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to be revised. Indeed we consider that the only possible order under the circumstances was the order passed by the District Judge. We accordingly dismiss this application with costs both here and below. The stay order is discharged.

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Smith

1936
March, 24

MAKHAN LAL (PLAINTIFF) *v.* MUFTI TAWASSUL HUSAIN (DEFENDANT)*

Agra Tenancy Act (Local Act III of 1926), sections 8, 73, 219—Thekadar—Covenant against reduction of rent upon remission of revenue—Validity.

A theka granted by a zamindar contained a covenant that the amount fixed as the rent to be paid by the thekadar would not be reduced or affected in any way on account of any remission or suspension of revenue or rent which might be made by the Government:

Held that the covenant was valid and was not overridden by section 8(1) of the Agra Tenancy Act, inasmuch as the word "tenant" in that section did not include a thekadar; there was no express provision in section 8 for the inclusion of a thekadar, as required by section 3(6), nor was section 8 one of the five sections mentioned in section 219 as being applicable to thekadars. Accordingly the covenant would override the provisions of section 73, under clause (3) of which a thekadar would be entitled to the benefit of an order of remission or suspension of his rent, passed in consequence of the remission or suspension of revenue.

Messrs. G. *Agarwala* and *Kartar Narain Agarwala*, for the appellant.

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

BENNET and SMITH, JJ.:—This is a first appeal from a decision dated the 10th March, 1932, of an Assistant Collector of the First Class of the Bijnor district. The suit was one under section 132 of the Agra Tenancy Act for recovery of "theka" money, with interest at 12 per

*First Appeal No. 187 of 1932, from a decree of Mir Ali Raza, Assistant Collector, first class of Bijnor, dated the 10th of March, 1932.

cent., per annum, for the years 1336, 1337 and 1338F., the total amount claimed being Rs.15,871. The learned Assistant Collector has decreed the plaintiff Rs.8,948 with past interest at 12 per cent. per annum, and future interest at 6 per cent. per annum, and proportionate costs. The money was ordered to be paid in two equal instalments at intervals of six months. Against that decision the plaintiff has appealed.

On the 11th August, 1928, the defendant respondent, Mufti Muhammad Tawassul Husain, executed a usufructuary mortgage in respect of the properties concerned in favour of the plaintiff appellant, Sahu Makhan Lal, for a sum of Rs.1,45,000. On the 24th August, 1928, the mortgagor executed a qabuliat in favour of Sahu Makhan Lal, by which he agreed to hold the property on lease for an annual payment of Rs.13,000. The terms of the lease were that the lessee should pay the Government revenue and cesses, amounting to Rs.4,300 annually, and should pay the balance, Rs.8,700, to the mortgagee lessor. As regards the revenue, it was provided that if it was reduced, enhanced or remitted at any future settlement, or for any other reason, the lessee, and not the lessor, should be affected by any such change. That portion of the qabuliat concludes with the words: "I, the lessee, shall under all circumstances continue to pay the aforesaid amount of profits to the mortgagee zamindar." As regards the rents, it was stipulated in paragraph 6 of the qabuliat that "If, on account of terrestrial or celestial calamities, any remission or suspension be made by the Government, it shall have no effect as against the lessor; I, the lessee, the executant, shall enjoy the benefit and be liable for the loss resulting therefrom, and I shall, as per conditions set forth above, continue to pay the lease money to the mortgagee, the lessor, without raising the aforesaid pleas." The learned Assistant Collector has in framing his accounts deducted from the amount payable to the plaintiff for the year 1336F. a sum of Rs.1,027 in respect

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of remissions of rent said to have been granted in that year, and in the year 1338F. he has similarly deducted a sum of Rs.3,050. In his judgment the learned Assistant Collector took the view that it was only in cases where the remissions of rent were due, as he put it, "to earthly or atmospheric reasons" that the thekadar would not be entitled to make any deductions from the amounts payable by him under the lease. He went on to say that it was only just and equitable that the defendant should be allowed to make deductions where the remissions of rent had been allowed by Government on account of abnormally low prices.

When the appeal was first before us, we found it necessary to make inquiries as to the grounds on which the remissions of rent were, in fact, made in the years 1336 and 1338F. The Collector has now sent us a tabular statement, which shows that in 1336F. remissions of revenue and rent were made in some of the villages in question on account of agricultural calamity, and similar remissions were also made in the year 1338 F. in most of the villages concerned on account of the fall in the prices of agricultural produce. In these circumstances it seems to us to be clear that the deduction made by the learned Assistant Collector in respect of the year 1336 F. ought not to have been made, since the remissions of rent and revenue made in that year were due to agricultural calamity, which is a matter specifically covered by paragraph 6 of the lease. As regards the deductions made in 1338 F. the matter is not so simple. According to section 73(1) of the Agra Tenancy Act (Act III of 1926):—"When for any cause the Local Government, or any authority empowered by it in this behalf, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land, whether such revenue is payable to an assignee or to the Government, a Collector, or, if so empowered by the Local Government, an Assistant Collector of the first class, may order that the

