CIVIL APPELLATE JURISDICTION.

1899
February 20.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Knox.

DEOCHARAN SINGH AND OTHERS (PLAINTIFFS) *v.* BENI PATHAK AND OTHERS (DEFENDANTS).*

Landholder and tenant—Act No. XII of 1881 *(N.-W. P. Rent Act), section* 189*—Appeal—"Rent payable by the tenant" not in issue.*

Certain defendants being sued by the zamindars for the rent of land held by them, pleaded in effect that, whatever the rent of the land in suit might be, they were entitled to retain it under an agreement between them and the predecessor in title of the plaintiffs in lieu of interest payable to them on account of a mortgage given by the said predecessor in title.

Held that the case was not one in which an appeal would lie to the District Judge under section 189 of the N.-W. P. Rent Act, inasmuch as the rent payable by the tenant was not in issue in the suit.

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Gobind Prasad*, for the appellants.

Mr. *Amiruddin*, for the respondents.

The judgment of the Court was delivered by STRACHEY, C.J.—The question in this appeal is whether Mr. Justice Dillon was right in holding that the plaintiffs had no right of appeal under section 189 of the N.-W. P. Rent Act, XII of 1881, from the decision of the Collector dismissing their suit on appeal from the Assistant Collector of the second class. Its solution depends on the exact nature of the matter in issue and decided in the suit, and this is not altogether easy to determine. The suit was in terms one for arrears of rent for three years, under section 93(*a*) of the Rent Act. The written statement of the defendants is not very clearly expressed. Its principal plea is thus stated:—"The rent of the land, in respect of which rent is claimed, has all along been enjoyed by the defendants' ancestor and subsequently by the defendants in lieu of interest under a mortgage deed of 23rd December 1886, executed by the former zamindar from the time of the execution of the said deed of mortgage. No zamindars of the mahal ever received or realized

*Appeal No. 23 of 1898 under section 10 of the Letters Patent.

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rent in respect of the said land. Hence, unless all the co-sharers in the mahal repay the mortgage debt and get the mortgage redeemed, no zamindar of the mahal can be competent to sue for arrears of rent." In another paragraph of the written statement the defendant pleaded that in two of the years to which the suit related "the mahal was joint. The plaintiffs alone are not competent to sue. There were also other sharers." The best construction which we are able to place upon the written statement is that the defendants, while not denying that the land in suit was held under the plaintiffs and their co-sharers as zamindars, pleaded that under a mortgage executed in favour of their ancestor by the plaintiffs' predecessor in title, they were entitled, until redemption of the mortgage, to apply, in satisfaction of the interest due, the money which they would otherwise have had to pay to the zamindars as rent. Although they stated that no zamindars of the mahal ever received or realized rent in respect of the land, they did not plead that the relation of landholder and tenant did not exist, or that, as no rent had been either fixed by agreement or determined by a Court, the suit under section 93(*a*) was not maintainable. Their case was, in substance, that while it was true that rent was to be paid on account of the holding of the land, that rent was, by a special agreement, not to be paid to the landholder but to be appropriated by themselves in lieu of interest due to them, the tenants, from the landholder upon a mortgage debt, until the landholder should redeem the mortgage. The mortgage had not yet been redeemed, and hence for years the rent had not been paid to the landholder. They raised no issue as to the rent payable, but pleaded that, whatever it might be, they were entitled to apply it in the manner which had been agreed.

So much for the pleadings. The Assistant Collector of the second class who tried the suit framed three issues: first, "is the mahal a joint mahal and are the plaintiffs competent to sue?" second, "are the defendants the tenants and are they liable to pay rent?" third, "has the rent been paid or is it in arrears?" Upon the second issue the Assistant Collector

apparently regarded the mortgage set up by the defendants as not sufficiently proved, saying in his judgment "it does not appear to me to be worth consideration." Relying mainly upon the settlement papers, in which there was no mention of the mortgage and in which the land was entered in the name of the defendants' ancestor as a tenant at fixed rates, and as bearing a rent of Rs. 3-$\frac{1}{2}$-10, he held that the defendants' liability to pay rent at that rate was established, and decreed the suit. Against his decision the defendants appealed to the Collector of the District under section 183 of the Rent Act. In their memorandum of appeal they again relied upon the mortgage, which they described as showing "that the rent of the land in suit, amounting to Rs. 115, has been mortgaged to the appellants in lieu of interest;" and again contended that "under the circumstances, unless a redemption of the mortgage is secured, no claim for arrears of rent can stand." That is how the case came before the Collector. His conclusion was thus stated: "I do not entertain any doubt that this mortgage really does exist, and that no agreement to pay rent, either at all, or at any particular rate, has so far been entered into between the parties." He accordingly allowed the appeal and dismissed the suit. His finding was in substance that the defendants held the land as mortgagees and not as tenants—a view which, whether right or wrong, was not that which the defendants themselves put forward in their pleadings. That is how the case stood when the plaintiffs appealed to the District Judge from the Collector's dismissal of their suit. The District Judge reversed the Collector's decision and decreed the suit on grounds which it is unnecessary to state. The question is, whether he was competent to entertain the appeal.

