

order of this kind. It is difficult, indeed, to say under what provision of the law the order was made. It cannot be regarded as an order under section 206 of the Code, because the Court did not profess to act on any ground stated in that section. Nor can it be regarded as an order of review. We think that the principle laid down in the Full Bench case must be applied; that the decree-holders did not realize anything in excess of what was due to them under the decree, and that this appeal of the judgment-debtors must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Banerji.

ZUBEDA BIBI (DEFENDANT) v. SHEO CHARAN (PLAINTIFF)*

Act No. XII of 1881 (N.-W. P. Real Act), 26—Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.

Held, that the mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is as a trespasser.

THE plaintiff in this case was the purchaser of the rights of the mortgagor in certain property which was the subject of a usufructuary mortgage. The defendant, Zubeda Bibi, was the representative in interest of the mortgagees. The plaintiff redeemed the mortgage by deposit of the whole mortgage money in Court, and obtained possession of the mortgaged property with the exception of four plots of land on which the mortgagee during the continuance of the mortgage had planted trees. The plaintiff accordingly brought the present suit for the recovery of these four plots.

The Court of first instance (Munsif of Basti) decreed the plaintiff's claim. The defendant appealed and urged, *inter alia*, that the suit was not cognizable by a Civil Court because on a former occasion the plaintiff had sought to eject the defendant as

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*Second Appeal No. 196 of 1899 from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 31st December 1898, confirming a decree of Mr. H. David, Munsif of Basti, dated the 6th November 1897.

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a tenant by proceedings under the North-Western Provinces, Rent Act, 1881. This was so; but in those proceedings the Board of Revenue had found that the relation of land-holder and tenant did not subsist between the parties, and had directed the plaintiff to seek his remedy in a Civil Court. The lower appellate Court (Subordinate Judge of Gorakhpur) dismissed the appeal confirming the decree of the Court of first instance.

The defendant thereupon appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the respondent.

BANERJI, J.—This is an untenable appeal. The plaintiff respondent is the purchaser of the rights of two persons who mortgaged certain property to the defendant appellant. The amount of the mortgage was deposited by him in Court, and was withdrawn by the mortgagee in full discharge of the mortgage. The mortgagee delivered possession to the plaintiff of the whole of the mortgaged property except a grove which is claimed in this suit. The Courts below have decreed the claim. The first contention urged in this appeal is that the suit is cognizable by a Court of Revenue and not by the Civil Court. That contention is based upon the argument that the plaintiff, by reason of his having applied to the Revenue Court for the ejectment of the defendant under section 36 of Act No. XII of 1881, is precluded from denying that the relationship of landlord and tenant exists between him and the defendant. It appears that the plaintiff did issue a notice for the ejectment of the defendant under section 36 of the Rent Act. That notice was contested, and in the result the appellate Court held that the plaintiff was not entitled to eject the defendant under the proceedings taken by him in the Revenue Court. The order of the Board of Revenue, which is the only order on the record of this case, is to the effect that the plaintiff ought to seek his remedy in the Civil Court. From that order it is clear that the Revenue Court did not find that the relation of landlord and tenant existed between the parties. The mere fact

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of the plaintiff having applied to the Revenue Court for the ejectment of the defendant does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is as a trespasser. The application made by the plaintiff in the Court of Revenue did not amount to anything more than an admission which was rebuttable. In this case he asserted that the defendant, after having received the mortgage money, had no right to continue in possession of a part of the property, and that she was thus in possession as a trespasser. A suit brought upon such an allegation can only be brought in the Civil Court. It has been found that the relation of landlord and tenant does not exist between the parties. It was never stated in the pleadings that such relation subsisted between the parties. The only ground upon which the defendant contended in the Courts below that the suit was not cognizable by the Civil Court was the ground stated in the first plea in the memorandum of appeal to the lower appellate Court, namely the fact that the plaintiff had issued a notice of ejectment under section 36 of Act No. XII of 1881. Upon the allegations made in this case and the findings of the Court below this was a suit which was exclusively cognizable by the Civil Court. The lower appellate Court has found that the grove in question was planted during the time when the defendant was in possession as an usufructuary mortgagee, and that it is thus an accession to the mortgaged property. It has found that separate possession and enjoyment of the grove without detriment to the principal property is not possible. It has further found that the planting of the grove was not necessary to preserve the property from destruction, forfeiture, or sale, and that the grove was not planted with the consent of the mortgagor. Consequently under section 63 of the Transfer of Property Act the mortgagor is entitled to obtain delivery of possession over the accession made to the mortgaged property. It is true that the lower appellate Court in its judgment uses the word plaintiff when referring to the question of consent; but having regard to the fact that the Court in distinct terms referred

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to the provisions of the second paragraph of section 63, and that it was considering whether all the conditions mentioned in that section applied, it is clear that the Court meant to find that the grove was not planted with the consent of the original mortgagors. Upon the findings of the lower appellate Court the second contention raised in this appeal cannot be sustained. It is urged, lastly, that the plaintiff ought to have sued for redemption of the mortgage. It has been found, and it is a fact which was evidently admitted on the pleadings, that the defendant received the whole of the mortgage money in full satisfaction of the mortgage. That being so, there has been a redemption of the mortgage, and as the bulk of the property has been restored to the representative of the mortgagor, the only suit which the plaintiff, as such representative, had to bring was a suit for recovery of possession of the property which was withheld from him. I dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Blair and Mr. Justice Aikman.

DHANI RAM (DEPENDANT) v. CHATURBHUI AND ANOTHER
(PLAINTIFFS).*

Civil Procedure Code, section 244—Execution of decree—Questions for the Court executing the decree—Sale in execution—Suit by decree-holder and judgment-debtor against auction purchaser to set aside sale alleging an uncertified adjustment of the decree prior to the sale.

Held, that the provision of section 244 of the Code of Civil Procedure disallowing a separate suit to determine questions arising between the parties to the suit in which a decree has been passed and bearing upon the execution thereof, operates not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. *Basti Ram v. Fattu* (1), and *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2) referred to.

* First Appeal from order No. 46 of 1899 from an order of W. F. Wells, Esq., District Judge of Agra, dated the 6th May 1899.

(1) (1886) I. L. R., 8 All., 146.

(2) (1892) I. L. R., 19 Calc., 683.

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