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grove, and if he did so, no doubt he would become a grove-holder and have a transferable interest; but he has not so planted a grove and we consider therefore that the first part of the definition of land in section 3(2) of the present Tenancy Act governs the case, that is, "land means land which is let or held for agricultural purposes". Grove-land is defined in section 2(15) as "any specific piece of land in a mahal having trees planted thereon in such numbers that when full grown they will preclude the land or any considerable portion thereof being used primarily for any other purpose". It is clear therefore that the land is not grove-land but is agricultural land. We are of opinion therefore that the property is property to which the restriction contained in section 23 will apply and the interest of the judgment-debtors is not transferable in the execution of the decree of the appellant. For these reasons we agree with the judgment of the learned single Judge and we dismiss this Letters Patent appeal with costs.

MISCELLANEOUS CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

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January, 28

BISHNATH SINGH AND OTHERS (DEFENDANTS) *v.* COLLECTOR OF BENARES (PLAINTIFF)*

Civil Procedure Code, order XLVII, rule 1—*Review of judgment—Ground that appeal did not lie to that court—Over valuation—Jurisdiction—Suits Valuation Act (VII of* 1887), *sections* 8, 11—*Court Fees Act (VII of* 1870), *section* 7(xi) *(cc) —Suit to eject a thekadar—Whether thekadar is "tenant" within the meaning of Court Fees Act—Agra Tenancy Act (Local Act III of* 1926), *sections* 3(6), 199(1), 220, 242.

A suit for ejectment of a thekadar, paying an annual rent of Rs.111, was filed in the court of an Assistant Collector of the first class. The suit was valued for purpose of jurisdiction at Rs.6,000. The trial court dismissed the suit on the merits and the plaintiff filed an appeal to the High Court. No objection

*Application for review of judgment in First Appeal No. 348 of 1932.

was taken, either in the trial court or in the High Court, that the valuation of the suit should have been Rs.111 only and not Rs.6,000, and that therefore no appeal lay. The High Court decided the appeal in the plaintiff's favour. Thereafter the defendant applied for review of judgment on the ground that the proper valuation for purpose of payment of court fee was Rs.111 according to section 7(xi) (*cc*) of the Court Fees Act, and therefore the proper valuation for purpose of jurisdiction was also Rs.111 according to section 8 of the Suits Valuation Act; and as the value of the subject-matter was less than Rs.200 no appeal lay at all, according to section 242 of the Agra Tenancy Act:

Held, that there was no ground for review; there was no discovery of any new and important matter or evidence, nor was there an error or mistake apparent on the face of the record, within the meaning of order XLVII, rule 1. On the face of the record an appeal lay to the High Court, as the valuation of the subject-matter of the suit in the plaint was Rs.6,000, and no objection was taken that this was an overvaluation. Such an objection should have been raised at the hearing of the appeal. As the High Court, assuming jurisdiction on the basis of the statement as to valuation made in the plaint, entertained and decided the appeal and no plea of overvaluation and consequent want of jurisdiction was taken by the defendant respondent when he had the opportunity of raising it, so by virtue of section 11 of the Suits Valuation Act it could not be said that the High Court had acted without jurisdiction in deciding the appeal.

Per BENNET, J.—Further, having regard to the distinction drawn in the Agra Tenancy Act between a thekadar and a tenant, it is very doubtful if a thekadar can be regarded as a "tenant", and the present suit as a suit "between landlord and tenant", within the meaning of section 7(xi) (*cc*) of the Court Fees Act. Again, section 242 of the Agra Tenancy Act speaks of the "value of the subject-matter", and not of the "value for computation of court fees" or "value for the purpose of jurisdiction" which are spoken of in section 8 of the Suits Valuation Act.

Dr. *K. N. Katju* and Mr. *B. S. Shastri*, for the applicants.

The application was heard *ex parte*.

