1915

KHUSHHALI RAM v. BHOLAR MAL.

proceedings, and that Khushhali Ram's remedy, if any, was by way of a separate suit. In our opinion the learned Judge misconceived the extent of his jurisdiction in insolvency proceedings. He was bound to inquire into this question of the alleged mortgage, at the instance of any creditor who claimed to be prejudiced thereby. He might have come to the conclusion that there had been a transfer by way of mortgage under circumstances calling for interference on his part under section 36 of the Insolvency Act, or he might have found that there had been a purely fictitious transaction, not involving any transfer; in either case the name of Bholar Mal would require to be removed from the list of creditors and the property purporting to be affected by this mortgage would become available for the benefit of all the creditors, free of incumbrance. We think that Khushhali Ram's application should have been taken up, notice of the same given to the insolvent and to Bholar Mal, and the question raised inquired into and decided. We set aside, accordingly, the order complained of and remand the case to the court below with directions to inquire into the matter as stated above. The costs of this appeal will abide the result of this further inquiry hereby directed.

Appeal allowed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

1915

February, 8.

SHER KHAN AND OTHERS (DEFENDANTS) *v.* DEBI PRASAD (PLAINTIFF)*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 167—*Jurisdiction—Civil and Revenue Courts—"Matter in respect of which a suit might be brought" in the Revenue Courts.*

The owners of certain zamindari property first mortgaged the property and then executed a perpetual lease of some land appertaining thereto. The mortgagees brought the zamindari to sale, and it was purchased by a stranger. The auction purchaser then sued the lessees in the civil court for recovery of possession of the land held by them. The lessees were directed to institute a suit in the revenue court to determine the question whether they were or were not tenants of the plaintiff. In this suit the auction purchaser admitted the existence of a tenancy, but pleaded that the precise nature of the tenancy, and in particular the validity of the perpetual lease, was not a matter for determination *in that suit*. A decree was passed by the revenue court to the effect that the lessees were tenants of the plaintiff auction purchaser.

* First Appeal No. 102 of 1914, from an order of H. E. Holmes, District Judge of Aligarh, dated the 4th of May, 1914.

Subsequently the plaintiff amended his plaint by asking for a simple declaration that the perpetual lease was not binding on him.

Held that the suit so framed was barred by section 167 of the Agra Tenancy Act, 1901. The plaintiff might have instituted a suit for ejectment in the revenue court, in the course of which the validity of the perpetual lease would have to be determined. *Ram Singh* v. *Giraj Singh* (1) followed.

THE facts of this case were as follows :—

On the 12th of January, 1897, Musammat Lachman Kunwar executed a mortgage of a 4 biswa share in favour of Chattar Singh. On the 6th of April, 1898, she executed a perpetual lease of 31 bighas odd out of the mortgaged property in favour of Nawab Khan. Chattar Singh sued on his mortgage. He impleaded Nawab Khan as a defendant and impeached the perpetual lease. No relief by way of cancellation thereof was, however, prayed for, and there was no issue or finding on that point. A decree for sale was passed, and the property was sold and purchased by the plaintiff, who obtained delivery of possession in July, 1909. It appeared that after this he accepted rent from the heirs of Nawab Khan, who had died meanwhile. On the 27th of September, 1910, the plaintiff sued the heirs of Nawab Khan in the Civil Court for possession of the 31 bighas odd and for a declaration that the perpetual lease was void and not binding on him. The defendants pleaded that the relation of landlord and tenant subsisted between the parties and that the suit was not cognizable by the Civil Court. They were directed to institute a suit in the Rent Court to establish their tenancy. They did so, and in that suit the plaintiff admitted that the defendants were his tenants, although he questioned the validity of the perpetual lease. On the 15th of June, 1912, the Rent Court declared the defendants to be tenants of the plaintiff; the question of the validity or otherwise of the perpetual lease was not decided, the plaintiff having pleaded that it was not a matter for determination in that suit. The plaintiff then amended his plaint of the 27th of September, 1910, by abandoning the claim for possession. The court of first instance was of opinion that the question between the parties was virtually one relating to the class of the defendant's tenancy and triable by the Rent Court alone. It dismissed the suit. On appeal the

(1) (1914) I. L. R., 37 All., 41.

1915

SHER KHAN v. DEBI PRASAD.

District Judge held that the suit was not barred by section 167 of the Tenancy Act, and remanded the case for trial on the merits. The defendants appealed to the High Court.

