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that the suit by a landlord against a trespasser lies in the civil court, and although section 44 of Act III of 1926 would also give a remedy with a limited amount of damages in the revenue court, still section 230 of that Act does not bar the jurisdiction of the civil court. In this state of the authorities I have no difficulty in holding that the alternative ground on which the decision in *Dan Sahai* v. *Jai Ram Singh* (1) is based is not correct, and being opposed to the Full Bench ruling of this Court cannot be treated as good law. Accordingly I allow this revision, set aside the orders of the lower courts and remand the case to the court of first instance with the direction that the suit be restored to its original number and disposed of according to law. Costs hitherto incurred shall abide the result.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom and Mr. Justice Rachhpal Singh

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MUHAMMAD HASAN (PLAINTIFF) *v.* GAJADHAR PRASAD AND OTHERS (DEFENDANTS)*

U. P. Electoral Rules (1926), *rule* 8(2); *schedule II, paragraphs* 2, 11 *proviso—Elector—Landholder—Land held "in his own personal right"—Agra Landholders' constituency—Member of joint Hindu family, whether an elector—Court of Wards Act* (*Local Act IV of* 1912), *section* 4(1) *proviso—Membership of Court of Wards—Eligibility—Payment of land revenue—Member of joint Hindu family paying joint land revenue—Reference to Full Bench—Question of law arising in a case—Whether whole case must be referred—Rules of High Court, chapter I, rule* 3A.

The defendant was a member of a joint Hindu family which owned land in respect of which land revenue of over Rs.5,000 was paid. He was a member of the Agra Province Zamindars' Association, the membership of which required, by rule 5 of the Association, the same qualification as was laid down by

*First Appeal No. 217 of 1935, from a decree of Brij Behari Lal, Civil Judge of Allahabad, dated the 1st of March, 1934.

(1) [1932] A.L.J., 517.

schedule II, paragraph 11 of the U. P. Electoral Rules for an elector for the Agra Landholders' constituency. It appeared that he had been nominated as representative of the joint Hindu family by a majority of the family, for the purpose of paragraph 2(1) of schedule II of the U. P. Electoral Rules (1926) which were in force at the relevant date. As a member of the Agra Province Zamindars' Association he was one of three persons who were elected by that Association to be members of the Court of Wards, under section 4(1)(*c*) of the Court of Wards Act. It appeared that the proportionate amount of land revenue, which would be payable by him in respect of the share of the land which would come to him upon a present partition in the family, would be below Rs.1,500. The plaintiff, who had obtained the next highest number of votes after the defendant, sued for a declaration that he and not the defendant was a duly elected member of the Court of Wards, because the defendant was not eligible for such membership according to the proviso to section 4(1) of the Act, nor was he qualified to be a member of the Agra Province Zamindars' Association:

Held, that a person who did not pay in his own personal right land revenue amounting to Rs.5,000 or more per annum, but was merely a member or even a representative of a joint Hindu family paying such land revenue, was not qualified as an elector for the Agra Landholders' constituency, within the meaning of paragraph 11 of Schedule II of the U. P. Electoral Rules (1926), and was therefore not eligible for membership of the Agra Province Zamindars' Association under its rule 5.

The proviso to paragraph 11 of schedule II overrides the general rule contained in paragraph 2 of that schedule, according to the well established principle that general provisions have to give way to a special provision. The words, "in his own personal right", in the proviso are not used merely as a contrast to "not in a fiduciary capacity". Obviously, two conditions are prescribed, both of which must be fulfilled, viz. he must hold "in his own personal right" and also "not in a fiduciary capacity"; and a distinction is drawn between "right" and "capacity". Further, paragraph 2(3) of the schedule has already drawn a distinction between two capacities which a qualified elector may possess, viz. (*a*) his personal capacity and (*b*) capacity of a representative of a joint family; and, bearing in mind this distinction, it is clear that "in his own personal

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right" is quite different and distinct from "in the capacity of a representative of a joint family".

Held, also, that a person who does not pay in his own personal right land revenue of Rs.1,500 or more per annum, but is merely a member or a representative of a joint Hindu family paying such land revenue, is not eligible for membership of the Court of Wards, under section 4(1) proviso of the Court of Wards Act.

