Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

BAIJ NATH PATHAK (PLAINTIFF) *v.* GAYA DIN SINGH AND OTHERS (DEFENDANTS)* 1934 *January*, 23

Agra Tenancy Act (Local Act III of 1926), section 242(3)(b)—Plea of jurisdiction may be frivolously raised—Appeal lies to District Judge—Agra Tenancy Act, section 35(1)(b)—Extinction of tenancy—Ejectment must be qua *tenant—Ejectment* qua *mortgagee in execution of civil court decree not enough —Remedy of tenant upon such ejectment—Agra Tenancy Act, section 99.*

In order to see whether the requirements of section 242(3)(*b*) of the Agra Tenancy Act are fulfilled so that an appeal lies to the District Judge it is not necessary to investigate whether the plea of jurisdiction raised was a frivolous or futile one, but all that is necessary is whether the plea was that on the allegations contained in the plaint the revenue court had no jurisdiction. There are no words in the section to suggest that it would not apply if the question of jurisdiction is a frivolous one or if it has not been raised in good faith. *Deo Narain Singh* v. *Sitla Bakhsh Singh* (1), disapproved.

The words "a court" in the phrase "ejected in execution of a decree or order of a court" in section 35(1)(*b*) of the Agra Tenancy Act are wide enough to include both a civil and a revenue court, but they obviously must mean a competent court possessing jurisdiction to eject a tenant. It is the ejectment by the court of a tenant as such which extinguishes the tenancy; the ejectment of the person must be in his capacity as a tenant and not as a mortgagee, lessee or licensee. It follows that the ejectment of a tenant contemplated by section 35(1)(*b*) must be by a revenue court, or the District Judge hearing a revenue appeal, who alone would be competent to eject a tenant as such. So it was *held* that where *A* was a tenant of *B*, and was also his mortgagee, in respect of certain plots of land, the dispossession of *A* by *B* in execution of a civil court decree for redemption of the mortgage was a dispossession in his capacity as a mortgagee and not as a tenant. Such dispossession, therefore, was not the ejectment of a tenant in execution of a decree of a court within the meaning of section

*Second Appeal No. 839 of 1930, from a decree of Harish Chandra, District Judge of Benares, dated the 12th of March, 1930, reversing a decree of Mahadeo Prasad, Honorary Assistant Collector, first class of Jaunpur, dated the 30th of September, 1929.

(1) (1916) I.L.R., 40 All., 177.

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35(1)(*b*); and it followed that the tenancy was not extinguished thereby, also that the ejectment was not one in accordance with the provisions of the Agra Tenancy Act and a suit for possession under section 99 of the Act was maintainable by *A* against *B*, who having obtained possession from the civil court as a mortgagor was preventing his tenant *A* from obtaining possession of the holding.

Messrs. *K. Verma* and *S. K. Mukerji*, for the appellant.

Messrs. *Harnandan Prasad* and *Gopalji Mehrotra*, for the respondents.

SULAIMAN, C.J. and MUKERJI, J.:—This is a plaintiff's appeal arising out of a suit for recovery of possession under section 99 of the Agra Tenancy Act. The zamindar has also been impleaded.

It appears that a suit for redemption was brought by the defendant against the plaintiff, which was first dismissed by the Munsif on the ground that it was barred by *res judicata*. His decree was set aside on appeal and the case was remanded and the order of remand was affirmed by the High Court. On remand the Munsif decreed the claim *ex parte* for redemption against the plaintiff.

In 1928 the present plaintiff filed a suit for a declaration of his status as an occupancy tenant against the present defendant under sections 121 and 123 of the Agra Tenancy Act and he also impleaded the zamindar as a party. The suit was decreed by the Assistant Collector and the decree was affirmed by the Commissioner on the 4th of October, 1928. In the revenue court a copy of the judgment of the Munsif in the redemption suit had been filed, but the Commissioner considered that it did not debar the plaintiff from getting relief inasmuch as the civil court had merely allowed redemption of the mortgage without deciding the question of tenancy. He accordingly upheld the order of the Assistant Collector declaring that the plaintiff was the occupancy tenant of the land. That order became final and bound the zamindar as well as the defendant.

Having lost his case in the Commissioner's court the defendant executed the civil court decree and obtained delivery of possession through the civil court on the 21st of May, 1929. Upon this the plaintiff promptly instituted the present suit on the 15th of June, 1929. The Assistant Collector decreed the claim, holding that he was bound by the judgment of the Commissioner and that the civil court judgment was not any obstacle in the way. On appeal the District Judge has come to a contrary conclusion and dismissed the claim, holding that the tenancy was extinguished under section 35(1)(*b*) of the Tenancy Act on the delivery of possession through the civil court. He, however, overruled the objection of the plaintiff that the District Judge had no jurisdiction to entertain an appeal inasmuch as the appeal lay to the Commissioner.

