Before Mr. Justice Tottenham and Mr. Justice Norris.

AZIZUDDIN HOSSEIN AND OTHERS (DEFENDANTS) *v.* RAMANUGRA ROY AND ANOTHER (PLAINTIFFS).* 1887 *June* 3.

Mesne profits—Decree for possession of immovable property—Reversal of decree on appeal—Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal—Jurisdiction—Civil Procedure Code (Act XIV of 1882), *s.* 244.

A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that if the amount were not paid within fifteen days the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced, and a decree made directing that if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsiff's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree.

It was contended on second appeal that the suit would not lie as the matter might and should have been determined in the execution department under s. 244 of the Civil Procedure Code.

Held, that as the suit was instituted in the Munsiff's Court, and the Munsiff under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsiff, which he did not possess, and that upon the authority of the decision in *Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (1) this could not be made a ground of objection on appeal.

Held also that the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal.

Quære.—Whether such a suit does not lie, and whether the decisions in *Lati Kooer* v. *Sahodra Kooer* (2) and analogous cases to the effect that such a suit does not lie are correct. *Ram Ghulam* v. *Dwarka Rai* (3) cited and approved.

* Appeal from Appellate Decree No. 2272 of 1886, against the decree of Baboo Grish Chunder Chatterjee, Subordinate Judge of Tirhoot, dated the 16th of September, 1886, reversing the decree of Syed Imam Ali, Munsiff of Tajpore, dated the 8th of September, 1885.

(1) 19 W. R., 90. (2) 2 C. L. R., 75.

(3) I. L. R., 7 All., 170.

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THIS action was brought by the plaintiffs to recover mesne profits under the following circumstances: The present plaintiffs were the tenants of the defendants. The defendants in the year 1882 brought a suit against the plaintiffs for arrears of rent, and on the 24th April, 1882, obtained a decree for the full amount of the claim. They had alleged in their plaint that the rent due from the now plaintiffs, then defendants, was Rs. 3-9 per bigha. Together with their decree for an amount of money they asked for and obtained a decree for ejectment under s. 52 of the Rent Act. The then defendants appealed against the decree, and on the 25th January, 1883, the decree, which had been passed against them in April, 1882, was modified. They were found liable to pay the arrears of rent, not at the rate of Rs. 3-9 per bigha, but at the rate of Rs. 3-5 per bigha, and a decree against them for the amount due at that rate was made by the lower Court, and an order for ejectment unless the amount so decreed was paid within fifteen days. The amount so decreed was, as a matter of fact, paid within the fifteen days mentioned by the lower Appellate Court.

Pending the appeal, *viz.*, on the 27th July, 1882, the plaintiffs in the rent suit, the now defendants, took possession of the land under the decree of the first Court, which had made an order for ejectment unless the amount claimed was paid within fifteen days from the 24th April, 1882, and the now defendants remained in possession of the land from the 27th of July, 1882, to the 31st March, 1883; and it was to recover mesne profits in respect of their occupation of the land for that period that this suit was brought. The amount claimed in the suit did not exceed Rs. 1,000, and the suit was therefore instituted in the Munsiff's Court.

The defendants in the first paragraph of their written statement stated as follows: "That the plaintiffs have not the right to institute the present suit, and to retain possession of the khas land alleged by the plaintiffs, because a decree was passed by this Court on the 24th April, 1882, of the Christian era in favor of your petitioners, giving effect to s. 52, Act VIII of 1869, and the payment of the decretal amount ordered within fifteen days from the date of the preparation of the decree. But the plain-

tiffs did not cause to be deposited the decretal amount according to the decree passed by the Court or even the arrears according to their statement within fifteen days from the date of the preparation of the decree by the first Court." The other objections taken by the defendants are immaterial for the purposes of this report.

The Munsiff dismissed the plaintiffs' suit on the ground that the defendants were not trespassers or wrong-doers. The plaintiffs thereupon appealed to the Subordinate Judge, contending that as they had been deprived of possession of their lands by the act of the defendants they were entitled to a remedy for the wrong done to them. For the defendants it was argued that, as the plaintiffs could have prevented the execution of the decree of the Court of first instance by depositing the amount decreed within the time prescribed by that Court, no blame attached to the defendants for taking khas possession of their jotes in execution of their decree when the decree stood unaltered and unreversed.

The plaintiffs' right to bring a regular suit for remedying the injury occasioned in execution of the decree which was so altered on appeal was not questioned before the lower Appellate Court by the defendants, and the Subordinate Judge refrained from passing any opinion on that point and decided the case on its merits, and gave the plaintiffs a decree for a certain amount of the mesne profits claimed by them.

Against that decree the defendants now appealed to the High Court.

Mr. *M. L. Sandel* for the appellants.

Baboo *Abinash Chunder Banerjee* for the respondents.

Mr. *Sandel* contended that this suit would not lie as the matter was one which should have been decided in the execution department in the previous suit, and in support of that contention cited and relied on the following authorities: *Lati Kooer* v. *Sahodra Kooer* (1); *Partab Singh* v. *Beni Ram* (2); *Mothoora Pershad Singh* v. *Mohunt Shumbhoo Geer* (3);

(1) 2 C. L. R. 75. (2) I. L. R., 2 All., 61.

(3) 19 W. R., 413.

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Bibee Hamida v. *Bibee Bhudhun* (1); *Bama Soonduree Dabee* v. *Tarinee Kant Lahoree* (2); *Duljeet Gorain* v. *Rewul Gorain* (3).