Under section 183 of the Rent Act the order of the Collector was, *primâ facie*, final. Notwithstanding that section, however, an appeal lay to the District Judge under section 189, if the suit was one in which the amount or value of the subject-matter exceeded Rs. 100, or in which the rent payable by the tenant had been a matter in issue and had been determined, or in which

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the proprietary title to land had been determined between parties making conflicting claims thereto. In the present case, the amount or value of the subject-matter was less than Rs. 100, and there was no question of conflicting claims to the proprietary title to land. Unless, therefore, it can be held that the rent payable by the tenant was a matter in issue and was determined, no appeal lay to the District Judge. The words in section 189—"the rent payable by the tenant—were inserted in the Rent Act by section 5 of Act XIV of 1886, and have been considered in several rulings of this Court. See *Radha Prasad Singh* v. *Pergash Rai* (1); *Radha Prasad Singh* v. *Mathura Chaube* (2); *Mohib Ali Khan* v. *Martin* (3); *Sarju Prasad* v. *Haidar Khan* (4). The effect of these rulings is that the words "the rent payable by the tenant" mean the rate of rent, and not merely the actual amount of money which is due at any given time by the tenant to the landlord as rent. Whether the rent payable by the tenant in this sense has been a matter in issue and has been determined, depends upon whether the determination of the question of rent is one which would affect and be binding on the parties as *res judicata*, not merely for a particular year, but for all succeeding years, so long as no change in their relations was made either by their own agreement or by the Act of a Court. The principle would exclude an appeal where the issue had been whether the whole or part of the rent payable had been paid or not. If, then, the defendants here had pleaded that they had paid the rent payable either in whole or in part, the ruling would obviously be applicable and would exclude an appeal under section 119. If their plea had been not payment but accord and satisfaction, the result would be the same. If it had been neither payment nor accord and satisfaction, but that, by virtue of an agreement between the parties, the defendants had set off against the rent otherwise payable by them, a sum payable to them by the plaintiffs, the same result would follow, as the rate of rent

(1) (1890) I. L. R., 13 All., 193.
(2) (1891) I. L. R., 14 All., 50.
(3) (1893) I. L. R., 16 All., 51
(4) Weekly Notes, 1896, p. 148.

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would not have been in issue. The issue in fact raised by the defendants was closely similar to this. They raised no question as to the rate of rent payable. Their plea was, in substance, that, whatever the rent payable might be, it was by virtue of a particular contract not to be paid in to the plaintiffs' hands, but appropriated in a special manner, namely, the discharge of the plaintiffs' liability to pay interest due under the mortgage. If the mortgagee had been a third person, the plea would obviously have been one of payment. As the mortgagee alleged to be entitled to interest was also the tenant from whom rent was claimed, it was in the nature of a set-off of the interest due against the rent repayable, and it impliedly admitted that whenever the rent payable ceased to be applicable by the defendants in satisfaction of the interest, the zamindars would be entitled to recover it. It is difficult to distinguish in principle such a plea from a plea that the rent payable in respect of the years in suit had been in effect paid or otherwise satisfied in full, and in this view of the case we think, having regard to the ruling, that the rent payable by the tenant was not a matter in issue, that the decision of Mr. Justice Dillon was right, and that this appeal must be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

1899
February 20

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Knox.

DONDH BAHADUR RAI AND OTHERS (PLAINTIFFS) *v.* TEK NARAIN RAI AND OTHERS (DEFENDANTS).*

Mortgage—Usufructuary mortgage—Suit for redemption—Non-payment at proper time of the whole mortgage money—Dismissal of suit—Second suit for redemption accompanied by payment in full—Res judicata - Act No IV of 1882 *(Transfer of Property Act) sections* 92, 93.

Held that a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage money at a time authorized by the deed, did not have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the

* Appeal No. 43 of 1898, under section 10 of the Letters Patent.