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which might be deemed to be a part of the mortgage money are the costs referred to in rule 10 of order XXXIV, i.e., the costs of a suit for a decree for foreclosure, or sale or redemption. The costs awarded in the present case are not costs of this description, and therefore they could not be deemed to be a part of the mortgage money which the mortgagees were entitled to realize from the mortgaged property.

Whether the mortgagees should be permitted to bid for and purchase at the sale to be held in execution of their decree, is a matter which the court executing the decree should consider in the event of the mortgagees applying for leave to bid, but in our opinion, their prayer for sale of the mortgagor's rights in the mortgaged property has been rightly allowed, and this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

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July, 21.

Before Mr. Justice Tudball and Mr. Justice Piggott.

UDIT TIWARI (PLAINTIFF) *v.* BIHARI PANDE (DEFENDANT)*.

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 199—*Civil and Revenue Courts—Jurisdiction—Appeal—Question of proprietary right.*

The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his occupancy holding and that the defendant was his sub-tenant. The defendant pleaded that he was a co-sharer in the village and that the land in suit was his *khud-kasht*. *Held* that no question of proprietary title was raised by the pleadings, and that no appeal, therefore, lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance. *Dal Chand* v. *Shamla* (1) dissented from.

THE facts of this case were as follows:—

The plaintiff alleged that he was occupancy tenant of a certain plot and that the defendant had taken that plot, for purposes of cultivation, as sub-tenant from him. It was admitted by the plaintiff that the defendant was the proprietor of practically the whole village. The plaintiff brought this suit for ejectment in the Revenue Court. The defendant pleaded that he did not take the land as a sub-tenant of the plaintiff, but that he was cultivating it as a proprietor, as his *khud-kasht*. The Assistant

*Second Appeal No. 105 of 1913 from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 20th of September, 1912, reversing a decree of Kamta Prasad, Assistant Collector, First Class, of Basti, dated the 7th of June, 1912.

(1) (1905) 2 A. L. J., 176.

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Collector held that the defendant, though a proprietor, had taken the land from the plaintiff as sub-tenant and decreed the claim. On the defendant's appeal to the District Judge the lower appellate court, without deciding the preliminary objection raised by the plaintiff that no appeal lay to that court, reversed the decree, holding that the defendant had not taken the land under a contract from the plaintiff, but that he had forcibly ejected the plaintiff several years ago and that the plaintiff's occupancy right was extinguished. The plaintiff appealed to the High Court.

The appeal first came before TUDBALL, J., who referred the case to a Bench of two Judges.

The case coming on before a Division Bench.

Babu *Piari Lal Banerji*, for the appellant :—

The learned Judge has erred in deciding the appeal before him, without deciding the plaintiff's preliminary objection that no appeal lay. An appeal would lie to him, if a question of proprietary title was in issue before the court of first instance and before him. In this case, no question of proprietary title was ever in issue. The plaintiff claimed no proprietary title himself nor ever denied the defendant's proprietary title. The plaintiff alleged a specific contract of tenancy and that was the only question that arose in the case. If the tenancy was proved, the plaintiff would succeed. If the tenancy was not proved, the defendant's possession would prevail. The defendant was admittedly in possession and his allegation that he was in possession as proprietor was a mere surplusage. It practically amounted simply to a denial of the alleged tenancy and thus the only question in issue was whether the alleged contract of tenancy was proved. No appeal, therefore, lay to the District Judge. The case of *Dal Chand* v. *Shamla* (1) was wrongly decided and should not have been followed.

Pandit *Ladli Prasad Zutshi* (with him Pandit *Mohan Lal Nehru*), for the respondent :—

The case reported in 2 A. L. J., 176, is exactly in point and is a Division Bench ruling. The defendant, by pleading that he was in possession as proprietor, did raise a question of proprietary title which the Assistant Collector could have referred to a Civil Court for decision under the provisions of section 199 of the

(1) (1905) 2 A. L. J., 176.

Tenancy Act. If the defendant was directed to bring a suit in the Civil Court for declaration of his proprietary right, he could not have been met by the plaintiff with an allegation that there was no need for such a declaration as his proprietary right was not denied. Possession, as proprietor, was denied and that raised a question of proprietary title.

