

be taken into consideration. The office will calculate the fee payable on the appeal as if the two appeals were one. The sum already-paid will be deducted and the balance only will be recoverable. Let the office submit a report on this basis. When the amount is ascertained I will fix the time within which the deficiency should be made good.

By my order, dated the 15th of February, 1917, this appeal and earlier appeal (F. A. No. 364 of 1915) have been consolidated into one appeal. The valuation of the appeal to this Court must be taken to be Rs. 61,000, and on that valuation a court fee of Rs. 1,250 must be paid. A court fee of Rs. 1,035 having been paid in the earlier appeal, and of Rs. 2 on this appeal, total Rs. 1,037, there is a deficiency of Rs. 213, payable by the defendants appellants in this Court. Let the deficiency be received, if paid within six weeks.

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 March, 14.

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

ABDUL HASAN AND OTHERS (DEFENDANTS) v. MAKHDUM BAKHSH AND OTHERS (PLAINTIFFS) AND MOHAN KOEBI AND ANOTHER (DEFENDANTS).^{*}
Act (Local) No. II of 1901 (Agra Tenancy Act), section 79—Fixed rate holding—Purchase of holding at auction sale in execution of a decree—Formal possession obtained—Suit for physical possession—Jurisdiction.

The purchasers of a fixed-rate holding at an auction sale held in pursuance of a decree on a mortgage applied for and obtained formal possession of the holding; the zamindar, however, refused to allow them to cultivate, and in consequence thereof they instituted, in a Civil Court, a suit for possession of the holding.

Held that the position of the plaintiffs was that of tenants who had been wrongfully ejected by the zamindar, to which section 79 of the Agra Tenancy Act, 1901, applied, and that no suit would lie in a Civil Court. *Collector of Benares v. Shyam Das* (1) distinguished.

THE facts of the case were as follows :—

In execution of a decree for sale upon a mortgage a certain fixed rate tenure was sold by auction and was purchased by the mortgagees. The land was at that time in possession of the zamindar who had ejected the tenant in execution of a decree for

^{*} Second Appeal No. 1848 of 1915, from a decree of Muhammad Shafi, Additional Subordinate Judge of Jaunpur, dated the 30th of June, 1915, confirming a decree of Rup Kishan Agha, City Munsif of Jaunpur, dated the 28th of April, 1914.

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arrears of rent. The zamindar had been made a party to the mortgage suit. After their purchase the auction-purchasers were, on their application, put in formal possession of the land as against the zamindar on the 18th of March, 1910. On the 16th of April, 1910, they applied to the Revenue Court for mutation of names. The Revenue Court refused the application on the ground that the zamindar was in actual possession. Thereafter, on the 26th of April, 1913, they brought a suit in the Civil Court for possession against the heir of the former zamindar. The defence, *inter alia*, was that the Civil Court had no jurisdiction to entertain the suit inasmuch as the suit came within the purview of section 79 of the Tenancy Act; and, further, that a suit under that section was now barred by time. This plea was overruled by the Court, which relied on the ruling in the case of *Collector of Benares v. Shiam Das* (1) and the suit was decreed. On appeal the lower appellate court upheld the decree. The defendants appealed to the High Court.

Maulvi *Mukhtar Ahmad* (for Dr. S. M. *Suleman*), for the appellants :—

The suit is cognizable by the Revenue Court and not by the Civil Court. The plaintiffs, by their auction-purchase, became the representatives in interest of the original tenant at fixed rates. The suit comes within the scope of section 79 of the Tenancy Act, being a suit by tenants wrongfully ejected by the landholder for recovery of possession of the holding. This case is distinguishable from that of the *Collector of Benares v. Shiam Das* (1). There the auction-purchaser never obtained possession either actual or even constructive. In the present case the plaintiffs had obtained formal possession as against the zamindar. They alleged in their plaint that they had duly obtained delivery of possession on the 18th of March, 1910. Section 79 of the Tenancy Act is, therefore, applicable to the facts of the present case.

Mr. S. A. *Haidar* (with him Maulvi *Iqbal Ahmad*) for the respondents :—

Section 79 of the Tenancy Act contemplates a case where a tenant being in actual possession as such is wrongfully ousted by

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the zamindar and not the case of a man who has never been in physical possession. By the auction-purchase and the delivery of merely formal possession the plaintiffs did not become tenants in possession. They never obtained actual possession of the land and were never in a position to exercise any act of ownership thereon, e. g., ploughing the land. In point of fact the zamindar was all along in possession and continued to be in actual possession notwithstanding the formal delivery of possession to the plaintiffs by the Civil Court Amin. There was no "ejectment" of the plaintiffs by the zamindar, for that word signifies a change of possession from one person to another. Section 79 does not apply, therefore, and the case, comes within the ruling of the *Collector of Benares v. Shiam Das* (1).

