

right could come into force only on the failure of the mortgagor to carry out the illegal contract of transferring his occupancy holding to the plaintiff. In our opinion the view of the lower appellate court is correct. The appeal fails and is hereby dismissed with costs.

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v.
SAT NARAIN.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Gokul Prasad.

JAWAHAR BANO AND ANOTHER (DEPENDANTS) v. SHUJAAT HUSAIN BEG AND OTHERS (PLAINTIFFS) AND KAZIM ALI BEG (DEPENDANT).^{*}
Civil Procedure Code (1908), order XLI, rule 33—Decree against three defendants—Appeal by two only, the third not being made a party to the appeal—Jurisdiction of appellate court to modify decree in favour of the non-appealing defendant.

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A decree was passed for varying amounts against three defendants, of whom two only appealed, the third not being made a party to the appeal.

Held that it was competent to the appellate court to modify the decree in favour of the defendant who had not appealed by decreasing the whole sum due to the plaintiffs against the defendants who had. *Rangam Lal v. Jhandu* (1) distinguished.

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

The Hon'ble Munshi *Narain Prasad Ashthana*, for the appellants.

Munshi *Girdhari Lal Agarwala* and Maulvi *Iqbal Ahmad*, for the respondents.

SULAIMAN and GOKUL PRASAD, JJ. :—These two connected appeals are appeals by the defendants in suits for profits under section 165 of the Tenancy Act against their co-sharers. It is admitted that the plaintiffs are entitled to a 1/6 share of the total profits.

Second Appeal No. 1296 arises out of a suit which was brought on the 21st of July, 1916. The suit was decreed partly against Kazim Ali Beg and partly against Musammats Jawahar Bano and Mumtaz Bano. Musammats Jawahar Bano and Mumtaz Bano appealed to the District Judge without

^{*} Second Appeal No. 1298 of 1917, from a decree of Jagat Narain, First Additional Judge of Aligarh, dated the 28th of July, 1917, modifying a decree of Zain-ud-din, Assistant Collector, First class, of Aligarh, dated the 15th of January, 1917.

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making Kazim Ali Beg a party to the appeal. Kazim Ali did not appeal from the decree against him. No appeal or cross-objection was filed by the plaintiffs against Musammats Jawahar Bano and Mumtaz Bano.

Second Appeal No. 1293 arises out of suit No. 12 of 1915 for profits by the same plaintiffs against the same set of defendants but for different years. In this case also a decree was passed against these two sets of defendants, but both of them appealed to the District Judge. After various remands these three appeals were tried together by the District Judge and have been disposed of by one judgment, which unfortunately has caused some confusion. In the opinion of the District Judge, Kazim Ali was not liable for any share of the profits to the plaintiffs at all. On the other hand, he has found that Jawahar Bano and Mumtaz Bano had realized more than their share of the profits and were alone responsible to the plaintiffs. The result of his finding was this, that he allowed Kazim Ali's appeal in the second suit and exempted him altogether from all liability. He dismissed Jawahar Bano's and Mumtaz Bano's appeal, but at the same time he has modified the decree of the first court in both these suits and decreed the plaintiff's claim for the amounts found due by the first court as against Jawahar Bano and Mumtaz Bano. Only two appeals have been filed in this Court. No appeal has been filed by the defendants, Jawahar Bano and Mumtaz Bano, from the decree allowing the appeal of Kazim Ali against them. In our opinion when the District Judge was satisfied that it was Jawahar Bano and Mumtaz Bano alone who were liable to pay the plaintiffs' share of the profits, he had jurisdiction to modify the decree of the first court and decree the plaintiffs' claim as against these two defendants only. It is true that Kazim Ali was not formally made a party in the appeal which had arisen out of the first suit. But as the modification of the decree was to be in favour of Kazim Ali himself who had been a party to the original suit, the defect of his not having been formally brought on the record in that appeal is not very material.