The Hon'ble Mr. *Abdul Raoof* (with him Maulvi *Shafi-uz-zaman*), for the appellants :—

The real object of the suit is the determination of the character of the defendants' tenancy ; whether they are tenants at will or tenants holding under a perpetual lease. A suit for a declaration that the perpetual lease is not binding on the plaintiff is in substance a suit for a declaration that the defendants are tenants at will. The suit falls within section 95 of the Tenancy Act ; if not within clause (*b*) then within clause (*a*) of that section. The words " description of the tenant " in clause (*a*) cover a statement whether the tenant is a tenant at will or a perpetual lease-holder. Hence section 167 of the Tenancy Act bars the cognizance of the suit by the Civil Court. If it be held that the suit as framed does not fall within section 95 of the Tenancy Act, still the suit is barred by section 167. The plaintiff's natural and proper remedy against the perpetual lease was to sue in the Revenue Court for ejectment of the defendants, treating them as tenants at will and ignoring the lease. If the defendants then set up the lease the Revenue Court would be competent to determine and would determine whether it was valid and binding or not. As the plaintiff could have adopted that course, section 167 bars the jurisdiction of the Civil Court to determine the same question. The mere alteration in the form of the suit by asking for a declaration that the lease is not binding cannot oust the exclusive jurisdiction of the Revenue Court ; the ultimate object of this declaration is ejectment of the defendants by the Revenue Court. I rely on the cases of *Rai Krishna Chand* v. *Mahadeo Singh* (1) and *Ram Singh* v. *Girraj Singh* (2). What section 167 provides is that where the dispute or matter about which the plaintiff seeks relief is such that in respect thereof he can bring a suit or make an application of the nature specified in the fourth schedule of the Tenancy Act, then he must do so; he cannot take the matter to any other court under some other guise. In this case the plaintiff could

(1) Weekly Notes, 1901, p. 49 (2) (1914) I. L. R., 37 All., 41.

bring a suit for ejectment under section 58 which is a suit specified in the fourth schedule. Unless this interpretation is put upon section 167, the latter part of it would be pointless and unnecessary. That a comprehensive scope was intended to be given to the latter portion of the section is clear; for it excludes from the jurisdiction of the Civil Court not alone "such suits and applications" as are specified in the fourth schedule, but "any dispute or matter in respect of which any such suit or application might be brought or made."

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Babu *Purushottam Das Tandan*), for the respondent:—

The suit as framed is expressly for a declaration that a certain lease is bad. It is *prima facie* cognizable by a Civil Court unless the cognizance thereof is barred by any enactment. It is said that section 167 read with section 95 of the Tenancy Act, operates as a bar. Section 95 has no application; the declaration claimed does not come under either clause *(a)* or clause *(b)* of that section. The nature and character of a tenancy comes within the word "class" of clause *(b)*. It cannot be said that the word "description" in clause *(a)* means the same thing; there must be a sharp distinction between the two clauses. Now, whether the lease is good or bad, the defendants cannot come under any "class" of tenancy as defined in section 6 of the Tenancy Act other than the fifth, namely, non-occupancy tenant. There is thus no dispute as to the class of tenancy and the suit does not fall within section 95. A suit for a declaration that a lease is inoperative is not of the nature specified in the fourth schedule of the Tenancy Act. In fact, such a suit is not expressly provided for by the Rent Act at all. Section 167 does not, therefore, apply. In considering the applicability of section 167, one must begin by finding out whether the suit or application is provided for in the fourth schedule; if it is not, then the latter portion of the section does not come into play at all. The word "such" shows this. The section is to be interpreted in this way, that the first part says that certain specified suits and applications are cognizable by the Revenue Courts but does not prohibit the jurisdiction of the Civil Court; then comes the second part which says that in "such"

1915

SHER KHAN v. DEBI PRASAD.

cases the jurisdiction of the Civil Courts is excluded. According to this interpretation the second part would not be unnecessary or meaningless; but for it the jurisdiction of the Civil Courts would not be ousted. The interpretation sought to be put upon it by the appellants would be too wide. But, even accepting that interpretation, the question would arise whether the Revenue Court was competent, in a suit for ejectment, to decide whether the perpetual lease was valid or not. The Revenue Court has no authority to determine such a question; and if it took upon itself to do so the decision would not be final or *res judicata*. I rely on the case of *Gomti Kunwar* v. *Gudri* (1). The ruling in 22 A. W. N., relied on by the appellants was considered in that case. Section 167 is directed only to those matters which can be finally and effectively decided by the Revenue Courts so as to constitute *res judicata*. The case cited by the appellants—*Ram Singh* v. *Girraj Singh* (2)—is distinguishable. There the lease had been directly set up in the Revenue Court and that court had decided that it was valid. When the plaintiff went to the Civil Court the Judges said that the effect of the civil suit would be to nullify the decision of the Revenue Court. In the present case the Revenue Court did not decide the question of the validity of the lease at all. It expressly left the question open. Moreover, in that case the suit was in substance one for ejectment; here, as the case now stands, the suit is for a declaration alone. If a plaintiff wants a declaration from a Civil Court he cannot be compelled to go to another court and seek ejectment. There may be cases in which the plaintiff has no right to present possession by ejectment; for example, where the question is whether the defendant holds as lessee for ten years or as a permanent lessee.

