

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
Mr. Justice Mukerji.*

BIKRAM SINGH (DEFENDANT) *v.* DIP SINGH (PLAINTIFF), *
Civil Procedure Code, order XXI, rule 63—Agra Tenancy Act 1932
March, 18.
*(Local Act III of 1926), sections 247, 264—Execution of
decree by Assistant Collector, second class—Claimant's
objection to attachment of certain property allowed—
Appeal therefrom to Collector—Suit for declaration under
order XXI, rule 63, maintainable.*

Certain property was attached in execution of a decree for arrears of rent in the court of an Assistant Collector of the second class, and an objection to the attachment was made by an intervenor who claimed that the property was his. This objection was allowed by the court, and the decree-holder filed an appeal to the Collector under section 247 of the Agra Tenancy Act. The Collector allowed the appeal and dismissed the claimant's objection. The claimant then brought a suit, in accordance with order XXI, rule 63, of the Civil Procedure Code, to establish his claim to the property. The question was whether the suit was maintainable.

Held, that the suit was maintainable. Section 264 of the Agra Tenancy Act does not provide that the right of suit under order XXI, rule 63 is not exercisable in cases where the order of the execution court in proceedings under order XXI, rule 58, is appealable to the Collector and the appeal is decided by him. Even if it be assumed that the provision of a right of appeal from the order of the Assistant Collector, second class, is somewhat inconsistent with the provisions of order XXI, rule 63, that rule will be inapplicable, according to section 264 (a) of the Agra Tenancy Act, only so far as the inconsistency extends, i.e. an appeal would be entertained where no appeal would otherwise have lain. But there is no inconsistency between the right to file a civil suit and a right to appeal under the Tenancy Act.

The judgment of the single Judge, from which the Letters Patent appeal was filed, was as follows :—

SEN, J. :—This and the connected appeal arise out of two suits instituted by Dip Singh in the court of the Munsif of Moradabad against Bikram Singh, Raghubir Singh and others and against Kallu Singh and others for a declaration that certain she-buffaloes and a calf were not liable to attachment and sale in execution of decrees Nos. 512 and 515 of 1927, obtained by Bikram Singh against Raghubir Singh and others

*Appeal No. 48 of 1931, under section 10 of the Letters Patent.

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for arrears of rent from the court of an Assistant Collector, second class. Bikram Singh in execution of his decrees attached these buffaloes as the property of his judgment-debtors. Dip Singh, plaintiff, intervened with the objection that the buffaloes in question belonged to him and did not belong to the judgment-debtors. His objections were allowed by the Assistant Collector, second class. Bikram Singh appealed to the Collector under section 247 of the Agra Tenancy Act (Act III of 1926). His appeals were allowed and the appellate court held that the buffaloes were the property of the judgment-debtors. This led to the institution of the present suits. The court of first instance decreed both the suits. The defendant appealed and the lower appellate court has affirmed both the decisions. The finding of the lower appellate court in concurrence with the trial court is that the buffaloes are the property of Dip Singh, plaintiff respondent.

Bikram Singh appeals and the sole point urged is that having regard to the provisions of section 264 of the Agra Tenancy Act the suit in the civil court is misconceived and that no suit lies. It has been argued that an order under order XXI, rule 58, of the Code of Civil Procedure passed by an Assistant Collector of the second class was open to appeal to the Collector under section 247 of the Agra Tenancy Act and that in such a case the appellate order of the Collector is final and that it is not within the competence of the civil court to entertain a suit under order XXI, rule 63, of the Code of Civil Procedure with a view to upset the appellate order of the Collector. Reliance has been placed upon section 264 of the Agra Tenancy Act in support of this contention. Section 264 provides that "the provisions of the Code of Civil Procedure, 1908, except (a) provisions inconsistent with anything in this Act so far as the inconsistency extends . . . shall apply to all suits and other proceedings under this Act, subject to the modifications contained in list II of the second schedule." The suits instituted by Dip Singh for a declaration of title to the buffaloes in controversy are not suits or proceedings under the Agra Tenancy Act but are suits instituted under order XXI, rule 63, of the Code of Civil Procedure. Section 264 of the Agra Tenancy Act does not provide that the right of suit which a party has under order XXI, rule 63, of the Code of Civil Procedure is not exercisable in cases where the orders of the Assistant Collector, second class, in proceedings under order XXI, rule 58, are appealable to the Collector and have been taken in appeal before that officer and

