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MIR TILAWAN v. KING-EMPEROR.

Judge of Muzaffarpur. The petitioners were convicted by the Subdivisional Officer of Sitamarhi under section 143, Indian Penal Code, and sentenced to 14 days' rigorous imprisonment and a fine of Rs. 20 each; one of the petitioners was also ordered to give security to keep the peace under section 106, Criminal Procedure Code. On appeal to the Sessions Judge the convictions and sentences have been upheld.

The first point urged in support of this application is that the provisions of section 342, Criminal Procedure Code, have not been complied with inasmuch as the accused were not examined after the prosecution witnesses had been examined, cross-examined and re-examined. It appears that they filed written statements not only at that stage of the proceedings but after the defence witnesses had also been examined and cross-examined and discharged. It is clear therefore that the accused have not been prejudiced and on this account there has been no miscarriage of justice. In these circumstances we see no reason to interfere on this ground in revision.

APPELLATE CIVIL.

Before Coutts and Macpherson, J.J.

1931.

August, 3.

CHAUDHURI SHYAM NARAIN SINGH

v.

SHIWCHARAN SAHU.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *sections* 157, 224, 227 *and* 228—*suit against several tenants collectively—appeal by one, where lies*—Ex-parte *decree, what amounts to—order reviving suit decreed* ex-parte, *appeal from.*

Where a rent suit is brought against several tenants or sets of tenants collectively under section 240 of the Chota Nagpur

* Appeal from Appellate Decree, No. 399 of 1919, from a decision of C. H. Reid, Esq., Judicial Commissioner of Chota Nagpur, dated the 1st February, 1919, confirming a decision of Maulavi Ali Karim, Munsif-Deputy-Collector of Palamau, dated the 21st December, 1914.

Tenancy Act, 1908, and the aggregate amount sued for exceeds Rs. 100, the appeal lies to the Judicial Commissioner even though the appeal relates to a tenant or a set of tenants against whom the claim does not exceed Rs. 100.

The *forum* of appeal in a rent suit is determined at the date of the institution of the suit by the amount sued for and cannot be disturbed by a revival of the suit at a later stage in respect of a portion only of the subject-matter.

To come within section 157 it is not necessary that a decree should appear on the face of it to have been passed *ex-parte*; it is sufficient if it is shewn to have actually been passed *ex-parte*.

Where a claim for rent against two defendants was decreed on the admission of one of them and it appeared that the other defendant though sued as major was a minor and that he had not appeared and still less admitted liability, *held*, that the judgment was in fact passed against the minor by default for non-appearance within the meaning of section 157 and that an order under section 227 setting aside such a judgment was final under section 228.

The facts of the case material to this report were as follows :—

The landlord of Sildilia in the district of Palamau instituted a collective rent suit against four sets of tenants for recovery of Rs. 240. Defendants Nos. 2 and 3 constituted one set and both were described in the plaint as majors. The claim against these two defendants was for Rs. 33-0-3 as arrears of rent for 1320F in respect of an area of 5 *bighas*, 1 *katta*, *naqdi uttakar*, plus damages at 25 *per cent.*, the total being Rs. 41 odd.

On the 11th December, 1913, defendant No. 2 appeared and admitted the claim as against himself and defendant No. 3.

On the 6th March, 1914, the suit was dismissed as against one set of defendants and decreed on admission as against the other three sets, including defendants Nos. 2 and 3.

On the 31st March, 1914, the mother of defendant No. 3 applied on his behalf for revival of the suit on the following grounds, namely, (*i*) that defendant No. 3

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was a minor, (*ii*) that he had not appeared in the suit nor admitted the claim, (*iii*) that the holding was one of 5 *bighas* and 15 *kattas* held on a *naqdi jama* of Rs. 6 including cesses, (*iv*) that defendant No. 2 had no concern with the holding, and (*v*) that no rent was due.

On the 24th June, 1914, the *ex-parte* decree was set aside under section 227 of the Chota Nagpur Tenancy Act, 1908. The suit was then tried and decreed for Re. 0/10/6 being the difference between Rs. 6, the rent alleged by the contesting defendants, and Rs. 5-5-6, the amount shewn in the plaintiff's papers as realised in the year in suit.

