

RAJA BAJRANG BAHADUR SINGH

v.

JAI NARAIN

April 8, 1969

[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

U.P. Tenancy Act (U.P. 17 of 1939), s. 289—Suits under ss. 60, 61 and 180 decreed—Possession handed over—Zamindari Abolition & Land Reforms Rules enacted—Suits abate—Defendant applies for restitution of lands before revenue court—Revenue Court allows restitution—Appeals to both Civil and Revenue Courts—Civil Court allows Appeal—Revenue Court dismisses for default—Plea that Civil Court had no jurisdiction if can be permitted.

The appellant instituted two suits in the Court of Assistant Collector (a Revenue Court) against the respondent under ss. 60, 61 and 180 of the U.P. Tenancy Act, 1939. The suits were decreed, and the appellant took symbolical possession of the lands. The Assistant Commissioner, affirmed the decrees, and during the pendency of the respondent's second appeals in the High Court, the Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952 came into force. The Board of Revenue held that in view of the Rules, the pending appeals as also the suits had abated. The respondent filed applications for restitution of the lands under s. 114 C.P.C. in the Court of Assistant Collector. The Assistant Collector referred the issue whether the appellant had acquired Bhumidari rights to the civil court. He refused to recall the reference in spite of the respondent's plea that he had no power to pass the order as no question of proprietary title had arisen. The civil court answered the issue in the negative, and the Asstt. Collector allowed the applications for restitution. As the appellant was not certain about the proper forum of appeals against these orders of the Assistant Collector, he filed appeals in the revenue court as also in the civil court. The Assistant Commissioner held that the revenue court had no jurisdiction to entertain appeals and the appeals lay to the civil court under ss. 286(4) and 265(3) of the U.P. Tenancy Act. The appellant filed revision petitions against the orders before the Board of Revenue. In the meantime the appeals filed before the civil court, came up for hearing. The respondent submitted to the jurisdiction of the civil court, and did not contend that the civil court had no jurisdiction to entertain the appeals. The Civil Judge allowed the appeals and dismissed the application for restitution. Because of this decision, the appellant did not proceed with the pending revision petitions before the Board of Revenue and there the petitions were dismissed. The respondent filed second appeals in the High Court against the appellate orders of the civil court, without taking the plea that the civil court had no jurisdiction to entertain the appeals, but later on he took the plea by adding a new ground. The High Court held that the appeals lay to the revenue court and the respondent was not estopped from raising the contention. In appeals to this Court the appellant contended that the appeals lay to the civil court and not to the revenue court, and in the circumstances of this case, and in view of s. 289(2) of the U.P. Tenancy Act, the respondent was precluded from raising the objection that the appeals did not lie to the civil court. Allowing the appeals, this Court.

HELD : In this case the doctrine of approbate and reprobate could not be pressed into service to preclude the respondent from raising the objection that the appeals did not lie to the civil court, as the court in which the proceedings were originally filed *suo motu* raised the objection,

But the effect of upholding his objection would be that the appellant would be deprived of his right of appeal altogether, and s. 289(2) of the U.P. Tenancy Act is intended to prevent such grave miscarriage of justice. [237 F]

Section 289(2) applies whenever any suit, application or appeal having been rejected either by the civil court or revenue court on account of want of jurisdiction is subsequently filed in the court of the other description and the latter court disagrees with the finding of the former. In such a case, a reference to the High Court is compulsory and the conflict of opinion is resolved by a decision of the High Court which is binding on all courts. A court subordinate to the Collector cannot make the reference without the previous sanction of the Collector under s. 289(3). It is implicit in s. 289(3) that if the Collector refuses to give the sanction, the case will proceed as if there is no disagreement with the finding of the former court. [237 H]

