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arisen over the different methods of applying the practice to the varying circumstances in which the question has from time to time occurred and also to the unnecessary frequency with which particular cases of no general importance are reported as if they laid down some general principle. A little care at the Bar in studying the actual facts of the authorities would, I think, remove a great deal of superfluous difficulty which has been raised about this question. I have said all I have to say upon the point of practice in *Sundar Nath* v. *Barana Nath* (1). I would merely add to what I stated there my concurrence in what has been pointed out by my brother, that proceedings in revision in this case, quite apart from the authorities of this Court, are clearly authorized by the expression in section 439, sub-section (1) "proceeding which otherwise comes to its knowledge."

BY THE COURT.—We set aside the magistrate's order directing that the rooms or *kothris* locked up by the police with the locks of each parties do remain locked up as heretofore.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Ryves.

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November, 27.

RAGHUNATH (PLAINTIFF) v. GANESH AND OTHERS (DEFENDANTS)*.

Civil and Revenue Courts—Jurisdiction—Suit for ejectment of defendants as trespassers—Defence set up that defendants were tenants of the plaintiff—Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 202.

In a suit filed in a Civil Court for ejectment of the defendants as trespassers, the defendants pleaded in effect that they were tenants of the plaintiff. With reference to this plea the civil court held that the suit was not cognizable by it; but, instead of returning the plaint for presentation in the proper court, passed a decree dismissing the suit. On the plaintiff's appeal the lower appellate court agreed with the first court that the suit was not cognizable by a civil court and made an order returning the plaint.

Held that an appeal lay to the High Court against this order.

Held also that, the suit being on the face of the plaint a suit cognizable by a civil court, the court of first instance should have entertained it, but, in

* First Appeal No. 35 of 1919, from an order of Kalka Singh, Subordinate Judge of Banda, dated the 19th of November, 1918.

(1) (1918) I.L.R., 40 All., 364.

view of the defence set up, should have taken action under section 202 of the Agra Tenancy Act, 1901.

THE facts of the case may be briefly stated as follows :—

During the plaintiff's minority his *sarbarahkar* gave a *zar-i-peshgi* lease of a certain zamindari property of the plaintiff to the defendants. On attaining majority the plaintiff brought a suit in the Civil Court to eject the defendants as trespassers, on the allegation that the *sarbarahkar* had no authority to grant the lease, and that the lease was not binding on him. The defendants pleaded that the lease was valid, and had been recognized by the plaintiff who had accepted rent under it. They pleaded, though not expressly, that they were the plaintiff's tenants ; and they further pleaded that the suit was cognizable by the Revenue Court and not by the Civil Court. The court of first instance held that the suit was not cognizable by the Civil Court, but instead of returning the plaint to be filed in the Revenue Court, it dismissed the suit. On appeal, the lower appellate court took the same view as to the court by which the suit was triable, but modified the decree of the first court to this extent that it ordered the plaint to be returned to the plaintiff. Against this order the plaintiff appealed to the High Court.

Dr. *Kailas Nath Katju*, for the respondents, took a preliminary objection that there could not be two appeals in a matter like the present. If the first court had returned the plaint, as it should have done, there would have been one appeal from that order, and no further appeal. The appellant was now seeking a second appeal, in which the same question which had been decided by the two lower courts was sought to be agitated again. That was never contemplated by the Legislature for a case of this kind ; it would virtually be getting a second appeal from an order. In the circumstances it should be deemed as if the order returning the plaint had been passed by the first court. Nor could a revision lie, as the decision of the appellate court was not open to any of the defects mentioned in section 115 of the Code of Civil Procedure.

