APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

1937
March, 1

MUSAMMAT JANKA KUER AND OTHERS (DEFENDANTS-APPELLANTS) *v.* THAKUR ANANT SINGH (PLAINTIFF-RESPONDENT)*

Oudh Rent Act (XXII of 1886), section 108(10a)—Theka—Suit for possession by lessee of land leased of which he is not given possession—Jurisdiction of Civil and Revenue Court to try the suit—Registered lease sought to be varied by subsequent unregistered agreement, whether permissible—Oudh Courts Act (IV of 1925), section 12(2)—Point not taken before Judge from whose decree appeal is preferred—Point, if can be entertained in third appeal.

The word 'or' ought not to appear in clause (10*a*) of section 108 of the Oudh Rent Act after the words "Under the third proviso to section 30A". It follows that clause (10*a*) is confined to suits under the third proviso to section 30A. Clause (10*a*) of section 108 has no application to a suit for the recovery of possession of a holding by one who has never been in possession of it, and a suit for possession by a lessee of landed property of which he has been given a *theka*, but has not obtained possession is, therefore, not barred from the cognizance of a civil court by the contents of that clause.

Where the terms of a registered lease are sought to be varied by a later unregistered agreement, the latter agreement being inadmissible in evidence for want of registration, the effect is to leave standing the original registered lease without any conditions. *John Cowie* v. *William Ramfry* (1), *Thomas Hussey* v. *John Horne-Payne* (2), *Bristol, Cardiff and Swansea Aerated Bread Company* v. *Maggs* (3), *Tika Ram* v. *Deputy Commissioner of Bara Banki* (4), *Abdullah Khan* v. *Basharat Husain* (5), and *Afsar Jehan Begam* v. *Beche Lal* (6), referred to.

The usual practice of the Chief Court in appeals under section 12(2) of the Oudh Courts Act is to decline to entertain any

*Section 12(2), Oudh Courts Act, Appeal No. 6 of 1935, against the decree of Hon'ble Mr. Justice Bisheshwar Nath Srivastava, Chief Judge of the Chief Court of Oudh, dated the 22nd of August, 1934, setting aside the decree of Ch. Akbar Husain, I.C.S., District Judge of Sitapur, dated the 18th of April, 1933.

(1) (1846) 3 M.I.A., 448.
(2) (1879) L.R., 4 A.C., 311.
(3) (1890) L.R., 44 Ch.D., 616.
(4) (1899) L.R., 26 I.A., 97.
(5) (1912) L.R., 40 I.A., 31.
(6) (1931) I.L.R., 7 Luck., 16.

point which was not taken before the Judge from whose decision the appeal has been preferred.

Mr. *R. B. Lal,* for the appellants.

Mr. *P. N. Chaudhri,* for the respondent.

NANAVUTTY and SMITH, JJ.:—This is an appeal under section 12(2) of the Oudh Courts Act against a decision, dated the 22nd of August, 1934, of the learned Acting Chief Judge. The decision is reported in *Anant Singh, Thakur* v. *Ganga Bakhsh Singh, Thakur* (1).

The suit was brought by one Thakur Anant Singh against one Thakur Ganga Bakhsh Singh for possession of certain zamindari property for which the plaintiff was said to have been given a *theka* on the 19th of April, 1929. Mesne profits to the extent of Rs.100 were also claimed. The lease, according to the plaint, was for a period of fifteen years, and provided for an annual payment of Rs.250. On that same day a separate agreement is said to have been entered into between the parties under which the *thekadar* was to sue one Hem Singh for arrears of rent due to Thakur Ganga Bakhsh Singh, and pay over to the latter anything that he succeeded in realizing from Hem Singh. Admittedly Anant Singh did not take any steps to carry out the terms of this agreement, and he did not obtain possession of the leased property. The learned Munsif found the plaintiff entitled to no relief, and accordingly dismissed his suit with costs. The plaintiff appealed, but his appeal was dismissed by the learned District Judge. The plaintiff then preferred a second appeal in this Court, and that appeal was allowed by the learned Acting Chief Judge, who decreed the plaintiff's suit, with costs in all the courts. It is against that decision that this present appeal was preferred by the defendant under the provisions of section 12(2) of the Oudh Courts Act. Thakur Ganga Bakhsh Singh, the original defendant, has since died, and is now represented by his widow Musammat

(1) (1934) 11 O.W.N., 1184.

