APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice King.

1931
March, 17.

FAQIRA SINGH AND OTHERS (DEFENDANTS) *v.* PARDAMAN KUMAR (PLAINTIFF).*

Agra Tenancy Act (Local Act III *of* 1926), *sections* 79, 248(3) *—Ejectment on decree for arrears—Amounts to execution of decree—Appeal from order of ejectment—Agra Tenancy Act (Local Act III of* 1926) *sections* 252, 253*—Revision—Order of revenue court rejecting application for review—Whether revision lies to High Court or Board of Revenue—Agra Tenancy Act, section* 273*—Provisions mandatory.*

A zamindar obtained a decree for arrears of rent against his tenants and applied under section 79 of the Agra Tenancy Act, 1926, for their ejectment. An order under section 80 for ejectment was passed *ex parte* and the plaintiff obtained possession. The defendants applied for review of that order, but the application was rejected by the Assistant Collector. On revision the Board of Revenue set aside the order of ejectment and the defendants obtained restoration of possession. The plaintiff filed a suit in the civil court for a declaration that the order of the Board of Revenue was without jurisdiction, and for recovery of possession. The defendants pleaded, *inter alia*, that they held the land as tenants of the plaintiff. *Held*—

The civil courts have jurisdiction to decide whether an order passed by the Board of Revenue in revision was *ultra vires* inasmuch as the Board had no jurisdiction to entertain the revision.

An application under section 79 of the Agra Tenancy Act, 1926, for ejectment of a tenant against whom a decree for arrears of rent has been passed, is an application in execution of the decree and the determination of such an application is the determination of a question under section 47 of the Civil Procedure Code. An order of ejectment under section 80, passed in execution of a decree for arrears exceeding Rs. 200, was therefore appealable to the District Judge under section 248(3) and the Board of Revenue had no jurisdiction to entertain a revision against and to set aside such an order.

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*Second Appeal No. 914 of 1928 from a decree of M. O. Karney, Subordinate Judge of Saharanpur, dated the 9th of May, 1928, confirming a decree of Sheo Narain Vaish, Munsif of Havali, dated the 2nd of March, 1928.

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As no appeal lay against the order rejecting the application for review, under section 252 of the Agra Tenancy Act a revision lay to the Board of Revenue and it had power to set aside that order of the Assistant Collector. The revision would not lie to the High Court, for section 253 only empowers the High Court to exercise revisional powers in cases decided by revenue courts in which an appeal lies to the District Judge. But the Board, while it could set aside the order rejecting the review, had no power to set aside the order of ejectment itself under the guise of an incidental order.

The language of section 273 of the Agra Tenancy Act, 1926, is imperative and when in a suit instituted in the civil court relating to an agricultural holding the defendant pleads that he holds such land as the tenant of the plaintiff, the civil court is bound to refer the issue on the plea of tenancy to the revenue court, even though the civil court is of opinion that the plea is clearly untenable.

Dr. *M. L. Agarwala* and *K. N. Malaviya*, for the appellants.

Dr. *K. N. Katju* and Mr. *Akhtar Husain Khan*, for the respondent.

BANERJI and KING, JJ. :—The facts giving rise to this appeal are briefly as follows :—

The plaintiff is a zamindar and the defendants were his occupancy tenants. On the 29th September, 1926, the plaintiff obtained a decree for Rs. 664 against the defendants for arrears of rent. Under section 79 of the Agra Tenancy Act, 1926, the decree-holder applied to the Assistant Collector for the ejectment of the defendants in execution of his decree. Proceedings were taken under section 80 and on the 13th June, 1927, the Assistant Collector passed an *ex parte* order for the ejectment of the defendants. On the next day, namely the 14th June, 1927, the defendants appeared and applied for review of the order of ejectment. On the 25th June, 1927, the plaintiff obtained possession of the holdings in pursuance of the order passed under section 80. On the 2nd July, 1927, the Assistant Collector rejected the application for review.

The defendants then applied for revision to the Board of Revenue, and on the 20th of October, 1927, the Board accepted the application and set aside the ejectment order. The defendants applied to the Assistant Collector for being restored to possession of the holding. The plaintiff then instituted a suit for a declaration that the order passed by the Board of Revenue in revision was passed without jurisdiction, and for a permanent injunction restraining the defendants from obtaining possession of the holding in pursuance of the Board's order. The defendants obtained possession of the holding in pursuance of the Board's order before filing their written statement and pleaded that section 42 of the Specific Relief Act barred the suit for a mere declaration. The plaintiff then amended the plaint by praying for recovery of possession of the holding.

The defence was that the suit was barred by *res judicata* by reason of the Board's order and that the suit was not cognizable by the civil court as the relation of landholder and tenants existed between the parties.

