1901

PADARATH v. RAM GHULAM.

It was contended that a decree should not be passed as against the second defendant for possession of such of the plots as, in the opinion of the Courts below, had been given to him by Sukha, a previous mortgagee of the land. But the second defendant did not plead that he was a sub-tenant of any of the plots in suit. He claimed the whole of the land in suit under one and the same title, and consequently the question whether he held any of the plots as sub-tenant was not put in issue. He must abide by his pleadings. It is too late now to inquire into the precise terms on which he holds a few of the plots in suit.

For the above reasons I would set aside the decrees of the Courts below, which include a declaration to which on the authorities the plaintiff is not entitled, and in lieu thereof I would pass a decree in favour of the plaintiff for possession of the land in suit. I would make no order as to costs.

BURKITT, J.—I concur.

Appeal decreed.

1901
July 5.

FULL BENCH.

Before Mr. Justice Knox, Acting Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

KANHAYA LAL (PLAINTIFF) *v.* HURIYAN AND ANOTHER (DEFENDANTS).*

Act No. XII of 1881 *(N.-W. P. Rent Act), section* 93, *cls. (b), (c), and (cc)—Suit by zamindar against tenant for removal of trees planted by tenant on tenant's holding—Jurisdiction—Civil and Revenue Courts.*

The plaintiff alleged in his plaint that he being the zamindar, and the defendants being, respectively, tenant and sub-tenant of an agricultural holding, the defendants had without his permission planted certain trees on the holding, thereby committing an act detrimental to the land and injurious to the plaintiff; and he prayed for a mandatory injunction directing the defendants to remove the trees and to restore the land to its original condition.

Held that the suit involved a dispute or matter in which a suit of the nature mentioned in section 93 of Act No. XII of 1881 might have been brought, and was therefore not cognizable by a Civil Court. *Raj Bahadur* v. *Birmha Singh* (1) declared to be no longer in force. *Amrit Lal* v. *Balbir* (2),

* Second Appeal No. 6 of 1898 from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 29th September 1897, confirming a decree of Sheikh Maula Bakhsh, Munsif of the suburbs of Bareilly, dated the 9th July 1897.

(1) (1880) I. L. R., 3 All., 85. (2) (1883) I. L. R., 6 All., 68.

1901

KANHAIYA LAL v. HURIYAN.

Gangadhar v. *Zahurriya* (1) and *Prosonno Mai Debi* v. *Mansa* (2) overruled. *Deodat Tiwari* v. *Gopi Misr* (3), *Chet Ram* v. *Kokla* (4) and *Jai Kishen* v. *Ram Lal* (5) referred to.

THE facts of this case sufficiently appear from the judgments of Knox, Acting C. J. and Aikman, J.

Mr. *D. N. Banerji* and Dr. *Satish Chandra Banerji* (for whom Pandit *Madan Mohan Malaviya*), for the appellant.

Pandit *Madan Mohan Malaviya* for the plaintiff-appellant contended that the suit being one for mandatory injunction directing defendants to remove the trees they had planted and to restore the land to its original condition was cognizable by a Civil Court. He referred to the decision of a Full Bench of the Court in *Raj Bahadur* v. *Birmha Singh* (6). He also referred to the case of *Amrit Lal* v. *Balbir* (7), in which the tenants were sued on the ground that by building a house on their agricultural holding they had done an act detrimental to the land. Reference was also made to the case of *Gangadhar* v. *Zahurriya* (1), where the suit was for removal of trees planted by a tenant on his holding, and this Court held that the suit being a suit for an injunction was cognizable by a Civil Court and not by a Revenue Court. An opposite view had been taken in the case of *Deodat Tiwari* v. *Gopi Misr* 3), but its correctness was doubted in the later case of *Prosonno Mai Debi* v. *Mansa* (2), in which the Court did not overlook clause *(cc)* of section 93 of the Rent Act, but held that the suit was to obtain a mandatory injunction, not to prohibit a person from plainting trees, but to uproot trees which had been already planted, and was as such cognizable by a Civil Court. In *Chetram* v. *Kokla* (4), the Court no doubt expressed a different opinion, *viz.* that suits for the removal of trees fell within the purview of clause *(cc)* of section 93 of the Rent Act, and were, therefore, excluded from the cognizance of Civil Courts. But the attention of the Court does not seem to have been drawn on that occasion to its decision in *Prosonno Mai Debi* v. *Mansa* (2), where it might possibly be said that though a suit for the removal of trees was a suit to prohibit an act or breach mentioned in clause *(cc)* of section 93 of the Rent Act, yet the suit

