1880
August 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BHAWANI GIR (PLAINTIFF) *v.* DALMARDAN GIR (DEFENDANT.)*

Lambardár and Co-sharer—Suit for arrears of revenue—Mortgagee—Act XVIII. of 1873 (*N.-W. P. Rent Act*), *s.* 93 (g)—*Act VIII of* 1879, *ss.* 11, 12—*Jurisdiction.*

Per STUART, C. J., and STRAIGHT, J.—The term 'co-sharer" in s. 93 (*g*) of Act XVIII of 1873 does not include the mortgagee of a co-sharer, and therefore a suit by a lambardár against the mortgagee of a co-sharer for arrears of Government revenue is not one which, under that section, is cognizable in a Court of Revenue, but is one which is cognizable in a Civil Court.

Per PEARSON, J, and OLDFIELD, J.—*Contra.*

THIS was a suit under s. 93 (*g*) of Act XVIII of 1873, in which the plaintiff claimed, as the lambardár of a mahál, Rs. 145-5-5, arrears of Government revenue, for the years 1284, 1285, and 1286 fasli, in respect of a four-anna share of such mahál. The defendant was the mortgagee of the four-anna share under a mortgage from the plaintiff, the owner of the share. The plaintiff mortgaged the share to the defendant in 1273 fasli for Rs. 900. Under the terms of the instrument of mortgage, the share was redeemable at the end of 1281 fasli, and the mortgagee was to hold possession of the share, paying the Government revenue and appropriating the profits of the share in lieu of interest on the mortgage-money. The plaintiff stated in his plaint in this suit that the defendant, notwithstanding he had collected the rents of the share for the years 1284, 1285, and 1286 fasli, had not paid the Government revenue payable in respect of the share for those years. On the issue whether the suit was cognizable in a Court of Revenue, the Assistant Collector trying it held that it was cognizable in a Court of Revenue, the defendant being the representative of a co-sharer. With reference to the merits of the suit, the Assistant Collector held that the defendant was not liable for the arrears of Government revenue claimed, as he had not been in possession of the share and had not collected the rents of it during the years for which such arrears were claimed. On appeal by the plaintiff the District Judge affirmed the decree of the Assistant Collector.

* Second Appeal, No. 338 of 1880, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 6th January, 1880, affirming a decree of Babu Chatardhari Thakur, Assistant Collector, dated the 6th October, 1879.

On appeal by the plaintiff to the High Court, the Division Bench before which the appeal came for hearing (PEARSON, J., and STRAIGHT, J.), on the 12th July, 1880, referred to the Full Bench the question whether the suit was entertainable by the Revenue Court, the order of reference being as follows :—

ORDER OF REFERENCE.—This is a suit brought by a lambardár under cl. (*g*), s. 93, Act XVIII of 1873, for arrears of Government revenue against the defendant, who is not a co-sharer in the mahál but the mortgagee of a co-sharer. We refer to a Full Bench the question whether the suit was entertainable by the Revenue Court under the law above cited.

Babu *Lal Chand* and Mir *Akbar Husain*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Lala *Lalta Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—I must answer this reference in the negative. I am quite clear that the suit was not entertainable by the Revenue Court, but could only be proceeded with in the Civil Court. I am clear that under the revenue law as applicable to this case, that is, the revenue law in operation prior to the passing of the amending Act VIII of 1879, a mortgagee is not in the position of a co-sharer. A co-sharer is a land-owner, or land-holder, or proprietor, whereas the interest of a mortgagee, even of a mortgagee in possession, is of a more limited nature. A mortgagee may by foreclosure become possessed of the mortgaged property, but he can never by the direct and unaided effect of his mortgage-right become absolute owner, and unquestionably he has no proprietary right to begin with. Ss. 11 and 12 of Act VIII of 1879 (amending the Revenue Act of 1873) were referred to at the hearing as showing that the intention of the Legislature was that the terms "owner" and "proprietor" included a mortgagee. But if these words were intended to be applied in their full and complete sense, no argument could be deduced from such a provision of the law in favor of the present appellant, for that Act is not retrospective, or simply declaratory in any retrospective sense; and it would be much more reasonable

1880

AWANI GIR v. ALMARDAN GIR.

to argue that ss. 11 and 12 of Act VIII of 1879 rather showed that, in the mind and intention of the Legislature, the revenue law previously enacted did not recognise any synonymous right in landlord or proprietor and mortgagee, but that to make these different rights mean the same thing an express law had for that purpose to be passed. The sections in question, however, only provide that a mortgagee shall be deemed to be an owner or proprietor in a very partial sense. Thus s. 11 provides that a mortgagee shall only be deemed an owner as that term is used in s. 141 of Act XIX of 1873, that is, as being "bound to maintain and keep in repair at their own cost the boundary-marks lawfully erected" in maháls, villages, or fields; and under s. 12 a mortgagee in possession or a farmer is only to be understood as a proprietor within the meaning and application of s. 146 of Act XIX of 1873. In all other respects, as regards these two sections of Act VIII of 1879, a mortgagee remains such without any further rights.

