FULL BENCH

Before Mr. Justice C. M. King, Chief Judge, Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

1935
April 3

NAWAB ALI KHAN (PLAINTIFF-APPELLANT) *v.* BASANT LAL AND OTHERS (DEFENDANTS-RESPONDENTS)*.

Oudh Rent Act (XXII of 1886), section 108(15)—Profits—Co-sharer collecting less than his share of rent—Liability to render accounts and surrender portion of realisations to other co-sharers.

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.

KING, C.J. *and* ZIAUL HASAN, J. (SRIVASTAVA, J. *dissenting*): Where a co-sharer makes collections in pursuance of an agreement with the lambardar he makes himself liable to account to the other co-sharer and to pay them their share of the amount collected even though he did not realise more than his own share of the rent. *Nageshwar Singh* v. *Sripal Singh* (1), and *Rukmangad Singh* v. *Balbhaddra Prasad* (2), distinguished. *Durga Prasad* v. *Ganga Saran* (3), *Chater Sen* v. *Mitter Sen* (4), *Kalka Singh* v. *Rai Jwala Prasad* (5), and *Kanhaiya Lal* v. *R. H. Skinner* (6), referred to.

The case was originally heard by a Bench consisting of Srivastava and Thomas, JJ. who referred an important question of law raised therein to a Full Bench for decision. The referring order of the Bench is as follows:

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January 11

SRIVASTAVA and THOMAS, JJ.:—This is a second appeal arising out of a suit under section 108, clause 15 of the Oudh Rent Act.

The plaintiff-appellant has acquired by purchase a 3 annas share in village Piareypur, pargana Kakori, tahsil and district Lucknow, and the defendants-respondents nos. 1 and 2 are co-sharers to the extent of 12 annas in the said village. Defendant no. 3, Mirza Mohammad Haider, is the co-sharer of

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*Section 12(2) of Oudh Courts Act Appeal No. 3 of 1934, against the Collister, I.C.S., District Judge of Lucknow, dated the 11th of February, 1933, reversing the decree of S. Mohammad Zahid, Assistant Collector, 1st class, Lucknow, dated the 24th of September, 1932.

(1) (1933) I.L.R., 8 Luck., 665.
(2) (1928) A.I.R., Oudh, 9.
(3) (1922) 70 I.C., 763.
(4) (1933) 18 R.D., 12.
(5) (1916) 19 O.C., 326.
(6) (1918) I.L.R., 42 Bom., 728.

the remaining 1 anna and is also the lambardar. The plaintiff's case was that the defendants had made collections but had not rendered any account to him. He, therefore, claimed that accounts be taken and he be given a decree for the share of profits due to him. Both the lower courts have disallowed the plaintiff's claim for profits in respect of 1336 Fasli on the ground that the plaintiff was not a co-sharer in possession during that year. As regards the remaining two years, 1337 and 1338 Fasli, the trial court found that no collections were made during those years, either by the plaintiff or by the lambardar, Mirza Mohammad Haider. It further found that the defendants nos. 1 and 2 had collected a sum of Rs.1,944-14-6 and accordingly gave the plaintiff a decree for a 3/16th share out of this amount. On appeal, the learned District Judge held that as the amount collected by the defendants 1 and 2 was not in excess of the share of profits to which they were entitled, the plaintiff was not entitled to get any share of it from them.

In the first place, the learned counsel for the plaintiff has impugned the finding of the lower courts about the plaintiff having no title to profits in respect of 1336 Fasli. We are of opinion that the finding is quite correct. It is not disputed, and is fully borne out by the plaintiff's own application, exhibit A2, that the plaintiff did not get possession from his mortgagee until 1337 Fasli. We must, therefore, uphold the finding of the lower courts on this point.

Next, it was also argued that the defendants-appellants had usurped the functions of the lambardar and must, in the circumstances of the case, be treated as in the position of a lambardar. This contention also appears to us to be without substance. The word "lambardar", as used in clause 15 of section 108 of the Oudh Rent Act, in our opinion, refers to a person who has been appointed as such by an order of the Revenue Court. As admittedly the defendants 1 and 2 have not been appointed lambardars, and the person so appointed is defendant no. 3, therefore, we are also in agreement with the lower appellate court that the present suit, as against defendants nos. 1 and 2, cannot be treated as a suit against a lambardar.

