

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

1933
November, 22

LALLU SINGH (DEFENDANT) *v.* CHANDRA SEN (PLAINTIFF)*

Agra Tenancy Act (Local Act III of 1926), sections 226, 229—Suit by assignee of profits—Cognizable by revenue court—Jurisdiction—Civil and revenue courts—Set off—Suit for profits—Lambardar can claim set off for arrears of revenue paid by him for the plaintiff co-sharer in the year to which the suit relates—Transfer of Property Act (IV of 1882), sections 3, 132—Actionable claim—Claim for profits, cognizable by revenue courts, is not an actionable claim—Assignee of profits whether liable for equities enforceable against the assignor—Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—Plea of fraudulent transfer can be raised in defence by a creditor and not only on a suit by him—Practice and pleading.

Where a co-sharer assigns not his share but his right to recover the profits due to his share for a particular year or years, the transferee is an "assign" of the co-sharer within the meaning of section 229 of the Agra Tenancy Act, 1926, and a suit by the transferee to recover such profits from the lambardar is cognizable by the revenue court.

In a suit for profits the defendant lambardar can get credit for all payments of arrears of revenue made by him, on account of the plaintiff co-sharer, in the particular year or years for which the profits are claimed. The language of section 226 of the Agra Tenancy Act, 1926, is different from that of the corresponding section 164 of the Tenancy Act of 1901, and the change in the language suggests that in the suit for profits the mutual accounts that may stand between the co-sharer and the lambardar will have to be adjusted and then a decree should be made. This applies also where the suit is brought by an assignee of the profits. But the set off can be claimed by the lambardar only in respect of payments made by him in the year or years in suit, and the mere fact that he has obtained a decree for arrears of revenue against the co-sharer will not entitle him to a set off except as regards such portion of it as represents payments made by the lambardar in the years in suit.

In the province of Agra a suit for profits is cognizable by the revenue courts and not by the civil courts; a claim for profits

*Second Appeal No. 10 of 1932, from a decree of Joti Sarup, District Judge of Bulandshahr, dated the 16th of November, 1931, modifying a decree of Abdul Wahid Khan Khalil, Assistant Collector, first class of Bulandshahr, dated the 31st of May, 1930.

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in this province, therefore, is not a claim to a debt in respect of which the civil courts can afford relief, and does not come within the definition of actionable claim in section 3 of the Transfer of Property Act. Accordingly, no set off under section 132 of that Act can be claimed by the lambardar defendant in a suit by an assignee of profits of a co-sharer, in respect of liabilities or equities enforceable by the lambardar against the co-sharer himself.

If a transfer of a debt is a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act, made with the object of defeating or delaying the transferor's creditors, then in a suit by the transferee to enforce the debt against the debtor, who also happens to be one of the transferor's creditors, it is open to the defendant to raise the plea that the transfer to the plaintiff is a fraudulent transfer; it is not necessary that a representative suit must have been instituted by the creditor to avoid the transfer. No change in the law in this respect has been effected by the amendment made in section 53 by the Amending Act of 1929.

Mr. *Shiva Prasad Sinha*, for the appellant.

Mr. *A. M. Khwaja*, for the respondent.

SULAIMAN, C. J., MUKERJI and KING, JJ.:—This is a reference to a Full Bench, and it has arisen out of a second appeal. The points that will have to be determined by the Full Bench will be stated presently. The facts are as follows:

One Lakshmi Kunwar was the owner of a certain share in a certain village. She was entitled as such co-sharer to certain profits for the year 1334 Fasli as against the appellant Lallu Singh, who is the lambardar of the mahal in which the share lies. The profits fell due to her on the 1st of August, 1927, and two days later, on the 3rd of August, 1927, she assigned her right to recover the profits to the respondent Chandra Sen. Chandra Sen brought the suit out of which this second appeal arose for recovery of the said profits. In the years 1332 and 1333 Fasli Lakshmi Kunwar failed to pay her share of the land revenue. Lallu Singh had to pay the same as the lambardar. He filed a suit for recovery of the sums thus paid by him and obtained a decree against Lakshmi Kunwar. It is alleged that

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Lakshmi Kunwar's property had been sold and she had nothing out of which Lallu Singh could recover the amount for which he had obtained a decree, except the profits for the year 1334 Fasli. When Chandra Sen brought the suit, Lallu Singh pleaded *inter alia* that the transfer in favour of Chandra Sen was a fictitious one, having been made to defeat Lallu Singh's claim for reimbursement out of the profits ostensibly sold. Lallu Singh claimed credit for the amount due to him under the decree as against the profits.