The Revenue Courts could not have entertained a suit in which the relief now claimed was incorporated in the plaint.

The Hon'ble Mr. *Abdul Raoof* was not heard in reply.

PIGGOTT, J.—This is an appeal by the defendants against an order of the learned District Judge of Aligarh passed under order XLI, rule 23, remanding to the court of the Subordinate Judge of Aligarh, for decision on the merits, a suit which had been dismissed by that court. The learned Subordinate Judge had

(1) (1902) I. L. R., 25 All., 138. (2) (1914) I. L. R., 37 All, 41.

held that, on the facts stated in the plaint, the suit was not cognizable by him, being barred by section 167 of the Agra Tenancy Act (Local Act II of 1901). This is the finding which the learned District Judge has reversed on appeal and his decision is now challenged before us. There was a mortgage of some zamindari property on which a suit was brought and a decree for sale was made. After the mortgage, but before the decree for sale, the mortgagors executed a perpetual lease in respect of certain lands appertaining to the share in question. In execution of the decree for sale the zamindari property was put to sale and was purchased by the present plaintiff. He brought this suit in order to get rid of the perpetual lease. As originally drafted, the relief claimed in the plaint was recovery of possession over the land in question as against the defendants lessees. In reply the defendants lessees claimed the benefit of section 202 of the Tenancy Act, and were accordingly directed to institute a suit in the Revenue Court for the determination of the question whether or not they held the land in suit as tenants of the plaintiff. They instituted a suit accordingly; but when that suit came up for trial the present plaintiff, who was defendant in the Revenue Court, admitted the existence of a tenancy. He pleaded that the precise nature of that tenancy, and in particular the validity of the perpetual lease under which the present defendants claimed to hold, was not a matter for determination in that suit. On this understanding a decree was passed to the effect that the plaintiffs in the Revenue Court, who are appellants before this Court, held the land in suit as tenants of the present plaintiff respondent. After the proceedings in the Revenue Court had thus terminated, the respondent obtained leave to amend his plaint by asking for a simple declaration that the perpetual lease in question was not binding upon him. It was the plaint as thus amended which the learned Subordinate Judge has held not to be cognizable by the Civil Court. The provisions of section 167 of the Agra Tenancy Act have been discussed in a number of rulings, the most recent of which is *Ram Singh* v. *Girraj Singh* (1). As will be apparent from that report, I am myself deeply committed to the

(1) (1914) I. L. R., 37 All., 41.

1915

SHER KHAN v. DEBI PRASAD.

view that the provisions of section 167 of the Tenancy Act do bar a suit like the present. The plaintiff in this case, having obtained possession of the zamindari share on his auction purchase, found in existence a perpetual lease of a portion of the property which he regarded as interfering with his full enjoyment of the property acquired by him. His natural remedy, if as a matter of fact the lease was executed under such circumstances as not to be binding upon him, was by way of a suit for ejectment under section 58 of the Tenancy Act. Such a suit would fall within the provisions of serial number 29 of group *(c)* of the fourth schedule to the Act in question and would be cognizable only by the Revenue Courts. The plaintiff in such a case would seek for ejectment of the defendants lessees on the ground that they hold only as tenants from year to year. In reply the perpetual lease in favour of the said defendants would be set up, and in order to the determination of the question thus raised the Revenue Court would have to decide whether the said lease was valid and binding on the plaintiff. The question is whether the plaintiff can be allowed to oust the jurisdiction of the Revenue Court, and bring his suit before a different forum, by seeking for a mere declaration. In the judgement which was before the Bench of this Court which decided the case of *Ram Singh* v. *Girraj Singh* (1) I have discussed this question at some length, and so far as I am concerned I have nothing to add to the reasons which I gave in my judgement in that case for holding that the second part of section 167 of the Tenancy Act must be construed as barring a suit like the present. It may be said that the final decision of the Bench of this Court does not proceed precisely on the lines taken by me. Even, however, confining my decision to the grounds taken by the learned Judges who decided the case of *Ram Singh* v. *Girraj Singh* (1) on appeal under section 10 of the Letters Patent, I would say that, if we disregard the form of the present suit, the real substance is clearly one which could have been decided in the Revenue Court. The object of the plaintiff is to get rid of the defendants who claim to hold the land in suit under a perpetual lease. This he can undoubtedly do by a suit in ejectment in the Revenue Court of the

