intentional. Moreover, a decision of the Privy Council has negatived the argument on behalf of the appellant, namely, that the omission to sue may be an accidental omission or in the language used by the learned vakil for the appellant "an after thought." The Privy Council has expressed the opinion that a right which a litigant possesses without knowing it does not come within the Rule cited because it is not "a portion of his claim" and adopting that view it follows that if a plaintiff has accidentally omitted in a partition suit to include undivided property of which he had no knowledge he is not barred. I agree with my learned brother's order dismissing the appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

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

1916
January, 31.

GANGA SINGH (DEFENDANT) *v.* RAM SARUP AND ANOTHER (PLAINTIFFS).*

Act (Local) No, II of 1901 (*Agra Tenancy Act*), *section* 164—*Suit against lambardar for profits—Sir and khudkasht land held by co-sharers to be taken into account.*

Held that in a suit for profits brought by a co-sharer against a lambardar under section 164 of the Agra Tenancy Act, 1901, the plaintiff is entitled to have taken into account the profits of sir and khudkasht land held by the other co-sharers in the village. *Bishambhar Nath* v. *Bhullo* (1) discussed. *Gulzari Mal* v. *Jai Ram* (2) referred to.

THIS was a suit by certain co-sharers in a village for profits of their shares against the lambardar of the village. The court of first instance decreed the claim in part. The plaintiffs appealed, and the additional District Judge remanded the case for a fresh account to be made up between the parties, including the profits of the *sir* and *khudkasht* lands held by other co-sharers in the village, which had previously not been taken into consideration. In the result the court of first instance (Assistant Collector) passed a decree in favour of the plaintiffs for about half the amount claimed by them. The plaintiffs again appealed and

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* Second Appeal No. 1379 of 1914, from a decree of Banke Behari Lal, Additional Judge of Cawnpore, dated the 31st of July, 1914, modifying a decree of Kewal Krishna, Assistant Collector, first class, of Cawnpore, dated the 8th of May, 1913.

(1) (1911) I. L. R., 34 All., 98. (2) (1914) I. L. R., 36 All., 441.

1916

GANGA SINGH v. RAM SARUP.

this time the lower appellate court increased to some extent the amount formerly awarded to them. The defendant appealed to the High Court, the main question raised in appeal being whether or not the profits of the sir and khudkasht lands ought to be brought into account as between the parties.

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

Munshi *Gulzari Lal*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiffs, who are co-sharers, against the defendant, who is the lambardar, for profits. In the events which have happened the only point which we are called upon to decide is whether the lower appellate court was correct in directing that in estimating what was due to the plaintiffs the *sir* and *khudkasht* held by the other co-sharers should be taken into account. The lower appellate court held that it should. The defendant contends that it should not. If the *sir* and *khudkasht* should be left out of consideration the defendant's appeal should be allowed. If on the other hand it should be taken into consideration the appeal should be dismissed. The appellant's contention is that having regard to the ruling in *Bishambhar Nath* v. *Bhullo* (1) the court below was wrong in directing that the *sir* and *khudkasht* should be taken into account. In that case it was held that a lambardar could not bring a suit to recover profits due to him and other co-sharers from some of the co-sharers who held *sir* and *khudkasht* in excess of their proper shares. The argument is that inasmuch as the lambardar could not sue for the profits of *sir* and *khudkasht* he cannot be made liable, and it is sought to extend this doctrine still further by getting the Court to hold that in a suit under section 164 *sir* and *khudkasht* must be totally disregarded. To illustrate the question under consideration we will suppose a case. *A* the lambardar has in his hand Rs. 1,000 representing rents which he has collected. He is sued by *B*, who holds a two anna share in the mahal, for Rs. 125, out of the Rs. 1,000. The lambardar admits that he has the Rs. 1,000 and admits that the plaintiffs have a two anna share in the mahals, but says that the plaintiff holds *sir* and *khudkasht* in

(1) (1911) I. L. R., 34 All., 98.

