

## APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice  
Radha Krishna Srivastava

January, 16  
1940

UPPER INDIA BANK, THROUGH MR. H. HUNTER (PLAIN-  
TIFF-APPELLANT) v. AJODHIA SINGH AND OTHERS  
(DEFENDANTS-RESPONDENTS)\*

*Oudh Rent Act (XXII of 1886), section 140—Nankar allowed for long to be deducted from rent of holding—Claim for deduction of nankar in suit for rent, if barred by section 140—Oudh Courts Act (IV of 1925), section 12(2)—Appeal under section 12(2)—Appellant, whether can be heard on point not raised in appeal.*

Where it is found on fact that in the past for many years the proprietor has followed the practice of allowing a deduction for the amount of *nankar* from the rent due from the holding and has realised the balance only, in such a case the claim for deduction amounts to a plea of payment or adjustment of accounts, and not a claim to set off and is not barred by section 140 of the Oudh Rent Act. *Deputy Commissioner, Gonda, for Bilahra Estate v. Bhagwan* (1), *Hafiz Suleman v. Baroda Das and others* (2), *Beni Madho v. Gaya Prasad* (3), *Aminullah Jamati v. Mahkdom Beg* (4), *Bhagwati Prasad Singh v. Ram Jiawan and others* (5), *The Special Manager, Court of Wards, Balrampur v. Ram Pargat* (6), and *Ganga Prashad v. Babu Mahadeo Bux* (7), referred to.

In an appeal under section 12(2) of the Oudh Courts Act an appellant has no right to be heard on points which he did not raise before the Judge against whose decree he is appealing.

*Ramzani v. Bansidhar, Chaudhri* (8), *Rajana, Musammat v. Musaheb Ali* (9), *Ziauddin Ahmad, Qazi v. Mohammad Abdul Haseeb* (10), and *Janka Kuer, Musammat v. Anant Singh, Thakur* (11), relied on.

Mr. *Ram Bharose Lal*, for the Appellant.

Mr. *Haider Husain*, for the Respondents.

\*Section 12(2) Oudh Courts Act, Appeal No. 10 of 1937, against the order of Hon'ble Mr. Justice Ziaul Hasan, Judge of the Chief Court of Oudh, Lucknow, dated 5th January, 1937.

(1) (1909) 12 O.C., 124. (2) (1899) A.W.N., 143.  
(3) (1893) I.L.R., 15 All., 404. (4) (1930) A.I.R., All., 179.  
(5) (1913) 17 O.C., 6. (6) (1926) A.I.R., Oudh, 182.  
(7) (1927) A.I.R., Oudh, 181. (8) (1937) I.L.R., 13 Luck., 76.  
(9) (1937) I.L.R., 13 Luck., 178. (10) (1937) O.W.N., 241.  
(11) (1937) I.L.R., 13 Luck., 270.

THOMAS, C.J., and RADHA KRISHNA, J.:—The Upper India Bank through Mr. H. Hunter, liquidator, brought two suits for recovery of arrears of rent against two different sets of defendants in respect of their occupancy holdings. The village in which these holdings are situated belonged originally to Raja Durga Prasad and was purchased by the plaintiff in a court sale.

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The defence in each suit with which we are concerned was that the defendants had been receiving the *nankar* amount from the proprietor by deduction thereof from the rent of the holding.

The plaintiff disputed this claim for deduction of the *nankar* from the rent of the holding and urged that it amounted to a claim to set off and could not be entertained in view of section 140 of the Oudh Rent Act.

The trial court and the court of first appeal came to a finding of fact that the amount of *nankar* used to be deducted from the rent and that this had been the practice for a long time.

The plaintiff's second appeals were dismissed by a single Judge of this Court by a common judgment. The present appeals are appeals under section 12(2) of the Oudh Courts Act and can be disposed by one judgment, as the question to be decided is the same in both the appeals, i.e. whether the claim of the defendants to have the *nankar* deducted from the rent in accordance with the old practice is a plea of payment or a claim to set off. On behalf of the appellant reliance was placed upon *Deputy Commissioner, Gonda, for Bilahra Estate v. Bhagwan* (1), *Hafiz Suleman v. Baroda Das and others* (2), *Beni Madho v. Gaya Prasad* (3), and *Aminullah Jamati v. Makhdoom Beg* (4).

The respondents' counsel relied upon *Bhagwati Prasad Singh v. Ram Jiawan and others* (5), *The Special Manager, Court of Wards, Balrampur, v. Ram Pargat*

(1) (1909) 12 O.C., 124.

(2) (1899) A.W.N., 143.

(3) (1893) I.L.R., 15 All., 404.

(4) (1930) A.I.R., All., 179.

