

FULL BENCH.

1917
December, 11.

*Before Justice Sir Pramada Charan Banerji, Mr. Justice Piggott and
Mr. Justice Walsh.*

BHARAT SINGH (PLAINTIFF) v. TEJ SINGH AND ANOTHER (DEFENDANTS)*
Act (Local) No. II of 1901 (Agra Tenancy Act). sections 164 and 166—Lambardar and co-sharer—Suit for profits against lambardar—Death of defendant pending suit—Liability of representative for sums not collected owing to negligence of lambardar.

Held on a construction of sections 164 and 166 of the Agra Tenancy Act, 1901, that where, a suit for profits having been filed against a lambardar, the lambardar dies pending the suit, and his legal representative is brought on the record as defendant, the representative is, so far as the assets of the deceased lambardar in his hands are concerned, liable to the same extent as the lambardar, that is to say, not only for money actually collected by the lambardar, but also for money left uncollected owing to his negligence or misconduct. *Murad-un-nissa v. Ghulam Sajjad* (1) and *Dip Singh v. Ram Charan* (2) distinguished.

THE facts of the case fully appear from the following extracts from the order of WALSH, J., referring the appeal to the Chief Justice for the appointment of a Full Bench :—

This is a suit under section 164 of the Tenancy Act of 1901. The suit was brought by the plaintiff, a co-sharer, against Kundan Singh, the then lambardar and another defendant, the vendor of the plaintiff, whose position is immaterial to the question raised in this appeal. The claim made was for the plaintiff's share of the profits which Kundan Singh had actually collected and also for such sums as owing to his negligence or misconduct he had failed to collect. During the suit, and before the date of hearing, Kundan Singh died, and the present defendant Tej Singh, the son and heir, was brought on the record as his personal representative, and the suit proceeded against the defendant, the personal representative, as such, in respect of the liability of his deceased father which had accrued before the death of the father to the extent of the assets which came into the hands of the defendant as his father's representative. The son is not sued in his personal capacity, nor does the action relate to any failure to carry out

* Second Appeal No. 795 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 17th of February, 1916, reversing a decree of R. D. W. D. MacLeod, Assistant Collector, First Class, of Aligarh, dated the 11th of August, 1915.

(1) (1897) I. L. R., 20 All., 78. (2) (1906) I. L. R., 29 All., 15.

the duty of lambardar, or misfeasance in carrying out the duty, after the death of Kundan Singh. The sole questions therefore in the suit are what would have been the liability of Kundan Singh under section 164, if he had lived, and what is the liability of his estate now that he is dead. The lower court has held that the son is not liable for the misconduct and negligence of his father and from that decision this appeal is brought. In the sense that a son is not liable for the torts of his deceased father, it is an accurate expression of the law, but in my opinion the negligence or misconduct mentioned in section 164 is not a tort at all. It is the breach or neglect of an obligation of *quasi* contractual nature arising out of an agency or trust undertaken by the lambardar by the acceptance of the post and imposed upon him by Statute *viz.*, section 164.

There is a considerable body of authority that the liability for sums remaining uncollected does not survive under this section after the death of the lambardar. By that authority I am bound, and therefore I must either dismiss the appeal or refer the matter to the Chief Justice for further consideration by a Full Court.

"The general rule" says Williams on Executors, Volume II of the 10th Edition, page 1346, "has been established from very early times with respect to such personal claims as are founded upon any obligation, contract debt, covenant or other duty, that the right of action on which the testator or intestate might have been sued in his life-time survives his death and is enforceable against his executor or administrator. Therefore it is clear that executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased." Again, on page 1353, after pointing out that in cases of tort, if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator, the author goes on:—"But the case is different where the act is not a mere tort, but is a breach of *quasi* contract, where the claim is founded on a breach of fiduciary relation or on failure to perform a duty." I take it to be impossible to deny that the duty of a lambardar imposed upon him by this section, to take reasonable care to collect the profits and to hand over what he has collected,

1917

 BHARAT
SINGH
v.
TEJ SINGH

1917

BHARAT
SINGH
v
TEJ SINGH.

comes within the definition which I have read and the liability survives after death.

