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under consideration being part of the settlement record duly made and attested, the entries in them with regard to the amount of rent of the holding must be presumed, until the contrary is proved, to be a correct record of the agreement of the parties in respect of the rental. The judgment in the case, on which the lower appellate court relies, does not disclose the nature of the revenue papers which were produced as evidence in proof of the amount of rent in that case. I am, therefore, of opinion that the entries prove the case of the plaintiff as to the amount of the rent of the holding and it is agreed that there is no rebutting evidence against the evidence furnished by the entries.

I, therefore, allow this appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan.*

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*Author, p. 2.*

SHIVA DAYAL SINGH (DEFENDANT-APPELLANT) v. RAM NARAIN AND OTHERS (PLAINTIFFS), AND MUSAMMAT RAJ KUMARI AND OTHERS (DEFENDANTS) (RESPONDENTS).\*

*Oudh Rent Act (XXII of 1886), section 108, clause (15)—Suit by a co-sharer against a lambardar for share of profits—Lambardar's liability to pay interest—Fiduciary position of lambardar—Co-sharer, whether entitled to profits on the basis of gross rental as well as interest.*

*Held*, that a lambardar's liability to pay interest on the arrears of profits due to a co-sharer could not be based on the provisions of the Indian Contract Act, 1872, nor on those of the Interest Act, 1839, but he could be charged with

\*Second Rent Appeal No. 15 of 1927, against the decree, dated the 18th of December, 1926, of Mahmud Hasan, District Judge of Hardoi, modifying the decree, dated the 15th of May, 1926, of Shahzad Ali Khan, Assistant Collector, First Class, district Hardoi, decreeing the plaintiff's claim.

interest under certain circumstances on the ground that he stood in a fiduciary position towards his co-sharers and was liable to account.

Where a co-sharer has been allowed a share of profits on the basis of gross rental he is not further entitled to recover any interest on the arrears of profits. The measure of loss which a co-sharer has suffered and for which the lambardar is made liable is the difference between the gross rental and the actual collections. Obviously a co-sharer is not entitled to compensation twice over on an accounting between him and the lambardar when the former occupies the position of a *cestui que* trust and the latter of a trustee. [*Babu Aditya Prasad v. Babu Chhote Lal* (1); and *Mirza Sadik Husain Khan v. Hafizul Rahman* (2), followed.]

Messrs. *Ali Zaheer* and *Shankar Sahai Srivastava*, for the appellants.

Mr. *Radha Krishna*, for the respondents.

HASAN, J. :—This is the appeal of Sheo Dayal Singh, defendant No. 1, from the decree of the District Judge of Hardoi, dated the 18th of December, 1926, modifying the decree of an Assistant Collector of the first class of the district of Hardoi, in a suit for a share of profits under clause 15 of section 108 of the Oudh Rent Act, 1886.

The plaintiffs hold certain shares in the village of Saroman Nagar, district Hardoi. Other shares in the village are held by the defendants. Babu Sheo Dayal Singh is also the lambardar of the village. The plaintiffs asked for a decree of their share of the profits for the years 1329 to 1332 Fasli. The suit was decreed by the court of first instance for a sum of Rs. 731-12-9. That court allowed a deduction in favour of the lambardar for village expenses to the extent of Rs. 151-13 and refused to saddle him with any interest on the arrears of profits. The lower appellate court has reduced the deduction for village expenses to Rs. 106-4 only and has also awarded interest against the lambardar on the arrears of profits

(1) (1924) 11 O.L.J., 206.

(2) (1903) 6 O.C., 89.

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at the rate of 6 per cent. per annum "from the date when they became due." The modification made by the lower appellate court in these matters is challenged in second appeal before me.

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On the question of village expenses, the finding of the court below is clearly based on a consideration of the evidence in that behalf and is one of pure facts. It must, therefore, be upheld.

The second question of the lambardar's liability to pay interest is to my mind one of importance. The general rule applicable to such class of cases was stated by me in the case of *Babu Aditya Prasad v. Babu Chhote Lal* (1), following the decision of Mr. SPANKIE, A. J. C., to *Mirza Sadik Husain Khan v. Hafizul Rahman* (2). I held in the case just now mentioned that a lambardar's liability to pay interest on the arrears of profits due to a co-sharer could not be based on the provisions of the Indian Contract Act, 1872, nor on those of the Interest Act, 1839, but he could be charged with interest under certain circumstances on the ground that he stood in a fiduciary position towards his co-sharers and was liable to account. I still adhere to the view then expressed by me.