BENNET, J.:—This is an application of Bishnath Singh and others for review of judgment given by this

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Bench in First Appeal No. 348 of 1932, Collector of Benares v. Bishnath Singh and others, on the 14th October, 1936. The plaintiff in that suit claimed for ejectment of the defendants as thekadars under section 205 of the Agra Tenancy Act, 1926, and section 84 of that Act, and he claimed that the condition of the theka had been broken and asked for the relief of cancellation of the lease and dispossession of the defendants. The lease in question was for payment of Rs.111 per annum and was a lease granted on the 18th December, 1875, of the entire mauza Batoli in favour of the father of the defendants. The trial court had dismissed the suit, and on appeal this Court decreed the plaintiff's suit for ejectment with costs. The present applicants are the defendants and the point which has been raised now for the first time is that this Court had no jurisdiction to entertain the appeal. The plaint was valued in paragraph 12 for Rs.6,000 for the purpose of jurisdiction. Section 242 of the Agra Tenancy Act provides for an appeal to the District Judge from the decree of an Assistant Collector of the first class or of a Collector in any of the suits included in Group A of the fourth schedule in which the amount or value of the subject-matter exceeds Rs.200, and it is further provided that where the amount or value of the subject-matter of the suit exceeds Rs.5,000 the appeal shall lie to the High Court. No objection was taken in this Court, during the hearing of the appeal, that the plaint had been overvalued and that jurisdiction did not lie in the High Court for the appeal. The argument which is now made before us is that the value of the suit should have been only Rs.111 and therefore no appeal lay either to the District Judge or to the High Court. This argument is based on the fact that in the Court Fees Act it is provided in section 7(xi)(*cc*) that in suits between landlord and tenant for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy, the amount

of fees shall be computed according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint. The argument then proceeds that in the Suits Valuation Act section 8 provides: "Where in suits other than those referred to in the Court Fees Act, 1870, section 7, paragraphs (v), (vi) and (ix), and paragraph (x), clause (*d*), court fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same." Learned counsel therefore argued that the valuation both for court fee and for jurisdiction should be Rs.111, and therefore no appeal lay from the decree of the Assistant Collector refusing ejectment. Now in section 11 of the Suits Valuation Act it is provided that an objection about the overvaluation or undervaluation of a suit or appeal in a court of first instance or lower appellate court which had not jurisdiction with respect thereto shall not be entertained by an appellate court unless "(*b*) the appellate court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was overvalued or undervalued, and that the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits." Now the matter was not raised in appeal but is raised now in review. The principles which should govern a court in considering such an application in review have been laid down by a Bench of this Court of which one of us was a member, in the case of *Khudaijat-ul-Kubra* v. *Amina Khatun* (1), and it was there laid down that where the court, assuming jurisdiction on the basis of a statement made in the plaint, decreed the suit in favour of the plaintiff and no such plea was taken by a defendant when he had the opportunity of raising it, it could not be said that the court had acted without jurisdic-

(1) (1923) I.L.R., 46 All., 250.

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tion, and a subsequent suit by the defendant to set aside the decree for want of jurisdiction would not lie, and that ruling was based on section 11 of the Suits Valuation Act. The plaint in the case before us laid down that for the purpose of jurisdiction the value of the property was Rs.6,000. Now the lease was granted as long ago as 1875 and the suit was brought in 1930, that is, after an interval of 55 years. It is clear that the value of property had increased materially during this period of 55 years, and *prima facie* the valuation of Rs.6,000 in the plaint would appear to be a valuation which was correct. No argument in fact has been addressed to us that the actual valuation of the property is less than the Rs.6,000 stated in the plaint, but the argument is that on account of this technical rule said to be contained in these two Acts the valuation should be assumed to be only Rs.111 for the purpose of jurisdiction. Reference was made for this proposition to two rulings; one is *Nandan Singh* v. *Debi Din* (1) decided by a learned single Judge of this Court, which was a simple suit by a landlord for the recovery of immovable property from a tenant by ejectment under section 57, clause (*b*) of the Tenancy Act of 1901. The other ruling to which reference was made was *Raghunath Ram* v. *Sitaj Lal* (2), which came before a Bench of which one of us was a member. That was a case where the plaint professed to be one in a suit under section 44 of Act III of 1926. The trial court held that the case had been wrongly brought under that section, but that the plaintiff should get a decree for ejectment under section 197(*e*) read with section 84(*a*) of the Act. The suit was valued for the purpose of jurisdiction at Rs.15, which was the rent for the year preceding the suit, and it was held that the valuation was proper and that no appeal lay to the District Judge under section 242(1)(*a*) of the Tenancy Act, as the value of the