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Janka Kuar; one Thakur Puttu Singh, who is described as the son of Hem Singh, and appears from the substitution application to claim under a will executed by Thakur Ganga Bakhsh Singh; and Musammat Lali Debi, the daughter of Thakur Ganga Bakhsh Singh.

Narayutty and Smith, JJ.

The procedure adopted by the parties in executing two separate documents on the 19th of April, 1929, the agreement being in modification of the terms of the *theka*, was distinctly peculiar. The terms embodied in the agreement could perfectly well have been included in the *theka*. This much was conceded by the learned counsel for the respective parties. However, the parties chose to adopt this peculiar procedure, and most of the trouble in the case has arisen by reason of it. The learned Munsif took the view that as the plaintiff did not perform the duties imposed upon him by the agreement, the lease became "illegal and inoperative". Incidentally he came to the conclusion that the agreement did not require to be registered, but he said that even if it was invalid for want of registration, the defendant was entitled under section 92(3) of the Evidence Act to prove an oral agreement showing that the lease was subject to a condition precedent. The learned District Judge did not definitely decide whether the agreement required registration, though he said that the argument that it was inadmissible for want of registration was "not without force". The learned District Judge clearly wrote "admissible" at this point in his judgment by a clerical mistake for "inadmissible". He agreed with the learned Munsif, however, that the alleged agreement was proved by oral evidence, and that it had rightly been taken into account by the learned Munsif. He accordingly dismissed the plaintiff's appeal. Before the learned Acting Chief Judge the learned counsel for the defendant-respondent conceded that section 92 of the Evidence Act does not apply, as there is no question of the admissibility of any oral agreement or statement. He, however, supported the

judgment of the District Judge on the ground that the *theka*, exhibit 1, and the agreement, exhibit A-1, were both executed on the same date, and ought to be treated as part of one transaction. He further contended that the agreement, exhibit A-1, did not require registration.

The learned Acting Chief Judge held that the agreement required registration, and that not having been registered it was inadmissible in evidence, and that the learned District Judge was therefore wrong in dismissing the plaintiff's claim on the ground that he failed to perform the condition embodied in the agreement. At a very late stage it was further contended before the learned Acting Chief Judge by the learned counsel for the defendant that the suit was not cognizable by a civil court by reason of the provisions of section 108(10)(*a*) of the Oudh Rent Act, but that contention was repelled by the learned Acting Chief Judge, who in the end, as we have mentioned already, allowed the plaintiff's appeal, and decreed his suit, with costs in all the courts.

Nanavutty and Smith, JJ.

As regards the point taken with regard to section 108, clause (10*a*), of the Oudh Rent Act, the position is curious. We have discovered that the copy of the Act that was placed before the learned Acting Chief Judge wrongly contained the word "or" after the words "Under the third proviso to section 30A". We have ourselves seen copies of the Act in which the word "or" appears at that point, but we are satisfied that that is a mistake. Section 30A and also clause (10*a*) of section 108 were introduced into the Oudh Rent Act by the Oudh Rent (Amendment) Act, IV of 1921, which was published in Part VII of the *Government Gazette* of these provinces, dated the 11th of February, 1922. The section of the amending Act which introduced clause (10*a*) into section 108 is section 53(4), and the *Gazette* shows that the new clause (10*a*) was printed thus:

> "Under the third proviso to section 30A, for the recovery of the occupancy of a holding or part thereof, and for compensation for dispossession."

