APPELLATE CIVIL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

TAHAD ALI KHAN (DEFENDANT) *v.* ISRAR-ULLAH (PLAINTIFF) AND NAWAB KHAN AND OTHERS (DEFENDANTS)* 1938 September, 27

Landlord and tenant—Perpetual lease of agricultural land granted by co-sharers, one of them acting as de facto *guardian of minor co-sharers—Lessee cultivating the land and paying rent—Lessee becomes a tenant, and not a trespasser if perpetual lease be invalid as such—Muhammadan law—Guardian and minor—Mother as* de facto *guardian of minor sons joining with other co-sharers in settling agricultural land on tenant—Validity—"Alienation".*

A perpetual lease of certain agricultural lands was executed by all the major co-sharers and by the mother of the minor co-sharers (Muhammadans), as their *de facto* guardian. The lessee entered into possession and cultivated the lands and paid the rent regularly. After several years a suit was brought by one of the said minors for possession of the lands on the ground that the mother had no power under the Muhammadan law to transfer any portion of the property belonging to her minor sons:

Held that the settlement of agricultural land, forming part of the zamindari property inherited by a Muhammadan widow and her minor sons, with a tenant for agricultural purposes, made by the mother for herself and as *de facto* guardian of her minor sons does not come within the rule of Muhammadan law which negatives the power of a *de facto* guardian of a minor to alienate or charge the minor's interest in immovable property. Any person who as natural guardian is managing zamindari property belonging to a Muhammadan infant has the right to settle agricultural land with tenants and such acts of management do not amount to alienations or transfers of the minor's proprietary interests. Although the perpetual lease executed by the mother may not be binding as such upon the minor sons, on the ground that it amounts to an alienation which she had no power to make, yet the person in whose favour the lease of the agricultural land had been executed and who had been holding it as an agricultural tenant and paying rent, had become a tenant of the land within the meaning of the Tenancy Act, and was not a trespasser who could be ejected as such.

*Appeal No. 16 of 1937, under section 10 of the Letters Patent.

1938

TAHAD ALI KHAN v. ISRAR-ULLAH

Mr. *Mansur Alam*, for the appellant.

Mr. *Mushtaq Ahmad*, for the respondents.

BENNET, A. C. J. and VERMA, J.:—This is an appeal by a person who was impleaded as the defendant No 1 in the action which was brought by the respondent No. 1. The action was one in ejectment and a decree has been passed in favour of the plaintiff respondent No. 1.

The material facts, which are not in dispute, are these. One Qurban Ali had two sons, Ibrahim and Ismail. Qurban Ali had certain zamindari property which, on his death, was inherited by Ibrahim and Ismail in equal shares. Ibrahim died leaving a widow, Musammat Rabia Bibi, two minor sons, Anwar Ullah and Israr Ullah, and three daughters, one of whom, Musammat Abida, has assumed the role of next friend of the infant plaintiff, Israr Ullah, in this action. It appears that the three daughters of Ibrahim relinquished their rights of inheritance in their father's property in favour of their mother and brothers. In the other branch, Ismail died leaving a son, Muhammad Shakir, and a daughter, Musammat Zubaida, and some other daughters who do not appear to have claimed any share in the inheritance. The position by the year 1925 was that in all the zamindari property which had descended from Qurban Ali, Musammat Rabia Bibi and her two minor sons, Anwar Ullah and Israr Ullah, were owners to the extent of one half and the other half was owned by Muhammad Shakir and his sister, Musammat Zubaida. In this zamindari there are two plots of agricultural land, Nos. 53/1 and 95, the former measuring 13 biswas 5 dhurs and the latter 15 biswas 15 dhurs, the total being one bigha 9 biswas. In the Fasli year 1332, which corresponds to 1924-25, the agricultural tenant who was occupying these two plots of land for purposes of cultivation as a tenant of the zamindars died without leaving any heirs who could succeed to the tenancy in accordance with the provi-

