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the decision of the Calcutta High Court I refer this case to a bench of two Judges.

The case coming on before a Division Bench, the following judgement was delivered :—

KNOX and GRIFFIN, JJ.—We have carefully considered the description given of the game which both the courts below held to be not a game of mere skill. The learned counsel for the applicant who asks us to interfere with the view taken by these courts, has referred us to a Calcutta ruling in Criminal Revision No. 771 of 1907, *Hari Singh* v. *King-Emperor*. There is a material difference between the words used in section 10 of the Bengal Public Gambling Act and section 12 of Act No. III of 1867, which is the Act which governs the case now before us. We are by no means sure that the game which the Calcutta High Court Judges had under consideration was precisely the same as is described by the learned Sessions Judge of Cawnpore. We are, of course, only concerned with the game described by the latter. From the description so given we find ourselves unable to interfere. We hold that the game described by the learned Sessions Judge of Cawnpore is not a game of mere skill. The application is dismissed.

Application dismissed.

APPELLATE CIVIL.

1911
October, 26.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

BISHAMBHAR NATH (PLAINTIFF) *v.* BHULLO AND OTHERS (DEFENDANTS.) *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 194—*Lambardar—Suit by lambardar against co-sharers for excess of profits due to other co-sharers and himself—Lambardar not agent of co-sharers.*

Held that a lambardar is not the agent of the co-sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khudkasht* lands in excess of their proper shares.

THE facts of this case were briefly as follows :—

The plaintiff was lambardar and the defendants were co-sharers of a certain village. The defendants held *sir* and *khud-kasht* in

* First Appeal No. 56 of 1911 from an order of H. W. Lyle, District Judge of Agra, dated the 23rd of January, 1911.

excess of their share; i.e., the income from these lands was greater than their share of profits. The plaintiff, as lambardar, sued for the excess due to himself as a co-sharer as well as for that due to the other co-sharers. The Assistant Collector gave a decree for the whole sum. The District Judge, on appeal, held that the lambardar, as such, was not entitled to recover the excess due to the other co-sharers, and remanded the suit. His judgment was as follows:—

"This is a suit for profits. The lower court decreed the suit for a certain sum. The defendants appeal. In my opinion the learned Assistant Collector's judgement as well as the suit itself is based on misconception and confusion of ideas. I shall, so far as I can, endeavour to make the position clear. The plaintiff respondent is lambardar of the village. The defendants appellants are co-sharers. It is stated that the defendants hold *sir* and *khudkasht* in excess of the share, in other words that the income which they draw from this *sir* and *khudkasht*, is more than the whole of the profits to which they are entitled. Now I do not think there can be any doubt that the plaintiff as a co-sharer can sue for his share for that excess if any.

"But he goes further than this, he sues as lambardar for the excess due to other co-sharers as well as to himself. The position he takes up is that as lambardar he is bound to distribute to each co-sharer the proper amount of profits, and that if any co-sharer therefore has drawn more profits than he is entitled to do, the lambardar is bound to recover the excess from him and distribute it to the co-sharers who are entitled to it. In my opinion this is an extension of the rights and liabilities of a lambardar which is not warranted by law. The ordinary functions of a lambardar are to collect the rents and to distribute the amounts so collected among the co-sharers in proportion to the share of each. Besides the rent so collected he is also liable for any such sums as with due care and diligence he ought to have collected.

"But in some villages, as in the present case, land is held by co-sharers as *sir* or *khudkasht*. The estimated income from this land is set off against their share of the profits, but the lambardar does not collect that income from them and add it to the total amount for distribution. The amount is not recoverable by the lambardar and he could not realize it if he would. Now where a co-sharer holds *sir* and *khudkasht* which gives him an income in excess of his share of the profits the lambardar cannot be held liable to the other co-sharers for this excess. He is not bound to, nor indeed can he, recover this amount in order to re-distribute it in proper proportion. Take a simple instance: A, B, C, are co-sharers in equal shares of a village. A is lambardar, C holds sir which brings him in an estimated income of Rs. 200: the rent of the land let to tenants is Rs. 100. This amount is collected by A as lambardar. Now it is clear that B can sue A for his one-third share of the Rs. 100 which A has collected in his capacity of lambardar. It is equally clear that C has got Rs. 100 in excess of his proper share and that both A and B are entitled to recover one-third of this, but A cannot sue C

