APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma

1938
May, 9

KASHI KAHAR (DEFENDANT) *v.* ASHARFI SINGH (PLAINTIFF)*

Agra Tenancy Act (Local Act III of 1926), sections 34, 82, 85(3)—Fixed rate tenant selling part of the land for house building purpose—Not an "improvement"—Suit by landholder against transferee for demolition and injunction——Jurisdiction—Civil and revenue courts—Civil Procedure Code, sections 104(2), 105(1)—Civil court ordering plaint to be returned for presentation to revenue court—Order reversed by District Judge on appeal—Suit decreed on remand—Whether question of jurisdiction can be raised again in second appeal from the decree—Agra Tenancy Act, sections 268, 269—Not applicable where suit properly lies in revenue court and appeal therefrom lies on the revenue side.

A fixed rate tenant sold a small part of the holding, for the purpose of the purchaser building his dwelling house thereupon. The landholder brought a suit in the civil court against the purchaser for demolition of constructions made by him and for injunction against future constructions. The Munsif held that the suit was cognizable by the revenue court and ordered the plaint to be returned for presentation to that court. This order was, on appeal, reversed by the District Judge. The Munsif then tried the suit and decreed it, and the decree was upheld by the District Judge on appeal. The question of jurisdiction was again raised in second appeal:

Held that the question of jurisdiction and of the correctness of the order of the lower appellate court on the first occasion could be raised in second appeal, under the provisions of section 105(1) of the Civil Procedure Code, although according to section 104(2) no appeal could have been filed against that order itself.

Sections 268 and 269 of the Agra Tenancy Act did not stand in the way of the question of jurisdiction being raised in the second appeal, inasmuch as those sections do not apply to a case where the suit properly lies in the revenue court and appeal therefrom lies on the revenue side and not to the

*Second Appeal No. 425 of 1937, from a decree of Sarup Narain, District Judge of Benares, dated the 7th of December, 1936, confirming a decree of H. P. Varshni, Additional Munsif of Benares, dated the 27th of July, 1936.

District Judge, and the present case was a case of such a nature.

The suit was one cognizable by the revenue court. The building of the house would not come within section 3(11)(*d*) of the Agra Tenancy Act and would therefore, not be an "improvement" which the tenant or his transferee would be entitled to make, and the transfer for the purpose of building the house was illegal, and it was illegal for the further reason that it was a transfer of a part of the holding and amounted to a division of the holding contrary to the provisions of section 37 of the Act. According to sections 34, 82(1) and 85(3) of the Act a suit for ejectment or for injunction and repair of the damage could be brought in the revenue court. As adequate relief could be obtained by the plaintiff by such a suit, therefore by section 230 of the Act the suit was cognizable by the revenue court alone. As under section 242 the appeal from such a suit would lie on the revenue side, sections 268 and 269 could not apply to the case.

Mr. *B. Malik,* for the appellant.

Messrs. *P. L. Banerji* and *K. L. Misra,* for the respondent.

BENNET and VERMA, JJ.:—This is a second appeal by a defendant against a decree of the learned District Judge of Benares passed in first appeal dismissing the appeal and upholding the decree of a Munsif for removal of certain constructions by the defendant and an injunction against the defendant making any constructions on the plot in question. The plaintiff is the landholder of mauza Bhadaini which happens to be within the municipal limits of Benares city. There was a fixed rate tenant of the plaintiff, Benarsi Lal, and he executed a sale deed dated the 15th of February, 1934, in favour of Kashi, the defendant. That sale deed sets out that Benarsi Lal had purchased at auction sale a fixed rate tenancy of 1 bigha 6 biswas 17 dhurs of land and that he needed money and was not able to sell all the area so he was selling it off in small lots and he sold to Kashi Kahar 1 biswa 31/68 dhurs for Rs.285. It is a fact that the sale deed does not actually state that the purchase was for building a house but the sale deed does state that the various purchasers agreed to have

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a way demarcated for the convenience of all of them. The defendant Kashi also in the witness-box admitted that the sale was for the purpose of building a house on the whole of it for his residence. The court below has held that under the Agra Tenancy Act, Act III of 1926, section 3(2) states that "land" means land which is let or held for agricultural purposes, or as grove-land or for pasturage, but does not include land for the time being occupied by dwelling houses or manufactories or appurtenant thereto. The court pointed out that under section 109 a fixed rate tenant may make any improvement, but although under section 3(11)(*d*) buildings on the holding elsewhere than on the village site were classed with "improvements" this was admittedly not the case here because the defendant was not building the house for the profitable use of the holding. He had merely purchased a portion of the plot for the purpose of building a house on it. The case for the landholder therefore was that because the definition of "improvement" does not cover the present case therefore the defendant had no right to build the house. The defendant pleaded in the Munsif's court that the civil court had no jurisdiction and he amplified that plea by arguing that the revenue court had exclusive jurisdiction. The Munsif accepted this argument and ordered the plaint to be returned to the plaintiff for presentation to the proper court. A first appeal was brought and the appellate court held that the civil court had jurisdiction and remanded the suit for disposal on the merits. The Munsif then decreed removal and injunction and an appeal was brought to the District Judge and the District Judge has dismissed that appeal.