Great reliance has been placed by the learned vakil for the appellants on the Full Bench case of *Rangam Lal v. Jhandu* (1). In that case, in a suit brought by a zamindar against a tenant for rent, the court of first instance had decreed the claim for a much smaller amount than that claimed by the plaintiff. The plaintiff submitted to the decree and never appealed from it. The defendant tenant appealed to the District Judge, challenging the decree. After a remand the District Judge was of opinion that the defendant was in reality liable to pay more to the plaintiff, and he, while dismissing the defendant's appeal, modified the decree of the first court and granted the plaintiff a decree for a greater amount. The Full Bench in that case held that, although the words of order XLI, rule 33, were very wide and the Judge, strictly speaking, had jurisdiction to pass the decree which he had made, still there was not a proper exercise of jurisdiction by him in that case. It was pointed out that in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections, the court will hesitate before allowing him to object at the hearing of the appeal. The case before us, however, is clearly distinguishable. In the present case, if we simply allowed the defendants' appeal and dismissed the plaintiffs' suit as against them, it would be doing a great injustice to the plaintiffs, because they would be deprived of the amount to which they have been found entitled. The plaintiffs must have their decree for profits, and the only question for consideration before the District Judge was whether that decree should be against one set of defendants or against another set of defendants. When the Judge was of opinion that Kazim Ali defendant was really not liable to the plaintiffs for their profits, he exercised his jurisdiction very properly in directing that the defendants Jawahar Bano and Mumtaz Bano should be made liable for the whole amount. In Second Appeal No. 1293, which arises out of the second suit, Kazim Ali was actually a respondent in the appeals before the District Judge and no defect of non-joinder can be urged in that case.

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(1) (1911) I. L. R., 34 All., 82.

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We think that the learned District Judge has acted within his jurisdiction in passing the decree which he has passed and we find no grounds for holding that this exercise of jurisdiction as conferred on him by order XLI, rule 33, has in any way been improper. Substantial justice has been done in this case. These appeals are without force and are hereby dismissed with costs.

Appeals dismissed.

Before Mr. Justice Tudball and Mr. Justice Kanhaiya Lal.

BHUPAL SINGH (PLAINTIFF) v. UJAGAR SINGH AND ANOTHER

(DEPENDANTS).*

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June, 21.

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 233(k)—Imperfect partition—Sharelegally the property of one party to the partition proceedings allotted to another on the strength of entries in the khewat—Suit after confirmation of partition for a declaration of plaintiff's title to the share.

Plaintiff, as the result of a suit for pre-emption, got possession of certain zamindari property, but never obtained mutation of names in respect thereof. Some years after this pre-emption suit the defendants applied for imperfect partition of their share as recorded in the khewat, which included the property decreed to the plaintiff. During the partition proceedings the plaintiff applied for mutation of names in his favour, but failed, and the partition was concluded on the basis of the entries in the khewat. Thereafter the plaintiff brought the present suit for a declaration that the pre-empted share, which stood in the names of the defendants and which had been allotted to them by the partition, belonged to him and did not belong to them.

Held that the suit was barred by section 233(k) of the United Provinces Land Revenue Act, 1901.

Muhammad Sadiq v. Laule Ram (1) followed. *Bijai Misir v. Kali Prasad Misir* (2) and *Shambhu Singh v. Daljit Singh* (3) referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are fully set forth in the judgment.

Babu *Sital Prasad Ghosh* (for *Munshi Panna Lal*), for the appellant:—

The present suit is not barred by section 233 (k) of the Land Revenue Act. It is a suit not for possession but for declaration only. The appellant has been found to be in possession since 1897, although his name does not appear in the revenue papers

* Appeal No. 74 of 1919, under section 10 of the Letters Patent.

(1) (1901) I. L. R., 23 All., 291. (2) (1917) I. L. R., 39 All., 469.

(3) (1916) I. L. R., 38 All., 243.