Babu *Piari Lal Banerji*, not heard in reply.

TUDBALL and PIGGOTT, JJ.:—This is a second appeal by the plaintiff, whose suit for recovery of possession was decreed by an Assistant Collector of the Gorakhpur district, but has been dismissed by the District Judge of Gorakhpur on appeal. The question is whether an appeal lay, under the circumstances, to the court of the District Judge. The plaintiff alleged that the land in suit was his occupancy holding and that he had sub-let it to the defendant, whom he now desires to eject by a suit under the provisions of the Agra Tenancy Act for that purpose. The defendant replied that he was a co-sharer in the mahal and held the land in suit as his *khud-kasht*. We cannot see that the defendant's title as proprietor was ever denied by the plaintiff. Certainly the latter never claimed to be himself the proprietor of the land in dispute or to have any right in the same, other than the right of an occupancy tenant. Under the circumstances it appears to us impossible to say that a question of proprietary title was raised by the pleadings. We have been referred in argument to the provisions of section 199 of the Tenancy Act. According to that section where, in a suit like the present, a question of proprietary title is raised by the defendant, the Revenue Court may either determine the question of title itself or require the defendant to institute a suit in the Civil Court for the determination of the same. If the Assistant Collector had begun by holding that the present was a case to which the provisions of section 199 aforesaid applied, and had required the defendant to institute a suit in the Civil Court, that suit would have been one for a declaration that the defendant was the proprietor, or one of the proprietors, of the land in suit, in the sense of being a co-sharer in the mahal to which this land appertains. Such a suit, so far as we can gather, would have been met by the present plaintiff with a plea that he never had denied, or was disposed to deny, the defendant's proprietary

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title. There is a ruling of this Court which is in favour of the respondent in this case, namely, *Dal Chand* v. *Shamla* (1). With all respect to the learned Judges who decided that case, it seems to us that they failed to distinguish between the case of pleadings by which a question of proprietary title is raised and that of pleadings which merely raise a question as to the nature of the defendant's possession. In the present case, what the plaintiff had to prove in order to succeed was that he, as occupancy tenant, let the land in suit to the defendant, and even though the latter be a co-sharer in the mahal to which the land appertains or even the sole proprietor of that mahal, there would be nothing illegal in such a contract of tenancy as was alleged by the plaintiff. The point thus raised was one the decision of which is within the province of the Revenue Court, and, as we are unable to hold that any question of proprietary title was raised before the Assistant Collector, was determined by that court or was in issue before the District Judge, we must hold that no appeal lay in this case to the latter court. We, therefore, accept this appeal, set aside the order and decree of the lower appellate court and direct the District Judge of Gorakhpur in lieu thereof, to return the petition of appeal presented to his court for presentation to the proper court. The appellant will get his costs in this Court and in the lower appellate court.

Appeal allowed.

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July, 22.

Before Mr. Justice Tudball and Mr. Justice Piggott.

MUMTAZ AHMAD AND ANOTHER (JUDGEMENT-DEBTORS) *v.* SRI RAM (DECREE-HOLDER) AND BHAWANI SINGH AND OTHERS (JUDGEMENT-DEBTORS.)*

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 17 (*b*), 49—*Document compulsorily registrable*—*Assignment of decree for sale of immovable property.*

Held that a deed of assignment of a final decree for the sale of mortgaged property under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, is not a document which is compulsorily registrable under the provisions of section 17(*b*) of the Indian Registration Act, 1908. *Gopal Narayan* v. *Trimbak Sadashiv* (2) and *Mutsaddi Lal* v. *Muhammad Hanif* (3) distinguished. *Abdul Majid* v. *Muhammad Faizullah* (4) and *Baij Nath Lohea* v. *Binoyendra Nath Palit* (5) followed.

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*Second Appeal No. 386 of 1913 from a decree of Muhammad Shafi, Additional Judge of Meerut, dated the 5th of February 1913, confirming a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 29th of August, 1912.

(1) (1905) 2 A. L. J., 176.
(2) (1876) I. L. R., 1 Bom., 267.
(3) (1912) 10 A. L. J., 167.
(4) (1890) I. L. R., 13 All., 89.
(5) (1901) 6 C. W. N., 5.