

The case came on for hearing before Stuart, C.J. and Oldfield, J., by whom the question whether the application for the execution of the decree of Her Majesty in Council might be granted was referred to a Full Bench.

1877.

UDAI SINGH
v.
BHARAT
SINGH.

Mr. Conlan, Munshi *Hanuman Prasad*, and the *Senior Government Pleader* (*Lala Juala Prasad*), for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondents.

PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., concurring : The decree of the Privy Council must be executed, notwithstanding its execution involves the disturbance of the possession obtained by Uday Singh under the decree of this Court which has become final. The decree of the Privy Council is the later in date, and had Uday Singh desired to secure his possession, he should have pleaded the decree of this Court in the cross suit when the suit in which the decree of the Privy Council has been passed was before that tribunal in appeal.

STUART, C.J.—Under the peculiar circumstances of this case I do not think that I ought to withhold my assent to the order agreed to by my colleagues, although I desire to guard myself against the opinion, as matter of law, that the decree of the Privy Council is as such a better decree than the decree of any other Court of a prior date and which has become final.

APPELLATE CIVIL.

1877
July 27.

Before Mr. Justice Pearson and Mr. Justice Spankie.

BHAGWAN SINGH AND ANOTHER (PLAINTIFFS) v. MURLI SINGH AND ANOTHER (DEFENDANTS).*

Act XVIII of 1873 (North-Western Provinces Rent Act), s. 7—Ex-proprietary Tenant—Sir-land—Mortgage of Proprietary rights in a Mahal.

Where a person mortgaged his proprietary rights in a mahal, which rights consisted of certain lands occupied by him, covenanting to give the mortgagee pos-

* Special Appeal, No. 656 of 1877, from a decree of Maulvi Muhammad Abdul Kaim Khan, Subordinate Judge of Agra, dated the 28th April, 1877, modifying a decree of Mahabansad Muhi-ud-din Khan, Munsif of Jalesar, dated the 5th January, 1877.

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session for the purpose of cultivation and the payment of Government revenue, and being at liberty to redeem the lands at any time at the end of the month Jaith, such person could not resist a claim on the part of the mortgagee for possession of the lands on the ground that he had a right of occupancy in the lands under s. 7 of Act XVIII of 1873, such section not being applicable, and contemplating something more than a mere temporary transfer of proprietary rights.

THIS was a suit in which the plaintiffs claimed from the defendants possession of 32 bighas, 9 biswas of land which comprised the proprietary rights of the defendants in a certain mahal. These lands, which the defendants themselves cultivated, were mortgaged by them to the plaintiffs on the understanding that the plaintiffs were to occupy the same, that they should pay the Government revenue, and that the defendants might redeem the lands at any time at the end of the month Jaith.

The defendants failed to give the plaintiffs possession, and the latter consequently brought this suit. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court held that they had a right of occupancy in the lands, under the provisions of s. 7 of Act XVIII of 1873, and modified the decree of the Court of first instance, giving the plaintiffs a decree "for declaration of right and possession as mortgagees by preservation of the defendants' tenancy-rights."

On special appeal by the plaintiffs to the High Court it was contended by them that s. 7 of Act XVIII of 1873 was not applicable, and that they were entitled to the possession of the lands.

Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Mir Zahur Husain*, for the respondents.

The judgment of the Court, so far as it related to the above contention, was as follows :

SPANKIE, J.—We understand that the share of the defendants is expressed in bighas of which they are in possession and which they cultivate. These they have mortgaged to the plaintiffs, covenanting to give possession of the same for the purpose of cultivation and the payment of Government revenue. They can redeem the land in any year in Jaith. S. 7 of the Rent Act does not appear

to apply to this case. The defendants have not lost or parted with their proprietary rights, attached to which is a certain proportion of sir-land, of which they might claim, under s. 7 of Act XVIII of 1873, a right of occupancy as ex-proprietary tenants. The section not only contemplates something more than a mere temporary transfer of proprietary rights, but in the particular case before us the lands in the occupation of the share-holders are the measure of each man's share, and the lands of the defendants are the subject of the mortgage. The plaintiffs are entitled to a decree as claimed.

Appeal allowed.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

THE EMPRESS OF INDIA *v.* DARBA AND OTHERS.

Act VIII of 1873 (Northern Indian Canal and Drainage Act), s. 70—Act XLV of 1860 (Indian Penal Code), s. 65—Act X of 1872 (Criminal Procedure Code), s. 309,—Act I of 1868 (General Clauses Act) s. 5.

S. 309 of the Criminal Procedure Code does not extend the period of imprisonment which may be awarded by a Magistrate under s. 65 of the Indian Penal Code, it only regulates the proceedings of Magistrates whose powers are limited (1).

THIS was a reference to the High Court by Mr. H. M. Chase, District Judge of Sahāranpur, under s. 296 of Act X of 1872, of the cases of nine persons convicted under s. 70 of Act VIII of 1873 of various offences under that section. These persons were only fined. The sentences of imprisonment awarded in default of payment of the fines inflicted were all in excess of one-fourth of the maximum period of imprisonment allowed by s. 70. The reference was made on the ground that these sentences were illegal in view of s. 65 of the Indian Penal Code. Turner, J., having held on a former occasion that such sentences were illegal in view of that section, Spankie, J., before whom the reference was laid, referred to a Full Bench the question whether the sentences in the cases referred were legal or illegal, thinking that s. 309 of Act X of 1872 left the matter in some doubt.

(1) Contrast *Reg. v. Muhammad Saib*, I. L. R., 1 Mad. 277.

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August 3.