1901

LALA SURAJ PROSAD v. GOLAB CHAND.

if contested, have to be decided in another suit. But that question has now been decided in this suit. This view is not inconsistent with that taken by the High Court at Madras in two cases, one of *Ramasamayyan* v. *Virasami Ayyar* (1), which was followed in the case of *Palani Goundan* v. *Rangayya Goundan* (2) or with the principle laid down by the Bombay High Court in the case of *Devji* v. *Sambhu* (3).

Under these circumstances, seeing that the minor plaintiff does not ask for liberty to redeem the mortgage, a right which I understand the mortgagee is not prepared to contest, and it having been found against the minor plaintiff that the debt was not contracted for immoral or illegal purposes, and no other defence to the mortgagee's claim having been raised or even suggested, it seems to me that his suit and his appeal must fail, and that both must be dismissed with costs.

SALE, J.—I agree.

BRETT, J.—I agree.

B. D. B. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Pratt.

1901. *Jan.* 7, 8, 9.

SADAI NAIK (PLAINTIFF) *v.* SERAI NAIK (DEFENDANT) AND MATANGINI DASI (OBJECTOR).*

Second appeal—Rent, arrears of—Suit—Act X of 1859, ss. 23, 77, 153, 160, 161—Act VIII of 1859, ss. 284, 372—Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), ss. 37, 144.

A second appeal lies to the High Court from an appellate decree of the District Judge in a suit for arrears of rent instituted under Act X of 1859 and tried by the Deputy Collector.

* Appeal from Appellate Decree No. 2087 of 1899, against the decree of W. B. Brown, Esquire, District Judge of Cuttack, dated the 14th of September 1899, reversing the decree of Babu Nayananjan Bhuttacharjee, Sub-divisional Officer of Bhadrak, dated the 13th of May 1899.

(1) (1898) I. L. R. 21 Mad. 222.
(2) (1898) I. L. R. 22 Mad. 207.
(3) (1899) I. L. R. 24 Bom. 135.

1901

SADAI NAIK v. SERAI NAIK.

Hallodhur Biswas v. *Mohesh Chunder Haldar* (1) followed; *Khedu Mahto* v. *Budhun Mahto* (2) distinguished.

A lease granted by a Hindu widow in possession of her widow's estate, does not necessarily become void on her death, but is only voidable by the next inheritor of the estate.

THIS appeal arose out of a suit for arrears of rent for the year (Urya) 1305 [= 24th Bhadra 1304 B. S.—12th Bhadra 1305 B. S.], amounting to Rs. 3-8-0, instituted in the Court of the Sub-divisional Officer of Bhadrak, District Cuttack, under the provisions of Act X of 1859. The plaintiff sued as an *ijaradar* under two ladies, Adharmoni and Giribala, who owned two-thirds of the zemindari and held the remaining one-third share under an *ijara* granted by the owner, Nistarini, another lady, for the period 1289 to 1304 B. S. Nistarini having died on the 4th Falgoon 1303 B. S. (= 14th February 1897), her daughter, one Matangini, intervened in the present suit on the ground that, the *ijara* granted by her mother having terminated by her death, she was entitled to receive her share of the rent from the defendant, and not the plaintiff.

The defendant, a raiyat, pleaded payment to Matangini and her co-sharers, which he failed to prove. The Sub-divisional Officer held on the facts that the *ijara* granted by Nistarini was allowed to stand for its entire period, and that, therefore, the plaintiff was entitled to recover rent up to the end of 1304 B. S. The suit was decreed accordingly for half the annual rent.

On appeal by Matangini, the District Judge held that the *ijara* granted by Nistarini was determined by her death, and accordingly dismissed the suit in respect of the half of the one-third share of Matangini sued for.

Thereupon the plaintiff appealed to the High Court.

1901, JANUARY 7 AND 8. Babu *Boido Nath Dutt*, for the appellant.

Dr. *Asutosh Mukerjee*, Babu *Ganendra Nath Bose* and Babu *Biraj Mohan Majumdar*, for the respondents.

(1) (1861) S. D. A. decisions, p. 144.
(2) (1900) I. L. R. 27 Calc. 508.

1901

SADAI NAIK v. SERAI NAIK.

1901, JANUARY 9. The judgment of the High Court (GHOSE and PRATT, JJ.) was as follows :—

This appeal arises out of a suit for rent instituted under Act X of 1859.

