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ISAN KHAN v. NGA RAM.

The Court (STUART, C. J. and STRAIGHT, J.) delivered the following

JUDGMENT.—It does not appear to us that s. 13 of Act XV of 1877 applies to proceedings in execution, and we therefore do not think that time was saved to the appellant during his absence at Kabul. The other grounds are not pressed. The appeal is dismissed with costs.

Appeal dismissed.

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August 17.

Before Mr. Justice Oldfield and Mr Justice Straight.

UDAI RAM AND ANOTHER (DEFENDANTS) *v.* GHULAM HUSAIN (PLAINTIFF).*

Lambardár and Co-sharer—Profits.

The lambardár of one patti of a mahál, who was a shareholder of both pattis of the mahál, sued the lambardár of the other patti and a shareholder of such patti for profits divisible among the shareholders of the mahál generally, deducting the share of such profits belonging to the defendants *Held* that, as the suit was one for settlement of accounts between the body of shareholders in which it was necessary that all of them should be properly represented, and as the plaintiff was suing without their authority, the suit was not maintainable.

A VILLAGE called Bedohri consisted of two pattis, one of 6¾ biswa, the other of 13¼ biswas. The plaintiff in this suit was the lambardár of the former patti, and Udai Ram, one of the defendants in this suit, was the lambardár of the latter patti. The plaintiff in this suit was a co-sharer of both pattis. Udai Ram and his co-defendant held lands in both pattis and a part of the common lands of the village as "*khud-kasht*" at certain rates of rent. They sub-let such lands from the beginning of 1283 fasli at enhanced rates of rent. The plaintiff brought the present suit against them in the Court of an Assistant Collector of the first class, claiming, as the profits of the co-sharers of the village, Rs. 1,102-10-4 the difference, after deducting the share of the defendants, between the rent payable by them for such lands for the years 1283 and 1284 fasli, and the rent payable to them by their sub-tenants for such lands for those years. He alleged that

* Second Appeal, No. 485 of 1880, from a decree of H. M. Chase, Esq., Judge of Saháranpur, dated the 11th March, 1880, reversing a decree of T. Harkness, Esq., Assistant Collector of the first class, dated the 1st December, 1879.

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the defendants held such lands at favorable rates of rent on the condition that they should retain them in their own cultivation, and that, if they sub-let such lands, they should forfeit their right to hold them at such rates, and should be liable to pay the rent payable by ordinary tenants in the village. The defendants set up as a defence to the suit, amongst other things, that the plaintiff was not competent, without authority, to sue on behalf of all the co-sharers of both pattis. The Court of first instance framed on the allegations of the parties the following issues, amongst others, *viz.*—"Can plaintiff as a lambardár or co-sharer sue the defendants in his own name to the exclusion of his co-sharers. Is plaintiff, being lambardár of the 6¾ biswa patti, authorized to recover profits on behalf of the co-sharers of both pattis." These issues the Court of first instance decided against the plaintiff, as also the other issues, and dismissed the suit. It observed in its decision as follows:—"With reference to the first issue, I have to remark that the plaintiff, in the absence of a power of attorney on behalf of the other co-sharers in his name, cannot sue the defendants but as their agent. Such suit under the rulings noted—*Ladlee Pershad* v. *Gunga Pershad* (1) and *Manohar Das* v. *Kishen Dyal* (2)—cannot be brought in the name of agents, but in that of persons in whom the legal right of suit is vested. Hence the action brought by the plaintiff against the defendant is illegal. Similarly, the plaintiff had sued the defendant for a similar claim for 1283 in Mr. Donovan's Court, and the claim was lodged for patti 6¾ biswas only. That officer passed a decree in his favor, but before him no such plea or question was moved; otherwise, had the above rulings been brought to his notice, I doubt not he would probably have concurred with my opinion on the point. The result of the above issue was sufficient to throw out the case. But the Court deems it necessary to touch on every issue, so that the case be thoroughly settled with regard to all the points at issue. Therefore I give my judgment relative to every remaining issue as follows. The above rulings shall answer for the second issue too. However, I do not think it amiss to remark that a lambardár generally can sue, for recovering of rent, the tenants of other co-sharers, if he has been

(1) H. C. R., N.-W. P., 1872, p. 59. (2) H. C. R., N.-W. P., 1871, p. 175.