An examination of the section shows that it contains nothing to the contrary. Sub-section (1) provides that a co-sharer may sue the lambardar for his share of the profits. By section 166, the word 'lambardar' there includes heirs and legal representatives. Sub-section (2) provides that in any such suit the court may award to the plaintiff sums remaining uncollected owing to the negligence or misconduct of the defendant. Plaintiff in sub-section (2) means co-sharer and defendant means lambardar. They are merely synonymous. Apart from authority, therefore, having regard to the common law and sections 164 and 166, I find considerable difficulty in seeing what defence a son has, in respect of assets in his hands, to an action brought against his father under section 164, during his father's life-time. With great diffidence I think that the authorities to the contrary are not satisfactory. In this case the defendant was the lambardar when the suit was instituted and the cause of action must be determined at the time of the commencement of the suit, and therefore there is a distinction between this and the case reported in I. L. R., 29 All., 15. I think the matter is one which I ought to refer to the acting Chief Justice with a view to having the question re-considered by a Full Bench.

Dr. *Surendra Nath Sen*, for the appellant :—

In a suit instituted against a lambardar under section 164 of the Tenancy Act, if the lambardar dies in the course of the suit, what is the measure of the liability of his legal representative who is brought on the record? That is the question for determination in this appeal. The enforcement of the liability will, of course, be limited by the amount of the assets of the deceased lambardar in the hands of his legal representative; the question is what is the extent of the liability? If the lambardar had not died *pendente lite* the plaintiff would unquestionably be entitled, under clause (2) of section 164, to get profits not only on the collections actually made by the defendant lambardar, but also on sums left uncollected owing to his negligence or misconduct. The mere fact that the original defendant died during the pendency of the suit would not alter the rights of the plaintiff or affect the

1917

 BHARAT
SINGH
v.
TEJ SINGH.

suit in any way, and the liability of the original defendant would attach unaltered to his assets in the hands of his legal representatives. In other words, the right of suit survives in its entirety against them; the same cause of action and the same suit continue against them. This is made clear from a comparison of the language of the present Act and of that of Act XII of 1881. In section 164 of cl. (2) of the present Act, the word "defendant" has been substituted for the word "lambardar" in section 209 of the former Act, and a new provision introduced by section 166. By this change the Legislature has made it quite clear that a suit brought against the lambardar can be continued unchanged against his legal representatives. A consideration of general principles, apart from the enactment, also points the same way. The liability of a lambardar in respect of the payment of profits to the co-sharers is not of the nature of a personal tort, but is a *quasi* contractual liability. His position is like that of a trustee or agent of the whole body of co-sharers. Having regard to the nature of his position, the obligation is not merely personal but *quasi* contractual. That being the case, the liability is not altered by the mere fact of his death during the pendency of the suit and the substitution of his heirs on the record. The word "defendant" in section 164, cl. (2), means the original defendant to the suit, who, in the present case, was the lambardar himself. The case of *Dip Singh v. Ram Charan* (1) is distinguishable. There the suit was brought *after* the death of the lambardar, against his legal representative. The other cases mentioned in the referring order were decided under the former Act, XII of 1881. Moreover, the decisions were based on the view that the liability of a lambardar was a personal liability only. The case in the Allahabad Weekly Notes for 1886 at page 32 was, again, a case in which the suit was instituted against the heir of the deceased lambardar.

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

In order to ascertain the basis of a lambardar's liability it is necessary to consider his position. He is not a trespasser or a person in wrongful possession and cannot, like them, be made liable for mesne profits which he has not collected. But for

(1) (1906) I. L. R., 29 All., 15.

1917

BHARAT
SINGH
v.
THE SINGH.

section 164 (2), he cannot be made liable for what he has not collected, *i.e.*, liable by way of damages. Although this liability is statutory in character, it is really based upon a liability for damages. A lambarदार makes no contract whatsoever with the co-sharers. He may, at the outside, be regarded as making a contract with the Collector. Negligence or misconduct in the performance of duty is always a tort. In confining the lambarदार's liability in respect of sums left uncollected to those sums which are proved to have been uncollected owing to his negligence or misconduct, the Legislature clearly shows that it regards his liability as being based on tort. This liability, being a personal one, based on tort, cannot be enforced against his legal representatives. Where the estate of a tort-feasor has not been enriched the estate as such is not liable, but the tort-feasor is only personally liable in damages. The leading case on the subject of liability of representatives is that of *Phillips v. Homfray* (1). Reference was made to *Williams: Law of Executors: Tenth Edition*, page 1352, 1356. The following cases also support the view that the liability of a lambarदार in respect of non-collections is a personal one, based on tort, and cannot be enforced against his heirs and legal representatives: *Gulab v. Fateh Chand* (2), *Murad-un-nissa v. Ghulam Sajjad* (3) and *Bir Narain v. Girdhar Lal* (4). The next question is, whether there are sufficient grounds for supposing that the Legislature, in the present Act, altered its view of the character of this liability and regarded it as resting on some other basis. The alterations made by the present Act are the enactment of section 166, and the change of the word "lambarदार" to the word "defendant" in section 164(2). By the first, suits were allowed to be brought in the Revenue Courts against the heirs of a lambarदार, whereas the former Act XII of 1881 allowed suits only against the lambarदार himself. Under that Act, however, a suit which had been brought against the lambarदार could, on his death, be continued against his heirs, who were brought on the record, as happened in both the cases in I. L. R. 20 All., cited above. The continuation of the suit against the heirs is not a new feature introduced by

(1) [1868] 24 Ch. D., 439.