Lastly, the question is whether the defendants 1 and 2 are liable to account to the plaintiff for a share of the collections made by them, even though such collections may not be in excess of the share to which they are entitled. The plaintiff's contention that he is entitled to call the defendants nos. 1 and 2 to account, even though the collections made by them are less than their share of profits, is supported by a decision

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of a Bench of this Court in *Raja Rukmangad Singh* v. *Balbhaddra Prasad* (1), which was followed by another Bench in *Nageshwar Singh* v. *Sripal Singh* (2). The learned counsel for the respondents disputes the correctness of these decisions. He has forcibly contended that if a co-sharer, who is not a lambardar, has collected amounts which are less than his share, he is under no obligation to render an account to his other co-sharers, or to surrender any portion of his collections to them. Reference has also been made by him to the decision of the late Judicial Commissioner's Court in *Kalka Singh* v. *Rai Jwala Prasad* (3). This case fully supports the respondents' contention. The question thus raised appears to us to be one of considerable importance which can frequently arise in suits for profits. We think it, therefore, desirable that in this state of conflict of decisions in the Province and because the correctness of the two Bench rulings of this Court is questioned, we should refer the question for decision to a Full Bench. We accordingly refer the following question under section 14(1) of the Oudh Courts Act for decision to a Full Bench:

> Is a co-sharer, who is not a lambardar, liable to render accounts, and to surrender any portion of the amount collected by him to the other co-sharer if his collections do not exceed his own share of profits?

Mr. *Hakim-uddin Siddiqi*, for the appellant.

Mr. *Data Prasad Khare*, for the respondents.

1935 *March*, 23

ZIAUL HASAN, J.:—In this second rent appeal the following question has been refered to the Full Bench:

Is a co-sharer who is not a lambardar liable to render accounts and to surrender any portion of the amount collected by him to the other co-sharers if his collections do not exceed his own share of profits?

The question has been formulated in a general way but it seems necessary to give the facts of the case. They are as follows:

Respondent No. 3 was originally proprietor of the entire village of Piareypur, pargana Kakori, district Lucknow. On the 7th of February, 1919, he sold a six annas share of the village to respondents 1 and 2. Subsequently he sold another six annas share to the said

(1) (1928) A.I.R., Oudh, 9. (2) (1933) I.L.R., 8 Luck., 665.
(3) (1916) 19 O.C., 326.

respondents and out of the four annas share which remained to him, he made a usufructuary mortgage of three annas eleven pies to the said respondents. On the 25th of September, 1928, he sold the equity of redemption in three annas share to the plaintiff-appellant who deposited the mortgage money due to respondents 1 and 2 and redeemed the mortgage. He then brought a suit for profits relating to the years 1336 to 1338 Fasli not only against respondent No. 3 who was the lambardar but also against respondents 1 and 2. The defence of respondents 1 and 2 was that the plaintiff was not entitled to profits in respect of 1336 Fasli and that they were not liable for 1337 and 1338 Fasli also as in these years their collections did not amount even to their own share in the village.

The trial Court held that the plaintiff was not entitled to profits for 1336 Fasli but finding that respondents 1 and 2 had collected a sum of Rs.1,944-14-6 in 1337 and 1338 Fasli gave the plaintiff a decree against them for three-sixteenths of this amount. The defendants-respondents appealed to the District Judge who decreed the appeal and held that the plaintiff was not entitled to recover anything from respondents 1 and 2. Thereupon the plaintiff filed a second appeal in this Court which came on for hearing before two learned Judges who referred the question stated above for decision by the Full Bench.

On a consideration of all the facts and the authorities laid before us, I am of opinion that no hard and fast rule applicable to all cases can be laid down in respect of the liability to account of a co-sharer whose collections do not exceed his own share of profits. While generally speaking it seems unreasonable that a co-sharer who has made collections which do not come up to his own share of profits should be made liable to share those collections with his co-sharers, cases may arise in which it would be but fair and equitable that he should be so made liable.

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Coming to the authorities to which we were referred, I find that the cases of *Nageshwar Singh* v. *Sripal Singh* (1), and *Raja Rukmangad Singh* v. *Balbhaddra Prasad* (2), relied on by the learned advocate for the appellant do not help him much. All that was held in these cases was that if any co-sharer is found to have collected less than his share out of the total collections and the other co-sharers to have collected more than their shares, the former should be held entitled to call upon the latter to account for the same.

