

remarks apply to this as to the previous case. The mere mention of an order as being made under section 145 of the Code of Criminal Procedure will not under such circumstances make the order an order under chapter XII of the Code. In the present case the proceedings before the learned Joint Magistrate of Ballia were in intention, in name and in fact, proceedings under chapter XII of the Code by a Magistrate who was duly empowered to act under that chapter. This being so, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861.

We dismiss this application, and we direct that the record be returned.

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APPELLATE CIVIL.

 1903
July 17.

Before Mr. Justice Blair and Mr. Justice Banerji.

MASIH-ULLAH KHAN AND OTHERS (DEFENDANTS), v. MAJID-UN-NISSA (PLAINTIFF).*

Execution of decree—Restitution due in virtue of the modification in appeal of the decree of a Rent Court—Procedure—Civil Procedure Code, sections 583 and 244.

Held that although section 583 of the Code of Civil Procedure might be applied by analogy to proceedings before Courts of Revenue under Act No. XII of 1881, section 244 could not be applied to such proceedings. The remedy, therefore, of a person entitled to a refund in consequence of the reversal or modification in appeal of a decree passed under Act No. XII of 1881 by a Court of Revenue, is two-fold, both by means of an application in execution and by a separate suit. *Doorga Purshad Roy Chowdry v. Tara Purshad Roy Chowdry* (1) referred to.

THE defendants to the suit out of which this appeal arose had obtained a decree for profits against the plaintiff in a Court of Revenue. There were four other decrees in which the defendants, the plaintiff, and the son and daughter of the plaintiff were interested. Applications were made for the execution of all five decrees, and the Revenue Court executing the decrees ordered the amount of the decree for profits mentioned above to be set off against the amount of a decree held by

* First Appeal No. 135 of 1902, from an order of F. W. Browrigg, Esq., District Judge of Aligarh, dated the 12th of September 1902.

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the plaintiff against the defendants, and thus the amount of the defendants' decree against the plaintiff was realized. Subsequently on appeal the amount of that decree was reduced, and thereupon the plaintiff applied to the Revenue Court for a refund of the sum which had been realized in excess of the amount decreed by the appellate Court. The Court, accepting the contention of the defendants, held that the plaintiff's remedy was by a suit and not by proceedings in execution. The plaintiff appealed against the order of the Court of first instance, but for some reason or other did not proceed with the appeal, but brought the present suit. The Court of first instance (Additional Subordinate Judge of Aligarh) dismissed it, holding that it was barred by section 244 of the Code of Civil Procedure. The plaintiff appealed, and the lower appellate Court (District Judge of Aligarh) set aside the decree of the first Court and remanded the case under section 562 of the Code of Civil Procedure. Against this order of remand the defendants appealed to the High Court.

Mr. *W. K. Porter*, for the appellant.

Mr. *Karamat Husain*, for the respondent.

BLAIR and BANERJI, JJ.—The only question to be determined in this appeal is whether the suit brought by the plaintiff respondent for restitution of the money which the appellants defendants had realized from her in execution of a decree which was subsequently varied by the appellate Court is maintainable. It appears that the defendants obtained a decree for profits against the plaintiff in the Court of Revenue. There were four other decrees in which the defendants, the plaintiff, and the son and the daughter of the plaintiff were interested. Applications were made for the execution of all the five decrees, and the Revenue Court executing the decrees ordered the amount of the decree for profits mentioned above to be set off against the amount of a decree held by the plaintiff against the defendants, and thus the amount of the defendants' decree against the plaintiff was realized. Subsequently on appeal the amount of that decree was reduced, and thereupon the plaintiff applied to the Revenue Court for a refund of the sum which had been realized in excess of the amount decreed by the appellate Court. The Court, accepting the contention of the