(1) (1914) 12 A.L.J., 933. (2) [1934] A.L.J., 708.

subject-matter, viz., the rent for one year, did not exceed Rs.200. Another ruling of a Bench of this Court is in *Seth Bankey Lal* v. *Piare Lal* (1). This was a suit brought for the ejectment of certain tenants from a grove alleging that they had committed a breach of their tenancy under section 57, Act II of 1901. The plaint valued the suit at Rs.18, which was the amount of the rent paid in the year preceding the suit, and an appeal was brought by the defendants alleging that the plaint was undervalued and putting the valuation of Rs.125. It was held that the valuation in the plaint was correct and that there was no right of appeal.

Now in the present case a further point arises because the plaint is brought against the defendants as thekadars under section 205 of the present Tenancy Act. In the former Tenancy Act it was laid down in section 4(5) that "tenant includes a thekadar". Now in the present Tenancy Act that provision no longer appears, and instead it is laid down in section 3(6) that "Tenant includes a grove-holder, but does not include a mortgagee of proprietary rights, a rent-free grantee or, save as otherwise expressly provided by this Act, a thekadar." In section 199(1) of Act III of 1926 it is stated: "A thekadar is a farmer or other lessee of proprietary rights in land, and in particular of the right to receive rents or profits." Now the Act therefore draws a distinction between a thekadar and a tenant, and under the present law in this province a thekadar is not a tenant except so far as the Act expressly provides; for example, in section 10 where the different classes of tenants are enumerated a thekadar is not one of those classes of tenants. Section 220 is as follows: "Every suit or application brought by a thekadar against his lessor, or against a thekadar by his lessor, under the provisions of this chapter, which is of the same nature as any suit or application specified in the fourth

(1) (1926) 7 U.D.B.R. (H.C. Supp.) 153

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schedule which may be brought by a tenant against his landholder or by a landholder against his tenant, shall be deemed to be included in that schedule under the same serial number as such similar suit or application." This section indicates that a suit like the present under section 205 against a thekadar can be brought as if that suit was included in the fourth schedule, Group A, where there is provision for a suit for ejectment of a tenant on the grounds specified in section 84. But it does not appear to me that this section indicates that for the purpose of such suits a thekadar is in the same category as an ordinary tenant or lessee. In section 219(2) there is no doubt a provision that "A theka shall be deemed to be a lease for agricultural purposes within the meaning of section 117 of the Transfer of Property Act, 1882." This no doubt indicates that for the purpose of the Transfer of Property Act, so far as that section provides, the theka shall be a lease for agricultural purposes. That section 117, however, does no more than say "None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government may notify." There is no notification in force in these provinces, and therefore all that this section provides is that the Transfer of Property Act, chapter V, dealing with leases does not apply to thekadars any more than it applies to agricultural tenants under the Tenancy Act. Now the situation therefore is by no means clear. Learned counsel for the applicant for review argues that the Court Fees Act, section 7(xi)(*cc*) must apply to a thekadar, and that for the general provisions of law in the Court Fees Act and in the Suits Valuation Act it must be assumed that a thekadar is a tenant, and the argument is that because the Tenancy Act is for a special purpose, therefore it cannot be taken into account in regard to the Court Fees Act or the Suits Valuation Act. On the other hand, the appeal in question arises under the

