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issue of law, without going into the facts of the case, is practically an impossibility. To this extent the learned District Judge is right, namely, the suit requires to be tried out on the merits. It has to be determined whether the present plaintiffs are or are not in a position to impeach the alienation of the joint family property effected by means of the decree passed against Bhondu and Raj Narain. In order to ascertain this fact it has necessarily to be considered whether the plaintiffs would have had a good defence against the suit of 1898 on the lines suggested by these pleadings. Subject to these remarks, it seems to me that the decision of the learned District Judge—if that decision be properly understood—is not fairly open to objection. I would therefore dismiss this appeal while leaving costs of the parties here and hitherto to be costs in the suit.

WALSH, J.—I concur.

BY THE COURT.—The appeal is dismissed. Costs of the parties here and hitherto will be costs in the suit.

Appeal dismissed.

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February, 28.

Before Mr. Justice Piggott and Mr. Justice Walsh.

DIGBIJAI SINGH (DEFENDANT) v. HIRA DEVI (PLAINTIFF).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 164—Jurisdiction—Civil and Revenue Courts—"Profits"—Income derived from land and houses in the abadi.

Held that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a suit was cognizable exclusively by the Court of Revenue under section 164 of the Agra Tenancy Act, 1901. *Baldeo Singh v. Beni Singh* (1) referred to.

THE facts of this case were as follows :—

The plaintiff and defendant were co-sharers in a certain mahal, the defendant being the lambardar. The plaintiff brought the present suit in the Civil Court alleging that the defendant had during the years in suit realized certain moneys on behalf of himself and of the plaintiff, in respect of which the latter claimed his share. The moneys in question are described as being rents of certain shops and houses, market dues and ground rents paid in connection with a market. Apart from

* First Appeal No. 170 of 1915, from an order of E. C. Allen, District Judge of Moradabad, dated the 16th of August, 1915.

(1) Weekly Notes, 1899, p. 57.

his defence on the merits, the defendant pleaded that these realizations had been made by him in his capacity of lambardar of the mahal, and that the only form of suit which could be brought against him would be a suit under section 164 of the Agra Tenancy Act (Local Act II of 1901). He also pleaded that a suit under the provisions of the Tenancy Act had already been brought against him as lambardar in the Revenue Court, and that of the claim now put forward, a part, namely, the portion relating to the rents of shops and houses, had been included in the claim before the Revenue Court and dismissed by that court, while the remainder of the claim had not been included in the suit brought in the Revenue Court, whereas it should have been so included. The court in which the present suit was filed upheld the defendant's contention on the point of law and held that the whole of the present suit was barred, either by the provisions of section 11 of the Code of Civil Procedure, or by those of order II, rule 2, of the same Code. In appeal the learned District Judge has reversed this finding and remanded the case for trial on the merits. The defendant appealed against the order of remand.

Mr. B. E. O'Connor, Mr. Nihal Chand and Babu Sital Prasad Ghose, for the appellant.

Pandit Rama Kant Malaviya, for the respondent.

PIGGOTT, J.—In this case the plaintiff and the defendant are both co-sharers in a certain mahal and the defendant is the recorded lambardar of the same. The plaintiff brought the present suit in the Civil Court, alleging that the defendant had during the years in suit realized certain moneys on behalf of himself and of the plaintiff, in respect of which the latter claimed his share. The moneys in question are described as being rents of certain shops and houses, market dues and ground rents paid in connection with a market. Apart from his defence on the merits, the defendant pleaded that these realizations had been made by him in his capacity of lambardar of the mahal, and that the only form of suit which could be brought against him would be a suit under section 164 of the Agra Tenancy Act (Local Act II of 1901). He also pleaded that a suit under provisions of the Tenancy Act had already been brought against him as lambardar in the Revenue Court, and that of the claim now put forward,

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a part, namely the portion relating to the rents of shops and houses, had been included in the claim before the Revenue Court and dismissed by that court, while the remainder of the claim had not been included in the suit brought in the Revenue Court, whereas it should have been so included. The court in which the present suit was filed upheld the defendant's contention on the point of law and held that the whole of the present suit was barred, either by the provisions of section 11 of the Code of Civil Procedure, or by those of order II, rule 2, of the same Code. In appeal the learned District Judge has reversed this finding and remanded the case for trial on the merits. The defendant appeals against the order of remand. We have been referred to one authority which certainly has some bearing on the question of law involved. It is the case of *Baldeo Singh v. Beni Singh*(1). The learned Munsif seems to have thought that that case was authority for his decision, but if it be attentively examined, it seems to be all the other way. The learned Chief Justice in that case came to the conclusion that the money claimed in the suit then before him was part of the income of a village derived from revenue paying land, and that consequently the lambardar who had realized it was bound to include it among the divisible profits for the benefit of other co-sharers and could be made to account for the same by means of a suit in the Revenue Court. The learned Judge who concurred in the decision laid it down that the word "profits" should be understood to mean all income which the lambardar of a mahal realizes by virtue of his position as such, save and except the income derived from lands occupied by dwelling-houses and manufactories or appurtenant thereto. The income in question in the present case would seem clearly to be income derived from land occupied by dwelling-houses or appurtenant thereto. So far as I can gather from the record it is not revenue-paying land within the sense in which that expression was used by the learned Chief Justice in the case under reference. The learned District Judge has based his decision upon a somewhat broader ground. The point seems to me to be a very arguable one if it came before us as *res integra*. I think, however, it is virtually covered by the decision to which I have

(1) Weekly Notes, 1899, p. 57.

referred and that this is a matter in which it is peculiarly important that the established course of decision should not be disturbed. At any rate I am not prepared to dissent from the conclusion arrived at by the learned District Judge that the present claim was not one which could have been maintained as a suit for profits in the Revenue Court under section 164 of the Tenancy Act. If this is so, then both the objections taken fall to the ground, as neither order II, rule 2, of the Code of Civil Procedure, nor section 11 of the same Code could bar the present suit. I would, therefore, dismiss the appeal with costs.

WALSH, J.—I concur.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice
Muhammad Rafiq.*

MAHABIE SINGH AND ANOTHER (PLAINTIFFS) v. BHAGWANTI (DEFENDANT).
*Act (Local) No. II of 1901 (Agra Tenancy Act), section 22 - Occupancy holding—
Succession—Holding owned by a joint Hindu family.*

An occupancy holding owned by a joint Hindu family does not devolve at the death of the last surviving member of the joint family on that member's widow.

THIS was a suit for a declaration that certain leases of occupancy and non-occupancy holdings, executed by Musammat Bhagwanti, widow of one Ram Prasad, were null and void on the ground that Ram Prasad was a member of a joint Hindu family with the plaintiffs and the co-parcenary body which made up the joint Hindu family of which Ram Prasad was a member constituted the "tenant," therefore no interest devolved on Musammat Bhagwanti. The principal defence was that Ram Prasad died a separated Hindu and on his death having regard to the provisions of section 22 of the Tenancy, his interest devolved on Musammat Bhagwanti and she was therefore entitled to execute the leases in question. The court of first instance decreed the suit. On appeal the District Judge modified the decree. The plaintiffs appealed to the High Court.

* Second Appeal No. 1388 of 1914, from a decree of B. J. Dalal, District Judge of Benares, dated the 26th of June, 1914, modifying a decree of Banke Bihari Lal, Subordinate Judge of Benares, dated the 27th of March, 1914.

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