

Another point raised for the appellant was, that only one of the *benamidars*, namely, Balwant Singh, appealed from the judgment of the first Court. The other *benamidar*, Zabar Singh, did not join in the appeal, and was not brought in as a respondent. It is contended that, as far as Zabar Singh is concerned, the decision of the first Court has become final. As to that question, it is sufficient to refer to section 544 of the Code of Civil Procedure. This is clearly a case to which that section applies. The decree appealed against did proceed on a ground common to the two *benamidars*, and that being so, it was quite allowable for one of them to appeal against that decree. The reversal of the decree of the first Court enured to the benefit of both the *benamidars*. We are unable in this case to treat the plaint as an application made in the execution proceedings under sections 244 and 294. The execution proceedings were in the Court of the Munsif, and this suit was instituted in the Court of the Subordinate Judge, who is not seised of the execution proceedings. For the above reasons we dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Burkitt and Mr. Justice Chamier.*

PADARATH (DEFPNDANT) v. RAM GHULAM (PLAINTIFF).\*

*Act No. XII of 1881 (North-Western Provinces Rent Act), sections 10, 93, 95—Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), section 241—Jurisdiction—Civil and Revenue Courts—Suit by mortgagee from occupancy tenant for possession of the mortgaged property against occupancy tenant and an alleged trespasser, and for a declaration.*

The plaintiff was the mortgagee from an occupancy tenant of some 34 odd bighas of land. When he attempted to take possession of the land under his mortgage, he was resisted by a third party who was in possession of about half of the land in question. The plaintiff accordingly sued in a Civil Court for possession of 17 bighas 15 biswas 18 dhurs of land "by virtue of the first defendant's right of occupancy and his (the plaintiff's) right as mortgagee," and also for a declaration that the second defendant had "nothing to do with the land."

\* Second Appeal No. 60 of 1900 from a decree of H. E. Holme, Esq., District Judge of Azamgarh, dated the 6th October 1899, confirming a decree of Munshi Murari Lal, Munsif of Mohandabad Gohna, dated the 30th August 1899.

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Held, that the suit was properly brought in a Civil Court, and that the Civil Court was competent to grant the plaintiff a decree for possession, though it could not grant him the declaration asked for. *Ajudhia Rai v. Parmeshar Rai* (1), *Subarni v. Bhagwan Khan* (2), *Dukna Kunwar v. Unkar Pande* (3), *Kaliani v. Dassu Pande* (4) and *Baru Mal v. Niadar* (5) referred to.

THE facts of this case sufficiently appear from the judgment of Chamier, J.

Mr. *Abdul Raoof* for the appellant.

Mr. *Abdul Majid* (for whom Mr. *Ishaq Khan*) for the respondent.

CHAMIER, J.—This is an appeal against a decree of the District Judge of Azamgarh confirming a decree of the Munsif of Muhammadabad Gohna. The plaintiff asserts that the first defendant, Turant, being the occupancy tenant of 34 bighas 9 biswas of land in mauza Jamre, mortgaged that land to him on August 13th, 1897, but that when he (the plaintiff) went to take possession of the land, as he was entitled to do under the mortgage, the second defendant, Padarath, obstructed him in regard to 17 bighas 15 biswas 18 dhurs of that land. The relief claimed by the plaintiff is a decree for possession of 17 bighas 15 biswas 18 dhurs “by virtue of the first defendant’s right of occupancy and his (the plaintiff’s) right as mortgagee,” and a declaration that the defendant Padarath has “nothing to do with the land.”

‘The first defendant did not defend the suit.’

The second defendant alleged that he had been in possession of the land for more than twelve years before the suit as occupancy tenant; that the first defendant had never been in possession of, and had no right to, the land; and he pleaded that the suit was barred by limitation and by an order of a Deputy Collector, dated February 18th, 1897.

The Munsif held it proved that the first defendant’s grandfather and father had been occupancy tenants of the land in suit, and that the first defendant was entitled to the land as occupancy tenant at the date of the mortgage to the plaintiff, and

(1) (1896) I. L. R., 18 All., 340.

(2) (1896) I. L. R., 19 All., 101.

(3) (1897) I. L. R., 19 All., 452.

(4) (1898) I. L. R., 20 All., 520.

(5) Weekly Notes, 1901, p. 127.

that the second defendant had acquired no right to the land by adverse possession or otherwise.

On appeal the District Judge confirmed the decree of the first Court.

The first point taken in appeal to this Court is, that the order of the Deputy Collector, dated February 18th, 1897, declared that the second defendant, and not the first defendant, was the occupancy tenant of the land, and therefore the question was *res judicata*. We have examined the copy of the order which is on the record, and we find that it was merely an order passed upon the report of a kanungo, directing the entry of Padarath's name in the revenue records on the ground of possession. Obviously such an order cannot be conclusive upon a question of title, and it was so held in regard to a similar order in *Kaliani v. Dassu Pande* (1).

The next point taken on behalf of the appellant is, that the jurisdiction of the Civil Court to entertain the present suit is barred by section 95 read with section 10 of the Rent Act, and by clauses (d) and (e) of section 241 of the Land Revenue Act.