The trial court found that the Board's order, dated the 20th of October, 1927, was *ultra vires* and passed without jurisdiction and therefore it could not operate as *res judicata*. The court also found that as the defendants had recovered possession in pursuance of a void order, and no fresh contract of tenancy had been made between the parties, the defendants were mere trespassers and the civil court had jurisdiction to eject them. The court accordingly decreed the suit for possession. The defendants appealed, but the lower appellate court endorsed the findings of the trial court and dismissed the appeal. The defendants now come to this Court in second appeal.

The first question for determination is whether the Board of Revenue had jurisdiction to set aside the

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order of ejectment passed by the Assistant Collector under section 80. It has been expressly held in *Naraini* v. *Parsanni* (1) that the civil courts have jurisdiction to decide whether an order passed by the Board of Revenue in revision was passed *ultra vires* and without jurisdiction. This proposition has not been disputed before us.

Under section 243(1)(*a*) an appeal against the Assistant Collector's decree for arrears of rent clearly lay to the District Judge since the value of the subject matter exceeded Rs. 200.

Under section 248(3), if the order of ejectment is held to be an order determining a question relating to the execution of the decree under section 47 of the Code of Civil Procedure, then it is clear that an appeal against that order would lie to the District Judge.

The question, therefore, arises whether the order of ejectment passed under section 80 was an order relating to the execution of the decree within the meaning of section 47 of the Code of Civil Procedure.

In our opinion the answer must be in the affirmative. Section 79 provides an additional mode of executing a decree for arrears of rent, in addition to the ordinary modes of execution of a decree for money specified in order XXI, rule 30 of the Code of Civil Procedure. It has been argued that there is a distinction between an application for execution of a decree for money and an application for ejectment under section 79. The Board of Revenue in their order of the 20th of October, 1927, (which is reported in volume 8, Unpublished Decisions, p. 130) take the view that an application for ejectment and an application for execution of a decree are essentially different, the former not being a step in aid of execution, and therefore section 47 does not apply. It is pointed out that in group F of the fourth schedule of the Agra Tenancy Act a distinction appears to be

(1) (1905) 2 A.L.J., 331.

drawn between an application for the ejectment of a tenant on the ground of an unsatisfied decree for arrears of rent and an application for the execution of a money decree. It is true that an application for the ejectment of a tenant on the ground of an unsatisfied decree for arrears of rent is not expressly stated to be an application for execution of a decree for arrears of rent, but we are unable to hold that the language of this schedule affords any sound basis for the contention that an application for the ejectment of a tenant under section 79 is not an application for execution of a decree for arrears of rent. There is a difference between the language of section 59 of the Agra Tenancy Act, 1901, and the corresponding section 79 of the Agra Tenancy Act, 1926. Under the provisions of the old Act it might well have been held that there was a distinction between an application for ejectment under section 59 and an application for execution of a decree. Section 59 lays down that the application for ejectment shall be made "in the same manner as for execution of the decree." This clearly indicates that an application for ejectment is not considered to be an application for execution of the decree, but the application must be made in the same manner as for execution of the decree. The language of section 79, on the other hand, expressly lays down that a decree for arrears of rent may be executed by the ejectment of a tenant. In our opinion it is quite clear that ejectment is provided as one of the modes of executing the decree for arrears of rent, in addition to detention in the civil prison or attachment and sale of the judgment debtor's property. The old rulings, such as Selected Decision No. IX of 1912, passed with reference to the old Act are, in our opinion, no longer applicable. We hold that an application under section 79 is clearly an application for execution of the decree and the determination of such an application is the determination of a question under section 47 of the Code of Civil

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Procedure. It follows that an appeal against an order of ejectment passed under section 80 must lie to the District Judge. It may be noted that under section 248(1)(*c*) an appeal lies to the Collector from the order of an Assistant Collector allowing time under section 80. No express provision is made for appeal from an order of ejectment under section 80. In our opinion such an order must be held to be an order passed under section 47 of the Code of Civil Procedure, which is provided for in section 248(3). We agree with the court below, therefore, that the Board of Revenue had no jurisdiction to set aside the order of ejectment passed under section 80.

The second question is whether the Board had jurisdiction to set aside the order rejecting the application for review, dated the 2nd of July, 1927. Under order XLVII, rule 7 of the Civil Procedure Code no appeal lies against such an order and no appeal against such an order is expressly allowed under the Agra Tenancy Act. *Prima facie*, therefore, the Board of Revenue had jurisdiction to interfere in revision under section 252, since the decision of the application for review was a decision against which no appeal lies either to the District Judge or to the Board.

