APPELLATE CIVIL

Before Mr. Justice C. M. King, Chief Judge

1935
January, 9

BHAGWAN DUTTA (PLAINTIFF-APPELLANT) *v.* BALBHADDAR (DEFENDANT-RESPONDENT)*

Oudh Rent Act (XXII of 1886), sections 108 (2), 116, 117 and 127—Suit for arrears of rent under section 127(1)—Decree passed for ejectment only—Appeal, whether lies to District Judge or Commissioner—Jurisdiction of Civil and Revenue Courts—Decree for ejectment only, whether can be passed in a suit for arrears of rent.

In a suit for arrears of rent under section 127(1) a decree for ejectment can only be passed as a consequential relief, on the application of the plaintiff, if a decree for arrears of rent has already been passed, such a suit therefore is a suit of the description mentioned in section 108, clause (2) and therefore irrespectively of the nature of the decree passed by the trial Court the appeal must lie under section 119 to the District Judge. *Bam Bahadur Singh* v. *Pirthi Singh* (1), dissented from. *Sarfaraz Singh* v. *Deputy Commissioner, Manager Court of Wards, Ajudhia estate* (2), followed.

A decree for ejectment under section 127(2) can only be passed when a Court has passed a decree for arrears of rent under sub-section (1). If therefore the Court fails to pass a decree for arrears of rent under sub-section (1), it has no jurisdiction to pass a decree for ejectment.

Mr. *Radha Krishna Srivastava*, for the appellant.

Mr. *S. N. Roy*, for the respondent.

KING, C.J.:—This is a second rent appeal by the plaintiff arising out of a suit for arrears of rent under section 127 of the Oudh Rent Act. The plaintiff sued defendant No. 1 as being a mere trespasser cultivating land in the plaintiff's patti. Defendant No. 1 pleaded that he was cultivating the land as a tenant of defendant No. 2 and had been paying rent to defendant No. 2. The trial Court dismissed the plaintiff's suit as regards

*Second Rent Appeal No. 87 of 1933, against the decree of Pandit Shiam Manohar Nath Shargha, District Judge of Gonda, dated the 25th of February, 1933, reversing the decree of Saiyed Zahir Uddin, Assistant Collector, 1st class, Gonda, dated the 26th of September, 1932.

(1) (1928) 22 Revenue Decisions, p. 626. (2) (1929) I.L.R., 4 Luck., 517.

arrears of rent but passed a decree for ejectment of defendant No. 1. The question whether defendant No. 1 had in fact been paying the rent of the holding in good faith to defendant No. 2 was not decided, as it should have been, having regard to the provisions of section 138 of the Oudh Rent Act.

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The plaintiff did not appeal against the dismissal of his claim for rent but the defendant appealed against the decree for ejectment and the learned District Judge in his appellate order dismissed the plaintiff's suit on the finding that section 127 of the Oudh Rent Act does not apply to the case and on the further ground that a decree for ejectment could not be passed unless and until a decree for arrears of rent had been passed.

The first contention of the plaintiff-appellant is that as the decree passed by the trial Court was for ejectment only, therefore an appeal against that decree lay to the Commissioner and not to the District Judge.

Under section 116 of the Oudh Rent Act an appeal from a decree made by an Assistant Collector of the first class lies ordinarily to the Commissioner but the provisions of section 116 are subject to the provisions of section 119. Under section 119 it is clear that an appeal from an original decree of an Assistant Collector of the first class in a suit under section 108, clause (2) lies to the District Judge if the value of the suit does not exceed Rs.5,000. The suit under section 127 in so far as it was a suit for rent undoubtedly was a suit of the description mentioned in section 108, clause (2) and therefore I think it is clear that an appeal against a decree passed by the Assistant Collector in such a suit must lie to the District Judge. The fact that the decree passed by the trial Court was for ejectment only is in my opinion immaterial. The suit was a suit for arrears of rent under section 127, clause (1) and a decree for ejectment can only be passed as a consequential relief, on the application of the plaintiff, if a decree for arrears of rent

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has already been passed. The suit therefore was certainly a suit of the description mentioned in section 108, clause (2) and therefore irrespectively of the nature of the decree passed by the trial Court the appeal must lie under section 119 to the District Judge.