(1) (1886) I. L. R., 8 All., 446.
(2) (1886) I. L. R., 9 All., 35.
(3) Weekly Notes, 1882, p. 102.
(4) Weekly Notes, 1892, p. 45.
(5) (1898) I. L. R., 20 All., 519.
(6) (1880) I. L. R., 3 All., 85.
(7) (1883) I. L. R., 6 All., 68.

1901

KANHAIYA LAL v. HURIYAN.

was really one to obtain a mandatory injunction not to prohibit an act or a breach, but to compel a person to undo what he had done. A Civil Court was the proper court for the trial of suits of this nature.

Pandit *Baldeo Ram*, who appeared (holding the brief of Maulvi *Ghulam Mujtaba*) for the respondents, was not called upon.

KNOX, Acting C. J.—The plaintiff, appellant in this second appeal, instituted a suit in the Court of the Munsif of Bareilly. The relief asked for in the plaint was, that the defendants, whom the plaintiff as zamindar described as his tenant and sub-tenant, respectively, be ordered to uproot certain trees newly planted by them on land in their occupation as tenants. He also asked for damages. The respondents in their written statement do not in so many words take exception to the jurisdiction of the Civil Court to try the matter in dispute between them and the appellant. I find, however, that the question of jurisdiction was in a half-hearted way made a matter in issue, and the decision of the Munsif was that the plaintiff could not sue for the relief he sought in the Civil Courts. In appeal the lower appellate Court went further and held in plain terms that the suit was cognizable only by the Revenue Court under clause *(cc)* of section 93 of Act No. XII of 1881.

A second appeal was filed in this Court and the question again raised as to whether the suit was or was not cognizable by the Civil Court. In view of the conflict of rulings in this Court my brother Burkitt referred the case to a Bench of two Judges. Eventually the appeal was referred for decision to a Full Bench of this Court.

The determination of the question seems clearly provided for by the express words of section 93 of Act No. XII of 1881. This section provides that "Except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise." One of the suits so mentioned is a suit for compensation for or to

prohibit any act, omission or breach mentioned in clause *(b)* or clause *(c)* of section 93. On turning to clause *(b)* I find that the acts prohibited are acts detrimental to the land in the occupation of a tenant or inconsistent for the purpose for which the land was let. The appellant, as his plaint shows, maintains that the respondents have planted a grove on the land in dispute without any right, and are using the land for purposes other than agricultural. This act is deemed injurious to the land and prejudicial to the plaintiff's right. In other words, the suit is clearly one for compensation for and prohibition of an act detrimental to the land in the occupation of the respondents. It is a suit which might be brought under clause *(cc)* of section 93 of Act No. XII of 1881, and being so, was a suit that no Court other than a Court of Revenue had jurisdiction to hear and to determine. So far, then, as the express words of the Legislature go, I have no hesitation in answering and holding that the suit was one over which the Civil Court had no jurisdiction.

There are, however, certain cases in which this Court has held otherwise. The first of these cases is a Full Bench decision of this Court—*Raj Bahadur* v. *Birmha Singh* (1). That suit was instituted when Act No. XVIII of 1873 was still in force. The last mentioned Act contained no provision similar to that contained in clause *(cc)* of section 93 of Act No. XII of 1881, and I think it may safely be held that had such provision existed, that decision would have resulted otherwise than it did. Owing to the distinct change in the law, it is no longer a decision binding upon this Court. The next decision in order of time is that in *Amrit Lal* v. *Balbir* (2). The attention of the Judges who decided that case does not appear to have been drawn to the provisions of clause *(cc)* of section 93 already cited, and their decision was apparently in ignorance of its existence.