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doing so according to village-custom. He can bring action for recovery of revenue against other co-sharers. But I do not see a rule under which he can sue on behalf of other co-partners a co-sharer having *khud-kasht* for the enhanced rent realized by the latter from his sub-tenants; much less, can he bring such an action for the patti (13¼ biswa) of which he is not lambardár at all. This evidently leads one to conclude that the plaintiff is at least entitled to recover the claim for patti 6¾ of which he is a lambardár. But under the rulings given above, and in the absence of a power of attorney on behalf of other co-sharers, the plaintiff is not authorized to lodge the action in hand at all." On appeal by the plaintiff the District Court gave him a decree for the amount claimed.

The defendants appealed to the High Court, again contending that the plaintiff was not competent to sue for the body of the co-sharers of the village without their authority.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD, J., and STRAIGHT, J.) delivered the following

JUDGMENT.—The plaintiff and defendants are co-sharers in the mauza which is divided into two pattis, plaintiff being lambardár in one patti, and one of the defendants lambardár in the other. The defendants hold and cultivate certain lands in both pattis: and this suit has been brought by the plaintiff to recover from defendants a sum of money which plaintiff alleges is divisible among the body of shareholders by way of profits, and for which defendants have to account out of the rents collected by defendants on the lands they hold, after deducting the defendants' own share of the profits. That is substantially the character of this suit, and it is therefore one in the nature of a suit for settlement of accounts between the body of shareholders, in which it was necessary that all should be properly represented. The plaintiff professes to sue for the body of shareholders, but he cannot do so without their authority, which is wanting in this suit. The primary

ground, therefore, on which the Court of first instance dismissed the suit is valid, namely, that the suit is not maintainable, and the third plea in the memorandum of appeal must prevail. We reverse the decree of the lower appellate Court and restore that of the first Court, and dismiss the suit with costs.

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Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Straight.

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NARAIN DAT (PLAINTIFF) *v.* BHAIRO BUKHSHPAL AND OTHERS (DEFENDANTS).*

Act X of 1877 *(Civil Procedure Code), s.* 13, Explanation II.—*Res judicata.*

S and *B* jointly sued *N* for the redemption of a mortgage of an eight-anna share of a village, *B* suing as the purchaser from the mortgagor of a moiety of such share. *N* did not in defence of such suit assert a right of pre-emption in respect of such moiety, although such right had accrued to him on its sale by the mortgagor to *B*. *S* and *B* obtained a decree in such suit and the mortgage was redeemed. *N* subsequently sued *B* and his vendor to enforce his right of pre-emption in respect of such moiety. *Held* that it was incumbent upon *N* in the former suit to have asserted in defence his right of pre-emption in respect of such moiety, inasmuch as if that right had been established it must, so far as *B* was concerned, have proved fatal to his title to redeem, and that as he had not done so the suit to enforce his right of pre-emption was barred by the provisions of s. 13 of Act X of 1877, *Explanation II.*

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Ajudhia Nath*, for the respondents.

The judgment of the Court (PEARSON, J. and STRAIGHT, J.) was delivered by

STRAIGHT, J.—One Zor Prasad was the owner of an eight-anna share in mauza Hasanpur. This he mortgaged to the plaintiff-appellant, Narain Dat, in the year 1266 fasli for Rs. 701 advanced. Upon his death his estate was inherited by his son Pirbhu Dayal, whose name was recorded in the revenue record. Afterwards Pirbhu Dayal caused *dakhil-kharij* to be effected in favour of his cousin Sital Prasad in respect of four of the eight annas. The remaining four annas he sold to the defendants-respondents. Ultimately Sital

* Second Appeal, No 386 of 1880, from a decree of D. M. Gardner, Esq., Judge of Gorakhpur, dated the 27th January, 1880, reversing a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 11th September, 1879.