

**(1930) 02 AHC CK 0009****Allahabad High Court****Case No:** None

(Mandir) Thakurji Maharaj

APPELLANT

Vs

Risal

RESPONDENT

**Date of Decision:** Feb. 11, 1930**Citation:** AIR 1930 All 527**Hon'ble Judges:** Niamatullah, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

Niamatullah, J.

This is an appeal from the judgment and decree passed by the Additional District Judge, Meerut, in proceedings u/s 81. Agra Tenancy Act 3 of 1926.

2. Appellant is the zamindar of village Nagal in which the respondent is his tenant. The appellant issued a notice u/s 81, Tenancy Act, against the defendant calling upon him to pay arrears of rent for the years 1332, 1333 and Rabi 1334 Fasli. Notice was, as usual, filed in the Court of the Tahsildar with an application referred to in that section praying for ejectment of the tenant in case arrears were not paid. The respondent contested that notice on the ground that the appellant's claim to the arrears of rent for the years mentioned above was barred by the provisions of Order 2, Rule 2, Civil P.C., inasmuch as the appellant had instituted, on 23rd April 1927, a suit for arrears of rent for Rabi 1331 Fasli. It should be mentioned that the rent for the years 1332, 1333 and Rabi 1334 Fasli was overdue on 23rd April 1927 when the suit was instituted. It was, therefore, contended by the respondent that the present claim for those years is barred by Order 2, Rule 2, Civil P.C. Both the lower Courts have given effect to this plea and the plaintiff has preferred the present second appeal.

3. The only question argued before me has reference to the respondent's plea that the appellant's claim to arrears of rent for 1332, 1333 and Rabi 1334 Fasli is barred

by Order 2, Rule 2, Civil P.C., Section 81, Agra Tenancy Act 3 of 1926. entitles a landholder to apply to the Tahsildar for the issue of a notice to his tenant, not being a permanent tenure-holder or a fixed rate tenant, for payment of arrears of rent and for his ejectment in case of default. It is, however, open to a tenant on whom such notice is served to contest the claim, in which case:

the application for issue of notice shall be deemed to be a suit for arrears of rent on payment of the proper Court-fee. If the arrears claimed does not exceed Rs. 200 the Tahsildar shall, subject to the provisions of Section 78(4), decide the suit if the arrears claimed exceeds Rs. 200, the Tahsildar shall forward the suit to the Court of the Assistant Collector in charge of the subdivision, who shall decide it.

4. It has been conceded before me by the learned counsel for the appellant that if instead of taking proceedings u/s 81, the landholder had instituted an ordinary suit for arrears of rent for the years 1332, 1333 and Rabi 1334 Fasli it would have been barred by Order 2, Rule 2, Civil P.C., in consequence of a suit for arrears of rent having been instituted on 23rd April 1927, and of the rent for the years now in suit not having been claimed. The whole controversy is thus narrowed down to the question whether different considerations are applicable to the claim for arrears of rent made u/s 81, Tenancy Act.

5. Section 81(5), the material part of which has been quoted by me above, makes it clear that if the tenant contests the claim of the landholder to arrears of rent the application becomes a plaint on proper Court-fee being paid. It is not disputed before me that Court-fee was paid in the present case. The application must therefore be deemed to be the plaint of a suit for arrears of rent for the years already mentioned. The proceedings u/s 81, were by operation of law converted into a regular suit for arrears of rent. It follows that the tenant who should be regarded as the defendant in such suit is entitled to put forward all pleas open to him in a suit for arrears of rent including a plea in bar.

6. Order 2, Rule 2(2) of the Civil P.C., provides as follows:

Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portions so omitted or relinquished.

7. If the landholder can be said to be suing in respect of the portion omitted in the previous suit, while he is prosecuting the arrears of rent suit into which his application is converted, there can be no doubt that Order 2, Rule 2, Civil P.C. is as much a bar as would be the case if he had brought an ordinary suit for arrears of rent. It cannot be contended that the landholder is not suing for arrears of rent u/s 81(5) when his application for notice is "deemed to be a suit."

