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GOBIND RAI v. BANWARI LAL.

Subordinate Judge, referring to the decision in *Nannhu* v. *Sri Thakurji Maharaj* (1) and placing a certain interpretation on the plaint, held that this was a suit cognizable only by a Revenue Court. On this ground he reversed the decision of the first court and dismissed the suit. The ruling referred to by the lower appellate court has no bearing on the facts of the present case. The plaintiff came into court alleging that he had been wrongfully ejected and seeking to be restored to the same possession which he had previously enjoyed. A rent-free grantee is not a tenant within the meaning of the definition in the Agra Tenancy Act (No II of 1901). There is no section in the Act, and no article in the schedule, which provides for a suit by a grantee to recover possession as such, in the event of his wrongful ejectment, even though that ejectment may be the act of his zamindar. Consequently, if the present plaintiff had no remedy in the Civil Court he had no remedy anywhere. The decision of the lower appellate court is clearly wrong. As the plea of jurisdiction was the only one pressed in that court, it follows that the decision of the court of first instance on the merits must be restored. We accept this appeal, set aside the order appealed against and restore the decree of the first court. The case has been heard *ex parte*, but the appellant must get his costs.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MOJIZ FATIMA BEGAM AND OTHERS (PLAINTIFFS). *v.* ALI AKBAR (DEFENDANT).*

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March, 16.

Act (Local) No. II of 1901 *(Agra Tenancy Act) sections* 164 *and* 194 *—Lambardar and co-sharer—Suit for profits—Liability of lambardar in respect of rents accruing due before the date of his appointment.*

In a lambardari mahal the lambardar is, from the date of his appointment the agent appointed to act on behalf of the co-sharers, and he is the only person who, under section 194, clause (1), of the Agra Tenancy Act has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not statute-barred.

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* Second Appeal No. 449 of 1918, from a decree of B. J. Dalal, District Judge of Aligarh, dated the 17th of January, 1918, modifying a decree of Chatura Dat Joshi, Assistant Collector, First class, of Aligarh, dated the 5th of September, 1917.

(1) (1918) I. L. R., 41 All., 37.

A distnction, however, may require to be drawn in many cases between the degree of responsibility attaching to a lambardar in respect of arrears of rent which had accumulated during an *interregnum* prior to his appointment, and his responsiblity for the realization of the current demand as it fell due after the date of his appointment.

Ganga Sahai v. *Ganga Baksh* (1) and *Bharat Indu* v. *Syed Muhammad Mustafa Khan*, (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman*, for the appellants.

Munshi *Panna Lal*, for the respondent.

PIGGOTT and WALSH, JJ. : —This was a suit by three co-sharers against a lambardar for profits. One minor complication we may dispose of at once. While the second appeal was pending in this Court one of the three plaintiffs, by name Musammat Amir Begam, has compromised with the defendant lambardar. In the compomise it is stated that Musammat Amir Begam's claim on account of the profits of her share has been completely settled out of court and she is content that the appeal, in so far as it relates to her share, be dismissed without any order as to costs. This order will be noted when we come to pass the final decree of this Court. The remaining two plaintiffs, who are entitled each to a one-tenth share in the divisible profits of this mahal, have elected to proceed with their appeal and it will have to be decided in respect of the shares of these two plaintiffs. We have come with reluctance to the conclusion that it is impossible for us to decide the appeal without more specific findings from the court below upon certain issues of fact. In this connection we may point out that the tabular statement filed by the patwari, on the strength of which the court of first instance arrived at certain figures as representing the divisible profits of the mahal, is full of palpable mistakes. We have made an attempt to use it for the purpose of arriving ourselves at a final determination of the suit, but have found it impossible to do so because of the errors above mentioned.

We now proceed to consider the questions raised by the appeal. The suit was on account of the profits of the agricultural years 1321,1322 and 1323 Fasli. It is admitted that this is

(1) Weekly Notes, 1890, p. 3. (2) (1919) I.L.R., 41 All., 316.