The claim was in respect of the year 1305 (Urya style—24th Bhadra 1304 to 12th Bhadra 1305 B.S.). It was opposed by the defendant, the tenant, upon the ground that the plaintiff had no right to recover it ; and he was supported in that respect by a third party, who intervened under the provisions of s. 77 of the said Act.

The Deputy Collector, who had to try the suit, was of opinion that the plaintiff was entitled to recover the rent and accordingly passed a decree in his favour.

An appeal was preferred against that decree to the District Judge, and that officer has reversed the judgment of the Deputy Collector upon the ground that the plaintiff is not entitled to recover the rent claimed. We shall presently notice the grounds, upon which the learned Judge has come to this conclusion.

The appeal to this Court is by the plaintiff, and a preliminary objection has been raised on behalf of the respondents, the defendants, upon the ground that no second appeal lies to this Court against the judgment of the District Judge, the suit for rent being for a sum below Rs. 5,000.

The learned vakil on behalf of the respondents has, in support of this objection, mainly relied upon the decision of a Full Bench of this Court, namely, the case of *Khedu Mahto* v. *Budhun Mahto* (1). The case in which that decision was pronounced was one governed by the provisions of the Chota Nagpur Act (I of 1879 B. C.) The said Act contains provisions somewhat similar to those contained in Act X of 1859, and it has been contended that the reasons, which were assigned by the learned Judges, who composed the Full Bench, for holding that a second appeal would not lie to this Court in a case governed by Act I of 1879 B. C., where the amount of rent claimed is below Rs. 5,000, apply equally to a case governed by Act X of 1859, in which the claim

(1) (1900) I. L. R. 27 Calc. 508.

for rent is below Rs. 5,000, so as to debar a second appeal to this Court.

The question as to the right of second appeal to this Court in a suit for rent under Act X of 1859, was considered by a Full Bench of the late Sudder Dewani Adalat Court in the case of *Hallodhur Biswas* v. *Mohesh Chunder Holdar* (1), in which the various provisions of Act X of 1859, as bearing upon this point, were considered, and it was held, that where an appeal from the decision of a Deputy Collector is decided by a District Judge, a second appeal would lie to this Court. Among the sections they had to consider was s. 161; and we observe that the Chota Nagpur Act (I of 1879) does not contain any section with provisions similar to those that are to be found in that section. The learned Judges, who sat on the Full Bench in the case relied upon by the learned vakil for the respondents, proceeded upon a consideration of ss. 37 and 144 of the Chota Nagpur Act—sections which correspond in substance to ss. 23 and 160 of Act X of 1859. S. 161, however, contains other provisions, and which provisions, we notice, the Full Bench of the late Sudder Court relied upon specially in holding that a second appeal would lie to this Court in a case for rent under Act X of 1859, when the appeal is decided by the District Judge. The learned Judges in referring to the provisions of the said sections made the following observations :—

"Now it has been rightly argued, we think, that these words are sufficient to show that the Legislature intended that these appeals should be treated in every respect as regular appeals in the Zillah or Sudder Courts, and that Act X of 1859, having given the right of appeal to these Courts, intended to leave the Courts to deal with the appeals according to their own forms and mode of procedure, and to place no sort of restriction upon the action of the laws, by which the decisions of those Courts are ordinarily governed. It, therefore, naturally follows that as our new Code of Procedure, Act VIII of 1859, has enacted by s. 372 (corresponding to s. 584), 'that unless otherwise provided by any

(1) (1861) S. D. A. Decisions, p. 144.

1901

SADAI NAIK v. SERAI NAIK.

law for the time being in force, a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal by the Court subordinate to the Sudder Court,' a special appeal will lie from the decisions of the Zillah Judges in appeals preferred to them under Act X of 1859. To hold otherwise would be to presume that Act X of 1859 was intended to invest the subordinate Civil Courts with some new finalities as to their appellate jurisdiction, and to restrict the ordinary power of this Court, which we see no reason whatever to think was contemplated by the Legislature in framing the Act in question. We, therefore, determine that, subject to the provisions enjoined by s. 372 of Act VIII of 1859, petitions of special appeal from decisions passed in appeal by the Zillah Judges in suits instituted under Act X of 1859, can be heard and determined by the Sudder Court."

