

1935  
 NAWAB ALI KHAN  
 v.  
 BASANT LAL  
 Srivastava,  
 J.

justice and equity may require that a co-sharer should share his collections with the other co-sharers even though his collections do not exceed his own share of profits. I, therefore, agree to the answer given by my learned brother ZIAUL HASAN, J., to the abstract question referred to the Full Bench.

BY THE COURT (KING, C.J., SRIVASTAVA and ZIAUL HASAN, JJ.):—The answer to the question referred to the Full Bench is that though a co-sharer who has collected less than his own share cannot always be made liable to render accounts and to surrender a portion of the amount collected by him to the other co-sharers, he should be so made liable in cases in which on account of special reasons, justice and equity require it.

## APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

1933  
 November 30

SYED MOHAMMAD AGHA (PLAINTIFF-APPELLANT) v.  
 BAIJNATH SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)\*

*United Provinces Local Rates Act (I of 1914), section 7.—Superior proprietor's right to recover cesses from under-proprietors or pukhtedars—Order of Settlement Commissioner that under-proprietors are not liable for cesses, effect of—Stipulation in old lease that chaukidar and patwari rates should be paid by superior proprietor, effect of.*

Under section 7 of Act I of 1914 (The U. P. Local Rates Act), the superior proprietor has a legal right to recover the cesses from his lessees or under-proprietors and the decision of a Settlement Commissioner that *pukhtedars* are not liable for cesses or an agreement contained in a lease of 1878 by which the superior proprietor undertook to pay the old *chaukidari* and *patwari* rates that were then recoverable from landlords cannot take away this legal right. *Har Narain Das v. Gajraj Singh* (1), distinguished. *Prithipal Singh v. Mahant Hari Saran Das* (2), referred to.

\*Second Rent Appeal No. 40 of 1932, against the decree of R. B. Pandit Raghubar Dayal Shukla, District Judge of Rae Bareilly, dated the 18th of July, 1932, confirming the decree of Thakur Birendra Vikram Singh, Assistant Collector, 1st class of Rae Bareilly, dated the 1st of January, 1932.

(1) (1930) I.L.R., 6 Luck., 15.

(2) (1929) 13 R.D., 278.

Mr. *Ali Mohammad*, for the appellant.

Respondent in person.

NANAVUTTY, J.:—These are three connected appeals filed by the plaintiff from a judgment and decree passed by the learned District Judge of Rae Bareli, dated the 18th of July, 1932, confirming the judgment and decree of the Court of Thakur Birendra Bikram Singh, Assistant Collector of Rae Bareli, who dismissed the plaintiff's claim for cesses.

The plaintiff Syed Mohammad Agha has now come up in second appeal. The sole point for determination in these appeals is whether the plaintiff, who is the superior proprietor of the village, is entitled to claim cesses from the defendants-respondents, who are lessees holding under-proprietary rights in the land in suit. The trial Court held that the defendants were not liable to pay any cesses in view of the stipulation made by them or their predecessors-in-interest in the lease of the 28th of May, 1878. The learned District Judge in appeal upheld the finding of the trial Court on this point by making a reference to the order of the Settlement Commissioner, dated the 25th of March, 1931, in which that officer held that the defendants-pukhtadars were not liable for cesses. The learned District Judge found that by this order of the Settlement Commissioner the very foundation of the plaintiff's claim for recovery of cesses was taken away from him and that the lease also provided that whatever taxes besides revenue were to be paid would be borne not by the lessees but by the lessor.

I have heard the learned counsel of both parties at some length. In my opinion these three connected appeals must succeed. Under section 7 of Act I of 1914 (The United Provinces Local Rates Act), the superior proprietor has a legal right to recover the cesses from his lessees or under-proprietors. The agreement or lease of the 28th of May, 1878, upon which reliance is placed on behalf of the defendants-respon-

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dents, cannot support their contention. In that lease the superior proprietor undertook to pay the old *chaukidari* and *patwari* rates that were then recoverable from landlords. A similar contention to that advanced before me on behalf of the defendants was raised in *Prihipal Singh v. Mahant Hari Saran Das* (1) decided on the 27th of February, 1929. One of the contentions of the appellant in that case was that as there was no proof that at the time of the commencement of Act I of 1914 he was liable for the payment of any rates payable under the U. P. Local and Rural Police Rates Act of 1906, the decision of the lower Court was wrong and it was urged that if he paid anything at all he paid it under an agreement of the year 1866. This contention on behalf of the appellant was rejected by this Court in that case. Reference has also been made to a ruling of this Court reported in *Har Narain Das v. Gajraj Singh* (2) but the point decided in that case was different from the one that falls to be decided in the present appeals. In my opinion the decision of the learned District Judge cannot be upheld for the simple reason that the decision of the Settlement Commissioner upon which the lower Court relies cannot take away the legal right conferred upon the plaintiff-appellant, who is the superior proprietor of the village, to recover the local cesses imposed by the Local Government under Act I of 1914. The agreement of 1878 upon which reliance is placed by the defendants-respondents also does not take away the plaintiff-appellant's right to sue for recovery of local cesses due to him and imposed under Act I of 1914. Section 86 of the Land Revenue Act (III of 1901) to which my attention has been invited by the learned counsel for the respondents has also no applicability in the present case. In my opinion the plaintiff zamindar has a legal right under Act I of 1914 to recover the cesses from his lessees.

(1) (1929) 13 Rev., Dec., 278.

(2) (1930) I.L.R., 6 Luck., 15.

I accordingly allow these appeals, modify the judgments and decrees of the lower courts and decree also the plaintiff's claim for cesses with costs throughout.

*Appeal allowed.*

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SYED  
MOHAMMAD  
AGHA  
v.  
BAJNATH  
SINGH

### APPELLATE CIVIL

*Before Mr. Justice E. M. Nanavutty and Mr. Justice  
G. H. Thomas*

JAGANNATH SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS)  
v. MADHO SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)<sup>1</sup>

1934  
October 30

*Civil Procedure Code (Act V of 1908), Schedule II, paragraph 1(2)—Provision in paragraph 1(2) of Schedule II that "application shall be in writing", whether mandatory or merely directory—Reference made on statements of counsel—Award, whether invalid.*

The expression 'Application shall be in writing' in paragraph 1, clause (2) of the second Schedule of the Code of Civil Procedure is merely directory and not mandatory. *Mirza Mohammad Hasan Beg v. Mirza Shakir Beg* (1), *Mahabir v. Manohar Singh* (2), *Waliullah v. Bhaggan* (3), *Shama Sundaram v. Abdul Latif* (4), *Abdul Hamid v. Riaz-ud-din* (5), and *Umed Singh v. Sobhag Mal* (6), referred to.

Where, therefore, the counsel for both parties and the parties to an appeal express a desire that all the points involved in the appeal be referred to the arbitration of a certain person and accordingly the statements of the counsel of the parties are recorded and the case is referred to arbitration, the award is not invalid on the ground that there was no valid reference to arbitration inasmuch as no application in writing was made by the parties to refer the dispute to arbitration.

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

Mr. K. N. Tandon, for the respondents.

NANAVUTTY and THOMAS, JJ.:—These are two cross-appeals from a judgment of the learned Additional

\*First Civil Appeal No. 1 of 1933, against the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Unao, dated the 29th of September, 1932.

(1) (1923) 11 O.L.J., 142.

(3) (1925) A.I.R., Oudh, 267.

(5) (1907) I.L.R., 30 All., 32.

(2) (1923) I.L.R., 46 All., 208.

(4) (1899) I.L.R., 27 Cal., 61.

(6) (1915) L.R., 43 I.A., 1.