The proviso to section 4(1) lays down as a condition to the eligibility to membership, either the payment of land revenue amounting to Rs.1,500 or, in the alternative, the receipt of a maintenance allowance of Rs.1,200 per year. So far as the personal qualification of the member is concerned, both of these alternative conditions must be co-extensive and have to be understood in the same sense. As the second alternative, the receipt of a maintenance allowance of Rs.1,200, must necessarily refer to the allowance to which he is entitled personally, and not to the entire amount which may be allowed to him and the other members of his family jointly, similarly the first alternative, that of payment of land revenue amounting to Rs.1,500, must be understood to refer to the land revenue paid by him in his own personal right, and not to the entire land revenue which the joint family of which he is a member is paying.

Held, further, that rule 3A in chapter I of the Rules of the High Court now expressly sanctions the practice which exists in this Court of referring to a Full Bench questions of law arising in a case, without referring the whole case to the Full Bench.

Messrs. *A. M. Khwaja, Shiva Prasad Sinha* and *S. M. Salman*, for the appellant.

Sir *Tej Bahadur Sapru*, Drs. *K. N. Katju*, and *N. P. Asthana*, Messrs. *P. L. Banerji, K. Verma, B. Malik, Janaki Prasad, Ram Nama Prasad, Ambika Prasad, S. N. Verma* and *Satya Narain Prasad*, for the respondents.

SULAIMAN, C.J., THOM and RACHHPAL SINGH, JJ.:—A preliminary objection was taken to the reference that the whole case ought to have been referred to the Full Bench.

For some years a practice had undoubtedly grown up in this Court to refer questions of law to a Full Bench as distinct from the whole case. This practice was

obviously based on convenience so that the authoritative opinion of the Full Bench might be ascertained on the difficult questions of law and the time of the Full Bench might not be occupied by other questions of fact or other questions of law of lesser importance. In *Mahant Shantanand Gir* v. *Mahant Basudevanand Gir* (1) two questions of law were referred to a Full Bench of seven Judges, who delivered their opinions and answered the two questions. The case was then disposed of by the referring Judges. Again, in *Udaypal Singh* v. *Lakhmi Chand* (2) the Full Bench expressed the opinion on the question of law, on which there was a conflict of opinion, leaving other matters to be decided by the Bench concerned.

There appears to be a similar practice in Calcutta, Bombay and Madras.

Recently this Court has added rule 3A in chapter I, which is as follows:

"3A. The Chief Justice may constitute a Full Bench of three or more Judges either to decide a case or to decide any question or questions of law formulated by a Court hearing a case; and in the latter case the issues so decided shall be returned to the Court hearing the case, and that Court shall follow the decision of the Full Bench on the issues referred, and shall then decide the remaining issues if any, and dispose of the case."

In view of this new rule no objection can now be raised.

The following judgments were then delivered on the questions of law referred to the Full Bench:

SULAIMAN, C.J.:—The following question has been referred to this Full Bench: "Whether a person who does not pay in his own right land revenue of Rs.1,500 per annum, but who is a member of a joint Hindu family paying land revenue amounting to more than Rs.5,000, is eligible for election to the court of wards or the Agra Province Zamindars' Association under section 4 of the

(1) (1930) I.L.R., 52 All., 619. (2) (1935) I.L.R., 58 All., 261.

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United Provinces Court of Wards Act read with rule 5 of the rules of the Agra Province Zamindars' Association and the United Provinces Electoral rules?"

The dispute is as regards the eligibility of respondent, Mr. Gajadhar Prasad, advocate. Admittedly he does not pay land revenue or under-proprietary rent amounting to Rs.1,500 in respect of any property which is exclusively his own, nor is he in receipt of any maintenance allowance of at least Rs.1,200 a year from the estate of a proprietor exclusively for his own use, but he is a member of a joint Hindu family which pays such revenue.

It would be convenient first to consider the question as to the eligibility for election to the Agra Province Zamindars' Association. Rule 5(i) of the rules for 1927, which were then in force, lays down as a condition of eligibility for membership that persons should be "qualified under the second schedule, rule 11 of the United Provinces Electoral rules, or such other rules as may for the time being be in force concerning electors for the Agra landholders' constituency". It is not claimed that the respondent is eligible under any other sub-rule.