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Certain authorities have been cited but only one of them is in the appellant's favour. In the case of *Bam Bahadur Singh* v. *Pirthi Singh* (1) it was held by a learned single Judge of this Court that an appeal against a decree for ejectment passed under sub-section (2) of section 127, Oudh Rent Act, lies to the Commissioner and the Board whereas a decree for arrears of rent passed under sub-section (1) of section 127 is appealable on the civil side. This decision is no doubt in the appellant's favour and on the strength of that decision it could be held that in the present case where the trial Court passed a decree for ejectment only and not a decree for arrears of rent then the appeal would lie only to the Revenue Court. It must be observed however that the question of jurisdiction was not argued before the learned single Judge and the proposition that the appeal against the decree for ejectment lies to the Commissioner seems to have been conceded.

On the other hand there is a decision of a Bench of this Court in *Sarfaraz Singh* v. *Deputy Commissioner, Manager, Court of Wards, Ajudhia estate* (2) in which it was held that where in a suit for arrears of rent brought under section 127 of the Oudh Rent Act a decree for ejectment is passed it is appealable to the Civil Courts along with the decree for arrears of rent, and no separate appeal would lie to the Court of Revenue against the decree for ejectment. This decision by a Bench is binding upon me sitting alone and I may say with due respect that I concur in the view expressed. I therefore hold that the appeal against the Assistant

(1) (1928) 12 Revenue Decisions p. 626. (2) (1929) I.L.R., 4 Luck., 517.

Collector's decree was rightly instituted in the Court of the District Judge.

It has also been argued that under section 44 of the Land Revenue Act the decision of the Revenue Court in the case regarding the correction of revenue papers is binding upon the Revenue Courts which must therefore hold the plaintiff to be the owner of the land in suit. In the case regarding the correction of papers it was decided that the plots in suit are included in patti No. 1 which belongs to the plaintiff and not in patti No. 2 which belongs to defendant No. 2. It is argued that on the strength of this decision the Revenue Courts are bound to hold that the plots in suit belong to the plaintiff and that the plaintiff is entitled to collect the rent from defendant No. 1 who is in actual cultivatory possession. The Court below has not treated the decision of the Revenue Court on this point as binding, on the ground that the question of adverse possession raised on behalf of the Mahant, namely, defendant No. 2 was not at all considered by the Revenue Court. I think it is unnecessary for me to express any opinion in respect of this contention because it seems to be clear that the appeal must fail upon another ground.

One of the grounds upon which the learned District Judge allowed the appeal and dismissed the plaintiff's suit was that under section 127 of the Oudh Rent Act a decree for ejectment could not be passed without at the same time a decree for arrears of rent having been passed. This view is I think undoubtedly correct as it is in accordance with the language of the statute. Section 127, sub-section (2) makes it clear that a decree for ejectment can only be passed under that sub-section when a Court has passed a decree for arrears of rent under sub-section (1). If therefore the Court fails to pass a decree for arrears of rent under sub-section (1), as in the present case, it has no jurisdiction to pass a decree for ejectment. This position seems to be perfectly clear and on this ground alone the Court below

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was right in dismissing the plaintiff's suit. It must be observed that the plaintiff has not appealed against the dismissal of his claim for rent and it is clear that no decree for ejectment can be passed unless and until a decree for arrears of rent has first been passed.

For this reason I dismiss the appeal with costs. The same order governs appeals Nos. 38 and 39 of 1933.

Appeal dismissed.

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Before Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice Ziaul Hasan

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CHANDRA NATH (PLAINTIFF-APPELLANT) *v.* DASRATH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Evidence Act (I of 1872), section 115—Estoppel—Attestation of a document with knowledge of its contents—Person attesting, whether estopped from questioning document.

Mere attestation of a deed does not necessarily import consent. It is possible that an attestation may take place in circumstances which would show that the witnesses did in fact know of the contents of the document. If it is proved by evidence and other circumstances that when certain persons attested a document they were fully aware of the contents thereof and that their attestation was obtained for the purpose of its evidencing their consent to the transaction, they and their successors are estopped from subsequently questioning it. *Hari Kishen Bhagat* v. *Kashi Prasad Singh* (1), *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*, (2), and *Pandurang Krishnaji* v. *Markandeya Tukaram* (3), referred to.

Mr. *L. S. Misra*, for the appellant.

