REVISIONAL CIVIL.

Before Mr. Justice Niamat-ullah.

RAM NARAIN SAHU (DEFENDANT) *v.* MAKHNA (PLAINTIFF).*

1931 December, 1.

Agra Tenancy Act (Local Act No. III of 1926), section 253—Suit for profits—Application for stay pending decision of civil court appeal—Order refusing stay—Revision.

Under section 253 of the Agra Tenancy Act, 1926, the High Court is empowered to call for the record of a suit or application which has been *decided* by a subordinate revenue court. Ordinarily, therefore, a revision lies after the proceedings in a suit or those started by an application terminate. But in the case of proceedings started by an application made in a pending suit, if such application is dismissed and an appeal lies therefrom to the District Judge but not to the High Court, a revision would lie though the suit is still pending.

The revisional jurisdiction of the High Court under section 253 can be invoked only after the termination of the proceedings in the suit or those based on an application made in the suit or otherwise, provided in either case an appeal lies to the District Judge, but not to the High Court, from the decree passed in the suit, or from the final order passed in the proceeding started by an application, as the case may be.

In a suit for profits an application was made for stay of the proceedings pending the decision of a civil court appeal *inter partes* and dealing with the question of the parties' title. The application was refused by the Assistant Collector. *Held*, in revision from the order of refusal, that the order might be taken to mark the termination of a proceeding started by an application made for stay, but as no appeal lay to the District Judge from such an order, it was not open to revision under section 253.

Messrs. *B. E. O'Conor* and *Ram Nama Prasad*, for the applicant.

Mr. *K. Verma*, for the opposite party.

NIAMAT-ULLAH, J. :—A preliminary objection has been taken by the learned advocate for the opposite party that no revision lies, having regard to the pro-

*Civil Revision No. 188 of 1931.

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visions of section 253 of the Agra Tenancy Act (III of 1926). The facts which bear on the arguments addressed to me on the preliminary objection are briefly as follows:—

Mst. Makhna, the opposite party, instituted a suit for profits in the revenue court against the defendant applicant in respect of a certain zamindari share. Her proprietary right to that share was denied by the defendant. Acting under section 271 of the Agra Tenancy Act (III of 1926), the revenue court made a reference to the civil court for a finding on the issue thus raised on the question of proprietary right. The defendant applicant had, in the meantime, instituted in the civil court a declaratory suit in which the same question was raised. The civil court decided the common issue raised before the revenue court and before itself, in a consolidated proceeding, which resulted in the dismissal of the suit brought by the defendant applicant and a finding in favour of the proprietary right set up by Mst. Makhna in the suit for profits pending in the revenue court. On receipt of such finding the revenue court proceeded to decide the question of proprietary right arising in the suit for profits in terms of the finding returned by the civil court; but the defendant applied for stay of the suit for profits on the ground that he had preferred an appeal to this Court from the decree passed in the title suit brought by himself in the civil court. The application was founded on sections 10 and 151 of the Civil Procedure Code. The revenue court refused to stay further proceedings in the suit for profits. The present revision was then filed. It should be mentioned that, having regard to the value of the subject matter of the suit pending in the revenue court, no appeal can lie direct to this Court but to the District Judge.

It is common ground that the revisional jurisdiction of this Court has to be determined with reference

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to section 253 of the Agra Tenancy Act (III of 1926), and not section 115 of the Code of Civil Procedure. The question is whether, in the circumstances already stated, section 253 of the Agra Tenancy Act, III of 1926, bars the jurisdiction of this Court to entertain a revision from the order of the Assistant Collector refusing to stay the suit for profits pending before him. That section runs as follows:—"The High Court may call for the record of any suit or application which has been decided by any subordinate revenue court and in which an appeal lies to the District Judge and in which no appeal lies to the High Court, and if such subordinate revenue court appears . . . the High Court may pass such order in the case as it thinks fit."

