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necessary, it may be a wise course and may expedite the settlement of the matter and permit of a speedy hearing of the suit.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

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July, 22.

KOKA AND ANOTHER (DEFENDANTS) *v.* CHUNNI (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 165*—Lambardar and co-sharer—Suit by lambardar against co-sharer for profits of* sir *or* khudkasht *in excess of his share.*

A lambardar cannot sue as lambardar one or more co-sharers for any sum due from them by reason of their holding as *sir* or *khudkasht* excess land. *Bishambhar Nath* v. *Bhullo* (1), followed. *Ganga Singh* v. *Ram Sarup* (2), dissented from. *Kundan Lal* v. *Basant Rai* (3), referred to.

A suit under section 165 of the Tenancy Act must be one for accounts primarily and it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer, who is plaintiff, is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket will not give the plaintiff a right to recover the money so paid from a third co-sharer.

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

Munshi *Narain Prasad Asthana*, for the appellants.

Dr. *N. C. Vaish*, for the respondent.

ASHWORTH and KENDALL, JJ. :—This second appeal which came up before a single Judge of this Court has been referred to a Bench of two Judges on account of

*Second Appeal No. 464 of 1925, from a decree of A. G. P. Pullan, District Judge of Agra, dated the 26th of November, 1924, confirming a decree of Mahesh Bal Dikshit, Assistant Collector, first class of Agra, dated the 24th of March, 1924.

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.
(3) (1923) 75 Indian Cases, 330.

the apparent conflict between the case of *Bishambhar Nath* v. *Bhullo* (1), on the one side, and *Ganga Singh* v. *Ram Sarup* (2) and *Kundan Lal* v. *Basant Rai* (3), on the other hand. The whole question involved is whether a lambardar can sue as lambardar any co-sharer who has occupied land bringing in an estimated yearly income in excess of the sum due to that co-sharer according to his fractional interest in the mahal.

An attempt has been made by the plaintiff lambardar's counsel in this second appeal to show that the suit was not one of this description, and, secondly, that it was not treated by the lower courts as one of this description. The former attempt must fail in view of the account filed by the plaintiff with his plaint. That account does not show the plaintiff's share in the mahal as a co-sharer. It claims from the defendants the whole of the excess in value of their *khudkasht* and *sir* land over the amount due to the defendants by reason of their fractional share in the mahal. It also credits the plaintiff with *lambardari haq*. It is, therefore, quite clear that the plaintiff is suing as a lambardar.

The trial court, of which the decision has been upheld by the lower appellate court, does appear to have treated the suit as one by the lambardar in his capacity as a co-sharer. The trial court has ascertained the plaintiff's individual share and worked out what sum was due to him as an individual co-sharer. This involves a change in the nature of the suit from that actually brought. We might have been disposed to permit of such a change being made and uphold the decree of the lower courts, if it were not open to objection on another ground than that the plaintiff's case had been changed in the course of hearing. But the lower courts have, in our opinion, erred in one material point. They have allowed the plaintiff to claim the whole of the excess

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 228.
(3) (1923) 75 Indian Cases, 330.

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income in the hands of the two defendants, because the plaintiff's share in the total profits of the mahal does not exceed (except by a few rupees) that excess. One co-sharer is not entitled to claim the whole of the excess in the hands of another co-sharer merely because he is short to that extent of his fractional share in the income of the mahal. All the other co-sharers who are similarly short are entitled to share in the excess income enjoyed by any one co-sharer and they must be made parties to the suit by the one co-sharer. This fact was ignored by the trial court. It was perceived by the lower appellate court which attempted to meet it in the following way. The District Judge has stated that four of the other co-sharers admitted as witnesses (not as parties) that there was nothing due to them and later on he states that the plaintiff's case is that he has paid off the other co-sharers what was due to them. This will not, however, satisfy the requirements of section 165 of the Tenancy Act. A suit under section 165 must be one for accounts primarily. It is necessary that there should be accounts showing that the plaintiff is entitled to the sum claimed. For this purpose it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer, who is plaintiff, is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket will not give the plaintiff a right to recover the money so paid from a third co-sharer under section 165. Section 165 is confined to a claim for a share of money collected in excess which is due to the plaintiff on the ground of its being so collected. One co-sharer cannot claim on behalf of another co-sharer merely by reason of making a payment to that other co-sharer, without some transfer of the actionable claim which would be valid in law. No such transfer is set up in this case. So far, then, as the decree appealed against may be regarded as a decree in favour of an individual co-sharer, it may be impugned on the ground that the plaintiff respondent

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was not shown by the accounts prepared by the trial court to be entitled to the sums decreed him, inasmuch as the claims of the other co-sharers were not included in that account. We are unable, therefore, to uphold the decree of the lower courts.

We now come to the question raised by the Judge of this Court who had this case referred to a Bench. The plaintiff sued as lambardar. Should his suit have been entertained as such? In the case of *Bishambhar Nath* v. *Bhullo* (1) it was held by a Bench of two Judges of this Court that a lambardar is not the agent of the co-sharers generally, so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khudkasht* lands in excess of their proper shares. The basis of this decision was that there might be a custom or rule conferring on the lambardar a power to represent all the co-sharers against a non-co-sharer, but that there could not be (or at any rate was not) any custom or rule of law entitling a lambardar to represent some of the co-sharers against others. In *Ganga Singh* v. *Ram Sarup* (2) there was a suit by certain co-sharers against a lambardar for profits. The plaintiffs claimed in that suit that the lambardar should be responsible to them for excess income enjoyed by other co-sharers by reason of the value of their *sir* and *khudkasht* exceeding their fractional share of profits. The court permitted this to be done, although it was argued that a lambardar could not be made liable for such excess profits, if, as ruled in *Bishambhar Nath* v. *Bhullo*, he was not entitled to realize them by a suit. This contention was rejected mainly on the consideration that a lambardar must be entitled to reply to co-sharers claiming their shares of rental collected that these co-sharers had realized all that to which they were entitled by possession of *sir* and *khudkasht*. This consideration was

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.