In neither of these cases was a co-sharer, who had collected less than his own share, made liable to account to the other co-sharers. In fact in the case of *Nageshwar Singh* v. *Sripal Singh* (1), Mr. Justice KISCH was of opinion that co-sharers who had collected a little more than their proportionate share of the rent were not liable to account for their collections though this finding was reversed by RAZA and NANAVUTTY, JJ., in an appeal under section 12(2) of the Oudh Courts Act. At any rate these two cases do not support the contention that the respondents 1 and 2 who have admittedly made collections short of their own share of profits, should share those collections with the plaintiff-appellant. On the other hand, in the case of *Chatar Sen* v. *Mitter Sen* (3), which was a case under section 227 of the Agra Tenancy Act, it was held by BENNET, J., that a collecting co-sharer is liable to the extent of what he has collected beyond his own legitimate share and out of the share of the co-sharer suing for his share of the profits, and that it was not the duty of a co-sharer to collect for other co-sharers. It may be mentioned that the provisions relating to suits for profits against the lambardar and co-sharers are similar both in the Agra Tenancy Act and the Oudh Rent Act. In the case of *Durga Prasad* v. *Ganga Saran* (4) a single Judge of the Allahabad High Court held that it not being the duty of one co-sharer

(1) (1933) I.L.R., 8 Luck., 665 (2) (1928) A.I.R., Oudh, 9.
(3) (1933) 18 R.D., 12 (4) (1922) 70 I.C., 763.

to collect the share of rent due to another co-sharer, in a suit under section 165 of the Agra Tenancy Act, the defendants could be held liable only if they had collected rents in excess of their own legitimate share and as in that case the defendants were found not to have collected anything in excess of their share, they were held not to be liable to account for their collections. A similar view was taken in the case of *Kanhaiya Lal* v. *R. H. Skinner* (1).

It will thus be seen that the consensus of authority is against the contention put forward on behalf of the appellant. In *Kanhaiya Lal* v. *R. H. Skinner* (1), however, the dissenting judgment of Mr. Justice NIAMATULLAH appears to me eminently reasonable, if I may respectfully say so, and is authority for the view that in some special cases it may be necessary in the interests of justice that a co-sharer collecting less than his own share be made liable to account to other co-sharers. His Lordship says:

"Except in a case where a co-sharer acts for himself and is entitled, under an arrangement or legal custom, to collect his share of rent payable by each tenant or his share of the entire rental payable by all the tenants, he should be deemed to be acting for the whole body of co-sharers. The fact that he demands the whole rent payable by a tenant clothes him with a fiduciary character. To my mind, there is no difference, in principle, between a case where one of the co-sharers appropriates part of the common land and where a co-sharer collects part of the rent due to all the co-sharers. In the first case, it is settled law that other co-sharers can recover joint possession and it would be no defence to their claim, by the co-sharer who has taken exclusive possession of part of the common land, to say that there are other lands of a similar quality with similar advantages and the complaining co-sharer can appropriate to himself such land in proportion to his share, the princi-

(1) (1931) I.L.R., 54 All., 240.

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ple being that no co-sharer can make a partition for himself by taking possession of what he thinks is less than his share. Similarly, in the second case, if a co-sharer collects part of the rent which belongs to all the co-sharers jointly, he must allow them to participate in the collections made by him and should not be allowed to direct other co-sharers to recoup themselves by collecting the arrears. In such a case, law fastens a constructive trust on the co-sharer who collects money due to himself and others jointly. Section 90 of the Indian Trust Act, which occurs under Chapter IX, headed as 'On certain obligations in the nature of trust', provides, *inter alia,* that: "Where a . . . co-owner . . . or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage,"

Further on the learned Judge says—

"An influential and resourceful co-sharer may, in disregard of the power of the lambardar, steal a march over him and other co-sharers by collecting from the best tenants to the extent of his share of the gross rental and leaving irrecoverable rents for the rest. This state of things, if permitted by law, would be intolerable and would lead to gross abuse in certain cases."

