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contended on their behalf that a valid waqf of the three shops and the house in dispute was created by Musammāt Wafatan. In our opinion upon a true construction of the will of Musammāt Wafatan there was a waqf of the value of the property for the erection of a mosque and not of the property itself. The property was not to be appropriated to the erection of a mosque but the proceeds of the sale of the property, whether it was purchased by a stranger or kept by Dilawar and Shukr-ullah, were to be devoted to the construction of a mosque. In these circumstances we think that the waqf was in fact a waqf of the value of the property and not as we have said above of the property itself. This being our view, there was no case against Bihari Lal, the purchaser of a part of the property, and the suit was rightly dismissed as against him. We accordingly dismiss this appeal with costs to Bihari Lal.

Appeal dismissed.

FULL BENCH.

*Before Mr. Justice Tudball, Mr. Justice Muhammad Rafiq and
Mr. Justice Ryves.*

KALKA DAS (PLAINTIFF) v. GAJJU SINGH AND ANOTHER (DEFENDANTS). *
Act No III of 1907 (Provincial Insolvency Act), sections 16 (2), 56(2)—Act
(Local) No. II of 1901 (Agra Tenancy Act), sections 193, 20—Insolvency
—Occupancy holding—Position of insolvent occupancy tenant.

An occupancy holding being altogether outside the provisions of the Provincial Insolvency Act, 1907, that Act is no bar to a suit for arrears of rent brought by the zamindar pending proceedings in insolvency. *Raghubir Singh v. Ram Chandar* (1) overruled.

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

Dr. Kailas Nath Katju, for the appellant.

Dr. S. M. Sulaiman, for the respondents.

TUDBALL, MUHAMMAD RAFIQ and RYVES, JJ. :—This appeal arises out of a suit brought by the plaintiff appellant for the

Second Appeal No. 720 of 1918, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 2nd of March, 1918, confirming a decree of Gobind Ram Agha Dhanel, Assistant Collector, First Class of Cawnpore, dated the 12th of July, 1917.

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recovery of arrears of rent of an agricultural occupancy holding. Kalka Das, the plaintiff appellant, is the zamindar and lambar-dar of the village. Gajju Singh, the principal respondent in the case, is the occupancy tenant. He was declared an insolvent on the 23rd of June, 1914. On the 5th of June, 1917, Kalka Das brought the suit out of which this appeal has arisen for the recovery of arrears of rent for 1922, 1923 and 1924 Faslis in respect of the holding. The plaintiff impleaded the Receiver also as a defendant in the suit. The Receiver objected to being brought on the record on the ground that the order of the District Judge vesting the property of the insolvent in him (the Receiver) did not refer to the occupancy holding. This objection was allowed. At the time the suit was brought by Kalka Das the insolvent had not been discharged. The latter pleaded in defence that the suit against him was not maintainable in view of the provisions of section 16 (2) of the Provincial Insolvency Act, No. III of 1907. The courts below have acceded to this plea and have dismissed the suit; hence this second appeal to this Court which, though triable by a single Judge, has been referred to this Full Bench in view of the decision in *Raghubir Singh v. Ram Chandar* (1).

On behalf of the appellant it is urged that the decision in the case mentioned above is incorrect, as the attention of the learned Judges who decided it had clearly not been called to section 193 of the Tenancy Act. In the case referred to it was held that a suit for arrears of rent against a tenant declared an insolvent, and as against whom such declaration was in full force and effect at the date of the suit, was not maintainable.

That decision was based on section 16 (2) of the Provincial Insolvency Act and the learned Judges say that that section expressly provides that save as therein provided no suit shall be brought against a person who is declared to be insolvent, without leave of the court. They went further on to express the opinion that so far as an ordinary suit for rent is concerned the landlord was in exactly the same position as any other creditor.

Section 193 of the Tenancy Act lays down that the provisions of the Code of Civil Procedure shall apply to the procedure in all

(1) (1911) I. L. R., 34 All., 121.

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suits and other proceedings under the Act so far as they are not inconsistent therewith and subject to certain modifications and additions. Clause (a) of the section runs as follows:—

Clause (a) of the second proviso to section 266, sections 320 to 326 (both inclusive), Chapter XX, section 370 and Chapters XXVI, XXVIII, XXXIX, XL, XL III and XLIV of the Code of Civil Procedure shall *not* apply to any such suit or proceeding.

The Code of Civil Procedure then in force was Act XIV of 1882. The Provincial Law of Insolvency when the Tenancy Act was enacted was embodied in Chapter XX of the Code of Civil Procedure. Section 193 (a) of the Tenancy Act, therefore, clearly laid down that Chapter XX which contained the insolvency law of the province should not apply to any suit or proceeding under the Tenancy Act. Chapter XX of the Code of Civil Procedure was repealed by Act III of 1907, the Provincial Insolvency Act. Section 56 of that Act runs as follows:—“The enactments mentioned in the schedule are hereby repealed to the extent specified in the 4th column thereof.” In the schedule is entered Act XIV of 1882, the Code of Civil Procedure, section 341 (e) and Chapter XX (sections 344 to 360 A). Clause 2 of section 56 of Act III of 1907 goes on to say that where in any enactment in force at the date of the commencement of this Act reference is made to Chapter XX of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1882, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof. Reading this section with section 193 of Act II of 1901, it is obvious that the Provincial Insolvency Act does not and cannot apply to any suit or proceeding under the Tenancy Act. The law, therefore, on the subject is perfectly clear and plain. Section 16 of the Insolvency Act cannot and does not apply to the suit for rent out of which this appeal has arisen and it is obvious that the decision in *Raghubir Singh v. Ram Chandar* (1) mentioned above was incorrect.

We would also like to point out that section 16 (2) (a) of the Insolvency Act makes it clear that on the making of an order of adjudication the whole of the property of the insolvent, save

in so far as it includes such particulars as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree, shall vest in the court or in the Receiver. The occupancy holding is not transferable in execution of a decree of the Civil or Revenue Court or otherwise than by voluntary transfer between certain persons. This is to be found in section 20 of the Tenancy Act. It is, therefore, clear, even on the face of the Insolvency Act itself, that the occupancy holding cannot be dealt with by an insolvency court. Section 193 of the Tenancy Act and section 56 of the Insolvency Act make the point quite clear and there is nothing further to be said in the matter.

In our opinion the decision of the courts below is incorrect. The suit having been dismissed on a preliminary point will have to go back for decision on the merits.

We, therefore, allow this appeal, set aside the decrees of the courts below and remand the case to the court of first instance through the lower appellate court with directions to restore the case to its original number on the file and to proceed to hear and determine it on the merits. All the costs incurred up to the present time will be costs in the cause and will abide the result.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

PURSHOTTAM SARAN (JUDGMENT-DEBTOR) v. HARGU LAL (DECREE-HOLDER) AND PAHLADI LAL (AUCTION-PURCHASER)*

Civil Procedure Code (1908), section 110, order XLI, rule 5—“Substantial question of law”—Stay of execution—Appellate court—Jurisdiction.

Held (1) that an appellate court cannot order a stay of sale unless it has seisin of the case in which the sale was ordered to take place, and (2) that the question whether or not an appellate court could order a stay of sale without having seisin of the case in which the sale was ordered to take place, was not “a substantial question of law” within the meaning of section

* Application No. 38 of 1920, for leave to appeal to His Majesty in Council.

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