

APPELLATE CIVIL.

1904
February 13.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.*

ZAMIN ALI KHAN (PLAINTIFF) v. GENDA AND OTHERS

(DEFENDANTS).*

*Act No. II of 1901 (N.-W. P. Tenancy Act), sections 180 and 175—Appeal
—Jurisdiction—Letters Patent, section 10.*

Held that the words of section 180(2)(b) of the North-Western Provinces Tenancy Act, 1901:—"A question of jurisdiction has been decided" mean "decided by the Collector as an appellate Court." Where a question of jurisdiction had been decided by the Court of first instance (Assistant Collector), but was not raised before or decided by the appellate Court (Collector), it was *held* that no appeal would lie to the District Judge.

Held also that section 175 of the said Act has no effect upon the jurisdiction conferred by section 10 of the Letters Patent of the Court.

A suit to recover arrears of rent was instituted under the provisions of section 93 of Act No. XII of 1881 in the Court of an Assistant Collector of the second class. The suit was instituted on the 9th of May 1901, and its object was to recover the sum of Rs. 140 as rent of certain pasturage rights, which the plaintiff alleged to be due from the defendants under a sub-lease granted by him and accepted by them. In defence the defendants pleaded (1) that as the land in dispute was uncultivated it was "not governed by Act No. XII of 1881," and the suit was therefore not cognizable by a Revenue Court; and (2) that the plaintiff was not their lessor. They alleged that they were lessees under the zamindar and not sub-lessees under the plaintiff. In the Court of first instance the first issue fixed was that of jurisdiction. The Assistant Collector on this point found for the plaintiff, holding that the suit was cognizable by a Revenue Court. On the facts also he found for the plaintiff and decreed the claim on the 25th of October 1901. The defendants appealed. In their memorandum of appeal they again pleaded to the jurisdiction of the Revenue Court; but apparently when the appeal came up for hearing the question of jurisdiction was not argued, or was not pressed, before the Collector. The judgment of the Collector dealt only with questions of fact and made no mention of any plea as to jurisdiction. The Collector dismissed the appeal, and from his judgment an appeal was

* Appeal No. 45 of 1903 under section 10 of the Letters Patent.

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preferred to the District Judge under section 180, cl. (2) of the North-Western Provinces Tenancy Act of 1901. The question of jurisdiction was again raised, but, it seems, not pressed. The District Judge decided the appeal on the merits, and, reversing the appellate decree of the Collector, dismissed the plaintiff's suit with costs. The plaintiff preferred an appeal to the High Court urging that under the new Tenancy Act, which was in force when the appeal to the District Judge was filed, no appeal lay, no question of proprietary title or of jurisdiction having been decided by the Collector. This appeal came before a single Judge of the Court who dismissed it, holding that "the case clearly falls within the range of section 180 of the Tenancy Act of 1902 (?1901), and, the question of jurisdiction having been decided, an appeal did lie to the District Judge." The plaintiff thereupon appealed against this judgment under section 10 of the Letters Patent.

Mr. *G. W. Dillon*, for the appellant.

Mr. *Agarwala*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal under section 10 of our Letters Patent from a judgment of one of the learned Judges of this Court, passed on appeal from a decree of the learned District Judge of Aligarh, on appeal from a decree of the Collector of that district, affirming on appeal a decree of an Assistant Collector of the 2nd class in a suit to recover arrears of rent instituted under the provisions of section 93 of Act No. XII of 1881. The suit, which was one under clause (a) of the section just mentioned, was instituted on the 9th of May 1901, and its object was to recover the sum of Rs. 140 as rent of certain pasturage rights which the plaintiff alleged to be due from the defendants under a sub-lease granted by him and accepted by them. The suit was instituted in the Court of an Assistant Collector of the 2nd class who was then (1901) competent to hear it, but who since the passing of the N.-W. P. Tenancy Act, No. II of 1901, ceased to exercise, from January 1st, 1902, jurisdiction in such a suit where the subject-matter exceeded Rs. 100. In defence the defendants pleaded (1) that as the land in dispute was uncultivated, it was "not governed by Act No. XII of 1881;" the suit "is therefore not cognizable by the Revenue

