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February 24.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

SHEOAMBAR AHIR AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF AZAMGARH AND OTHERS (DEFENDANTS) AND MAHABIR AHIR AND ANOTHER (PRO FORMÂ PLAINTIFFS).*

Jurisdiction—Civil and Revenue Courts—Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 4, 95, 167, 197*—Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), sections* 56, 233 (*i*)*—Suit for declaration regarding various alleged customary rights of zamindars, mostly of the nature of cesses.*

A suit was filed by certain tenants of a village against the zamindars praying for a declaration that no custom existed in their village which entitled the zamindars to take certain fruits and wood, or to the use of a plough, or to a number of other dues, including sugarcane juice from some of the tenants, poppy seed from the Koeries, and various other matters of the same description.

Held that the suit was properly filed in a Civil Court, and was not excluded from the jurisdiction of such court by anything contained in either the Agra Tenancy Act, 1901, or the United Provinces Land Revenue Act, 1901.

The facts of this case were as follows:—

At the seventh settlement of the district of Azamgarh an entry was made in the wajib-ul-arz of mauza Jamalpur to the effect that the zamindars were, by usage, entitled to certain dues, by way of cess, from the tenants; namely, half the fruit and wood of trees, including clumps of bamboo,, five seers of poppy seed from each Koeri tenant, one pot of sugarcane juice from each tenant, one rupee from each tenant pressing sugarcane in a mill, &c. The tenants of mauza Jamalpur brought a suit in the court of the Subordinate Judge on the allegations that the said entry was made behind their backs at the instance of the zamindars; that at the sixth settlement the zamindars attempted to obtain a similar entry, but it was decided that there was no such custom in their favour; that there never had been nor was any custom or usage by which the zamindars were entitled to the said dues. The relief sought was a declaration as to the non-existence of any such custom or usage. One of the pleas in defence was that the suit was not cognizable by the civil courts but by the revenue courts. Both the

* Second Appeal No. 619 of 1911 from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 6th of April, 1911, confirming a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 18th of August, 1910.

lower courts gave effect to this plea and dismissed the suit. The plaintiffs appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellants :—

The suit is cognizable by the civil court. The relief sought is a declaration that an alleged custom does not exist. It is the civil court alone which can go into the question whether a certain custom exists or not; the revenue courts have no jurisdiction to entertain such a suit. The disputed entry in the wajib-ul-arz expressly bases itself upon a usage, and not upon an agreement between the landlord and tenant. If these dues were claimed as a matter of contract between the landlord and tenant, the case would be different. Whether the dues are of the nature of rent or cess or other dues, the suit, having regard to the relief claimed, is of a nature cognizable by the civil court alone.

Section 167 of the Tenancy Act bars the cognizance by civil courts of certain suits specified in the Act. The only provision of the Act which might be regarded as applicable to this suit is section 95, clause (*d*). But the suit does not come under section 95 (*d*), for it is not a suit for a declaration as to the rent payable *in respect of a holding*. That section applies to all matters in dispute relating to the contract or agreement between landlord and tenant in respect of a holding; it has no application where the dues claimed are neither based on agreement nor are in respect of the holding. The disputed dues are quite independent of the nature or extent of the holdings; they are something over and above the rents. For example five seers of poppy seed are claimed from a tenant, not because of his holding, but because he is a Koeri; one rupee is to be paid, not because a tenant grows sugarcane, but because he presses it in a mill. Some of the plaintiffs have only groves, which are not "holdings," having regard to the definitions of "holding" and "land" in the Tenancy Act.

Again, section 95 (*d*) cannot apply unless the dues are "*rent.*" The defendants claim them to be, and they are entered in the wajib-ul-arz as "cesses" within the meaning of section 56 of the Land Revenue Act. The wording of that section shows that a clear distinction is drawn between (1) rent and cess, and (2) between rent and dues "which are of the nature of rent payable in addition to the rent of tenants." Neither cesses nor such dues are "rent,"

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therefore, within the meaning of the Land Revenue Act. Now, the meaning of the word "rent" in that Act is defined to be the same as that under the Tenancy Act. The dues, therefore, are not "rent" within the meaning of the Tenancy Act; and, so, section 95 (*d*) does not apply.

