

1938

MUSAMMAT
RAGHURAI
v.
BINDRA
PRASAD

By COURT (THOMAS, C.J. and ZIAUL HASAN and HAMILTON, JJ.): The appeal is allowed and the decree of the lower appellate court is set aside and the plaintiff's suit is decreed with costs. —

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Acting Chief Judge and Mr. Justice Ziaul Hasan

BADRI DASS AND OTHERS, (APPELLANTS) v. RAJA BIRENDRA BIKRAM SINGH, (RESPONDENT).

1938

April, 7

United Provinces Encumbered Estates Act (XXV of 1934), section 7—Words “debt” and “any pecuniary liability”, meaning of—Civil Procedure Code (Act V of 1908), order XXI, rule 19—Application under order XXI, rule 19 deals with cases in which two parties claim to recover money from each other and not with cases where creditors of a party are also concerned.

The word “debt” in section 7 of the Encumbered Estates Act does not connote a contract. “Debt” includes any pecuniary liability except a liability for unliquidated damages. The words “any pecuniary liability” are wide enough to include not only the costs payable by the decree but also mesne profits claimed and awarded. Those profits cannot be said to be “unliquidated damages” as their amount is fixed after inquiry by court.

Order XXI, rule 19 of the Code of Civil Procedure deals with a case in which only two parties are entitled to recover sums of money from each other and does not cover a case in which the creditors of one of the parties are also concerned. *Birendra Bikram Singh v. Basdeo* (1), *Nuzhat-ud-Daula Abbas Husain Khan v. Dilband Begum* (2), *Kamaruddin Mandal v. Raja Thakur Barham* (3), *Jamini Nath Roy v. Dharma Das Sur* (4) and *Jai Berham v. Kedar Nath Marwari* (5), referred to.

Messrs. *Radha Krishna Srivastava, Bishambhar Nath Srivastava, Bhagwati Nath Srivastava and Suraj Narain*, for the appellants.

*Execution of Decree Appeal No. 50 of 1936, against the order of Mr. Abid Raza, Civil Judge of Gonda, dated the 14th of September, 1936.

(1) (1936) I.L.R., 12 Luck., 52.

(2) (1913) 16 O.C., 225.

(3) (1918) 46 I.C., 465.

(4) (1906) I.L.R., 33 Cal., 857.

(5) (1922) L.R., 49 I.A., 351.

Messrs. *Ishwari Prasad and Girja Shankar Srivastava*,
for the respondent.

THOMAS, A. C. J. and ZIAUL HASAN, J:—These three connected appeals arise out of orders passed by the learned Civil Judge of Gonda in two execution cases.

In 1928 two suits for pre-emption, Nos. 86 and 89 were instituted by Basdeo and others and Brij Mohan respectively against Raja Birendra Bikram Singh of Payagpur in respect of properties in two villages. Both the suits were dismissed by the trial court, the learned Subordinate Judge of Gonda, but later on were decreed by this Court. The plaintiffs in suit no. 86 deposited a sum of Rs.25,736 and the plaintiff in suit no. 89 deposited Rs.10,542-8 in court and both the sets of plaintiffs obtained delivery of possession of the pre-empted properties. The Raja did not withdraw these sums of money but filed appeals against this Court's decrees to His Majesty in Council. On the 30th of April, 1934, their Lordships of the Privy Council recommended that the decrees should be reversed and these recommendations were accepted by His Majesty the King-Emperor on the 14th of May, 1934. The Order-in-Council was handed over to the Raja's counsel about the end of July, 1934. Thereupon an application was made to this Court by the Raja under order XLV, rule 15 of the Code of Civil Procedure for transmission of the aforesaid order to the lower court. On the 21st of September, 1934, the order together with the memorandum of costs prepared in the office of this Court was transmitted to the Subordinate Judge of Gonda who received it on the 25th of September, 1934.

It appears that both the sets of pre-emptors had deposited the money by borrowing parts of it. Basdeo and others had borrowed Rs.14,000 from Badri Das and others (appellants in appeal No. 50 and respondents in appeal No. 54) and Brij Mohan had similarly borrowed money from Pyare Lal (respondent in appeal No. 53). On the 7th of May, 1934, Badri Das and others (whom

1983

BADRI
DASS
v.
RAJI
BIRENDRA
BIKRAM
SINGH

1938

BADRI
DASS
v.
RAJA
BIRENDRA
BIKRAM
SINGH

Thomas,
A. C. J.
and Ziaul
Hasan, J.

we shall henceforth call the "first appellants") filed a suit against Basdeo and others for recovery of their debt and on the 13th of July, 1934, a decree was passed in their favour for a sum of Rs.23,469-7-3 Similarly Pyare Lal from whom Brij Mohan had borrowed Rs.5,000 brought a suit against Brij Mohan on the 2nd of May, 1934 and on the next day he applied for attachment of the money deposited by Brij Mohan in court.

On the 16th of May, 1934, Pyare Lal's suit was decreed for Rs.9,500. Out of the deposit made by Basdeo and others the first appellants withdrew two sums of Rs.18,762-12 and Rs.4,943-4-4 under the orders of the Subordinate Judge dated the 17th and 23rd of July, 1934, respectively. In the same manner on the 5th of July, 1934, Pyare Lal withdrew a sum of Rs.8,286-2 out of the deposit made by Brij Mohan. Against these orders of payment passed by the learned Subordinate Judge, the Raja (whom we shall call the "second appellant") filed applications in revision in this Court. These applications were allowed by this Court on the 29th of January, 1936, and the orders made by the learned Subordinate Judge permitting the first appellants and Pyare Lal to withdraw the money were set aside [*vide Birendra Bikram Singh v. Basdeo and others* (1)].

