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the conclusion that Gaur Das was entitled only to joint possession shows clearly that the learned Judge, on the evidence before him, came to the conclusion that Ballabh Das was in possession along with Gaur Das. There is, therefore, no force in the revision filed on behalf of Gaur Das also.

For the foregoing reasons we dismiss both these petitions in revision with costs.

FULL BENCH

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

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 December, 18

RAMDEO (PLAINTIFF) v. SADAYATAN PANDE AND OTHERS
 (DEFENDANTS)*

U. P. Encumbered Estates Act (Local Act XXV of 1934), section 9(5)(b) and (c)—Joint debtors—Application by some of them under section 4 of the Act—Remedy of creditor against the non-applicant debtors—Suit instituted against the non-applicants before the addition of clause (c) in 1939—Procedure.

Where some of the joint debtors have applied under section 4 of the U. P. Encumbered Estates Act but the others have not, then under section 9(5)(b) and (c), as amended by Local Act XI of 1939, the creditor must, in the matter of enforcing his claim against the non-applicant joint debtors, wait until the amount due by these debtors has been determined by the Special Judge, and thereafter he may apply to the civil court for a decree for that amount against them.

Where a suit against the non-applicant joint debtors was instituted by the creditor before the said amendment by the Act of 1939, the appropriate procedure would be to treat the suit as an application under section 9(5)(c) and to dispose of it accordingly.

Messrs. *Shiva Prasad Sinha, Muhammad Najm Uddin and B. C. Ganguli*, for the appellants.

Messrs. *N. Upadhiya and K. L. Misra*, for the respondents.

THOM, C. J., RACHHPAL SINGH and GANGA NATH, JJ.:—This is a plaintiff's appeal arising out of a suit in

*First Appeal No. 406 of 1937, from a decree of M. M. Seth, Civil Judge of Mirzapur, dated the 25th of August, 1937.

which the plaintiff claims a decree against the defendant for the sum of Rs.22,645-9-6.

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The defendant along with his two brothers executed a sarkhat on the 17th of June, 1934. The amount sued for represents one-third of what is due under the sarkhat. The three brothers who executed the sarkhat separated on the 23rd of July, 1936. Thereafter the defendant's two brothers filed an application under section 4 of the Encumbered Estates Act. An order was passed thereon by the Collector under section 6 of the Act. The application was transmitted to the Special Judge for disposal. In the application which they filed under the Act the defendant's brothers admitted liability to the extent of two-thirds of the amount due under the sarkhat. In the proceedings under the Encumbered Estates Act the plaintiff in the present suit filed a written statement on the 15th of April, 1937. He pleaded that the defendant in the present suit be made a party to those proceedings. It appears, however, that the defendant had already been made a party.

The suit has been dismissed by the learned Civil Judge. The learned Judge held that the suit did not lie, an application having been made by two out of the three joint debtors under the provisions of the Encumbered Estates Act.

It was contended in appeal that the provisions of the Act did not bar the suit. It was urged that the plaintiff was entitled to recover what was admittedly due from the joint debtor who had not applied under the Act. It was argued for the respondents on the other hand that sub-section (b) of section 7 of the Act clearly barred the suit. Sub-section (b) enjoins that "No fresh suit or other proceeding other than an appeal or revision against a decree or order, or a process for ejectment 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

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before the passing of the said order." This provision is undoubtedly very wide in its terms and it would appear from section 9, sub-section (5)(b) that the remedy of the creditor against the non-applying debtor was by way of execution of a decree passed by the Special Judge. Section 9, sub-section (5)(b) is as follows: "If all the joint debtors have not applied under section 4 the creditor shall have a right to recover from the debtors who have not applied only such amount on account of the joint debt as may be decreed by the Special Judge to be due by them."

The question as to whether under the Act before amendment the creditor was entitled by a separate suit to recover what was due by a joint debtor who had not preferred an application under the Act is one which is not free from difficulty. We are, however, absolved from deciding the question in view of the amendment to the Act, and in view of the procedure which we think it is appropriate to follow in disposing of this appeal.

The Encumbered Estates Act of 1935 has been amended by Act XI of 1939. In particular section 9, sub-section (5)(b) has been amended and for the word "decreed" in that sub-section the word "determined" has been substituted; and clause (c) has been added, by section 11 of the 1939 Act, as follows: "(c) Where no suit has been instituted or where no application for execution of a joint decree has been made in any other court in respect of such joint debt or joint decree the creditor may on application to any court having jurisdiction to entertain such suit, or execute such decree, obtain a decree, or get the decree executed against non-applicant joint-debtors, for the amount so determined, subject to the payment of the court fee payable on such execution application, or on a plaint in a suit for the amount determined by the Special Judge." Under the amended Act, therefore, the creditor must wait until the amount due by the joint debtor who has not

made an application under the Encumbered Estates Act has been determined by the Special Judge. Thereafter he may apply to the civil court for a decree for that amount against the debtor.

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When the suit out of which this appeal arises was filed the law as to the procedure to be adopted by the creditor to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encumbered Estates Act was somewhat in doubt. The procedure to be followed is now made plain by the amendment above referred to. In these circumstances we are of the opinion that the appropriate course would be for this Court to allow the appeal and direct the record to be sent to the court below. That court will then treat the suit as an application under section 11 of Act XI of 1939 and dispose of it according to law after the amount due by the defendant has been determined by the Special Judge.

In the result the appeal is allowed and the order of the learned Civil Judge is set aside. The record will be returned to the court of the learned Civil Judge with the direction that the plaint be treated as an application under section 11 of Act XI of 1939. This application will be disposed of according to law after the amount due by the defendant has been determined by the Special Judge in the proceedings under the Encumbered Estates Act.

In all the circumstances we direct the parties to bear their own costs in this appeal. Costs in the court below will abide the result.