

Rs.271-6 interest up to the 9th of December, 1935, total Rs. 933-9.

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In the result we accept the appeal in part, set aside the decision of the lower court in so far as the claim for refund of costs is concerned and give the appellants a decree for Rs.986-15 against opposite party No. 1 with future interest at 6 per cent. per annum on the sum of Rs.683 from the 9th of December, 1935, up to the date of realisation, and as against opposite parties Nos. 2 to 4 we give a decree for Rs.933-9 with interest at 6 per cent. per annum on Rs.662-2-6 from the 9th of December, 1935, until the date of realisation. The opposite parties Nos. 2 to 4 will be liable only to the extent of the assets of the deceased Kunwar Nand Lal that might have come into their hands and not been duly disposed of.

As to costs both in this Court and in the court below we order that the parties shall receive and pay them in proportion to their success and future.

### REVISIONAL CIVIL

Before Mr. Justice Mulla

SWADESHI BIMA COMPANY (PLAINTIFF) v. SHIV NARAIN  
KATIYAR AND ANOTHER (DEFENDANTS)\*

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September,  
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*U. P. Encumbered Estates Act (Local Act XXV of 1934), sections 7(1)(b), 9(5)(b)—Suit against two defendants—Joint and several liability—One of them a landlord who has applied under this Act, but not the other—Maintainability of suit against the other—Amount for which decree is to be passed.*

Where the liability of two debtors is not merely joint, but also joint and several, and one of them happens to be a landlord who has made an application under section 4 of the U. P. Encumbered Estates Act upon which an order under section 6 has been passed, then the effect of section 7(1)(b) of the Act in such a case is that the suit on the debt is not maintainable as against that defendant but the suit so far as it relates to the other defendant is maintainable; the suit brought against both the defendants should, therefore, be dismissed only in so far as it relates to the former, who had made the application.

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If the plaintiff had instituted the suit against the latter (non-applicant) defendant alone, or having instituted it against both the defendants he had later on exempted the other, then, the liability being joint and several, no objection could have been raised to the maintainability of the suit; and, for the same reason, no such objection can be raised, either under section 7(1)(b) of the U. P. Encumbered Estates Act or under any other law, where by virtue of that section the suit is not maintainable as against the applicant defendant.

The decree to be passed in the suit, however, should be for such amount as may be determined and apportioned by the Special Judge under section 9(5)(b) of the Act, and it is open to the court to wait for such decision of the Special Judge.

Mr. J. Swarup, for the applicant.

The opposite parties were not represented.

MULLA, J.:—This is an application in revision under section 25 of the Small Cause Courts Act. It arises out of a suit for recovering a certain amount on the basis of a promissory note. The applicant here was the plaintiff in the court below. The promissory note upon which the suit is based was executed by the opposite parties, Shiv Narain Katiyar and Kanhi Singh, on the 21st July, 1934, and the suit was instituted on the 20th July, 1937, that is on the last day of limitation. The plaintiff impleaded both the executants of the promissory note as defendants. It is admitted that one of the defendants, namely Shiv Narain Katiyar, had previously made an application under section 4 of the Encumbered Estates Act and had obtained an order from the Collector under section 6 of that Act. The suit was not contested by Shiv Narain Katiyar, but the other defendant Kanhi Singh wanted to take advantage of the fact that Shiv Narain Katiyar had made an application under section 4 of the Encumbered Estates Act and had secured an order of the Collector under section 6 of that Act. He therefore made an application to the court, in the first instance, praying that the suit should be stayed, but a few days later made another application in which he claimed that the suit should be

dismissed altogether because it could not be instituted under the law. The learned small cause court Judge has allowed that contention to prevail and has consequently thrown out the whole suit. Hence the present application in revision.

The learned small cause court Judge is of the opinion that the defendants' contention was well founded on section 7(1)(b) of the Encumbered Estates Act, which runs as follows: "No fresh suit or other proceeding other than an appeal or revision against a decree or order or a process for ejection for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue court in the United Provinces in respect of any debts incurred before the passing of the said order." The argument on behalf of the applicant is that the learned Judge has not correctly interpreted section 7(1)(b) of the Encumbered Estates Act and has consequently erred in throwing out the suit altogether, that is, even so far as it related to Kanhi Singh who had made no application under the Encumbered Estates Act. It is contended that the plea that the suit could not be instituted was not open at all to Kanhi Singh who had made no such application. Upon a very careful consideration of the scheme of the Encumbered Estates Act and section 7 and other relevant provisions contained therein, I have no hesitation in holding that the view taken by the learned small cause court Judge is entirely wrong. Section 7(1)(b) is no doubt in very general terms and refers to a suit or other proceeding "in respect of any debts incurred before the passing of the said order"; but a moment's consideration will show that the debts in question must be debts to which a landlord is subject as referred to in section 7(1)(a). Again the reference in section 7(1)(b) is to debts incurred before the passing of "the said order" which clearly refers to the order passed by the Collector under section 6 of the Act. It is evident