Applications for execution from which these appeals have arisen were brought by the second appellant for restitution under sections 144 and 151 of the Code of Civil Procedure praying that as the orders of payment have been held to be illegal by this Court, the creditors of the pre-emptors who have withdrawn amounts deposited in court be ordered to refund them and that the costs of all the three courts due to him be paid to him out of those amounts. These applications of the second appellate were opposed by the first appellants and Pyare Lal mainly on the ground that the second appellant was not entitled to the benefit of sections 144 and 151 of the Code of Civil Procedure. Pyare Lal also

pleaded that proceedings against him should be stayed as he has made an application under section 4 of the United Provinces Encumbered Estates Act.

The learned Civil Judge held that section 7 of the United Provinces Encumbered Estates Act applied to the proceedings so far as Pyare Lal was concerned and ordered that execution case No. 13 against Pyare Lal be consigned to records and that the applicant should lay his claim against Pyare Lal in the Court of the Special Judge if he so chooses. In the other execution case, No. 12 against the first appellants, he ordered restitution to the second appellant and laid down the details of how restitution was to be made. Appeal No. 50 has been brought by the first appellant, against the second appellant, appeal No. 53 has been brought by the second appellant against Pyare Lal and appeal No. 54 has also been brought by the second appellant against the first appellants.

The plea raised on behalf of the first appellants is that as they were no parties to the pre-emption suit, the decree in which is sought to be executed by the second appellant, no restitution can be claimed against them under section 144 of the Code of Civil Procedure. It is argued that the words "party" and "parties" in section 144 mean party and parties to the decree which has been reversed by the appellate court and reliance is placed in this connection on the case of *Nuzhat-ud-Daula Abbas Husain Khan v. Dilband Begam* (1). This case no doubt helps the first appellants but in *Kamaruddin Mandal v. Raja Thakur Barham* (2) it was held by their Lordships of the Patna High Court that sections 47 and 144 of the Code of Civil Procedure must be read together and the word "parties" in section 144 must be taken to include their representatives and further that representative does not mean only a party's legal representative but it means his representative-in-interest.

(1) (1913) 16 O.C., 225.

(2) (1918) 46 I.C., 465.

1088

BADRI
DASS
v.
RAJI
BIJENDRA
BIHARAM
SINGH

Thomas,
A. C. J.,
and Ziaul
Hasan, J.

1938

BADRI
DASS
v.
RAJA
BIRENDRA
BIKRAM
SINGH

Similarly in *Jamini Nath Roy v. Dharma Das Sur* (1) the Calcutta High Court held that the assignee of the decree of the appellate court which reversed the decree appealed against, is entitled to obtain restitution by applying for execution of the appellate decree.

There is also another aspect of the case and it is this that the first appellants were parties to the orders for payment passed by the lower court and as those orders were reversed by this Court, they are in justice and equity liable to make restitution and refund the amount withdrawn by them. In *Jai Berham v. Kedar Nath Marwari* (2), their Lordships of the Judicial Committee say—

“It is the duty of the Court under section 144 of the Code of Civil Procedure to place the parties in the position which they would have occupied but for such decree or for such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards *all parties involved.*”

We are therefore of opinion that the learned Judge of the court below was right in ordering the first appellants to refund the money withdrawn by them. This disposes of appeal No. 50 of 1936.

Coming now to the second appellant's appeals (Nos. 53 and 54) in the former of which he challenges the lower court's finding that section 7 of the Encumbered Estates Act applies to the case and in both of which he objects to the lower court's order to the moneys being rateably distributed amongst the pre-emptors' creditors, we have come to the conclusion that neither of these appeals has any force. The learned counsel for the second appellant argues that the word “debt” in section 7 of the Encumbered Estates Act connotes a contract but we are unable to find any justification for this proposition either in section 7 or anywhere in the Act.

(1) (1906) I.L.R., 33 Cal., 857.

(2) (1922) L.R., 49 I.A., 351.

*Thomas,
A. C. J.
and Ziaul
Hasan, J.*

On the other hand section 2(a) lays down that "debt" includes any pecuniary liability except a liability for unliquidated damages. The words "any pecuniary liability" are wide enough in our opinion to include not only the costs payable to the second appellant by the decree but also mesne profits claimed by and awarded to him. Those profits cannot in our judgment be said to be "unliquidated damages" as their amount was fixed after inquiry by court.

1938

 BADEMI
DASS
v.
RAJA
BIRENDRA
BIHARAM
SINGH

*Thomas,
A. C. J.
and Ziaul
Husain, J.*

We therefore hold that the learned Judge properly stopped proceedings against Pyare Lal under the provisions of section 7 of the United Provinces Encumbered Estates Act.

The next plea of the second appellant that out of the money which was deposited by the creditors' pre-emptors, he is entitled to recover the entire amount due to him to the exclusion of the other creditors, does not also appeal to us as no good ground has been advanced for this proposition. Order XXI, rule 19 of the Code of Civil Procedure relied on by the learned counsel for the second appellant is of little help to him as it deals with a case in which only two parties are entitled to recover sums of money from each other. It does not in our opinion cover a case like the present in which the creditors of one of the parties are also concerned.

The result is that we dismiss all the three appeals before us and confirm the orders of the learned Civil Judge. Parties will bear their own costs of these appeals.

Appeal dismissed.