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a constructive as well as an actual or physical ejection of the plaintiff from his tenancy. The principle underlying that ruling seems to be, that where a person claiming to have succeeded to a tenancy by right of inheritance finds that, on endeavouring to take possession of the same, his right is denied and his possession ousted by the zamindar, he has suffered an ejection at the hands of the landlord within the meaning of the section, and his appropriate remedy is by a suit under the Tenancy Act as indicated above. For these reasons we allow this appeal, set aside the order of the lower appellate court and restore the decree of the court of first instance with costs throughout.

Appeal allowed.

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December, 2.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
DALIP SINGH AND OTHERS (DEFENDANTS.) v. KUNDAN SINGH AND OTHERS
(PLAINTIFFS)*

Civil Procedure Code (1908), section 104; order XLIII, rule 10 (a)—Order of appellate court returning plaint for presentation to the proper court—Appeal—Act No. VII of 1887 (Suits Valuation Act), section 11.

Held that an appeal lies under the Code of Civil Procedure, 1908, as it did under the former Code, from an order returning a plaint to be presented to the court. *Wahidullah v. Kanhaya Lal* (1) followed.

Where, however, such an order is to be made by an appellate court, it is the duty of such court first to consider whether the over-valuation or under-valuation of the suit has prejudicially affected its disposal on the merits and thereafter to take action in the manner prescribed by section 11 of the Suits Valuation Act, 1887.

THE facts of the case were as follows :—

A suit for pre-emption was brought in the court of Munsif by the plaintiffs respondents. They sought possession of certain property, the value of which they gave as Rs. 800. There were many defences, but, amongst other objections taken by the defendants, it was urged that the real value of the property was Rs. 1,500 and the Munsif's court had no jurisdiction to entertain the suit. The Munsif framed all the issues in the case, took evidence thereon, held that the value of the property was Rs. 1,500, but in spite of that proceeded to decide all the issues and dismissed the suit. The right to pre-empt was based

*First Appeal No. 157 of 1913 from an order of Banke Behari Lal, Second Additional Judge of Aligarh, dated the 24th of June, 1913.

(1) (1902) I. L. R., 25 All., 174.

on village custom, and he held that the custom did not exist. The plaintiffs appealed, urging that the custom of pre-emption did exist and that the true value of the property was Rs. 800. The lower appellate court decided that the value of the property was Rs. 1,500. It, thereupon, without deciding any other point, set aside the decree of the first court and directed the plaint to be returned to the plaintiffs for presentation in the proper court.

Against this order the defendants vendees appealed to the High Court.

Munshi *Govind Prasad*, for the appellants.

Mr. *D. R. Sawhny*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption which was brought in the court of the Munsif by the plaintiffs respondents. They sought possession of certain property, the value of which they gave as Rs. 800. There were many defences, but, amongst other objections taken by the defendants, it was urged that the real value of the property was Rs. 1,500 and the Munsif's court had no jurisdiction to entertain the suit. The Munsif framed all the issues in the case; took evidence thereon; held that the value of the property was Rs. 1,500, but in spite of that proceeded to decide all the issues and dismissed the suit. The right to pre-empt was based on village custom, and he held that the custom did not exist. The plaintiffs appealed, urging that the custom of pre-emption did exist and that the true value of the property was Rs. 800. The lower appellate court decided that the value of the property was Rs. 1,500. It, thereupon, without deciding any other point, set aside the decree of the first court and directed the plaint to be returned to the plaintiffs for presentation in the proper court.

The defendants have come here on appeal from this order, and it is urged that the lower appellate court should have taken action under section 11 of the Suits Valuation Act and ought not to have returned the plaint as it has done. A preliminary objection is taken that no appeal lies to this Court from the order of the lower appellate court directing the plaint to be returned. The point is one which was considered by a Full Bench of this Court in *Walid-ullah v. Kanhaya Lal* (1). The present Code has made

(1) (1902) I. L. R., 25 All., 174.

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no alteration in this respect, and in accordance with that ruling it is clear that an appeal does lie to this Court. That case, moreover, is in other respects parallel to the case before us. It was therein pointed out that in circumstances such as those of this case, it was the duty of the lower appellate court to take action under clause (2) of section 11 of Act No. VII of 1887. The lower appellate court, having come to the conclusion that the valuation was Rs. 1,500, ought to have at once considered the question whether or not the under-valuation had prejudicially affected the disposal of the suit. (Under the circumstances of this case this is not likely to have happened.) If the lower court had then found that the parties had not been prejudicially affected and the materials necessary for the decision of the suit were on the record (as they appear to be), it was clearly its duty to dispose of the appeal as if there had been no defect of jurisdiction in the court of first instance. We agree with, and are bound by, the ruling in the Full Bench decision mentioned above; and, as in that case, we set aside the order of the lower appellate court and remand the case for disposal by it, having due regard to the provisions of the Suits Valuation Act as mentioned above. The costs of this appeal will abide the event.

Appeal decreed and cause remanded.

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December, 3.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
KAMTA PRASAD AND OTHERS (DEPENDANTS) v. RAM JAG AND OTHERS
(PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Resale of property during pre-emption suit to person with a preferential right, but after extinction of his right to pre-empt by reason of limitation.

During the pendency of a suit for pre-emption under the provisions of the village wajib-ul-arz, the vendee resold the property in suit to a person who originally had a pre-emptive right superior to that of the plaintiff, but who at the date of the sale, was barred by limitation from enforcing it. *Held* that the plaintiff's claim was not defeated by such sale. *Mangal v. Sahib Ram* (1), *Janki Prasad v. Ishar Das* (2) and *Ram Gopal v. Piarai Lal* (3) distinguished.

In this case certain property, which was subject to pre-emptive rights under the provisions of the village wajib-ul-arz was sold to

* Second Appeal No. 195 of 1913 from a decree of Soti Raghubans Lal, District Judge of Mirzapur, dated the 9th of October, 1912, modifying a decree of Udit Narain Sinha, Subordinate Judge of Mirzapur, dated the 20th December, 1911.

(1) (1905) I.L.R., 27 All., 544.

(2) (1899) I.L.R., 21 All., 374

(3) (1899) I.L.R., 21 All., 441.