rents of the tenants holding such land or any portion thereof, mediately or immediately from the landlord, shall be remitted or suspended for the period of such remission or suspension of payment of revenue, to an amount which shall bear the same proportion . . ." In sub-section (3) of this section it is provided that the word "tenant" includes a thekadar. It is to be observed, however, that in cases where the Local Government or any authority empowered by it remits or suspends for any period the payment of the whole or any part of the revenue, a Collector, or an Assistant Collector of the first class if so empowered, *may order* that the rent of the tenants holding such land shall be remitted or suspended, etc. In the present case, we are not shown that there was any order remitting any portion of the rent payable by the thekadar, the defendant respondent in the present case. His learned counsel has suggested that as this particular point has not come up for consideration until today, we should remit a definite issue to the learned court below for a finding as to whether any remission was granted in the rent of this thekadar in the year 1338F. or not. We do not think that at this stage we ought to remit any such issue. It was the duty of the defendant clearly to plead the provisions of section 73(1) of the Agra Tenancy Act, and to show that his case was covered by those provisions. He did not do so, and in the circumstances we do not see any reason to give him an opportunity to do so now. The result is that in our opinion the deduction of Rs.3,050 made by the Assistant Collector from the money due under the theka for the year 1338 F. should not have been allowed.

A ruling has been produced by learned counsel for the respondent in *Fateh Chand* v. *Murari Lal* (1). That case is distinguished from the present case by two points. It was under section 51 of the Agra Tenancy Act, II of 1901, which corresponds to the section before us, section

(1) (1924) I.L.R., 46 All., 840.

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73 of the Agra Tenancy Act III of 1926. The case differed from the present case because on page 842 of the ruling it is stated that there was a certificate by the Collector containing an express order that the rent payable by the defendant lessee should be remitted to the extent mentioned therein. There is not any such order in the present case. The second point on which there is a difference is of more general importance, because there has been a change in the law in regard to thekadars. The ruling set out that the contract between the zamindar and the thekadar was overridden by the express provision of law contained in section 51 of the Tenancy Act, and that the stipulation in the lease that rent would be payable irrespective of whether there was any drought or flood or any calamity causing loss of produce in the village was overridden by the provisions of section 51. The ruling referred to the definition in section 4(5) of the Tenancy Act, II of 1901, where it is stated that a "tenant" includes a thekadar. Accordingly, therefore, under that Act section 3(1) applied to a thekadar, and this sub-section stated:—"Notwithstanding anything contained in section 2, nothing in any lease or agreement made between a landholder and a tenant on or after the first day of April, 1900, shall take away or limit any right of the tenant as conferred or recognized by this Act." Therefore the learned Judges in that case were correct in applying section 3(1) and holding that the provision in the lease was overridden by section 51 of Act II of 1901.

We have in the present case a similar provision in the lease, but the law is different. Under Act III of 1926 there is no doubt in section 8(1) a provision:—"Every agreement which purports, or would operate, to restrict a tenant from enforcing or exercising any right conferred on or secured to him by this Act is void to that extent." But the word "tenant" in section 8 no longer includes a thekadar. This is shown by section 3(6), which states: "'Tenant' does not include . . . save as otherwise

expressly provided by this Act, a thekadar." Now section 8 does not expressly include a thekadar, and therefore that section cannot be applied to the present lease by a zamindar to a thekadar. The covenant in the lease, therefore, is not affected by the provisions of section 73 of the Agra Tenancy Act of 1926. That section 8 does not apply to a thekadar is further shown by the fact that section 219, which is in the chapter for thekadars, and which sets out certain sections of the Act as applying to thekadars, does not state that section 8 applies to thekadars. It is also provided in section 219(1) that the five sections mentioned therein shall apply to thekadars unless there is an express provision to the contrary in the theka. Therefore the situation has changed with the passing of Act III of 1926, and it is now open to a zamindar to grant a theka which contains provisions contrary to the provisions of Act III of 1926 in regard to tenants. The ruling, therefore, for these two reasons has no application to the present case.

The result of our findings is that the correct figures for the years in suit are as follows. [Calculations were made in accordance with the amount claimed by the plaintiff, no deductions being allowed on the head of remission of rent; and the appeal was decreed with costs.]

MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

CHAMBER OF COMMERCE, HAPUR (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE-PARTY)*

1936
April, 6

Income-tax Act (XI of 1922), sections 4(1), 4(3)(ii), and 6—Association in the nature of a "mutual concern"—Incorporated under section 26 of Companies Act—Members' entrance fees and subscriptions—Receipt of commissions on sales by or through members—Liability to income-tax—Income, profits or gains—Business—Other sources—"Charitable institution"—"Object of general public utility".

*Miscellaneous Case No. 637 of 1934.