1939

RAM KALI v. MUNNA LAL

a village pathway, and had no reference to a way of the third class, namely, a public highway. This distinction has been overlooked, not infrequently, and Sir LAWRENCE JENKINS, C. J., had occasion to emphasise it again in *Kali Charan Naskar* v. *Ram Kumar Sardar* (1). It is only in the case of a public highway that the question of special damage arises: where the case is one of a village path, there is no question of special damage." The way in dispute is not a public highway, and section 91 of the Code of Civil Procedure does not bar the suit.

There is no force in the appeal, and it is therefore ordered that it be dismissed with costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

NOOR MUHAMMAD AND OTHERS (PLAINTIFFS) *v.* LALLOO AND OTHERS (DEFENDANTS)*.

1939

April, 19

Agra Tenancy Act (Local Act III of 1926), section 3(4)—Sayar —Weighment dues—Suit to recover zamindars' share of the weighment charges realised by weighmen in a village market —Jurisdiction—Civil and revenue courts.

A share, claimed by the zamindars as payable to them, of the weighment dues realised by weighmen who by the license of the zamindars attend and do their business at a village market held on land belonging to the zamindars comes within the definition of "sayar" in section 3(4) of the Agra Tenancy Act, and a suit by the zamindars for realisation of such share is a suit for "rent" and is therefore cognizable by the revenue court.

Messrs. *Mushtaq Ahmad* and *Mahboob Alam*, for the appellants.

Messrs. *P. L. Banerji* and *S. N. Katju*, for the respondents.

BENNET and VERMA, JJ.:—This is a first appeal by a lambardar and 18 other plaintiffs who have brought a suit against 22 defendants. The court below has held that the suit does not lie in the civil court but in the revenue

*First Appeal No. 220 of 1937, from an order of Tufail Ahmad, Civil Judge of Banda, dated the 14th of May, 1937.

(1) (1912) 18 Indian Cases, 67.

court and therefore the plaint has been returned to the plaintiffs for presentation to the proper court. The question therefore is solely one of jurisdiction and the jurisdiction will be determined by the allegations in the plaint. The plaint sets out in paragraph 3 that about 50 years ago the zamindars, who were predecessors of the plaintiffs, established a new bazar on a certain plot of land. Paragraph 6 states that about 150 persons including the 22 defendants earned money by weighing goods which come to the bazar and making a charge which is a customary charge according to paragraph 8. Paragraph 9 alleges that the plaintiffs as zamindars are entitled to have three-fourths share of the charge made by the defendants for weighment and the one-fourth should remain with the defendants. It is not alleged that the plaintiffs have ever collected this amount before, but apparently the plaintiffs rely on the fact that they are zamindars and therefore have a legal title to this share because the transactions take place on their land. Paragraph 11 alleges that on 10th March, 1934, the plaintiff No. 1, lambardar, granted a theka for the realisation of weighment dues to one Hashim Khan but owing to the obstruction of the defendants the theka was not enforced. It was only a few days after the theka that the plaint was filed on 28th March, 1934. The defendants filed a written statement making allegations with which we are not at present concerned. The question is whether the remedy of the plaintiffs lies in the revenue court or in the civil court. It is true that relief (*a*) appears to be a declaration, and (*b*) is an injunction, but relief (*c*) is for the share of the plaintiffs, for the last three years prior to the suit, of weighment dues to Rs.4,000. It is clear that the revenue court, if it has jurisdiction, can grant a sufficient relief to the plaintiffs by making a decree for any share to which they may be shown entitled.

For the respondents it is pointed out that the Agra Tenancy Act, Act III of 1926, provides in section 3:

1939

NOOR MUHAMMAD v. LALLOO

"'Rent' means whatever is, in cash or kind, to be paid or delivered by a tenant for land held by him, and in chapter IX includes 'sayar', as defined below."

Chapter IX deals with the recovery of rent by suits for arrears. The definition in section 3(4) of "sayar" is as follows: "'Sayar' includes whatever is to be paid or delivered to a landholder by a lessee or licensee on account of the right of gathering produce, forest rights, fisheries, tanks not used for agricultural purposes, the use of water for irrigation, whether from natural or artificial sources, or the like."

Now it is claimed that the plaint implies that the defendants are licensees. No express license is set up in the plaint but it is stated in the Easements Act of 1882, section 54: "The grant of a license may be express or implied from the conduct of the grantor." The allegations in the plaint imply that the collection of weighment dues by the defendants on the lands of which the plaintiffs are zamindars was with the implied consent of the plaintiffs and that the plaintiffs had no objection to the action of the defendants provided the defendants were willing to pay them three-fourths of the dues so collected by the defendants. It appears to us that the case of the plaintiffs does amount to a claim for three-fourths of the dues which are realised by the defendants as licensees of the plaintiffs and therefore such a claim will come within the definition of "sayar" and therefore for the purpose of chapter IX a suit for rent will lie. Learned counsel for the plaintiffs objected that the claim for a share of weighment dues was not specially mentioned in section 3(4). But the sub-section ends up with the words "or the like" and apparently therefore all payments for the use of land of a landholder will come under this definition. Certain rulings were referred to: *Surajpal Singh* v. *Jawahar Singh* (1), in which a Bench of this Court held that "weighment dues" do come under the definition of "sayar". That

(1) (1933) I.L.R. 55 All. 375.

1939

NOOR MUHAMMAD v. LALLOO

no doubt referred to a suit in which a zamindar sued under a definite lease under which the weighment dues were payable. But we do not consider that it makes any difference for the purpose of jurisdiction whether the suit was brought on a lease or on a license. Reference was made to an old ruling, *Sadanand Pande* v. *Ali Jan* (1). This ruling laid down that "cesses mentioned in sections 56 and 86 of the Agra Land Revenue Act are rates levied as a rule by the zamindar upon tenants and residents of villages. Moneys paid by frequenters of markets are voluntary payments made by persons who are under no obligation to use the market unless they please and cannot be called cesses at all." This, however, is a different case and we are not concerned with the question of the weighment dues paid by the persons who got their goods weighed. We are in the present case concerned with a claim by the zamindars for a share of those weighment dues from the people who make the weighments.

We consider that the court below was correct in its view that the jurisdiction in the case of the present plaint lies in the revenue court and accordingly we dismiss this appeal with costs.

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

1939
April, 19

ASMAT ULLAH AND OTHERS (DEFENDANTS) *v.* KHATUN-UN-NISSA (PLAINTIFF)*

Muhammadan law—Divorce—Evidence of—Statement or acknowledgment by husband that he had divorced his wife by repeating talak *thrice—Divorce effective from date of statement.*

In a suit by a Muhammadan widow to recover possession of her husband's property as his heir the defence was that she

*Second Appeal No. 953 of 1936, from a decree of Kunwar Bahadur, Additional Civil Judge of Gorakhpur, dated the 30th of April, 1936, reversing a decree of S. Ghayas Alam, First Additional Munsif of Deoria, dated the 18th of January, 1936.

(1) (1910) 7 A.L.J. 176.