In a case falling within s. 289(2), only the court in which the proceeding is subsequently instituted can disagree with the finding of the former court on the question of jurisdiction. If it so disagrees, it must refer the matter to the High Court; and only the High Court on such a reference can override the finding. No other court can disagree with the finding and make the reference. If no such reference is made, the finding of the former court on the question of jurisdiction becomes final and conclusive; and the objection that it is erroneous cannot be entertained by the appellate or revisional court or any other court. [238 D]

Having regard to the circumstances of this case, it was not open to the respondent to raise the objection in the High Court that the civil court was not competent to hear the appeals. In view of the fact that no reference under s. 289(2) was made, the finding of the revenue court that the civil court was competent to entertain the appeals could not be challenged in the High Court. The case must be decided on the footing that the Civil Judge was competent to entertain the appeals. [238 F]

On the merits the respondent had no case. The Civil Judge found that the appellant was in possession of the lands on the dates of the institution of the suits. The High Court agreed with this finding. No ground has been made for setting aside this concurrent finding of fact. The appellant did not obtain possession of the lands by executing the decrees passed in the two suits. Even assuming that the suits had abated and the decrees passed therein had been set aside or reversed, no case for restitution of the lands under s. 144 of the Code of Civil Procedure was made out.

The applications under s. 144 C.P.C., were rightly rejected.

Nathan v. Harbans Singh, A.I.R. 1930 All. 264, *Mohammad Mehdi Khan v. Mussammat Sharatunnissa*, 3 Oudh Cases 32, 35-37, *Mahadeo Singh v. Pudai Singh*, A.I.R. 1931 Oudh 123 and *Saira Bibi v. Chandrapal Singh*, I.L.R. 4 Luck. 150, 166, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 735 and 736 of 1966.

Appeals by special leave from the judgment and decree dated March 26, 1965 of the Allahabad High Court, Lucknow Bench in Second Execution Decree Appeals Nos. 3 and 4 of 1961.

J. P. Goyal and *S. P. Singh*, for the appellant (in both the appeals),

- A *C. B. Agarwala* and *K. B. Gupta*, for the respondent (in both the appeals).

The Judgment of the Court was delivered by

- Bachawat, J. The appellant filed suit nos. 87 of 1948 and 2/12 of 1948 in the court of the Assistant Collector, 1st Class, Pratapgarh, (a revenue court) against the respondent and 8 others persons under ss. 60, 61 and 180 of the U.P. Tenancy Act (U.P. Act XVII of 1939) claiming a declaration that the defendants had no right to the suit lands and a decree for possession in case the defendants were found to be in possession thereof. The suits were decreed in 1948. The appellant took symbolical possession of the lands in execution of the decrees. Appeals against the decrees filed by the respondent and other defendants were dismissed by the Additional Commissioner, Faizabad. The defendants filed second appeals against the decrees. During the pendency of the appeals rules 4 and 5 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules 1952 came into force. The Board of Revenue held that in view of rules 4 and 5 the pending appeals as also the suits had abated.

- In 1955 the respondent filed applications for restitution of the lands under s. 144 of the Code of Civil Procedure in court of the Assistant Collector, 1st Class, Pratapgarh. The appellant contested the application. One of the issues arising on the application was whether the appellant had acquired Bhumidari rights. The Assistant Collector referred this issue to the Civil Court for decision. He refused to recall the order of reference in spite of the respondent's plea that he had no power to pass the order as no question of proprietary title had arisen. On May 7, 1958 the civil court answered the issue in the negative. On February 18, 1958 the Assistant Collector allowed the application for restitution and directed that the respondent be put in possession of the lands.