The High Court is empowered to call for the record of a suit or application which has been *decided* by a subordinate revenue court and not of one which is still pending. Ordinarily, therefore, a revision lies after the proceedings in a suit or those started by an application terminate. It is, however, easy to imagine the case of proceedings started by an application made in a pending suit, for example where a suit is dismissed for default of appearance and an application is made for restoration. If such application is dismissed an appeal lies to the District Judge but not to the High Court (assuming the valuation leads to this forum of appeal). In such a case a revision would lie though the suit is still pending. Groups C to E of the fourth schedule to the Tenancy Act, III of 1926, mention cases which are started by applications wholly independent of suits. In all those cases, if appeals lie to the District Judge but not to the High Court, the latter can call for the records in the exercise of its revisional jurisdiction. It was contended by the learned advocate for the respondent that applications referred to in section 253 are those specified in groups C to E of the fourth schedule. I do not think this is the case. I have already given an instance of an application made in a pending suit

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and the language of section 253 is wide enough to include other cases, provided other conditions exist.

Part of the record of a suit may be the whole record of a proceeding based on an application made in the suit. The expression "record of an application" can not, therefore, create any difficulty. The phrase "in which an appeal lies to the District Judge" creates an insuperable bar to revisions from all interlocutory orders where no appeal lies to the District Judge. It was contended by the learned counsel for the applicant that as an appeal lies to the District Judge in the suit itself an order refusing to stay the suit can be the subject of a revision. But this view militates against another part of the section, namely the condition that it should have been *decided*. If the suit is still pending no revision can lie as regards the suit itself. Obviously the word "which" at both places refers to one and the same proceeding. In my opinion the revisional jurisdiction of the High Court can be invoked only after the termination of the proceedings in the suit or those based on an application made in the suit or otherwise, provided in either case an appeal lies to the District Judge but not to the High Court from the final order (that is, decree in case of a suit) passed in the suit or in the proceeding started by an application.

Clauses (*a*), (*b*) and (*c*) of section 253 have been taken verbatim from the corresponding clauses of section 115 of the Code of Civil Procedure, but a somewhat different language has been used in the opening part of section 253 to sail clear of the difficulty which arose in cases under section 115 of the Code of Civil Procedure from the words "case decided". Some Judges held that that expression excludes interlocutory orders from the revisional jurisdiction of the High Court, while others took a contrary view. Section 253 of the Agra Tenancy Act, III of 1926, has avoided the use of those words and made it clear that an interlocutory order is not open to revision unless it was passed on an application and unless

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an appeal lies therefrom to the District Judge but not to the High Court.

In the case before me the order of the Assistant Collector refusing to stay the proceedings in the suit pending before him was passed on an application and may be taken to mark the termination of a proceeding started by an application made for stay. No appeal, however, lies to the District Judge from such an order. It is not, therefore, open to revision at this stage. In this view the preliminary objection prevails and the application is dismissed with costs.

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Sen.

1931 December, 7.

KALLU MAL (PLAINTIFF) *v.* BIKRAMAJIT SINGH (DEFENDANT).*

Provincial Small Cause Courts Act (IX of 1887), section 17 (1) proviso—Deposit with application for setting aside ex parte *decree—"Amount due under the decree".*

Where an application for setting aside an *ex parte* decree of a small cause court was accompanied by a deposit which covered the amount due under the decree at the date thereof but fell short of the amount which became due at the date of the application, and the *ex parte* decree was set aside, it was *held* in revision that the deposit was in compliance with the provisions of section 17(1) proviso of the Provincial Small Cause Courts Act, and that in any case substantial justice having been done there was no ground for revision.

Mr. *S. N. Seth*, for the applicant.

Mr. *R. C. Ghatak*, for the opposite party.

MEARS, C. J. and SEN, J. :—On the 20th of January, 1930, an *ex parte* decree was passed in favour of Kallu Mal by a court of small causes for a sum of Rs. 792-2-3 together with interest at the rate of 6 per cent. per annum. The decree also allowed Rs. 108-8-0 as costs to the plaintiff. On the 4th of November, 1930, the defendant applied to set aside

*Civil Revision No. 45 of 1931.