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ISHAQ KHAN
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RUSTAM ALI
KHAN.

We allow the appeal, set aside the decree of court below and remand the case to that court with directions to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

Before Mr. Justice Piggott and Mr. Justice Walsh.

JAGARDEO SINGH (DEFENDANT) v. ALI HAMMAD AND OTHERS
(PLAINTIFFS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 34—Person occupying land without consent of landlord—Ejectment—Non-occupancy tenant—Usufructuary mortgagees entitled to possession.

The plaintiffs were the usufructuary mortgagees entitled to possession of the mortgaged property. The defendant having acquired a part of the equity of redemption asserted a right to the possession of some of the *sir* lands comprised in the mortgage without tendering the mortgage money, and somehow managed to get into possession of certain plots.

Held, that section 34 of the Agra Tenancy Act, 1901, applied, and the defendant could be regarded as a person in possession of land without the consent of the landlord and ejected as if he were a non-occupancy tenant. *Balli v. Naubat Singh* (1) followed.

UNDER a usufructuary mortgage executed before the present Tenancy Act came into force the plaintiffs were in possession of certain plots of *sir* land as mortgagees. The defendant acquired a share in the mahal in which the plots were situate and thus became the owner of a portion of the equity of redemption. Subsequently the defendant took possession of some of the plots of *sir* land. The plaintiffs sued in the Revenue Court for ejectment of the defendant as a non-occupancy tenant. The defendant pleaded that there was no contract of tenancy between the parties and that he was in proprietary possession as a co-sharer in the mahal. The Revenue Court, acting under section 199 (1) (a) of the Tenancy Act, referred the defendant to the Civil Court. The final decision of the Civil Court was to the effect that these plaintiffs were entitled to exclusive possession of the plots as usufructuary mortgagees, and that the defendant

* Second Appeal No. 118 of 1915, from a decree of Durga Dat Joshi, District Judge of Azamgarh, dated the 9th of December, 1914, confirming a decree of Govind Atma Ram Dhandi, Assistant Collector, first class, of Mohammadabad, dated the 18th of July, 1914.

(1) (1912) 9 A. L. J., 771.

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by becoming a co-sharer in the mahal had acquired a share in the equity of redemption. Following this decision the Assistant Collector decreed the ejectment suit on the ground that the status of the defendant could only be deemed to be that of a non-occupancy tenant. The defendant appealed to the Commissioner, who held that a question of proprietary title was still in issue between the parties and that the appeal lay to the District Judge. The defendant then appealed to the District Judge, who held that no such question was any longer open between the parties, as it had been finally determined by the Civil Court, and that the appeal therefore did not lie to him. Against this decision the defendant appealed to High Court. After some of the facts stated above had been found upon a remand by the single Judge who first heard the appeal, the case was referred by him to a Division Bench.

Maulvi *Iqbal Ahmad*, for the appellant :—

The District Judge was wrong in holding that the appeal did not lie to him. The finding of the Assistant Collector that the defendant was a non-occupancy tenant of the plaintiffs was challenged in the appeal on the ground that the defendant was a proprietor and nobody's tenant. So, a question of proprietary title was still a matter in issue in the appeal, and under section 177(e) of the Tenancy Act the appeal lay to the District Judge. The plaintiffs came to the Revenue Court on the allegation that the defendant was their tenant. Upon the facts ascertained, the defendant is not their tenant. Taking it that he is a trespasser without title, the plaintiffs cannot in this suit turn round and claim to eject him as a trespasser. The Revenue Court cannot entertain a suit to eject a mere trespasser. The plaintiffs came to court with wrong allegations and they have themselves to thank if after a protracted trial they find that the suit must be dismissed. If in the present case the suit were decreed on the ground that the defendant was a trespasser, the result would be that zamindars need never go to the Civil Court to eject trespassers pure and simple; they would sue in the Revenue Court on an allegation of tenancy, and when the allegation was found against them, would claim a decree on the ground that the defendant was

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a trespasser. The jurisdiction of the Civil Court would thereby be effectively ousted. It is significant that the court fee payable for a suit under section 58 of the Tenancy Act is different from that for a suit in the Civil Court for ejection of a trespasser. In the case of *Balmakund v. Dalu* (1) the suit was instituted in a court which could properly pass a decree for ejection on the facts as found. The difficulty in the present case is that the Revenue Court was not the proper court to eject a mere trespasser; the suit should have been brought in the Civil Court. Sections 196 and 197 of the Tenancy Act apply only to cases in which the appeal would in any event lie to the District Judge, although the suit was instituted in the wrong court. They are not applicable here, for an appeal from a suit under section 58 of the Tenancy Act ordinarily lies to the Commissioner; *Bechu Sahu v. Nandrum Das*(2).