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The clause in question is printed in the same way in the copy of the amending Act which appears in the "Collection of the Acts passed by the Local Legislature of the United Provinces of Agra and Oudh in the year 1921" which was printed in 1922 by the Government Press at Allahabad. As we have said, we have seen copies of the Oudh Rent Act which print the word "or" after the words "Under the third proviso to section 30A" in clause (10*a*) of section 108 of the Act. In particular the well-known commentary on the Oudh Rent Act, "Rent Law in Oudh", by Messrs. M. P. and R. P. Saksena prints the word "or" in the text of the Act at page 452, but in the commentary, at page 661, clause (10*a*) is printed without the word "or" at the point in question. We are satisfied from the version printed in the *Government Gazette* and in the Collection of the Acts that we have referred to above that the word "or" ought not to appear in clause (10*a*) of section 108 after the words "Under the third proviso to section 30A", and it follows that clause (10*a*) is confined to suits under the third proviso to section 30A. It so happens that this was precisely the conclusion arrived at by the learned Acting Chief Judge, though, as we have said, the version of clause (10*a*) that was put before him contained the word "or" at the point in question, and he only arrived at his conclusion by construing the word "or" as meaning "or in other words". The learned Acting Chief Judge said that the use of the word "or" after the words "section 30A" does not appear to be very happy. As we have shown, the word "or" really ought not to be printed at all after the words "section 30A". The result is that we are in agreement with the learned Acting Chief Judge that clause (10*a*) of section 108 of the Oudh Rent Act has no application to a suit like the present one for the recovery of possession of a holding by one who has never been in possession of it, and the present suit was, therefore, not barred from the cognizance of a civil court by the contents of that clause.

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It was conceded before us that the agreement exhibit A-1 was inadmissible for want of registration, but the learned counsel for the respective parties differed as to the effect of the inadmissibility in evidence of that agreement. The contention of the learned counsel for the appellants was that the learned Acting Chief Judge himself regarded the lease Exhibit 1 and the agreement Exhibit A-1 as constituting one transaction, and in these circumstances, it was contended, inadmissibility in evidence of the agreement carried with it the failure of the whole transaction. The learned counsel referred us to Explanation 1 and Illustration (*a*) of section 91 of the Evidence Act, and he further relied upon the following authorities: *John Cowie and others* v. *William Remfry and others* (1), (the judgment begins at page 460, and the particular passage relied upon is at page 467); *Thomas Hussey* and *John Horne-Payne and G. M. Horne-Payne, His wife* (2) and *Bristol, Cardiff, and Swansea Aerated Bread Company* v. *Maggs* (3).

The learned counsel for the respondent, on the other hand, contended that the inadmissibility in evidence of the agreement exhibit A-1 has the effect of leaving standing unmodified the lease exhibit 1, and that, therefore, the learned Acting Chief Judge was right in decreeing the plaintiff's suit. He referred us to the following authorities:

Tika Ram v. *Deputy Commissioner of Bara Banki* (4), *Saiyid Abdullah Khan* v. *Saiyid Basharat Husain* (5) and *Afsar Jehan Begam and another* v. *Beche Lal and others* (6).

In the first of the cases relied on by the learned counsel for the appellants a transaction was in question which was held to have been contained in two separate notes, between which there was a material variation. It was said (vide page 467), that the consequence followed, from all

(1) (1846) 3 M.I.A., 448.
(2) (1879) L.R., 4 A. C., 311.
(3) (1890) L.R., 44 Ch.D., 616.
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(5) (1912) L.R., 40 I.A., 31.
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the legal principles, that no binding contract had been effected.

In the second case two letters were in question, as to which it was said (vide pages 320-321):

> "Now, my Lords, the conclusion I draw from that is this, that we have here the appellant himself telling us that the two original letters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms. The consequence therefore of the whole is, that it appears to me not only that there is no note in writing, according to the 'Statute of Frauds', of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties".

