

fishermen, who, according to the plaintiff, are landing their fish on the river bank where his ferry is situate. He claims that as lessee of the ferry he is entitled to a fixed toll of Rs. 8 per boat. The suit was instituted in the Court of Small Causes at Allahabad, and the Judge of that court has held that he had no jurisdiction, as the suit is one which falls under article 13 of the second schedule to the Provincial Small Cause Courts Act. The plaintiff comes here in revision and urges that the suit is cognizable by the court below. Article 13 contemplates a suit to enforce payment of dues when such dues are payable to a person by reason of his interest in immovable property and the question is whether the plaintiff by reason of his lease of the ferry has an interest in immovable property. The point was considered in two cases, namely, *Gokal Chand v. Lal Chand* (1) and *Desa Singh v. Narain Das* (2). The right to a ferry no doubt is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act. I fully agree with the two above mentioned rulings. In my opinion the order of the court below is perfectly right. I dismiss the application. The costs of this application will abide the result and will be costs in the cause.

Application dismissed.

Before Mr. Justice Tudball.

KALYAN MAL (PLAINTIFF) v. SAMAND AND OTHERS (DEFENDANTS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 58 and 200—Appeal—Question of proprietary title—Defendants setting up a title as mortgagees of the proprietary rights.

In a suit for ejectment under section 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption. Held that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge.

THE facts of this case are fully stated in the judgement of the Court.

Mr. M. L. Agarwal, for the applicant.

Maulvi Muhammad Ishaq, for the opposite parties.

* Civil Revision No. 111 of 1912.

(1) Punj. Rec., 1897, C. J., 215.

(2) Punj. Rec., 1898, C. J., 278.

1913

ABDUL HAMID
KHAN
S.
BABU LAL.

1913

January, 9.

1913

KALYAN MAL
v.
SAMAND.

TUDBALL, J.—This application for revision arises out of the following circumstances:—One Abdul Rahman was a zamindar of plot No 1381, which is involved in the present suit. He cultivated it as his *sir* land. On the 11th of May, 1892, he gave a usufructuary mortgage to the predecessors in title of the present defendants. In 1897 Abdul Rahman's proprietary rights were sold in execution of a decree and purchased by Kalyan Mal. Subsequently to this the heirs of Abdul Rahman were recorded in the *patwari's* papers as exproprietary tenants of that plot. The mortgagees under the deed of the 11th of May, 1892, were recorded as mortgagees of the exproprietary tenure. Kalyan Mal brought a suit against the heirs of Abdul Rahman for the rent of this plot and obtained a decree, and the formality of ejection was gone through, on the 27th of December, 1910. As a matter of fact the mortgagees remained in possession and were no parties whatever to the proceedings in the Revenue Court taken by Kalyan Mal. The present suit, out of which this application has arisen, was brought against the mortgagees, the predecessors in title of the opposite party, ostensibly under section 58 of the Tenancy Act. The defence of the mortgagees to the suit was that the relation of landlord and tenant did not exist between the parties and that they were the mortgagees of the proprietary rights. In other words they clearly set up their mortgage, and said that Kalyan Mal was a mortgagor, having acquired the equity of redemption and that they were the mortgagees. The first court dismissed the suit, holding that the relationship of landlord and tenant did not exist between the parties. Kalyan Mal appealed to the Commissioner, who held that a question of proprietary title was involved in the case and that an appeal lay to the District Judge. On the 24th of February, 1912, he returned the appeal for presentation to the proper court. The appeal was presented on the 26th of February, 1912, to the District Judge. An affidavit was filed. The appeal was admitted and then on the 19th of June, the District Judge made the following order:—“Heard pleader. A mortgagee of a right to occupy *ex sir* land has been ejected, as the expropriator relinquished, though without redeeming the mortgagee. There is no question of proprietary title, nor was any question of jurisdiction decided in the lower court. No appeal lies here. Returned.”

It is perfectly clear that the defendants distinctly claimed a proprietary title, or at least a portion of the bundle of rights which go to make up proprietary title. An appeal did lie to the District Judge. I, therefore, admit the application, set aside the order of the District Judge and direct the Judge to readmit the appeal on its original number and proceed to hear and decide it according to law. I make no order as to costs.

Application allowed.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
 BHARAT INDU AND OTHERS (PLAINTIFFS) v. YAKUB HASAN AND ANOTHER
 (DEFENDANTS).*

1913

1913
 KALYAN MAL
 v.
 SAMAND.

January, 10.

Civil Procedure Code (1908), order XX, rule 18—Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree.

In a suit for partition a preliminary decree was passed and confirmed on appeal. When the case went back to the court of first instance for the passing of a final decree that court passed an order directing that actual partition should be made in accordance with certain directions then given by it. *Held* that no appeal would lie against such an order, but its propriety could be questioned in appeal from the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows :—

" This was a suit for partition of certain houses. A preliminary decree was passed dismissing a portion of the claim, but declaring the plaintiff's right to possession by partition of certain specified shares in each of the two houses. This declaration was, however, subject to a condition, viz., that a smaller fractional share in each house, that is to say, a portion of the share declared to belong to the plaintiffs, was subject to a charge of Rs. 877-0-0 in favour of the defendant Yakub Husain and directing that the plaintiffs should pay the same before they could obtain possession. That decree was contested up to Letters Patent appeal before the Court, and was substantially affirmed. The plaintiffs then presented to the court of first instance an application to the effect that they had no desire to redeem the fractional shares subject to the charge of Rs. 877, but could be content with actual partition of a smaller share in each house arrived

* Appeal No. 79 of 1912 under section 10 of the Letters Patent.