Mr. S. M. Yusuf Hasan, for the respondents:—

On the facts found it is clear that the defendant has no right to remain in possession of the plots in dispute. Apart from technicalities, that is the real question between the parties, namely, whether the defendant should be ejected, and that has to be determined by the Court now. The defendant is a mere trespasser, and the Civil Court has an inherent jurisdiction, notwithstanding technicalities and formal defects, if any, in the suit as instituted, to pass a decree for ejection in accordance with the rights of the parties. Sections 151 and 153 of the Code of Civil Procedure are intended to meet the requirements of a case like the present, and give very wide powers. If the court now decreed the defendant's ejection, he could have no ground for saying that he had been taken by surprise or been prejudiced in any way. For, in the civil suit between the parties, which was instituted in accordance with section 199 (1) (a) of the Tenancy Act, the defendant had an ample opportunity of raising all the pleas which he could possibly have raised by way of defence if the plaintiffs had originally sued for ejection in the Civil Court. Technically, also, there is nothing against the passing of a decree for ejection in the present suit as brought. It has been held that the provisions of section 34 of the Tenancy Act point to the

(1) (1908) I. L. R., 25 All., 498.

(2) (1914) 12 A. L. J., 902.

conclusion that a trespasser who is in cultivatory occupation of land without the consent of the zamindar can be ejected by the Revenue Court as a non-occupancy tenant; *Balli v. Nurbat Singh* (1).

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Maulvi *Iqbal Ahmad*, in reply:—

Sections 151 and 153 of the Code of Civil Procedure do not apply to suits instituted in the Revenue Courts; vide section 193 of the Tenancy Act. The case relied on by the respondents was not correctly decided. Section 34 finds a place in Chapter IV of the Tenancy Act, which chapter deals only with “determination, etc.” of rent; there is no corresponding provision in chapter V, which is the chapter dealing with ejection by the Revenue Courts. That shows that the Legislature intended that, though a trespasser could be sued in the Revenue Court for rent he could not be ejected by that court. Sections 57 and 58 of the Tenancy Act are exhaustive of the grounds on which a person can be ejected by the Revenue Court, and a trespasser does not come within those sections. The latter portion of section 34 emphasizes that a trespasser does not become a tenant until he pays rent. The Full Bench case of *Nandan Singh v. Ganga Prasad* (2) considered the provisions of section 34 and doubted whether the Revenue Court could eject unless the relationship of landlord and tenant existed between the parties.

PIGGOTT, J.:—These are four connected appeals which have come before us under the following circumstances:—

The plaintiffs instituted, in the court of the Assistant Collector, Azamgarh, four suits, for the ejection of the defendant from certain specified plots of land, in each case with the allegation that they themselves were mortgagees in possession of the proprietary rights over the said plots, and the defendant was a non-occupancy tenant of the same. The defendant replied that there was no contract of tenancy between himself and the plaintiffs; that his possession was proprietary in its nature and that he was in possession as of right, because he was a co-sharer in the proprietary rights of the particular sub-division of a *mahal* to which the land in suit appertained. On this the learned Assistant Collector took action under section 199 of Act II of 1901, requiring the defendant to file a suit in the

(1) (1912) 9 A. L. J., 771. (2) (1913) I. L. R., 35 All., 512.

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Civil Court for the determination of the question of title in issue between himself and the plaintiffs. The court of first instance determined the question in favour of the present defendant, who was, of course, the plaintiff in the Civil Court. On appeal, however, this decision was reversed. The controversy in this case has been very largely as to the meaning and effect of the appellate court's decision in this litigation. The decision, fairly considered, amounts to this, that the plaintiffs respondents (the defendants in the Civil Court) held a usufructuary mortgage in respect of the plots of land in suit and were entitled to the exclusive possession of the same as such mortgagees; but the present defendant had acquired a share in the proprietary rights, that is to say, in the equity of redemption, in respect of the mortgage held by the opposite party. The case came again before the Assistant Collector, who was bound to dispose of the ejectment suit then pending before him in accordance with the final decision of the Civil Court. He passed a brief order to the effect that in view of the decision of the Civil Court, the defendant could only be regarded as in possession of the land in suit as a sub-tenant, that is to say, a non-occupancy tenant (the land in question being *sir* land) from the plaintiffs. He ordered the defendant to be ejected accordingly. The defendant filed an appeal in the Commissioner's court, who refused to entertain it, holding that a question of proprietary title was still in issue as between the parties. The defendant then went before the District Judge in appeal, who dismissed the appeal, holding that the question of proprietary title, originally in issue, had been finally and completely disposed of in the suit already referred to, and that there was no question left for determination in the case which was not exclusively cognizable by the Revenue Courts. Against this decision four second appeals have been filed. When the case originally came up for hearing, the facts were not as clear as they are now, and an order was passed directing the District Judge to entertain the defendant's appeal and to determine certain issues of fact.

We have now before us the findings arrived at by the District Judge on the issues remanded, and as a matter of fact his findings proceed on admissions made by the parties. The mortgage under

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which the present plaintiffs respondents now hold, and have been holding since 1902, was a mortgage of the specific plots of *sir* land which are now in suit. The mortgage itself had been contracted prior to the passing of the present Tenancy Act; so no question of ex-proprietary rights arises. On the terms of the mortgage, the plaintiffs, as transferees of the mortgagee rights, were entitled from 1902 and onwards to actual possession and enjoyment in respect of the land in suit.