(3) (1897) I. L. R., 20 All., 73.

(2) Weekly Notes, 1886, p. 32.

(4) (1897) I. L. R., 20 All., 74.

1917

 BHARAT
SINGH
v.
TEJ SINGH.

the present Act, and there has been no change of policy so far as suits instituted against a lambardar, who happens to die *pendente lite*, are concerned. The second alteration, namely, that of the word "lambardar" to the word "defendant," was necessitated by the fact that under the present Act a suit could be brought against the heir of a deceased lambardar. By this alteration the Legislature clearly indicated an intention that the heirs of a deceased lambardar were not to be made liable for the non-collections of the lambardar. If the word "lambardar" had continued to stand as it was, then in a suit instituted against the heirs of a lambardar, a decree would be passed against them in respect of the sums left uncollected through the negligence or misconduct of the deceased lambardar. In keeping with the view that the liability for non-collections was personal to the lambardar, and to prevent the liability from being enforced against his heirs, the Legislature altered the word "lambardar" to "defendant." Further, clause (2) of section 164 deals with the powers of the court in passing a decree; it fixes the limits of the decree to be passed. It is reasonable, therefore, to construe the word "defendant" as meaning the defendant against whom the court is going to pass a decree. Clause (2) has reference to the time at which the court's award or decree is to be made. If at that time there is before the court a person answering to the description of a defendant through whose negligence or misconduct sums have remained uncollected, then the court can pass a decree in respect of those sums against him. In the present case the defendant against whom the decree was to be passed was, obviously, not a person guilty of any such negligence or misconduct. It is quite clear from the use of the word "defendant" in clause (2) that where the suit is instituted against the heir he cannot be made liable for the negligence of the deceased lambardar. It would be a recognition of the same principle to hold the same where the lambardar was sued in the first instance but died after the institution of the suit.

Dr. *Surendra Nath Sen*, was not heard in reply.

BANERJI, J.—This appeal arises out of a suit brought for the recovery of the share of profits of a co-sharer, for the year 1318 Fasli. The plaintiff is the assignee of the profits from the

1917

BHARAT
SINGH
v.
TEJ SINGH.

co-sharer who is the second defendant in the suit. The suit was brought against Kundan Singh, who was the lambardar in the year in question. The plaintiff claimed a share, not only of the profits actually realized but also of the profits which, according to him, had not been realized by the lambardar through gross negligence and misconduct. During the pendency of the suit the lambardar died, and his legal representative, Tej Singh, was brought upon the record. He contended that he was not liable for amounts which his predecessor in title, namely, Kundan Singh, had neglected to collect. The court of first instance repelled this contention, and made a decree for what it held to be the total amount shown in the rent roll and other sums which had not been shown in the rent roll but which the lambardar must be taken to have realized. Upon appeal by the defendant, the legal representative of the lambardar, the lower appellate court dismissed the suit holding that the representative of the lambardar could not be held liable for amounts which the lambardar had through misconduct and negligence not collected, and as the amount actually collected fell short of the Government revenue and cesses paid by him, the plaintiff was not entitled to recover anything from the defendant. From this decision of the learned Judge of the lower appellate court the present appeal has been filed. The question we have to determine is whether in the circumstances of the present case, the contention of the defendant is a valid contention. It seems to me that the decision of the case turns upon the construction of section 164 of the Agra Tenancy Act, under which the suit was brought. That section provides that "a co-sharer may sue the lambardar for his share of the profits of a mahal or of any part thereof. In any such suit the court may award to the plaintiff not only a share of the profits actually collected, but also of such sums as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the defendant." What we have to consider is what is the scope of this section. The test for answering the question is whether by the word "defendant" the Legislature meant the original defendant to the suit or the person who was in the array of defendants at the time the decree was passed. By section 166, a 'lambardar' includes the heirs