The court of first instance dismissed the suit, holding that the transfer in favour of Chandra Sen was a fictitious one and did not entitle him to maintain the suit. On appeal by the plaintiff the then District Judge, Mr. Raghunath Prasad, held that although there was every probability of the transfer in favour of Chandra Sen being a fictitious one, yet there was no clear allegation of fraud, and therefore the learned Judge held that the suit was maintainable. He, however, further held that the plaintiff could recover the profits claimed "on the same condition on which the Musammat (Lakshmi Kunwar) could have done if she herself had filed the suit against the respondent." In the result, Mr. Raghunath Prasad remanded the suit for trial to the court of first instance. The case went back to the court of the Assistant Collector before whom the suit had been instituted, and the Assistant Collector, who seems to be a gentleman other than the officer who heard the suit originally, decreed it for a sum of Rs.875-11-0. On the question of set off, the learned Assistant Collector held that he was precluded from allowing it, as this Court had ruled that it could not be allowed in the circumstances of the case. He referred to the case of *Gobind Ram v. Kunj Behari Lal* (1). The defendant filed an appeal. The District Judge, who had succeeded Mr. Raghunath Prasad, affirmed the decree subject to a slight modification. The

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defendant has come up in second appeal, and the following points have been argued on his behalf, and these are the points that we have to decide: (1) Whether the suit was maintainable in the revenue court: (2) Whether Lallu Singh was entitled to a set off in the circumstances of this case, (a) because of the change in the law since the ruling in *Gobind Ram v. Kunj Behari Lal* was given, and (b) because the claim for profits was an actionable claim, and the transferee could take the transfer only subject to equities against the transferor: (3) Whether the suit was not maintainable on the ground that the transfer in favour of the plaintiff was voidable at the option of the defendant appellant.

On the question of jurisdiction no case has been cited on behalf of the appellant. It appears to us that since the passing of the Tenancy Act of 1901 the policy of the legislature has been that a suit by an assignee of a co-sharer for profits should be maintained in the revenue court as if it were a suit by the co-sharer himself. In this respect a departure was made from the Rent Act of 1881. Section 166 of the Tenancy Act of 1901 enacted that the word "co-sharer" would include an assign of a co-sharer for the purposes of Chapter XI of the Tenancy Act, that is to say, for the purposes of recovering arrears of profits, etc. The same law has been maintained in section 229 of the new Tenancy Act of 1926. A person who purchases the share of a co-sharer will be the co-sharer's assign, but so will be the person who purchases not the share of the co-sharer but only the co-sharer's right to recover profits in any particular year or years. The assignee need not be the assignee of the entire interests of a co-sharer, but may be an assignee of only a portion of those interests. In this view, we are clearly of opinion that the suit was properly instituted in the revenue court.

We may point out that the question of jurisdiction was not taken in any of the courts below, and the defect in jurisdiction, if any, could have been cured by the

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fact that an appeal from a suit for profits lies to the district court and not to the appellate revenue court. The point, however, being important, we allowed it to be argued, and we have accordingly answered it.

The next question 2(a) is whether Lallu Singh is entitled to a set off because section 226, which has taken the place of section 164 of the Tenancy Act of 1901, is slightly differently worded. Section 164 of the Act of 1901 says: "A co-sharer may sue the lambardar for his share of the profits of a mahal or any part thereof." Section 226 runs as follows: "A co-sharer may sue the lambardar for settlement of accounts and for his share of the profits of a mahal or of any part thereof." The change in the language suggests that before a co-sharer can get a decree for profits, the mutual accounts that may stand between the co-sharer and the lambardar will have to be adjusted and then a decree should be made. It is possible that it was the intention of the legislature that where such an account is settled and the defendant lambardar is found entitled to recover something from the plaintiff co-sharer, the lambardar would be entitled to get a decree in the very suit of the co-sharer, without recourse to a subsequent suit. This, however, is not a point which we are called upon to decide. Suffice it to say that the new law does permit an adjustment of account between the parties to the suit.

It is because of this change in the law that it is argued by the learned counsel for the appellant that Lallu Singh is entitled to have his dues under the decree made in his favour for arrears of revenue paid by him for the years 1332 and 1333 Fasli adjusted by being set off against the claim of Chandra Sen. Although, in this matter, we can treat Chandra Sen to be in the same position as his assignor, we have not got any information as to when Lallu Singh made the payment for the arrears of land revenue due for the years 1332 and 1333 Fasli.