Mr. *A. E. Ryves* (with him Dr. *Satish Chandra Banerji* and Maulvi *Muhammad Ishaq*), for the respondents:—

It is not the civil court alone which can determine a question as to the existence or otherwise of a custom. A revenue court is quite competent to entertain and decide such a question if it arises in connection with the amount of rent payable, *vide* section 37 of the Tenancy Act. If the zamindars sued one of these tenants for rent, saying that so much was rent proper and, besides, so much on account of dues based on custom, the rent court could enter into the question of the existence of the custom in order to determine the correct amount of the rent. Having regard to the relief claimed, therefore, it cannot be said that the suit is not cognizable by the revenue court.

On the other hand, it is exclusively cognizable by the revenue court; for it comes under section 95 (*d*). The dues are not independent of the holdings, but in respect of them. They are payable by the tenants *as such*; that is to say, in respect of their holdings. The test is not whether the dues are proportional in amount to the extent of the holdings, but whether they are payable by the tenants only or by other persons as well, who are not agricultural tenants.

Then, these dues come under the term "rent" in section 95 (*d*). The definition of "rent" in the Tenancy Act is wide enough to cover these dues. It includes whatever is payable for the occupation of land. The ruling in *Mahabir* v. *Sheodihal* (1) is in my favour.

There is no real distinction between "rent" and things in the nature of rent drawn by section 56 of the Land Revenue Act, under which section most of these dues were professedly entered. No sharp line of demarcation can be drawn. The Act is badly framed. Besides section 95 (*d*) of the Tenancy Act, section 233, clause (*i*), of the Land Revenue Act, also bars the jurisdiction of the

(1) Weekly Notes, 1885, p. 320.

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civil court. The definition of rent is the same for both the Acts, but there is this difference that section 233 (*i*) does not speak of the rent *payable in respect of a holding*. The ruling in S. A. No. 497 of 1910, decided on 8th June, 1913, supports my case.

Babu *Surendra Nath Sen* was not heard in reply.

RICHARDS, C. J.—This and the connected appeal arise out of suits in which the plaintiffs sought a declaration that no custom existed in their village which entitled zamindars to take certain fruits and wood, or a right to the use of a plough and a number of other alleged dues, including sugarcane juice from some of the tenants, poppy seed from the Koeries, and various other matters of the same description. The suit was instituted in the court of the Subordinate Judge of Azamgarh. He decided that the suit was not cognizable in a civil court and he declined to return the plaint for presentation in the proper court. The learned District Judge in first appeal affirmed the decision of the Subordinate Judge and dismissed the plaintiffs' suit. The plaintiffs come here in second appeal.

I think that the question whether or not the villagers are liable to these dues is a question of very great importance, no matter what is the proper tribunal to decide it. However, all that we have to decide in the present appeal is whether or not the suit is cognizable by a civil court.

In my opinion the suit was cognizable in the civil court. *Primâ facie* the civil court is the court to decide all cases of a civil nature. Only cases which by express enactment are withdrawn from the cognizance of the civil court are not triable by that court. It is argued that section 95 read with section 167 excludes the present suit from the cognizance of the civil court. Section 167 provides that the suits specified in the fourth schedule shall only be cognizable in the revenue court: included in the fourth schedule are the suits specified in section 95. Section 95 provides that at any time during the continuance of the tenancy either the landholder or the tenant may sue for a declaration as to any matters there mentioned. Amongst these matters is the rent payable in respect of a holding and whether it is payable in cash or in kind. It is argued that this suit is a suit as to the rent payable for the holding, and whether it is payable in cash or kind. Reliance is also placed upon section 233, clause (*i*), of the Land

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Revenue Act, which provides that no suit shall be instituted in the civil court by a tenant in respect of the rent payable by him.

