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August 14.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

BHIKHAN KHAN AND ANOTHER (PLAINTIFFS) *v.* RATAN KUAR (DEFENDANT).*

Act XVIII of 1873 (*North-Western Provinces' Rent Act*), *ss.* 31, 34, 35, 93, 206, 207—*Act XIX of* 1873 (*North-Western Provinces' Land Revenue Act*), *s.* 3, *cl.* 8—*Co-sharer—Lambardar—Suit for Profits—Jurisdiction—Civil Court—Revenue Court—Profits when due—Limitation.*

Held, by the Division Bench, following the ruling of the majority of the Full Bench in *Ashraf-un-nissa* v. *Umrao Begam* (1), that a suit by a co-sharer in an undivided mahal against the heir of a deceased lambardar for his share of profits collected by the lambardar before his death is a suit cognizable not by a Civil Court but by a Court of Revenue.

Per STUART, C.J.—Observations on the application of ss. 206 and 207 of Act XVIII of 1873.

Held, by the majority of the Full Bench, that the share of a co-sharer in an undivided mahal of the profits of the mahal for any agricultural year are due to him from the lambardar as soon as, after the payment of Government revenue and

* Special Appeal, No. 1256 of 1875, from a decree of G. H. Lawrence, Esq., Judge of Aligarh, dated the 2nd September, 1875, affirming a decree of Maulvi Sami-ul-la Khan, Subordinate Judge of Aligarh, dated the 27th November, 1874.

(1) This is an unreported case which arose out of a reference to the High Court under s. 205 of Act XVIII of 1873. The suit was one by a co-sharer in a mahal to recover the profits due on her share for the years 1279 and 1280 fasli, from the heir of the lambardar who made the collections for those years and subsequently died. It was instituted under s. 93, cl. (*h*), Act XVIII of 1873.

The reference was made in view of the case of *Mata Deen* v. *Chundee Deen*, H. C. R., N.-W. P., 1870, p. 54, and of *Mata Deen Doobey* v. *Chundee Deen Doobey*, H. C. R., N.-W. P., 1874, p. 118.

The Division Court (TURNER and SPANKIE, JJ.) before which the reference came referred it to the Full Bench, the order of reference being as follows:

It appears to us, and indeed has been held by us on former occasions, that—(*a*) the heir of a deceased lambardar succeeds to the cause of action and must sue in the Revenue Court—(*b*) the heir of a deceased lambardar is liable for debts of the deceased if he has inherited assets, and therefore the suit is not a suit for profits, although incidentally the amount of the share of the profits claimed must be determined. As our views on the first question are opposed to a recent decision, we refer this reference to a Full Bench for disposal.

PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion:

When the cause of action survives, the nature of a suit is not changed by reason that the plaintiff or defendant is not the person to or against whom the cause of action has accrued but his legal representative; and this being so, it would seem to follow that, where a special Court has been constituted for the trial of suits of a particular nature, the Court has cognizance of suits of that nature, whether they be brought against the person to or against whom the cause of action accrued or his legal representative.

Thus, in the case out of which this reference has arisen, if the suit has been brought against the defendant as the legal representative of the deceased, it cannot be argued that, except in the circumstance that the representative is sued instead of the deceased, there is any feature in the suit other than would have been present had the suit been brought in the lifetime of the deceased.

village-expenses, there is a divisible surplus in the hands of the lambardar, unless by agreement or custom a date is fixed for taking the accounts and dividing the profits, in which case any divisible surplus which may have accrued prior to that date is due on that date, and the divisible profits in respect of any arrears which may be collected after that date are due when they reach the hands of the lambardar or his agent.

Held, per STUART, C. J. and SPANKIE, J.—That where by agreement or custom there is no date fixed for dividing such profits, the share of a co-sharer becomes due on the last day of the agricultural year as fixed by Acts XVIII and XIX of 1873.

THIS was a suit for a share of the profits of a mahal for 1278 fasli, instituted in the Court of the Subordinate Judge on the 29th June, 1874. The plaintiffs, who were co-sharers in the mahal, alleged that the profits for that year had been collected by Bulaki Das, a co-sharer and lambardar, that their share of these profits became due and payable on the 1st July, 1871, but had not been paid to them, and they sued the widow of Bulaki Das, who was his heir and in possession of his estate, for the share. The defendant set up as a defence, among other matters, that the suit was, under s. 93 of Act XVIII of 1873, cognizable by a Court of Revenue, and that, as the profits for the year 1278 fasli became due, not on the

The circumstance that a legal representative is substituted for one of the parties is an accident to rather than a property of the suit. Of course, when a legal representative appears as defendant, the decree cannot be executed against him personally, but only against the estate of the deceased.

If, however, a claim be brought, not against the legal representative to obtain relief out of the estate of the deceased, but against an heir or stranger, on the ground that he has taken and converted to his own use assets of the deceased, and so rendered himself personally liable for the debts of the deceased, the suit is not a mere suit for profits, but a suit which differs in an essential point from the suit which would have been brought against the deceased had he survived; a liability has been created by the act of the heir or stranger attaching to such heir or stranger personally, and on that liability the right of suit is founded. If then a suit be brought against an heir or stranger, to recover from him personally a debt due to the plaintiff in respect of his profits as co-sharer on the ground that the defendant has intermeddled with the estate of the person who collected the profits, the suit lies, not in the Revenue, but in the Civil Court.

