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indivisible and extended over every portion of the goods for the entire debt, they had a right to insist upon retaining the entire quantity of the goods in their possession until the entire amount of their claim was paid. That being so, it seems the case for damages made by the defendant fails. That is in substance, the only defence to the suit raised by the written statement. It appears to me that the plaintiffs are entitled to have an account taken of what is due [946] to them on the banianship dealings in respect of the firm of Sewaram Buldeo Dass ; and in taking that account the defendant is entitled to raise the question which she has raised in the 6th paragraph of her Written Statement in respect of Rs. 19,179-9-3 alleged to be due in respect of certain chitties which the defendant says the plaintiffs ought to have realized.

An order has already been made in course of the suit giving the plaintiffs the right to sell the goods in their possession and hold the proceeds pending the determination of the suit. The present decree does not affect in any way that order which I think must remain in full force and effect.

The costs of suit reserved until the taking of the accounts.

Judgment for plaintiff.

Attorneys for the plaintiff's firm: *Manuel & Agarwalla.*

Attorney for the defendant : *S. C. Mitter.*

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30 C. 947 (=7 C. W. N. 514).

[947] APPELLATE CIVIL.

BANARASI PERSHAD *v.* MAKHAN ROY.*

[19th June, 1903.]

Rent, suit for—Money admitted to be due to landlord—Burden of proof—Plea of 'confession and avoidance'—Rate of rent—Bengal Tenancy Act (VIII of 1885), s. 150.

Section 150 of the Bengal Tenancy Act is limited in its operation to those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him ; in other words, where it is a plea of confession and avoidance. The section does not, therefore, apply to a case where the rate of rent is in dispute.

[Ref. 62 I. C. 80=1921 Pat. 301.]

SECOND APPEAL by the plaintiff, Banarasi Pershad.

The plaintiff brought two suits for rent against the defendant for the years 1303 to 1306 F. S. with cesses and damages. In one of the suits, namely No. 482 of 1899, the rent was claimed for 11 bighas 8 cottahs of *jote* land at the annual rent of Rs. 26-8-2½ dams The defendant in his evidence admitted that rent was due for the period in suit, but that it was for 9 bighas of *jote* land at the annual rent of Rs. 9. There was a similar dispute as to the rate of rent in the other suit.

The Munsif found that the plaintiff had failed to establish his case as to the rates of rent, and decreed the suits at the rates admitted by the defendant with cesses and damages. An application dated the 13th March 1900 filed by the plaintiff for the adjournment of the hearing of

* Appeals from Appellate Decrees Nos. 1860 and 2354 of 1900 against the decree of Kali Kumar Bose, Subordinate Judge of Bhagalpore, dated Aug. 28, 1900, confirming the decree of Saroda Prosad Chatterjee, Munsif of Bhagalpore, dated March 29, 1900.

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suit No. 482 of 1899 and for issue of warrants against his witnesses who had not appeared, was rejected by the Munsif.

The plaintiff appealed and contended before the Subordinate Judge (*i*) that the Munsif was wrong in rejecting the application filed by the plaintiff for issue of warrants against witnesses, (*ii*) that having regard to the provisions of section 150 of the **[948]** Bengal Tenancy Act, the defence of the defendant as to the rates of rent should have been rejected by the Munsif as the admitted rent was not deposited, and so forth. With reference to the first contention, the Subordinate Judge held that in the circumstances of the case the application was rightly rejected by the Munsif. With regard to the provisions of section 150 of the Bengal Tenancy Act, the Subordinate Judge overruled the objection on the ground that as it was not taken before the Munsif by the plaintiff, he must have waived his right, and could not take it in appeal. The appeals were accordingly dismissed.

Dr. *Ashutosh Mukherjee* (Babu *Lalmohan Ganguli* and Babu *Narendra Chandra Bose* with him), for the appellant, contended that as the plaintiff admitted that money was due, unless he paid it into Court, the Court could not take cognisance of the plea having regard to section 150 of the Bengal Tenancy Act.

[BANERJEE, J. The section seems to be restricted to cases where the admission and the plea are of such character that if no evidence were given on either side, the plaintiff would be entitled to a decree for the whole amount.]

Then it would be necessary to read into the section words which are not to be found there. The Lower Appellate Court has also erred in law in holding that the plaintiff's application dated the 13th March 1900 was rightly rejected by the Munsif.

Babu *Shib Chandra Palit*, for the respondent, submitted that the section was only directory, and not imperative. The language of section 151 showed that this contention was correct. Further, section 150 only contemplated cases in which the burden of proof was on the tenant, that is to say, cases in which the defendant confessed the claim, but wanted to avoid the liability to pay.