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In the Full Bench decision of *Sheo Ghulam v. Salik Ram* (1) it was held that the co-sharer who claims profits for a particular year is entitled to a share in all the collections made by the lambardar *in that year*. It is no doubt open to the lambardar also to get credit for all payments made by him in the year in question namely the year for which profits are claimed. This would follow from the principle laid down in the Full Bench case just quoted and also because of the wider language of section 226 of the Act of 1926. But for this purpose Lallu Singh must show that he made the payment in the year 1334 Fasli, although the arrears were due for previous years. In our opinion, he is not entitled to claim, by way of settlement of account, a right to be reimbursed out of the profits for 1334 Fasli anything that he paid in the years 1332 and 1333 Fasli. Any payment that may have been made in the year 1332 or 1333 Fasli can be taken into account only in adjusting the accounts of those years and those years alone. Lallu Singh could have got his decree for the payments for land revenue made by him only on the footing that he did not hold in his hands anything due to Lakshmi Kunwar on account of profits due to her for 1332 and 1333 Fasli. If Lallu Singh held any money due to Lakshmi Kunwar as profits for the years 1332 and 1333 Fasli, the amount must be taken to have been set off against the amount claimed by Lallu Singh on account of land revenue for those years paid by him. In this view, the mere fact that Lallu Singh holds a decree against Lakshmi Kunwar will not enable him to ask for an adjustment on account of that decree, unless he can show that he actually made the payments for which he obtained the decree in the year 1334 Fasli. If he paid any portion of the land revenue for 1332 or 1333 Fasli *in the year 1334 Fasli* he would be, in our opinion, entitled to have that amount set off against anything that may be due to the co-sharer or her assign. The

(1) (1924) I.L.R., 46 All., 791.

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fact that he has got a decree will not make any difference. As there is no clear finding on the point, we shall have to ask for one.

Question No. (2)(b) is not free from difficulty that arises in this way. For Lallu Singh it is urged that Chandra Sen has purchased what is virtually an actionable claim, and because an actionable claim can be enforced by the transferee only subject to the equities that may exist against the transferor, Chandra Sen, cannot recover anything till the decree in favour of Lallu Singh has been satisfied. It is clear that if Lakshmi Kunwar had brought the suit out of which this appeal has arisen, the defendant could have claimed a set off of his decree. But under the Tenancy Act of 1901, as interpreted in the Full Bench case of *Gobind Ram v. Kunj Behari Lal* (1), no set off can be allowed unless the defendant holds a decree against the plaintiff himself. The defendant cannot be allowed a set off with regard to any decree that he may hold against the assignor of the plaintiff. In this respect the law under the Tenancy Act of 1926 is the same as it stood under the older Act of 1901.

The question whether a claim for profits is or not an actionable claim was not before the Full Bench in the case of *Gobind Ram*, and on this point it is conceded that the Full Bench is no authority. The Full Bench had to decide only two points which had been referred to it by the Local Government, and its attention was not drawn to the point now taken before us.

An actionable claim is defined in section 3 of the Transfer of Property Act as meaning "a claim to any debt which the civil courts recognize as affording grounds for relief" A suit for profits can be maintained only in the revenue court and not in the civil court. A suit for profits, therefore, *prima facie* would not be an actionable claim. It is, however, argued that the words "civil court" used in

(1) (1923) I.L.R., 46 All., 398.

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section 3 of the Transfer of Property Act mean a court exercising jurisdiction of a civil nature and would include a claim for profits. A decision of the Patna High Court in *Sheogobind Singh v. Gouri Prasad* (1), has been quoted in support of the argument. There it was held that an arrear of rent in respect of land subject to the Tenancy Act of 1895 was an actionable claim, and, therefore, the purchase of it by a legal practitioner was prohibited by section 136 of the Transfer of Property Act. This ruling followed a Full Bench decision of the Calcutta High Court in *Hiralal Singha v. Tripura Charan Ray* (2). In Bengal and in the province of Bihar rent suits are instituted in civil courts, and there are no separate courts, going by the name of "revenue courts," to take cognizance of suits for recovery of arrears of agricultural rents or a suit for profits like the one before us. We have, therefore, to decide whether a debt, which a "revenue court" recognizes as "affording grounds for relief", can be treated as an actionable claim in the province of Agra.

The Transfer of Property Act applies to almost the whole of British India, and if we hold that what is an actionable claim under the Transfer of Property Act in Bengal and Bihar is not necessarily an actionable claim in the province of Agra, we shall be laying down a proposition of law which at first sight may appear to be rather anomalous. But the fact remains that in the province of Agra a civil court cannot afford relief in respect of a claim for profits, and, therefore, the present claim does not come within the *letter* of the law. We assume that the legislature were not ignorant of the fact that in the province of Agra and Oudh there is a class of courts described as "revenue courts" with a distinct jurisdiction over certain matters over which the civil courts as such have no original jurisdiction. If, therefore, an anomaly does happen to exist, it would be for the legislature to correct it. We think that we

(1) (1924) I.L.R., 4 Pat., 43.

(2) (1913) I.L.R., 40 Cal., 650.