legal representatives, executors, administrators and assignees of the lambardar. The present suit was not brought against a representative of the lambardar but against the lambardar, himself. Sub-section (2) seems to me to refer to the case of a person who was sued as the original lambardar, and in that view the misconduct or negligence which would entitle the plaintiff to recover a share of the amount which remained uncollected, would be the misconduct or negligence of the defendant who was sued, namely, (as in the present case) the original lambardar. If the person who was sued was the representative of the lambardar, he would be the defendant in the suit and he would not be liable according to the language of the section, as the misconduct or negligence could not be his misconduct or negligence. However, we are not called upon to decide that question in this case. In the present case, the original lambardar who made the collections in the year in question was sued, and it was after his death that his representative was brought upon the record. The word "defendant" in sub-section (2) of section 164 contemplates, in my opinion, the original defendant to the suit, and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is, of the lambardar. This may create an anomaly, but we have to construe the section "as it stands. The case of *Murad-un-nissa v. Ghulam Sajjad* (1), to which reference was made, was a case under Act XII of 1881. Section 209 of that Act provided that in a suit brought against a lambardar for a share of profits, the plaintiff would be entitled to a sum equal to the plaintiff's share in the profits which through gross negligence or misconduct the lambardar had omitted to collect. That was a suit in which the heir of the lambardar was subsequently brought upon the record on the death of the lambardar. Having regard to the provisions of section 209, the liability of the lambardar would be for amounts which he had not collected. The word "lambardar" in Act XII of 1881, did not include the legal representative of a lambardar and therefore having regard to the fact that the word "lambardar" was used in that section, the heir of a lambardar could not

1917

 BHA
 SINGH
 v.
 THE SINGH.

(1) (1897) I. L. R., 20 All., 73.

1917

BHARAT
SINGH
v
TEJ SINGH.

be held liable. That case, therefore, does not seem to have any bearing upon the question we have to decide with reference to the language used in section 164 and the addition of section 166 to the present Tenancy Act. The case of *Dip Singh v. Ram Charan* (1), was a suit against the heir of a deceased lambardar and was brought under the present Tenancy Act. In that case it was held that having regard to the use of the word "defendant" in the section, the heir, who was the defendant, could not be held liable, as the negligence or misconduct referred to in the section was not his negligence or misconduct. That case, therefore, does not help us in the decision of the present suit. In my opinion, in view of the provisions of section 164, the question of gross negligence or misconduct of the original lambardar, against whom a suit was brought, would have to be gone into, and, if such negligence or misconduct was shown, his representative would be liable to the extent of the assets of the deceased which came into his hands. In any case the liability of the representative of the lambardar would not be a personal liability. On principle it does not seem that the assets of the deceased lambardar should escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct happened to die after the expiry of the year during which the collections had to be made. In my opinion no question of tort or of *quasi* contract arises under the circumstances mentioned above. The case, as I have already said, depends upon the construction of section 164, and I would construe the section in the manner I have stated above. In my opinion the decision of the lower appellate court ought to be reversed and the case remanded to that court.

PIGGOTT, J.—I concur both in the proposed order and in the reasons given for the same. I only wish to refer to the provisions of order XXII, rule 4, of the Code of Civil Procedure, as further strengthening the position taken up. When the suit was instituted the original defendant Kundan Singh was under a liability to the plaintiffs, by reason of the provisions of clause (2) of section 164 of the Tenancy Act. On his death his son Tej Singh was brought on the record as his legal representative. It

was then open to Tej Singh to make any defence appropriate to his character as a legal representative of Kundan Singh deceased. If Tej Singh had been sued as an original defendant after the death of his father it would no doubt have been open to him to say that, under the Statute, the negligence or misconduct on which a certain liability was imposed must be that of the defendant in the suit, and that he himself could not be held liable for any negligence or misconduct on the part of his father; but such a defence is, in my opinion, inappropriate to the character of Tej Singh as a legal representative of a deceased defendant brought upon the record under order XXII, rule 4, of the Code of Civil Procedure. This was a case in which it could not be pleaded that the right to sue did not survive, within the meaning of the rule in question; and, if the right to sue survives, it must do so against the legal representative of a deceased defendant in the same manner as against that defendant himself. In my opinion, on the wording of sections 164 and 166 of the Tenancy Act, the plaintiff's claim, based upon the second clause of section 164, was maintainable against the legal representative of Kundan Singh after the death of Kundan Singh.

WALSH, J.—I agree.

By THE COURT.—The order of the Court is that the appeal is allowed, the decree of the court below is set aside and the case is remanded to that court with directions to re-admit it under its original number in the register, and to try and determine the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

1917

BHABAT
SINGH
v.
TEJ SINGH.