It appears to me that in the eventuality referred to by Mr. Justice NIAMAT-ULLAH in the last preceding paragraph, it would undoubtedly be equitable that the co-sharer who has collected " from the best tenants to the extent of his share of the gross rental" or even less, "and leaving irrecoverable rents for the rest", should be

liable to share his collections with the other co-sharers. Similarly, it is possible to conceive of other cases in which the same procedure may be found necessary for other reasons and one of those reasons is afforded by the present case. In this case the respondents 1 and 2 while purchasing respondent No. 3's share, made a stipulation in the sale deed that they would be entitled to make collections of rent in the village though the vendor was to remain lambardar on paper. In pursuance of this agreement they not only collected rents but brought suits for ejectment against tenants. They thus constituted themselves agents of the lambardar and consequently of the co-sharers. This being so, they are in my opinion liable not only in equity but in law to account for the collections to the other co-sharers even though they did not realise more than their own share of the rents.

Further, in a case which a co-sharer has made collections only to the extent of his share on the gross rental, it may in some cases be unfair to allow him to keep his collections to himself as it is not often that the entire gross rents can be realised from the tenants in any year.

In view of all the above reasons, my 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.

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KING, C.J.:—I agree to the opinion expressed by ZIAUL HASAN, J. I think it is impossible to answer the general question, which has been formulated for our decision, by a simple "Yes" or "No". The answer depends upon the facts of the case. In the present case the plaintiff owned a share of 3 annas in a *mahal* for which a lambardar, respondent No. 3, was appointed.

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King, C.J.

Under section 126, Oudh Rent Act, the plaintiff was not entitled to collect the rents proportionate to his share, and he did not attempt to do so. The lambardar was the only co-sharer entitled to make collections and if he had performed his duties and exercised his powers the plaintiff could have recovered his share of profits from the lambardar. But as a matter of fact the lambardar delegated his rights and duties to respondents 1 and 2 who owned a 12 annas share. The latter cannot be said to have "usurped" the rights of the lambardar because he expressly agreed to permit them to make collections of rent in the village. In pursuance of this agreement respondents 1 and 2 exercised all the powers of the lambardar both in collecting rents and in ejecting tenants. Respondent no. 3 remained lambardar only in name while respondents 1 and 2 performed his duties and exercised his rights. Whatever collections were made in the village were made by respondents 1 and 2. In such circumstances I think the plaintiff is clearly entitled to recover his share of profits (calculated on collections) from respondents 1 and 2 who were fulfilling the lambardar's duties with the lambardar's consent. If a co-sharer takes it upon himself to exercise the lambardar's powers in the mater of collecting rents I think he renders himself liable to account to the other co-sharers and to pay them their share of the profits. The fact that respondents 1 and 2 collected less than 3/4ths of the gross rental is immaterial in my opinion. They must pay to the plaintiff his share of profits, based on actual collections, whatever the amount collected may have been. It is no answer to the plaintiff's claim to say that he might have made his own collections to the extent of his 3 annas share. The plaintiff was not entitled under section 126 to make any collections. There was no agreement between the co-sharers that each co-sharer should collect his proportionate share of rent from each tenant, or that he should collect the whole rent due from certain specified tenants. As the res-

pondents 1 and 2 assumed the rights and duties of the lambardar I hold that they are liable to render accounts and to pay to the plaintiff his share of the amount collected, although that amount did not exceed their own share of profits calculated on the rental demand.

King, C.J.

1935 *March* 30

SRIVASTAVA, J.:—Section 108, clause 15 of the Oudh Rent Act gives Courts of Revenue exclusive jurisdiction to decide suits for a share of the profits brought by a sharer against a lambardar or co-sharer. A lambardar represents all the co-sharers of the *mohal* and is charged with the duty of making collections and distributing profits amongst the co-sharers. It is, therefore, well settled that whatever be the amount of collections made by the lambardar, he must make a rateable distribution of them amongst the co-sharers including himself in proportion to their shares. The question is whether the same principle should govern collections made by co-sharers who are not lambardars. In the present case, the lambardar, respondent 3, had made an agreement with the respondents 1 and 2 authorising them to make collections of rent in the village. It was urged that the respondents 1 and 2 in making the collections acted in the exercise of powers delegated to them by the lambardar and as such constituted themselves agents of the lambardar. It is argued that in this view of the facts of the case, respondents 1 and 2 are liable to pay a proportionate share of their collections to the plaintiff just as much as the lambardar would have been liable if he had made the collections himself. In my opinion the rights and duties of the lambardar are of a personal character and are not capable of being delegated to another. However, a lambardar can act through an agent but in such cases the agent is under no liability to the co-sharers. On the other hand the lambardar as principal is responsible for the acts of his agent. If respondents 1 and 2 are treated to have made the collections as agents of the lambardar, no decree for profits can be made against them for collections made as