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shall be doing violence to the clear language of section 3 of the Transfer of Property Act if we should hold that the words "civil court" include all courts exercising jurisdiction of a civil nature, that is to say, all courts other than the criminal courts. We have come to this conclusion with some hesitation, but we do not think that we could properly come to any other conclusion. We hold that no set off can be allowed to the appellant on the ground that the plaintiff is a purchaser of an actionable claim and, under section 132 of the Transfer of Property Act, has purchased it subject to equities against his transferor.

Now the last point: There can be no doubt that whether we apply the Transfer of Property Act as it stood before the amendment of 1929 or after the amendment of 1929, the defendant is entitled to show that the transfer in favour of the plaintiff is a sham transaction, made not for the purpose of passing title to the plaintiff but for the purpose of keeping Lakshmi Kunwar's property (claim for profits) secure to her from being attached in execution of Lallu Singh's decree. The learned counsel for the respondent has argued that section 53 of the Transfer of Property Act as it stands after amendment is to be applied, and, therefore, a suit that may be instituted for a declaration that the transfer in favour of the plaintiff was fraudulent and voidable at the option of creditors, must be a representative suit and that, therefore, it is not open to Lallu Singh to raise the question by way of defence. We can see no force in this contention. Assuming that the amended Act applies, we find the following provision as the first paragraph of section 53: "Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of *any creditor* so defeated or delayed." Here no question of institution of suit arises. In the fourth paragraph of section 53 it is laid down that whenever a suit is instituted by a creditor to avoid a transfer on the

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ground that it has been made with intent to defeat or delay the creditors, it shall be a representative suit, being one for the benefit of all creditors. But it does not follow that when a purchaser, who is not a *bona fide* purchaser and who has simply lent his name to a debtor to be used as a cloak for the property, brings a suit to enforce the debtor's claim, it is not open to the individual who happens to be a creditor of the debtor to prove the nature of the transfer. It is conceded that under the law as it stood before the amendment a defendant could show the true nature of the transaction in plaintiff's favour. We find nothing in the amended law which alters the situation. We hold, therefore, that the defendant is entitled to establish the true nature of the transfer in favour of the plaintiff respondent.

A plea like this was taken by the defendant, and the learned District Judge, Mr. Raghunath Prasad, it seems, was inclined to a great extent to accept the plea as correct. Although he said that the plaintiff could recover the profits under the same conditions under which his assignor could claim, yet he did not definitely hold that the transfer in plaintiff's favour was really meant to defeat or delay creditors.

If the plaintiff is not a *bona fide* purchaser for value and has lent his name only to be used as a cloak by Lakshmi Kunwar, we can regard the suit before us only as a suit instituted by Lakshmi Kunwar herself through her *benamidar*. In that case there would be nothing to prevent us from allowing Lallu Singh to claim a set off of his decree against the claim of Lakshmi Kunwar, although the claim is made in the *name* of the respondent.

As we have not got any definite finding, we have to send down an issue to the court below. We have already mentioned that we want a finding on another point from the court below. We accordingly send down the following issues to the court below for clear findings:

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(1) On what date or dates did Lallu Singh pay the land revenue in respect of which he obtained the decree against Lakshmi Kunwar? If he paid any of the items, which go to make up the decretal amount, in the agricultural year 1334 Fasli, what is the amount or total amount of the sum or sums so paid?

(2) Whether the transfer in favour of the plaintiff is a fraudulent one, having been made with intent to defeat or delay the creditors of Lakshmi Kunwar?

As the issue No. 2 to be remitted was not raised in its clear form in the court of first instance and as no issue like the issue No. 1 was framed in the court below, we allow the parties to adduce fresh evidence.

PRIVY COUNCIL

J. C.*
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July, 20

BISHESHWAR PRATAP SAHI, SINCE DECEASED, AND ANOTHER
v. PARATH NATH AND ANOTHER

[On appeal from the High Court at Allahabad.]

Civil Procedure Code, section 114; order XLVII, rule 1(1)—Review of judgment—Jurisdiction—Claim based on Hindu widow's deed of relinquishment—Dismissal of claim—Death of widow—Plaintiffs next reversioners.

The jurisdiction which a court has under section 114 of the Code of Civil Procedure, 1908, to review its judgment can be exercised only upon the grounds for an application for a review stated in order XLVII, rule 1(1), and the words therein "or for any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specifically stated in the rule.

Plaintiffs sued for a declaration that they were entitled to property under a deed of relinquishment executed by a Hindu widow, and that an attachment of part of the property in execution of a money decree against her was invalid. The Subordinate Judge dismissed the suit, on the ground that the deed was fraudulent and invalid. On the day before, or the day upon which, he delivered judgment the widow died. Upon the plaintiffs' application the Subordinate Judge reviewed

*Present: Lord RUSSELL of KILLOWEN, Sir LANCELOT SANDERSON, and Sir SHADI LAL.