In the third case also two letters were in question, and with regard to them it was held (we quote from the headnote):

> "Although those two letters would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the company had themselves shown that the agreement was not complete by stipulating afterwards for an important additional term, namely, the restriction on *M's* carrying on business, which kept the whole matter of purchase and sale in a state of negotiation only; and that *M* was therefore at liberty to put an end to the negotiations by withdrawing his offer, though within the ten days mentioned in his letter."

Coming now to the cases relied on by the learned counsel for the plaintiff-respondent, two unregistered *ruqqas* were in question in the first case. With regard to them their Lordships said, at page 100:

> "It was urged that the *ruqqas*, though not registered, fettered the equity of redemption. The learned District Judge was of that opinion clearly. But their Lordships

have a difficulty in understanding how an unregistered instrument which the statute declares is not to affect the mortgaged property can fetter the equity of redemption in that property. It seems to be a contradition in terms."

In the second case it was held that a written but unregistered agreement made after a mortgagor had given up possession under a lease by the mortgagee as to the mode in which the rents and profits should be dealt with was inadmissible in evidence under the Registration Act III of 1877.

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In the third case, which was decided by a Bench of this Court, it was held, to quote from the headnote, that "if a document is required to be registered, its terms cannot be varied by a later unregistered agreement".

It is doubtless true that if a contract is contained in several letters, all the letters in which it is contained must be proved, and that section 91 of the Evidence Act applies equally to cases in which contracts, grants or dispositions of property are contained in one document and to cases in which they are contained in more documents than one. This much appears in Explanation 1 and Illustration (*a*) themselves of section 91 of the Evidence Act, but the difficulty in the present case is that the agreement exhibit A-1 cannot be admitted in evidence owing to its not having been registered, so that the point at issue cannot be solved by a mere reference to those provisions of the Evidence Act. The inadmissibility in evidence of exhibit A-1 seems to us also to prevent the application of the principle laid down in the rulings relied upon by the learned counsel for the appellants. The case would be otherwise, of course, if that agreement were admissible in evidence, since in that case regard would have to be had to the contents both of the lease exhibit 1 and the later agreement exhibit A-1. Of the rulings relied upon by the learned counsel for the plaintiff-respondent the first to some extent supports his contention, but the second does not appear to us to be helpful in deciding the precise point that is before us.

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The third ruling, however, appears to us to be distinctly in point, since here we are concerned with a registered lease, the terms of which it is sought to vary by a later unregistered agreement. That, according to the Bench decision of this Court, is not permissible. The learned Acting Chief Judge seems to have assumed that if the agreement exhibit A-1 was inadmissible in evidence for want of registration, the effect was to leave standing the lease exhibit 1 without any conditions. We are inclined to think that it was not contended before him that the effect would be the failure of the entire transaction. In any case, for the reasons we have given, we agree with the view taken by the learned Acting Chief Judge.

One point remains. It was urged before us by the learned counsel for the appellants that the plaintiff's claim for mesne profits ought in any case not to have been decreed, since in his appeal before the learned District Judge he distinctly said in the grounds of appeal that he limited his appeal to recovery of possession, and paid court-fees for that relief alone. In his grounds of appeal, however, in the appeal that was decided by the learned Acting Chief Judge there was no such relinquishment of the claim for mesne profits, and it was prayed that the decrees of the courts below be discharged, and the suit be decreed with costs. There is nothing in the judgment of the learned Acting Chief Judge to indicate that this point was raised before him. Had it been raised, we think that he would undoubtedly have mentioned it, and dealt with it, and in these circumstances we think that we ought to follow the usual practice of this Court in appeals under section 12(2) of the Oudh Courts Act, and decline to entertain any point which was not taken before the learned Judge of this Court from whose decision the appeal has been preferred.

The result is that we dismiss this appeal with costs.

Appeal dismissed.