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a mahal for which ordinarily a lambardar is appointed to collect rents from tenants and otherwise to act on behalf of the other co-sharers under section 194 of the Local Tenancy Act (No. II of 1901). The lambardar who preceded the defendant respondent died in the month of July, 1913, that is to say, slightly before the commencement of the agricultural year 1321 Fasli. It is admitted that there was an *interregnum*. The learned District Judge says at the commencement of his order that the defendant, Saiyid Ali Akbar, was appointed lambardar on the 30th of August, 1914. If we could accept this as a clear finding of fact we should certainly have to recast the account on the basis of which the lower appellate court has framed its decree. It is true that the agricultural year 1322 Fasli had commenced before the 30th of August, 1914, but not a single instalment of rent on account of the *Kharif* of the said year had fallen due; consequently the realization of all rents falling due during the agricultural year 1322 Fasli would be the duty of the lambardar and there would be no basis whatever for the procedure adopted by the learned District Judge in limiting the lambadar's liability to the *Rabi* instalment, that is to say, to the second half of the agricultural year 1322 Fasli. When, however, this was pointed out in argument, the learned counsel for the defendant pressed it upon us that there was nothing on the record, that he could discover, to warrant the learned District Judge's statement as to the date of the defendant's appointment, but that on the contrary the patwari had distinctly stated that Ali Akbar only entered upon his duties as lambardar from the *Rabi* of 1322 Fasli, that is to say, from the commencement of the second half of the said agricultural year. As the learned District Judge has recorded a finding of fact in one sense and then worked out his decision in a different sense, we are not prepared to accept either as a finding of fact binding upon this Court. We must, therefore, in any case, remit the following issue and we do so accordingly.

1. From what part of the agricultural year 1322 Fasli did the defendant enter upon his duties and responsibilities as lambardar? Was it from the commencement of the said year, or from the commencement of the second half of the year?

When this point has been finally settled a further question will arise with regard to the arrears of rent due on account of the period preceding the defendant's appointment as lambardar. There was, as we have already pointed out, an *interregnum* during which the mahal was not in charge of any lambardar. The duration of this *interregnum* was either one year or one year and a half. During that period there was a dispute as to the right of succession to the share of Saiyid Amir Haidar, the lambardar who had preceded the present defendant: as might be expected under the circumstances, collections during this period of *interregnum* were low and considerable arrears of rent accumulated. The learned District Judge has found, though we are unable to say on what precise evidence, that the defendant Ali Akbar as a matter of fact realized Rs. 300 on account of arrears of rent which had fallen due before his appointment as lambardar. He has very properly treated this sum as part of the divisible profits and framed his account accordingly. The contention of the appellants is, however, that from the date of his appointment it became the duty of the new lambardar to realize all arrears of rent due from tenants which had accrued due during the period immediately preceding his appointment and the right to recover which was not yet barred by limitation. Further, the applicants contend that if the defendant respondent was guilty of negligence or misconduct, in consequence of which these arrears still remained uncollected, he is liable to account to the co-sharers for the same by reason of the second clause of section 164 of the Local Tenancy Act (No. II of 1901). The learned District Judge has disposed of this matter by holding that the lambardar, after the date of his appointment, could not have maintained a suit against any single tenant in respect of arrears of rent which had fallen due prior to the date of the defendant's appointment. If this is a correct proposition of law it is obvious that no duty lay upon the defendant in respect of these arrears and that it cannot be said that he had been guilty of any negligence in failing to realize the same. We are satisfied, however, that the learned District Judge is wrong on this point. This is a lambardari mahal, in which a lambardar is ordinarily appointed, not merely to collect rents from tenants,

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but, as is stated in the Board of Revenue's Circular on the subject, to act on behalf of the other co-sharers under section 194 of the Agra Tenancy Act. Under clause (1) of this section the obligation imposed upon all co-sharers to sue jointly for any arrears of rent due to them jointly is made subject to this exception, that if they have appointed an agent to act on behalf of them, the suit may be maintained by the said agent. In a lambardari mahal the lambardar is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers, and he is the only person who under section 194, clause (1), aforesaid, has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not statute-barred. To hold otherwise would involve practical consequences of a very undesirable nature. In the present case, for instance, assuming for the sake of argument that the appointment of the defendant Ali Akbar as lambardar took effect from the middle of the agricultural year 1322 F'asli, and that arrears of rent were due from a tenant on account of the first half of that year, the result would be that before that tenant could be compelled to discharge his just liabilities, there would have to be separate suits, by the co-sharers for the first half of the year and by the lambardar for the second half of the year. It does not seem to us that any such intention on the part of the Legislature is to be deduced from the wording of section section 194 of the Tenancy Act. Under the former Tenancy Act the contrary was clearly held by a Bench of this Court in *Ganga Sahai* v. *Ganga Baksh* (1). In a recent case, that of *Bharat Indu* v. *Syed Muhammad Mustafa Khan* (2), this Court in remitting an issue to the court below clearly implied that a lambardar could obtain decrees under the Tenancy Act on account of arrears of rent which had accrued due prior to the date of his appointment. We are satisfied that this is a correct view of the law. As regards the present case, however, it requires to be considered what sort of evidence of negligence or misconduct on the part of the defendant lambardar would be required to discharge the burden of proof laid upon the plaintiff co-sharers by section 164, clause (2), of the Tenancy Act. It

