

not exclude the rights of others, who, as pointed out above, may also be regarded as *shafi-i-khalit*.

As the plaintiff in the present case has the right of flow of water over the disputed property he has the right of pre-emption as a *khalit*, and has priority over the vendee, who is only a neighbour. This appeal must therefore fail, and is accordingly dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

MAHARANI OF DUMRAON (DECREE-HOLDER) v. BUDDHA KURMI AND OTHERS (JUDGMENT-DEBTORS).*

Act No. XII of 1881 (North Western Provinces Rent Act), section 35—Decree for rent—Execution of decrees—Application to eject tenant—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 179—Act (Local) No. II of 1901 (Agra Tenancy Act), section 175 et seq.—Appeal.

A land-holder obtained under Act No. XII of 1881, section 35, a decree for arrears of rent against certain tenants. The decree-holder did not attempt to execute this decree against the tenants until more than three years had elapsed from the date thereof; but meanwhile she did apply for and obtained the ejectment of the tenants. *Held* that execution of the decree was barred, and that the decree-holder's application for ejectment could not operate to save limitation.

Sed quere whether any appeal lay from the order of the first Court (Assistant Collector) disallowing execution. *Kharag Singh v. Pola Ram* (1) doubted.

THE Maharani of Dumraon obtained a decree for arrears of rent under the North-Western Provinces Rent Act, 1881, against certain tenants on the 15th of February 1900. The decree-holder, on the 21st of January 1901, applied for ejectment of the tenants under section 35 of the Act above mentioned and in April of the same year they were ejected. On the 18th of January 1904 the decree-holder applied for execution of her decree for rent by attachment and sale of certain cattle belonging to the judgment-debtors. The Court of first instance

* Second Appeal No. 64 of 1905, from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 12th day of October 1904, affirming an order of Kunwar Kuntal Prasad, Assistant Collector of Ghazipur, dated the 12th day of August, 1904.

1905

KARIM
v.
PRYO LAL
BOSE.

1905
July 19.

1905

MAHARANT
OF DUMBAON
v.
BUDDHA
KUNWAR.

(Assistant Collector) dismissed this application as barred by limitation, and on appeal the District Judge of Ghazipur confirmed the order of the lower Court. The decree-holder thereupon appealed to the High Court.

Mr. *Abdul Majid* and *Munshi Haribans Sahai*, for the appellant.

Mr. *B. E. O'Connor* and *Munshi Gobind Prasad*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The plaintiff in the suit out of which this appeal has arisen obtained a decree for arrears of rent against her tenants, the respondents, on the 15th of February 1900. She subsequently made an application under section 35 of the old Rent Act for the ejection of the tenants on the 21st of January 1901, and in the succeeding month of April the tenants were ejected. Subsequently, on the 18th of January 1904, that is, more than three years after the date of the decree, an application was made for execution of the decree for arrears of rent. This application was refused on the ground that it was time barred. On appeal to the learned District Judge the decree of the Assistant Collector was affirmed. Hence this appeal.

It has been argued by Mr. *O'Connor* on behalf of the respondents that no appeal lay from the order of the Assistant Collector to the District Judge and therefore this appeal must fail. He relies upon section 175 and the following sections of the Agra Tenancy Act, No. II of 1901. If this contention be correct this appeal must fail. Mr. *O'Connor*, however, further contends that the application made under section 35 of the old Rent Act was not a step in aid of execution of the decree for arrears of rent and that in any case the application for execution of the decree was barred by limitation.

As regards the first point raised by him he is met by the decision of a Bench of this High Court in the case of *Kharag Singh v. Pota Ram* (1). In that case it was held by our brothers Blair and Banerji that an appeal does lie to the District Judge from an order of the Assistant Collector of the 1st class if such order by the force of section 2 of the Code of Civil

(1) (1904) I. L. R., 27 All., 31.

Procedure amounts to a decree. We have serious doubts as to the correctness of this decision, and if it were necessary to determine the point we should be disposed to send the case to a Full Bench of the Court. However, having regard to the view which we take of the other point which has been raised by Mr. O'Connor, we do not think it necessary to have this question at present discussed before a full Bench. We are clearly of opinion that the application for ejection made under section 35 was not a step in aid of execution of the decree for arrears of rent. The right of the landlord to eject the tenant under that section is a right supplemental to the right which he had to recover the arrears of rent. It is optional with him whether he will or will not eject his tenant who neglects to satisfy a decree for arrears of rent passed against him. In no way does an order of ejection help the landlord to recover arrears of rent so decreed, and therefore the application under section 35 cannot be said to be in aid of execution of the decree for such arrears. The decision of the Courts below upon this point appears to us to be correct.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NISAR ALI (DEFENDANT) v. ALI ALI (PLAINTIFF).*

Letters Patent, section 10—Appeal—Revision—Civil Procedure Code, section 622.

No appeal under section 10 of the Letters Patent of the Court will lie from an order of a single Judge of the Court disposing of an application under section 622 of the Code of Civil Procedure. *Naim-ullah Khan v. Ihsan-ullah Khan* (1) *Gauri Datt v. Parsotam Das* (2), *Hira Lal v. Bai Asi* (3) and *Sriramulu v. Ramasam* (4) followed.

In this case the plaintiff-respondent presented his plaint in the Court of an Assistant Collector. The Assistant Collector being of opinion that the suit was not cognizable by a revenue Court ordered the plaint to be returned to the plaintiff for presentation in the proper Court. The plaintiff did not appeal

* Appeal No. 11 of 1905, under section 10 of the Letters Patent.

(1) (1892) I. L. R., 14 All., 226.

(3) (1897) I. L. R., 22 Bom., 891.

(2) (1898) I. L. R., 15 All., 373.

(4) (1890) I. L. R., 22 Mad., 109.

1905

MAHARANI
OF DUMRAON
v.
BUDDHA
KUNWAR.

1905
July 22.