APPELLATE CIVIL

1937 September, 13

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

SRI RAM (PLAINTIFF) *v.* JAI KISHAN LAL AND OTHERS (DEFENDANTS)*

Agra Tenancy Act (Local Act III of 1926), section 222—Suit by Lambardar's son for defendant's share of revenue—Whether plaintiff must prove that he paid it out of his pocket over and above what was payable by him to defendant as his share of the profits—Set off can not be claimed by defendant—Agra Tenancy Act, schedule II, list II, serial number 10—Civil Procedure Code, section 105(1) and (2)—Application to cases under Agra Tenancy Act.

In a suit under section 222 of the Agra Tenancy Act, by a lambardar against a co-sharer for the latter's share of the revenue paid by the former, it is not necessary for the plaintiff to establish, by rendering an account of collections made by him, that he paid it out of his own pocket, there being then no money in his hands which was payable by him to the defendant as the latter's share of the profits. To require the plaintiff to do so would in substance be to allow the defendant to claim a set off, when no plea of set off is entertainable in view of schedule II, list II, serial number 10, of the Agra Tenancy Act. The only manner in which the defendant can raise the question is by instituting a separate suit.

The case would be different, however, where the parties have previously arranged between themselves that the plaintiff would pay the defendant's share of the revenue out of funds belonging to the defendant in the hands of the plaintiff, in which case the defendant would be entitled to say that the plaintiff made the payment in terms of the arrangement settled between them.

According to the provisions of section 264 of the Agra Tenancy Act, section 105 of the Civil Procedure Code applies to cases under that Act; therefore, non-appealable orders passed in cases under that Act can be challenged in appeal from the decree, according to sub-section (1) of section 105. As the Agra Tenancy Act does not allow an appeal from an order of remand, sub-section (2) of section 105 does not stand in the way of challenging the correctness of an order of remand in appeal from the decree.

*Second Appeal No. 1101 of 1934, from a decree of M. B. Ahmad, District Judge of Shahjahanpur, dated the 23rd of July, 1934, confirming a decree of Sultan Ahmad, Assistant Collector first class of Shahjahanpur, dated the 15th of November, 1933.

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

Mr. *M. A. Aziz*, for the respondents.

NIAMAT-ULLAH and ALLSOP, JJ.:—This is a second appeal by the plaintiff and arises out of a suit brought by him for recovery of the defendants' share of revenue alleged to have been paid by the plaintiff. The suit was one under section 222 of the Agra Tenancy Act and was brought before an Assistant Collector.

The defendants pleaded that the plaintiff's father who was lambardar died in the year 1337 F. when the plaintiff alleges to have paid the revenue in question, that the plaintiff's father was bound to make collections diligently on behalf of all the co-sharers including the defendants, that in consequence of his negligence arrears were not collected from the tenants and that the plaintiff as representing his father was liable to pay to the defendants the latter's share of the profits of 1337 F. and finally that the revenue paid by the plaintiff cannot be considered to have been paid on behalf of the defendants who had defaulted in paying their share. It was not made clear by the defendants that the revenue paid by the plaintiff had accrued due in the lifetime of his father. The court of first instance decreed the plaintiff's claim in full. The defendants appealed to the District Judge who held that the plaintiff was not entitled to recover the sum claimed by him unless he established that the payment had been made out of his own pocket and not out of funds of the defendants in the hands of the plaintiff. The decree of the court of first instance was accordingly set aside and the case was remanded for a fresh decision. No appeal is allowed by the Agra Tenancy Act from an order of remand and consequently it remained unchallenged till a later stage.

The Assistant Collector held after remand that the plaintiff failed to establish by rendering proper accounts that no profits were receivable by the defendants from him and that consequently it could not be said that the plaintiff had paid revenue for the defendants who had

defaulted. On that finding the Assistant Collector dismissed the plaintiff's suit. The latter appealed to the District Judge who concurred with the Assistant Collector in holding that the plaintiff failed to establish that he had paid the revenue now claimed against the defendants out of his own pocket. In that view the plaintiff's appeal was dismissed.

In the present second appeal the plaintiff has challenged the *ratio decidendi* adopted by the District Judge, viz., that the plaintiff must establish by proper accounting that he had no profits belonging to the defendants in his hands when the revenue of the defendants' share was paid by him. Learned counsel for the defendants respondents strongly argued that the first order of remand in which that principle was laid down between the parties became final and that it operates as *res judicata* at subsequent stages.

In our opinion this contention has no force. The Agra Tenancy Act does not allow an appeal from an order of remand and there is nothing to prevent such order being questioned by a superior court when the final decree is appealed from. The Civil Procedure Code is applicable to suits and appeals under the Tenancy Act, except so far as it is inconsistent with the provisions of the Act (section 264). Section 105(1) of the Code of Civil Procedure allows a non-appealable order to be challenged in appeal from the decree and is applicable to cases under the Tenancy Act. Section 105(2) is not applicable, as the Tenancy Act does not allow an appeal from an order of remand.

