entitled to recover the higher rate of interest, namely, Rs. 3-2, upon the principal amount, but that he is entitled to such interest upon the interest accruing year after year. The question whether the mortgagee has a right to compound interest

at the higher rate of Rs. 3-2 is not free from difficulty, but having regard to the judgment of a Full Bench of this Court in the case of *Kala Chand Koyal* v. *Shib Chunder Roy* (1) delivered by Pigot, J., we think that the plaintiff is not entitled to this higher rate of interest, it being in the nature of a penalty within the meaning of section 74 of the Contract Act. In that case, the provision in the bond was that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at a higher rate from the date of the bond up to date of realization ; and the question that was discussed was whether this provision amounts to a provision in the nature of a penalty such as under section 74 of the Contract Act could not be enforced. The majority of the Court followed the decision of this Court in the case of *Mackintosh* v. *Crow* (2), and held that the said provision amounted to a stipulation for payment of a penalty, and therefore it could not be given effect to. The learned Judges had, in deciding that case, to consider the correctness of another judgment of this Court, namely, in the case of *Baij Nath Singh* v. *Shah Ali Hossein* (3), and Pigot, J., with reference to this case and to a case decided by the Madras High Court, made the following observations :—

"I think that the objection made in the judgment in *Baij Nath Singh* v. *Shah Ali Hossein*, (3) that cases such as the present do not come within section 74 of the Contract Act, because no sum is named, is not one to which effect ought to be given. By the fixing of a rate of interest the sum to become payable, at any rate, as the Madras High Court says, at the time when default is made, is fixed, and this is what the section contemplates.

"Upon the second question I think that when the provision in the contract in question amounts to a provision for a penalty (or, which is the same thing, stipulates for a sum in case of breach within the meaning of section 74) that that goes to the whole sum which may accrue due under the provision, although it may be that by non-payment for an indefinite time the aggregate amount ultimately payable may greatly exceed the amount—the

(1) I. L. R., 19 Calc., 392. (2) I. L. R., 9 Calc., 689.
(3) I. L. R., 14 Calc., 248.

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fixed and ascertainable amount—to be due at time of default. I think they cannot be separated, and that section 74 applies to all, that is, that it applies to the money claimed at the increased rate of interest from the date of the bond until realization."

These last observations were made especially with reference to the question that was raised in the case, whether the plaintiff could not recover the higher rate of interest from and after the due date, and it was held that the provision as to the increased interest was a provision which could not be separated, and that therefore section 74 of the Contract Act applied both to the period before the due date as also to the period subsequent thereto.

It was contended before us by the learned Vakil for the respondent, relying upon certain observations of this Court in the case of *Mangniram Marwari* v. *Rajpati Koeri* (1) that section 74 of the Contract Act had no application to this case, because no sum was named as the amount to be paid in the event of a breach of the contract to pay; that the amount would vary with the time for which payment was withheld; and that, with regard to compound interest, there was but one rate stipulated, *viz.*, Rs. 3-2, and that therefore it could not be regarded as a penalty. We observe, however, that the first portion of this argument, as we understand it, is the same that was used by Mitter, J., in the case of *Baij Nath Singh* v. *Shah Ali Hossein*, but it does not seem to have been accepted as correct by the majority of the Judges who composed the Full Bench in the case of *Kala Chand Koyal* v. *Shib Chunder Roy*. They rather adopted the view of the law that was expressed by the Madras High Court in the case of *Nanjappa* v. *Nanjappa* (2). The learned Judges in that case, with reference to this question, observed as follows:—

"It is said there is in the present case *no sum named* within the meaning of section 74 of the Contract Act, and that therefore that section is not applicable. To that argument we would reply, that, though no sum is named in rupees, the extra sum payable is fixed and ascertainable before hand or at any rate at the time when default is made. To hold that more than this is required, and that it is necessary that the exact sum should be mentioned in the

(1) I. L. R., 20 Calc., 366. (2) I. L. R., 12 Mad., 161.

bond, is in our judgment to countenance an easy mode of avoiding the effect of the section altogether."

