

913

MUHAMMAD
ABDUL MAJID
KHAN
v.
AHMAD SAID
KHAN.

actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." This case is therefore, not an authority on the question which is now before us. The case of *Saiyid Ali v. Ali Jan* (1) is also clearly distinguishable. In that case, the *mutawalli* had been appointed by the District Judge, and it was therefore held that, as it was a suit for the removal of a duly appointed *mutawalli*, it could only be brought in conformity with the provisions of section 92. In this case, the plaintiff says that he is the rightful *mutawalli* and that defendant No. 1 is wrongfully in possession of the waqf property. He does not ask for any of the reliefs specified in section 92. He is not suing on behalf of the public or of any section of the public, but merely as an individual to enforce his own alleged individual rights.

In our opinion, such a suit does not come within section 92 of the Civil Procedure Code and is, therefore, within the jurisdiction of the Subordinate Judge. We, therefore, allow the appeal, and, setting aside the decree of the lower court, remand the case to that court, under order XLI, rule 23, with directions to re-admit the suit under its original number and proceed to determine it on the merits. Costs here, and in the court below, will abide the result.

Appeal allowed and cause remanded.

Before Mr. Justice Banerji and Mr. Justice Muhammad Rafiq.

SHIVA PRAKASH (DEFENDANT) v. KARNA (PLAINTIFF) AND DHARAMJIT (DEFENDANT)*.

Civil and Revenue Courts—Jurisdiction—Occupancy holding—Usufructuary mortgage—Surrender of holding—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him.

An occupancy tenant who had made a usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar, who had the mortgagee ejected by the Revenue court.

Held, on suit by the mortgagee for a declaration that the surrender of his holding by the mortgagor was not binding on him, that no such suit would lie in the face of the ejectment proceedings in the Revenue court which were binding on the parties. *Ram Devi Kuari v. Bindewsi Upadhya* (2) followed.

* Second Appeal No. 4 of 1912 from a decree of Mubarak Husain, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Agra, dated the 23rd of September, 1911, confirming a decree of Muhammad Amanul Haq, Additional Munsif of Agra, dated the 24th of July, 1911.

(1) (1912) I. L. R., 35 All., 98. (2) (1911) 3 A. L. J., 940.

1913
May, 31.

IN this case one Dharam Jit, an occupancy tenant, made a usufructuary mortgage of his holding in favour of Karna. Some years afterwards Dharam Jit surrendered the holding which he had mortgaged to Karna to his zamindar Shiva Prakash. Shiva Prakash took proceedings against Karna in the revenue court and had him ejected. Thereupon Karna brought the present suit in a civil court, asking for a declaration that the surrender of his holding by Dharam Jit to the zamindar was not binding upon him, the plaintiff. The court of first instance gave the plaintiff a decree, and this decree was affirmed by the lower appellate court. The zamindar thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

BANERJI and MUHAMMAD RAFIQ., JJ.:—Dharam Jit, an occupancy tenant, made a usufructuary mortgage of his holding to the plaintiff, Karna, on the 16th of April, 1901. Dharam Jit subsequently surrendered his holding to the zamindar, Jotshi Shiva Prakash, in June or July, 1910. Shiva Prakash brought a suit in the Revenue court for the ejectment of Karna and obtained a decree for ejectment on the 29th of November, 1910. Meanwhile on the 12th of September, 1910, Karna brought the suit out of which this appeal has arisen for a declaration that the surrender of his holding by Dharam Jit was not binding on him, the plaintiff.

The court of first instance granted the plaintiff a decree, and this decree has been affirmed by the lower appellate court. In our judgement, the decisions of both the courts below are incorrect. The Revenue Court having made a decree for ejectment, and this decree having been carried into effect and the plaintiff having been ejected, the present suit is, in our opinion, not maintainable. The decree of the Revenue Court is binding on the parties and any decree made in this suit would be wholly nugatory. The point is covered by authority, the latest reported case on the subject being *Ram Devi Kuari v. Bindesri Upadhya* (1). The judgement of the learned Judge who decided that case was affirmed on appeal under the Letters Patent (2). In this judgement all the authorities on the point are collected, and we are of opinion that in view of the decision in that case and of some of the cases on

(1) (1911) 8 A. L. J., 940.

(2) L. P. A. 127 of 1912, decided on the 26th of July, 1912.

1913

SHIVA
PRAKASH
v.
KABNA.

1913
June, 5.

which it is based, this appeal must prevail and the plaintiff's suit must fail. We accordingly allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's suit with costs.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

ABDUL AZIZ KHAN AND OTHERS (DEFENDANTS) v. NIRMA (PLAINTIFF).^{*}
Act No. XXI of 1850 (Caste Disabilities Removal Act), section 1—Act No. XV of 1856 (Hindu Widows' Remarriage Act), section 2—Hindu widow—Conversion and subsequent remarriage.—Widow's estate not divested.—Hindu law.

The widow of a separated Hindu became a convert to Muhammadanism and married a Muhammadan.

Held that the widow did not thereby lose her interest in the property of her late husband in view of the provisions of Act No. XXI of 1850; nor did section 2 of the Act No. XV of 1856 affect the situation, inasmuch as that section applied to Hindu widows only. *Khunni Lal v. Gobind Krishna Narain*, (1) followed. *Matungini Gupta v. Ram Rutton Roy* (2) dissented from.

THE facts out of which this appeal arose were as follows:—

One Musammat Parbati, a Hindu widow, wished to construct a temple and a well on a portion of the property of her late husband. She came to court on the allegation that the defendants obstructed her in carrying out the work and prayed for an injunction restraining them from interference. Her suit was decreed by the court of first instance. The defendants appealed to the District Judge. While the appeal was pending, Musammat Parbati became a convert to Muhammadanism and was married to a Muhammadan. Her mother-in-law, the respondent to the present appeal, put in an application to the District Judge that Musammat Parbati having been converted to Muhammadanism, her own name may be substituted in her place as a respondent in the appeal. An application was also put in by Musammat Parbati, praying that her suit be dismissed and the appeal of the defendants be allowed. The defendants put in an application objecting to the claim of Musammat Nirma, the mother-in-law of Musammat Parbati, on the ground that Musammat Parbati having withdrawn her suit, her mother-in-law had no status in law to carry it on.

^{*} First Appeal No. 157 of 1912 from an order of W. D. Burkitt, District Judge of Saharanpur, dated the 18th of July, 1912.

(1) (1911) I. L. R., 33 All., 356.

(2) (1892) I. L. R., 19 Cal., 289.