The case of *Gangadhar* v. *Zahurriya* (3), which followed in 1886, is also one in which no allusion whatever is made to the provisions of clause *(cc)*, and the judgment given by Mr. Justice Mahmood would be unintelligible except on the supposition that this clause had been overlooked. Mr. Justice Tyrrell did not go

(1) (1880) I. L. R., 3 All., 85. (2) (1883) I. L. R., 6 All., 68.
(3) (1886) I. L. R., 8 All., 446.

1901

KANHAIYA LAL v. HURIYAN.

into the question at all. Close upon the heels of the last named case came the case *Prosonno Mai Debi* v. *Mansa* (1). In this case clause *(cc)* of section 93 of the Rent Act was undoubtedly considered by the learned Judges. It was a suit in which the landholder prayed for the removal of certain trees planted by a tenant on land let to him for cultivating purposes, and to obtain a mandatory injunction, not to prohibit a person from planting trees, but to uproot trees which had already been planted. A faint attempt was made to remove the suit from the provisions of clause *(cc)*. It appears to me that the plaintiff in this case could have attained his object by a suit brought under clauses *(b)*, *(c)*, and *(cc)*, and with great respect to the learned Judges who decided that case, I would hold that, this being the case, the matter in issue between him and his defendant could be heard and determined by the Revenue Courts alone. I do not propose to discuss at any length the cases in which an opposite view was held in this Court, namely, *Deodat Tiwari* v. *Gopi Misr* (2), *Chet Ram* v. *Kokla* (3), *Jai Kishen* v. *Ram Lal* (4).

The words of the Act are so express and clear that it seems difficult to understand how contrary views, except in *Raj Bahadur* v. *Birmha Singh* (5), were held by this Court. I would dismiss this appeal with costs.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff, a landholder, against his tenant Musammat Huriyan, and her sub-tenant Wahid, on the allegations that nearly two years before the date of suit the defendants had planted trees in a plot of land in their occupation, that this was a use of the land for purposes other than agricultural, and an act detrimental to it and injurious to the plaintiff, and that the defendants refused to uproot the trees when called on to do so. The plaintiff prayed that the defendants should be ordered to remove the trees within a time to be fixed by the Court, and restore the land to its original state.

The suit was instituted in the Court of Munsif of Bareilly, who dismissed it as not cognizable by the Civil Court. On appeal the Additional Subordinate Judge held that the suit was

(1) (1886) I. L. R., 9 All., 35.
(2) Weekly Notes 1892, p. 102.
(3) Weekly Notes 1892, p. 45.
(4) (1898) I. L. R., 20 All., 519.
(5) (1880) I. L. R., 3 All., 85.

cognizable exclusively by a Revenue Court under section 93*(cc)* of Act No. XII of 1881, and dismissed the plaintiff's appeal.

The plaintiff comes here in second appeal, contending that the lower appellate Court was wrong in holding that the suit was not cognizable by the Civil Court.

The appeal came before our brother Burkitt sitting singly. He expressed his opinion that the suit was cognizable only by a Rent Court, but referred the case to a larger Bench owing to the conflicting rulings of the Court on the question at issue in this appeal.

The following cases were relied on by the learned vakil who appears on behalf of the appellant.

Raj Bahadur v. *Birmha Singh* (1). This was a Full Bench decision. The suit is stated to have been one brought by a landholder claiming that the defendant—his tenant—might be restrained from constructing a well upon land occupied by him, that the materials might be removed, and the land restored to its former condition, and that a sum of Rs. 10 might be awarded to him (plaintiff) as compensation. It was held in that case that the matter in dispute was, whether the plaintiff was entitled to demolish the well, and that that was not a matter in respect of which a suit could be brought in the Revenue Court. The fact that the judgment was passed before the enactment of clause *(cc)*, section 93 of the N.-W. P. Rent Act, deprives it of any binding force in the present case. In the case of *Amrit Lal* v. *Balbir* (2), the plaintiffs had sued in the Revenue Court to eject the defendants, who were their tenants at fixed rates, on the ground that by building a house on their holding they had done an act detrimental to the land. The suit was dismissed by the Revenue Court. The plaintiffs then sued in the Civil Court to have the house demolished. The Subordinate Judge held that the suit was barred by section 13 of the Code of Civil Procedure. On appeal to this Court, Oldfield and Tyrrell, JJ., without specifically considering the question whether the suit was cognizable by the Civil Court, held that it was not barred by section 13. The case of *Gangadhar* v. *Zahurriya* (3), was a suit similar

(1) (1880) I. L. R., 3 All., 85. (2) (1883) I. L. R., 6 All., 68.
(3) (1886) I. L. R., 8 All., 446.

