

## APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Sricastava, Chief Judge,

KAILASH CHANDRA (PLAINTIFF-APPELLANT) v. SARJOO  
(DEFENDANT-RESPONDENT)\*

1937  
January, 22.

*Oudh Rent Act (XXII of 1886), sections 61 and 108(2)—Civil Procedure Code (Act V of 1908), order XXII, rule 9—Suit for ejectment on ground of rent not having been paid—Abatement—Subsequent suit for recovery of arrears of rent for those years, if barred by order XXII, rule 9.*

Though a claim for ejectment under section 61, Oudh Rent Act, is based on the ground of rent not having been paid yet the cause of action for ejectment is quite different from the cause of action for recovery of the rent. Consequently when a suit under section 61 of the Oudh Rent Act for ejectment of the defendant, on the ground of rent for certain years not having been paid abates a subsequent suit instituted to recover the arrears of rent for those very years under section 108, clause (2), Oudh Rent Act, is not barred by order XXII, rule 9, Civil Procedure Code, as it prescribes that where a suit abates no fresh suit shall be brought on the same cause of action. *Nandan Singh v. Ganga Prasad* (1), and *Mata Din v. Saiyed Mustafa Husain* (2), relied on.

Mr. Pyare Lal Varma, for the appellant.

SRIVASTAVA, C. J.—This is a second rent appeal against the decree of the learned District Judge of Rae Bareilly modifying a decree of an Assistant Collector in that district. It arises out of a suit for arrears of rent for 1338 to 1341 Fasli. Previous to the institution of this suit Bhagwant Kuar, mother of the plaintiff-appellant, had instituted a suit under section 61 of the Oudh Rent Act for ejectment of the defendant on the ground of rent for 1338 to *kharif* 1341 Fasli not having been paid. Musammat Bhagwant Kuar died during the pendency of the suit and no steps having been taken to bring her legal representatives on the record an order was made

\*Second Rent Appeal No. 12 of 1935, against the decree of Mr. K. N. Wanchoo, I.C.S., District Judge of Rae Bareilly, dated the 12th of December, 1934, modifying the decree of Shaikh Anwar Ali Qidwai, Assistant Collector, of the Rae Bareilly, dated the 31st of August, 1934.

(1) (1913) I.L.R., 35 All., 512. (2) (1926) 2 O.W.N., 217.

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for abatement of the appeal in February, 1933. The present suit was instituted on the 28th of May, 1934, to recover the arrears of rent for 1338 to 1341 Fasli under section 108, clause 2 of the Oudh Rent Act. The learned District Judge has held that the claim for arrears for 1338 to *kharif* 1340 Fasli is barred by order XXII, rule 9 of the Code of Civil Procedure as the cause of action for the earlier suit for ejectment and of the present suit for arrears of rent in so far as they relate to 1338 to *kharif* 1340 Fasli is the same. I regret I cannot agree with this opinion of the learned District Judge. Though the claim for ejectment under section 61 is based on the ground of rent not having been paid yet the cause of action for ejectment is quite different from the cause of action for recovery of the rent. In *Subraya Chetti v. Rathnavelu Chetti* (1), it was held by a Bench of the Madras High Court that the claim for rent is a distinct cause of action from that of the recovery of possession—the former arising from the rent accrued due and the latter when the tenancy terminates. In *Nandan Singh v. Ganga Prasad* (2) a Full Bench of the Allahabad High Court also held that a claim for rent is not on the same cause of action as the claim for possession. The same principle underlies the decision of the late Court of the Judicial Commissioner of Oudh in *Mata Din v. Saiyed Mustaja Husain* (3) in which it was held that in decreeing a suit for arrears of rent it is improper, if not illegal, to direct ejectment of the tenant in case he makes a default in payment of the rent decreed within a specified period. Order XXII, rule 9 prescribes that where a suit abates no fresh suit shall be brought on the same cause of action. Thus the test for the application of the rule being identity of cause of action I have no doubt that the claim for arrears of rent for 1338 to *kharif* 1340 Fasli was not barred by this rule.

(1) (1908) I.L.R., 32 Mad., 330.

(2) (1913) I.L.R., 35 All., 512

(3) (1926) 2 O.W.N., 217.

(516-17).

The result therefore is that the amount due to the plaintiff for the four years in suit at the rate of Rs.72-3 per annum is Rs.288-12. Interest thereon at the statutory rate amounts to Rs.24-1-2 making a total of Rs.312-13-2. It is admitted by the counsel for the plaintiff that he has received Rs.153-2-9 in part payment of the arrears in suit. In addition to this the lower appellate court has given the defendant credit for Rs.10 which was paid in December, 1933. Thus deducting Rs.153-2-9 plus Rs.10 from Rs.312-13-2 the balance due to the plaintiff amounts to Rs.149-10-5. As the plaintiff has appealed to this court for Rs.110 only and his claim has already been decreed for Rs.16-15-6, I therefore allow the appeal and modify the decree of the lower court decreeing the plaintiff's claim for Rs.126-15-6. The plaintiff-appellant will get his proportionate costs from the defendant in the lower courts. As the respondent has not appeared to oppose the appeal I make no order as to the costs of this Court.

*Appeal allowed.*

### APPELLATE CIVIL

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

SURAJ BAKHSH SINGH (DEFENDANT-APPELLANT) *v.* BALDEO SINGH AND ANOTHER (PLAINTIFFS-RESPONDENTS)\*

1937  
January, 26

*Oudh Laws Act (XVIII of 1876), section 9(2)—Pre-emption—Village divided into number of thoks having revenue assessed and having lambardar—Thoks sub-divided into pattis—Pattis, if separate mahals—Sale of land in one patti—Co-sharers in different pattis of same thoks, rights of—Co-sharer related to vendor, if has preferential right of pre-emption.*

Where a village is divided into a number of *thoks* each of which has a lambardar and each of the *thoks* is further sub-

\*Section 12(2) Oudh Courts Act Appeal No. 5 of 1935, against the decree of Hon'ble Mr. Justice M. Ziaul Hasan, Judge of the Chief Court of Oudh at Lucknow, dated the 8th of March, 1935, confirming the decree of Dr. Ch. Mohammad Abdul Majid Abdul Azim Siddiqi, Additional Civil Judge of Lucknow, dated the 31st of July, 1933, reversing the decree of Syed Akhtar Ahsan, Munsif Haveli, Lucknow, dated the 23rd of December, 1932.

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*Srivastava,  
C. J.*