apply, to redemption suits. The present was no redemption suit, and in our opinion the court below had no jurisdiction to extend the time. The order of the court in the decree directing payment of the money within a specified time has not been obeyed and the result followed as laid down in the decree. The respondent, therefore, was not entitled to a final decree for sale. Incidentally we call the attention of the court below to the following words in the proviso to order XXXIV, rule 8, "upon good cause shown." As far as we are able to discover, no cause whatever, good, bad or indifferent, was shown. The court appears to have acted in a purely arbitrary manner without assigning any reasons. The result, therefore, is that we allow the appeal and set aside the decree of the court below. The application for a final decree will stand dismissed with costs in both courts.

Appeal decreed.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

CHHABRAJI KUNWAR (DEFENDANT) *v.* GANGA SINGH (PLAINTIFF).* 1920 *June*, 2.

Act (Local), No. II of 1901 *(Agra Tenancy Act), section 134—Lambardar and co-sharer—Suit for profits—Decree to be either on gross rental or actual collections, but not on both—Finding as to negligence of lambardar a mixed finding of law and fact.*

In a suit for profits by a co sharer against a lambardar the decree must be based either on the gross rental or on the actual collections. It cannot be based partly on one and partly on the other. *Nand Kishore v. Ram Ratan* (1) referred to.

Held also that a finding of negligence or misconduct on the part of a lambardar is a mixed finding of fact and law, and is not exempt from reconsideration by the High Court in second appeal.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Babu *Satya Chandra Mukerji*, and Babu *Piari Lal Banerji*, for the respondent.

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*Second Appeal No. 967 of 1917, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 2nd of July, 1917, confirming a decree of Bashir Ahmad, Assistant Collector, First class, of Cawnpore, dated the 19th of April, 1916.

(1) Weekly Notes, 1887, p. 250.

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RYVES and GOKUL PRASAD, JJ.:—This appeal arises out of a suit under section 164 of the Agra Tenancy Act of 1901.

Thakur Ganga Singh (plaintiff respondent) sued Musammat Chhabraji Kunwar, lambardar (defendant appellant) for his share of the profits of the village for the years 1321 and 1322 Fasli. In his plaint he stated that the village was well irrigated and that the tenants were well-to-do; and without alleging any specific misconduct or negligence on the part of the lambardar (except in one particular which has been abandoned) claimed to be paid a sum Rs. 2,200, which included interest, on the basis of the gross rental. He went on, however, to state, in paragraph 4 of his plaint, that "in the years in question the defendant lambardar realized a considerable amount on account of arrears for the past years, and the plaintiff is entitled to get the profits on the said amount according to his own share."

The relief sought was (*a*) a decree for Rs. 2,200, principal and interest, and (*b*) "a decree for the amount which is found due in addition to the amount claimed may also be passed in his favour and an additional court fee charged."

To the plaint was annexed an account showing what was due for the two years in suit, 1321 and 1322 Fasli. It is, therefore, clear that the suit was mainly concerned with the profits of these two years. Court fees were paid only for the profits of these two years, and the accounts filed with the plaint referred exclusively to them. No details were furnished as to collections made for years before 1321 Fasli. The main defence was that there was no negligence or misconduct and that plaintiff was only entitled to a decree on the basis of actual collections.

The trial court held that the lambardar defendant had been guilty of misconduct, and gave a decree for the two years in suit on the gross rental, and also a further sum for the years 1318, 1319 and 1320 for arrears which he found had been recovered by the defendant in the years in suit. In all he passed a decree for Rs. 3,190-3-0 with costs and interest in favour of the plaintiff. On appeal the District Judge upheld this decree. Hence this second appeal.

Two main grounds have been argued:—

(1) That the decree should have been passed either on the basis of the gross rental for the two years in suit, or on the basis of actual collections during those two years, which would of course include collections of arrears of rent due in previous years, but that it was wrong to give a decree for the gross rental *plus* such arrears.

(2) That misconduct or negligence had not been established and that therefore the decree should be passed according to the actual collections.

It has been held, certainly since the decision in *Nand Kishore* v. *Ram Ratan* (1), that the divisible profits for any agricultural year mean ordinarily the net balance remaining in the hands of the lambardar after deducting the land revenue, cesses, village expenses and lambardari dues from his total realizations made during the year in question, whether on account of the demand of the year itself or on account of previous years. If a plaintiff claims under section 164, clause (2), on the basis of gross rental for his share of the profits of any given year, he cannot also get a decree for arrears of past years, collected in the year in question; because to hold otherwise might be to evade the law of limitation. Indeed it was admitted by the learned vakil for the respondents at a late stage of the argument, that as the suit was filed on the 20th of November, 1915, the arrears for 1318 and 1319F as such were certainly time-barred and probably most of the arrears of 1320.