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such agents, by the Revenue Court under section 108, clause 15 of the Oudh Rent Act. A suit under this section against a lambardar can be maintained only against the particular individual appointed as such and not against any other person as his representative. This view is supported by the decision of the late Court of the Judicial Commissioner in *Banke* v. *Umrao Lal* (1) in which it was held that a suit against a son or heir of a deceased lambardar for profits collected by his predecessor cannot be entertained by the Revenue Court. I am, therefore, of opinion that the respondents 1 and 2 cannot be made liable in this suit to account for collections made by them as agents of the lambardar.

If therefore respondents 1 and 2 must be treated merely as co-sharers, we have to see whether they can be made liable to share the collections made by them with the plaintiff even though the amount collected by them is less than their share of the profits. In *Kalka Singh* v. *Rai Jwala Prasad and others* (2), it was held by Mr. LINDSAY, J.C., that a co-sharer who is not the lambardar of the village being under no obligation towards the other co-sharer to collect the rent, cannot be made to surrender any portion of the amount he has collected to another co-sharer, if his collections do not exceed his own share of the profits. In my opinion, as a general rule, this is the correct view. The two decisions of this Court in *Nageshwar Singh and others* v. *Sripal Singh and others* (3) and *Raja Rukmangad Singh* v. *Balbhaddra Prasad and others* (4) on which reliance was placed by the appellant are no authorities for the contrary view because in both of them certain co-sharers had collected more than their shares and were held liable to account for the amount realised in excess. The provisions of the Agra Tenancy Act, on this subject, are similar to those of the Oudh Rent Act. The weight of decisions of the Allahabad

(1) (1905) 8 O.C., 206. (2) (1916) 19 O.C., 326.
(3) (1933) I.L.R., 8 Luck., 665. (4) (1928) A.I.R., Oudh, 9.

High Court is also in support of the view of Mr. LINDSAY in *Kalka Singh* v. *Rai Jwala Prasad* (1). In *Lala Durga Prasad and others* v. *Ganga Saran and others* (2), Mr. Justice SULAIMAN held that as it is not the duty of one co-sharer to collect the share of rent due to another co-sharer, in a suit under section 165 of the Agra Tenancy Act, the defendants can be held liable only if they have collected rents in excess of their own legitimate share. A similar view was expressed by BENNET, J., in *Chatar Sen* v. *Mitter Sen and another* (3). MUKERJI and PULLAN, JJ., also in *Kanhaiya Lal and another* v. *R. H. Skinner and others* (4), held that in a suit brought under section 165 of the Agra Tenancy Act, by certain co-sharers against the other co-sharers, the plaintiffs are not entitled to participate in the collections made but are entitled to a proportionate share only in the excess profits collected by the defendants over and above their own full shares. Mr. Justice NIAMAT-ULLAH dissented from this view on the ground that the law fastens a constructive trust on the co-sharer who collects money due to himself and others jointly. Ordinarily the rule of constructive trust applies to cases where the parties stand in a fiduciary relationship. It seems difficult to say that respondents 1 and 2 held any fiduciary position in relation to the plaintiff or that in making the collections they acted for the whole body of the co-sharers. It is clear that the collections made by them were in contravention of the provisions of section 126 of the Oudh Rent Act. I am, therefore, of opinion that, in the present case, the plaintiff has failed to make out any grounds for making a departure from the general rule that a co-sharer who has collected less than his share cannot be made liable to surrender any portion of the amount collected by him to the other co-sharer. Yet it is conceivable that there may be cases in which on account of a constructive trust or other special reasons

(1) (1916) 19 O.C., 326.
(2) (1922) 70 I.C., 763.
(3) (1933) 18 R.D., 12.
(4) (1931) I.L.R., 54 All., 240.

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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

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

1933 November 30

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.

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

(1) (1930) I.L.R., 6 Luck., 15. (2) (1929) 13 R.D., 278.