- The appellant filed appeals against the orders dated February 18, 1958. As he was not certain about the proper forum of the appeals he took the precaution of filing the appeals in the revenue court as also in the civil court. On October 23, 1959 the Additional Commissioner, Faizabad Division, held that the Revenue Court had no jurisdiction to entertain the appeals and that the appeals lay to the civil court under ss. 286(4) and 265(3) of U.P. Tenancy Act. Accordingly he returned the memoranda of appeals for presentation to the proper court. The appellant filed revision petitions against the orders before the Board of Revenue. In the meantime the appeals filed before the civil court came up for hearing. The respondent submitted to the jurisdiction of the civil court. He did not raise the contention that the civil court had no jurisdiction to entertain the appeals. On

November 12, 1960 the Additional Civil Judge, Pratapgarh allowed the appeals and dismissed the applications for restitution. He held that (1) the appellant was in possession of the lands on the dates of the institution of the suits; (2) the board of revenue had no power to abate the suits or to set aside the decree passed therein, and (3) the application for restitution was not maintainable as the appellant had not obtained possession of the lands in execution of any decree which had been reversed or set aside. In view of this decision, the appellant did not proceed with the pending revision petitions before the board of revenue and on November 18, 1960 the revision petitions were dismissed. On February 1, 1961 the respondent filed second appeals in the High Court against the appellate orders of the civil court dated November 12, 1960. In the original memorandum of appeal, he did not take the plea that the civil court had no jurisdiction to entertain the appeals. For the first time on January 24, 1964, he took this plea by adding a new ground in his memorandum of appeal. The High Court held that (1) the appellant was in possession of the lands before the passing of the decree; (2) the suits had not abated and the Board of Revenue had no jurisdiction to set aside the proceedings in the suits and (3) the applications for restitution were not maintainable. The High Court, however, held that (1) appeals against the orders for restitution lay to the revenue court, (2) the civil court had no jurisdiction to entertain the appeals and (3) the respondent was not estopped from raising the contention. Accordingly on March 26, 1965 the High Court allowed the second appeals, set aside the order of the Additional Civil Judge and returned the memoranda of appeals for presentation to the proper court. The appellant has filed the present appeals after obtaining special leave.

On behalf of the appellant it is argued that (1) the appeal from the order of the Assistant Collector dated February 18, 1959 lay to the civil court and not to the revenue court (2) in the circumstances of the case, and in view of s. 289(2) of the U.P. Tenancy Act, the respondent was precluded from raising the objection that the appeals did not lie to the civil court.

It is common case that suits nos. 87 of 1948 and 2/12 of 1948 were of the nature specified in Group B of the fourth schedule to the U.P. Tenancy Act. In view of s. 265(2) read with s. 271(2) appeals from orders in proceedings under s. 144 of the Code of Civil Procedure arising out of the two suits lay to the revenue court. The appeals did not lie to the civil court under ss. 265(3) and 286(4) read with s. 271(2) as no question of jurisdiction was decided by the Assistant Collector nor was any question of proprietary title referred to or decided by the civil court. But the more important question is whether having regard to the

- A scheme of the U.P. Tenancy Act and the circumstances of the case, the objection as to the lack of competence of the civil court to entertain the appeals could be raised in the High Court.

- The U.P. Tenancy Act 1939 consolidates and amends the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh. It repealed the Agra Tenancy Act, 1926 and the Oudh Rent Act 1886. Chapter XIV of the Act deals with the procedure and jurisdiction of courts. Section 242 provides that certain suits and applications are cognizable by the revenue courts only. The chapter provides for appeals and revisions. No appeal lies from any decree or order passed by any court under the Act except as provided in the Act (s. 263).
- B
- C In some cases an appeal lies to a revenue court; in other cases the appeal lies to the civil court. The High Court has no revisional power under s. 276 in a case in which no appeal lies to the civil court. It is often a question of extreme nicety whether a suit, application or appeal is cognizable by the revenue court or by the civil court. Sections 289, 290 and 291 deal with objections regarding the proper forum.
- D

