BEFORE A FULL BENCH

1876
February 25

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

UDAI SINGH (PLAINTIFF) *v.* JAGAN NATH (DEFENDANT)*

Lambardár—Co-sharer—Profits—Revenue—Set-off

Held (SPANKIE, J. dissenting), that a lambardár, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharers, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment.

This was an appeal to the Full Bench, under cl. 10 of the Letters Patent, against a judgment of Pearson, J. from which Spankie, J. dissented.

The facts of the case which are material appear in the judgments of the learned Judges.

PEARSON, J.—The first plea in appeal appears to be valid. The defendant is the lambardár of the mahál of which the plaintiff is a co-sharer. The jama of the mahál was fixed by Mr. Lowe at Rs. 1,488-12-0. Mr. Currie reduced it to Rs. 1,275 from 1272 fasli. In 1278 fasli the Government disallowed the reduction, and directed the difference to be recovered for the previous six years. The amount was made good by the defendant in 1281 fasli, and it cannot be denied that he would be entitled, if he had paid it out of his own pocket, to recover from the plaintiff a sum proportionate to his share in the mahál. In the present suit the plaintiff claims Rs. 384-14-0 as arrears of profits due to him for 1278, 1279, and 1280 fasli. The defendant answers that he has paid the amount claimed to the Government in payment of the demand above-mentioned, and that it is less than what is due from the plaintiff on that account. The lower Courts have held this defence to be insufficient. They think that he was not justified in applying in 1281 fasli profits which were due to plaintiff before that time, and without first calling on the plaintiff to pay his share of the Government demand; and that the proper course to be taken was to have brought a suit against the

* Appeal under clause 10 of the Letters Patent, No. 7 of 1875.

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plaintiff for his share of the Government demand, in the event of his refusing to pay it on demand.

The opinion of the lower Courts is not well-founded in reason or equity. When the defendant was required to pay to the Government an amount for which the plaintiff was jointly responsible, the former had in his hands a balance remaining out of the collections of 1278, 1279, and 1280—a balance which, after payment of the Government revenue and village expenses, would have been divisible as profits among the co-sharers of the mahál. But it was no breach of trust or breach of duty on his part to use that balance in paying the demand of Government for the arrears of revenue on account of the six years previous to 1278. There was nothing illegitimate in the course adopted by him; and it seems unreasonable to insist that he should have paid to his co-sharers the profits which would doubtless otherwise have been due to them, and that he should have paid the demand of the Government out of his own pocket, and sued them for contribution. For the moneys claimed he has accounted most satisfactorily, and it may well be presumed that they were reserved during the years to which the suit refers for the purpose to which they have been applied.

The answer made to the suit being good and sufficient, the suit should have been dismissed. The appeal is therefore decreed by reversal of the lower Courts' decrees, with costs in all the Courts.

SPANKIE, J.—I am sorry that I cannot accept the proposed judgment of my honourable colleague.

The judgments of the lower Courts appear to me to be correct on the point regarding which I differ from Mr. Justice Pearson. In the present case the order for payment of the enhanced jama had been made in 1278 fasli (1), but it had not been complied with by the appellant, the lambardár, until February and March, 1874; and in case No. 368, which is a similar one to case No. 369 now before me, the lambardár had not made his second payment until May, 1874—that is to say, not until after the institution of the suit. It is found in both cases that the defendant, appellant, had never called upon the plaintiffs to make good their quota of the enhanced jama from 1272 to 1278 fasli (2). Nor had he himself, as far as appears from

(1) Sept., 1870—Sept., 1871. (2) Sept., 1864—Sept., 1871.

the record, ever paid their portion or any portion of the sum claimed by Government for those six years from his own pocket—the first payment made by him in this case being on the 27th October, 1873, *i.e.*, Katik, 1281 fasli.

Now the plaintiff, respondent, claims profits on account of the years 1278, 1279, and 1280 fasli from the defendant, the lambardár, *i.e.*, whatever is due to him after payment of the Government revenue and village expenses. There is no dispute that his quota of the Government revenue on Mr. Currie's jama has been paid for those years, and what he claims is the profits of the three years, after deducting the Government revenue and village expenses. The accounts for each year should be closed and audited annually, and any sum remaining after the satisfaction of the Government jama and village expenses should be made over to the shareholders, and until distributed may be regarded as being in the hands of the lambardár in trust for the shareholders. He is not at liberty to appropriate them for any other particular purpose without authority from the shareholders. In these years 1278, 1279, and 1280 fasli the defendant, as lambardár, had not himself made any extra payment to Government. If he desired to make his co-sharers responsible for their quota of arrears of Government revenue which he had to pay, or expected that he might have to pay, he might have sued them for the amount under the Rent Act, or he should have taken such other steps, as the Civil Court or Revenue laws permitted him to take, for the recovery of the money, after he had been compelled to pay in 1281 fasli the difference between the jama of 1272 and that of 1278 fasli as settled by the Government. But he was not, in my judgment, at liberty to claim, in answer to this suit, from the plaintiff his share of the profits of 1278, 1279, and 1280 fasli, as a set-off (for it amounts to that), being his quota of the sum actually paid by the defendant on account of the revenue demanded by Government, and levied from him in 1281 fasli.