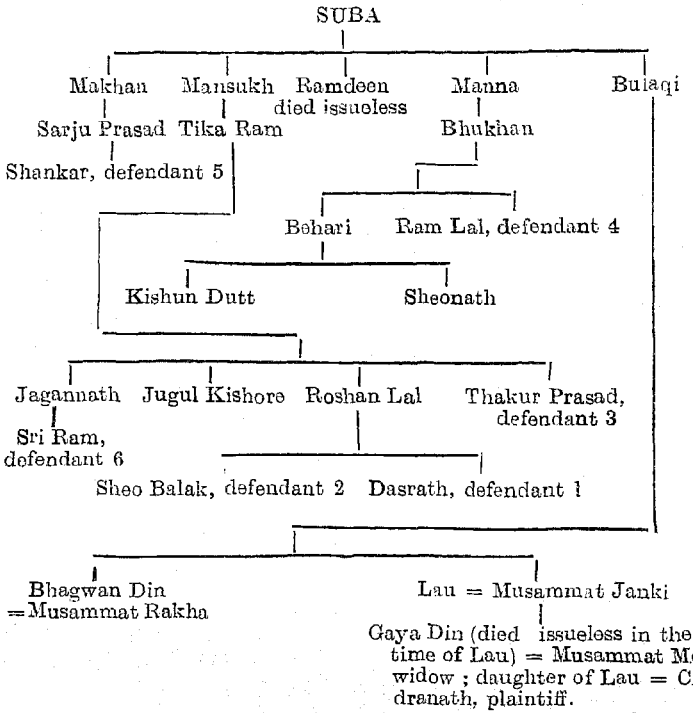
Messrs. *Hyder Husain* and *P. N. Chaudhri*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is an appeal against the decree, dated the 14th of January, 1933, of the learned Additional Subordinate Judge of

*First Civil Appeal No. 21 of 1933, against the decree of Pandit Krishna Nand Pandey, Additional Subordinate Judge of Unao, dated the 14th of January, 1933.

(1) (1914) L.R., 42 I.A., 64. (2) (1916) L.R., 43 I.A., 249.
(3) (1921) L.R., 49 I.A., 16.

Unao. The relationship of the parties will appear from the following pedigree which is not in dispute:



Lau purchased a 2 annas 8 pies share in village Majkuria on the 15th of July, 1876. He died on the 12th of November, 1879, and mutation in respect of the aforesaid share was made in favour of his widow Musammat Janki on the 2nd of February, 1880. In 1881 certain other zamindari properties were purchased under three sale deeds, exhibits 1, 2 and 3, which were executed in the name of Musammat Janki. On the 20th of February, 1904, Bhagwan Din, brother of Lau, executed a will (exhibit A-1) which contains recitals to the effect that he and his brother Lau were members of a joint Hindu family, that their entire property, movable and immovable, was also joint, and that he on the death of his brother became entitled to the entire property by right of survivorship but allowed the name of Musammat Janki to be entered in place of Lau for her consolation. It is further stated therein that he was

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the real purchaser of the property acquired under exhibits 1, 2 and 3 and had got the name of Musammat Janki entered therein fictitiously. The will provided that after his death his wife Musammat Rakha, Musammat Janki, widow of Lau, and Musammat Menda, daughter-in-law of Lau, were to remain in joint possession of all the property during their lifetime without any power of alienation with a right of survivorship *inter se*, and that on the death of the last survivor of the three widows, his cousin's sons Jagannath, Roshan Lal and Jugul Kishore shall be the absolute owners in equal shares of the entire property. Bhagwan Din died soon after the making of this will, and mutation in respect of the property, which stood recorded in his name, was effected in favour of the three ladies above mentioned on the basis of the will exhibit A-1 in October, 1904. Musammat Rakha, widow of Bhagwan Din, died shortly after this. About the same time some disputes arose between the two surviving widows, Musammat Janki and Musammat Menda and the plaintiff Chandra Nath, who is the daughter's son of Lau and Musammat Janki, in respect of the title to the property, which were settled by means of two agreements both dated the 29th of August, 1905, under which Musammat Janki and Musammat Menda agreed to give Chandra Nath generation after generation an annuity of Rs.263 per annum making it a charge upon the property in their possession, and Chandra Nath agreed to relinquish all his rights and interest, present and future, in the said property. Exhibit 15 is the agreement executed by Musammat Janki and Musammat Menda in favour of Chandra Nath, and exhibit A-5 is the agreement executed by Chandra Nath in favour of the widows embodying the terms stated above. It would be worthwhile to quote verbatim the concluding sentence of the agreement exhibit A-5 which is as follows:

> "Therefore I, the declarant, do hereby relinquish all my rights, present or future, which I, the declar-

ant, have in the assets of Lau and Bhagwan Din at present or those which I may have in future and promise and reduce to writing that in future I, the declarant, or the heirs and respresentatives of me, the declarant, shall not bring any claim or raise any dispute against the said ladies and after their death against Roshan Lal, Jagannath and Jugul Kishore or their representatives in court or before the members of the community; if I may do so, it shall be considered null and void in the face of this deed and shall not be fit to be entertained by the court."

