
(1948) 08 AHC CK 0023
In the Allahabad High Court

Khatirzaman Khan

APPELLANT

Vs

Mohd. Zafar Ali Khan

RESPONDENT

Date of Decision : 12-08-1948

Acts Referred:

Uttar Pradesh Land Revenue Act, 1901 — Section 79
Uttar Pradesh Tenancy Act, 1939 — Section 228

Citation : AIR 1949 All 255

Hon'ble Judges : Kaul, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kaul, J.—This is a second rent appeal preferred by one of the defendants in the trial Court against an appellate decision of the learned Civil Judge of Sultanpur.

2. The material facts are as follows : A suit was brought by Mirza Bahadur Mohammed Zafar Khan against 13 defendants for recovery of under-proprietary rent due for the years, 1346, 1347, and 1348 F. The sum claimed was Rs. 407-4-9. A written statement was filed by some of the defendants, but it appears that they failed to appear on the date fixed for hearing, and a decree for Rs. 375-14-9 with costs and interest was passed ex parte against all the defendants on 20th June 1942. There was, however, a provision contained in the decree that the liability of each defendant was limited to 1/13th of the sum decreed. One of the defendants to the suit, Khaliq Bahadur Khan, defendant 10, was a minor. An application for setting aside the ex parte decree was made on his behalf on 26th July 1942. This was allowed, and the ex parte decree was set aside against the minor defendant 10 only, on 2nd September 1942. On 29th December 1942, a decree for Rs. 28-13-10 2/13 with proportionate costs and future interest at 61/4 per cent. per annum was passed against Khaliq Bahadur Khan alone. On 2nd January 1943, Khaliq Bahadur Khan preferred an appeal against the decree which was passed against him on 29th December 1942. He impleaded all the other defendants also in the array of respondents and the last ground of appeal

contained the following statement:

The appeal is being filed for the benefit of respondents 2 to 13 who are joined as pro forma respondents.

When this appeal came up for hearing before the Civil Judge of Sultanpur on 12th July 1943, counsel for the decree-holder (who was respondent 1) stated "that the decree be set aside as the appellant's proper guardian was not appointed by the trial Court." It appears from the judgment under appeal that counsel for respondent 1 further stated that he discharged the appellant (Khaliq Bahadur Khan) from the array of parties. There. upon the learned Civil Judge passed the following order:

In view of this statement, the appellant's name is ordered to be removed from the array of the parties and the trial Court's decree is hereby set aside as against him. Other grounds of appeal are consequently not pressed. As the other respondents against whom the ex parte decree has been passed have not appealed it is left intact.

Khatirzaman Khan, who was arrayed as defendant 11 in the trial Court, and against whom also an ex parte decree was passed on 20th June 1942, has preferred this appeal against the decree of the learned Civil Judge dated 12th July 1943.

3. It was contended by the learned Counsel for the appellant that the learned Judge in the Court below was in error in allowing respondent 1 to abandon his claim against Khaliq Bahadur Khan at that stage in the Court of appeal. He further contended that as a result of the course adopted by the learned Judge he was deprived of an opportunity to challenge the propriety of the decree. Reference was also made in the course of arguments by the learned Counsel to the provisions of Sections 228 and 234, U.P. Tenancy Act. He argued that under the provisions of Section 234, the liability of each defendant should" have been specified in the decree that was passed. This last argument of the learned Counsel is obviously based on a misapprehension. I have looked into the decree and, as already stated in the opening portion of this judgment, it contains a provision that the liability of each defendant is limited to 1/13th of the amount decreed. The contention of the learned Counsel proceeded on a misapprehension as to the nature of that decree. I may observe, however, that the decree which is under appeal now is not the decree of 20th June 1942, but that passed by the learned Civil Judge of Sultanpur on 13th July 1943. No appeal against the decree dated 29th December, (20th June 1942) was preferred by Khaliq Bahadur Khan. I may further observe in passing that even if it were permissible for the appellant to challenge the decree of 20th June 1942, (to which he is clearly not entitled) any reference to S3. 228 and 234, U.P. Tenancy Act would be wholly irrelevant. As laid down by a Bench of the Avadh Chief Court in AIR 1944 312 (Oudh) the provisions of Section 228 are applicable to sub-proprietors in the province of Agra only and not to under-proprietors in Avadh.