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held to establish in suits under section 165 of the Tenancy Act the necessity of taking into consideration the amount of *sir* and *khudkasht* owned by the parties. Incidentally in this decision it was remarked that " if the lambardar is the agent of the co-sharers to bring a suit for rent, he seems to be equally their agent for the purpose of bringing a suit against co-sharers who hold *sir* and *khudkasht* in excess and who have refused to allow the *sir* and *khudkasht* which they hold to be taken into account ".

This latter passage was quoted with approval by a single Judge in the case of *Kundan Lal* v. *Basant Rai* (1) in which case the lambardar was held to have a right to sue on behalf of certain co-sharers against other co-sharers holding land in excess of their shares. It is not clear from the recorded judgement in the case of *Ganga Singh* v. *Ram Sarup* (2) whether the plaintiffs were asking the lambardar to account for an excess which had been realized by the lambardar or not. If this excess was one not yet realized by the lambardar but which it was claimed he could realize, then it is true that the decision in *Ganga Singh* v. *Ram Sarup* (2) could not be reconciled with the decision in *Bishambhar Nath* v. *Bhullo* (3), otherwise there would be no inconsistency between the two decisions. Again the illustration given in *Ganga Singh* v. *Ram Sarup* (2), which led to the decision of the court that it was necessary to take *sir* and *khudkasht* into consideration, does not appear to us necessarily to have that effect. If a co-sharer sues a lambardar for his share of rental, that co-sharer must be deemed to have actually collected in excess the value of his *khudkasht* so far as that value exceeds his fractional share of the income of the mahal. There is no difficulty in making a co-sharer, whether plaintiff or defendant, liable for payment of what he has actually collected or must be deemed to have col-

(1) (1923) 75 Indian Cases, 330. (2) (1916) I.L.R., 38 All., 223.
(3) (1911) I.L.R., 34 All., 98.

lected. It is quite another matter to require a lambardar to be responsible to co-sharers for excess due by other co-sharers which he has not collected. As regards a lambardar being the agent for certain co-sharers against other co-sharers, there is certainly nothing in the definition of " lambardar " in the Revenue Act as applied to the Tenancy Act by section 4 (13) and read with section 49 of the Revenue Act and the Board Rules, which would authorize a lambardar to represent a few only of the co-sharers against other co-sharers. Again, the collection of rent is governed by entirely different considerations to the collection of excess income from one co-sharer holding land yielding an annual income in excess of his share of the income of the whole mahal. A tenant is a party outside the co-sharers; and the lambardar, when suing the tenant, will represent all the co-sharers. A co-sharer holding *sir* or *khudkasht* cannot be regarded as holding it in a capacity other than that of a co-sharer. He holds the land because he is a co-sharer and it is impossible to set up the co-sharing body as a juristic body with interests entirely separate from the single co-sharer's interest.

We, therefore, in accordance with the decision in *Bishambhar Nath* v. *Bhullo* (1), in preference to that in *Ganga Singh* v. *Ram Sarup* (2), which decision we consider should not be followed so far as it dissents from the previous decision, hold that a lambardar cannot sue as lambardar one or more co-sharers for any sum due from them by reason of their holding as *sir* or *khudkasht* excess land.

We have remarked above that the lower courts allowed the plaintiff's case to be varied in the course of hearing, but their decision was open to objection even on the basis of the substituted case for the reasons stated.

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.

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For the above reasons we allow this appeal and dismiss the suit of the plaintiff with costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Iqbal Ahmad.

1927 *July*, 26.

ABDUL KHAN (DEFENDANT) *v.* SHAKIRA BIBI (PLAINTIFF).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 4 (3) *and* 16—*Pre-emption—Claim based on the Act and partly on the Muhammadan law—Effect of failure of one ground—"Land".*

The property which was the subject of a suit for pre-emption consisted of a zamindari share and also a one-third share in a house and a sugarcane pressing mill. The plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, 1922, and the share in the house and the mill on the basis of the Muhammadan law. She failed in her claim under the Muhammadan law because the necessary demands had not been properly made.

Held, that the whole claim should be dismissed, section 16 of the Agra Pre-emption Act not having made any change in the law in this respect.

Muhammad Wilayat Ali Khan v. *Abdul Rab* (1), *Mujib-ullah* v. *Umed Bibi* (2), *Abdul Rahman* v. *Hedayat-ullah* (3) and *Puech* v. *Aziz Fatima Bibi* (4), followed.

Aliter, if the claim for pre-emption of the house and the sugarcane pressing mill was based on the plaintiff's right to pre-empt these properties under the Act as being attached to the land upon which they stood, and if the whole of such land was included in the sale.

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

Maulvi *Mukhtar Ahmad*, for the appellant.

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*Second Appeal No. 1159 of 1926, from a decree of Priya Charan Agarwal, Subordinate Judge of Azamgarh, dated the 25th of March, 1926, confirming a decree of Bijaypal Singh, City Munsif of Azamgarh, dated the 2nd of December, 1925.

(1) (1888) I.L.R., 11 All., 108. (2) (1898) I.L.R., 21 All., 119.
(3) (1913) 12 A.L.J., 88. (4) (1920) 19 A.L.J., 107.