Musammat Janki died in 1906 and Musammat Menda in June, 1931. After the death of Musammat Menda mutation in respect of half of the entire property was made in favour of defendants 1 and 2, the sons of Roshan Lal, and of the other half in favour of defendant 6, the son of Jagannath, in accordance with the will of Bhagwan Din. Defendants 3, 4 and 5 having raised some dispute in respect of the aforesaid will, it was settled by their being given a few plots by defendants 1, 2 and 6. The facts stated so far are no longer in dispute, and were admitted before us by the counsel of the parties.

The plaintiff's case was that ever since the execution of the agreements dated the 29th of August, 1905, he had been in receipt of the annuity of Rs.263 per annum but that the payment of this annuity had been discontinued by the defendants since the time when they came into possession after the death of Musammat Menda. He also alleged that his maternal grandfather Lau was separate from his brother Bhagwan Din at the time of his death and that he was the exclusive owner of the property possessed by him. As regards the properties purchased in the name of Musammat Janki his case was that they had been purchased out of the income of the property inherited by her from her

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husband. He further pleaded that Gaya Din had survived his father Lau and that he was legally entitled to the property belonging to Lau or purchased by Musammat Janki. He therefore claimed a decree for possession of the said property against the defendants who were alleged to be in unlawful possession thereof. In the alternative he claimed a declaration that the defendants were bound to pay Rs.263 annually to the plaintiff generation after generation and that the said amount was a charge on the family property.

The learned trial Judge found that Gaya Din predeceased his father Lau, and that the latter died joint in estate and family with Bhagwan Din. He further held that the agreement evidenced by exhibits 15 and A-5 were binding only on the widows Musammat Janki and Musammat Menda and could not be enforced against the defendants. As defendants 2 and 6 had entered into a compromise with the plaintiff under which they agreed to pay to the plaintiff generation after generation Rs.65-12 and Rs.131-8 respectively per annum making it a charge upon the shares of the property in their possession, the plaintiff was given a decree against them in terms of the compromise. But as a result of the findings referred to above the plaintiff's claim was dismissed *in toto* against the other defendants.

The learned counsel for the plaintiff has in the first place pressed his claim for one-fourth of the annuity against defendant No. 1 on the basis of the agreements dated the 29th of August, 1905. He has pointed out that under the compromise above mentioned his claim in respect of three-fourths of the annuity has been accepted by defendants 2 and 6 who are in possession of three-fourths of the property, in terms of the agreements exhibits 15 and A-5 and said that he would be content if he is given a decree for the remaining one-fourth of the annuity in terms of the aforesaid agreements against defendant No. 1 who is in possession of

a one-fourth share in the property. In case his claim based on the agreements fails, he would in the alternative claim a decree for possession of the property on the ground of his being the heir-at-law of Lau.

We are of opinion that the plaintiff's claim based on the agreements dated the 29th of August, 1905, ought to succeed. The plaintiff as P. W. 1 stated on oath that on the intervention of Roshan Lal, (father of defendant 1), the widows Musammat Janki and Musammat Menda agreed to pay him and his children in perpetuity Rs.263 annually. He further stated as follows:

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> "Roshan Lal, Jagannath and Jugul Kishore who were three brothers also signed it in agreement of the terms regarding payment of the annuity to me. This agreement was made at the desire of Roshan Lal, his two brothers and widows Musammat Janki and Menda."

The defendant No. 1 did not go into the witness-box to deny this statement. Nor did he adduce any rebutting evidence in respect of it. The sworn statement of the plaintiff is further supported by the fact that all the three brothers Roshan Lal, Jagannath and Jugul Kishore are attesting witnesses to the agreement exhibit 15. The registration endorsement shows that the executants of the deed, Musammat Janki and Musammat Menda were identified by Roshan Lal who was also the mukhtar of the ladies. The registration endorsement also contains a statement to the effect that the contents of the deed were read over and explained to the ladies. The endorsement at the back of the stamp paper on which the agreement exhibit 15 was engrossed also shows that it was purchased by Roshan Lal on behalf of the two ladies for execution of a deed of maintenance. The concluding sentence of exhibit A-5 which we have already quoted shows that the plaintiff bound himself to raise no claim or dispute