1901

KANHAIYA LAL v. HURIYAN.

to the present, *i.e.* for removal of trees planted by a tenant on land in his occupation. The Munsif dismissed the suit as cognizable only by the Revenue Court. On appeal the District Judge, without expressing any opinion on the question of jurisdiction, held that the suit was barred by limitation. The appeal to this Court was heard by Tyrrell and Mahmood, JJ. Tyrrell, J., does not discuss the question of jurisdiction. The judgment of Mahmood, J., does, and he holds that the suit was cognizable by the Civil Court. He refers to the rulings just cited, but he does not refer to the opening words of section 93 of the Rent Act, which are the material words to be considered, and it is difficult to reconcile his judgment with a judgment presently to be referred to—*Deodat Tiwari* v. *Gopi Misr* (1), to which he was a party. The next case relied on by the appellant is *Prosonno Mai Debi* v. *Mansa* (2), decided by Edge, C. J. and Oldfield, J. This, like the present, was a suit for the removal of trees planted by a tenant in his holding. The Courts below had held the suit not to be cognizable by the Civil Court. Edge, C. J. (Oldfield, J., concurring), held that the suit was cognizable by the Civil Court. He expressed his doubts of the correctness of the ruling in *Deodat Tiwari* v. *Gopi Misr*, and held that as the suit was one to remove trees already planted and not to prohibit planting, clause *(cc)* would not apply.

In this case also, as in the other cases relied on by the appellant, the Court omitted to consider the material words governing the question of jurisdiction, *i.e.* the words with which section 93 opens. As will be shown later on, Edge, C. J., adopted a different view in a subsequent case.

Reference was also made to the case of *Musharaf Ali* v. *Iftkhar Husain* (3); but as that was a case in which the trees were planted by the tenant, not on land in his occupation, but on waste land belonging to the zamindar, it has no bearing on the question before us.

For the respondent reliance was placed on the following cases.

Deodat Tiwari v. *Gopi Misr* (1). This was a case in which certain tenants at fixed rates were sued by the landholder for the

(1) Weekly Notes, 1882, p. 102. (2) (1886) I. L. R., 9 All., 35.
(3) (1888) I. L. R., 10 All., 634.

demolition of a house and removal of trees. The Court (Brodhurst and Mahmood, JJ.), held that such a suit was not cognizable by the Civil Court. Their judgment cites the opening words of section 93, and points out that the plaintiff might have obtained his object by dint of a suit under section 93*(b)*, and an order under section 149 of the Rent Act.

The next case in favour of the respondent is that of *Chet Ram* v. *Kokla* (1). This was a case in which a landholder sued his tenant for two reliefs,—*first*, that certain trees planted by the defendant in his holding should be removed and the land restored to its former state; *second*, that the defendant should be ejected for having, in planting the trees, done an act inconsistent with the purpose for which the land was let. When the appeal was argued in this Court, it was admitted that the claim for the second relief was not within the cognizance of the Civil Court. But it was contended on the strength of the ruling in *Gangadhar* v. *Zahurriya* (2) that the Civil Court had jurisdiction to deal with the claim for the first relief. Straight, J., overruled this contention, pointing out that in the judgment cited there was no reference to the clause *(cc)* of section 93 of the Rent Act. He held that the suit fell within that clause, inasmuch as it was a suit to prohibit the defendant from maintaining upon the land the trees he had planted. Edge, C. J., entirely agreed, remarking that if clause *(cc)* had been brought to the attention of the learned Judges who decided the case *Gangadhar* v. *Zahurriya*, he had little doubt they would have given effect to it, and applied it to the case before them. The attention of the learned Chief Justice does not appear to have been called to his own decision in *Prosonno Mai Debi* v. *Mansa* (3).

