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on the merits and not on a preliminary point. Rules 23 and 25 should be differentiated. An incorrect order of remand under rule 23 instead of rule 25 necessitates a fresh appeal from the fresh decree of the first court. The case of *Mata Din* v. *Jamna Das* (1) was decided under section 562 of the Code of 1882, and there is some difference in language between that section and the present order XLI, rule 23.

Munshi *Newal Kishore*, for the respondents, was not heard.

WALSH and STUART, JJ. :—In this case four issues were framed. The Munsif decided the first issue in favour of the defendants and dismissed the suit. Now the first issue was an issue which if decided in favour of the defendants, finally disposed of the suit. If on the other hand it was decided in favour of the plaintiffs, it left other issues undetermined, and the suit therefore came up to the appellate court in the condition that if the first issue was wrongly decided, the remaining issues had not been decided at all, and it was necessary to decide them. Having regard to the previous decisions in this Court and particularly to the decision in *Mata Din* v. *Jamna Das* (1), we think that that was a preliminary point within the meaning of order XLI, rule 23. It is important that on these questions of practice the decisions of the Court should be consistent. We think therefore that the case was a proper one for remand under that order. We are not disposing of the suit which still remains to be decided on the result of issues 2, 3, and 4 in the Munsif's court. This appeal must be dismissed with costs.

Appeal dismissed.

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November, 20.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

PACHAN SINGH (PLAINTIFF) *v.* JANGJIT SINGH AND ANOTHER (DEFENDANTS).*

Sale of immovable property—Agreement by vendee to pay revenue—Reservation of portion out of the property sold—Agreement not binding on transferee.

The vendor of a village reserved for her maintenance 196 bighas, and the vendee also agreed not to ask for rent of those 196 bighas. The vendee further did not insist upon payment of the proportionate share of Government revenue due from the vendor, but paid it himself.

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*Appeal No. 112 of 1915, under section 10 of the Letters Patent.

(1) (1905) I. L. R., 27 All., 691.

Held that any agreement which might have existed as between the vendor and the vendee as regards the payment of Government revenue was a purely personal matter and could not bind the vendee after the death of the vendor when the land was in the possession of her legatee. *Sri Thakurji Maharaj* v. *Lachmi Narain* (1), *Ram Gobind* v. *Sri Thakurji Maharaj* (2) and *Ali Husain* v. *Hakim-ullah* (3) referred to.

THE facts of this case were as follows:—

One Musammat Bari Dulaiya was the recorded owner of the entire village Garo, which was revenue-free till 1831, but was assessed to revenue in 1836. She sold the entire village in 1847 to one Dewan Parichit Lal, but remained in possession of 196 bighas of land in the village. Dewan Parichit sold the village to the ancestor of the plaintiff on the 1st of October, 1872. The latter sued Musammat Bari Dulaiya and her daughters-in-law Musammat Rani Dulaiya and Musammat Nanhi Dulaiya, who were in possession of the 196 bighas, for rent in the Revenue Court, and obtained a decree in 1874, whereupon the said ladies sued Dewan Parichit and his transferee in the Civil Court for a declaration that they were not liable to pay rent on the ground that the 196 bighas were reserved by Musammat Bari Dulaiya from the sale in 1847 as her *malikana* for the maintenance of herself and her daughter-in-law. The suit was decreed in 1876. The ladies remained in possession without payment of any rent and were recorded as *malikanadars*. On their death, the defendants entered into possession under a will executed by Musammat Rani Dulaiya and Musammat Nanhi Dulaiya and were recorded as *malikanadars*. They paid no rent to the plaintiff or his predecessor and the revenue which was assessed upon the entire village was always paid by the latter. At the settlement of the village in 1317F., this area of 196 bighas was separately assessed to a revenue of Rs. 88 per year. The plaintiff, who was also lambardar, paid the revenue of the whole village and brought the present suit against the defendants for their share of the revenue under section 159 of Act No. II of 1901. The defence was that the defendants had never paid rent or revenue and were not liable to pay any revenue. They further pleaded that they had not entered into any agreement with Government for the payment of revenue, and that if this area of

(1) (1913) 11 A. L. J., 212. (2) (1913) 11 A. L. J., 231.

(3) (1916) I. L. R., 38 All., 230.

