

REVISIONAL CIVIL

Before M. Justice Bisheshwar Nath Srivastava, Chief Judge

1937
January, 20

KUNJ BEHARI LAL AND ANOTHER (PLAINTIFFS-APPLICANTS) v.
SANT PRASAD (DEFENDANT-OPPOSITE PARTY)*

United Provinces Land Revenue Act (III of 1901), section 233 (m)—Attachment of mahal to recover canal dues—Co-sharer satisfying Government demand—Suit by such co-sharer to recover amount paid by him in excess of his liability—Jurisdiction of civil and revenue courts to try suit—Former suit for share of profits and canal dues—Decision that canal dues cannot be joined with claim for profits—Question of jurisdiction not raised—Subsequent suit for canal dues—Estoppel—Defendant, if estopped from questioning jurisdiction of civil court to try subsequent suit.

Where a lambardar recovers certain canal dues from the tenants but fails to pay them to Government and the Government therefore attaches the mahal in order to recover the arrears of the canal dues and certain co-sharers satisfy the Government demand and get the mahal released and then bring a suit to recover the amount paid by them in excess of what they were personally liable for, the claim is one exclusively cognizable by the revenue court under section 233, clause (m) of the United Provinces Land Revenue Act.

Where in a previous suit for profits under section 108, clause (15), Oudh Rent Act, canal dues are also claimed and no question of jurisdiction is raised in that suit and all that is decided in it is that the claim for canal dues could not be joined with the claim for profits, the defendant is not estopped from objecting to the jurisdiction of the civil court to try a second suit relating to the canal dues.

Mr. *Siraj Husain*, for the applicants.

SRIVASTAVA, C. J.—This is a civil revision under section 115 of the Code of Civil Procedure against an order of the learned District Judge of Unao upholding an order of the Munsif of Purwa in that district returning the plaint for presentation to the proper court.

*Section 115 Application No. 122 of 1936, against the order of Mr. Raghubar Dayal, I.C.S., District Judge of Unao, dated the 17th of March, 1936, upholding the order of Pandit Amrit Deo Bhattacharya, Munsif of Purwa at Unao, dated the 6th of December, 1935.

The facts of the case are that one Gur Prasad is lambardar. He recovered certain canal dues from the tenants but failed to pay them to Government. The Government therefore attached the mahal in order to recover the arrears of the canal dues. The plaintiffs who are co-sharers of 8 annas satisfied the Government demand and got the mahal released. They then brought the present suit to recover the amount paid by them in excess of what they were personally liable for against Gur Prasad. The latter died during the pendency of the suit and is now represented by his son. Both the lower courts have held that the claim was one exclusively cognizable by the revenue court under section 233, clause (m) of the United Provinces Land Revenue Act.

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It is not disputed that any sum due for canal dues is under the provisions of the Northern India Canal and Drainage Act realisable as Government revenue. But it is contended that as no process was enforced on account of the arrears of the canal dues in question clause (m) of section 233 had no application to the case. Assuming that the enforcement of a process is necessary for application of the clause I am of opinion that the attachment of the mahal was a process enforced on account of these arrears. I therefore agree with the lower appellate court that in view of section 233(m) of the Land Revenue Act the claim made in this case relating to the canal dues was one cognizable exclusively by the revenue court.

Next it was contended that the defendant was stopped from questioning the jurisdiction of the civil court to decide the claim. This contention was based on the ground that the question had been decided between the parties in a previous suit. In this previous suit the plaintiff had claimed a share of profits under section 108, clause 15 of the Oudh Rent Act and also the canal dues which are claimed in the present suit. Exhibits A-2 and A-3 are the judgments of the trial court and of

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the appellate court in that suit. I have looked into these judgments and am satisfied that no question of jurisdiction was raised in this suit. All that was decided in it was that the claim for canal dues could not be joined with the claim for profits in a suit under section 108, clause 15 of the Oudh Rent Act. Thus it being clear that no question of jurisdiction was raised by the defendant in the previous suit it cannot be said that he is estopped from objecting to the jurisdiction of the civil court to try the present suit. I accordingly dismissed the application. As the opposite party does not appear I make no order as to costs.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

1937
January, 21.

NAWAB ZAKIA BEGAM AND OTHERS (DEFENDANTS-APPELLANTS) v. THE LUCKNOW IMPROVEMENT TRUST, PLAINTIFF AND ANOTHER DEFENDANT (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), section 11 and order II, rule 2—Sale—Former Suit for rectification of sale-deed and possession of property wrongly shown as exempted—Sale-deed—Subsequent suit for possession of property shown as sold but of which possession not delivered—Subsequent suit, if barred by res judicata or order II, rule 2—Easement of necessity, when to be granted—Evidence Act (I of 1872), section 115—Estoppel—Defendant incurring expenditure on property knowing it to have been sold to plaintiff—Defendant, if entitled to raise plea of estoppel.

Where in a former suit the plaintiff alleged that in the plan attached to the sale-deed certain property was by mistake shown as exempted from the sale and prayed for a decree for rectification of the sale-deed and for possession of such property, but in a subsequent the plaintiff claimed that the portions of the building which were marked as sold in the plan attached to the sale-deed and in respect of which the defendant failed to deliver possession in accordance with the sale-deed and wrong-

*First Civil Appeal No. 14 of 1935, against the decree of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 21st of September 1933.