The United Provinces Electoral rules, which were in force at the time, are those for 1932. Under these rules there are two classes of constituencies recognized, (*a*) General and (*b*) Special. Rule 8(2) specially provides that "The qualifications of an elector for a special constituency shall be the qualifications specified in schedule II in the case of that constituency."

Schedule I contains the list of constituencies which are Non-Muhammadan, Muhammadan and European. Then follow the special constituencies, including two of the Agra landholders (North) and (South).

Schedule II deals with the qualifications of the electors. Paragraphs 1 to 5 are general in their character. Paragraphs 6 to 9 deal with general constituencies. Paragraphs 10 to 13 deal with special constituencies; in particular paragraph 11 deals with the Agra landholders'

constituency specifically. Under paragraph 2(1) where property is held jointly by the members of a joint family, the family is to be adopted as the unit for deciding whether under schedule II the requisite qualification exists; and if it does exist, the person qualified shall be, in the case of the Hindu joint family, the manager thereof, or the member nominated in that behalf by a majority of the family. Sub-paragraph (3) makes it clear that a person may be qualified either (*a*) in his personal capacity or (*b*) in the capacity of a representative of a joint family, but not in both capacities. Besides Hindu joint families the paragraph applies to joint tenancies and to other joint families as well. This paragraph gives to a joint family the status of a unit which can take advantage of the combined income; at the same time it does not permit more than one manager or representative to have a vote. These rules contain the general provisions which would apply to general and special constituencies, unless of course there is any special provision restricting the applicability of the general rule as prescribed by rule 8(2).

Coming to the special constituencies, we find that under paragraph 10 an ordinary member of the British Indian Association of Oudh is qualified as an elector for the Taluqdars' constituency. To such a person the provisions of paragraph 2 would not be applicable. His qualification depends exclusively on his ordinary membership of the Association. We then come to paragraph 11 referring to the Agra landholders' constituency, which requires that the person should be one who "(*a*) is the owner of land in the constituency in respect of which land revenue amounting to not less than Rs.5,000 per annum is payable; or (*b*) . . ." There is then a proviso added to the end of the paragraph in the following words: "Provided that, in determining the eligibility of a landholder as an elector, only land revenue payable or nominally assessed in respect of such land or share in land as he may hold in his own personal right and not in

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a fiduciary capacity shall be taken into account." Learned counsel for the respondent argued before us that this proviso is subject to the general rule contained in schedule II, paragraph 2. But it is impossible to accept this contention, as it is a well established principle that the general provisions have to give way in face of a special provision. It is next argued that the words "in his own personal right" are used merely as a contrast to "not in a fiduciary capacity", and that both the expressions mean the same thing. If this argument were accepted, the last part of the proviso would read as "in his non-fiduciary capacity and not in a fiduciary capacity". The expression would be tautologous and there would be an unnecessary repetition of the same provision. When the two expressions are joined by the conjunction "and" they cannot have identically the same meaning. Obviously there is not only one condition prescribed, but two conditions both of which must be fulfilled. He must "hold in his own personal right" and also "not in a fiduciary capacity". A distinction is drawn between "right" and "capacity". Obviously the two words connote different ideas and are not synonymous. Again, a double emphasis is laid on the kind of "right" that is required. It was not thought enough to say "in his right"; nor was it even thought enough to say "in his personal right"; but the rule goes further and says "in his own personal right". There was no need for such a double emphasis if the expression was intended to mean nothing more than "not in a fiduciary capacity".

As pointed out, schedule II, paragraph 2(3) drew a distinction between two capacities which a qualified person may possess; (*a*) his personal capacity, and (*b*) in the capacity of a representative of a joint family. The two are different. Obviously the Government had the same distinction in mind when framing paragraph 11. "In his own personal right" would be different from "in the capacity of a representative of a joint family". The definition of the word "owner" in schedule II, paragraph

I had itself made it clear that an owner does not include a mortgagee, a trustee or a lessee.