We also find that the Privy Council, in the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1), where the question was raised whether the Rent Courts, established by Act X of 1859, were Civil Courts within the meaning of Act VIII of 1859, and whether under s. 284 of Act VIII a Collector could transfer a rent decree for execution to another district, in the course of their judgment, made the following observations:—

"S. 160 of Act X of 1859 has a bearing on this question. That section provides that an appeal from the judgment of a Collector or a Deputy Collector shall lie to the Zillah Judge. But the Zillah Judge is a Civil Court to all intents and purposes. It was not disputed that, if an appeal went from the Collector to the higher Court,—to the Zillah Judge or to the High Court—and the decree of the Collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII of 1859 (the then Civil Procedure Code). Then this consequence would follow, that the act of the parties would alter the nature of the decree; as long as the decree remains the decree of the Collector, it is incapable of enforcement in any other district, but let the decree be affirmed by a Court of Appeal, and though it is between the same parties for the same subject matter, it then becomes enforceable in another district.

(1) (1882) I. L. R. 9 Calc. 295; L. R. 9 I. A. 174.

It is very difficult to suppose that any such result as that could possibly have been intended by the Legislature."

In other words, when the suit is dealt with in appeal by a District Judge, though it may be a suit for rent under Act X of 1859, the decree of the Appellate Court becomes the decree of the Civil Court, and according to the decision of the late Sudder Court, in the case to which we have already referred, a second appeal would lie to this Court against a judgment of a District Judge according to the same procedure, which obtains in respect of second appeals in suits tried in the ordinary Civil Courts. We might here observe that, ever since the year 1861, when the Sudder Court passed the decision in the case of *Hallodhur Biswas* v. *Mohesh Chunder Holdar* (1), second appeals have been entertained by this Court in suits for rent, when the appeal was decided by a District Judge and we are not aware that it was ever disputed that the right of second appeal lay to this Court in such suits.

In these circumstances, we think that we should guide ourselves by the ruling in the case of *Hallodhur Biswas* v. *Mohesh Chunder Holdar* (1). We accordingly overrule the objection taken by the respondents before us.

We then proceed to deal with the case on the merits.

It appears that a certain zemindari belonged to three ladies, Adharmoni, Giribala and Nistarini, each being entitled to a one-third share thereof. Nistarini executed an *ijara pottah* in respect of her one-third share in favour of Adharmoni and Giribala, and it was for a period commencing from 1289 and ending with 1304 B. S Nistarini died in Falgun 1303 B. S. corresponding to some date in February, 1897, and Matangini the intervenor defendant, the daughter of Nistarini, succeeded to the estate. In the meantime Adharmoni and Giribala had sublet their *ijara* interest in favour of the present plaintiff. Shortly after the death of Nistarini, the revenue payable on account of her share in the zemindari fell due, and it was paid by the plaintiff in April 1897 and not by Matangini.

We ought here to mention that one of the terms of the *ijara* lease was that out of the rent payable by the *ijaradars* to the

(1) (1861) S. D. A. Decisions, p. 144.

1901

SADAI NAIK v. SERAI NAIK.

lessor, the former should pay the Government revenue on account of the lessor's share in the zemindari, and apparently, it was with reference to this condition in the *ijara pottah* that the payment in April 1897 was made by the plaintiff.

In Kartick 1304 B. S., corresponding to some date in October 1897, two notices were issued by Matangini, one of the notices being to the tenants on the property and the other to Adharmoni and Giribala. The notice given to the tenants was as follows :—

"That Jogendra Nath Mullick and Nogendra Nath Mullick of Andul took *ijara* settlement of the said 5 annas 4 gandas share in the *benami* of their agent Jadu Nath Kundu from one Nistarini Dassi, that the term of the said *ijara* having expired and the said Nistarini Dassi having died on the 4th of Falgun 1303 B. S., I have become owner of all the properties left by her, that all the tenants shall from the month of Bhadra 1304 pay all dues payable by them to the agent on my behalf holding my *parwana*," and so forth.

The *ijara* is there said to have expired, whereas according to the terms of the grant made by Nistarini it had yet to expire. Then turning to the notice given to Adharmoni and Giribala we find the following passage: "That on or from the 15th of this month (Kartik), she (that is to say Matangini) will realize the rents due from raiyats for the present year (amli) *i.e.*, 1305, of the said property and that she has accordingly given notices to the tenants." No allusion was there made as to the *ijara* having either expired or been brought to a termination; and we do not find anything in either of these notices, indicating that Matangini had determined the *ijarah*. However, that may be, we find that, in the next month, November 1897, another *kist* of Government revenue fell due, but Matangini took no steps to pay the *kist*, just in the same way as she had made no payment in respect of the April *kist*, to which we have already referred.