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that the Collector's order under section 6 must relate to an application made by a landlord under section 4 of the Encumbered Estates Act. It necessarily follows therefrom that the debts referred to in section 7(1)(b) cannot be the debts of a person who is not a landlord and who has made no application under section 4 of the Act. If the interpretation put by the learned small cause court Judge is accepted, it would be necessary to hold that the intention of the legislature in passing the Encumbered Estates Act was to bring the whole machinery of the civil courts to a standstill so far as any suit or proceeding was based upon any debt. This is obviously an entirely untenable position. The Encumbered Estates Act was enacted to provide for the relief of encumbered estates in the United Provinces and it is not concerned with the relationship between an ordinary creditor and debtor. It is only when the debtor happens to be a landlord and he makes an application under section 4 of the Encumbered Estates Act that the provisions of that Act come into operation for the purpose of staying any proceeding that might be pending against him in any civil court at the date of his application and of preventing the institution of any fresh proceeding after the date of his application. Any person who is not a landlord, but who incurs a liability jointly and severally with a landlord who makes an application under section 4 of the Encumbered Estates Act, cannot plead that no suit can be instituted against him in respect of that liability. It is only in those cases where his liability with the landlord is only joint and not several that it may be open to him to contend that no suit can be instituted at all.

There can be little doubt in the present case that the liability of the two defendants Shiv Narain Katiyar, who had made an application under section 4 of the Encumbered Estates Act, and Kanhi Singh, who had

made no such application, was not merely a joint liability, but a liability that was joint and several. Section 43 of the Indian Contract Act, which makes the point perfectly clear, runs as follows: "When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise." Illustration (a) to that section is as follows: "A, B and C jointly promise to pay D Rs.3,000. D may compel either A or B or C to pay him Rs.3,000." In view of this clear provision there cannot be the slightest doubt that the plaintiff could have recovered the debt either from Shiv Narain Katiyar or from Kanhi Singh. It was open to him to bring a suit against any one of them alone, and if he had adopted that course it would have been fully justified by order I, rule 6 of the Civil Procedure Code, which runs as follows: "The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes." It is thus clear that if the plaintiff had instituted the suit against Kanhi Singh alone, no valid objection could have been taken by the latter on the ground that his joint promisor Shiv Narain Katiyar had not been impleaded. It is equally clear that if the plaintiff had instituted his suit, in the first instance, against both the defendants, there was nothing in the law to prevent him at some later stage from exempting Shiv Narain Katiyar and in that case also Kanhi Singh could not have raised any valid objection. The suit instituted by the plaintiff, out of which this application in revision arises, was, therefore, fully competent as against Kanhi Singh, and the learned small cause court Judge was obviously wrong in dismissing the whole suit. His order of dismissal so far as the defendant Shiv Narain Katiyar is concerned was perfectly right, but I find no

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justification in law for the dismissal of the suit as against Kanhi Singh. There is nothing in the Encumbered Estates Act to affect or control the plaintiff's right to institute a suit against Kanhi Singh. It is true that upon the application made by Shiv Narain Katiyar a notice would be issued in the ordinary course to the plaintiff to put in a written statement of his claim, and it would be open to the Special Judge under section 9, clause (5), of the Act to make Kanhi Singh a party to the proceeding and to apportion the liability under the promissory note between him and Shiv Narain Katiyar who is the applicant under section 4 of the Act. When the Special Judge has made such apportionment, section 9, clause (5)(b), shall come into operation and the plaintiff shall have a right to recover from Kanhi Singh only such amount as may have been determined by the Special Judge. There is nothing, however, in any provision contained in the Encumbered Estates Act even to suggest that the plaintiff's right to bring a suit against Kanhi Singh is barred or limited in any way. It is to be noted that the apportionment of liability between joint debtors made by a Special Judge under section 9, clause (5) of the Act is not an executable decree. In fact the Encumbered Estates Act provides only for a decree being passed in favour of a claimant against the landlord who makes an application under section 4 of the Act. There is no provision in it for a decree in favour of the claimant against any person who is jointly liable with the landlord to discharge the debt. If the plaintiff is not allowed to institute the suit, the necessary result would be that his claim against Kanhi Singh would be barred by time. There is no provision in the Encumbered Estates Act to save limitation for the claimant against the landlord in respect of any claim which he might further have against the joint debtor with the landlord, arising out of a joint and several liability. I am therefore definitely of the opinion that the suit instituted by

the plaintiff was fully competent as against Kanhi Singh and it should not have been dismissed as against him. The view which I have taken in this case is fully supported by two decisions of this Court, one by a learned single Judge in *Ram Murlī Saran v. Rahat Ali Beg* (1) and the other by a Bench in *Firm Sewai Ram Pitam Lal v. The Imperial Bank of India, Agra* (2). The former case is entirely on all fours with the present one, while the latter proceeds on the same principle, namely that where the liability of two debtors is not merely joint, but also joint and several, and one of them happens to be a landlord who makes an application under section 4 of the Encumbered Estates Act, it is not open to the other to raise the objection that the suit so far as it relates to him cannot be instituted. The result therefore is that I allow this application and set aside the order of dismissal passed by the learned small cause court Judge. The suit shall be restored and shall be deemed to proceed against Kanhi Singh alone. It will be open to the learned small cause court Judge to wait for the decision of the Special Judge regarding the liability of Kanhi Singh. The applicant shall have his costs in this Court.

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(1) Civil Revision No. 451 of 1937, decided on 23rd April, 1938.

(2) Civil Revision No. 470 of 1936, decided on 24th November, 1937.