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Tenancy Act and that Act states definitely that "the amount or value of the subject-matter" determines the forum of appeal, if any. These words certainly do raise a difficulty, as there is no doubt that the amount or value of the subject-matter in the present case is over Rs.5,000 and nothing has been shown to indicate the contrary. Turning to the Suits Valuation Act it is provided in section 8 already quoted that an exception to that section is suits referred to in the Court Fees Act, section 7, paragraph (v). Now paragraph (v) deals with suits for the possession of land and the valuation is to be according to the value of the subject-matter. Various rules are laid down as to how that subject-matter is to be ascertained. If the present case is not one of a tenant and a thekadar is to be distinguished from a tenant, then the suit for possession would be one which would come under section 7, paragraph (v). These matters, it appears to me, are points which might well have been raised by the defendants respondents when the appeal was being argued, but at that stage no argument was addressed to us on the subject. I may indicate some of the difficulties in the way of learned counsel for the applicant with which he has not attempted to deal even on the present occasion. The suit lay under section 205 of Act III of 1926 and under section 220 it is deemed to be included in the fourth schedule, Group A, serial number 2. The heading provides: "Suits triable, in the case of serial numbers 1, 2, etc., whatever the value . . . by Assistant Collector of the first class—appeal, if any, to the civil court." Section 240 states: "No appeal shall lie from any decree or order passed by any court under this Act except as provided in this Act." Section 242 follows with its criterion of "the amount or value of the subject-matter". All these provisions are inconsistent with the calculation of the "value for the purposes of jurisdiction" as the same for "the value as determinable for

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the computation of court fees" under section 8 of the Suits Valuation Act. The first inconsistency is the provision that for the jurisdiction of the trial court the valuation does not matter at all, and all such suits must be in the court of an Assistant Collector of the second class. The next inconsistency is that for an appeal the criterion is not "the value as determinable for the computation of court fees" but "the amount or value of the subject-matter". As the special law makes special provisions for jurisdiction of the trial court and the appellate court, and for the valuation of the appeal, I consider that it has not been shown that the general law of the Suits Valuation Act can apply. In the present case the plaintiff asks for possession of a whole village valued at Rs.6,000 and it seems to me very strange that this relief should be valued at only Rs.111 because in 1875 Rs.111 was fixed as the rent which the thekadar was to pay to the plaintiff, and that there should be no appeal even to the District Judge as the valuation is supposed to be under Rs.200. The suit for possession of the village does not seem to me to be at all the same as suit for recovery of immovable property from a tenant, referred to in section 7(xi)(*cc*) of the Court Fees Act. There is no definition of "tenant" in the Court Fees Act, and presumably learned counsel would refer to the definition in the Transfer of Property Act, section 105. But as that definition is in chapter V, the definition does not apply to a thekadar, as provided by section 117 of that chapter and section 220 of the Agra Tenancy Act. And as the defendants respondents did not raise this point of law during the hearing of the appeal but submitted to the jurisdiction of this Court, I consider that it is too late to raise the point now in review.

For these reasons I would dismiss this application for review.

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SULAIMAN, C.J.:—I agree that this application for review should be dismissed. The point raised is certainly not any new and important matter or evidence which, after the exercise of due diligence, was not within the applicants' knowledge or could not be produced by them at the time when the decree was passed, nor can it be said that there is an error or mistake apparent on the face of the record. On a previous occasion the applicants had themselves come up in appeal to the High Court in a suit filed against them by the landlord, and succeeded. The value of the subject-matter of the suit was certainly Rs.6,000 and the valuation given in the plaint was never objected to, nor was any objection taken in appeal when the matter came up for argument. On the face of the record an appeal lay to the High Court and it was entertained and allowed. I do not think that the applicants should be allowed to get this order reviewed on grounds which might have been taken by them earlier. As pointed out by my learned brother, the Court had perfect jurisdiction to decide the appeal, as laid down in the case of *Khudaijat-ul-Kubra* v. *Amina Khatun* (1). It is not necessary to decide the question finally whether the defendants who hold this theka under the counterpart of the lease of 1875 are or are not tenants within the meaning of section 7(xi)(*cc*) of the Court Fees Act. I would therefore dismiss the application.

BY THE COURT:—The application is dismissed.

(1) (1923) I.L.R., 46 All., 250.