The first point urged in appeal is that the District Judge had no jurisdiction to hear the appeal inasmuch as no question of jurisdiction was properly decided. A plea of jurisdiction was raised in the written statement to the effect that the plaintiff was not competent to bring the suit under section 99 of the Tenancy Act nor was the claim cognizable by the court. No doubt, having regard to the allegations in the earlier paragraphs of the written statement, there was some ambiguity as to whether the defendants intended that the revenue court had no jurisdiction to entertain a suit on the allegations contained in the plaint or whether it was intended that it had no jurisdiction because on the facts alleged by the defendants, namely that a civil court had put them in possession, the suit was not maintainable; but the revenue court framed separate issues as regards the competency of the plaintiff to maintain the suit and as regards the jurisdiction of the revenue court. Issue No. 4 was: "Is the suit cognizable by the revenue court?" The Assistant Collector held that section 99 was clearly a case for the revenue court and no reason had been shown as to why the revenue court had no

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jurisdiction. He, no doubt, added that the issue was actually not pressed at the time and he decided it against the defendant. No admission was recorded, and it is suggested on behalf of the defendant that there was no abandonment of the plea but probably the mukhtar argued the point in a half-hearted manner. There is at any rate no doubt that the Assistant Collector decided the issue against the defendant. In dealing with the question whether the plaintiff was competent to maintain the suit the Assistant Collector relied upon the allegations of the plaintiff in the plaint and emphasised that there had been no allegations made against the zamindar and he decided that the plaintiff was entitled to bring the suit under section 99. That issue was also decided in favour of the plaintiff. In the grounds of appeal before the District Judge the question of the jurisdiction of the revenue court was again raised and it has been decided by the Judge in favour of the plaintiff.

The learned advocate for the plaintiff however contends that the plea of want of jurisdiction was a most frivolous plea inasmuch as the revenue court was the only court which could have entertained the suit and that therefore no question of jurisdiction was in substance decided by the trial court and that therefore no appeal lay to the District Judge. He relies strongly on the case of *Deo Narain Singh* v. *Sitla Bakhsh Singh* (1).

Now section 242(3) provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector in all suits in which either (*a*) a question of proprietary right has been in issue between the parties and is in issue in appeal, or (*b*) a question of jurisdiction has been decided and is in issue in appeal. There are no words in the section which would suggest that the section would not apply if the question of jurisdiction is a frivolous one or if it has not been raised in good faith or has been decided by the court summarily. No

(1) (1916) I.L.R., 40 All., 177.

doubt the case relied upon by the learned counsel for the plaintiff lends some support to his contention, but this case was not followed or, at any rate, is in conflict with the decision of another Bench, of which one of the same learned Judges was a member, in *Damodar Das* v. *Jhaoo Singh* (1). A similar question in a different way arose in *Umrai Singh* v. *Ewaz Singh* (2). These cases were considered in the Full Bench case of *Gokaran Singh* v. *Ganga Singh* (3). BANERJI, J., was inclined to adopt the view expressed by PIGGOTT, J., in *Umrai Singh's* case that a proper plea of jurisdiction is, assuming that the allegation made in the plaint is true, the suit as brought is not cognizable by the revenue court. PIGGOTT, J., also expressed the view that if the point arose he would prefer to follow the view expressed in *Damodar Das* v. *Jhaoo Singh*. RAFIQ, J., who had been a member of the Bench in both the earlier cases, agreed with BANERJI, J.

It is therefore quite clear that the observations made in the Full Bench support the view that in order to see whether section 242(3)(*b*) applies it is not necessary to investigate whether the plea was a frivolous or a futile one, but all that is necessary is whether the plea was that on the allegations contained in the plaint the revenue court had no jurisdiction. If the defendant's position is that on proving certain additional facts he will be able to establish that the plaintiff is not entitled to the relief he claims, then that is not a plea of jurisdiction. This view has been endorsed by a subsequent Full Bench of which both of us were members, *Sahdeo* v. *Budhai* (4), where it was clearly laid down that it is the allegations in the plaint alone which determine whether the court has jurisdiction to entertain a suit; and if on a further investigation fresh facts are established which disentitle the plaintiff from claiming relief then the suit is to be dismissed on the merits. We may add that in the new Act the words, "and is in issue in the appeal",

(1) (1917) 15 A.L.J., 319.
(2) (1918) I.L.R., 41 All., 270.
(3) (1919) I.L.R., 42 All., 91.
(4) (1929) I.L.R., 51 All., 853.

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have been added and they in our opinion reinforce the view stated above. We must accordingly hold that the District Judge had jurisdiction to entertain the appeal.

