

Before Mr. Justice Mukerji and Mr. Justice Banerji

1930
June, 24.

DAN KUAR ((DEFENDANTS) v. EWAZ SINHG (PLAINTIFF).*

Agra Tenancy Act (Local Act No. III of 1926), section 271—Revenue court referring issue of proprietary right to competent civil court—Competency to be judged by value of the proprietary title, irrespective of valuation of the suit in the revenue court—Transfer of the proceeding to a court other than that named by the revenue court.

The words "competent civil court" in section 271 of the Agra Tenancy Act, 1926, mean a court which would be competent to entertain and decide a suit involving the issue on the question of proprietary title which has been raised regarding the property in question. So, where in a suit for profits valued at Rs. 700 in a revenue court the plaintiff alleged a half share in the property in question and the defendant denied the plaintiff's title, and the value of the property in question was over Rs. 9,000, it was *held* that the competent civil court, to which the revenue court was to refer the issue on the question of proprietary title for decision, would be the court of the Subordinate Judge and not that of the Munsif. The revenue court having sent the issue through the District Judge to the court of the Munsif, it was *held*, further, that the District Judge was competent, under section 24 of the Civil Procedure Code, to transfer the proceedings pending in the Munsif's court to the court of the Subordinate Judge.

Messrs. *N. P. Asthana* anr *B. N. Sahai*, for the applicant.

Mr. *S. N. Seth*, for the opposite party.

MUKERJI and BANERJI, JJ. :—This application in revision arises under the following circumstances. The respondent Thakur Ewaz Singh brought a suit for recovery of profits against the applicant Kuerin Mst. Dan Kuer for recovery of Rs. 700 and odd as profits, being the profits of a half share in a mortgaged property. The respondent's case was that he and the defendant had taken a mortgage, in equal shares, from certain persons and the respondent had not been given his share of the profits by the Kuerin Mst. Dan Kuer, who was in possession.

* Civil Revision No. 203 of 1929.

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In her defence the defendant raised the plea that she was the owner of the entire mortgage and that the plaintiff was not at all interested in the mortgage. The question of proprietary title to the property, involved in the suit for profits, having thus been raised the learned Assistant Collector framed an issue and sent it through the District Judge to the court of the Munsif at Shikohabad for trial.

An application was made by Kuerin Mst. Dan Kuer to the District Judge for transfer of the proceedings from the court of the Munsif to the court of the Subordinate Judge, on the ground that the value of the property involved was more than Rs. 10,000 and the value of the mortgage itself was over Rs. 9,000. It appears that the Munsif at Shikohabad is invested with pecuniary jurisdiction up to Rs. 4,000 only.

This application was opposed before the learned District Judge by Thakur Ewaz Singh, and the learned Judge was of opinion that the valuation of the issue to be tried must be the value of the suit for profits, namely Rs. 700 and odd. In that view, the learned Judge dismissed the application. The defendant Kuerin Mst. Dan Kuer has come before us and it is urged that the question of proprietary title of a large property has to be tried and it ought to be tried by the Subordinate Judge.

We are of opinion that the "competent court" before whom an issue like this should go is the court which would take cognizance of a suit involving the title to the property and of the suit in which that question of title may be fairly and ultimately decided. We are fortified in this opinion by the language of section 271 of the Agra Tenancy Act, III of 1926. The relevant portion runs as follows: "the revenue court shall frame an issue on the question of proprietary right and submit the record to a competent civil court for decision of that issue only." The words "competent civil court" have been intentionally used so that the

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issue may be tried by a court which would be competent to decide the question of proprietary title to the property in question. We are further fortified in this view by the provision made in the same section, namely that an appeal would lie from the decision of the Assistant Collector to a court which would be competent to hear an appeal from the court which shall decide the question of proprietary title. This would mean that if the proprietary title relates to a property of the value of, say Rs. 20,000, the Subordinate Judge should hear the issue and the appeal from the revenue court should come directly to the High Court. This state of the law has great advantage, because the question of proprietary title, we take it, will be finally decided between the parties and no further chance of litigation will be left to them.

We would point out that in the rules that were framed by the High Court for the guidance of the subordinate courts, the court directed the District Judge to send the case to "a proper subordinate civil court for disposal." The idea clearly was that the Judge would be in a better position to see which court would have jurisdiction to hear the question of proprietary title raised by the issue.

It was urged by the learned counsel for the respondent that the Assistant Collector having said that the issue should go before the Munsif, we should virtually be setting aside an order of the revenue court if we said that the case should go before the Subordinate Judge. We do not think this argument is sound. When once the Munsif is fully seised of the case, it is open to the High Court or the District Judge, under section 24 of the Civil Procedure Code, to transfer the proceedings to any other court of competent jurisdiction.

In the result, we allow the application and direct that the proceedings pending before the learned Munsif at Shikohabad be transferred to the court of

the Subordinate Judge of Mainpuri. Having regard to the fact that the question is a new one and much could be said on either side, we direct that the parties pay their own costs in the court below and in this Court.

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FULL BENCH.

Before Sir Grimwood Mears, Chief Justice, Mr. Justice Boys and Mr. Justice Young.

RAM KINKAR RAI AND ANOTHER (PLAINTIFFS) v. TUFANI
 AHIR AND OTHERS (DEFENDANTS).*

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Practice and pleading—Point of law raised for the first time in second appeal—Whether permissible—Civil Procedure Code, order XLI, rule 2.

A point not taken in the court below, whether the omission was by the appellant in that court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly—

I. Where the point may be described as involving a question of public policy, e.g., (1) involving jurisdiction, (2) involving the principle of *res judicata*, (3) where the decision of the point would prevent future litigation. In the above instances the point will be allowed to be argued only if it can be decided upon the materials before the court and does not involve the taking of further evidence or the sending of the case, or any issue, back to the lower court, or a decision of a question of fact.

II. Where the plaint discloses no cause of action, or the written statement no ground of defence.

It is not a ground for permitting a new point to be argued, merely (1) that it was omitted by oversight in the court below, or (2) that the materials are all on the record and that the answer to the point is plain.

[The question whether a point of limitation can, under certain conditions, be entertained if raised for the first time in second appeal was expressly left open by the Full Bench.]

* Second Appeal No. 1157 of 1928, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 29th of May, 1928, reversing a decree of Riksheshwari Prasad, Munsif of Ghazipur, dated the 28th of February, 1928.