It seems to me that rent in both section 95, clause (*d*), of the Tenancy Act, and section 233, clause (*i*), of the Land Revenue Act, refers to the ordinary conventional or contractual rent payable by a tenant for his holding. No doubt the definition of rent in section 4 of the Tenancy Act is wide. It is there defined as being whatever in cash or kind is to be paid or delivered by a tenant for land held by him or on account of groves, tanks, *et cetera*. Notwithstanding this definition, it seems to me that the plaintiffs in the present case cannot, in truth, be said to be suing in respect of a matter relating to the rent payable in respect of their holding. The claim of the zamindars which the plaintiffs seek to resist in the present case is, it seems to me, a claim based on custom, the zamindars claiming by right of custom to be entitled to certain cesses or dues. These dues to some extent are claimed, no doubt, by reason of the fact that the plaintiffs are tenants, and to this limited extent it may be argued that they are payable in respect of their holdings. It is extremely difficult to see how fulfilment of some of these customary rights could be enforced in the revenue court. One custom is the giving to the zamindars the use of a plough. If the tenant refused, it seems to me that the zamindar's only right would be to sue for damages, and such a suit could only be brought in the civil court. Again, it would be impossible for the zamindar to enforce the delivery of the sugarcane juice, if, by chance, the tenant did not grow any sugarcane, and accordingly the value of the sugarcane juice would have to be assessed and sued for as damages. I may mention that the wajib-ul-arz, which is the basis of the claim of the zamindars, particularly specifies some of the items as being cesses referred to in section 56 of the Land Revenue Act. That section is as follows :—

"In the North-Western Provinces all cesses which are payable by tenants on account of the occupation of land and which are of the nature of rent payable in addition to the rent of tenants, or in lieu of which property rights may be assigned under section 78, clause (*b*), shall be recorded by the record officer under the appellations by which they are known, and no cesses not so recorded shall be recoverable in any civil or revenue court."

In the Land Revenue Act it is expressly provided that the term *rent* is to have the same meaning as it has in the Tenancy Act. It

is quite clear that this section draws a distinction between rent and payments in the nature of rent. These latter payments are not "rent." In the words of the section itself they are payments which have to be made in addition to the "rent." It seems to me that there is no provision in either the Land Revenue Act or the Tenancy Act which excludes from the cognizance of the civil court a suit for a declaration that no custom exists in the village which renders the plaintiffs liable to the payment of these dues.

The plaintiffs also sue to have the entry as to these alleged dues declared null and void as against them, on the ground that they were entered in the wajib-ul-arz behind their back and without their having a proper opportunity of showing that no such custom existed. If these allegations are correct, it seems to me not at all unreasonable that the plaintiffs should have a declaration to the effect that the entries are not binding on them.

I would allow the appeal and remand the suit for trial on the merits.

BANERJI, J.—I also am of opinion that the suit brought by the plaintiffs was not excluded from the cognizance of the civil court. Section 167 of the Agra Tenancy Act provides that no court other than the revenue court shall take cognizance of any dispute or matter in respect of which any suit or application of the nature specified in the fourth schedule to the Act might be brought or made. Therefore, unless the suit is of the nature mentioned in the schedule, its cognizance by the civil court is not forbidden by the section. The plaintiffs' claim may be taken to be a claim for a declaration that they are not liable to pay the amounts or deliver the articles mentioned in the wajib-ul-arz of the village, which the defendants (zamindars) claim from them. Unless these payments can be brought within the meaning of the word "rent" as used in section 95, clause (*d*), of the Act, the suit would be cognizable by the civil court. Clause (*d*) of section 95 provides that a land-holder or a tenant may sue for a declaration as to the rent payable in respect of the holding of a tenant. The word "rent" is defined in section 4, clause (iii), as meaning "whatever is in cash or in kind to be paid or delivered by a tenant for land held by him." The remainder of the definition is inapplicable to the present case. Now "land" as defined in the Act means "land which is let or