sions of the Tenancy Act. The zamindars therefore took possession of the plots of land. On the 6th of October, 1925, Musammat Rabia Bibi in her own right and purporting to act as the guardian of her minor sons Anwar Ullah and Israr Ullah, and Muhammad Shakir executed a deed of perpetual lease in favour of the appellant. The document recites that the executants were in possession of the plots in question as proprietors, that Tahad Ali had expressed a desire to take the plots on lease, that Tahad Ali had paid to the executants a sum of Rs.350 as nazrana and that in consideration thereof and of a rent of Rs.4 being paid per annum the executants were executing the lease. The lessee was given the right either to cultivate the land or to build a house or to plant trees. The power to transfer his rights under this document was also given to the lessee. Subsequently, on the 6th of April, 1926, Muhammad Shakir, who, as stated above, had already joined in the execution of the lease of the 6th of October, 1925, along with his sister Musammat Zubaida, executed another deed of lease in respect of the same plots of land in favour of the appellant. The nazrana paid under this document to Muhammad Shakir and Musammat Zubaida was Rs.190 and the annual rent payable to these two executants was fixed at Rs.2. In other respects the document was similar to the one of the 6th of October, 1925. It is common ground that Tahad Ali was let into possession of these two plots of land and has been in possession ever since and has been regularly paying rent.

As stated above, this suit was brought by Israr Ullah, who is still a minor, with his sister Musammat Abida Bibi as next friend, for possession of the plots on the ground that Musammat Rabia Bibi, the plaintiff's mother, had no right to transfer any portion of the property belonging to the plaintiff. Three other persons were impleaded as defendants 2, 3 and 4 along with Tahad Ali Khan as the defendants of the first

1938

TAHAD ALI KHAN v. ISRAR-ULLAH

party. It does not appear what justification there was for impleading these three persons and the learned counsel for the plaintiff respondent has not justified their being impleaded in this suit. The appellant, Tahad Ali, contested the suit on various grounds. One of the pleas taken by Tahad Ali in his written statement was that the relation of a tenant and zamindar exists between the parties and that accordingly the civil court had no jurisdiction to entertain the suit and to grant the relief prayed for. One of the issues framed in the trial court was "Whether the defendant No. 1 is a tenant of the plaintiff". In accordance with the provisions of the Agra Tenancy Act (III of 1926), which was the Act in force at the time of the institution of the suit in 1931, that issue was referred to the revenue court for decision. The revenue court tried that issue and held that the plea raised by the defendant Tahad Ali was well founded. Among the persons examined before the revenue court were Anwar Ullah, the elder brother of the plaintiff, who by that time had attained majority, and Muhammad Shakir. There were also receipts of rent produced before the court. It was admitted by Anwar Ullah and Muhammad Shakir that Tahad Ali had all along been in possession as a tenant and had been regularly paying rent to the zamindars. Taking all the evidence into consideration the learned Assistant Collector held, as stated above, that the relationship of landlord and tenant between the plaintiff and the defendant Tahad Ali was established. On receipt of this finding from the revenue court the learned Munsif dismissed the suit. The plaintiff appealed. The lower appellate court says in its judgment that the chief point that had to be decided was whether the defendant No. 1 was the tenant of the plaintiff. It reversed the finding of the revenue court on the ground that under the Muhammadan law Musammat Rabia Bibi had no right to execute a lease on behalf of her minor sons and that therefore it was

not binding on the plaintiff. It further held, on the authority of the case of *Panchanan Banerji* v. *Anant Prasad* (1), that the lease having been executed by some of the co-sharers was not binding upon the others also. In the result it allowed the appeal of the plaintiff and decreed the suit. That decree of the lower appellate court has been upheld by the learned single Judge of this Court.

