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contemplate the confiscation of the money found on the person of the accused. He refers to a ruling of this Court, *Emperor* v. *Maturwa* (1). I accept the recommendation of the learned Judge and direct that the order of confiscation be set aside.

Recommendation accepted.

[But *Cf. Emperor* v. *Kifayat*, I. L. R., 41 All., 272, where a distinction is drawn between a conviction under section 3 or 4 and conviction under section 13. Ed.]

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919 *January*, 15.

SURAJ KUMAR (PLAINTIFF) *v.* CHET RAM AND OTHERS (DEFENDANTS*).

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 142 *and* 199—*Usufructuary mortgage—Lease by mortgagee in favour of mortgagor—Distraint for arrears of rent—Suit to contest distraint—Subsequent suit by mortgagee for possession of property mortgaged*—Res judicata.

A usufructuary mortgagee of certain zamindari gave a lease of the mortgaged property to the mortgagors. Subsequently the lessor distrained for rent due under the lease. The lessees instituted a suit under section 142 of the Agra Tenancy Act, disputing the validity of the distraint on the ground that the mortgage debt had been discharged and the lease had therefore come to an end. In this suit the Court of Revenue found that the mortgage had been discharged. Thereupon the mortgagee instituted the present suit in a Civil Court against the mortgagors claiming possession of the mortgaged property upon the ground that the mortgage still subsisted.

Held that the decision of the Court of Revenue could not operate as *res judicata*. Section 199 of the Agra Tenancy Act, 1901, did not apply to a suit by an alleged tenant against an alleged landlord but only to a suit by a landlord against a tenant.

THE facts of this case were as follows :—

The defendants made a usufructuary mortgage of their zamindari in favour of the plaintiff; and the plaintiff then leased the mortgaged property to the defendants. The rent due under the lease being in arrears, the plaintiff issued a distraint for it. The defendants replied by filing a suit under section 142 of the Agra Tenancy Act, in which they alleged that the mortgage debt had been paid off, and the lease had in consequence had come to an

*First Appeal No. 278 of 1916, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 8th of May, 1916.

(1) (1918) I. L. R., 40 All., 517.

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end. In this suit the Court of Revenue found that the mortgage had been discharged. The plaintiff thereupon instituted the present suit, in which she alleged that her *mukhtar-am* in collusion with the defendants had fraudulently endorsed payment on the bond and returned it to the mortgagors and that in fact the mortgage was still unsatisfied. She also claimed possession of the mortgaged property. The court of first instance held that the decision of the Court of Revenue in the suit to contest the distraint operated as *res judicata*, and, without coming to any further finding, dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Panna Lal*, for the appellant.

Mr. *A. H. C. Hamilton*, and Mr. *N. C. Vaish*, for the respondents.

RICHARDS, C. J., and BANERJI, J. :—The facts connected with the suit out of which this appeal arises are as follows :—The defendants made a usufructuary mortgage in favour of the plaintiff of their zamindari. For the convenience of the parties the mortgagee made a letting of the mortgaged property to the defendants. Thus the defendants became tenants at a rent to their own mortgagee. Later on the plaintiff distrained for the rent alleged to be due under the letting. The defendants alleged that the distraint was illegal because (as they alleged) the mortgage had been discharged and that therefore the tenancy had come to an end. They instituted a suit under section 142 of the Agra Tenancy Act, challenging the validity of the distraint on these grounds. That suit resulted in a finding by the Revenue Court that the mortgage had been discharged. Thereupon the plaintiff instituted the present suit, alleging that her *mukhtar-am* in collusion with the defendants had fraudulently endorsed payment on the bond and returned it to the mortgagors, and also alleging that the mortgage was in fact unsatisfied and undischarged and that the full amount was due thereon. The plaintiff claims possession of the mortgaged property. The court below, without taking evidence, held that the decision of the Revenue Court in the suit instituted by the defendants under section 142 of the Agra Tenancy Act, operates as *res judicata*. *Primâ facie* the decision of the Revenue Court would not operate as *res judicata* in the

Civil Court because the Revenue Court was not competent to try the present suit.