(5) (1913) 17 O.C., 6

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(1), *Ganda Prashad v. Babu Mahadeo Bux* (2), and *Kunwar Nageshwar Sahai v. Bhabhuti and others* Rent Appeal No. 51 of 1921, decided by the late Court of the Judicial Commissioner of Oudh. A perusal of these cases will show that the claim to have the *nankar* deducted from the rent due to the proprietor has been held to be a plea of payment and not a claim to set off in the

*Thomas, C.J.* following two contingencies:

and  
*Rudha  
 Krishna,  
 J.*

1. Where the *nankar* or cash allowance and the right to hold the holding either as tenant or under-proprietor are interdependent. In most of such cases the liability for the *nankar* and the right to possession of land as tenant or under-proprietor were created by the same decree. In such cases it has been held that the claim for deducting the *nankar* from the rent amounted to a plea of payment, (*vide Bhagwati Prasad Singh v. Ram Jiawan and others* (3), *The Special Manager, Court of Wards, Balrampur v. Ram Pargat* (1), and *Ganda Prashad and another v. B. Mahadeo Bux* (2).

2. Where it is found on fact that in the past for many years the proprietor has followed the practice of allowing deduction for the amount of *nankar* from the rent due from the holding and has realised the balance only. In such a case also it has been held presumably on the ground of an implied agreement between the parties that the claim for deduction amounts to a plea of payment or adjustment of accounts (*vide Kunwar Nageshwar Sahai v. Bhabhuti and others* Rent Appeal No. 51 of 1921, decided by the late Court of the Judicial Commissioner of Oudh).

The present cases fall in the second category of the case mentioned above in view of the finding of fact arrived at by the first two courts that the *nankar* has always been allowed in the past to be deducted from the rent.

(1) (1926) A.I.R., Oudh, 182. (2) (1927) A.I.R., Oudh, 181.  
 (3) (1913) 17 O.C., 6.

The cases relied upon by the learned counsel for the appellant proceeded upon the assumption that the plea for deduction of *nankar* or cash allowance in those cases amounted to a claim to set off. It is not necessary to discuss these cases at length. It is admitted that the question, whether the claim for deduction amounts to a plea of payment, depends upon the interpretation of the decree or grant by which it was granted and also upon the proof of any practice or agreement that may have regulated the payment thereof in the past. If on the facts of a case it is established that the plea for deduction is a plea of a set off, then that plea will be barred by the provisions of section 140 of the Oudh Rent Act. We have found in the present case that the said plea amounts on the facts of these cases to a plea of payment or a plea for adjustment of accounts.

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The learned counsel for the appellant further argued that the practice or the implied agreement to adjust the *nankar* towards the rent as found by the first two courts are not in the nature of covenants running with the land and would not be binding upon the appellant, who is a purchaser at a court sale. This plea was not put forward specifically in the pleadings. It seems to have been urged in arguments before the trial court but was not persisted in the first appellate court or before our learned brother, who decided the second appeals. This contention is absent from the application for leave to appeal under section 12(2) of the Oudh Courts Act and we refuse to entertain it.

In our opinion in an appeal under section 12(2) of the Oudh Courts Act an appellant has no right to be heard on points which he did not raise before the learned Judge against whose decree he is appealing. The right of a third appeal conferred by the said section stands on the same footing as the right of an appeal under the Letters Patent of a High Court. Almost all High Courts are unanimous in holding that in appeals under the Letters Patent the appellant is not entitled to be heard

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on points which he did not raise before the Judge against whose decree he has appealed. Our view is supported by the following decisions of this Court:

*Ramzani v. Bansidhar, Chaudhri* (1), *Rajana, Musammat v. Musaheb Ali* (2), *Ziauddin Ahmad, Qazi v. Mohammad Abdul Haseeb*, (3), and *Janka Kuer, Mst. v. Anant Singh, Thakur* (4).

The result is that the appeals fail and are dismissed with costs.

*Appeals dismissed.*

### MISCELLANEOUS CIVIL

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

1940

January, 18

GAYA PRASAD AND ANOTHER (DEFENDANTS-APPELLANTS) v  
BADAL AND OTHERS (PLAINTIFFS-RESPONDENTS)\*

*Oudh Courts Act (IV of 1925), section 12(1)—Civil Procedure Code (Act V of 1908), section 151 and Order 41, rule 23, and Order 43, rule 1(u)—Order of remand by single Judge—Remand not under Order 41, rule 23, but under inherent power of court—Appeal under section 12(1), Oudh Courts Act, whether lies against such orders of remand.*

Where a Judge of the Chief Court sitting singly passed an order of remand and the remand was ordered not under order 41, rule 23, Civil Procedure Code but under the inherent powers of the court on account of the fact that the trial of the case was considered to have been unsatisfactory due to the looseness of the pleadings of the parties, *held*, that no appeal lies under section 12(1) of the Oudh Courts Act, against such an order of remand. *Umrai v. Rahim Bux* (5), relied on.

Mr. *Siraj Husain*, for the appellants.

THOMAS, C.J. and ZIAUL HASAN, J.:—This is an appeal purporting to be under section 12(1) of the Oudh

\*Miscellaneous Appeal No. 90 of 1939 against the order of the Hon'ble Mr. Justice Radha Krishna Srivastava, Chief Court Judge, Lucknow, dated 4th September, 1939.

(1) (1937) I.L.R., 13 Luck., 76.

(2) (1937) I.L.R., 13 Luck., 178.

(3) (1937) O.W.N., 241.

(4) (1937) I.L.R., 13 Luck., 270.

(5) (1939) O.W.N., 246.