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RAJA RAMPAL SINGH v. LAL SURENDRA BIKRAM SINGH

By THE COURT: We dismiss these appeals as far as the question of personal decree is concerned, but we allow them on the question of the reduction of the respondents' allowances. As there are no materials before us on which the proper amounts to be awarded to the respondents can be determined, we remand the cases to the trial courts for decision after the determination of those amounts. We think it equitable in all the circumstances that the parties should bear their own costs of the appeals in this Court. Costs in the courts below will abide the result.

1936, *November*, 9.

Appeal partly allowed.

APPELLATE CIVIL

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

1936 *November*, 10

RAMZANI (DEFENDANT-APPELLANT) *v.* CHAUDHRI BANSIDHAR (PLAINTIFF-RESPONDENT)*

Oudh Courts Act (IV of 1925), section 12(2)—Third appeal—Point not raised before Judge whose decree is appealed against, if can be raised in third appeal—Evidence Act (I of 1872), section 116—Estoppel—Father holding shop, falling in arrear—Son undertaking to pay arrears and execute sarkhat*—Son, if estopped from denying landlord's title—Tenant seeking to save himself from bar of estoppel, whether must plead definitely that he had not been let into possession by landlord.*

The right of third appeal conferred under section 12(2) of the Oudh Courts Act is not a right wider than that conferred under the Letters Patent of a High Court. In appeals under the Letters Patent an appellant is not entiteld to be heard on points which he has not raised before the Judge against whose decree he is appealing and it is a sound principle which should be applied also in the case of appeals under section 12(2) of

*Section 12(2) Oudh Courts Appeal No. 3 of 1935, against the decree of the Hon'ble Mr. Justice E. M. Nanavutty, Judge of the Chief Court of Oudh, Lucknow, dated the 13th of February, 1935, upholding the decree of Babu Bhagwati Prasad, Civil Judge, Mohanlalganj, dated the 29th of April, 1933, upholding the decree of Babu Hiran Kumar Ghoshal, Munsif, South, Lucknow, dated the 30th of November, 1932.

the Oudh Courts Act. *Bisheshwar Dayal* v. *Lachman Ram* (1), *Brij Bhukhan* v. *Durga Dat* (2), *Debi Charan Lal* v. *Sheikh Mehdi Husain* (3), and *Ahmad Shah* v. *Faujdar* (4) relied on.

Where father holds a shop as tenant and on his falling into arrears the son undertakes to pay the arrears and to execute a *sarkhat*, it must be deemed that there was surrender by father followed by the son being let into possession under the lease executed by him and he is estopped from denying the title of the landlord. *Venkata Chetty* v. *Aiyanna Goundan* (5), and *Badruddin Khan* v. *Bhagloo Koer* (6), referred to.

If a tenant wants to save himself from the bar of estoppel, it is his duty to plead definitely that he had not been let into possession by the landlord.

Messrs *Zahur Ahmad* and *Rameshur Dayal*, for the appellant.

Mr. *Nazir Uddin*, for the respondent.

SRIVASTAVA, C.J. and SMITH, J.:—This is an appeal under section 12(2) of the Oudh Courts Act against the judgment passed by our learned brother NANAVUTTY, J., in second appeal No. 253 of 1933.

The facts of the case are briefly as follows:

In 1869 the British Government by means of a Sanad granted to Mir Wajid Ali, the predecessor-in-interest of Qamar Jahan Begam, the right of collecting the rent of shops and the ground rent from persons using the roadways in bazar Fatehganj in the city of Lucknow. The plaintiff-respondent is the assignee of the rights of Qamar Jahan Begam under a lease, dated the 31st of July, 1931. The defendant holds a shop in this bar. The plaintiff, alleging the defendant to be a tenant of Qamar Jahan Begam, brought the present suit against him for recovery of arrears of rent and for ejectment. The defendant denied the tenancy, and claimed to be the owner of the site and shop. He also denied the title of Qamar Jahan Begam.

The trial court as well as the court of first appeal held that Qamar Jahan Begam was the proprietor of the

(1) (1926) 3 O.W.N., 576.
(2) (1898) I.L.R., 20 All., 258.
(3) (1916) 35 I.C., 888.
(4) (1919) 55 I.C., 983.
(5) (1916) I.L.R., 40 Mad., 561.
(6) (1934) Pat., 555.

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Fatehganj bazar, and entitled to collect the rents of the shops in the bazar. They also held that the defendant had failed to establish his alleged ownership of the shop in his possession. On the contrary, they held that he was a tenant of Qamar Jahan Begam, and that the plaintiff as a lessee from her was entitled to a decree for ejectment and arrears of rent. Our learned brother Justice NANAVUTTY has upheld these findings in second appeal. He further held that the defendant was estopped from denying the title of Qamar Jahan Begam

All application has been made to us for permission to raise a new ground of appeal not mentioned in the application made under section 12 of the Oudh Courts Act to the effect that the plaintiff's right as a lessee has not been established inasmuch as the provisions of section 107 of the Transfer of Property Act were not duly complied with. This is a new ground which has been raised for the first time in this application. In *Bisheshwar Dayal* v. *Lachman Ram* (1), it was held that the right of third appeal conferred under section 12(2) of the Oudh Courts Act is not a right wider than that conferred under the Letters Patent of a High Court. In *Brij Bhukhan v. Durga Dat* (2), *Debi Charan Lal* v *Sheikh Mehdi Husain* (3) and *Ahmad Shah* v. *Faujdar* (4), the Allahabad, Patna, and Lahore High Courts have held that in appeals under the Letters Patent an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing. We think that this is a sound principle which should be applied also in the case of appeals under section 12(2) of the Oudh Courts Act. We therefore disallow this application.