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held for agricultural purposes." The amounts which the defendants claim as payable by the plaintiffs and the articles which they say the plaintiffs must deliver to them are not payable or deliverable in respect of land which is held for agricultural purposes. Therefore the matter to which the suit relates cannot be deemed to be rent within the meaning of the Agra Tenancy Act. In my opinion the rent mentioned in clause (*d*) of section 95 is rent payable in respect of an agricultural holding and cannot apply to what is payable in *addition* to rent, such as is referred to in section 56 of the Land Revenue Act. Therefore there is nothing in the Agra Tenancy Act which makes a suit like the present cognizable by a revenue court. As rent has the same meaning in the Land Revenue Act as it bears in the Agra Tenancy Act, section 233, clause (*i*), of the Land Revenue Act does not apply to a case of this kind. The suit not being cognizable by a revenue court, the only court which can take cognizance of it is the civil court, and the courts below ought to have tried it on the merits. I agree in the order proposed.

TUDBALL, J.—I also agree in the order proposed. To my mind it is quite clear that the present suit cannot be said to be one for a declaration as to the rent payable by the plaintiffs in respect of their holdings. It is unnecessary to go into details. Many of the items are such that they could clearly be only recovered in a civil court; for example, the claim of Re. 1, which, it is said, a tenant of the village pays to the zamindar when he sets up a sugarcane press in the village to press his own cane. This cannot by any possible stretch of the meaning of ordinary language be said to be part and parcel of the rent. It is a claim entirely independent of the holding and in no way concerned with it. It is an item to recover which the zamindar would have to sue in the civil court, and in the civil court alone. Section 56 of the Land Revenue Act also to my mind is quite clear; the claims made by the zamindars thereunder are claims made over and above the rent that is payable in respect of the holding. In this view I have not the slightest hesitation in holding that the present suit was cognizable by the civil court.

BY THE COURT.—The order of the court is that the appeal is allowed, the decrees of the courts below are set aside, and the case

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is remanded to the court of first instance through the lower appellate court, with directions to readmit it under its original number in the register and proceed to hear and determine the same according to law. The appellants will have their costs in this court and in the court below. Other costs will abide the result.

Appeal allowed. Cause remanded.

APPELLATE CIVIL.

1912.
February 26.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

BHAGWAN DAS (DEFENDANT) v. RAJ NATH (PLAINTIFF).*

Civil Procedure Code (1882), *sections* 278, 279, 280, 281—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction.*

Held on a construction of sections 278, 279, 280 and 281 of the Code of Civil Procedure, 1882, that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it, and that, when an executing court disallows the claim of an objector under section 281, the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground.

The facts of this case were as follows :—

One Kishori Lal was the owner of the property in dispute and other property. On the 5th of August, 1888, he made a simple mortgage of all the properties to Nizam-ud-din. After that, he, on the 22nd of December, 1888, mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage on the 3rd of July, 1889. The prior mortgagee was no party to this suit. The prior mortgagee, Nizam-un-din, on the 20th of August, 1889, got a decree on his mortgage without impleading the subsequent mortgagee. The latter purchased the property, on the 20th of June, 1891, in execution of his decree and afterwards obtained actual possession. By the consent of the two mortgagees, the sale proceeds were first applied to the satisfaction of the decree on the prior mortgage, but a balance remained unsatisfied. Then, on the 13th of September, 1898, Kirpa Dayal sold the property to one Bhagwan Das, and afterwards Durga Prasad got a portion of the property by pre-emption. Nizam-ud-din then purchased

*Second Appeal No. 504 of 1911, from a decree of H. W. Lyle, District Judge of Agra, dated the 24th of February, 1911, modifying a decree of Shiva Prasad, Subordinate Judge of Agra, dated the 11th of July, 1910