The duties of a lambardar are the duties imposed on him by law. Under section 234, clause (f) of the United Provinces Land Revenue Act, 1901, the Local Government may make rules regulating the appointment, duties and dismissal of lambardars. The local Government has made such rules. They will be found in chapter VIII of volume I of the Manual of the Revenue Department, United Provinces. In paragraph 232 the duties of a lambardar are specified as follows :

" (a) . . . . . ; "

(b) to collect rents from tenants . . . . .

(1) (1924) 11 O.L.J., 206.

(2) (1903) 6 O.C., 89.

- (c) to divide at the appointed time such profits as may be divisible among the co-sharers whom he represents;
- (d) to disburse such sums on account of village expenses as he may be authorized to disburse out of the profits coming into his hands;
- (e) . . . . . ;
- (f) . . . . . ;
- (g) . . . . . ;
- (h) . . . . . ;
- (i) . . . . . ”

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Having regard to the nature of the duties of a lambardar, as stated above, there is no doubt in my mind that the lambardar of the village is clothed with a fiduciary character in relation to the co-sharers of the village in the matter of the collection and the disbursements of the village rents. In equity, therefore, he holds the position of a constructive trustee and, as such, he is “only bound to use such due diligence and care in the management of the estate as men of ordinary prudence and vigilance would use in the management of their own affairs”—See Underhill’s Law of Trusts and Trustees, eighth edition (1926), page 268, article 51. According to section 94 of the Indian Trusts Act, 1882, also the position of a lambardar is that of a constructive trustee and, according to section 95, he is under an obligation to perform the same duties and is subject, so far as may be, to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it. According to section 15 of the same Act a trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property as if it were his own and in the absence of a contract to the contrary a trustee so dealing is not

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responsible for the loss, destruction or deterioration of the trust property.

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In the present case the lambardar's liability must be determined primarily with reference to his duty of dividing at the appointed times such profits as may be divisible among the co-sharers whom he represents and also with reference to his duty to collect rents from tenants. It would follow from what has been stated above that if the rents due from tenants have not been collected in their entirety for the reason that the lambardar has not used such due diligence and care in the management of the estate as men of ordinary prudence and vigilance would use in the management of their own affairs he is guilty of breach of trust. He would also be guilty of breach of trust if he fails to divide at the appointed times such profits as may be divisible among the co-sharers and if his failure to do so can be attributed to his negligence in the management of the estate. The determination of the question of negligence or want of due diligence must necessarily depend on the particular circumstances of each case. The logical corollary, as it appears to me, is that the essence of breach of trust, with reference to both the two duties of collecting rents and dividing the profits, lies in negligence or absence of due diligence in the management of the estate.

In a case where breach of trust has thus occurred the court of equity may compensate the co-sharer for the loss, if any, in either of the two ways by charging the lambardar (1) with gross rental or (2) with interest on the actual realizations. But I am unable to hold that a court of equity will charge the lambardar in both ways.

In the present case the courts below have made the lambardar liable for the plaintiff's share of the profits on the basis of gross rental and there, in my judgment, the liability should rest. "Where trustees allowed rents to get in arrear, it was held that they were liable

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to make good the arrears, though without interest." —See Underhill's Law of Trusts and Trustees, eighth edition, page 271, and the cases cited therein. In so dealing with a case the measure of loss which a co-sharer has suffered and for which the lambardar is made liable is the difference between the gross rental and the actual collections. Obviously the co-sharer is not entitled to compensation twice over on an accounting between him and the lambardar when, as it has been held by me, the former occupies the position of a *cestui que* trust and the latter of a trustee. The plaintiffs in the present case having been allowed a share of profits on the basis of gross rental are not, in my opinion, further entitled to recover any interest on the arrears of profits.

I, therefore, allow the appeal and modify the decree of the lower appellate court by striking off the amount of interest which the lower court has allowed the plaintiffs in respect of interest on the arrears of profits for any period of time. In the matter of costs the defendant-appellant will be entitled to recover them from the plaintiffs in proportion to his success in this Court and in the lower appellate court. As regards costs in the court of first instance the decree of that court is upheld.

*Appeal allowed.*