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196 bighas had been shown as assessed to revenue, the plaintiff alone was liable to pay. The Assistant Collector decreed the suit, but in effect the District Judge dismissed the suit. The plaintiff preferred a second appeal, which was dismissed by a single Judge of the Court in the following judgement:—

"The admitted facts of this case and those which are found by the court below are as follows:—One Musammat Bari Dulaiya was the recorded owner of a village called Garo. She sold the entire village to her son-in-law Dewan Parichit, excepting however from the sale 196 bighas which she kept for her maintenance and for that of the other members of the family. On the 18th of October, 1872, Parichit sold the same village to the grandfather and grand-uncle of the plaintiff appellant. In 1876 Rani Dulaiya, one of the daughters-in-law of Musammat Bari Dulaiya, sued Dewan Parichit and his transferee for a declaration that she was entitled to remain in possession of the land excepted from the sale of 1847 and that she was not liable to pay revenue in respect of that land. Her claim was resisted on various grounds; but it was decreed by the court. She and Musammat Nanhi Dulaiya, another daughter-in-law of Musammat Bari Dulaiya, executed a will in favour of Sukh Singh bequeathing the 196 bighas of land in question to him. The two ladies died and Sukh Singh entered into possession. After his death his sons Jangjit Singh and Kalyan Singh obtained possession of the said land and are still in possession of it. The said land was not shown in any of the settlements except the last as liable for payment of revenue, but somehow at the last settlement a sum of Rs. 80 was shown as the revenue payable in respect of the said land. The plaintiff appellant, taking advantage, no doubt, of the entry in the last settlement, instituted the suit out of which this appeal has arisen against Jangjit Singh and Kalyan Singh for the recovery of revenue. The claim was resisted on the ground that no revenue was payable on the land. The first court decreed the claim. On appeal the learned District Judge remanded the case for trial of a fresh issue and on receipt of the finding on the issue thus remitted accepted the appeal and dismissed the claim. The plaintiff has come up in second appeal to this Court and challenges the decree against him on three points. He contends that it has not been shown that the transfer in favour of Sukh Singh was a legal and valid transfer. The genuineness of the will in favour of Sukh Singh is not disputed. The contention is that the land was reserved by Musammat Bari Dulaiya for her own maintenance and for the maintenance of the ladies of the family. Musammat Bari Dulaiya is dead as also her daughter and daughters-in-law. The daughters-in-law could not therefore convey any interest to Sukh Singh by executing a will in his favour. The point now raised was never raised in the courts below. Moreover, it may be that Musammat Bari Dulaiya and her daughters-in-law described the land excepted from the sale as the land reserved for maintenance; but it was never said at any time that the said land was to remain revenue-free only for the life-time of Musammat Bari Dulaiya and other ladies of the family. The next contention is that under section 158 of the Tenancy Act the land in question is liable to revenue. I do not think that section 158 is applicable to the case.

Under that section under certain conditions the Revenue Court is empowered to declare the holder of the land to be its proprietor and to determine revenue upon it. The said section lays down the procedure to be followed in certain cases. In the present case no relief has been sought by any of the parties under that section. The last contention is based on section 93 of the Land Revenue Act. It is said that as revenue has been assessed on the land in question by the Revenue Court and no objection was taken at the time by the respondents they are liable to pay the revenue. I do not think this argument is sound. The question is not whether revenue should or should not have been assessed on the land in question, but whether the respondents who are in possession of it are liable to pay revenue. They are entered in the papers as *malikanadars* and it has been decided between the predecessors in title of both the parties that the holder of the land will not have to pay revenue. The plaintiff therefore cannot claim any revenue from the defendants respondents. The appeal fails and is dismissed with costs."

The plaintiff preferred an appeal under section 10 of the Letters Patent.

Babu *Piari Lal Banerji*, for the appellant :—

The defendant is in possession of the 196 bighas of land which is shown as assessed to revenue and they are *prima facie* liable to pay revenue for it. Their plea of exemption is based on an allegation that this land was reserved in lieu of maintenance, but the maintenance grant was merely personal and could not be bequeathed by the ladies to the defendants by a will. Moreover, if Dewan Parichit had agreed to pay the revenue of this land, such an agreement would not be binding for all time to come and would not constitute the land a revenue-free grant. He relied on *Sri Thakurji Maharaj* v. *Lachmi Narain* (1), *Ram Gobind* v. *Sri Thakurji Maharaj* (2) and *Ali Husain* v. *Hakim-ullah*(3).