disposed of by him. The policy of the legislature was not to give conclusiveness to orders passed in summary proceedings under order XXI, rule 58, of the Code of Civil Procedure. There is nothing in the texture of Act III of 1926 to indicate that the legislature intended to invest the appellate order of the Collector with finality. Moreover, the right of suit given under order XXI, rule 63, of the Code of Civil Procedure is in no way inconsistent with section 247 of the Agra Tenancy Act or any other section of that Act. Where, therefore, on an objection raised by a party in a suit or proceeding cognizable by the revenue court, the Assistant Collector, second class, has decided the objection in a particular way and his order has been affirmed or reversed by the Collector under section 247 of the Agra Tenancy Act, the appellate order of the Collector is not final and the party aggrieved thereby has a right of suit under order XXI, rule 63, of the Code of Civil Procedure. I therefore overrule the contention of the appellant and hold that the suit which has given rise to the present appeal was maintainable. I accordingly dismiss this appeal with costs.

Mr. *Janaki Prasad*, for the appellant.

Messrs. *N. P. Asthana* and *B. N. Sahai*, for the respondent.

SULAIMAN, C. J. and MUKERJI, J. :—The facts of the case and the reasons for holding that a civil suit lies are fully set forth in the order of the learned single Judge of this Court, with whose view we agree.

By virtue of section 104(1) and order XLIII of the Code of Civil Procedure no appeal would have ordinarily lain from an order made under order XXI, rule 58, of the Code of Civil Procedure, dismissing the objection of a party to the execution proceedings. Section 247 of the Agra Tenancy Act, however, allows an appeal from every order of an Assistant Collector of the second class. In this way an appeal has been provided for, where there will be no appeal under the Code of Civil Procedure.

Order XXI, rule 63 lays down that “where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right

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which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." Even if it be assumed that the provision of a right to appeal from an order of an Assistant Collector, second class, is somewhat inconsistent with the provisions of rule 63, that rule will be inapplicable only so far as the inconsistency extends. That is to say, an appeal would be entertained where no appeal would otherwise have lain. But there is no inconsistency between the right to file a civil suit and a right to appeal under the Tenancy Act. It is to be noted that order XXI of the Code of Civil Procedure has been made applicable, with two exceptions, to execution proceedings under the Agra Tenancy Act (schedule II, list 2, serial Nos. 12 and 13).

It is obvious that a very large property may well be attached in execution of a very small amount. The policy of the legislature could not have been to make an order passed by an Assistant Collector or by a Collector in appeal final in such matters. Agreeing with the view explained by the learned single Judge of this Court, we dismiss this appeal with costs.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

DHAPO (JUDGMENT-DEBTOR) v. BAQRIDI (DECREE-HOLDER).*

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March, 31.

Civil Procedure Code, section 144—Restitution—Refund of money paid on attachment in execution of first court decree—Limitation—Terminus a quo—Limitation Act (IX of 1908), article 181—Whether period runs from date of lower appellate court's decree or from date of High Court's decree.

In execution of a decree for money certain property was attached and a sum of money was paid to the decree-holder and the attachment was removed. Subsequently the decree was reversed on appeal, and the decision of the appellate court was upheld by the High Court in second appeal. On an application for restitution of the money which had been paid

*Second Appeal No. 1374 of 1930, from a decree of A. P. Ghildial, Subordinate Judge of Meerut, dated the 29th of July, 1930, reversing a decree of B. P. Elhence, Munsif of Meerut, dated the 25th of March, 1930.