The learned counsel for the defendant appellant has not contested the proposition of law that the mother of a Muhammadan infant is not entitled as his *de facto* guardian to alienate his property. He has urged that even if the perpetual lease granted by Musammat Rabia Bibi on her behalf as well as on behalf of her sons on the 6th of October, 1925, be held to be invalid under the Muhammadan law, that alone cannot entitle the plaintiff in the circumstances of this case to obtain a decree for ejectment from the civil court. His contention is that the land having been settled with the defendant as an agricultural tenant, the relationship of landlord and tenant clearly existed and the civil court had no jurisdiction under the provisions of the Agra Tenancy Act to entertain the suit for ejectment. He has for the purposes of this argument given up all claims under the perpetual lease in question and has confined his arguments to the rights of the appellant as a tenant of these plots of agricultural land under the provisions of the Tenancy Act. It seems to us that this contention of the learned counsel for the defendant appellant is well founded. That the plots in question are agricultural land is admitted on all hands. It is equally clear that they were settled with the appellant by all the co-sharers who were of age and on behalf of the minor co-sharers by their mother under whose protection and care they must have been living. The case is therefore clearly distinguishable from the case of *Panchanan Banerji* v. *Anant Prasad* (1) where the

(1) (1932) LL.R. 54 All. 738.

1938

TAHAD ALI KHAN v. ISRAR-ULLAH

agent of one of three co-sharers, who were all *sui juris*, had settled the land with the defendant Anant Prasad. The learned counsel for the plaintiff respondent has referred to the case of *Mohammad Ejaz Husain* v. *Mohamad Iftikhar Husain* (1). That case in its turn follows the earlier decision of their Lordships in *Imambandi* v. *Mutsaddi* (2), in which it has held that under the Muhammadan law the mother has no power as *de facto* guardian of her infant children to alienate or charge their immovable property. The transaction in question in that case was a sale. In *Mohammad Ejaz Husain's* case the mother had referred certain disputes to arbitration and an award had been made as the result of which property to which her minor son was entitled as an heir to his father had been distributed and shares had been given in it to others. Their Lordships observe at page 10 of the report:—"The award in this respect, when carried out, amounted to an alienation of the plaintiffs' shares in that property, to which being infants they could not consent, and unless Faiyaz-un-nissa their mother, had authority to act on their behalf and was competent to enter into the alleged arrangement by which the said alienation was effected the infant plaintiffs' shares in the said property could not be affected." The contention of the learned counsel for the plaintiff respondent is that the settlement of agricultural land, forming part of the zamindari property inherited by a Muhammadan widow and her minor son, with a tenant for agricultural purposes amounts to an alienation or transfer of the minor's interest in the immovable property. In our judgment that is a contention which connot be accepted. The settlement of agricultural land within the zamindari belonging to a Muhammadan infant by his *de facto* guardian with tenants for agricultural purposes does not, in our opinion, come within the rule of Muhammadan law laid down by their Lordships of the Privy

(1) (1931) I.L.R. 7 Luck. 1. (2) (1918) I.L.R. 45 Cal. 878.

Council in the cases mentioned above. If the contention of the learned counsel were accepted, it would come to this that if a Muhammadan dies leaving a widow and an infant son, the widow without obtaining a certificate of guardianship and obtaining the sanction of the court cannot do any of the acts which have to be done from day to day for the proper management of the property which she and her infant son have inherited from the deceased. Under the provisions of section 265 of the Agra Tenancy Act a lambardar in an undivided mahal is entitled in the absence of any contract or usage to the contrary to collect rents and other dues, and where no such contract or usage exists and the lambardar is so entitled to collect rents, he is also entitled to settle and eject tenants. Now, there must be many undivided mahals in which there are co-sharers who are Muhammadan infants. In accordance with the provisions of section 265 of the Tenancy Act quoted above, any one who is a lambardar is entitled to settle tenants, even though he is not the *de facto* guardian or even a relative of the minor Muhammadan co-sharer. It is clear therefore that any person who is managing zamindari property belonging to a Muhammadan infant has the right to settle agricultural land with tenants and that such acts of management do not amount to alienations or transfers of the minor's proprietary interests. Any one who is looking after the estate of an infant must have the power in the course of the day to day management of the estate to do things which are necessary in the interests of the estate. Learned counsel for the plaintiff respondent has had to go to the length of arguing that the *de facto* guardian of a Muhammadan infant has not the power even to arrange for the cultivation of his *sir* plots or to get his residential house repaired even though it may be in imminent danger of falling down. That in our opinion is not the law. We have accordingly come to the conclusion that, although the perpetual lease executed in