We may add with reference to the case of *Mangniram Marwari* v. *Rajpati Koeri,* which was relied upon by the learned Vakil for the respondent, that the terms of the bond which the learned Judges were then called upon to consider are not identical with the terms of the bond in the present case.

It will be observed that the stipulation between the parties was that the interest would be payable at the end of each year, and that in default of payment of such interest at the rate of Re. 1-4 per cent *per mensem ;* the mortgagor should have to pay compound interest at the increased rate of Rs. 3-2 per cent. *per mensem* ; and that in default of payment of interest at the end of each year the creditor would be entitled to sue for the interest at the increased rate. So that, although no sum was named in the mortgage itself as would be payable upon a breach of the covenant on the part of the mortgagor, still the amount which the mortgagee would be entitled to recover from the mortgagor in the event of default of payment of interest at the end of each year was at once ascertainable, and in this view of the matter we think that the provision with which we are concerned falls within the scope of section 74 of the Contract Act; and we do not see it is possible to divide this provision into two parts, one of the parts being applicable to the principal, and the other part to the interest. The whole provision, as it seems to us, was one entire provision in the nature of a penalty which the mortgagor incurred in the event of default on his part to pay the stipulated interest at the end of each year ; and though in regard to compound interest there is but one rate (Rs. 3-2) mentioned, it is a rate higher than that at which interest was payable, if there was no breach of the covenant, and in this sense may well be regarded as a penalty.

Upon these grounds we are of opinion that the mortgagee is not entitled to enforce the penal provision in the mortgage bond as regards the higher rate of interest.

While, therefore, we think that the decree of the Court below should in the main be confirmed, we are of opinion that it should

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be modified so as to allow the plaintiff to recover interest at the rate of Rs. 1-4 per cent. *per mensem* upon the principal from the date of the bond to the date of realization, as also compound interest at the same rate; and we direct that a decree be drawn up in accordance with this declaration in terms of the Transfer of Property Act. Costs in proportion.

J. V. W. *Decree modified.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

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July 20.

CHHATRADHARI SINGH (DEFENDANT), AND ON HIS DEATH HIS SON AND HEIR KUNJ BEHARY SINGH *v.* SARASWATI KUMARI (PLAINTIFF.)*

Ghatwali Tenure—Right of succession to ghatwali tenure in Beerbhoom—Regulation XXIX of 1814, section 2—"Descendants," Meaning of—Impartible property—Separate property—Hindu law, Mitakshara.

Ghatwali tenures in Beerbhoom are tenures to be held in perpetuity and are descendible from generation to generation subject to certain conditions and obligations, and it would be inconsistent with the true character of these tenures to hold that the Legislature intended that they should devolve on issue of the body only, and not on heirs generally according to the law which may govern such succession. The word "descendants" therefore in section 2 of Bengal Regulation XXIX of 1814 is not to be construed in its restricted meaning, but includes the widow of a deceased *ghatwal*, who may therefore be one of his heirs. *Lall Dharee Roy* v. *Brojo Lall Singh* (1), and *Kustooree Koomaree* v. *Monohur Deo* (2) referred to.

Where a *ghatwali* tenure was admittedly impartible and governed by Mitakshara law, and the only heirs were the widow and the brother of the late *ghatwal*, *Held* (it being found on the evidence that the brothers had separated and that the *ghatwali* tenure was the exclusive property of the late *ghatwal*), that his widow was his heiress according to Mitakshara law.

Although, according to the decision of the Privy Council in *Chintaman Singh* v. *Nowlukho Kooncari* (3), impartible property is not necessarily separate property, yet, *Semble* that with reference to the peculiar character of *ghatwali* tenures as described in Regulation XXIX of 1814, they were intended to be the exclusive property of the *ghatwal* for the time being, and not joint family property in the proper sense of the term.

* Appeal from Original Decree No. 132 of 1893, against the decree of W. H. Smith, Esq., Sub-divisional Officer and Subordinate Judge of Deoghar in Zillah Sonthal Pergunnahs, dated the 15th of February 1893.

(1) 10 W. R., 401. (2) W. R. Gap. No. (1864) 39.
(3) I. L. R., 1 Calc., 153; 13 W. R., P. C., 21.