Babu *Piari Lal Banerji*, for the appellant :—

The preliminary objection amounts to this, that there is no appeal from the order of an appellate court returning a plaint,

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That contention was overruled in the cases of *Wahid-ullah* v. *Kanhaya Lal* (1) and *Dalip Singh* v. *Kundan Singh* (2). In the plaint the defendants were described as *thekadars* or lessees holding under a *zar-i-peshgi* lease; that meant that they were mortgagees. The suit was, therefore, rightly brought in the Civil Court. If it be held as open to question whether lessees under a *zar-i-peshgi* lease would undoubtedly mean mortgagees and not merely lessees, even then the suit was rightly instituted. For the plaintiff's case is that the lease was invalid, that the defendants derived no title by it and are trespassers. A suit to eject trespassers lies in the Civil Court. The plaintiff in no way admitted them to be his tenants. If the defendants set up a tenancy, the Civil Court can refer them, under section 202 of the Tenancy Act, to the Revenue Court; but it cannot throw out the suit itself. The rulings relied on by the lower appellate court in the cases of *Ram Singh* v. *Girraj Singh* (3) and *Sher Khan* v. *Debi Prasad* (4) are quite distinguishable. In the former, it was the plaintiff's case from the outset that the defendant was his non-occupancy tenant; in the latter, when the matter went to the Revenue Court under section 202 the plaintiff admitted the tenancy and then amended his plaint in the Civil Court. It is the allegations in the plaint that have to be looked to in determining the question of jurisdiction; *Gokaran Singh* v. *Ganga Singh* (5).

Dr. *Kailas Nath Katju*, for the respondents :—

No doubt it is the plaint that is to be looked at, but it is the plaint as a whole that has to be considered. The whole question as raised by the plaint is whether the lease is a valid or an invalid lease. The most appropriate court for the determination of this question is the Revenue Court and not the Civil Court.

The manner in which the point at issue is brought before a Revenue Court is a question of mere machinery, but the essential matter is that the validity or otherwise of the lease should

(1) (1902) I. L. R., 25 All., 174. (3) (1914) I. L. R., 37 All., 41.

(2) (1913) I. L. R., 36 All., 58. (4) (1915) I. L. R., 37 All., 254.

(5) (1919) I. L. R., 42 All., 91

be determined by the Revenue Court. If a lambardar executes a lease in excess of his power, and a co-sharer wishes to sue, where is the suit to be brought? The present case is analogous to that case. The plaintiff can proceed against the defendants in the Revenue Court under sections 34 and 58 of the Tenancy Act.

Babu *Piari Lal Banerji*, was not heard in reply.

TUDBALL and RYVES, JJ.:—The facts of this appeal are as follows:—The plaintiff is the owner of a two anna share out of an eight anna share in a certain village in the district of Hamirpur. His father died leaving him a minor, and one Musammat Piari, apparently his mother, looked after his affairs. She mortgaged his share. Subsequently proceedings were taken under the Bundelkhand Encumbered Estates Act. The creditor was paid off by Government and Musammat Piari proceeded to repay Government by instalments. After she had paid up a part of the debt she died. Another *sarbarahkar* was appointed in her place and then the owners of the eight anna share gave a *zar-i-peshgi* lease to the defendants respondents before us of the whole eight annas. The plaintiff's *sarbarahkar* was a party to this lease. The plaintiff has now come of age and he has brought the present suit to eject the defendants respondents from his two anna share and to obtain possession thereof for himself. An examination of the plaint will show that he has treated the transaction under which the defendants obtained possession as a lease. He has alleged, however, that his *sarbarahkar*, Toraiyan, had no power whatsoever to grant a lease of his property or to transfer it in any way. He therefore pleads that the lease is not binding upon him and he seeks to eject the defendants as trespassers on the property. The suit was instituted in the court of the Munsif at Hamirpur. The defendants' written statement may be boiled down to this. First of all that the *sarbarahkar* had full power to grant the lease, and, *secondly*, that even if he had not, still the plaintiff on coming of age had confirmed the lease and had accepted rent under it. Though in definite terms the defendants did not plead that they were the plaintiff's tenants, yet the whole sum and substance of their defence is that they are his tenants, and furthermore