(1) Weekly Notes, 1890, p. 3. (2) (1919) I. L. R., 41 All., 316.

is easily conceivable that a distinction might require to be drawn in many cases between the degree of responsibility attaching to a lambardar in respect of arrears of rent which had accumulated during an *interregnum* prior to his appointment and his responsibility for the realization of the current demand as it fell due after the date of his appointment. If there were no other reasons for drawing such a distinction, it would be a sufficient reason to note that during the *interregnum* the power to realize rents, and consequently the responsibility for doing so, had reverted to the entire body of co-sharers. It will be necessary for us, therefore, before this appeal can be determined, to remit two further issues. We want to know what were the accumulated arrears due from tenants of this mahal on the date on which the defendant assumed the office of lambardar and we must also have a finding from the lower appellate court as to whether any of those arrears, and if any, what portion, remained uncollected owing to negligence or misconduct on the part of the defendant. At present we have no real finding of fact on this point by the lower appellate court, because the learned District Judge has brushed the question aside upon his view of the law as to the rights of a lambardar to maintain suits for arrears of rent, from which we have been compelled to dissent. We, therefore, remit the following further issues :—

2. What arrears of rent were due from tenants of this mahal on the date on which the defendant entered into possession as lambardar? (The arrears referred to in this issue are rents not paid by the tenants to any person).

3. What portion, if any, of the said arrears remained uncollected owing to negligence or misconduct on the part of the defendant?

We should have preferred to direct that these issues be determined on the evidence already on the record, as it is not suggested that either party was precluded from laying before the court any evidence which he thought desirable; but it seems to us that the patwari will have to be recalled, if only to explain the statement of account, which we have found ourselves unable to make practical use of. We are also of opinion that either party should be permitted to produce documentary evidence as

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to the date of the formal order appointing Saiyid Ali Akbar to be lambardar of this mahal. To this extent the lower appellate court may admit fresh evidence at the request of either party. Ten days will be allowed for objections.

Issues remitted.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

MUHAMMAD MUSHTAQ ALI KHAN AND OTHERS (PLAINTIFFS) *v.* BANKE LAL AND OTHERS (DEFENDANTS)*.

1920 *March*, 17.

Redemption of mortgage—Tender of mortgage money—Offer to pay not accompanied by the production of any actual money.

The mortgagors of a usufructuary mortgage sent a notice to the mortgagees offering to pay a certain sum named therein, and asking for redemption of the mortgage, but no actual money was produced. *Held* that this did not amount to a legal tender of the sum due under the mortgage. *Chetan Das* v. *Gobind Saran* (1) referred to.

ON the 31st of March, 1880, Musammat Intizam-un-nissa Begam executed a usufructuary mortgage for Rs. 17,000 in favour of Santu Prasad. Both the mortgagor and the mortgagee died. On the 24th of June, 1916, the representatives of the mortgagor sent to the representatives of the mortgagee a notice offering to pay Rs. 17,000 to them and asking for redemption. To this the representatives of the mortgagee sent no reply. On the 30th of June, 1916, the mortgagors filed a suit for redemption. The defendants mortgagees raised the objection, *inter alia*, that the suit was premature because there had been no legal tender of the mortgage money by the mortgagors. The court of first instance accepted this plea, and also held that, even if the notice referred to amounted to a good tender, it was made at a wrong time and not in conformity with the terms of the mortgage deed. The court, therefore, dismissed the suit. Thereupon the plaintiffs appealed to the High Court

Mr. *B. E. O'Conor* and Mr. *Muhammad Ishaq Khan*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

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* First Appeal No. 273 of 1917, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 17th of April, 1917.

(1) (1914) I. L. R., 36 All., 139.