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the present case, as we have already shown, there was no such clause or condition in the order of 5th July, 1929, under which the decree *nisi* was made absolute and the amount of permanent alimony was settled. In the circumstances the petition of Thomas Henry Chandler fails and is dismissed with costs.

As regards the application of Annie Chandler for enhancement of the amount of alimony, there is an affidavit by Thomas Henry Chandler containing an averment to the effect that he has been discharged by the company in whose service he was; and in view of this affidavit learned counsel on behalf of Annie Chandler states that he does not press his application. In the circumstances this application also is dismissed with costs.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

BHAIRO KUMAR PRASAD (APPLICANT) *v.* MARKANDE GIR AND OTHERS (OPPOSITE PARTIES)*

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May, 2

Agra Tenancy Act (Local Act III of 1926), *section* 242(3)(*a*)—*Question of proprietary right in issue between parties claiming such right—Defendant claiming to be perpetual lessee or thekadar—Not a claim of proprietary right—Appeal—Forum.*

Where in a suit for ejectment under section 44 of the Agra Tenancy Act the defendant admits that the plaintiff is the proprietor of the holding but claims that he himself is not a trespasser but a perpetual lessee or thekadar, there is no question of proprietary right in issue between the parties claiming such right, within the meaning of section 242(3)(*a*) of the Agra Tenancy Act, and the appeal therefore does not lie to the District Judge but to the Commissioner.

Messrs. *Haribans Sahai* and *Janki Prasad*, for the applicant.

Mr. *K. L. Misra*, for the opposite parties.

IQBAL AHMAD and BAJPAI, JJ.:—This is a reference by the District Judge of Ghazipur under section 267 (2) of the Agra Tenancy Act. The reference has been made in connection with an appeal pending in his court. The suit had been dismissed by a revenue court and

*Miscellaneous Case No. 391 of 1938.

the appeal had been first filed by the plaintiff in the Commissioner's court. The defendant there raised a preliminary objection and said that the appeal ought to be returned for presentation to the civil court, and the Commissioner upheld the preliminary objection and said that "the proper forum of the appeal was the District Judge's court."

The appeal thus came to the District Judge and curiously enough the defendant again raised a preliminary objection and said that the appeal lay to the Commissioner. This is an inconsistent attitude adopted by the defendant but this has very little bearing on the reference except perhaps on a question of costs, and we have to decide the reference as made by the learned District Judge.

The facts may now be stated. The plaintiff alleging himself to be a landholder of certain plots sued the defendants under section 44 of the Agra Tenancy Act. Defendant No. 1 was said to be a trespasser and defendants Nos. 2 to 5 were said to be in possession of the land through defendant No. 1. The case of the defendant No. 1 was that he was the heir of one Mewa Gir who held the land under a perpetual lease from the zamindar of the holding and the case of defendants Nos. 2 to 5 was that they were in possession through defendant No. 1. The learned Assistant Collector held that defendant No. 1 was an heir of Mewa Gir, that Mewa Gir was a permanent lessee of the holding in question and therefore defendant No. 1 could not be treated as a trespasser and the plaintiff's suit was therefore dismissed.

The plaintiff in appeal once again raised the question that the defendant was a trespasser and was not a permanent lessee. What we have got to decide is whether the appeal lies to the District Judge or to the Commissioner. The suit was a suit under section 44 of the Agra Tenancy Act and is mentioned at serial No. 2 in group B of the fourth schedule to the Agra Tenancy

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Act. It is provided there that the suit is triable by an Assistant Collector of the first class and an appeal shall ordinarily lie to the Commissioner. Appeals lie to the District Judge under section 271 of the Agra Tenancy Act or under section 242(1) or section 242(3) of the Agra Tenancy Act. It is conceded that section 271 of the Agra Tenancy Act has no application because no issue was referred by the revenue court to the civil court. Section 242(1) has also no application and the only relevant provision of law is section 242(3)(*a*). Under that provision an appeal shall lie to the District Judge in all suits except suits under chapter XI "in which a question of proprietary right has been in issue between the parties claiming such right in the court of first instance, and is in issue in the appeal." There can be no doubt that what was in issue between the parties in the court of first instance was also in issue in the appeal, and the only thing that we have got to decide is whether a question of proprietary right has been in issue *between the parties claiming such right*. It is of some importance to note that under the former Tenancy Act (Local Act II of 1901) the words used in the corresponding section (section 177) were "a question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal." The words "between the parties claiming such right" did not find a place in section 177. We have, therefore, got to decide whether any question of proprietary right has been in issue between the plaintiff and the defendant who have been claiming such right in the court of first instance and are claiming the same right in the appeal.

The plaintiff alleges himself to be the zamindar and the defendant admits that the plaintiff is a zamindar. The defendant further pleads that he is a lessee of proprietary rights, or, in other words, a thekadar as defined in section 199 of the Tenancy Act. The word "lease" has not been defined in the Tenancy Act except in the interpretation clause section 3(13) where it is said that it includes a *qabuliyat*, but it is clear that under the

Tenancy Act a lease is hardly a transfer of proprietary interest in land, for the Act speaks of leases by landholders to tenants and by tenants to sub-tenants. Even a thekadar has been defined as a farmer or other lessee of proprietary rights and not as a transferee of proprietary rights in some form or another, and in chapter XIII, more particularly in section 220, it is provided that suits between a thekadar and his lessor shall be instituted in the revenue court. Although a thekadar is not expressly included in the definition of tenant, the provisions relating to tenants apply in the majority of cases to thekadars as well. It will, therefore, be inappropriate to say that when a defendant admits that the plaintiff is the proprietor of the holding and the defendant is a thekadar a question of proprietary right is in issue between the plaintiff and the defendant claiming such right. We, therefore, think that the view taken by the learned District Judge is correct and our order is that the appeal be returned for presentation to the Commissioner. As we indicated before, the attitude taken by the defendant was inconsistent, and we direct that the parties will bear their own costs of this reference.

Before Mr. Justice Ismail

1939
May, 5

PRABHU DAYAL (APPLICANT) *v.* LALDAS MAGANLAL AND OTHERS (OPPOSITE PARTIES)*

Civil Procedure Code, order XXXIX, rules 1, 2— *Injunction to stay another suit* inter partes *pending in a court outside the province—Jurisdiction of High Court to stay such suit—Inherent jurisdiction—Civil Procedure Code, section* 151— *Equitable grounds—Filing of mortgage suit in another province for the purpose of avoiding the operation of the U. P. Agriculturists' Relief Act—Whether illegal or inequitable.*

A mortgage comprising properties situate within the United Provinces as also properties outside those provinces was executed in 1934. The mortgagor, claiming to be an agriculturist within the meaning of the U. P. Agriculturists' Relief Act, brought a suit under section 33 of the Act at Agra in which he claimed the benefit of reduction of interest. While

*Application in F. A. F. O. No. 86 of 1939.