The defendant has now brought this second appeal and taken as his first ground that the lower court had erred in holding that the civil court had jurisdiction. Learned counsel for respondent argued that this question of jurisdiction should not now be raised in this

second appeal and he argued that the question was finally decided between the parties by the order in appeal of the appellate court on the first occasion. Now where a question of jurisdiction was determined and a plaint was returned to the plaintiff for presentation to the proper court, order XLIII, rule (1)(*a*) of the Civil Procedure Code provides that an appeal lies under the provisions of section 104. Now section 104(2) provides: "No appeal shall lie from any order passed in appeal under this section." Therefore no appeal lay from the order of the lower appellate court the first time, when the jurisdiction question came before it. As the case has now been concluded and a second appeal lies from the decree of the lower appellate court section 105(1) applies: ". . . where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." We consider therefore that this question of jurisdiction could be raised now in second appeal before this Court.

A further argument was made against the question being raised, by a reference to the Agra Tenancy Act, Act III of 1926, sections 268 and 269. Section 268 sets out the case in which that section will apply: "When, in a suit instituted in a civil or revenue court, an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong court shall not be entertained by the appellate court unless such objection was taken in the court of first instance; but the appellate court shall dispose of the appeal as if the suit had been instituted in the right court."

Learned counsel argued that because a question of jurisdiction had been raised in the court of the Munsif therefore an appeal lay to the District Judge. There is more than one error in this argument. In the first place the appeal from the decision of the Munsif about jurisdiction was not heard by the District Judge; it was heard by a small cause court Judge. Such a forum has

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no jurisdiction at all under the Agra Tenancy Act as an appellate court. Section 242 of that Act only refers to the court of the District Judge and not to a court such as the court of the small cause court Judge. But even if the matter has been decided by the District Judge there is the Full Bench ruling of this Court in *Ram Iqbal Rai* v. *Telesari Kuari* (1) in which the limits of section 268 were considered and it was held that it applied only to cases in which, if rightly instituted in a civil or revenue court, an appeal lies to the District Judge according to law, and cannot consistently with other provisions of the Act (section 230 and section 242) be applied to suits wrongly instituted in a civil court in which if rightly instituted in the revenue court an appeal would have lain on the revenue side. In that particular case the facts were similar to the present. The Munsif had returned the plaint for presentation to the proper court on the ground that jurisdiction lay in the revenue court. An appeal was brought in the court of the District Judge who held that the suit was triable by the Munsif and remanded the case for disposal according to law. It was held that the order of the District Judge was not an order which could be defended by a reference to the provisions of section 268. For these reasons therefore we consider that the appellant can raise this point of jurisdiction in this second appeal.

Now the question of jurisdiction arises under section 230 of the Agra Tenancy Act which provides that all suits and applications of the nature specified in the fourth schedule shall be heard and determined by the revenue courts, and the explanation states that if the cause of action is one in respect of which adequate relief might be granted by the revenue court it is immaterial that the relief asked from the civil court may not be identical with that which the revenue court could have granted. In the present case the allegation of the

(1) (1930) I.L.R. 53 All. 75.

plaintiff is that the defendant has no right to erect his house because of the provisions of the Agra Tenancy Act and he bases his objection on section 3(11). Now if this objection is correct there are various sections of the Agra Tenancy Act which would give the plaintiff relief. Section 34(1) provides that "Every transfer, other than a sub-lease, made by a tenant in contravention of the provisions of this Act . . . shall be void", and section 82(1) provides that "If a tenant (*a*) transfers his holding or any portion thereof contrary to sub-section (1) of section 34 . . . both he and any person who may have obtained possession of the whole or any portion of the holding in pursuance of any such attempted illegal transfer, or under any such voidable sub-lease, shall be liable to ejectment at the suit of the landholder."

Section 85(3) provides: "Notwithstanding anything contained in this section, a landholder may, in addition to, or in lieu of, suing for ejectment, sue . . . (*b*) for an injunction with or without compensation, or (*c*) for the repair of the damage or waste, with or without compensation."

There is also another provision in chapter VII which deals with "improvements" and this provision in section 120 is: "(1) If a question arises between a tenant and his landholder (*a*) as to the right to make an improvement, or (*b*) as to whether a particular work is an improvement, . . . the Assistant Collector in charge of the sub-division shall, on the application of either party, decide the question. (2) The decision of the Assistant Collector on questions arising under clauses (*a*) and (*b*) of sub-section (1) shall be final."

Now learned counsel attempted to answer these provisions by saying that he did not want to raise any question of "improvement", but his objection as contained in his plaint is that the defendant being a transferee from a fixed rate tenant has only got a right to make a building which is in conformity with the law in the Tenancy Act providing for "improvements."

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Now when we turn to the fourth schedule we find that in group B, No. 10 is section 82 and in group D, No. 5 is section 120(1)(*a*). Now section 242 does not allow an appeal to the District Judge in either of these cases, as the appeal to the District Judge is only in group A of the fourth schedule and not in group B or group D. The matters, therefore, which would be raised in a suit in the revenue court, would not come to the District Judge even in appeal and the questions in this case, therefore, both original and appellate are for the revenue court.

Another point which may be noted is that section 37 provides that a division of a holding can only be made (*a*) by agreement between the co-tenants, or (*b*) by a decree in a suit between co-tenants. The present area of the fixed rate tenancy was held by a single individual Benarsi Lal and he had no co-tenant with whom he purported to make any division. What he did purport to do was to transfer portions of his holding. That is clearly contrary to section 37 which only allows a division in two particular cases. This is another reason for considering that the case would lie in the revenue court as the acts alleged would be contrary to section 37 and section 34 and section 3(11) and therefore the suit for ejectment under section 82 or for injunction under section 85(3) would lie in the revenue court.

For these reasons we allow this second appeal with costs throughout and we direct that the plaint be returned to the plaintiff for presentation to the proper court.