The defendants, however, seek to call to their aid the provisions of section 199 of the Agra Tenancy Act. That section provides that if in any suit or application filed in a Revenue Court against a person alleged to be the plaintiff's tenant, the defendant pleads that he is not a tenant but has a proprietary right in the land, the Revenue Court may either require the defendant to institute a suit in the Civil Court for the determination of the question of title or it may determine such question of title itself. The section goes on to provide that if the Revenue Court determines to decide the question of title itself, it shall follow the procedure laid down in the Code of Civil Procedure for trial of suits, and, notwithstanding anything contained in section 193 of the Act, all the provisions of the Code should apply to the trial of such question. It is contended that a question of proprietary title did arise and that the decision of the Revenue Court must be deemed to be a decision of a Civil Court. We may assume for the purpose of argument that where a question of proprietary title is tried by the Revenue Court in exercise of its powers under the section in a case brought by a person against another alleging the latter to be his tenant and the defendant pleads that he has proprietary title and is not a tenant, the decision of the Revenue Court may operate in the same way as if the decision had been the decision of a Civil Court. But it seems to us that the section does not apply in the present case. The section applies to the case of a suit brought against a person whom the plaintiff alleges to be his tenant. In the present case the suit was one under section 142 of the Tenancy Act and was brought by the alleged tenant against the alleged landlord. Furthermore, it seems to us that there was no question of proprietary title involved in the previous suit. It was common case that the defendants were the proprietors. Musammat Suraj Kumar never claimed to be the proprietor. She only claimed to be mortgagee under a usufructuary mortgage and the question between the parties was not who had "proprietary title" but whether or not the mortgage had been discharged and satisfied. We must allow the appeal, set aside the decree of the court below, and remand the

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case to that court with directions to re-admit the suit in its original number and to proceed to hear and determine the same accoring to law. The appellants must have their costs of this appeal. Other costs will abide the result.

Appeal allowed, cause remanded.

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January, 22.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

GULZARI LAL (PLAINTIFF) *v.* AZIZ FATIMA AND OTHERS (DEFENDANTS)*.

Mortgage—Suit for recovery of mortgage money—Payment of prior mortgage debts—Subrogation—Circumstances in which intention to keep prior mortgage alive is to be inferred.

On the 22nd of March, 1911, one A. A. executed two *zar-i-peshgi* leases in favour of G. L., comprising a zamindari share in the village of Kura Mai and a house in the town of Marehra. Upon this, A. F. brought a suit against A. A. and G. L. for specific performance of an agreement entered into by A. A. to mortgage to her the zamindari in Kura Mai, and for a declaration that the *zar-i-peshgi* leases entered into with G. L. were ineffective as against her. The plaintiff obtained a decree, which was upheld in appeal by the High Court, and as the result a *zar-i-peshgi* lease was executed by A. A. in favour of A. F., under the order of the Court, and G. L's leases were declared to be void as against A. F.

Immediately after the execution of the *zar-i-peshgi* leases of the 22nd of March, 1911, G. L. paid off two prior mortgages of 1907 and 1908. No reference, however, was made to these in the deeds of 1911, nor was there any contract between the parties to these deeds that the mortgagee was to be subrogated to the benefits of the earlier securities which were to be paid off. Moreover, the mortgages of 1907 and 1908 comprised other property besides that included in the deeds of 1911.

Held that it was not competent to G. L., in a suit on his *zar-i-peshgi* leases of 1911, to set up a title under the mortgages of 1907 and 1908 and claim to recover from A. F. the money which he had expended in their redemption.

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

Pandit *Radha Kant Malaviya*, for the appellant.

Mr. *Ishaq Khan*, Babu *Jogindro Nath Mukerji* and Maulvi *Iqbal Ahmad*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—The appellant here, Babu Gulzari Lal, was the plaintiff in the court below in a suit brought for the recovery of mortgage money alleged to be due to him in respect of two mortgages executed in his favour on the

* First Appeal No. 14 of 1917, from a decree of Piare Lal Chaturvedi, Subordinate Judge of Aligarh, dated the 29th of September, 1916.