The next contention urged in support of the appeal is that the defendant should not be estopped from denying the title of Qamar Jahan Begam as he had not been let into possession by her. In this connection

(1) (1926) 3 O.W.N., 576.
(2) (1898) I.L.R., 20 All., 458.
(3) (1916) 35 I.C., 888.
(4) (1919) 55 I.C., 985.

it may be pointed out that the plaintiff's counsel in the course of oral pleadings recorded on 5th September, 1932, stated that the defendant was let into possession by Qamar Jahan Begam. The defendant did not controvert this statement, nor has the defendant's learned counsel referred us to any statement on his behalf in the written pleadings specifically alleging that the defendant was not let into possession by Qamar Jahan Begam. In the circumstances there is no definite finding of the courts below on this point. It has, however, been found by all the courts that the defendant attorned to Qamar Jahan Begam in 1919 by executing a *sarkhat* in her favour and has been paying rent for the shop ever since. It appears from the case law which has been discussed before us that the authorities are not unanimous as regards the necessity of the tenant being let into possession by the lessor for the purpose of attracting the application of the rule of estoppel contained in section 116 of the Indian Evidence Act, or as to what constitutes a letting into possession. The cases may be divided into two classes. In one of them, exemplified by the Madras Full Bench case: *Venkata Chetty* v. *Aiyanna Gounden* (1), it was held by the majority of the Full Bench that a tenant who had executed the lease, but had not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title, or that his execution of the lease was procured by fraud, misrepresentation, or coercion. The view taken in this case cannot help the appellant as it has been definitely found by all the courts that he has failed to establish the alleged fraud and misrepresentation. As regards the plea of mistake which was also raised on the defendant's behalf, it cannot help him inasmuch as any unilateral mistake on his part alone would not entitle him to relief under section 20 of the

(1) (1916) I.L.R., 40 Mad., 561

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Indan Contract Act. *Badruddin Khan* v. *Bhagloo Koeri* (1) is an instance of the other class. It was held in this case that the distinction between the case of a tenant being let into possession by the person whose title he seeks to deny and the case in which the person whose title he denies did not let him into possession seems to be this, that in the first case the estoppel is complete as provided by section 116, that is to say that so long as that tenancy continues the tenant cannot deny his landlord's title. In the second class of cases, the estoppel is not complete in the sense that the tenant may evade it by showing any circumstance which would vitiate the agreement which he has entered into with the landlord. Estoppel exists in both classes of cases but in the second class the defendant could show that he executed the "*kabuliat*" under misapprehension or coersion or by reason of fraud which would vitiate the contract which he had entered into. We have already pointed out that no case of fraud or misrepresentation has been made out. It needs no argument to say that if the present case falls under the first class the defendant would be clearly estopped from denying the title of his landlord.

Lastly, we would wish to point out that in the circumstances of this case we are of opinion that the defendant must be deemed to have been let into possession when he executed the *sarkhat* in favour of Qamar Jahan Begam. It is in evidence that his father Shubrati held the shop as tenant of Qamar Jahan Begam before 1919. As he fell into arrears the defendant undertook to pay the arrears and to execute a *sarkhat*. In these circumstances we think that it must be deemed that there was surrender by Shubrati followed by the defendant being let into possession under the lease executed by him. In any case we are of opinion that if the defendant wanted to save himself from the bar of estoppel. it was his duty to plead definitely that he had not been

(1) (1934) Pat., 555.

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let into possession by Qamar Jahan Begam. As already remarked, he did not raise any such plea In the circumstances we are of opinion that the view of the lower court that the defendant is estopped from denying the title of Qamar Jahan Begam must be accepted as correct.

Some arguments were also addressed to us on the question of Qamar Jahan Begam's title. As we have agreed with the lower court on the question of estoppel it seems unnecessary for us to discuss this matter.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL

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

1936 *November*, 12

MOULVI SAADAT HUSAIN AND OTHER (APPLLICANTS) *v.* MOHAMMAD HAIDER (OPPOSITE PARTY)*

Civil Procedure Code (Act V of 1908), *sections* 92 *and* 115—*Trust—Scheme of management of trust framed by court and trustees appointed—Provision in the scheme authorising court to appoint successor of a deceased trustee, if* ultra vires *and amounts to modification of original scheme—Jurisdiction of court to appoint new trustee, in place of deceased trustee—Order appointing new trustee, if can be interfered with in revision—Section* 92, *if applies to application for appointing successor of a deceased trustee—Illegitimacy, if by itself a disqualification for appointment of trustee.*

Where in a suit under section 92, Civil Procedure Code, the court framed a scheme for the management of a trust, the provision in the scheme giving the court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme, and is not therefore *ultra vires*. *Sivaram Dubai* v. *Rajagopala Misra* (1), and *Chandra Prasad Ram Prasad* v. *Jinabharathi Narayan Bharathi* (2), relied on. *Abdul*

*Section 115 application No. 39 of 1935, against the order of Babu Pratap Shankar, Civil Judge, Mohanlalganj, Lucknow, dated the 17th of November, 1934.

(1) (1930) I.L.R., 54 Mad., 315. (2) (1930) I.L.R., 55 Bom., 414.