

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

GOKARAN SINGH (DEBTOR) *v.* BRIJ BHUKAN SINGH
AND OTHERS (CREDITORS)*

1939
July, 27

U. P. Encumbered Estates Act (Local Act XXV of 1934), sections 4, 9, 14; rule 6—Civil Procedure Code, order XXII, rule 4—Proceedings under the Act upon application by a landlord—Position of the applicant that of a plaintiff and position of the creditors that of defendants—Death of a creditor-claimant pending the proceedings—Duty of the landlord-applicant to bring the heirs on the record.

In proceedings under the U. P. Encumbered Estates Act, initiated upon an application under section 4 by a landlord, the position of the landlord applicant is that of the plaintiff and the position of the creditors is that of defendants. So, when a creditor who had put in a written statement of his claim under section 9 dies pending the proceedings it is the duty of the landlord applicant, under order XXII, rule 4, of the Civil Procedure Code which is applicable to the proceedings by rule 6 of the rules framed by the Local Government under the Act, to take steps to bring the legal representatives of the deceased creditor on the record, and his omission to do so would have the effect of causing an abatement of his application so far as the deceased creditor or his legal representatives were concerned.

The fact that under section 9 of the Act the creditors prefer "claims", and in sections 10 and 14 they are described as "claimants", does not make their position that of plaintiffs. It is the landlord who claims relief under the Act, and it is with a view to grant relief to the landlord that the creditors are called upon to submit their respective claims before the Special Judge. The proceedings before the Special Judge are primarily with a view to grant relief to the landlord applicant and the decrees that are passed in favour of the creditors in accordance with section 14 of the Act are wholly and solely with the object of granting relief to the landlord applicant.

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

Dr. *N. C. Vaish*, for the respondents.

IQBAL AHMAD and BAJPAI, JJ.:—This appeal arises out of proceedings under the U. P. Encumbered Estates Act (XXV of 1934), and the cardinal question that arises

*First Appeal No. 57 of 1938, from an order of Sirajuddin, Special Judge first grade of Shahjahanpur, dated the 19th of July, 1937.

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for decision in the appeal is as to whether in proceedings under the Act the debtor-applicants or the creditor-claimants are to be treated as plaintiffs in proceedings before the Special Judge. The facts are undisputed and are as follows. Thakur Gokaran Singh appellant filed an application before the Collector under section 4 of the Act and the Collector in accordance with section 6 of the Act forwarded the application to the Special Judge. The appellant then, in pursuance of the provisions of section 8 of the Act, filed a written statement before the Special Judge embodying the particulars of the debts due from him, and one of the creditors named in the written statement was one Mulu Singh. The notices prescribed by section 9 of the Act were then published and Mulu Singh on the 18th of April, 1936, filed a written statement embodying the particulars of his claim. Thereafter Mulu Singh died on the 30th of October, 1936, and no application to bring upon the record the legal representatives of Mulu Singh was filed within ninety days of the death of Mulu Singh.

More than three months after the death of Mulu Singh his legal representatives filed an application for being brought upon the record. This application was opposed by Gokaran Singh appellant who contended that as no application for substitution of names was filed within ninety days of the death of Mulu Singh the proceedings so far as Mulu Singh was concerned abated and, as such, in view of the provisions of section 13 of the Act the claim of Mulu Singh must be deemed to have been duly discharged. This contention of the appellant was overruled by the learned Special Judge who granted the application filed by the legal representatives of Mulu Singh and ordered their names to be brought on the record.

In our judgment, the decision of the learned Judge is perfectly correct and ought to be affirmed.

By rule 6 framed by the Local Government under the Act proceedings under the Act are to be governed by the

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provisions of the Code of Civil Procedure of 1908 for the time being in force so far as they are applicable and not inconsistent with the provisions of the Act and of the rules framed by the Local Government. In view of this rule the provisions of order XXII of the Civil Procedure Code are applicable to proceedings under the Encumbered Estates Act, and the controversy between the parties in the court below centred round the question whether rule 3 or rule 4 of order XXII was applicable to the case. It was contended by Gokaran Singh appellant that as Mulu Singh was creditor and had filed a written statement preferring his claim against Gokaran Singh, Mulu Singh's position was that of plaintiff in the proceedings and the omission of his legal representatives to have themselves brought upon the record in place of Mulu Singh within the time limited by law had the effect of causing an abatement of the claim embodied by Mulu Singh in his written statement. In support of this contention reliance was placed on rule 3 of order XXII which provides about proceedings for substitution of names on the death of one of several plaintiffs or of the sole plaintiff in an action. Clause (2) of rule 3 lays down that where within the time limited by law no application is made for substitution of names as regards the deceased plaintiff the suit shall abate so far as the deceased plaintiff is concerned.

