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EMPEROR v. BHAGWAN DAS

In the result the application is allowed and the conviction and sentence are set aside. The fine if paid will be refunded.

APPELLATE CIVIL

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

1936 *August*, 20

KAN KUAR (DEFENDANT) *v.* ATAL BEHARI LAL AND OTHERS (PLAINTIFFS)*

Agra Tenancy Act (Local Act III of 1926), section 243—"Question of proprietary right between the parties claiming such right"—Mere denial of plaintiff's right not enough.

The words "proprietary right in issue between the parties claiming such right" in section 243 of the Agra Tenancy Act indicate that the dispute between the parties should be as regards their respective proprietary rights and that each party should be claiming such right. The mere fact that the defendant is denying the plaintiff's proprietary right without setting up any proprietary right in himself would not bring the case within the scope of the section.

Mr. *Baleshwari Prasad*, for the appellant.

Mr. *Krishna Murari Lal*, for the respondents.

SULAIMAN, C.J., and BAJPAI, J.:—This is a defendant's appeal arising out of a suit for recovery of rent. The defendant pleaded that the plaintiff was not the landholder and that the relationship of landholder and tenant did not exist between the parties. Both the revenue courts decreed the suit. The lower appellate court held that no appeal lay to his court, but has also gone on to decide the appeal on the merits. The third appeal filed in this Court has been dismissed on the ground that no appeal lay to the District Judge. It is contended before us that an appeal lies because a question of proprietary right was in issue between the parties in the first court and is in issue in appeal now. In support of this contention the learned advocate for the

*Appeal No. 66 of 1935, under section 10 of the Letters Patent.

appellant relies on the cases of *Gambhir Singh* v. *Surendra Singh* (1) and *Sheo Dihal Dube* v. *Moti Lal* Ahir (2). These cases no doubt support his contention; but the last mentioned case was decided a few months before the decision of the present case by the same learned Judge who on reconsideration has taken a different view and reviewed the judgment in *Sheo Dihal's* case. We think that the latter view is sound.

Under the old Tenancy Act, section 177 had provided for such an appeal in all suits in which a question of proprietary title had been in issue in the court of the first instance and was a matter in issue in appeal. Now we have section 243 in its place, which requires that a question of proprietary right should have been in issue between the parties claiming such right in the first appellate court and shall be in issue in the appeal. Now the words "proprietary right has been in issue between the parties claiming such right" clearly indicate that the dispute between the parties should be as regards their respective proprietary rights and that each party should be claiming such right. The mere fact that the defendant is denying the plaintiff's proprietary right without setting up any proprietary right in himself would not bring the case within the scope of the section, because there would be no question of any proprietary right *between the parties claiming such right.* In such a case a defendant does not claim any proprietary right at all and therefore the dispute between the parties is not as regards the proprietary right within the meaning of the section. The intention of the legislature by using the words "parties claiming such right" obviously was that the parties between whom the dispute arises should each claim such a right. There were some cases even under the old Act in which it was held that a mere denial of the plaintiff's title as a proprietor was not enough. That view has now been made clear by the legislature.

(1) (1930) I.L.R., 52 All., 714. (2) A.I.R., 1935 All., 568.

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KAN KUAR v. ATAL BEHARI LAL

We therefore think that the cases mentioned above were wrongly decided and the view expressed by the learned Judge of this Court in the present case is correct. The appeal is accordingly dismissed with costs.

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

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August, 22

HIDAYAT ULLAH AND OTHERS (DEFENDANTS) *v.* GOKUL CHAND AND ANOTHER (PLAINTIFFS)*

Limitation Act (IX of 1908), articles 110, 131—Periodically recurrent right—Suit "to establish" such right, meaning of—Suit for arrears of ground rent—Defendant had been denying plaintiff's right, and refusing to pay, since over twelve years before suit—Limitation.

Where the plaintiff's right to recover the arrears of rent claimed is denied by the defendant, the claim necessarily involves as a condition precedent the establishment of the plaintiff's subsisting right to recover rent, irrespective of the question whether an express relief for such a declaration is asked for or not. If a suit brought for the establishment of the plaintiff's right would be barred by time, then by merely not asking for such a relief the plaintiff can not evade and nullify the provisions of article 131 of the Limitation Act, and recover the amount claimed.

If in the same suit a relief for the establishment of a periodically recurring right is expressly claimed, as well as a relief for the recovery of certain arrears, then article 131 would apply to the first relief and some other appropriate article, e.g. 110, would apply to the second relief. In a suit in which a specific relief for the establishment of the right is not claimed but only certain arrears are claimed, and the enjoyment of the right had in fact been refused by the defendant more than 12 years before the suit, then inasmuch as the establishment of the right is a condition precedent for the granting of the relief for recovery of arrears, such a claim is necessarily implied in the suit and the suit is in substance one for establishing a periodically recurring right coupled with the recovery of the arrears claimed; and in such an event when the right itself can not be established after the lapse of 12 years from the refusal of the enjoyment of the right, no decree for arrears can be passed.

*Appeal No. 65 of 1935, under section 10 of the Letters Patent.