Maulvi *Mukhtar Ahmad*, was not heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—The facts of the case out of which this appeal has arisen are clear and undenied. One Girdhari was the owner of a fixed rate tenancy consisting of four plots of land. He hypothecated those plots of land to the predecessor in title of the present plaintiffs, who are the respondents before us. Girdhari died leaving a widow. The zamindar obtained a decree against the widow for arrears of rent. Then the mortgagees tendered and actually deposited the decretal amount. It was not accepted, and the widow was ejected from the land in execution of the decree. The mortgagees thereupon brought a suit to recover their money by enforcement of the mortgage, and the zamindar was made a party to the suit. He contested the claim, but the claim was decreed and the court directed the sale of the fixed rate tenure. When the property was put up for sale, the zamindar appeared and filed an objection, stating that the fixed-rate tenure no longer existed, that there was merely a non-occupancy tenancy and the land should be sold as such. His objection was disallowed, but a note of his objection was made on the sale proclamation. The fixed-rate tenure was put up for sale and was purchased by the mortgagees themselves. They then applied to the Civil Court for formal delivery of possession and on the 18th of March, 1910, they were formally placed in possession of the land as against the zamindar and the other

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defendants in the civil suit. On the 16th of April, 1910, they applied to the Revenue Court for mutation of names, alleging that they were in possession. The zamindar objected and the Revenue Court refused to enter their names at all. For three years the mortgagees, that is to say, the plaintiff respondents in the present case, did nothing. They then brought the present suit for possession of the fixed-rate tenure, giving the numbers and areas of the four plots in dispute. In paragraph 3 of their plaint they say :—“Subsequent to the ejection proceedings the ancestor of the plaintiffs brought a suit for enforcement of the hypothecation lien and in the said suit, both Musammât Sumari and Shah Ali Husain were impleaded. Furthermore, notwithstanding an objection taken by Shah Ali Husain aforesaid, the claim was decreed in the court of first instance and in the appellate court and the decree was made final. Then execution of the decree for the sale of the property in dispute was taken out as against Musammât Sumari and Shah Ali Husain. Shah Ali Husain took an objection to the effect that the property sought to be sold was not saleable, inasmuch as the nature of the tenure was that of a non-occupancy holding. The objection was disallowed and an order was passed directing the sale of the lands in dispute. Then the aforesaid plots of land were sold and the plaintiffs purchased the same and thereafter, they (the plaintiffs) duly obtained delivery of possession on the 18th of March, 1910.” In paragraph 4 they say :—“Subsequent to their obtaining the delivery of possession, the plaintiffs presented to the Revenue Court an application for the entry of their names, but their application was disallowed.” In paragraph 5 they say :—“Notwithstanding that the plaintiffs obtained delivery of possession, defendants Nos. 1 to 4 deny the right of the plaintiffs as auction purchasers and are in possession of the property in dispute, although they have no right of possession as against the plaintiffs.” In paragraph 7 they state :—“The cause of auction for this suit accrued on the 18th of March, 1910, the date on which possession was delivered to the plaintiffs, within the local limits of the jurisdiction of this Court.” In paragraph 8 (a) they state :—“A decree for possession of the lands specified at the foot and of the value of Rs. 530, may be passed in their favour as against the defendants.”

This suit has been decreed in both the courts below. The plea was taken in both courts that the suit was a suit by a tenant for recovery of possession of his holding and was one of a nature contemplated by section 79 of the Tenancy Act and as such was only cognizable by the Revenue Court. The courts below, relying on a decision of this Court in "*The Collector of Benares v. Shiam Das (1)*," held that the Civil Court had jurisdiction and decreed the claim. The defendants appeal, and the first point taken is that the suit is not cognizable by a Civil Court at all and that the ruling mentioned above does not apply to the facts of the present case. In our opinion this contention has considerable force. The case mentioned above was one which the plaintiff, although he had acquired the tenure, never obtained possession, constructively or otherwise. When he went to take possession he was resisted. In the present case there was no resistance. The ejectment of the opposite party was carried out according to law and the plaintiffs were put into possession. Paragraphs 3, 4 and 5 of the plaint clearly allege that the plaintiffs did obtain possession. In their application of the 16th of April, 1910, for mutation of names, the plaintiffs again alleged that they had been in possession from the 18th of March, up to the date of their application. The bare fact that the zamindars subsequently refused to allow them to cultivate the land does not alter the fact that the plaintiffs having acquired a fixed-rate tenure did obtain formal delivery of possession as against the zamindars. They therefore are tenants who have been ejected by the zamindars otherwise than in due course of law, and this is a suit for recovery of possession of the holding, which is one to which section 79 of the Tenancy Act clearly applies, and the suit was one which was not cognizable by a Civil Court at all. The appeal must prevail. The decrees of the courts below will be set aside and the suit will stand dismissed. In view of the circumstances of the case, we direct that the parties bear their own costs throughout the litigation.

Appeal decreed.

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