The legal representatives of Mulu Singh, on the other hand, placed reliance on rule 4 which provides about substitution of names of the legal representatives of a deceased defendant. Clause (3) of rule 4 lays down that where within the time limited by law no application is made to bring upon the record the legal representatives of the deceased defendant the suit shall abate as against the deceased defendant. Mulu Singh's representatives contended that the position of Mulu Singh was that of a defendant and the omission to bring upon the record his legal representatives within the time limited by law had the effect of causing an abatement of Gokaran

Singh's application so far as Mulu Singh's legal representatives were concerned. They, however, submitted that they did not desire to take advantage of the omission of Gokaran Singh to apply for substitution of names within limitation and that, as they were anxious that the controversy between the parties be decided once and for all, they themselves had made an application for substitution of names.

In order to decide as to whether the application of Gokaran Singh abated so far as Mulu Singh was concerned or whether the claim of Mulu Singh became extinguished in consequence of the omission to bring upon the record his legal representatives it was necessary to determine whether the position of Gokaran Singh or the position of Mulu Singh was that of the plaintiff in the proceedings.

It appears from the preamble to the Act that the Act was passed with a view "to provide for the relief of encumbered estates in the United Provinces". The preamble indicates that the relief under the Act is given to the landlord who is the owner of the encumbered estate. Ordinarily in a suit relief is granted to the plaintiff in the suit. The landlord must, therefore, in view of the wording of the preamble, be regarded as the plaintiff in the proceedings. Further, the initiation of legal proceedings rests with the plaintiff and as the machinery of the Act can be set in motion only on an application by the landlord the landlord's position must be that of a plaintiff in proceedings under the Act. This conclusion is supported by the provisions of section 20 of the Act which provides that under certain circumstances the landlord applicant can ask the Special Judge to quash the proceedings initiated on the application filed under section 4 of the Act. A plaintiff in an action can put an end to the action by withdrawing the same, but this cannot be done by a defendant. There is no provision in the Act entitling a creditor to terminate the proceedings initiated under the Act. This also shows that the position of the landlord applicant is that

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of the plaintiff and the position of the creditor is that of the defendant.

The learned counsel for Gokaran Singh argued that as in accordance with section 9 of the Act a "claim" is preferred by a creditor he must be looked upon as plaintiff in the proceedings, and in this connection he invited our attention to sections 10 and 14 of the Act where a creditor is described as a "claimant". He argued that as the creditor is the claimant his position is that of the plaintiff. We are unable to agree with this contention. As we have said before, it is the landlord who claims relief and it is with a view to grant relief to the landlord that the creditors are called upon to submit their respective claims before the Special Judge. The proceedings before the Special Judge are primarily with a view to grant relief to the landlord applicant and the decrees that are passed in favour of the creditors in accordance with section 14 of the Act are wholly and solely with the object of granting relief to the landlord applicant. It is further to be noted that the landlord is described in the Act as the "applicant" and an applicant can be more fittingly described as a plaintiff than a creditor who in pursuance of the provisions of the Act is called upon to submit a written statement embodying the particulars of his claim. We, therefore, hold that Gokaran Singh's position in the proceedings was that of the plaintiff and the omission to implead Mulu Singh's legal representatives had the effect of causing an abatement of Gokaran Singh's application so far as Mulu Singh was concerned.

Mulu Singh's legal representatives, however, filed an application for substitution of names. This application was beyond time. But the provisions of section 5 of the Limitation Act are applicable to applications for substitution of names under order XXII, rules 3 and 4, of the Code. It was therefore open to the learned Special Judge to extend to Mulu Singh's legal representatives the benefit of section 5 of the Limitation Act and to order the legal representatives of Mulu Singh to be

brought on the record. We, therefore, take it that in granting the application of Mulu Singh's legal representatives the Special Judge did intend to, and did as a matter of fact, extend the period of limitation for the application under section 5 of the Limitation Act.

For the reasons given above we dismiss this appeal with costs.

Before Sir John Thom, Chief Justice, and
Mr. Justice Ganga Nath

HIRA LAL AND OTHERS (DEFENDANTS) *v.* PEAREY LAL
(PLAINTIFF)*

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Hindu law—Partition—Right to accounts—Mesne profits, awarded where the coparcener had been totally excluded from enjoyment of the joint property—Receipt of some money by the mother of the minor adopted son—Whether amounts to participation by the minor—Guardian and minor.

As a general rule, a coparcener in a joint Hindu family is not entitled to call upon the manager to account for his past dealings with the joint family property, unless he establishes fraud, misappropriation or improper conversion; but a coparcener who is entirely excluded from enjoyment of the family property is entitled to an account of the income derived from the family property and to have his share of the income ascertained and paid to him. In other words he is entitled to what are called mesne profits.

Where the question was as to whether an adopted son, a minor, had been entirely excluded from enjoyment of the joint family property, and it appeared that a certain sum of money had been paid to and received by the adoptive mother in her personal capacity as widow of her husband and not in her capacity as guardian of the minor adopted son, it was held that the receipt by her of the money in such circumstances could not constitute participation by the minor in the income of the joint family property.

Mr. *Shiva Prasad Sinha*, for the appellants.

Mr. *C. B. Agarwala*, for the respondent.

THOM, C. J., and GANGA NATH, J. :—This is a defendants' appeal and arises out of a suit brought against them

*First Appeal No. 43 of 1937, from a decree of Bind Basni Prasad, Civil Judge of Bulandshahr, dated the 11th of November, 1936.