The plaintiff appealed from the decree of the Deputy Collector to the Deputy Commissioner who confirmed the decision of the trial court. The plaintiff then moved the Commissioner who held that as the aggregate value of the suit as originally instituted was Rs. 240, the appeal lay under section 218 read with section 224, to the Judicial Commissioner. The memo. of appeal was then presented to the Judicial Commissioner who dismissed the appeal on the ground of limitation. This last order was set aside by the High Court and, on the 1st February, 1919, the Judicial Commissioner, agreeing with the findings of the Deputy Collector, dismissed the appeal on the merits.

The plaintiff appealed to the High Court and the appeal came up for hearing before a Judge of the court sitting singly. Being of opinion that the appeal raised important questions his Lordship referred it to a Divisional Bench.

Kulwant Sahay and *Sheonandan Roy*, for the appellant.

Sambhu Saran, for the respondent.

MACPHERSON, J.—The rent-suit out of which this appeal has arisen, was instituted so long ago as 1913. The landlord of Sildilia in Palamau brought a collective suit for rent against four sets of tenants. The present respondents, who constituted one set, were defendants

Nos. 2 and 3 and both were sued as majors. On the 11th December, 1913, defendant No. 2 appeared and admitted the claim against them which was for a sum of Rs. 33/0/3 as arrears of rent for 1320F in respect of an area of 5 *bighas*, 1 *katta*, *nagdi uttakar*, plus damages at 25 *per cent.* or a total of Rs. 41 odd. On the 6th March, 1914, the suit was dismissed against one set of defendants and decreed under section 166 on admission against the other three sets including the defendants Nos. 2 and 3.

On the 31st March, 1914, the mother of defendant No. 3 applied on his behalf for revival of the suit on the grounds that the defendant No. 3 was a minor though he had been sued as a major, that he had not appeared in the suit, still less admitted the claim, that in fact the holding was one of 5 *bighas*, 15 *kattas*, at a *nagdi jama* of Rs. 6, including cesses, and that defendant No. 2 had no concern with the holding and no rent was due. On June 24th, 1914, the *ex-parte* decree was set aside under section 227 of the Chota Nagpur Tenancy Act, 1908, and the suit was tried and eventually decreed for Re. 0/10/6, being the difference between Rs. 6, the rent alleged by the contesting defendant, and Rs. 5/5/6 shown in the plaintiff's papers as realised in the year in suit.

The decree of the Deputy Collector was upheld by the Deputy Commissioner on appeal but set aside on revision by the Commissioner who held that as the aggregate value of the suit as instituted was Rs. 240, the appeal lay under section 218 read with section 224 of that Act to the Judicial Commissioner, although, as has been said, the claim against the set of defendants consisting of defendants 2 and 3 was only Rs. 41. The memorandum of appeal was thereupon presented to the Judicial Commissioner who dismissed the appeal on the ground of limitation. The High Court set aside this order, and eventually, on the 1st February, 1919, the Judicial Commissioner, agreeing with the findings of the Deputy Collector, dismissed the appeal on the merits.

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On second appeal the case was heard by a single Judge of this Court who referred it to a Division Bench on account of the importance of the questions involved.

The first of these questions is the preliminary objection taken on behalf of the respondent that no appeal lay to the Judicial Commissioner. It is contended in the first place that as the value of the claim against defendants 2 and 3 is only Rs. 41, the appeal under the provisions of section 218 lies to the Deputy Commissioner, and, secondly, that even if the "amount sued for" in the original suit be admitted to be Rs. 240 for the purposes of determining the *forum* of appeal, the "amount sued for" in the suit after the revival in respect of the defendants 2 and 3 only should be considered to be Rs. 41. In my opinion neither contention is well-founded and the objection must be repelled.

