

complied with. We think that the question whether or not the section has been complied with completely was clearly a question which the court below had jurisdiction to decide, that it exercised its jurisdiction, and that, even if we thought it had come to an erroneous conclusion, we would not have been entitled to interfere in revision.

As to the second contention, namely, that an auction purchaser has no right to appeal. The Code undoubtedly gives a right of appeal against an order setting aside the sale. The party mainly affected by the setting aside of the sale is the auction purchaser, and the Code provides that the sale should not be set aside without notice to him. We think it would be most unreasonable to hold that the Code restricts the right of appeal to the decree-holder or judgment-debtor. We think the application fails and we accordingly dismiss it with costs.

*Application dismissed.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Tudball and Mr. Justice Abdul Kacof.*

MITHAN LAL (PLAINTIFF) v. CHHAJU SINGH (DEFENDANT).\*

*Usufructuary mortgage—Lease of mortgaged property by mortgagee to mortgagor  
—Sale of equity of redemption to a third party in execution of a decree for arrears of rent—Liability of thekadar for rent.*

Defendant, being the owner of a zamindari share, made a usufructuary mortgage of it in favour of the plaintiff. On the same date the plaintiff executed a lease of the same property for the term of the mortgage. Defendant fell into arrears with his rent, and plaintiff sued him and obtained a decree, in execution of which he brought to sale defendant's equity of redemption under the mortgage and it was purchased by a third party; the purchaser, however, did not obtain mutation of names in his favour.

*Held*, on a fresh suit brought by the lessor for arrears of rent accruing due since the sale of the equity of redemption, that the defendant was still liable for payment of rent as *thekadar*.

The facts of this case were as follows:—

The defendant usufructuarily mortgaged his zamindari to the plaintiff on the 23rd of July, 1908. On the same day the

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\* Second Appeal No. 757 of 1916, from a decree of L. Johnston, District Judge of Meerut, dated the 23rd of February, 1916, modifying a decree of Brij Krishna Rama, Assistant Collector, First class, of Bulandshahr, dated the 15th of November, 1915.

1918

FAZAL RAB  
v.  
MANZUR  
AHMAD.

1918.  
March, 6.

1918

MITHAN LAL  
v.  
CHHAJU  
SINGH.

plaintiff executed a lease of the mortgaged property to the defendant, who remained in possession as *thekadar* paying rent to the plaintiff under the lease. On the 26th of June, 1912, the plaintiff sued him for arrears of rent, obtained a decree and in execution thereof put up the defendant's equity of redemption to auction sale. At that sale, held on the 20th of March, 1913, the equity of redemption was purchased by Bhuttu Mal. The present suit was brought by the plaintiff for arrears of rent against the defendant for a period partly prior and partly subsequent to the 20th of March, 1913. The defendant denied his liability for this latter period, on the ground that his equity of redemption had been sold. The Assistant Collector held that the purchase by Bhuttu Mal of the equity of redemption did not affect the lease at all, which was subsisting; and the suit was decreed in full. On appeal, the District Judge held that on the sale of the equity of redemption the defendant became the ex-proprietary tenant of the land, and that as no rent had been fixed by the Collector after the accrual of the ex-proprietary rights the plaintiff could not sue for rent for the period subsequent to the 20th of March, 1913. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghosh*, (with him Pandit *Uma Shankar Bajpai*), for the appellant, submitted that the usufructuary mortgage of 1908 was a transfer within the meaning of section 10 of the Tenancy Act, and consequently the defendant then became by virtue of the law the ex-proprietary tenant of the plaintiff. The District Judge was in error in holding that a fresh ex-proprietary right accrued to the defendant upon the sale of the equity of redemption. It was not necessary that there must be an order fixing rent under section 36 of the Land Revenue Act in all such cases, and there was nothing to prevent the parties coming to an agreement as to the amount of rent for a particular ex-proprietary holding, provided only that the rent was not greater than that indicated by section 10 of the Tenancy Act. What the law sought to provide was that an ex-proprietary tenant should not be permitted to contract himself out of the benefits conferred upon him by section 10; and it was not suggested by the defence in the present suit that the rent fixed in the lease was in excess of the statutory rent. The case of

*Prag v. Sital Prasad* (1), was not against the appellant; on the other hand, it was really in his favour. The judgment of Mr. TWEEDY in the case of *Musammat Ram Kuari v. Badri Singh* (2), went further than the law on the subject and ought not to be accepted.