The defendant, having acquired a part of the equity of redemption, asserted a right to take possession of some of the *sir* lands, without tendering the mortgage money. In prosecution of this claim he somehow succeeded in obtaining possession of the plots of land now in suit. The question specifically raised by these appeals is whether the learned District Judge was right or wrong in holding that no appeal lay to his court. I should be prepared to hold that that decision was correct, but the matter has now gone somewhat further. After the order of remand and the ascertainment of the facts, the real question before us is whether the Assistant Collector was right in ordering ejectment of the appellant. On the principles laid down by a learned Judge of this Court in *Balli v. Naubat Singh* (1), the Assistant Collector was clearly right. It has been suggested, on the other side, that this decision was doubted in a Full Bench decision of this Court, in the later case of *Nandan Singh v. Ganga Prasad* (2) (See specially the remarks at page 516). As a matter of fact the decision reported in 9 A. L. J., page 771, was not specifically considered or in terms overruled, though it is open for the appellant to contend that the remarks of the learned Chief Justice, when delivering the judgement of the Full Bench suggest that he was not prepared to accept the correctness of that ruling. We find, however, that the principle laid down in *Balli v. Naubat Singh* (1) has been in substance accepted and followed by the Revenue Court since that decision was pronounced. Reference may be made to the notes by Mr. M. L. Agarwala in his valuable commentary on the N.-W. P. Tenancy Act, fifth edition, at pages 40 *et seqq.*, of that edition. Moreover, there is a decision of the Board of Revenue, *Champa*

(1) (1913) 9 A. L. J., 771.

(2) (1913) I. L. R., 35 All., 512 (516).

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Kuar v. Pati Ram (1), which deals with the position of a squatter occupying agricultural land for cultivating purposes, and which adopts the principle of the case of *Balli v. Naubat Singh* (2) to its fullest extent. In this state of authorities I should be prepared personally to stand by the reported decisions directly bearing on the question before us. Moreover, I think that, there being nothing in favour of the defendant on the merits, it is not incumbent on us to go out of our way to insist upon any legal technicalities for the sake of enabling the defendant to prolong this litigation. The decision in the case of *Champa Kuar v. Pati Ram* (1) is by the Senior Member of the present Board of Revenue; and it is quite clear that if the defendant had got what he asked for, namely, a re-consideration of the Assistant Collector's order by the higher Revenue Courts, the result would have been to affirm his ejectionment.

So far as the Civil Courts are concerned they have already decided in favour of the plaintiffs respondents, and, if the present matter could rightly be taken cognizance of by the Civil Courts, they could not have come to a different decision from that arrived at by the Assistant Collector.

The defendant's possession is wholly unlawful, and the order of ejectionment a proper order on the merits. There are thus abundant reasons for dismissing these appeals.

WALSH, J.—I agree. Particularly I accept the cases of *Balli v. Naubat* (2) and *Champa Kuar v. Pati Ram* (1) as the correct expression of the law. I am not satisfied that in *Nandan Singh v. Gangu Prasad* (3) the Full Bench intended to dissent from the case of *Balli v. Naubat* (2), which was relied on by the appellant, who succeeded; but I think the *dictum* at the foot of page 515 in 35 All., requires further consideration. Apparently the Chief Justice thought that section 34 of Act II of 1901 could be made to work so long as the person was occupying the land "without permission" of the landlord. The words in the section are not "without permission." I am satisfied that the words "a person occupying land without the consent of the landlord" mean one who enters into occupation without express consent or without any previous arrangement with him.

(1) (1915) 33 Indian Cases, 70.

(2) (1912) 9 A. L. J., 771.

(3) (1913) L. L. R., 35 All., 512.

Two reasons seemed to me very strong to show this. If section 34 can be worked only against a person who having entered as a trespasser continues in possession "without permission" of the landlord, it is difficult to see how the landlord is to get rent from a person who remains in possession with his permission. Secondly, such a person is said by the section not to be deemed to hold the land within the meaning of section 11 of the Agra Tenancy Act until he begins to pay rent. Section 11 deals only with tenants, and, I cannot see how such a person could be deemed to be a tenant within section 11 so as to make it necessary for the Legislature to exclude him from the operation of section 11 unless he was occupying with the permission of the landlord. I think this consideration lends additional weight to the view of Sir GEORGE KNOX and of the Senior Member of the Board and I agree with my learned brother that the defendant is liable to be ejected by the Revenue Courts.

BY THE COURT :—We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR v. RAM DAS.*

Criminal Procedure Code, section 350—Procedure—Jurisdiction—Magistrate ceasing to have jurisdiction by reason of the transfer of a case pending before him to another court—Evidence not necessarily to be re-heard.

Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post.

Mohesh Chandra Saha v. Emperor (1), Kudrutulla v. Emperor (2) and Palaniandy Goundan v. Emperor (3) followed.

THE facts of this case were as follows :—

One Ram Das was charged with an offence under section 323, Indian Penal Code, and tried by an Honorary Magistrate exercising second class powers. After the whole of the prosecution

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* Criminal Reference No. 977 of 1917.

(1) (1908) I. L. R., 35 Cal., 457. (2) (1912) I. L. R., 39 Cal., 781.

(3) (1908) I. L. R., 32 Mad., 218.