Now from these facts (and these are substantially the only facts to which reference has been made by the District Judge) what is the legitimate inference to be drawn? Is it to be held that the intervenor having had the right to determine the lease,

which had been granted by Nistarini, did determine it or did she allow the lease to run on until the year 1304 B. S., in accordance with the terms of the *ijara* grant?

The learned Judge of the Court below has held that upon the death of Nistarini the *ijara* came to an end by itself, and that the failure on the part of the intervenor to pay the revenue either in April 1897 or in November 1897 could not and did not indicate that it was her intention to allow the lease to run on until the year 1304 B. S.

We have heard the learned vakils on both sides upon this question, and after full consideration, we are of opinion that the learned District Judge has not drawn the legitimate inference, which ought to be drawn from the facts which we have referred to. In the first instance, the learned Judge, we do not think, was right in holding that the lease came to an end by itself upon the death of Nistarini. As an authority for that view we need only refer him to the case of *Modhu Sudan Singh* v. *Rooke* (1) which he himself notices in his judgment. The lease no doubt was voidable and the intervenor was quite at liberty to bring the lease to a termination, but neither by the notices, to which we have already referred, nor by any other act or conduct on her part did she do so, but on the contrary, she allowed the *ijaradar* to pay the Government revenue on two occasions, once within two months of the death of Nistarini, and again shortly after the issue of the notices in October 1897, which are now relied upon by the intervenor as indicating her intention to bring the lease to a termination. And these payments, as we have already said, were in accordance with one of the conditions of the *ijara* lease itself, under which the *ijaradars* were to pay, out of the rent payable by them, the Government revenue payable on account of the share of the estate belonging to Nistarini. Such payments were in reality payments of rents due under the *ijara*, though they were paid into the Collectorate as revenue. The learned Judge, however, suggests certain reasons why these payments should not be regarded in the light in which the plaintiff puts them forward, but we are unable to agree with

(1) (1897) I. L. R. 25 Calc. 1.

1901

SADAI NAIK v. SERAI NAIK.

him, bearing in mind that the *kists* fell due after the succession of Matangini, and that it was she that was liable to pay them, and not the *ijaradars*, if the *ijara* came to an end upon the death of Nistarini. We think that the only legitimate inference that can be drawn from the facts to which we have referred, is, that the *ijara* was not brought to a termination, but was allowed to run on.

The result is that the decree of the District Judge is set aside, and that of the Court of First Instance restored, with costs in all the Courts.

M. N. R. *Appeal decreed.*

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.

1901 *May* 10, 13 *and June* 26.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)

v.

JAGAT MOHINI DASSI (PLAINTIFF) AND S. A. RALLI AND ANOTHER (DEFENDANTS NOS. 2 AND 3).

JAGAT MOHINI DASSI (PLAINTIFF) *v.* S. A. RALLI AND ANOTHER (DEFENDANTS).*

Damages and mesne profits, suit for—Attachment of the property of a wrong person at the instance of a third person—Criminal Procedure Code (Act V of 1898) s. 88—Secretary of State for India in Council—Damages—Liability of the person at whose instance the property was attached—Act for the protection of Judicial Officers (Act XVIII of 1850).

A suit was brought by the plaintiff to recover possession of certain immoveable property with mesne profits against the Secretary of State for India in Council, Messrs. Ralli Brothers & Co. and another person (Defendants Nos. 1 to 3), on the allegation that Defendants No. 2 instituted a criminal proceeding against defendant No. 3, who not having appeared, the property in dispute was attached at the instance of defendants No. 2 as the property of the accused (defendant No. 3), and that notwithstanding a notice under s. 424 of the Civil Procedure Code was served on defendant No. 1 by the plaintiff, the property in dispute, which belonged to her was not released.

The defence of defendants Nos. 1 and 2 was that they were not liable, whilst defendant No. 3 did not enter appearance.

* Appeal from Appellate Decrees Nos. 1164 and 1392 of 1898, against the decree of C. P. Caspersz, Esq., Additional District Judge of 24-Pergunnahs, dated the 2nd of April 1898, affirming the decree of Babu Bulloram Mullick, Subordinate Judge of that district, dated the 27th of January 1897.