1918

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 MITHAN LAL  
 v.  
 CHHATU  
 SINGH.

Munshi *Haribans Sahai*, for the respondent :—

Ex-proprietary rights arose in favour of the defendant on two occasions, (1) when he made the usufructuary mortgage and (2) when his equity of redemption was sold. The mere fact that he did not claim ex-proprietary rights on the first occasion could not operate to prevent the accrual of such rights for all time to come. He became, by operation of law, an ex-proprietary tenant on the sale of the equity of redemption, and unless the rent was fixed by the Collector the appellant could not sue for arrears of rent. Whatever may have been the law under Act XII of 1881, it is now clear, having regard to the provisions of section 10 of the present Tenancy Act and section 36 of the Land Revenue Act, that the rent of an ex-proprietary tenant cannot be fixed by private arrangement. In any case, having regard to the Full Bench ruling in *Debi Prasad v. Bhagwan Din* (3), the defendant became the ex-proprietary tenant of all the proprietary body, and the present suit is not maintainable. Then, reading together the two deeds of the 23rd of July, 1908, and having regard to the fact that the net rent reserved by the *theka* was equal to the interest on the mortgage money, the meaning is clear that the lease subsisted only so long as the defendant continued to be the mortgagor. When the equity of redemption was sold the defendant was no longer bound to pay the rent fixed by the lease; he was thereafter cultivating the land as an ex-proprietary tenant and was liable to pay only the statutory rent. The parties could not contract themselves out of the law. Reference was made to *Prag v. Sital Prasad* (1), *Musammat Ram Kuari v. Badri Singh* (2), and *Moti Chand v. Ikram-ullah Khan* (4). In any case an issue ought to be remitted to find out whether the rent reserved is or is not in excess of the statutory rent.

(1) (1914) I. L. R., 36 All., 155. (3) (1912) I. L. R., 35 All., 27.

(2) (1913) Board's Select Decisions, (4) (1916) I. L. R., 39 All., 173.

1918

MITHAN LAL  
v.  
CHHAJU  
SINGH.

TUDBALL and ABDUL RAOOF, JJ. :—This is a plaintiff's appeal. The facts out of which it has arisen are briefly as follows :—The defendant was the owner of a certain zamindari share, the area of which was some 13 bighas odd. On the 23rd of July, 1908, he gave a usufructuary mortgage of this zamindari to the plaintiff. On the same date the plaintiff gave him a lease of the same zamindari share on payment of a sum of Rs. 70-14-0 per annum *plus* Rs. 23-11-0 Government demand, etc. The defendant remained in possession as *thekadar* paying his rent to the plaintiff under the lease. On the 26th of June, 1912, the plaintiff sued him on the basis of that agreement for arrears of rent and obtained a decree and in execution of his decree for the arrears of rent due under the lease, he attached and put to sale the defendant's equity of redemption. This was sold on the 20th of March, 1913, and was purchased by one Bhuttu Mal. At the time of the sale the plaintiff's mortgage and one other mortgage were also notified. The price paid for the property at the sale was Rs. 40. Bhuttu Mal did not apply for mutation of names, and the Government record still stands as it was on the date of the original mortgage. The plaintiff has now, on the basis of the lease, sued his *thekadar*, the defendant, for the rent for a period which commenced prior to the 20th of March, 1913, and runs up to a date subsequent to that date. The defendant in his written statement merely pleaded that he was liable for the rent up to the 20th of March, 1913, but that for the period subsequent to that he was no longer liable under the lease because his equity of redemption had been sold and purchased by Bhuttu Mal. The court of first instance in the course of its judgment made the remark that "the mortgagor's right to redeem had been put to auction by the plaintiff decree-holder who *had purchased it for Bhuttu Mal* on the 20th of March, 1913." It is quite clear that the defendant had nowhere pleaded that Bhuttu Mal was the *benamidar* of the plaintiff or that Bhuttu Mal had purchased the property for and on behalf of the plaintiff. There was no issue on this point. There was no allegation or denial; no evidence and no finding. The court of first instance held that the purchase by Bhuttu Mal of the defendant's equity of redemption did not affect the case at all, that the lease subsisted, and that the defendant was liable under