BANERJEE, J. The questions raised in these two appeals are two, namely, *first*, whether the Lower Appellate Court is right in law in holding that the first Court had good grounds for refusing the application of the plaintiff, dated the 13th of March 1900, for further process on his witnesses; and *second*, whether the Court of Appeal below is right in holding that the first Court was justified in deciding the case without regard to the provisions of section 150 of the Bengal Tenancy Act.

[949] Upon the first question the Lower Appellate Court says: "It is clear from the record that the plaintiff took four adjournments before to produce his witnesses who are his tenants in these cases. Without taking any steps on previous two or three occasions to have his witnesses produced, he made an application for issue of warrants against his tenant witnesses on the 13th March 1900, but that application was rightly rejected by the Lower Court."

I do not think that the Courts below were wrong in their view that the application for further process on his witnesses that was made by the plaintiff was rightly rejected. If the plaintiff had not used due diligence in the matter, and if he had not asked for the issue of further process at the earliest date, it cannot be said that the first Court did not

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exercise its judicial discretion properly in refusing the application for further process on the 13th March 1900. At any rate, I cannot, in second appeal, say that the Lower Appellate Court, in holding that the first Court was right in the course it took, committed any error of law for which we can interfere with its judgment.

On the second question, it is argued that the language of section 150 of the Bengal Tenancy Act is imperative and makes it obligatory on the Court to refuse to take cognisance of the defendant's plea, when the defendant admits that some money was due, and the plea is that the amount claimed is in excess of the amount due ; and as the defendant in the present case admitted that some money was due, that is to say, that rent at the rate of nine rupees a year was due from 1303 to the date of the institution of the suit, the Court below was wrong in taking cognisance of the defendant's plea, that the rate at which rent was claimed was in excess of the rate at which rent was payable.

No doubt the defendant admitted in this case that rent at the rate of nine rupees annually was due from 1303 up to the date of suit, and the Court without recording any special reason in writing took cognisance of the plea that the rate at which rent was claimed was in excess of the rate at which it was payable. It not only permitted the defendant to cross-examine the witnesses called by the plaintiff in support of his claim, but allowed the defendant to give evidence to rebut that claim.

[950] But the question still remains whether the first Court acted in contravention of section 150 of the Bengal Tenancy Act. The Lower Appellate Court gets over the objection on the ground that as the plaint did not ask the Court to enforce the provisions of that section, the plaintiff must be taken to have waived his right to have the benefit of the section. I am not prepared to accept this view as correct. The section does not say that the plaintiff must ask the Court to enforce the section before the Court can be required to enforce the provisions of the section. Of course the omission of the plaintiff to call the attention of the Court to the section had this effect, namely, that it prevented the Court from recording special reasons in writing upon which it could take cognisance of the plea, notwithstanding that the amount admitted to be due was not deposited. It may also be said, now that the plea has been taken cognisance of and evidence has been gone into, that it would be too late to ask the Court to decide the case without taking cognisance of the plea, if it does not find any special reasons for dispensing with the provisions of the section against the taking of the plea. Be that as it may, I do not propose to base my judgment on any such narrow ground.

I am of opinion that, having regard to the nature of the objection raised in this case by the defendant, it must be held that it is one which is not covered by section 150 of the Bengal Tenancy Act. In my opinion, section 150 of the Bengal Tenancy Act is limited in its operation to those cases where the plea of the tenant is of a nature such that the burden of proving it rests upon the tenant, and in the absence of evidence on his side, the plaintiff would be entitled to a decree for the full amount ; as for instance where the plea is in the nature of a plea of payment or a plea of exemption from liability to pay rent by reason of diluvion or by reason of partial eviction or for any other similar reason. Where, however, the plea is of a nature such that the real question involved in it must remain to be determined by the Court notwithstanding that the defendant's plea is regarded. I am of opinion that the section was not

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intended to apply to such a case. No doubt the language of the section is not very happy; but the view I take seems to me to be the only reasonable view of its meaning and [951] intention, and the only view upon which it can work without leading to any anomaly. For where, as in the present case, the plea is that the amount claimed is in excess of the amount due by reason of the rent claimed to be annually payable being in excess of the amount that is really so payable, whether the defendant takes any plea objecting to the annual rate of rent or not, the burden must lie upon the plaintiff to prove that rent is payable at the rate claimed.