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Court;" and (2) they denied that the plaintiff was a lessor of the land or that they held a sub-lease under him. They alleged that they were lessees under the zamindar and not sub-lessees under the plaintiff. In the Court of first instance the first issue fixed by the Assistant Collector raised the question of jurisdiction. Other issues were directed to the questions of fact mooted in the pleadings. On the first issue the Assistant Collector (giving full reasons for his decision) held that the suit *was* cognizable by a Revenue Court. On the facts he found for the plaintiff, and on October 25th, 1901, gave a decree for the amount claimed. The defendants appealed. In their memorandum of appeal they again pleaded to the jurisdiction of the Revenue Court to try the suit, and raised the same issues of fact as before the Court of first instance. The appeal lay to the Collector under section 183 of Act No. XII of 1881. It was presented on November 20th, 1901, and was dismissed on December 2nd, 1901. It would appear that the question of jurisdiction was not argued or was not pressed before the Collector. Probably the appellant's legal advisers considered it a hopeless plea. Anyhow the Collector in his appellate judgment did not notice it. His judgment is somewhat curt and deals only with the questions of fact. The judgment does not decide any question of jurisdiction. Now it is unquestionable that under section 189 of Act No. XII of 1881 the appellate decision of the Collector was open to appeal to the District Judge. But that Act was repealed as from January, 1902, the date on which the new Tenancy Act, No. II of 1901, came into force, and it was after that date, namely, on February 11th, 1902, that the defendants preferred an appeal to the District Judge from the appellate decree of the Collector. It is unnecessary for us to consider whether if that appeal had been preferred before January 1st, 1902, it would have been affected by section 6 of Act No. I of 1868—the General Clauses Act. The appeal to the District Judge was preferred after Act No. II of 1901 had come into force, and we are of opinion that though the appeal to the District Judge was preferred from a decree passed under the provisions of the repealed Rent Act, nevertheless, as it was instituted after the new Act came into force, we must refer to the new Statute to ascertain

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on what terms the latter permits an appeal from an appellate decree of a Collector. Those terms differ considerably from those provided in section 189 of the repealed Act and are much more limited. They [section 180, clause (2)] omit entirely the first and second clauses of section 189 of the former Act, and while retaining the third they modify its language not a little, and add a provision giving an appeal from the appellate decree of a Collector in suits in which in that appellate decree "a question of jurisdiction has been decided." The reason for the first of these omissions is clear. It is because an Assistant Collector of the 2nd class is no longer empowered to hear suits in which the value of the subject-matter exceeds Rs. 100. Why the second clause was omitted we cannot say.

Now, as an appeal from an appellate decree of a Collector can be admitted, under the new Act, only if it comes under the conditions presented by section 180, clause (2) of that Act, we have to see whether the appeal preferred to the District Judge in this case comes within either of the conditions presented by the section just cited. There is no allegation that any question of proprietary title was decided by the Collector on appeal. It is also clear that he did *not decide* any question of jurisdiction. No doubt in the memorandum of appeal before him a question of jurisdiction was raised. But the Collector, probably for reasons set forth in an earlier portion of this judgment, did not *decide* that question. No allusion to it is to be found in his decision. An appeal under sub-section (6) of the second clause of section 180 of Act No. II of 1901 is permitted only when in the appellate decree of the Collector a question of jurisdiction has been *decided*. It is not sufficient that such question has been raised in the memorandum of appeal before the Collector. It must also have been decided. Here there was no decision of any such question. Therefore, in our opinion, no appeal lay to the District Judge in this case. The District Judge, however, entertained the appeal and eventually, reversing the appellate decree of the Collector, he dismissed the suit with costs. The judgment of the learned Judge is based entirely on the facts. He also took no notice of the question of jurisdiction which was again raised in the memorandum

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of appeal. From the decree of the District Court a further appeal was presented to this Court by the plaintiff, whose suit had been dismissed by the District Judge. In the memorandum of appeal it was contended that as the new Tenancy Act had come into force before the appeal was presented to the District Judge, the latter had no jurisdiction to entertain the appeal, no question of proprietary title or of jurisdiction having been decided by the Collector.

The appeal came on for hearing before one of the learned Judges of this Court who dismissed it, holding that "the case clearly falls within the range of section 180 of the Tenancy Act of 1902 (? 1901), and the question of jurisdiction having been decided an appeal did lie to the District Judge."

In these observations of the learned Judge of this Court we are unable to concur. In our opinion, for reasons set forth at length in an earlier portion of this judgment, the Collector did not decide any question of jurisdiction. The foundation of the District Judge's jurisdiction to entertain the appeal is the decision of such a question by the Collector, and no such question having been decided we hold that no appeal lay.

It was further contended before us that section 175 of the new Tenancy Act precluded an appeal under the Letters Patent of this Court from the judgment of the learned Judge of the Court. In our opinion that contention has no substance. When an appeal is instituted in this Court and is heard by a Judge of the Court sitting alone, an appeal from his judgment is allowed by section 10 of the Letters Patent. Section 175 of the Tenancy Act is not a section which purports (*inter alia*) to regulate the procedure to be observed by the Judges of this Court in hearing appeals. It can refer only to matters outside, and cannot have the effect of modifying section 10 of the Letters Patent of this Court.

We must therefore allow this appeal, and setting aside the decree of this Court and of the District Judge we restore the appellate decree of the Collector with costs in all Courts.

. Appeal decreed.