8. The learned counsel for the appellant has founded an argument on the words "subject to the provisions of Section 78(4)" occurring in Section 81(5), Tenancy Act.

He argues that the decree to be passed in the suit for arrears of rent contemplated by Section 81(5), is a decree directing the defendant to pay the rent and directing further, that he be ejected in default of payment of rent. It is urged that the suit into which an application u/s 81, is converted is not a suit for arrears of rent pure and simple, but also for the relief of ejectment on the tenant failing to pay the rent. Reference has also been made to Section 132 of the same Act. I find nothing in that section which in any way, supports the contention put forward on behalf of the appellant. S. 78, provides that

no decree or order for ejectment of a tenant shall be passed or enforced until any claim duly made by him on account of improvements has been investigated and the Court has recorded a finding as to the amount of compensation if payable to the tenant on that account.

9. An Assistant Collector of the second class is not empowered to entertain such a claim and to record a finding relating to it. Sub-S. (4) of that section therefore provides that:

if the Court to which a claim under sub-S. 1, is made, is the Court of an Assistant Collector of the Second Class, he shall forward the proceedings to the Assistant Collector in charge of the subdivision who shall dispose of the case as if it had been instituted before himself.

10. It is argued that a reference to Section 78(4) in Section 81(5) is a clear indication that the suit contemplated by the latter section is a suit not only for arrears of rent but also for ejectment in the event rent is not paid. I do not think that such reference to Section 78(4) is necessarily an indication of that fact. S. 79 entitles a landholder to execute a decree for arrears of rent by the ejectment of the tenant from the holding in respect of which the decree was passed. S. 80 provides that:

on receipt of an application u/s 79 the Court shall issue notice to the tenant, requiring him to pay the amount into Court within 15 days of the service of the notice, or to show cause why he should not be ejected from his holding.

11. Section 81(5) is not very happily drafted, but I entertain no doubt that an ordinary decree for arrears of rent has to be passed when the application is contested by the tenant and the application is thereupon converted into a suit provided it is decided in favour of the landholder. If the landholder is desirous of executing such decree by ejecting the tenant, he has to take action under Sections 79 and 80 of the Act. The provision in Section 81(5) that:

if the arrears claimed do not exceed rupees 200 the Tahsildar shall, subject to the provisions of Section 78(4), decide the suit.

12. Is suggestive of a contingency in which a tenant may claim compensation for improvement. In such a case the section declares that:

the Assistant Collector, Second Class, is not to decide the suit.

13. If the tenant declares in the initial stages of the suit that he would claim compensation for improvements the suit is to be transferred to the Sub-Divisional officer u/s 78(4), otherwise the Assistant Collector, Second Class is to proceed to a decree in favour of the landholder if rent is due, in which case no occasion will arise for transfer of proceedings under P. 78(4) until action is taken under Sections 79 and 80. For these reasons I am clearly of opinion that the suit referred to in Section 81(5) is a suit for arrears of rent pure and simple and if the application of Order 2, Rule 2, Civil P.C. depends, in the present case on the subsequent suit being regarded as one for arrears of rent, I have no hesitation in holding that the suit out of which the present appeal has arisen, was a suit of that character.

14. But I am of opinion that whatever may be the character of the subsequent suit Order 2, Rule 2, Civil P.C., will be applicable if the plaintiff is suing for arrears of rent, though he may be entitled to the additional relief of ejectment in a certain contingency. In such a case his claim to arrears of rent will be barred and ejectment proceedings will be out of question. I do not think the bar created by Order 2, Rule 2, Civil P.C., can be got over if in the subsequent suit additional reliefs are claimed by the plaintiff or can be granted by the Court.

15. For the foregoing reasons I am of opinion that the decree passed by the Court below is correct.

16. This appeal is accordingly dismissed with costs.