the lease. It accordingly decreed the suit. The lower appellate court on the defendant's appeal has held that after the 20th of March, 1913, the defendant became the ex-proprietary tenant of the land because the equity of redemption had been sold; that he was entitled to take up his position as an ex-proprietary tenant and as no rent had been fixed, he was not liable to pay any rent for the period subsequent to the 20th of March, 1913. The plaintiff appeals. It is quite clear to us that the judge of the court below has misunderstood the nature of the plaintiff's claim. It is based on the *theka* which was given to the defendant on the 23rd of July, 1908. We will assume that the defendant is the ex-proprietary tenant of the land. He is equally a *thekadar* under the contract of the 23rd of July, 1908. If the period of that contract has come to an end, then of course the plaintiff's claim must fail because the *theka* no longer subsists; but, so long as the *theka* subsists, the plaintiff is entitled to recover from his *thekadar* the rent which the latter has agreed to pay. He may as an ex-proprietary tenant be a tenant of the land under himself as *thekadar*. If the *theka* had been given to an outside person, there is no question that so long as it subsisted the *thekadar* would be liable for the rent. The lower court in its judgment has stated that Bhuttu Mal *appears* to have been a *benamidar* for the plaintiff. It has, however, come to no decision on the point, nor could it do so, for the simple reason that the issue had not been raised, no evidence taken upon it, and there had been no decision on it. The point would have been material if it had been raised, because the lease was to subsist only so long as the mortgage subsisted. If the defendant had pleaded and had proved to the court that the mortgage had come to an end, then the plaintiff's claim would have failed, but he is not allowed to raise a question of fact in second appeal on which there were no pleadings, on which there was no issue and to which no evidence was directed. The case must be decided on the assumption, right or wrong, that the mortgage still subsists and that Bhuttu Mal is the owner of the equity of redemption which was purchased in his name. This being so, the lease must still subsist, and, whether the defendant be or be not the ex-proprietary tenant of the land, he is liable as *thekadar* to his lessor. In this view we must allow the appeal,

1913

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MITHAN LAL  
v.  
CHHAJU  
SINGH

1918

MITHAN LAL  
v.  
OHHAJU  
SINGH.

set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff will have his costs in all courts. The court of first instance granted the plaintiff a decree for what it has called "usual interest." This interest will run from the date of the suit up to the date of realization, and at the rate of 6 per cent. per annum simple.

*Appeal decreed.*

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

COLLECTOR OF MORADABAD (PLAINTIFF) v. MAQBUL-UL-RAHMAN AND OTHERS (DEFENDANTS).\*

*Act No. XVI of 1908 (Indian Registration Act), sections 32, 33, 71, 73, 75, 87 and 88—Mortgage-deed—Registration—Presentation—Authority to present document for registration on behalf of executant—Distinction between presentation under Part VI and under Part XII of the Act.*

A mortgage-deed was executed on the 20th of November, 1911. Before, however, the deed could be registered, the mortgagee fell ill. On the 3rd of February, 1912, the mortgagee executed in favour of a pleader, a power of attorney of the kind referred to in section 32 of the Indian Registration Act, 1908. This was duly authenticated by the sub-registrar, and the document was presented for registration by the appointee on the 5th of February, 1912. On the 8th of February the mortgagee died. The mortgagor failed to appear before the sub-registrar and admit execution, and the sub-registrar refused to register the deed. An application was next presented to the Registrar under section 73 of the Act by the widow of the mortgagee in the capacity of guardian of the mortgagee's two minor sons, and on the 28th of June, 1912, the Registrar made an order under section 75(1) of the Act directing that the mortgage-deed should be registered. Meanwhile the estate of the minors had been taken under the superintendence of the Court of Wards, and the Collector, as Manager on behalf of the Court of Wards, on the 23rd of July, 1912, sent the mortgage-deed by a messenger to the sub-registrar, with a copy of the Registrar's order mentioned above and an official letter requesting that the document might be registered, which was accordingly done. On suit having been brought on the mortgage, some of the defendants raised an objection that the mortgage-deed in suit was not validly registered. *Held* that the document was properly registered. No valid objection could be sustained as to its presentation, either on the 5th of February, 1912, when it was presented by the pleader acting under his power of attorney given by the mortgagee, or on the 23rd of July, 1912, when it was sent by the Collector to the sub-registrar. The Collector was not bound to present the document in person, and that being so, it was immaterial what means he took to bring it before the sub-registrar.

\*First Appeal No. 139 of 1916, from a decree of Ram Chandar Saksena, Additional Subordinate Judge of Moradabad, dated the 29th of January, 1916.

1918  
March. 7.