Baboo *Abinash Chunder Banerjee* for the respondents contended that, as the Munsiff would have been the proper officer to enquire into the matter under the provisions of s. 244 of the Code of Civil Procedure in the execution department, there had been only an error in the form of the procedure, and he relied upon the case of *Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (4) to show that this could not be made a ground of objection in appeal.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by NORRIS, J., who, after stating the facts, continued as follows:—

The point raised before us by Mr. Sandel in second appeal is that no suit such as this will lie, and in support of his contention he has referred to various decisions of this Court, which, if not completely in his favor, are at least very strongly in his favor. On the other hand there is at least one case—*Ram Ghulam* v. *Dwarka Rai* (5)—a Full Bench case, to which the present Chief Justice of this Court, then the Chief Justice of Allahabad, was a party, which distinctly holds that such a suit as this will lie.

We were at first disposed to think that we ought to send this case to a Full Bench, because the balance of our judgment was rather to agree with the Allahabad case than with the cases decided by Division Benches of this Court; but after hearing the learned Vakil for the respondents we are satisfied that there is no necessity for our so referring this case, indeed not only that there is no necessity, but that we ought not to do it.

It has been pointed out by Baboo Abinash Chunder Banerjee that, supposing Mr. Sandel's contention is right, there has been at most an error in the form of the procedure which has been adopted, and that there has been no exercise of jurisdiction by the Munsiff which he did not possess, because, if this matter had

(1) 20 W. R., 238.
(2) 20 W. R., 415.
(3) 22 W. R., 435.
(4) 19 W. R., 90.
(5) I. L. R., 7 All., 170.

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been, as Mr. Sandel contends it ought to have been, enquired into under the provisions of s. 244 of the Code of Civil Procedure in the execution department, it would in the first instance have been enquired into by the Munsiff. The Munsiff is the person who tried this suit. If the parties had been dissatisfied with the decision of the Munsiff the appeal would have been to the Subordinate Judge. It is the Subordinate Judge who has heard the appeal from the Munsiff in this case, and he has set aside his decision. This view of the case is fortified by an authority referred to by the learned Vakil—*Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (1); the head note to the case is: "Where a question such as is provided for by Act XXIII of 1861, s. 11, instead of being determined by order of the Court executing the decree, was made the subject of a separate suit in that Court, it was held that, though the form of proceeding was wrong, there was not a want of jurisdiction which could be made a ground of objection in appeal." That was a decision of Couch, C.J., and Dwarka Nath Mitter, J., in a regular appeal. Further, in one of the cases which Mr. Sandel quoted, an authority which undoubtedly is in his favor, the learned Judge who gave the judgment of the Court holding that the suit would not lie also intimated that the Court would have been prepared to have considered the plaint as an application for the ascertainment of mesne profits in the execution department, so that upon principle and upon authority we think the contention of Baboo Abinash Chunder Banerjee is correct. We have further to observe that we do not think this point was raised in the pleadings. We have been referred to paragraph 1 of the defendants' written statement, but we think that that does not mean that this suit will not lie because the proper method of ascertaining what the plaintiffs are entitled to is by proceedings in the execution department under s. 244 of the Code of Civil Procedure. We think what the defendants meant to assert in the first paragraph of the written statement was that this suit would not lie at all, because the defendants had been put in possession of the land by a decree of a competent Court, which is a very different question from the question argued before us to-day. But,

(1) 19 W. R., 90.

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whether that is so or not, we think that the point was not raised in either of the lower Courts; and, it being a point which goes exclusively to the jurisdiction of the Court, we do not think that we ought to allow it to be raised here.

For these reasons we think that this appeal should be dismissed with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Norris.

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June 7.

TULSHI PERSHAD (PLAINTIFF) *v.* RAJA MISSER AND OTHERS (DEFENDANTS NOS. 1 TO 4).*

Civil Procedure Code (Act XIV of 1882), *s.* 561—*Practice—Objections to decree by respondent—Time for filing objections—Date fixed for hearing appeal—Partition—Joint family property—Suit for possession by member of family admittedly not joint—Limitation.*

Quære.—Whether under s. 561 of the Code of Civil Procedure objections to the decree by the respondent must necessarily be filed seven days before the date originally fixed for hearing the appeal, or whether it is not sufficient if they are filed seven days before the day on which the appeal is actually heard, and whether the decision of the Bombay High Court in *Rangildas* v. *Bai Girja* (1) to that effect is not correct, and the decisions of the Calcutta High Court to the contrary are not erroneous.

The plaintiff sued for possession of certain property, alleging that it had belonged to a joint family, of which he had been a member, and had been allotted to him on partition. The partition was not proved, and the suit was dismissed on the ground of limitation. On second appeal it was contended that if the partition was held not to be proved the family must be held to be joint, and as the possession of one member could not be adverse to another, the decree dismissing the suit on the ground of limitation was erroneous.

Held, that as the family was admittedly not joint the plaintiff was bound to remove the bar of limitation by showing some sort of possession by himself within twelve years before his suit could be entertained, and as he had not done so his suit was properly dismissed.

* Appeal from Appellate Decree No. 2301 of 1886, against the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of Shahabad, dated the 28th of July, 1886, reversing the decree of Baboo Tej Chunder Mukerjee, Munsiff of Buxar, dated the 25th of August, 1885.

(1) I. L. R., 8 Bom., 559.