It is argued for the respondent that the application for review, although it purports to be an application for review, was in reality an application for setting aside an *ex parte* order. We cannot accept that contention, since it has been held in *Baldeo Prasad Shukul* v. *Sukhdeo Prasad Shukul* (1) that order IX, rule 13, does not apply to an application for setting aside an *ex parte* order in execution proceedings.

It is further contended for the respondent that the application should be held to be an application under section 47 as it related to the execution of the decree and the provisions of order XLVII, rule 1 were

(1) A.I.R., 1929 All., 485.

not applicable. We do not agree to this contention. The grounds for review may have been inadequate, but in our opinion the application really was an application for review. We consider the application to be an application for setting aside an order passed under section 47, by way of review.

It is further argued for the respondent that if the application is to be treated as an application for review, then an application for revision of the Assistant Collector's order lay to the High Court and not to the Board of Revenue. The case of *Ram Jiawan* v. *Ram Adhin* (1) is cited in support of this contention. The ruling does no doubt support the respondent's contention. The facts of the case were very similar to the facts of the case before us. In that case the Assistant Collector refused to review his own judgment in a profits case under section 226 in which a decree for Rs. 483 had been given and it was held that an application for revision of the order does not lie to the Board of Revenue but to the High Court. It may be anomalous that if the Assistant Collector had granted the application for review then his order would have been appealable to the District Judge under section 248(3), whereas if the Assistant Collector rejects the application for review then an application for revision of the order lies to the Board and not to the High Court. We must however, interpret the language of sections 252 and 253 according to their plain and ordinary meaning. It appears to us clear that section 253 only empowers the High Court to exercise revisional powers in cases decided by a subordinate revenue court in which an appeal lies to the District Judge. No appeal lay to the District Judge against the order rejecting the application for review; so, in our opinion, the High Court was not empowered to interfere in revision under section 253. The Board of Revenue, on the other hand, were empowered under section 252, since no appeal from the order rejecting

(1) S.D. No. 1 of 1928.

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the application for review lay either to the District Judge or to the Board. We hold, therefore, that the Board had power to set aside the Assistant Collector's order rejecting the application for review. The result of setting aside the Assistant Collector's order rejecting the application for review would be that the case should have been returned to the Assistant Collector's court for rehearing the case under order XLVII, rule 8. In our opinion the fact that the Board had power to set aside the order refusing the application for review *could not empower the Board to set aside the order of* ejectment, under the guise of an incidental order.

The last question is whether the civil court was competent to decree the delivery of possession by ejecting the defendants. It has been argued for the appellant that the suit for the ejectment of the defendants is barred under section 230 of the Agra Tenancy Act, as the plaintiff might have applied to the revenue court to enforce the order of ejectment passed under section 80. But the order of ejectment had been set aside by the Board. We hold that the Board had no jurisdiction to set it aside, nevertheless it had been set aside and the plaintiff clearly had no remedy open to him in the revenue courts. Moreover, his case is that the defendants are mere trespassers and not tenants and, in our opinion, the suit was rightly instituted in the civil court.

The question remains, however, whether in view of the provisions of section 273 of the Agra Tenancy Act the civil court was not bound to frame an issue on the plea of tenancy and submit the record to the revenue court for decision of the issue. In our opinion section 273 is applicable. The defendants certainly pleaded that they held the land as tenants of the plaintiff. The court below has held that section 273 does not apply because the defendants had lost all tenancy rights that might previously have existed after they had been ejected, and therefore the suit could not be held to be

a suit relating to an agricultural holding. This seems to be arguing in a circle. The finding that the suit does not relate to an agricultural holding involves the decision of the question whether the defendants are tenants of the plaintiff and this is a question which the revenue courts alone have jurisdiction to decide. It may be that in the opinion of the civil court the defendants clearly have no title as tenants and are mere trespassers, but the language of section 273 is imperative when the defendant pleads tenancy rights. It may be noted that in the converse case under section 271, when a party raises a plea of proprietary right in a revenue court, the revenue court is not bound to refer the issue to the civil court for decision if the revenue court considers that the plea is clearly untenable and intended solely to oust the jurisdiction of the revenue court. No such discretion has been given to the civil court under section 273. We hold, therefore, that the civil court had no power to decree possession without first framing an issue on the plea of tenancy rights.

We, therefore, frame the following issue: "Assuming that the Board's order, dated the 20th of October, 1927, setting aside the order of ejectment, was passed without jurisdiction, did the relation of landholder and tenant exist between the plaintiff and the defendants when the latter recovered possession of the holding in pursuance of the Board's order?"

We send the record to the court of the Assistant Collector which passed the order of ejectment under section 80 for decision of the issue. The finding of the revenue court should be submitted within two months, and ten days will be allowed for objections. Parties will be allowed to adduce evidence, if they think fit, relevant to the issue framed. Costs of this appeal will abide the result.