- Section 290 provides that where in a suit instituted in a civil or revenue court, an appeal lies to the district judge or to the High Court, an objection that the suit was instituted in the wrong court shall not be entertained by the appellate court unless such objection was taken in the court of the first instance; and the appellate court shall dispose of the appeal as if the suit has been instituted in the right court. The section closely resembles s. 21 of the Code of Civil Procedure and is a recognition of the principle that an objection as to the proper forum for the trial of a suit may be waived. Section 291 treats the objection as technical and provides that even where the objection was taken in the court of the first instance, the appellate court may dispose of the appeal as if the suit had been instituted in the right court. It may declare any court to be competent to try the suit and may remand the suit for fresh trial, and the competence of the trial cannot be questioned later. With a view to avoid conflicts of jurisdiction s. 289 provides for reference to the High Court. Section 289 is as follows :—
- E
- F

- G “289(1) Where either a civil or revenue court is in doubt whether it is competent to entertain any suit, application or appeal, or whether it should direct the plaintiff, applicant or appellant to file the same in a court of the other description, the court may submit the record with a statement of the reasons for its doubt to the High Court;
- H

(2) Where any suit, application or appeal, having been rejected either by a civil court or by a revenue

court on the ground of want of jurisdiction, is subsequently filed in a court of the other description, the latter court, if it disagrees with the finding of the former, shall submit the record, with a statement of the reasons for its disagreement to the High Court;

(3) In cases falling under sub-section (1) or sub-section (2) if the court is a revenue court subordinate to the collector, no reference shall be made under the foregoing provisions of this section except with the previous sanction of the collector;

(4) On any such reference being made, the High Court may order the court either to proceed with the case, or to return the plaint, application or appeal for presentation of such other court as it may declare to be competent to try the same;

(5) The order of the High Court shall be final and binding on all courts, subordinate to it or the Board."

Section 289 vests in the High Court a special jurisdiction. The decision of the High Court given on a reference to it under s. 289 is binding on all courts. A reference can be made under s. 289(1) if any court doubts its own competence to entertain any proceeding. The reference under s. 289(1) is optional. Without making any reference the court may refuse to entertain the proceeding on the ground of want of jurisdiction. But the court of the other description in which the proceeding is subsequently instituted is not bound by this finding, see *Nathan v. Harbans Singh*⁽¹⁾. Before the enactment of s. 289(2) if it disagreed with the finding, it could reject the proceeding on the ground that the matter was cognizable by the other court. As neither court was bound by the finding of the other, the litigant could not get relief in any forum. Section 289(2) has been specially enacted to avoid such a deadlock. In such a situation, s. 289(2) compels the court to refer the matter to the High Court and to obtain a decision which will bind all the courts.

Provisions corresponding to ss. 290, 291 and 289(1) were contained in ss. 124A, 124B, 124C and 124D of the Oudh Rent Act 1886 and ss. 268, 269 and 267(1) of the Agra Tenancy Act, 1926. It seems that Oudh Rent Act, 1886 did not contain any provision corresponding to s. 289(2). The absence of such a provision seriously hampered the administration of justice. In numerous cases under the Oudh Rent Act, after a suit, application or appeal was rejected by a civil court or revenue court on the ground of want of jurisdiction, the court of the other descrip-

(1) A.I.R. 1930 All. 264.

- A tion where the proceeding was subsequently filed came to the opposite conclusion and held that the matter was within the cognizance of the former court. The decision of the court of one description including the decision of the High Court exercising appellate or revisional power over that Court was not binding upon the court of the other description. Such a situation led to
- B great injustice. The litigant was bandied about from court to court and he could not get any relief anywhere. The Oudh Chief Court mitigated the evil by applying the doctrine that a party litigant could not approbate and reprobate in respect of the same matter. A party litigant may not be allowed to take inconsistent positions in court to the detriment of his opponent at successive stages of the same proceeding or in a subsequent litigation growing out of the judgment in the former proceeding, see Bigelow on Estoppel, 6th Ed. pp. 783, 789, *Mohammad Mehdi Khan v. Mussammat Sharatunnissa*⁽¹⁾. On this principle it was held in *Mahadeo Singh v. Pudai Singh*⁽²⁾ that where a revenue court upheld the plea that it had no jurisdiction to entertain a suit, the party putting forward the plea would be precluded from contending that the civil court could not entertain the suit. Likewise in *Saira Bibi v. Chandrapal Singh*⁽³⁾ it was held that when an appeal was originally instituted properly in the revenue court but on objection being raised by a party was dismissed on the ground that the appeal did not lie to that court, it was not open to the party to raise the objection that the appeal could not be entertained by the civil court. This form of estoppel arises when the litigant takes inconsistent pleas as to jurisdiction in different courts. It cannot be pressed into service, where, as in the present case, the court in which the proceeding was originally filed *suo motu* raised the objection as to jurisdiction. In the present case it does not appear that the respondent raised before the revenue court the objection that it was not competent to entertain the appeals.
- F The doctrine of approbate and reprobate cannot be invoked to preclude the respondent from raising the objection that the appeals did not lie to the civil court. But the effect of upholding his objection is that the appellant is deprived of his right of appeal altogether. His appeals cannot be entertained either by the civil court or by the revenue court. Section 289(2) is intended to prevent such grave miscarriage of justice.
- G