This is evident from the limitation for suits under section 164 set out in the 4th Schedule, No. 16, appended to the Act. The limitation is three years, and the time from which limitation begins to run, is when the share of the profits becomes due.

We think, therefore, that the plaintiff is entitled to a decree either on the gross rental of the two years in suit, only if clause (2) of section 164 is applicable, or on the basis of actual collections made in those two years, whether in payment of the demand of those years, or as arrears due from former years but collected in those two years.

(1) Weekly Notes, 1887, p. 250.

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This was the view adopted in *Sham Lal* v. *Raj Bahadur* (1),* by a Divisional Bench of this Court of which one of us was a member. We see no reason to doubt the correctness of that decision. We have, however, been pressed with the decision in *Ram Dayal* v. *Seth Janki Prasad* (2), decided on the 3rd of

* S. A. No. 1762 of 1915, decided on the 27th of June, 1917.

PIGGOTT and RYVES, J J.:—This was a suit by two plaintiffs against a lambardar for profits. The claim was decreed in part by the court of first instance. There was an appeal and a cross-appeal to the court of the District Judge, with the result that the sum decreed in favour of the plaintiffs was slightly increased. We have now before us an appeal by the defendant lambardar and cross-objections filed by the plaintiffs. We dispose of the defendant's appeal first. . . .

In the cross-objections by the plaintiffs a point is taken at the outset which has some general importance. The suit as brought is on account of the plaintiff's share of the divisible profits for the years 1315, 1316 and 1317F. At the commencement of this period there were arrears of rent amounting to Rs. 873-12-3 due from tenants on account of the years 1312, 1313 and 1314. During the years in suit a portion of those arrears was realized, amounting in all to Rs. 340-11-2. In the court of the Assistant Collector the argument was apparently limited to the question whether the plaintiffs could claim in this suit their share of those realizations on account of the rental demand for years anterior to those in suit. Dealing with this question as a pure question of law, the Assistant Collector held that the collections on account of rental demand of previous years, if made within the years in suit, were liable to be taken into account in the total of collections made during those years for the purpose of ascertaining the divisible profits. For this finding the Assistant Collector referred to the authority of the case of *Nand Kishore* v. *Ram Ratan*, (3) and there can be no question as to the correctness of this principle in the case of a decree for profits passed on the basis of actual collections. However, the Assistant Collector went on to consider further whether the defendant lambardar was not liable under the provisions of section 164, clause (2), of the Tenancy Act, No. II of 1901, to give an account of profits due on account of sums which had remained uncollected owing to negligence or misconduct on his part, and came to the conclusion that upon the evidence before him the only satisfactory method of adjusting the account for profits between the parties was to hold the defendant lambardar liable to account for profits on the basis of gross annual rental. It is evident that, having come to that conclusion, the Assistant Collector no longer regarded the question of the realizations made during the years in suit on account of the arrears of 1312 to 1314 F., as of any consequence. He worked out his decree on the basis of the gross rental demand for each of the years in suit on account

(1) S. A. No. 1762 of 1915, decided on the 27th of June, 1917.

(2) S. A. No. 996 of 1906.

(3) Weekly Notes 1887, p. 250.

January, 1908, by STANLEY, C. J., and BURKITT, J., which, it is argued, lays down the contrary. That decision, however, it seems to us, is based on the particular facts of that case, and has no general application. There a co-sharer assigned her share of the profits for two years only, *i.e.*, 1307 and 1308, to the plaintiff. The plaintiff sued the lambardar for the profits of those two years, on the basis of gross rental under section 164 (2). The matter was referred to arbitration. The arbitrator awarded profits for the two years on the basis of actual collections, and gave an award for such amount as had been collected, and declared that the plaintiff should recover in the future any arrears for those two years from the lambardar if he, the lambardar, realized them. The plaintiff then brought a suit to recover the balance of the arrears for 1307 and 1308 subsequently collected by the lambardar. The suit was brought within