(1) (1914) I. L. R., 37 All., 41.

nature already explained. I do not think he is entitled to come to the Civil Court for a mere declaration, the only object of which would be to enable him to take further proceedings in ejectment before the Revenue Courts. It seems to me that, unless this view is maintained, a conflict of jurisdiction between the Civil and Revenue Courts in matters of this sort will sooner or later be inevitable. Section 11 of the Code of Civil Procedure could not be applied, strictly on its terms, so as to make the decision of a Civil Court in a declaratory suit binding on the Revenue Court in a suit for ejectment, for it could be pleaded that the Civil Court had no jurisdiction to try the suit for ejectment. I would accordingly set aside the order of the lower appellate Court and restore that of the Court of first instance.

CHAMIER, J.—The facts of this case have been stated by my learned colleague and I will not repeat them. In the courts below it was contended on behalf of the defendants that the jurisdiction of the Civil Court was barred by the provisions of section 167 read with section 95 of the Agra Tenancy Act. The Subordinate Judge accepted this contention and dismissed the suit. On appeal the District Judge held that section 95 of the Act did not apply to the case at all because the plaintiff could not have brought a suit under section 95 for a declaration as to the validity of the perpetual lease set up by the defendants or to have it declared that the defendants were not the holders of a perpetual lease. Having regard to the definition of the word *class* contained in the Act it appears to me that a suit for such a declaration would not be a suit for a declaration as to the class to which a tenant belongs, nor do I think that such a suit would be for a declaration as to the name and description of a tenant within the meaning of clause *(a)* of section 95, though it was vigorously contended by Mr. *Abdul Raoof* that the word "description" covered such a case. In this Court it is contended that even if section 95 does not apply to the case, yet the jurisdiction of the Civil Court to entertain this suit is barred because at the date of the suit the plaintiff might have brought a suit for the ejectment of the defendants under sections 58 and 63 of the Tenancy Act. It has been held, I think rightly, in

1915

SHER KHAN v. DEBI PRASAD

several cases by this Court that in a suit for the ejectment of a tenant if the tenant pleads that he holds under a perpetual lease under which he is not liable to be ejected it is for the Revenue Court to decide whether the plea is correct or not, but at least three Judges of the Court are further committed to the view that a suit like the one now before us cannot be maintained because the plaintiff might have instituted a suit in the Revenue Court for the ejectment of the defendants in which the validity of the lease set up by the defendants might have been determined. The case is really covered by the principle of the decision of RICHARDS, C. J. and BANERJI J. in *Ram Singh* v. *Girraj Singh* (1), in which they approved of the view taken by my learned colleague. On the authorities I feel bound to hold that the question whether the defendants are entitled to hold the land under the perpetual lease set up by them is a "matter in respect of which" a suit might have been brought in the Revenue Court within the meaning of section 167 of the Tenacny Act, although the plaintiff could not in the Revenue Court have claimed any declaration regarding the lease. It may be doubted whether the authors of the section intended that it should be construed in such a comprehensive manner, but a *cursus curiae* has been established from which I am not prepared to dissent. I agree that this appeal should be allowed and the decision of the first Court restored.

BY THE COURT.—The appeal is allowed. The decree of the lower appellate Court is set aside and the decree of the first Court is restored with costs here and in the lower appellate Court.

Appeal allowed.

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

1915

February, 9.

INDRAJ (PLAINTIFF) *v.* BROTHER CLEMENT, MISSIONARY (DEFENDANT) *

Per-emption—Custom—Vendor bound to offer to co-sharers—Refusal to purchase—Refusal to give more than a fixed price.

The custom in pursuance of which a right of pre-emption was claimed being that the vendor was bound to offer the property for sale to his co-sharers and only in case of their refusal he could sell to a stranger, the vendor offered the

* Second Appeal No. 53 of 1915, from a decree of L. Johnston, District Judge of Meerut, dated the 22nd of September, 1914, confirming a decree of Additional Munsif of Ghaziabad, dated the 8th of July, 1914.

(1) (1914) I. L. R., 37 All., 41.