

of the Indian Penal Code will stand, and so will the other orders passed by the trial Court with reference to the payment of compensation to Musammat Ram Raji, and the suspension of the driver's licence.

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EJAZ
AHMAD
v.
KING-
EMPEROR

Reference accepted.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice H. G. Smith*

BHARAT SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) v.
GUR PRASAD SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

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August, 7

Limitation Act (IX of 1908), articles 109 and 120—Transfer by Hindu widows—Reversioner's suit for possession against transferee decreed in part—Mesne profits, suit for—Limitation governing subsequent suit for mesne profits—Landlord suing for ejectment as tenant—Suit dismissed—Fresh suit for ejectment as trespasser, whether maintainable.

Where a suit for possession by the reversioners against the transferees from a Hindu widow is decreed in part, a subsequent suit against the transferees for mesne profits of the decreed property is governed by article 109 and not by article 120 of the Limitation Act. *Banwari Lal v. Mahesh* (1), *Maung Po Kin v. Maung Shwe Bya* (2), and *Yerukola alias Penta Jogula v. Yerukola alias Penta Tatayya* (3), distinguished.

Where a landlord sues a person for ejectment in the Revenue Court treating him as a tenant of the land in his cultivatory possession and fails, he cannot be allowed subsequently to sue him for ejectment as a trespasser. Having once elected to accept him as a tenant, he cannot be allowed to shift his ground, and to sue him afterwards as a trespasser. *Baldeo Singh v. Imdad Ali* (4), referred to.

Mr. D. K. Seth, for the appellants.

Messrs. M. Wasim, Pearey Lal Varma and Onkar Narain Bakhshi, for the respondents.

*First Civil Appeal No. 117 of 1933, against the decree of Pandit Braj Kishen Topa, Subordinate Judge of Malihabad at Lucknow, dated the 18th of September, 1933.

(1) (1918) L.R., 45 I.A., 284.

(2) (1923) I.L.R., 1 Rang., 405.

(3) (1922) I.L.R., 45 Mad., 648.

(4) (1893) I.L.R., 15 All., 189.

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SRIVASTAVA and SMITH, JJ.:—This is a plaintiffs' appeal against the decree, dated the 18th of September, 1933, of the learned Subordinate Judge of Malihabad in the Lucknow District.

The facts of the case are that one Musammat Bhagana was in possession of an eight annas share in Salehnagar, including its hamlets and a one anna share in Shahmau, belonging to her husband, Munnu Singh, as a Hindu widow. On the 2nd of February, 1897, she jointly with the plaintiffs executed a sale-deed in respect of her share in village Chaukandhia, a hamlet of Salehnagar, in favour of the ancestors of defendants 1 to 3. She died on the 24th of August, 1927. On the 4th of November, 1927, a suit was instituted by the present plaintiffs, who claimed to be the next reversioners of Munnu Singh, for possession of the shares in Salehnagar and Shahmau which had been in the possession of Musammat Bhagana. Gur Prasad Singh, who is defendant No. 1 in the present suit, was also made a party to this suit as a transferee of the property conveyed under the sale-deed, dated the 2nd of February, 1897, referred to above. This suit was dismissed by the trial Court, but on appeal to this Court it was held that the aforesaid sale-deed was binding in respect of the share of two of the plaintiffs, but was not binding in respect of the share of the third plaintiff, who at the time of the sale-deed was a minor. In the result the plaintiffs' claim was decreed for possession in respect of the entire property which formed the subject of the suit, with the exception of two-thirds of the property conveyed by the sale-deed, dated the 2nd of February, 1897.

The present suit was instituted by the plaintiffs on the 23rd of January, 1933, for a declaration that they were the owners of the entire 10 biswas share in village Salehnagar, and that the present khewat was wrong and fit to be corrected. They also claimed a decree for possession in respect of 37 bighas 1 biswa and 12 biswansis of land in Salehnagar on the allegation that the defendant

No. 1 had executed a *patta* in respect of it in favour of his son, defendant No. 3, which *patta* was alleged to be fictitious. Lastly, they claimed a decree for mesne profits from the 1st of October, 1927, to the 27th of February, 1930, the date on which their previous suit had been decreed by the Chief Court.

The defendants completely denied the claim, and contended that the plaintiffs were not entitled to any of the reliefs claimed in the suit.