1938

TAHAD ALI KHAN v. ISRAR-ULLAH

favour of the appellant is not binding on the plaintiff respondent, the relationship of landlord and tenant has been established between the parties and that their rights and liabilities can be adjudicated upon by the revenue court alone. Reference may be made to the cases of *Basdeo Narain* v. *Muhammad Yusuf* (1) and *Tapesar Singh* v. *Chhabi Ahir* (2). It is true that these were cases of joint Hindu families in which the manager had given the perpetual lease, but that circumstances does not affect their applicability to the case before us so far as the point under consideration is concerned. The only difference between those cases and the one before us lies in the grounds on which the perpetual lease is held to be ineffectual. The essential point is that even if the perpetual lease granted by the manager fails on the ground that the manager was not in the circumstances of the case entitled in law to grant it, the person in whose favour the lease had been executed can become the tenant of the infant zamindar within the meaning of the Tenancy Act if the land is agricultural and he has been holding it as an agricultural tenant and has been paying rent. The facts found by the Assistant Collector have not been controverted and are not denied and the lower appellate court upset the finding of the Assistant Collector merely on the view that it took of the Muhammadan law.

It has been urged by the learned counsel for the plaintiff respondent that as the defendant appellant was relying on the perpetual lease in question, it is not open to him now to rely on his rights as a tenant of agricultural land. This contention also is not well founded. If a person is claiming a larger right, it is always open to him to plead in the alternative a smaller right also. That the smaller right was pleaded in this case is clear from the pleas taken in the written statement and from the fact that an issue as to the existence of the relationship of landlord and tenant between the

(1) (1928) I.L.R. 51 All. 285. (2) A.I.R. 1933 All. 631.

1938

TAHAD ALI KHAN v. ISRAR-ULLAH

plaintiff and defendant was framed and referred to the revenue court for trial. The judgment of the lower appellate court is entirely confined to a consideration of that very point. It is clear therefore that the appellant is not raising any new point which he had not raised in the court below.

For the reasons given above we allow this appeal, and, setting aside the decrees of this Court and of the lower appellate court, restore that of the trial court. The appellant shall have his costs in all the courts.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad

SITA RAM RAI AND ANOTHER (DECREE-HOLDERS) *v.*

MADHO PRASAD (JUDGMENT-DEBTOR)*

1938 *September*, 27

Civil Procedure Code, section 39—Transfer of decree for execution—Jurisdiction—Court to which decree is transferred must be of competent jurisdiction—Limitation Act (IX of 1908), article 182(5)—Application "in accordance with law"—Application asking court to take a step which it has no jurisdiction to take.

Under section 39 of the Civil Procedure Code a decree cannot be transferred by the execution court, on the application of the decree-holder, to another court for execution if the latter court has not pecuniary jurisdiction, i.e. if the suit in which the decree was passed was beyond its pecuniary limits. The execution court has no jurisdiction to make such a transfer.

An application by the decree-holder to transfer the decree for execution to another court, which is not a court of competent jurisdiction, is not an application "in accordance with law" within the meaning of article 182(5) of the Limitation Act, as the prayer asked for is one which the court has no jurisdiction to grant; such an application, therefore, cannot save limitation.

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

Sir *Syed Wazir Hasan* and Mr. *B. N. Misra*, for the respondent.

IQBAL AHMAD, J.:—This appeal was heard *ex parte* and allowed by me on the 16th of April, 1937. But, on an

*First Appeal No. 160 of 1936, from a decree of S. M. Mir, Civil Judge of Agra, dated the 25th of January, 1936.