The position under Bengal Act I of 1879 was that it was incumbent on the landlord to institute a separate suit in respect of each tenant, and the *forum* of appeal in the case of a suit tried by a Deputy Collector was the Deputy Commissioner or the Judicial Commissioner according as "the amount sued for" did not or did exceed Rs. 100. The only substantial change in this respect made by the Chota Nagpur Tenancy Act, 1908, was the introduction in section 140 of a provision permitting a suit to

> "be instituted before.....the Deputy Commissioner collectively by or against any number of tenants holding land in the same village."

Here the important consideration, so far as the *forum* of appeal is concerned, is that a single suit is provided for. It is patent that in such a suit the "amount sued for" is the aggregate of the claims against the individual tenants sued collectively, and whether the contingency was or was not contemplated by the legislature, the only feasible interpretation of the enactment as it stands, is, as the Commissioner of Chota Nagpur held, that in a rent-suit against tenants collectively (as in a suit against an individual tenant) section 224 applies if the amount sued for exceeds Rs. 100,

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and the appeal lies to the Judicial Commissioner irrespective of whether the "amount sued for" in respect of the particular tenant who is appellant or respondent exceeded or did not exceed Rs. 100. Accordingly though the appeal by the landlord in this instance related to a tenant from whom he only claimed Rs. 41, it lay to the Judicial Commissioner, as the amount sued for in the suit exceeded Rs. 100. The first contention therefore fails, and as the *forum* of appeal in the rent suit is determined once for all at the date of institution by the amount sued for, it follows that it cannot be disturbed by a revival of the suit at a later stage in respect of a portion only of the subject-matter, since the suit as revived is still the same suit, and the second contention also cannot be sustained.

On behalf of the appellant exception is not taken to the judgment of the Judicial Commissioner, but it is sought to assail the order of the Deputy Collector under section 227 reviving the suit at the instance of defendant No. 3. Now section 228 provides that an order under section 227 setting aside a judgment shall be final. The learned vakil accordingly is driven to contend that that order was made without jurisdiction inasmuch as the consent-judgment passed against defendant No. 3 had not been

"passed against him for default of non-appearance under section 157."

There is, however, no force in the contention. Even if it was in law a nullity, the judgment came also within the terms of section 227. Though ostensibly by consent or *inter partes*, it had in fact been passed against him *ex-parte* under section 157—he had not appeared at all in the suit either personally or through defendant No. 2 as agent, even as major, still less as minor, and he had not consented to the decree. To come within section 157 it is not necessary that a decree should appear on the face of it to have been passed *ex-parte*; it is sufficient if it is shown to have actually been passed *ex-parte*, as in the present instance. This

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contention fails, and as no other point is pressed, I would dismiss this appeal with costs to defendant No. 3 throughout the litigation.

COUTTS, J. I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Coutts and Macpherson, J.J.

1921. *August*, 4.

MUSSAMMAT SHAHZADI BEGUM

v.

MUSSAMMAT KOKILA.*

Bengal Land Revenue Sales Act, 1857 (*Bengal Act XI of* 1857), *section* 54—"*incumbrance*", *whether includes a tenure intermediate between the proprietor and the* mukarraridar.

It is competent for a proprietor who has granted a *mukarrari* of his whole share to create an intermediate tenure between himself and the *mukarraridar*.

Therefore, where the proprietor granted to his wife, in lieu of dower, the right of collecting rent from the *mukarraridar*, *held*, that this was an incumbrance within the meaning of section 54 of the Bengal Revenue Sales Act, 1859.

Raj Kumar Majumdar v. *Probal Chandra Ganguli*(1), applied.

Bibi Jarao Kumari Saheba v. *Hanifuddin Akand*(2) referred to

The facts of the case material to this report were as follows :—

M. Khairat Ahmed, the owner of a 6-annas 8-dams share in Mouza Mai Fatehpur, died, leaving two widows

* Appeal from Appellate Decrees Nos. 283 and 284 of 1920, from a decision of G. Rowland, Esq., District Judge of Gaya, dated the 25th February 1920, confirming a decision of Babu Nirmal Chandra Ghose, Munsif of Gaya, dated the 11th June, 1919

(1) (1904-1905) 9 Cal. W. N. 656. (2) (1909-1910) 14 Cal. W. N. 389.