H Section 289(2) re-enacts the provision of s. 267(2) of the Agra Tenancy Act 1926. The object of s. 289(2) is to avoid a deadlock between the civil and the revenue courts on the question of jurisdiction, and its provisions should receive a liberal construction. Section 289(2) applies whenever any suit, application or appeal having been rejected either by the civil court or revenue

(1) 3 Oudh Cases, 32, 35-37.

(2) I.L.R. 4 Luck, 159, 166.

(3) A.I.R. 1931 Oudh 123.

court on account of want of jurisdiction is subsequently filed in the court of the other description and the latter court disagrees with the finding of the former. In such a case, a reference to the High Court is compulsory and the conflict of opinion is resolved by a decision of the High Court which is binding on all courts. A court subordinate to the collector cannot make the reference without the previous sanction of the collector under s. 289(3). It is implicit in s. 289(3) that if the collector refuses to give the sanction, the case will proceed as if there is no disagreement with the finding of the former court.

In a case falling within s. 289(2), only the court in which the proceeding is subsequently instituted can disagree with the finding of the former court on the question of jurisdiction. If it so disagrees, it must refer the matter to the High Court; and only the High Court on such a reference can override the finding. No other court can disagree with the finding and make the reference. In our opinion, if no such reference is made, the finding of the former court on the question of jurisdiction becomes final and conclusive; and the objection that it is erroneous cannot be entertained by the appellate or revisional court or any other court.

In the present case the respondent did not raise any objection before the Additional Civil Judge that the civil court was not competent to entertain the appeals. The Additional Civil Judge did not make any reference to the High Court under s. 289(2). He decided the appeal on the merits and did not disagree with the finding of the revenue court on the question of jurisdiction. Having regard to this decision the appellant did not proceed with the revision petitions filed by him against the orders of the revenue court on the question of jurisdiction. In these circumstances, it was not open to the respondent to raise the objection in the High Court that the civil court was not competent to hear the appeals. In view of the fact that no reference under s. 289(2) was made, the finding of the revenue court that the civil court was competent to entertain the appeals could not be challenged in the High Court. The case must be decided on the footing that the Additional Civil Judge, Pratapgarh, was competent to entertain the appeals.

On the merits the respondent has no case. The Additional Civil Judge found that the appellant was in possession of the lands on the dates of the institution of the suits. The High Court agreed with this finding. We see no reason for setting aside this concurrent finding of fact. The appellant did not obtain possession of the lands by executing the decrees passed in the two suits. Even assuming that the suits had abated and the decrees

- A** ed therein had been set aside or reversed, no case for restitution of the lands under s. 144 of the Code of Civil Procedure is made out. The Additional Civil Judge rightly dismissed the application under, s. 144.

- B** In the result, the appeals are allowed with costs, the orders of the High Court are set aside and the orders passed by the Additional Civil Judge, Pratapgarh, are restored.

Y.P.

Appeals allowed.