of the said years. When the plaintiffs presented their appeal to the court of the District Judge, it would almost seem as if they had not considered the decree of the court below, or appreciated the basis on which it proceeded. Their argument to the District Judge seems to have been based upon the assumption that they had been allowed their proportionate share out of the realizations of Rs. 340-11-2 already referred to. What they claimed was that they should have been allowed their share out of the gross outstanding demand on account of the arrears due at the beginning of the period for which the suit was brought. This contention the learned District Judge has dealt with in a carefully reasoned portion of his judgment and has repelled it. It is now contended before us that the plaintiffs should have been allowed one of the two things, either their share of the sum of Rs. 340-11-2 actually realized during the years in suit, or their share of the outstanding demand of Rs. 873-12-3. We are not prepared to accede to either of these contentions. Divisible profits of the agricultural year 1315F. mean ordinarily the net balance remaining in the hands of the lambardar after deducting the land revenue, cesses, village expenses, and lambardar's dues from his total realizations made during the year, whether on account of the demand of the year itself or on account of the demand of previous years. If, however, the plaintiffs desire to invoke the provisions of section 164, clause (2), of the Tenancy Act, they cannot do more than claim an account on the gross rental demand for the year 1315F. itself. To hold otherwise would be, as the learned District Judge has pointed out, to evade the law of limitation and going beyond the intention of section 164 of the Tenancy Act. The very utmost which a lambardar can be required to do is to account to his co-sharers for profits on the basis of the total recorded rental demand of a given year. This contention on behalf of the plaintiffs therefore fails.

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three years of the date when the lambardar realized them, and this Court held that he was entitled to a decree, under the award, although the co-sharer herself could not have recovered them in an ordinary suit for profits for the year when the transferee brought the suit. That was altogether a special case. The arrears for 1307 and 1308 were as if they were ear-marked as payable to the transferee and could be recovered by suit within three years of their realization.

It now remains to see whether the courts below were right in applying clause (2) of section 164. It is argued that in second appeal we cannot go behind the finding that there was misconduct or negligence on the lambardar's part within the meaning of section 164, because it is a finding of fact. We do not think it is purely a finding of fact. What the trial court finds is that the lambardar did or omitted to do certain things, and if the lower appellate court has come to the same conclusion, we are bound to hold that those things were done or that those omissions were made, but whether they amounted to negligence or misconduct within the meaning of the section is an inference of law. Now here the trial court based its finding of misconduct and negligence on three main grounds. (1) The actual collection in 1321 was very small compared with the demand. The demand was Rs. 5,718-12-9 and the amount actually collected in that year was Rs. 2,091-1-6. If that stood alone the trial court might have drawn an adverse inference from it, but he has overlooked the fact, that the actual collection was more than the demand, it was Rs. 6,014-13-2, that is to say, arrears for former years to a large amount had been recovered. It is quite probable that the comparatively small amount realized in 1321 was owing to the large realizations of past arrears, and would have been made good in the future.

Then the court finds, (2) that the lambardar made collections all the year round and, (3) instituted more than seventy suits to recover arrears. From this the court infers that he was negligent in his duties; we infer exactly the opposite.

However, we need not press the matter further, because the learned vakil for the plaintiff has frankly admitted that the decree should be on actual collections, having regard to our decision on the first ground of appeal.

That being so, it is admitted that this appeal must succeed in part. We have come to the conclusion that the plaintiff is entitled to Rs. 87-3-0 for 1321 Fasli together with interest at 12 per cent. from the 8th of June, 1914, up to the date of suit and thereafter at 6 per cent. up to the date of realization, and he is further entitled to Rs. 394-7-11 together with interest at 12 per cent. from the 27th of June, 1915, up to the date of suit and thereafter at 6 per cent. up to the date of realization.

The office will prepare an account on the basis of this order. The parties will receive and pay costs in proportion to failure and success in all courts. The costs in the lower appellate court and in this Court will be calculated on the value of the appeals and the extent to which either party has succeeded or failed. The decrees of the two lower courts are set aside and a decree as indicated above will be substituted for them.

Order modified.

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

LOKYA AND ANOTHER (PLAINTIFFS) v. SULLI AND OTHERS (DEFENDANTS).* 1920 *June*, 4.

Birt jajmani—*Nature of right—Both heritable and transferable—Not confined to males.*

The rights known as *birt jajmani* are heritable and transferable and their descent or transfer is not confined to males.

THIS was an appeal under section 10 of the Letters Patent from the following judgment of a single Judge of the Court:—

"It appears that there were three brothers, Chaubes by caste, called Dangal, Panjal (*alias* Mangal) and Sikandar. The source of their income was to officiate at the bathing in the Jamna and get offerings from the people who bathed in the river. Dangal entered into an agreement with his brother Panjal (*alias* Mangal) on the 13th of April, 1905, by which the latter was to officiate at the ceremony of bathing both for himself and for his brother Dangal, who had become too old to take part in the ceremony, but to pay him one-third of the offerings. There was a further stipulation in the agreement

* Appeal No. 11 of 1919, under section 10 of the Letters Patent.