The reason that there should be such strictness may not be far to seek. The Agra landholders' constituency is put on a par with the Taluqdars' constituency. It is well known that taluqdars pay large amounts of revenue. It was therefore appropriate that for the Agra landholders' constituency as well the payment of a large amount of revenue in one's own personal right should be a necessary condition and that the combined income of a large number of members of a joint family should not be considered to be sufficient. Government has advisedly used two different expressions in the proviso, and we must give to both such expressions distinct meanings which they ordinarily connote.

There is one further circumstance which strengthens this view. The general provision in schedule II, paragraph 2 was applicable to both general and special constituencies. Special constituencies are four in number and yet it is significant that in none of the paragraphs except paragraph 11 there is a proviso like this. The very circumstance that such a proviso has been added to paragraph 11 exclusively shows that it was intended to make it applicable to the Agra landholders' constituency specially, and to that extent overrides the general provisions contained in schedule II, paragraph 2. I would therefore hold that a person who does not pay in his own personal right land revenue amounting to Rs.1,500 or more per annum, but is merely a representative of a joint Hindu family paying such land revenue, is not qualified as elector for the Agra landholders' constituency, within the meaning of paragraph 11, and is therefore not eligible for membership of the Agra Zamindars' Association under rule 5(1).

The answer to the next question referred to us must depend solely on the interpretation of section 4 of the United Provinces Court of Wards Act as amended by Act V of 1933. Under this section provision is made for the constitution of the court of wards for the entire

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United Provinces consisting of a President and nine members. Section 6 of the Act shows that very responsible duties are imposed upon the court of wards and important powers are conferred upon it. It is reasonable to expect that for such a small court of wards, constituted for the entire province and consisting of a few members only, the qualifications required for membership should be high.

Section 4(1)(*b*) and (*c*) refer to members elected by the British Indian Association and by the Agra Zamindars' Association, while (*d*) refers to members of the United Provinces Legislative Council elected by the Council. The contrast in the phraseology used in (*b*) and (*c*) on the one hand and (*d*) on the other shows clearly that the members elected by the United Provinces Council must be members of the Legislative Council, whereas the members elected by the British Indian Association or the Agra Zamindars' Association need not be members of such associations. Section 4(1) contains the first proviso in the following terms: "Provided that no person except the President shall be elected or nominated as a member who does not pay land revenue or under-proprietary rent amounting to Rs.1,500, or who is not in receipt of a maintenance allowance of at least Rs.1,200 a year from the estate of a proprietor."

The qualification that an elected or nominated member must be in receipt of a maintenance allowance of at least Rs.1,200 a year must necessarily mean the allowance to which he is entitled personally, and not to the entire amount which may be allowed to him and the other members of his family jointly. The very essence of a maintenance allowance is to provide support for such person and the fixing of this amount is obviously intended to prescribe a minimum standard of status for him. It is impossible to hold that the manager of a joint Hindu family, and, for the matter of that, every junior member of such family, would be eligible merely because the entire family taken together is in receipt of

a maintenance allowance of Rs.1,200 a year, although the rateable share of each member may be a very small amount.

The condition of payment of land revenue or under-proprietary rent amounting to Rs.1,500 and that of being in receipt of a maintenance allowance of at least Rs.1,200 a year are alternative and it would seem that they should be co-extensive. So far as the personal qualification of the member is concerned, both of these conditions have to be understood in the same sense. It follows that an elected or nominated member to be eligible must himself be paying land revenue or under-proprietary rent amounting to Rs.1,500, and that for the purposes of this proviso he cannot take into account the entire land revenue or under-proprietary rent which all the members of his family living jointly with him are paying. So far as this Act is concerned, it applies equally to zamindars of all denominations who are residents of these provinces. No special provision is anywhere made in favour of joint Hindu families so as to entitle every single member of it to make himself eligible on the mere ground that the family taken as a whole fulfils the required conditions.

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It has been urged in argument that to open up such an inquiry regarding members of a joint family would be highly inconvenient. But ordinarily zamindars paying large revenues or under-proprietary rents would be elected or nominated as members and the cases where the qualification is really doubtful may be quite rare. In any case, that is no adequate ground for putting a strained interpretation on this proviso when it is worded in a general way so as to be applicable to persons of all denominations alike. I would therefore answer this part of the question also in the negative.

THOM, J.:—I concur.

RACHHPAL SINGH, J.:—I agree.