Clause (d) of section 241 of the Land Revenue Act deprives the Civil Court of jurisdiction over "the formation of the record of rights," but as the plaintiff does not ask the Court in the present suit to interfere with the record of rights, and the suit does not involve any interference with the record of rights, that clause clearly does not bar this suit.\* It might as well be contended that if, on the death of the proprietor of the land, the revenue authorities effected mutation of names in favour of A on the basis of possession, B could not sue A for possession of the land in the Civil Court on the basis of his title.

In support of his argument that cognizance of the present suit by the Civil Court was barred by section 95(a) of the Rent Act, and section 241(e) of the Land Revenue Act, counsel for the appellant referred to two cases decided by the Full Bench of this Court, namely, *Ajudhia Rai v. Parmeshar Rai* (2) and *Subarni v. Bhagwan Khan* (3). In the former case the plaintiffs alleged that they were tenants at fixed rates

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(1) (1898) I. L. R., 20 All., 520.

(2) (1896) I. L. R., 18 All., 340.

(3) (1896) I. L. R., 19 All., 101.

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of a holding; that at settlement the Settlement Officer had wrongly entered the defendants as tenants at fixed rates, and the plaintiffs as mortgagees only; and they asked for a decree for maintenance of possession "by invalidating the proceeding of the Settlement Officer." The Full Bench held (Banerji, J., *dubitante*), that the jurisdiction of the Civil Court to entertain the suit was barred for two reasons, namely—(1) that to give the plaintiffs the decree which they sought would be to determine that the plaintiff had a certain class of tenancy, and that the defendants had no class of tenancy in the holding, and that that would be "the determination of the class of a tenant" within the meaning of clause (e) of section 241 of the Land Revenue Act; (2) that either of the parties to the suit could make an application under section 10 and section 95(a) of the Rent Act. In that case the main relief claimed was considered to be the determination of the class of a tenant—a relief which, in the opinion of the majority of the Court, could have been obtained by either party under the Rent Act. In the present case the main relief claimed is a decree for possession. In the second of the Full Bench cases it was held, as I understand, that the suit was not maintainable in the Civil Court, because the defendant had presented an application to a Court of Revenue which was substantially an application under section 10 and section 95(a) of the Rent Act, and the order passed thereon had, under section 96(b) of that Act, the same effect as a judgment of a Civil Court. In the case before us there has been no application under the Rent Act, nor have there been any proceedings in any Court in which the status of either the plaintiff or the defendant has been determined.

Counsel for the respondent relied upon the decisions of this Court in *Dukna Kunwar v. Unkar Pande* (1), *Kaliani v. Dassu Pande* (2) and *Baru Mal v. Niadar* (3). In the last of these cases, Banerji, J., held that a suit for possession was maintainable in the Civil Court against a person who had been placed or maintained in possession by the revenue authorities as the heir of an occupancy tenant, the plaintiff alleging that the defendant was a trespasser, and that he was entitled to the land. That was

(1) (1897) I. L. R., 19 All., 452.

(2) (1898) I. L. R., 20 All., 520.

(3) *Weekly Notes*, 1901, p. 127.

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not a case like the present, but the two other cases just referred to are clear authorities for the proposition that a Civil Court has jurisdiction to entertain a suit for possession by an occupancy tenant, or a tenant at fixed rates against a person alleged by the plaintiff to be a trespasser, although the Court cannot give the plaintiff a declaration as to his status. According to these decisions the first defendant to this suit could maintain a suit in the Civil Court for possession against the second defendant, and if that is so, the plaintiff, who, as mortgagee, is the representative of the first defendant, can maintain the present suit so far as it is a suit for possession, but according to the decision of the Full Bench he cannot have a declaration as to his title.

A suit of this kind is certainly a suit of a civil nature within the meaning of section 11 of the Code of Civil Procedure, and therefore the Civil Court has jurisdiction, unless the cognizance of the suit is barred by some other enactment. Sections 93 and 95 of the Rent Act deprive the Civil Courts of jurisdiction over disputes or matters in respect of which a suit may be brought or an application made under those sections. No clause of either section 93 or section 95 could possibly apply to the present suit. Clause (a) was referred to by the learned counsel for the appellant, but it seems to me that neither the present plaintiff nor the first defendant could make an application under that clause, with reference to the terms of section 10 of the Act, which seems to contemplate an application by a person in possession, nor, in my opinion, could either of them recover possession of the land from the defendant by any other proceeding under the Rent Act.

Section 241(e) of the Land Revenue Act must be read with section 63 of that Act. It appears to me that a Settlement Officer acting under section 63 can deal only with tenants in possession, and that he is not entitled to determine the class of a tenant who is not in possession. This is made clear by section 64, which provides that all entries under section 63 shall be founded on the basis of actual possession.

It seems clear that the plaintiff could not obtain under the Land Revenue Act the relief which he now claims. If we were to hold that the present suit is not maintainable in the Civil Court, the plaintiff has no means of enforcing his rights.

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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.*

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## 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. Ballir* (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) (1888) I. L. R., 6 All., 68.