1916

GANGA SINGH *v.* SARUP

excess of the other co-sharers and that he objects to pay the plaintiff his proportionate share in the Rs. 1,000, without taking into consideration the *sir* and *khudkasht* which he holds. According to the contention of the appellant on the authority of *Bishambhar Nath* v. *Bhullo* (1) the lambardar would have no answer and would be obliged to pay the plaintiff the whole Rs. 125. It is not quite clear that such an inequitable result really follows from the decision of *Bishambhar Nath* v. *Bhullo* (1). The case was considered in the case of *Gulzari Mal* v. *Jai Ram* (2). The argument in *Bishambhar Nath* v. *Bhullo* (1) and the ground upon which the judgement proceeded was that the lambardar was not the *agent* for the co-sharers so as to enable him without joining the other co-sharers to bring a suit against a co-sharer in respect of the profit of *sir* and *khudkasht*. The court held that he was not the *agent* for the co-sharers. It seems to us that, if the case of *Bishambhar Nath* v. *Bhullo* (1) was rightly decided, it follows that the lambardar could not even sue a tenant for rent without joining all other co-sharers. There is no special section in the Tenancy Act which provides for a suit by a lambardar as such against a tenant and yet we know that it is the regular practice in lambardari villages that the lambardars sue the tenants for rent, and that it is frequently made a ground for making them liable upon the gross rental that they have neglected to bring such suits. If the lambardar is the agent of the co-sharers to bring a suit for rent, he seems to be equally their agent for the purpose of bringing a suit against co-sharers who hold *sir* and *khudkasht* in excess and who have refused to allow the *sir* and *khudkasht* which they hold to be taken into account. In the case of *Gulzari Mal* v. *Jai Ram* (2) the learned judges refer to the definition of "lambardar" in the Land Revenue Act. "Lambardar" in the Tenancy Act is declared to have the same meaning as in the Land Revenue Act. In the Land Revenue Act the expression is defined to mean "a co-sharer of a mahal appointed under this Act to represent all or any of the co-sharers in that mahal." In the "lambardari" villages in these Provinces the duties of the lambardar are fairly well understood and recognized. Beyond all doubt he has the power of collecting rents. The

(1) (1911) I. L. R. 34 All., 98. (2) (1914) I. L. R. 36 All., 421.

1916

GANGA SINGH *v.* RAM SARUP.

following extract from a judgement of the Board of Revenue in our judgement fairly describes the position of the lambardar in a lambardari village :—"Speaking generally the lambardar is the manager of the common lands entitled to collect the rents, settle tenants, eject tenants, procure enhancement of rents, and do all necessary acts relating to the management of the estates for the common benefit." It is contended that the only remedy which the plaintiffs had in a suit like the present was a suit under section 165 against all the co-sharers for a settlement of accounts, and it is further contended that *sir* and *khudkasht* rights can never be satisfactorily taken into account except in such a suit where all the co-sharers are parties. It is to be noticed that section 165 does not specifically refer to a suit by the lambardar *as such*. No doubt the lambardar is a co-sharer and would be entitled like any other co-sharer to bring a suit for settlement of accounts. Section 165 does not provide that all the co-sharers must necessarily be parties to the suit, although no doubt in very many cases it would be convenient that they were. The objection that may be made as to want of parties is met by this answer that it is open to any party to a litigation in a proper case to ask the court to add parties. The court also can do this of its own motion. It has a jurisdiction which the court ought not to hesitate to exercise in a fit and proper case. We think that the decision of the court below was correct and should be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1916
February, 1.

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

GANPAT RAI AND OTHERS (PLAINTIFFS) *v.* MULTAN AND OTHERS (DEFENDANTS)*.

Act No. I of 1872 (Indian Evidence Act), section 116—Landlord and tenant—Denial of landlord's title—Estoppel.

When once a person is the tenant of another person he cannot be allowed to deny that the person whose tenant he was, was the owner when the tenancy was created. He can no doubt admit that his landlord was the owner at the

*Second Appeal No. 1013 of 1914, from a decree of D. Dewar, District Judge of Saharanpur, dated the 5th June, 1914, confirming a decree of Abdul Hasan, Subordinate Judge of Saharanpur, dated the 28th of June, 1913.