The learned Subordinate Judge was not satisfied that the entries in the khewat were incorrect, and was of opinion that the plaintiffs had no cause of action for the declaration sought by them. As regards the 37 bighas odd land in Salehnagar, he found that the defendant No. 3 held it as a tenant, and that the *patta* in his favour was not proved to be fictitious. He accordingly held that the suit for possession in respect of the said land was not maintainable in the Civil Court. As regards the claim for mesne profits, he held that the claim in so far as it related to the period preceding the institution of the previous suit was barred by order II, rule 2 of the Code of Civil Procedure. He further held that under article 109 of the Indian Limitation Act the claim in so far as it related to a period beyond three years before the institution of the present suit was barred by that article. He accordingly held that the plaintiffs were entitled to a decree for mesne profits only from the 23rd of January, 1930, to the 27th of February, 1930. As a result of these findings he gave the plaintiffs a decree for mesne profits for the period just stated, and dismissed the rest of the claim.

The learned counsel for the plaintiffs-appellants has not disputed the correctness of the lower Court's finding in respect of their claim for declaration. He has confined his arguments to the questions of mesne profits and possession in respect of the 37 bighas odd land.

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*Srivastava
and Smith,
JJ.*

As regards mesne profits, it is contended that the claim was governed by article 120 of the Indian Limitation Act, and not by article 109. Article 109 relates to suits for profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. It is argued that as the defendants were held entitled to retain possession of two-thirds of the property conveyed under the sale-deed, dated the 2nd of February, 1897, therefore it could not be said that the profits received by them in respect of the remaining property, which had been decreed to the plaintiffs, were profits which were wrongfully received by the defendants within the meaning of this article. In other words, the argument is that by reason of the defendants' possession having been maintained in respect of two-thirds of the property transferred under the sale-deed, dated the 2nd of February, 1897, the position of the defendants in respect of the property decreed in favour of the plaintiffs was not that of trespassers, but of co-tenants. We are of opinion that this argument is fallacious, and cannot be accepted. The plaintiffs were the reversioners of Munnu Singh, husband of Musammat Bhagana. The transfers made by Musammat Bhagana were voidable at their instance. They elected to avoid the transfers made by them, and instituted the former suit treating them as trespassers. Their claim was upheld in regard to part of the property, and a decree was passed in their favour on the footing that the defendants' possession after the death of Musammat Bhagana was wrongful against the plaintiffs. On a question put by us the learned counsel for the plaintiffs admitted that if the plaintiffs had chosen to include a claim for mesne profits since the date of Musammat Bhagana's death in their previous suit, there was nothing to debar them from doing so. In the circumstances it seems to be perfectly clear that the profits now claimed were profits which had been wrongfully received by the defendants within the meaning of article 109. It is impossible to accede to the plaintiffs' argument that the

said profits were received by the defendants as co-sharers.

Reliance was also placed on *Banwari Lal v. Mahesh and others* (1), *Maung Po Kin and two others v. Maung Shwe Bya* (2) and *Yerukola alias Penta Jogulu and others v. Yerukola alias Penta Tatayya and six others* (3), in support of the argument that article 109 does not apply to the case. *Banwari Lal v. Mahesh and others* (1), was the case of a transferee from a Hindu father, and the transfer was set aside on condition of the son's paying the money to the vendee. In such a case it is obvious that the possession of the vendee could not be said to have been unlawful while the deed stood. In the Rangoon case—*Maung Po Kin v. Maung Shwe Bya* (2), the suit had been brought by one co-heir against another. It was held that as the occupation of the co-heir could not be wrongful therefore article 109 did not apply. Similarly in the Madras case—*Yerukola alias Penta Jogula and others v. Yerukola alias Penta Tatayya and six others* (3)—a suit for partition and account was brought by one brother against the other brothers, and it was held that the article applicable was 120 and not 109. We have already shown that in the previous suit the plaintiffs had sued the defendants as trespassers, and their position was not that of co-tenants. These authorities have therefore no application to the present case. We are therefore of opinion that the decision of the lower Court holding that the claim for mesne profits was governed by article 109 of the Indian Limitation Act is correct.

Next as regards the claim for possession in respect of the 37 bighas odd land in Salehnagar, the simple question is whether the defendant No. 3 is in possession of this land as a trespasser, or as a tenant. The plaintiffs' case is that the *patta* given to him by defendant No. 1 as *lambardar* is fictitious, and that the defendant's possession is only as a trespasser. It is admitted that the

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*Srivastava
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(1) (1918) L.R., 45 L.A., 234. (2) (1923) I.L.R., 1 Rang., 405.

