

the respondents in August, 1910, did not give them the right to pre-empt the share now in question as co-sharers.

We allow this appeal, set aside the decrees of the courts below, and decree the appellant's claim to possession of the share in question with costs in all three courts.

Appeal allowed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BIRHAM KHUSHAL (DEFENDANT) v. SUMERA (PLAINTIFF).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 79 and 95—Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Useless declaration refused.

The son of a deceased occupancy tenant filed a suit against the zamindar in the civil court asking (1) to have it declared that he was the son and lawful heir of the late tenant and (2) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit.

Held, that although so far as the first relief claimed was concerned the suit might be cognizable by a civil court, so far as the second relief was concerned the plaintiff's remedy was by suit under section 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since expired there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal v. Sardar Singh* (1) referred to.

IN this case the plaintiff sued as the son and heir of a deceased occupancy tenant praying for a declaration of his status as such and for possession of the occupancy holding which had been of his father. He had previously made an unsuccessful application for mutation of names in respect of the holding and had also brought a suit under section 95 of the Agra Tenancy Act, 1901, which had been dismissed in appeal by the Commissioner two years before the filing of his present suit. The present suit was dismissed by the court of first instance upon the ground that it was not cognizable by a civil court. On appeal, however, this decision was set aside and the suit remanded. Against this order of remand the zamindar defendant appealed to the High Court.

Munshi *Satya Narain*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ:—This appeal arises out of a suit, which was originally brought by the plaintiff Sumera in

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* First Appeal No. 161 of 1912 from an order of Pirthvi Nath, Additional Judge of Bareilly, dated the 12th of September, 1912.

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the Munsif's court, first, to have it declared that he was the son and lawful heir of one Jhau, deceased, and, as such, was entitled to the possession of a certain occupancy holding left by Jhau, and, secondly, for possession of the same as an occupancy tenant. The plaintiff claimed to be the legitimate son of Jhau and as such entitled to the holding. The zamindar resisted the claim. The plaintiff first of all applied to the revenue court for mutation of names in his favour. The zamindar objected, pleading that the plaintiff was not the legitimate son of Jhau. The application was disallowed. The plaintiff then brought a suit, under section 95 of the Tenancy Act, in the revenue court, asking for a declaration that he was the occupancy tenant of the holding. The suit was against the zamindar, who again raised the plea that the plaintiff was not the legitimate son of Jhau. The first court dismissed the suit and the court of the Commissioner upheld the decision on appeal in a very brief judgement, which runs as follows:—"The suit has been rightly dismissed. A suit under section 95 of the Tenancy Act is not the way in which to decide a question of legitimacy. The zamindar denies the existence of the tenancy and this is fatal to the suit. The appeal is dismissed with costs." This decision was passed on the 15th of November, 1909, apparently some two years or more after the death of Jhau. It is also clear that the Commissioner dismissed the suit on the ground that the tenancy was no longer in existence. Two years and six days after this decision the plaintiff comes to the civil court with this suit, in which he claims possession of the occupancy holding as against the landlord. The first court dismissed the suit on the ground that it was not cognizable by the civil court. This decision has been set aside in appeal and the suit remanded to the court of first instance by the Additional District Judge of Bareilly.

The defendant comes here on appeal, and urges that the suit is not cognizable by the Civil Court. The suit is very similar in its aspects to that of *Deri Lal v. Sardar Singh* (1), the only difference being that in that suit only a declaration was asked for that the plaintiff was the adopted son. It seems to us quite clear that on the death of Jhau, assuming that the plaintiff was

(1) (1906) 5 A. L. J., 514.

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his legitimate son, he was entitled to the tenure and to continue the cultivation thereof, and if the zamindar unlawfully prevented him from going on to the holding, the plaintiff as occupancy tenant thereof was illegally dispossessed, and it was open to him to bring a suit under section 79 of the Tenancy Act for possession. In that suit it would have been open to the landlord to plead that he was not the occupancy tenant, and that he was not the legitimate son, and the matter could have been fought out in that suit. Section 95 of the Tenancy Act is hardly the section under which to proceed, and the suit brought under that section was rightly dismissed, as the plaintiff was not in possession. Even in the present suit it had to be admitted on behalf of the plaintiff that his suit for possession could not lie in the civil court, and it is said that all that he requires and asks for is a declaration that he is the legitimate son of Jhau. We are not prepared to say that if the plaintiff had come to the civil court for a simple declaration that he was the legitimate son of Jhau, he would not have been entitled to the declaration, provided that he proved his case; but the suit is actually one for possession of an occupancy tenure and is brought against the landlord. For two years after the dismissal of his suit by the Commissioner he did nothing. A suit for possession by a tenant illegally dispossessed has to be brought within six months of the dispossession. Such a suit, if it be now brought by the plaintiff, could not succeed. Therefore to grant a declaration that he is the legitimate son of Jhau would be of no use to him now. It could not be followed up by a suit for possession in the revenue court. In these circumstances, in our opinion, the suit must fail. In so far as it is a suit for possession of the holding, it is not cognizable by the civil court, and in so far as it is a suit for a declaration that he is the legitimate son of Jhau, and as such entitled to the occupancy holding, the Court cannot grant such a declaration as it would be of absolutely no value to the plaintiff. He has misconceived his remedy. He ought, in the first instance, to have sued for possession in the revenue court. We allow the appeal, and, setting aside the decision of the lower appellate court, restore the decree of the court of first instance with costs in all courts.

Appeal allowed.