The learned advocate for the contesting defendant relies strongly on section 35 and urges that the interest of the tenant had been extinguished when the civil court decree was executed. His contention is that under section 35(1)(*b*) the interest of a tenant is extinguished in the land from which he has been ejected in execution of a decree or order *of a court* and contends that the expression "a court" is wide enough to include both a civil and a revenue court. In view of the fact that in other sections of the Act, for example section 99, both a civil and a revenue court are mentioned, it may be conceded that the expression "a court" would cover both such courts. The court of the District Judge hearing a revenue appeal would be a civil court and could come within the purview of the section, but it obviously must mean a competent court possessing jurisdiction to eject a tenant. It is further clear that it is the interest of a *tenant* who has been ejected by the court that is extinguished, and it follows that the ejectment of the person must be in his capacity as a tenant and not as a mortgagee, lessee or licensee. That this is so is also apparent from the other clauses in section 35 which deal with the death of a tenant or surrender by a tenant etc. These considerations necessarily involve an inference that the ejectment of a tenant within the meaning of section 35 must be by a revenue court, or the District Judge hearing a revenue appeal, who alone would be competent to eject a tenant as such. In such circumstances the ejectment would necessarily be in accordance with the provisions of the Tenancy Act. In this way section 35 would be in perfect harmony with the provisions of section 99 which apply where the ejectment is otherwise than in accordance with the provisions of the Tenancy Act. It therefore follows that when the plaintiff was formally dispossessed in execution of the redemp-

tion decree by the civil court he was dispossessed in his capacity as a mortgagee and not as a tenant. Section 35, therefore, would not apply to such a case. The civil court merely recognized the existence of the mortgage, allowed redemption and restored possession to the mortgagor. It did not feel called upon to consider any question of tenancy rights or the ejectment of a tenant. Section 35 therefore is not a bar to the plaintiff's claim. It seems to us that the judgment of the Commissioner must operate as *res judicata* between the parties. As pointed out above, the zamindar was not, and of course could not be made, a party in the redemption suit brought in the civil court. On the other hand, he was expressly made a party to the suit which went up in appeal to the Commissioner and is now also a party to the present suit. The *ex parte* decision obtained from the civil court for the redemption of the land did not decide the question of tenancy at all and was, of course, in no way binding upon the zamindar. It was only when the zamindar also was made a party that the question of the right to the tenancy was finally determined by the Commissioner. It cannot be contended that the Commissioner had no jurisdiction to hear the appeal arising out of the suit under section 121 and section 123 of the Tenancy Act or that he had no jurisdiction to declare that the plaintiff was the tenant. That judgment is binding upon all parties and in our opinion operates as *res judicata,* as the revenue court alone was competent to decide the question of tenancy.

It is next contended on behalf of the respondent that there has been no wrongful ejectment within the meaning of section 99 of the Tenancy Act inasmuch as the defendant obtained possession through a competent civil court as mortgagor. This contention, in our opinion, has no force. Section 99 applies both to a case where a tenant has been ejected from a holding and also to a case where he is prevented from obtaining

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possession of his holding. Under that section he is entitled to sue the person who ejected him or kept him out of possession. The delivery of possession by the civil court was to the mortgagor against the mortgagee. But when subsequently the defendant retained possession of the holding and refused to hand it over to the plaintiff, who had been found by the Commissioner to be entitled to the holding, he certainly prevented him from obtaining possession and was keeping him out of possession. The plaintiff is suing as a tenant and therefore as a person claiming through the landholder and is suing against a defendant who also claims to be a tenant and, therefore, a person claiming through the landholder, and so the suit lies under section 99 which directly applies.

We accordingly allow the appeal and setting aside the decree of the District Judge restore the decree of the Assistant Collector with costs in all courts

REVISIONAL CRIMINAL

Before Mr. Justice Bennet

EMPEROR *v.* KUNJI LAL*

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January, 23

Criminal Procedure Code, sections 369, 561A—*Review of judgment in criminal cases—Jurisdiction—Whether the High Court has power to review its judgment in a criminal case, after it has been signed and sealed—Letters Patent, clauses* 18, 19—*Criminal Procedure Code, section* 203—*Dismissal of complaint—Fresh complaint on same facts before same Magistrate—Transfer by him to another Magistrate.*

No application lies under section 561A of the Criminal Procedure Code for review of a judgment of the High Court, which has been signed and sealed, dismissing an application in criminal revision. Section 561A does not override section 369 of the Code.

There is a long series of rulings prior to 1923 holding that there was no power of review in criminal cases. The alteration in section 369, and the addition of section 561A, made by

*Application for review of judgment in Criminal Revision No. 330 of 1933.