STUART, C. J.—I concur in the last case suggested in the above answer, but I cannot accept as law what is laid down in the first part of it; and generally I remain of the opinion explained in my judgment in *Mata Deen Doobey* v. *Chundee Deen Doobey*, in our Reports for 1874, page 118. The heir of a deceased lambardar may succeed to the cause of action, or rather to the subject-matter of the cause of action, but it does not therefore follow that the heir can sue in the Revenue Court. That which is here called a cause of action is really a right to recover a portion of the deceased's estate, and can only be sued for in a Civil Court. Again, the circumstance that a legal representative is substituted for a deceased party may be an accident rather than a property of the suit, but it is an accident, in my opinion, which determines the *forum* where the suit may be prosecuted to decree.

I have only to add that Act XVIII of 1873 does not affect the question submitted to us, the principle, so far as the legal position of the heir is concerned, being the same as under Act XIV of 1863.

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1st July, 1871, but on the 3rd June, 1871, when that agricultural year ended, the suit was barred by limitation, not having been brought within three years from the latter date. The Court of first instance held that the suit was cognizable by a Civil Court, but dismissed it on the ground that it was barred by limitation, not having been instituted within three years from the 3rd of June, 1871, the end of 1278 fasli (1), or setting that date aside and considering that that year ended on the 15th June, 1871, the last day of payment of the last instalment of Government revenue, within three years of such latter date. The plaintiffs appealed contending that the suit was governed by art. 118, sch. ii, Act IX of 1871, and the period of limitation was consequently six years. The lower appellate Court, without deciding whether the suit was cognizable by a Civil Court or a Revenue Court, held that the period of limitation applicable to it was that prescribed in s. 94 of Act XVIII of 1873, *viz.*, three years, and that it was barred by limitation not having been instituted within three years from the last day of Jait 1278 fasli, that is to say, the 3rd of June, 1871.

The plaintiffs appealed to the High Court, contending that the suit being cognizable by a Civil Court the period of limitation applicable to it was that laid down in art 118, sch. ii of Act IX of 1871, and not that in s. 94 of Act XVIII of 1873, and that even if the period of limitation applicable was three years and such period was computed from the end of 1278 fasli, that year did not end on the 3rd June, 1871, but on the 30th June, 1871, and the suit was within time. The respondent objected, under s. 348 of Act VIII of 1859, that the suit was cognizable by a Court of Revenue.

Stuart, C.J. and Pearson, J., before whom the appeal came on for hearing, referred to a Full Bench the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal, is to be ascertained.

The orders of reference were as follows :

PEARSON, J.—A recent ruling of the Full Bench of this Court (2) has declared a suit of the nature of the present to be cognizable by

(1) According to the official calendar the year 1278 fasli did not end till the 28th September, 1871.

(2) See p. 512, note (1).

the Revenue and not by the Civil Courts. We must therefore, in pursuance of that ruling, admit the validity of the objection urged by the respondent, under s. 348 of Act VIII of 1859, to the extent that the Subordinate Judge was incompetent to take cognizance of the suit. The lower appellate Court was, however, warranted in disposing of the appeal preferred to it by the provision of s. 207 of the new Rent Act; and, under that or the following section, we are also bound to deal with the appeal before us. The first plea fails in reference to the ruling above-mentioned.

The question raised by the second plea next presents itself for consideration. By s. 94 of the Act above-mentioned a suit for a share of the profits of a mahal must be brought within three years from the day on which the share became due. But the law does not fix the day on which the share becomes due. It may be fair and reasonable to hold that it becomes due on the last day of Jait of the fasli year; but it would be not less fair and reasonable to hold the last day of the agricultural year, as defined in Act XIX of 1873, to be the day from which the period of limitation should run. Again, it might be held that when by agreement or by custom a particular day had been fixed for the distribution of profits in any mahal, or for a settlement of accounts, the time should run from such day. But where no such day has been fixed by agreement or custom, there would still be room for doubt. I would refer the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal is to be ascertained, to a Full Bench.

STUART, C.J.—The ruling of the Full Bench referred to by Mr. Justice Pearson was strongly dissented from and is still strongly dissented from by me as matter of law. But if not only in this suit but in all other similar cases I am absolutely bound by that ruling, then of course I must hold that the respondent's objection is well founded; and it was taken in the Court of first instance, s. 207 of the Rent Act therefore strictly applies.