The first order of remand, passed by the District Judge in the present litigation, could not have been challenged by the plaintiff in a second appeal to this Court. It is only when he preferred the present appeal from the decree that the plaintiff could question the correctness of the order of remand passed by the District Judge. We are of opinion that there is nothing in law to debar us

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from examining the correctness of the view on which the decision of the District Judge proceeds. Our view finds support from the case of *Shankar Lal* v. *Muhammad Amin* (1) and the case of *Kalika Prasad* v. *Ajudhia Prasad* (2).

On the merits of the question involved in this appeal we are unable to agree with the learned District Judge that the plaintiff cannot recover from the defendants their share of the revenue paid by him unless he renders an account of collections made by him and demonstrates that no money belonging to the defendants was in his hands when he paid the revenue of their share. We may note that the plaintiff does not admit that he made any collection for the defendants. The plaintiff was not the lambardar and it is common ground that after the death of the plaintiff's father, who was the lambardar, till another lambardar was appointed every co-sharer collected for himself. In our opinion the plaintiff is entitled to call upon the defendants to pay to him what they ought to have paid to the Government in respect of their share. Their liability being joint and several the Government were at liberty to recover it from the plaintiff alone, but as between the plaintiff and the defendants the former is undoubtedly entitled to contribution.

The defendants' plea that the plaintiff has paid out of their profits in his hands or out of what his father ought to have collected and was liable to pay to the defendants is in substance a plea of set off which cannot be entertained in view of schedule II, serial number 10, of the Agra Tenancy Act. The only manner in which he may raise it is that he should institute a separate suit instead of taking it in his written statement. The learned advocate for the defendants contended that his plea amounts to a plea of payment and not a plea of set off. He maintains that since the plaintiff had in his hands moneys payable to the defendants as their share of profits any payment made by the plaintiff on their behalf

(1) (1922) I.L.R. 44 All. 534. (2) (1929) I.L.R. 51 All. 780.

should be considered to have been made out of their funds. In the first place, the defendants have not proved by any evidence that the plaintiff had any funds belonging to them in his hands. In the second place we do not think that in the absence of any arrangement between the parties the so-called plea of payment can be distinguished from the plea of set off which is barred by the Agra Tenancy Act.

The view taken by the learned District Judge was supposed to have been laid down by a Division Bench of this Court in *Jagmohan Lal* v. *Ganga Prasad* (1). On a careful examination of the judgment in that case we are clearly of opinion that the decision in that case is limited to the peculiar facts of that case. There was an arrangement between the co-sharers that the plaintiff would pay the land revenue of the defendant's share out of the property left with him by the defendant who had retained only a small portion of the mahal. The plaintiff who paid the revenue of the defendant's share claimed it in a suit under section 222 against the defendant, who pleaded that the revenue had been paid out of the profits belonging to the defendant. The learned Judges observed on those facts that it had not been proved that the plaintiff paid the land revenue for the years in suit because the defendant defaulted and that the plaintiff had made the payment out of his own pocket. The learned Judges never intended to lay down the broad proposition that a plaintiff suing the defendant for the latter's share of revenue paid by the former must establish that he paid it out of his own pocket. It is only in cases where the parties have previously arranged between themselves that the plaintiff would pay the defendant's share of the revenue out of funds belonging to the defendant and made available to the plaintiff, that the defendant is entitled to say that the plaintiff must have paid it in terms of the arrangement, and if he has not done so and if it was not possible to

(1) [1931] A.L.J. 60.

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carry out the arrangement he must establish that fact so as to render the defendant liable in spite of the arrangement settled between the two. The learned District Judge has not noticed the distinction between the reported cases and the class of cases illustrated by the one before us.

A learned single Judge of this Court seems to have taken a similar view in *Durga Narain Singh* v. *Shanker Singh* (1). We have carefully read the judgment and find that the essential characteristics of *Jagmohan Lal* v. *Ganga Prasad* (2), followed in that case, was overlooked by the learned Judge. With due deference we are unable to follow that case.

For the reasons already explained we think that this appeal ought to succeed. It is accordingly allowed. The decrees of the two courts below are set aside and the plaintiff's suit is decreed with costs throughout.

REVISIONAL CIVIL

1937 *September*, 13

Before Mr. Justice Iqbal Ahmad and Mr. Justice Yorke

KAMLA BAI (DEBTOR) *v.* CHITRA PRASAD AND OTHERS (PETITIONING CREDITORS)*

Provincial Insolvency Act (V of 1920), section 6(e)—Act of insolvency—Sale of property in execution of decree—Decree against judgment-debtor in the capacity of legal representative of deceased debtor—No personal liability—Sale in execution of such decree is not an "act of insolvency"—Interpretation of statutes—Words—Same phrase in different parts of same section has the same meaning—Provincial Insolvency Act, section 75—Revision—Scope—Error of law.

The sale of property in execution of a decree passed against the judgment-debtor in his capacity as legal representative of the deceased original debtor and not imposing any personal liability on the judgment-debtor does not amount to an act of insolvency within the meaning of section 6(*e*) of the Provincial Insolvency Act. The phrase "decree for the payment of money" in section 6(*e*) means a decree for money such that the judgment-debtor is personally liable for the decretal amount.

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*Civil Revision No. 259 of 1936.

(1) A.I.R. 1934 All. 813. (2) [1931] A.L.J. 60.