This the learned vakil for the appellant does not dispute, and indeed it cannot well be disputed. The mere fact of the defendant being honest enough to admit some rent to be due, cannot exonerate the plaintiff from the obligation that attaches to the plaintiff in a rent suit to prove that rent is payable at the rate claimed. Even if the case had been tried *ex-parte*, the plaintiff would have been bound to prove that. If that is so, what would be the effect of the Court's refusing to take cognisance of the defendant's plea that the rate claimed is not the correct rate, when, notwithstanding the absence of any such plea, the Court is still bound to go into the question involved in the plea? Could it then be said that the Court refuses to take cognisance of the plea, when it must call upon the plaintiff to prove the rate claimed, and it must determine what the rate is at which the rent is annually payable? Though it may nominally refuse to take cognisance of the plea, yet it really does enter into a trial and determination of the question involved in the plea. Unless then the section is construed in the limited sense in which I understand it, namely, that it is intended to apply only to those cases where the plea of the tenant is one in respect of which the burden of proof lies upon him, there is no refusal to take cognisance of the plea; and to give effect to the contention urged on behalf of the appellant that the section applied even to cases like the present, would lead to this anomalous result, that although the Court has to determine the question involved in the plea, it is nevertheless to refuse to take cognisance of the plea. Shortly stated, the section is intended to cover that class of cases where the plea is, in technical language, a plea of confession and avoidance. The grounds of avoidance not being made out, the plea of confession will be operative, and the plaintiff will be entitled to a decree [952] without having to prove anything more. That is the view I take of the proper construction of the section, and in that view the Courts below were quite right in going into the question of the rate of rent without regard to the provisions of section 150 of the Bengal Tenancy Act.

The grounds urged before us both fail, and these two appeals must be dismissed with costs.

PARGITER, J. I agree. I wish to add a few words why I come to the same conclusion regarding section 150 of the Bengal Tenancy Act. The section treats the defence as consisting of two parts,—an admission and a plea. The admission is that money is due; the plea is that the amount claimed is in excess of the amount due. The admission according to the words of the section is in general terms, simply—money is due. The plea is the part that modifies the admission; it is the plea that, read with the concluding words of the section, introduces precision and specifies

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the exact amount admitted to be due. If the defendant does not pay in that amount and the plea is struck out in consequence, there remains the admission in general terms that money is due, and the result thereupon would be that the plaintiff would be entitled to a decree for his claim. That seems to me to be the effect of the words as they stand in the section, if taken apart from the intention of the Legislature. But I do not think that the Legislature can have intended to place an honest defendant in a worse position than a dishonest one; for if the defendant denies the whole of the plaintiff's case, the plaintiff is put to proof of it, and the defendant secures time before he is obliged to pay up any part of the claim; whereas according to the above construction an honest defendant who admits part of the plaintiff's claim would have the whole of the claim decreed against him unless he pays in the admitted sum at once.

It appears to me, therefore, that the construction must be modified, and it must be modified in the sense in which it has been taken by my learned colleague.

Appeals dismissed.

30 C. 953.

[953] APPELLATE CIVIL.

GANGA RAM MARWARI *v.* JAIBALLAV NARAIN SINGH.*

[4th March, 1903.]

Mortgage—Transfer of Property Act (IV of 1882) ss. 96, 97—Civil Procedure Code (Act XIV of 1882) s 295, prov. (c)—Sale-proceeds, surplus of—Prior mortgage—Contract Act (IX of 1872) s. 44—Contribution as between co-mortgagors—Interest to date of realisation, rate of.

If a mortgagee receives any money out of the surplus sale-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.

Johnson v. *Bourne* (1) followed.

The Court is quite competent to allow in a mortgage decree interest at the stipulated rate up to the actual date of realisation.

Rameswar Koer v. *Mahomed Mehdi Hossein Khan* (2) and *Maharaja of Bhartpur* v. *Rani Kanno Dei* (3) followed.

SECOND APPEAL by the plaintiff, Ganga Ram Marwari.

The plaintiff brought a suit for Rs. 4,851 on a mortgage bond dated the 31st October 1892. The suit was instituted on the 3rd February 1897, and it was alleged in the plaint that the defendants first party had executed the mortgage bond, on receipt of a loan of Rs. 1,865, in favour of the plaintiff, the property mortgaged being a 6¾-anna share out of a 7-anna *putti* in mehal Arsand, bearing tauzi No. 4197, or that treating the *putti* as sixteen annas, the share mortgaged was 15 annas, 8 gandas, 2 cowries, 1 krant. It was further alleged that the whole *putti* had been leased out to one Lalit Narain Khaihari at the annual rent of

* Appeal from Appellate Decree No. 1329 of 1899, against the decree of C. M. W. Brett, District Judge of Bhagulpore, dated March 3, 1899, modifying the decree of Nafar Chandra Bhatta, Subordinate Judge of that district, dated April 27, 1898.

(1) (1843) 2 Y & C. Ch. 268.

(2) (1898) I. L. R. 26 Cal. 39; L. R. 25 I. A. 179.

(3) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.