The pleader for the plaintiff-appellant referred us to the definition of land-holder in the Rent Act XVIII of 1873, as "the person to whom the tenant is liable to pay rent." This was a plausible and allowable argument, but it is untenable, for it is plain from the context and spirit of the Rent Act that land-holder means proprietor in an absolute sense, for it is used throughout that Act in connection with the right to enhance rent and other absolute and independent powers which in no view of his legal position can a mortgagee be allowed to claim. Allusion is made by Pearson and Oldfield, JJ., to two cases, one decided by the Sudder Court in 1864 (1), and which is no doubt in favor of the appellant's contention, if the law it lays down could be accepted by this Court. But I am distinctly of opinion that the ruling in that case was erroneous and ought not to be followed. But it was further pointed out that that case had been followed by a decision of a Bench of this Court in *Sree Kishen* v. *Ishri Pertab* (2). It does not appear to me, however, that we are to conclude from the report of that case that it followed the ruling of the Sudder Court. It recites the ruling in question, but it expresses no opinion as to whether such ruling was right or wrong, and the judgment goes

(1) *Gokul Dass* v. *Balmokund*, S. D. A. Rep., N.-W. P., 1864, vol. ii, 592.

(2) H. C. R., N.-W. P., 1867, p. 299.

on simply to observe that the position of the parties to the suit had not been ascertained, and that it was a question whether, the plaintiff's share being in the possession of a mortgagee, he could bring a suit. This Court, therefore, remanded the case for re-trial and a fresh decision. Such a case, therefore, proves nothing. For all these reasons my answer to this reference, as already signified, is in the negative.

PEARSON, J., and OLDFIELD, J., concurring.—The answer to the question referred depends on the construction to be put on the word co-sharer in cl. (*g*), s. 93 of Act XVIII of 1873, whether it includes a mortgagee of a co-sharer. We find that it has been held by the late Sudder Dewany Adawlut that s. 1, Act XIV. of 1863, which referred to suits by co-sharers for their share of the profits of an estate, was sufficiently comprehensive to include "not only actual proprietary co-partners, but all who occupy their places, such as transferees and mortgagees of their rights, who for the time occupy their places." This was ruled in a case decided on the 25th November, 1864, No. 698 (1), in which it was held that a suit for a share of profits by a co-sharer of a mortgagee against another co-mortgagee recorded as responsible *málguzár* must, under Act XIV of 1863, be brought in the Revenue Court; and the same rule was followed by this Court in *Sree Kishen* v. *Ishri Pertab* (2). Act XIV of 1863 has been superseded by Act XVIII of 1873, but the language of the two Acts, so far as they refer to suits by lambardárs for arrears of revenue payable through them by co-sharers whom they represent, and to suits by co-sharers for their share of profits, is the same; and we are indisposed to place any other construction on the term co-sharer in Act XVIII of 1873 than the one which has been hitherto accepted, and which would make it include a mortgagee, whatever opinion we might have been disposed to form had the question now come before us for the first time. It may be noticed that Act VIII of 1879 in amending the Land-Revenue Act has removed any difficulty of a similar nature that might arise under that Act in the definition of the term "owner," by defining it to include a lessee, mortgagee,

(1). *Gokul Dass* v *Balmokund*, S. D. A. Rep., N.-W. P. 1864, vol. ii, 592.

(2) H. C. R., N.-W. P., 1867, p. 299.

1880

BHAWANI GIR v. JALMARDAN GIR.

or other person in possession of the land. The answer to the question referred will be in the affirmative.

STRAIGHT, J.—In answer to this reference I would say that, in my opinion, the defendant did not hold the relation of a co-sharer to the plaintiff, and therefore could not be sued by him in the Revenue Court for arrears of Government revenue under the provisions of cl. (g), s. 93 of the Rent Act, for he was a mere mortgagee without possession, and had not the full proprietary rights of a co-sharer. Such obligations as existed between them were embodied in the mortgage-deed, and it is in his character of mortgagor that the plaintiff is entitled to claim, and not as lambardár. It therefore seems to me that the suit was not cognizable by the Revenue Court.

On the case again coming before the Division Bench (PEARSON, J., and STRAIGHT, J.) for disposal, the following judgment was delivered by the Division Bench:

PEARSON, J.—The Judges of the Full Bench being equally divided in opinion on the question referred to it, we proceed to dispose of the appeal irrespectively thereof. Whether the suit be cognizable by a Revenue or by a Civil Court, the Judge was competent to dispose of it on the merits under s. 207, Act XVIII of 1873. On the facts found by the lower Courts, we think that the first ground of appeal should be disallowed, and we see nothing in the remaining grounds to warrant interference with their decision. The appeal is therefore dismissed with costs.

1880
August 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

ZULFIKAR HUSAIN AND ANOTHER (DEFENDANTS) v. MUNNA LAL AND ANOTHER (PLAINTIFFS)*

Suit on accounts stated—Act IX of 1871 (*Limitation Act*), *sch.* ii, *No.* 62—*Act XV of* 1877 (*Limitation Act*), *s.* 2, *sch.* ii, *No.* 64—" *Title.*"

The accounts in a suit on accounts stated were stated when Act IX of 1871 was in force and were not signed by the defendant or an authorized agent on his behalf. Had that Act been in force when the suit was instituted the suit would have been

* Second Appeal, No. 302 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 23rd January, 1880, affirming a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 18th September, 1878.