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they clearly plead that the suit was not cognizable by the Civil Court but was cognizable only by the Revenue Court. The court of first instance held that the suit was not cognizable by the Civil court, but, instead of returning the plaint to be filed in the proper court, it dismissed the suit. From this decree the plaintiff filed an appeal, as he was fully entitled to do. He urged in the grounds of appeal that the suit as it stood was cognizable by a Civil Court and should have been entertained by the Munsif. At the time that the appeal was argued it was further urged that even if the Munsif's decision was a correct one, his decree dismissing the suit was bad and the plaint should be returned for presentation to the proper court. The appellate court agreed with Munsif that the suit was not cognizable by the Civil Court. It agreed with the appellant that the Munsif ought to have returned the plaint and not to have dismissed the suit, and, accepting this contention, it ordered the plaint to be returned to the plaintiff. The plaintiff has come here on appeal from this order. A preliminary objection was taken that no appeal would lie from the order of the court below on the ground that if the court of first instance had done its duty and passed a proper order, no second appeal could have lain against an order passed by the lower appellate court on appeal from the Munsif's order. We do not think that there is any substance in this point, as we have to take the facts as they are and not as they ought to have been. We must come to the merits of the appeal. In substance the plaint is an allegation by the plaintiff that the defendants are not his tenants. He distinctly pleads that they are trespassers and that he seeks to eject them. On the plaint as it stands we do not think that the suit could have been instituted in the Revenue Court. Neither section 58 nor section 34 of the Tenancy Act, to which we have been referred, will enable the plaintiff to file his present plaint in the Revenue Court and claim to have a decision on it. We have not been referred to any other section of the Tenancy Act which would enable him to bring this suit under that Act. In substance the defendants' plea is that they are the tenants of the plaintiff under the lease in question and that it is a valid and binding transaction. It seems to us, therefore, quite clear

that in these circumstances the Civil Court ought to have entertained the suit and ought to have taken action under section 202 of the Tenancy Act, and the question of the defendant's tenancy would then really be decided by a Revenue Court. The courts below have merely erred in the procedure adopted by them, but still the procedure laid down by law must be followed. It must be noted that there has been no previous litigation between the parties either in the Revenue or Civil Court in respect of the matter in dispute in this suit. The rulings in *Ram Singh* v. *Girraj Singh* (1) and *Sher Khan* v. *Debi Prasad* (2) do not apply to the present case, for in each of the suits with which those decisions are concerned there was (in the end at least) an admitted tenancy, and the plaintiffs were merely making an attempt to get round a decision of the Revenue Court already passed. In this view we allow the appeal, we set aside the orders and the decrees of the courts below, and we direct that the record be returned to the court of first instance through the lower appellate court with directions to re-admit the suit on its original number and to proceed to hear and decide it according to law, keeping in view our remarks in respect of the use of section 202 of the Tenancy Act. Costs of this appeal as well as the costs so far incurred up to the present date by the parties in all courts will abide the result of the suit.

Appeal decreed and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Ryves.

MUHAMMAD ASKARI (DEFENDANT) *v.* NISAR HUSAIN AND OTHERS (PLAINTIFFS).*

1919

November, 29.

Civil Procedure Code (1908), *order XLIII, rule* 1 *(s)*——*Order expressing merely an intention to appoint a receiver*——*Appeal.*

An appeal lies only from an order actually appointing a receiver, and not from an order by which the court expresses an intention to appoint a receiver and calls upon the plaintiff to suggest names with particulars regarding security, remuneration, etc. *Ramji* v. *Koman Das* (3) followed.

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* First Appeal No. 61 of 1919, from an order of Lachmi Narain Tandon, Subordinate Judge of Basti, dated the 15th of March, 1919.

(1) (1914) I. L. R., 37 All., 41. (2) (1915) I. L. R., 37 All., 254.

(3) (1914) 18 A. L. J., 79.