1869

SHIU DAS NARAYAN SING v. BHAGWAN DUTT.

the share to which the father was entitled; that the lower Courts was therefore wrong in dismissing the entire claim of the plaintiff.

On the first point the petition has been read, and we are of opinion that the lower Court has not misconstrued this petition. It appears that a sale in execution was imminent, and the plaintiff applied to the Court by petition, stating that his father, owing to old age and debility, had made over the whole estate to the plaintiff, the son; that the debt under the decree was justly due; and that the plaintiff had no present means to meet the decree, and, thereforef prayed the Court, either to apply the provisions of section 243 of the Code of Procedure, or to give him one month's grace, within which to raise the money to pay off the decree; this petition is, therefore, not, as the appellant contends, a simple prayer for the postponement of the sale, but a distinct admission of the justness of the debt and of the liability of the estate to pay the same.

The second point is a new one: it was not raised in the pleadings below: the plaintiff's case below was that his father was extravagant, and contracted the debts for purposes not sanctioned by the Hindu law, and an issue was raised on these pleadings to the effect of whether the plaintiff's father wasted the said properties, by extravagance not countenanced by the Hindu law, or incurred debts for purposes sanctioned by the Hindu law, such as the marriage of daughters and other charitable acts. The Courts below found that there was no proof of the extravagance of the father, and that the alienations were made for purposes sanctioned by the Hindu law.

We cannot permit the special appellant to entirely change in special appeal the allegations on which he went to trial.

We dismiss the special appeal with costs.

1869

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Before Mr. Justice Kemp and Mr. Justice Glover.

LACHMI NARAYAN PURI (INTERVENOR) *v.* PUKHRAJ SING AND OTHERS (PLAINTIFFS.)*

Act X. of 1859 *s.* 77—*Intervention*

Where an intervenor in a rent suit applies to be made a party under section 77 of Act X. of 1859, distinctly relying upon that section, it must be inferred that his case is that he has been in receipt and enjoyment of the rent before and up to the time of the commencement of the suit, and his petition should not be rejected, because it does not contain the words "that he claimed to occupy and receive the rent.

Mr. *R. E. Twidale* for appellant.

Baboos *Khettra Mohan Mookerjee*, *Budhsen Sing*, and *Munshi Mohammed Yusaff* for respondents.

* Special Appeal, No. 1393 of 1868, from a decree of the Judge of Gya, dated the 29th February 1868 affirming, a decree of the Deputy Collector of that district, dated the 12th November 1867.

1869

LACHMI NARAYAN PURI v. PURHRAJ SING.

The judgment of the Court was delivered by

KEMP, J.—This was a suit for rent. The plaintiff, as mokurruridar, sued the ticcadar for rent. The special appellant, who alleges that he has purchased the proprietary rights in the estate, intervened under section 77 of Act X. of 1859. The first Court—although this does not appear in its decision, but by order on a petition—refused to make the special appellant a party to the suit. On appeal, the Judge held, that no appeal would lie, and that the special appellant had no good claim to be, allowed to appear as intervenor before the lower Court. The Judge further observes that the petition presented to the Deputy Collector by the intervenor does not contain any allegation of receipt of rent, nor does it appear from that petition that the intervenor has ever received any rent.

We think that both Courts were wrong in not making the intervenor a party to the suit. The application to be allowed to be made a party was distinctly made under section 77 of Act X. of 1859. Now, there is no other ground upon which a party can claim to be made a party to a suit under section 77, except one, viz. that he has in good faith received and enjoyed rent up to the time of the commencement of the suit. Therefore, when a party applies under that section, quoting that section, it must be inferred that his plea is that he has been in receipt and enjoyment of the rent before and up to the commencement of the suit.

With reference to the petition presented by the intervenor, such portions as the pleader for the respondent wished to have read in support of the Judge's judgment, have been read. We do not find that the intervenor admitted in that petition that he had not been in receipt of the rent. What he stated was, that during the term of the ticca, he was entitled to the malguzari, or the rent, and that after the expiration of the term of the ticca he was entitled to *khas* possession. The ticcadar, who has been made a respondent, also objects to the intervenor being made a party to the suit, although the pleader for the respondent, the ticcadar, admits that his client was in doubt as to which party the rent was payable, *viz.* to the plaintiff or to the intervenor. We think that this is a case in which the intervenor ought to have been made a party under section 77; and that simply, because the words "that he claimed to receive and enjoy the rent" were omitted in the petition, although the section is distinctly quoted and relied upon, the lower Court ought not to have rejected the petition of the intervenor.

We, therefore, remand the case with directions to the Court of first instance to make the intervenor a party under section 77 of Act X. of 1859, and to re-try the case. The intervenor will be permitted to put in evidence in support of his claim.

Costs to follow the result.