been no unauthorised transfer by the guardian of the minor's property.

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SULTAN AHMAD KHAN v. SIRAJUL HAQ

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For the reasons given above we dismiss this appeal. We might have had some hesitation in the matter of costs, but during the pendency of the appeal the minor has attained majority and has applied to proceed with the appeal in his own name. We, therefore, direct that he will pay the costs of this appeal.

Before Mr. Justice Niamat-ullah and Mr. Justice Ismail

1937 *September*, 28

GAJRAJ SINGH (PLAINTIFF) *v.* TEJ SINGH AND OTHERS (DEFENDANTS)*

Agra Tenancy Act (Local Act III of 1926), *section* 227—*Suit for settlement of accounts—Lambardar* qua *co-sharer can bring such suit against another co-sharer—Suit for profits of sir and khudkasht held by co-sharer in excess of his share —All the co-sharers should be impleaded in such suit—Court should do so even at late stage—Civil Procedure Code, order I, rule* 10—*Court Fees Act (VII of* 1870), *section* 13—*Refund of court fee on remand—Discretion of court.*

A lambardar, being a co-sharer, can bring a suit for settlement of accounts under section 227 of the Agra Tenancy Act against other co-sharers; and in such a suit, brought on the allegation that the defendants were in possession of sir and khudkasht lands the estimated rent of which was far in excess of their share of the profits of the mahal, he is entitled to recover his proper share of such excess. If in such a suit the plaintiff impleads all the other co-sharers no difficulty can arise in the matter of ascertaining the plaintiff's proper share; if the plaintiff omits to implead all necessary parties the court should implead them, under order I, rule 10 of the Civil Procedure Code, even at a late stage, so as to decide once for all the rights and liabilities of all the co-sharers in the mahal.

In the circumstances of this case the Court, while remanding the suit to the first court, refused the appellant a refund of the court fee paid on the appeal.

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*Second Appeal No. 69 of 1935, from a decree of M. B. Ahmad, District Judge of Shahjahanpur, dated the 22nd of October, 1934, reversing a decree of K. B. Bhatia, Assistant Collector first class of Shahjahanpur, dated the 31st of March, 1933.

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GAJRAJ SINGH v. TEJ SINGH

Mr. *L. N. Gupta,* for the appellant.

Dr. *N. P. Asthana,* for the respondents.

NIAMAT-ULLAH and ISMAIL, JJ.:—This is a plaintiff's second appeal and arises from a suit under section 227 of the Agra Tenancy Act which provides for suits for settlement of accounts between co-sharers in a mahal. The plaintiff is admittedly a lambardar. He alleged in his plaint that the defendants were in possession of sir and khudkasht lands, the estimated rent of which is far in excess of the total amount of profits to which they are entitled. Accordingly the plaintiff claimed the excess. When the case went to trial, the plaintiff made a grievance of the fact that other co-sharers had sued him and obtained decrees for their shares of profits, with the result that the plaintiff had to part with what would have enabled him to recoup himself to the extent of his share in the profits of the mahal. His case was that if the excess payable by the defendants is recovered, he (the plaintiff) would be compensated for the loss of profits occasioned to him; in other words, whatever is payable by the defendants as profits in excess of their shares is due to the plaintiff and not to any other co-sharer. How far these allegations are true does not appear from the judgment of the lower appellate court which dismissed the plaintiff's suit on a preliminary ground. The trial court had decreed the plaintiff's suit for Rs.129-14-0. The lower appellate court did not enter into an account of the profits but held, relying on *Koka* v. *Chunni* (1), that the plaintiff's suit was not maintainable.

We think that there is nothing to prevent a lambardar from instituting a suit for settlement of accounts under section 227 of the Agra Tenancy Act. It is clear to us that every lambardar is a co-sharer first and anything else afterwards. The fact that he is a lambardar does not make him any the less a co-sharer. We have carefully examined the case above referred to and do not

(1) (1927) I.L.R. 50 All. 342.

find that the learned Judges who decided it held that a lambardar is not entitled to institute a suit for settlement of accounts under section 227 of the Agra Tenancy Act. Their decision is confined to the facts of that case. It is true that they have acted upon a principle which is applicable in other similar cases, but every difficulty which suggested itself to the learned Judges in the way of granting a relief to the lambardar instituting the suit under section 227 arose from the fact that the other co-sharers were not parties. The learned Judges observed: "One co-sharer is not entitled to claim the whole of the excess in the hands of another co-sharer merely because he is short to that extent of his fractional share in the income of the mahal. All the other co-sharers who are similarly short are entitled to share in the excess income enjoyed by any one co-sharer and they must be made parties to the suit by the one co-sharer. This fact was ignored by the trial court." The learned Judges then held: "A suit under section 165" (present section 227 of the Agra Tenancy Act) "must be one for accounts primarily. . . . and it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer who is plaintiff is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket will not give the plaintiff a right to recover the money so paid from a third co-sharer."

It seems to us that if a plaintiff, whether he is a lambardar or an ordinary co-sharer, impleads all other co-sharers in a suit for settlement of accounts under section 227, no difficulty can arise and the court will be in a position to determine which of the co-sharers is entitled to profits and which of them, having collected in excess of his share, is liable to pay. If it appears, as is alleged to be the case between the parties before us, that the only person to whom the excess in the hands of one of the co-sharers should go is the plaintiff, there should be no

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difficulty in passing a decree in favour of the plaintiff against that particular co-sharer. Even if the plaintiff omitted to implead all necessary parties in his plaint, the court should in the exercise of its wide powers under order I, rule 10 of the Code of Civil Procedure implead all or such other co-sharers as may be considered to be interested in the result of the suit, so as to decide once and for all the rights and liabilities of all the co-sharers in the mahal. We think that the case before us is eminently one in which all other co-sharers should have been impleaded even at a late stage. Accordingly we set aside the decrees of both the courts below and remand the case to the court of first instance for disposal according to law as herein indicated. Costs shall abide the result.

Having regard to the nature of the remand order passed by us, we do not think that the appellant is entitled to a refund of the court fee.

REVISIONAL CIVIL

Before Sir John Thom, Acting Chief Justice

1937 *September*, 29

PURAN CHAND AND ANOTHER (DEFENDANTS) *v.* BABU RAM AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code, schedule II, paragraph 3(2)—*Suit referred to arbitration—Award remitted for re-consideration—Withdrawal of suit pending arbitration proceedings—Civil Procedure Code, order XXIII, rule* 1—*Jurisdiction.*

A suit was referred to arbitration and the award made by the arbitrator was remitted by the court for re-consideration by the arbitrator. The plaintiffs then applied to the court for permission to withdraw the suit with liberty to bring a fresh suit, under order XXIII, rule I, of the Civil Procedure Code, and the application was granted by the court: *Held*, in revision, that the order of the court was without jurisdiction. Under paragraph 3(2) of the second schedule to the Civil Procedure Code the court has no power, after a suit has been referred to arbitration and so long as the reference subsists and the arbitration has not been superseded, to intervene and deal with the subject-matter of the suit in any way.

*Civil Revision No. 126 of 1937.