defendants, held that the plaintiff's remedy was by a suit and not by proceedings in execution. The plaintiff appealed against the order of the Court of first instance, but for some reason or other did not proceed with the appeal, and brought the present suit. The Court of first instance dismissed it, holding that it was barred by section 244 of the Code of Civil Procedure. The lower appellate Court has set aside the decree of the Court of first instance, and remanded the case under section 562 of the Code of Civil Procedure for trial. From this order of remand the present appeal has been brought. We find it difficult to agree with the reason given by the learned Judge for his order of remand. But we are of opinion that there is no bar to the maintenance of the present suit. It is true that under section 583 of the Code of Civil Procedure a party entitled to restitution should apply to the Court which passed the decree, but it is by reason of the provisions of section 244 that a separate suit is forbidden. There is no provision in the Rent Act, 1881, similar to those contained in that section. Chapter VII of the Rent Act, which relates to execution of decrees, must be deemed to contain all provisions relating to the execution of decrees passed by a Court of Revenue, and we cannot import into it the provisions of section 244 of the Code of Civil Procedure. We are therefore unable to hold that there is any bar to the maintenance of such a suit as the present. There cannot be any doubt that the plaintiff has some remedy for obtaining a refund of the money which was wrongfully realized from her. It may be that she had a remedy by an application to the Revenue Court, but in the absence of any rule of law forbidding the remedy by suit, we must hold that the latter remedy is also open to her. It was held by their Lordships of the Privy Council in *Doorga Purshad Roy Chowdry v. Tara Purshad Roy Chowdry* (1) that money recovered under a decree which has been reversed or superseded ought to be refunded, and is recoverable either by summary process or by a new suit. As we have already said, the plaintiff did apply for a refund to the Court of Revenue, but that Court upon the objection of the defendants refused to grant her relief. If it be now held that she is precluded from bringing

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a suit, the result will be that she will be wholly without remedy. We are unable to countenance such a state of things and to hold that she has no remedy. In our opinion the suit is maintainable, and should have been tried by the Court of first instance. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1903
July 18.

Before Mr. Justice Aikman.

ANNU (PLAINTIFF), v. DEBI DAS (DEFENDANT).*

Execution of decree—Sale of judgment-debtors' rights and interests as against representative of judgment-debtors—Sale not objected to at the time—Subsequent suit by representative against auction purchaser to recover property alleged to have been sold in excess of the share of the judgment-debtors.

A decree having been obtained by mortgagees for the sale of the rights and interests of the mortgagors in a 10-biswa share in a certain village, both mortgagors died. One Annu was substituted on the record of the case as the representative of both the mortgagors. The decree-holders, estimating the interest of the mortgagors to amount to 5 biswas 16 biswansis, caused such interest to be sold as against Annu, who at the time took no objection to the extent of the share sold. Some years afterwards Annu brought a suit against the auction purchaser to recover 1 biswa 11 biswansis upon the allegation that the judgment-debtors' share had not amounted to more than 4 biswas 5 biswansis. *Held* that such a suit was not maintainable. *Malkarjun v. Narhari* (1) referred to. *Samcal Das v. Bismillah Begam* (2) distinguished.

THE facts of this case are as follows:—

Certain mortgagees got a decree against Bodhi, the father of the appellant, and Kunji, the uncle of the appellant, for sale of their "rights and interests" in a 10-biswa share in a certain village. After decree the judgment-debtors both died, and in execution proceedings one Annu was brought upon the records as their sole legal representative. An application was made for execution of the decree, which left the exact rights and interests of the judgment-debtors unspecified, the decree-holders asking for sale of 5 biswas 16 biswansis out of the 10 biswas, as being the share to which the judgment-debtors were entitled. Notice

* Second Appeal No. 333 of 1902, from a decree of H. B. J. Bateman, Esq., District Judge of Bareilly, dated the 15th of January 1902, confirming a decree of Babu Ram Dhan Mukerji, Subordinate Judge of Bareilly, dated the 15th of August 1901.

(1) (1900) I. L. R., 25 Bom., 337.

(2) (1897) I. L. R., 19 All., 460.