4. As regards the learned Counsel's contention that the learned Judge ought not to have allowed the plaintiff-respondent, who was respondent 1 in the appeal before him, to withdraw his claim against Khaliq Bahadur Khan in appeal, it is sufficient to say that I am not satisfied that the discretion exercised by the learned Civil Judge in this matter was wrongly exercised. u/s 79 U.P. Land Revenue Act, the liability of co-sharers in an under-proprietary tenure in Avadh for payment of rent due to the superior proprietor is joint and several. In the case before me, a suit for recovery of rent was brought against all the co-sharers. An ex parte decree was passed against all of them. As already stated, the decree in this case specified the liability of each defendant separately. This ex parte decree was set aside at the instance of one of the defendants only in so far as it concerned him. The rest of the decree was left intact. No appeal was preferred against the ex parte decree by any of the defendants against whom it was not set aside. As against them it became final. The matter in appeal preferred by Khaliq Bahadur Khan related only to the liability of that defendant. It would in no way affect the liability of other defendants against whom the ex parte decree had been passed. It was open to the plaintiff who was arrayed as respondent 1, to withdraw his claim against the appellant. I should not be understood to hold that he had an absolute right to do so, and the Court had no say in the matter. But so far as can be gathered from the record, no objection to the course adopted by the plaintiff) respondent 1 in the lower appellate Court was taken. Nor does it appear that any of the other persons who were arrayed as pro forma respondents lodged any protest. There is nothing on the record to show that any objection was raised by them. In these circumstances, there is no good ground to hold that the learned Civil Judge wrongly exercised a discretion vested in him in allowing the plaintiff to abandon his claim against Khaliq Bahadur Khan. Reference was made by the learned Counsel in his arguments to the following cases : Ram Tahal Singh v. Sukeswar Ray AIR 1916 Pat. 400; Ashfaq Husain v. Bunyad Husain AIR 1923 Oudh 252 and Dharam Raja v. K.M. Pethur Raja AIR 1924 Mad. 79 . These cases have no bearing on the matter which arises in the present appeal. None of these cases deal with circumstances like those of the present case where an ex parte decree passed against a number of persons was set aside against one of them, but was left intact as against others; and where there was an appeal only by that defendant against whom the ex parte decree was set aside challenging the decree which was passed against him alone. Reference was also made by the appellant's learned Counsel to the provisions of Order 41, Rule 4 and Order 41, Rule 33, Civil P.C. The correct view of these provisions of the Code was, if I say so without disrespect, taken by a Bench of the Patna High Court in Mt. Jagapati Kuer Vs. Sukhdeo Prasad and Another, where it was held that Order 41, Rules 4 and 33, though couched in wide terms, must not be so applied as to disregard other provisions of the law. The right of appeal after it has lapsed, their Lordships further laid down, should not; be handed out gratuitously to persons who have themselves neglected to avail of it, especially when they have not asked for it, and the interests of the case do not require it for the purpose of doing justice to the person who has

appealed. Such a case is not one for the application by the Court of the powers which Order 41, Rule 4 and Order 41, Rule 33 confer upon it. In the case before me, the ex parte decree against the present appellant was allowed to remain intact. He did not appeal against it. It became final. The decree which was appealed against by Khaliq Bahadur Khan in no way affected the present appellant. Under the circumstances there is no justification for holding that the learned Civil Judge in the Court below should not have allowed the plaintiff to withdraw his claim against Khaliq Bahadur Khan.

5. There is no substance in this appeal. It is dismissed with costs.