In this conflict of authority we have to decide which view is correct. I have no hesitation in expressing my concurrence with the opinion of my learned colleague who referred this case, and holding that the suit is not cognizable by the Civil Court. As before remarked, the material words governing the question of jurisdiction are to be found in the first paragraph of section 93 of the Rent Act, which is as follows:—

(1) Weekly Notes, 1892, p. 45. (2) (1886) I. L. R., 8 All., 446.
(3) (1886) I. L. R., 9 All., 35.

1901

KANHAIYA LAL v. HURIYAN.

"Except in the way of appeal as hereinafter provided, no Courts, other than Courts of Revenue, shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act and not otherwise."

The question we have to ask ourselves in regard to this suit is, whether it was a dispute or matter in which any suit of the nature mentioned in section 93 might be brought. This is a question which, in my opinion, cannot be answered save in the affirmative.

The plaintiff might have sued under clause *(b)* to eject the defendant on the ground that the planting of the trees was an act detrimental to the land or inconsistent with the purpose for which the land was let. If a decree had been given for ejectment the relief asked for in this suit might have been obtained by an order under section 149 of the Rent Act.

The plaintiff might further have sued under clause *(cc)* for compensation, or he might under the same clause have sued for an order prohibiting the planting of the trees, or their maintenance when planted.

It is clear, therefore, that the lower Courts were right in holding that the Civil Court had no jurisdiction to entertain the suit.

The decisions of this Court, in which an opposite view was taken, are, in my opinion, erroneous and should be overruled.

The plaintiff ought to have sued in the Revenue Court. When he did come into Court his right of action had become barred under section 94 of the Rent Act, as on his own showing upwards of a year had elapsed from the day on which his right to sue accrued.

For the above reasons I would dismiss this appeal with costs.

BANERJI, J.—I agree with my learned colleagues, but not altogether without hesitation. Having regard to the frame of the suit and the prayer contained in the plaint, namely, the prayer that the defendants be ordered to uproot the trees planted by them and to restore the land to its original state, the claim was one for a mandatory injunction. Such a suit ordinarily lies in the Civil Court. It may, however, be inferred from the terms of clause *(cc)* of section 93 of Act No. XII of 1881, that the Legislature intended

1901

KANHAIYA LAL v. HURIYAN.

that a suit like the one before us, when brought by a landlord against his tenant, should be instituted in a Court of Revenue, as held in the recent rulings of this Court to which reference was made in the argument and to which my learned colleagues have referred in detail. It is desirable that the conflict of authority which exists on the subject should be removed, and I think the manner in which my learned colleagues propose to remove it will effectuate what appears to have been the intention of the Legislature. I may observe that in the Tenancy Bill now before the Legislative Council, it is proposed to confer jurisdiction on Revenue Courts in suits for an injunction like the present suit.

I concur in dismissing this appeal with costs.

BY THE COURT.—The order of the Court is that this appeal be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

1901
July 16.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BALDEO SAHAI (DEFENDANT) *v.* JUMNA KUNWAR (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), section* 23*—Consideration opposed to public policy—Parents making profit for themselves out of the marriage of their daughter—Small Cause Court suit—Act No. IX of* 1887 *(Provincial Small Cause Court's Act), Sch. ii, cl.* (38).

The parents of a girl caused her to enter into an utterly unsuitable marriage, the husband agreeing to pay a certain sum monthly for the maintenance of the parents. On suit by the mother to recover certain instalments of the maintenance so promised, it was *held* (1) that the suit was one not cognizable by a Court of Small Causes; and (2) that the agreement was one which was opposed to public policy and ought not to be enforced. *Bhagvantrao* v. *Ganpatrao* (1), *Dholidas Ishvar* v. *Fulchand Chhagan* (2), and *Visvanathan* v. *Saminathan* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Maulvi *Muhammad Ishaq Khan* for the respondent.

* Second Appeal No. 251 of 1900 from a decree of Maulvi Syed Zainulabdin, Subordinate Judge of Ghazipur, dated the 15th January 1900, confirming a decree of Babu Baidya Nath Das, officiating Munsif of Ghazipur, dated the 26th September 1899.

(1) (1891) I. L. R., 16 Bom., 267. (2) (1897) I. L. R., 22 Bom., 658.
(3) (1889) I. L. R., 13 Mad., 83.