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for the two-thirds share of Rs. 100 due to B and himself with a view to distributing it among other three co-sharers in proper proportions. As lambardar he is entitled to collect rents from tenants and to sue for these, if necessary, but what is due from C is not rent, and A could not recover it from him. When a co-sharer has realized an income in excess of his share of the profits, there is no section which enables a lambardar to recover the balance from him with a view to re-distributing it again among the whole body of co-sharers in proportion. It follows from this that no co-sharer can hold a lambardar responsible for income which another co-sharer draws in excess of his share from *sir* or *khudkasht* land.

"The present plaintiff can sue as a co-sharer for his share in the excess income if any, drawn by the defendants for their *sir* and *khudkasht* land; but such suit is in no way concerned with his position as lambardar. The introduction of the status of lambardar only raises confusion, for the appellant wishes to set off certain rents due from tenants which he says the plaintiff as lambardar ought to have collected. This would be practically to allow costs which would be due in a suit under section 164 to be set off against costs claimed under section 165, a procedure which is certainly not contemplated by the Tenancy Act. I do not say that the plaintiff might not sue all the co-sharers for a complete account, and that in that case all the amounts due to and by him might not be gone into, but that cannot certainly be done in a suit against one individual co-sharer. The lower court's decision was based on a preliminary point in regard to which that decision has been set aside. I must remand the case for decision on the merits. I hold that as the suit is now proved, the plaintiff can only sue as a co-sharer for the amount of his own share, all other points are open, and it will also be open to the lower court to allow the plaint to be amended and to add parties should it think fit."

The plaintiff appealed.

Dr. *Tej Bahadur Sapru*, for the appellant:—

The lambardar is responsible for the payment of the revenue and for the distribution of profits among the co-sharers. He can, therefore, sue for recovery of the excess profits realized by a co-sharer, for the purpose of distributing the excess among the other co-sharers. Having regard to section 194 of the Agra Tenancy Act the lambardar must be treated as the agent of all the co-sharers and can sue on their behalf, as he purports to do in this case. The clause "unless they have appointed an agent to act on behalf of them all" in section 194 (1) takes this case out of the ruling in *Udai Ram* v. *Ghulam Husain* (1). The lambardar is the person who is authorized to represent them all. The position which he actually occupies is that of their agent. The appointment may be inferred from the course of conduct; and he must be deemed to have been appointed to act for them all.

(1) (1880) 2 Legal Remembrancer, High Court Series, p. 10.

Pandit *Shiam Krishan Dar*, for the respondents, was not called upon.

KNOX and GRIFFIN, JJ. :—The suit out of which this appeal arises is a suit brought by one Babu Bishambhar Nath who represents himself as lambardar of an entire mahal and is the owner of one half of it. He sues the defendants for profits, and his allegation is that the defendants hold land *sir* and *khudkasht* in excess of what they are entitled to with reference to the shares owned by them. The Revenue Court of first instance gave the plaintiff a decree as prayed for. On appeal, the District Judge held that the plaintiff could only sue as a co-sharer for the amount of his own share and could not sue for profits due to other co-sharers. He therefore set aside the decree of the court of first instance and remanded the suit for further trial. In appeal before us it is contended that the view taken by the learned Judge is in error and that the plaintiff as lambardar can maintain the suit to recover his share and the shares of other co-sharers out of excess money realized by the defendants, and this contention is said to be based upon the words contained in section 194 of the Local Act No. II of 1901. It is urged before us that the lambardar must be deemed to be an agent appointed by the co-sharers to act on behalf of them all. We know of no authority derived from either statute or custom which confers such a power upon the lambardar, and we do not think that the words contained in section 194 can be strained into holding this meaning. The appeal is dismissed with costs.

Appeal dismissed.