The Act under which the suit has been brought does not allow a set-off to be pleaded in any claim of this nature. The money which the plaintiff claims in this suit as due to him was withheld by the defendant, appellant, before he had been compelled to make any payment on account of the enhanced Government demand;

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and I do not think that the share for which the plaintiff may be responsible can be deducted in this suit from the amount of profits due to him on account of the three years for which he has instituted his claim. (The learned Judge then proceeded to determine the remaining pleas in appeal, but so much of the judgment, for the purposes of this report, is immaterial.)

The *Senior Government Pleader* (Lála *Juálá Parshád*) for the appellant—The lambardár can only deduct from the profits of a year the legitimate village expenses of that year. He is a trustee and agent for the co-sharers, and cannot dispose of the profits of a co-sharer accrued due to him without his consent. The respondent should bring a separate suit.

Pandit *Ajudhia Náth* (with him Babu *Oprokash Chandar*)—Multiplicity of suits is to be avoided. The respondent had the money in his hands, and paid it in satisfaction of the Government demand, which he was entitled to do. He should be allowed the payment.

STUART, C.J., and PEARSON, TURNER, and OLDFIELD, JJ., concurred in the following opinion :—

It appears that Mr. Currie as Collector allowed a reduction of the yearly revenue, subject, it may be presumed, to the sanction of Government. In 1278 fasli sanction was refused, and a demand was made on the respondent, the lambardár, who however did not pay the arrear due until 1281 fasli. Meanwhile he retained in his hands the profits of 1278 fasli, 1279 fasli, and 1280 fasli, and not improbably for the purpose of meeting the Government demand if pressed. In the suit out of which this appeal arises, the appellants, the pattidárs, sue the lambardár for their profits of the years 1278, 1279, and 1280; and he pleads that, out of the sums collected in these years and remaining in his hands, he has paid the arrears of revenue above-mentioned; and the question which principally calls for decision in this appeal is whether he is or is not entitled to be allowed this payment. We are of opinion that he is. The lambardár is, in this village, the agent of the co-sharers to make collections, and after payment of the revenue to divide the profits. An arrear of revenue was due to Government, and to discharge this arrear he was entitled to have recourse to the collections for the years 1278

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fasli, 1279 fasli, and 1280 fasli, remaining in his hands undivided. There is nothing in the revenue law which restricts a lambardár or other co-sharer, who may make collections, to discharge arrears of Government revenue out of the collections of the particular year in which the arrear may accrue. It would be at least inconvenient to hold that, having in his hands profits to meet the Government demand, the respondent, instead of applying these profits to the discharge of the demand, should be driven to have resort to a suit against each co-sharer.

SPANKIE, J.—I adhere to the opinion expressed in my judgment of the 8th June, 1875. Nothing that I have heard leads me to think that my view is incorrect.

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February 19.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

IN THE MATTER OF HARDEO.

Act X of 1872, s. 297—High Court—Powers of Revision—Judgment of Acquittal.

The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297, Act X of 1872. *Queen* v. *Bisheshar Pandey* (1) observed upon.

Per TURNER and SPANKIE, JJ.—Such powers can only be exercised where the judgment of acquittal has proceeded on an error of law and not where it has proceeded on an error of fact (2).

HARDEO was tried by the Court of Session on a charge under s. 471 (using as genuine a forged document), Indian Penal Code, and was acquitted by that Court, in accordance with the opinion of the assessors, the Court remarking that, as there was "such a serious amount of doubt as to the offence charged and so little prospect of a substituted charge being established, the accused ought not to be convicted." An application was made to the High Court on behalf of the persons who had instituted proceedings against him praying that the record of the case might be called for, and a new trial ordered, on the ground that the facts found by the

(1) H. C. R., N.-W. P., 1874, p. 357.

(2) So held in a case of conviction—*Petition of Belilios*, 12 B. L. R. 249. As to "material error," see 12 B. L. R. 253, foot-note.