Pandit *Braj Nath Vyas*, for the respondent :—

The defendants were entered as *malikanadars* and were not co-sharers and were not liable to pay revenue, which had never been paid since 1847. The Civil Court judgement of 1876 operated as *res judicata* between the parties and the judgement clearly showed that the persons in possession of this area were not liable to meet any charges on this land, but were to enjoy it free of any payment.

Babu *Piari Lal Banerji*, was not heard in reply.

(1) (1913) 11 A. L. J., 212. (2) (1913) 11 A. L. J., 231.
(3) (1916) I. L. R., 38 All., 230.

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RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit brought under section 159 of the Tenancy Act by a lambardar alleging that the defendant is liable for his proportion of Government revenue paid by the lambardar. It appears that in the year 1872, the predecessors in title of the defendants sold the whole village, which included 196 bighas. These 196 bighas, it is alleged, were retained out of the sale "for the maintenance of the vendor." From the year 1872 right up to the present time it seems that the owner of the rest of the village has always paid the entire Government revenue. It is contended from this circumstance that there must have been an agreement that the 196 bighas should be held free of Government revenue as between the owners of the 196 bighas and the owners of the rest of the village. Of course, so far as Government were concerned, the entire village (including the 196 bighas) was liable for Government revenue. In the case of *Sri Thakurji Maharaj* v. *Lachmi Narain* (1) the facts were very similar, except that in that case the agreement as to Government revenue was expressly stated, while in this case it can only be inferred from the fact that the owners of the 196 bighas have not been in the habit of paying it. A learned Judge of this Court held that, notwithstanding the agreement, the lambardar was entitled to sue for the contribution of Government revenue. The same learned Judge in *Ram Gobind* v. *Sri Thakurji Maharaj* (2) decided to the same effect. In the case of *Ali Husain* v. *Hakim-ullah* (3), a Bench of two Judges, which included the learned Judge from whose decision the present appeal has been preferred, held that an agreement of the kind was void under Regulation XXXI of 1803. In deciding the present case the learned Judge of this Court seems to have thought that there had been a decision between the predecessors in title of the plaintiff and the predecessors in title of the defendant that the owner of this 196 bighas was not liable to pay *revenue*. A perusal of the judgement in that case shows that the decision was that the owner of the 196 bighas was not liable to pay *rent*, not that he was not liable to pay *revenue*. We think that we must follow the rulings to which we

(1) (1913) 11 A. L. J., 212. (2) (1913) 11 A. L. J., 231.
(3) (1916) I. L. R., 38 All., 230.

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have referred. We think at the same time that as this suit has been brought for the recovery of Government revenue for the first time since the year 1872 the plaintiff should abide his own costs in all courts. We accordingly allow the appeal, set aside the decree of this Court and of the lower appellate court and restore the decree of the court of first instance, with this modification that we direct that the parties do abide their own costs in all courts.

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Stuart.

1916, *November* 20.

LADU RAM AND ANOTHER (APPLICANTS) *v.* MAHABIR PRASAD (OPPOSITE PARTY.)*

Act No. III of 1907 (*Provincial Insolvency Act*), *sections* 43 (2), 46—*Creditor—Person aggrieved—Appeal.*

One of the creditors of an insolvent, in whose case no receiver had been appointed, applied to the court making allegations that the insolvent had been guilty of an offence under section 43, sub-section (2), of the Provincial Insolvency Act, 1907, the court, however, held that no case was made out and refused to move in the matter.

Held that the creditor-applicant was not a "person aggrieved" within meaning of section 46, sub-section (2), of the Act, and had no right of appeal against the court's order. *Iyappa Nainar* v. *Manikka Asari* (1) referred to.

THE facts of this case, so far as material for the purposes of this report, were as follows :—

The respondent was adjudicated an insolvent, but no receiver of his property was appointed. The appellant brought to the notice of the court certain offences which, according to him, made the respondent criminally punishable. The court below held that there was no case. The applicant appealed.

Munshi *Haribans Sahai*, for the respondents, raised a preliminary objection that no appeal lay under section 46 (2) by a creditor whose application was refused by the District Judge. The appellant is not a person aggrieved under section 46 of the Insolvency Act, as no order has been passed against him: *Iyappa Nainar* v. *Manikka Asari* (1).

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*First Appeal No. 105 of 1916, from an order of G. C. Badhwar, District Judge of Ghazipur, dated the 19th of April, 1916.

(1) (1914) 27 Indian Cases, 241.