

*Before Justice Sir Edward Bennet and Mr. Justice Verma*

GHASITU MAL (PLAINTIFF) *v.* ASA RAM (DEFENDANT)\*

1939  
September,  
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*Agra Tenancy Act (Local Act III of 1926), section 227—Suit for profits—Account of profits from sir—Defendant co-sharer also exproprietary tenant—Former suit inter partes for rent of exproprietary tenancy—Position taken by plaintiff in former suit—Estoppel—Evidence Act (I of 1872), section 115.*

The defendant was the sole owner in a particular khewat number, he also had 32 bighas sir. He sold one-sixth share of his zamindari rights in the khewat number to the plaintiff, and became exproprietary tenant of one-sixth of his sir, i.e. of about  $5\frac{1}{2}$  bighas sir. Exproprietary rent was fixed on this  $5\frac{1}{2}$  bighas, and the plaintiff sued for the rent. Although in law the plaintiff was entitled to only one-sixth of the rent, the remainder belonging to the defendant who was the only other co-sharer in the khewat number, the whole of the rent was decreed to the plaintiff and it was doubtless intended and understood that this was a convenient method of settling accounts of the sir and that plaintiff would accept the whole rent as including his share of the profits of the remaining  $26\frac{1}{2}$  bighas of sir. Thereafter the plaintiff sued the defendant for profits, including a claim to a share of the profits from the sir: *Held* that the plaintiff was estopped by section 115 of the Evidence Act from altering the position which he took up in the rent suit in regard to the profits of the sir and obtained the whole of the exproprietary rent from the defendant; having then obtained the whole of that rent as representing his share of profits of the sir, he could not now claim again any share of such profits.

Mr. *Jagnandan Lal*, for the appellant.

Mr. *B. Mukerji*, for the respondent.

BENNET and VERMA, JJ.:—This is a second appeal by the plaintiff who has been granted a decree for profits by the revenue court and who appealed in regard to a claim of his for a share of the profits of the sir land and the learned District Judge dismissed that appeal.

The circumstances are that in a particular khewat number the defendant Asa Ram was the sole owner, and

\*Second Appeal No. 183 of 1937, from a decree of K. K. K. Nayar, Additional District Judge of Meerut, dated the 14th of October, 1936, confirming a decree of Nehal Singh, Assistant Collector first class of Muzaffarnagar, dated the 31st of January, 1936.

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he had 32 bighas of sir in his possession. He executed a sale deed for one-sixth share of the zamindari rights in this khewat number to the plaintiff. Proceedings were taken under section 36 of the Land Revenue Act for assessing the rent on the exproprietary holding. For the years in suit the plaintiff brought a suit for arrears of exproprietary rent against the defendant. In that suit the plaintiff claimed the whole of the exproprietary rent. Actually, in accordance with the various rulings of this Court the plaintiff was only entitled to one-sixth of the exproprietary rent because in accordance with those rulings the exproprietary tenant is not the exproprietary tenant merely of the vendee but of the whole coparcenary body.

Apparently in the rent suit the parties each accepted the proposition that this rule of law which is intended for general purposes would not apply in this special case. No doubt this was more convenient for the purpose because there are only two co-sharers in the khewat number, the plaintiff and the defendant, and there would be no point in the defendant paying a share of exproprietary rent to himself. Therefore it was doubtless intended that he should pay the whole of his exproprietary rent to the plaintiff and that the plaintiff would accept this as his share of the profits of that portion of the khewat number which had been originally represented by 32 bighas of sir. Having obtained a decree for the whole amount of the exproprietary rent the plaintiff now claims in appeal and in second appeal that he should receive one-sixth share of the remaining amount of the 32 bighas which is represented by approximately 26 bighas of sir. If we acceded to his request this would mean that he would obtain a larger share of the profits of the khewat number than is equitable; that is, he is entitled to one-sixth share of the total profits and if his claims were allowed he would receive appreciably more as he has already obtained the whole instead of one-sixth of the exproprietary rent.

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Some rulings were referred to in regard to cases where a co-sharer had collected more than his share of the expropriatory rent of a tenant, but those cases were different from the present case, because in those cases the expropriatory tenant was not a co-sharer. In the present case the expropriatory tenant is not only a co-sharer but he is the sole remaining co-sharer and the sole defendant in the present case. The decree in the rent suit therefore was a decree between the present parties.

Some point is raised for appellant that in that decree the defendant was sued in his capacity of a tenant and not in his capacity of a co-sharer. We do not think that makes any difference. We may also note that under section 266(4) of the Tenancy Act it was only because the defendant had the capacity of a co-sharer and also of an expropriatory tenant that the plaintiff alone was entitled to sue for arrears of rent in the revenue court.

It appears to us that the plaintiff is estopped by section 115 of the Evidence Act from altering the position which he took up in the revenue court in regard to the profits for the years in suit in that suit, and he claimed and obtained the whole of the sir rent from the defendant. Having obtained the decree on the theory that he alone was entitled to the whole of the expropriatory rent we cannot now allow him to change the allegations that he made in that suit. We therefore consider that we must hold that the plaintiff is not entitled to any share of the remainder of the original 32 bighas sir.

Accordingly we dismiss this appeal with costs.