(3) (1922) I.L.R., 45 Mad., 648.

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*Sivastava
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plaintiffs, after they had obtained the decree from the Chief Court, on the 10th of November, 1930, brought a suit against the defendant No. 3 in the rent Court for his ejection from these lands under section 108, clause (4) and sections 62A and 68A of the Oudh Rent Act. In their plaint, exhibit A-70, they alleged that the defendant was a tenant of the land in question, and had submitted it contrary to the provisions of section 68A, and was also not a resident of village Salehnagar in which the said lands are situated. This suit was dismissed by the Sub-Divisional Officer of Malihabad on the 2nd of June, 1931, (exhibit A29), on the ground that the plaintiffs alone had no right to maintain an action in ejection. The plaintiffs now turn round and seek to treat the defendant as a trespasser. Can they be allowed to do so? When the plaintiffs got the decree from the Chief Court and found defendant No. 3 in possession of the lands in dispute, of which he was recorded as a tenant, there were two courses open to them. They could either accept him as a tenant, or, if they wished to question the *patta* in his favour as fictitious, treat him as a trespasser. They elected to treat him as a tenant, and treating him as such brought a suit for ejection against him. Having elected once to accept the defendant as a tenant, they cannot be allowed to shift their ground and sue him as a trespasser. The case is similar to *Baldeo Singh and another v. Imdad Ali and another* (1), where it was held that the service of a notice of ejection was a conclusive admission of the existence of the relationship of landlord and tenant between the person issuing the notice and the person on whom it was served. It was further held that the person who had issued the notice could not afterwards sue the person against whom the notice had been issued, for ejection in the Civil Court on the ground that he was not a tenant, but a mere trespasser. We are accordingly

(1) (1893) I.L.R., 15 All., 189.

of opinion that the claim for possession in respect of the land in Salehnagar has been rightly dismissed.

The result therefore is that the appeal fails, and is dismissed with costs.

The cross-objections filed by the defendants have not been pressed. They are also dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL

*Before Sir C. M. King, Knight, Chief Judge and
Mr. Justice Ziaul Hasan*

BABU BALAK RAM (PLAINTIFF-APPLICANT) *v.* MR. RAM-
JIAWAN LAL DIKSHIT, VAKIL, (DEFENDANT-OPPOSITE-
PARTY).*

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Civil Procedure Code (Act V of 1908), section 115, Schedule II, paragraphs 15 and 16—Arbitration—Award—Objection that arbitrator exceeded the terms of reference, rejected—Decree passed in terms of award—Revision, whether lies against decree—Finality of award and decree.

Where the validity of an award is challenged on the ground that the arbitrator had exceeded the terms of reference, but the objection is dismissed and a decree is passed in terms of the award, such a decree cannot be set aside either by way of appeal or by way of revision. Even if the revisional jurisdiction of the High Court is not barred, the revisional jurisdiction should not be exercised in such a case. *Ghulam Jilani v. Mohammad Hasan* (1), *Sheo Paltan v. Sukhdeo Singh* (2), *Baldeo Sahai v. Abdur Rahim* (3), *Lutawan v. Lachya* (4), *Krishna Behari v. Mohammad Ismail* (5), *Rup Narain v. Nandrani* (6), and *Ajudhia Prasad v. Budar-ul-Husain* (7), relied on. *Ramaswami Chettiar v. Venkatarama Aiyar* (8), and *Salebhai Abdul Kader Basrai v. Baisafiabu* (9), dissented from. *Debir-ul-Din v. Amina Bibi* (10), and *Lilaram v. Balchand* (11), distinguished.

*Section 115 Application No 14 of 1934, against the order of Syed Yaqub Ali Rizvi, Munsif of Fatehpur at Bara Banki, dated the 31st of October, 1933.

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| (1) (1901) L.R., 29 I.A., 51. | (2) (1922) 26 O.C., 107. |
| (3) (1932) I.L.R., 7 Luck., 642. | (4) (1913) I.L.R., 36 All., 69. |
| (5) (1933) 10 O.W.N., 669. | (6) (1934) 11 O.W.N., 1203. |
| (7) (1917) J.L.R., 39 All., 489. | (8) (1926) A.I.R., Mad., 201. |
| (9) (1911) I.L.R., 36 Bom., 105. | (10) (1925) A.I.R., Cal., 475. |
| (11) (1927) A.I.R., Sindh, 193. | |