That section is in the following terms: "If in any such suit such objection was taken in the Court of first instance, but the appellate Court has before it all the materials necessary for the determination of the suit, it shall dispose of the appeal as if the suit had been instituted in the right Court." The nature of the suit

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here referred to and the objection are described in s. 206 which is as follows: "In all suits instituted in any Civil or Revenue Court, in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, but the appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court." It thus appears that "the suit" and "the objection" are the same in both sections, but the manner in which the objection is to be treated is very different. S. 206 applies, by implication, where the objection had not been taken in the Court of first instance, and goes on to provide that the objection shall not be entertained, *i.e.*, shall not be looked at, shall not be taken cognizance of, or in any way noticed, but shall be altogether disregarded, and the appeal shall proceed as if the objection had never been taken at all; and, therefore, where, as in the present case, the suit had been instituted in the Civil Court, that Court shall be deemed the right Court, that is s. 206. S. 207, as I have stated, applies where the objection has been taken in the Court of first instance, and where, by implication, the objection has been entertained and allowed, and it goes on to provide for the case where the appellate Court has before it all the materials necessary for the determination of the suit, in which case the appellate Court "shall dispose of the appeal as if the suit had been instituted in the right Court," which, in the present case, must be understood to be the Revenue Court, and of course according to revenue law. That being so, the limitation of three years prescribed by s. 94 of the Rent Act of course governs. But I share the doubt and difficulty expressed by Mr. Justice Pearson respecting the date from which the limitation is to run. On this subject I concur in the reference to the Full Bench proposed by Mr. Justice Pearson.

Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellants.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

The Full Bench delivered the following judgments:

PEARSON, TURNER, and OLDFIELD, JJ. concurring.—The lambardar collecting rents on account of himself and the other co-

sharers in a revenue paying mahal is entitled to apply the collections, firstly, to the payment of Government revenue and village-expenses, and then, after deducting what (if anything) is due to himself as *haq lambardari*, is bound to divide surplus collections among the several co-sharers in proportion to their shares. Ordinarily then profits are due as soon as there is a divisible surplus in the hands of the lambardar. But it not unfrequently happens that by agreement or custom a date is fixed for taking the accounts and dividing the profits; in this case any divisible surplus which may have accrued prior to that date is due on the date so fixed, and the divisible profits in respect of any arrears which may be collected after that date are due at the time they reach the hands of the lambardar or his agent.

SPANKIE, J.—The share, it appears to me, becomes due at the end of the agricultural year, when the rents have been collected and the Government revenue has been paid. The village-accounts should then be made up. Probably custom or agreement between the shareholders regulates the practice. A Court dealing with a question of this nature should ascertain whether there is any custom or agreement between the shareholders to which it might refer for the determination of the date from which limitation should run. Where there is no custom or agreement the safest guide would be the end of the agricultural year as defined in cl. 8, s. 3 of Act XIX of 1873, that is to say, the thirtieth day of June. This also is the date fixed in the Rent Act as the day upon which the agricultural year expires; *vide* ss. 31, 34, and 35 of Act XVIII of 1873. It may be said that the lambardar may not have been able to collect the rents and that there are no profits to distribute, or that each share is less than the shareholder is ordinarily entitled to receive. In such a case the share would still be due at the close of the agricultural year on the assumption that the rents have been collected, and it would be for the lambardar to show that there were no profits, and that he had exercised all due diligence as lambardar and trustee for the sharers in collecting the rents and income of the estate. So in all disputes between co-sharers, whatever might be the nature of the defence, the share would become due at the expiration of the agricultural year. I would therefore say that where no custom is found to exist regulating the practice, or where there is no agree-

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ment between the shareholders on the point, the share becomes due on the 30th June in each year.

STUART, C. J.—I concur substantially in the opinion of Mr. Justice Spankie. I observe in the case that was before Mr. Justice Turner and myself in April of last year, *Girdhari Lal* v. *Lahori* (1), Special Appeal, No. 1336 of 1875, in which we made a remand, we expressed the opinion that the limitation of three years ran "from the date when the profits became payable," or otherwise, as we go on to explain, "in the absence of any custom or agreement to the contrary, profits become due from the time when they reach the lambardar's hands", which I suppose must be taken to be at the end of the agricultural year, that is, in this case, on the 30th of June of each year. But it might be well to inquire whether there is any custom or agreement on the subject in the district of Aligarh where the property here in suit is situated.

FULL BENCH

1877
December 3.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

ALTAF ALI (JUDGMENT-DEBTOR) *v.* LALJI MAL AND ANOTHER (DECREE-HOLDERS).*

Trespass on Land—Mesne Profits.

Held, by the majority of the Full Bench, that a trespasser on the land of another should, in estimating the mesne profits which the owner of the land is entitled to recover from him, be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered or continued on the land in the exercise of a *bonâ fide* claim of right, but where he has entered or continued on the land without any *bonâ fide* belief that he was entitled so to do, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground-rent.

Per STUART, C.J.—Whether such trespasser is a trespasser *bonâ fide* or not, he should be allowed such costs.

THIS was an application to recover in execution of a decree the mesne profits of certain villages accruing between the date of the decree and the date on which possession of the villages was obtain-

* Miscellaneous Regular Appeal, No. 62 of 1876, from an order of Rai Bakhtawar Singh, Subordinate Judge of Bareilly, dated the 2nd August, 1876.

(1) Unreported.