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On the whole, having regard to the attitude adopted by the defendant, and not without hesitation, we come to the conclusion that the balance of convenience is in favour of the Central Provinces and that the case must be transferred from the jurisdiction of these Provinces to enable the plaintiff to sue at the appropriate court in the Central Provinces, the defendant undertaking to do nothing unduly to delay the trial, to contribute Rs. 100 in any event, to the pleaders' fees already paid by the plaintiff to his lawyers, and not to object to the reasonable costs of translation of the present record and of the interpretation of the evidence being made costs in the cause. The costs of this application will abide the event.

Application granted.

APPELLATE CIVIL.

1923
January, 5.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KASHI PRASAD SINGH AND OTHERS (PLAINTIFFS) v. BALBHADDAR SINGH AND ANOTHER (DEFENDANTS). *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section 177—Suit for ejectment—Decree for ejectment reversed on appeal—Application to Court of Revenue for restitution—Application dismissed—Appeal—Civil Procedure Code (*1908*), section* 144.

An application for restitution of possession under section 144 of the Code of Civil Procedure in consequence of the decree against them having been reversed on appeal was made by the defendants in an ejectment suit to the court of first instance, being a Court of Revenue. That court, however, rejected the application.

Held that the order of the Court of Revenue was not a "decree" and no appeal lay therefrom to a Civil Court. *Zohra* v. *Mangu Lal* (1) referred to.

THIS was an appeal from a judgment of a single Judge of the Court under section 10 of the Letters Patent. The facts of the case are thus stated in the judgment under appeal, which was as follows :—

This is called a second appeal. It is a claim by the appellants for possession of certain land. It is only necessary to state the facts to see that they are clearly entitled to possession.

* Appeal No. 87 of 1921, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 28 All., 753

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The decision of the court below is fatal to their claim and unless this Court can interfere they have no remedy. I cannot believe that this is the true state of the law. If it were, it would be calculated to bring the law into ridicule and contempt.

The following are the facts. The defendants Balbhaddar Singh and others formerly brought a suit in the Rent Court for the ejectment of Kashi Prasad and others, the present appellants, who were defendants in that suit. They defended the suit on the ground that they were in possession as usufructuary mortgagees. The Assistant Collector decreed the suit for ejectment against them in May, 1910, and in May, 1911, the then plaintiffs and the present defendants, respondents to this appeal, obtained possession. An appeal was brought from the decree of the Assistant Collector by the defendants in that suit on the revenue side and the case went up to the Board of Revenue. The Board of Revenue decided that as a question of proprietary title was involved the appeal should have been brought to the District Judge.

The District Judge in October, 1912, allowed the appeal and decreed that the defendants, the present appellants, were entitled to remain in possession. That decree was confirmed by the High Court in March, 1914, and there is, therefore, between the parties a decree of this Court awarding possession to the present appellants. The High Court might have gone on to direct the defendants by express order to give up possession forthwith, but the High Court did not do so. As a result of the High Court's decree the present respondents were bound to give up the possession which they had obtained in 1911 under the decree of the Assistant Collector. They have been wrongfully in possession since that date and are resisting the appellants' claim against them to give up possession, in every possible way. They are in contempt and I had grave doubts, when I heard what the case was about, whether I ought to hear their counsel at all.

Failing to get possession the present appellants applied on the revenue side to the court of the Assistant Collector. In the form in which the matter now reaches this Court, it has been treated as a suit and it comes before me as a second appeal. The application in the Revenue Court, however, was clearly an

application under section 144 of the Code of Civil Procedure for restitution. The Assistant Collector dismissed it on an absolutely untenable ground. An appeal was then brought to the District Judge who disagreed with the view of the Assistant Collector and held that the justice of the case was entirely with the appellant, but he held also that there was no appeal from the refusal of the Revenue Court to make an order. The *ratio decidendi* in the authority quoted, namely, *Masih-ullah* v. *Majid-un-nissa* (1), is that section 144 cannot be applied to proceedings before Courts of Revenue and that the remedy of a person entitled to restitution in consequence of the reversal of a decree passed by a Court of Revenue is by means of a separate suit. It seems to me to follow from this that when section 144 speaks of the "*court of first instance*" to which the party entitled by way of restitution may apply, that cannot be read as meaning the Revenue Court. The High Court has no jurisdiction over the Revenue Court and cannot compel it to carry out its decrees. But there must be a court of first instance, and I am prepared to hold that where in a case like this the original decree has been passed in the court of revenue and the case has reached the High Court by way of the District Court the court of first instance for the purpose of the section must be the first Civil Court subject to the jurisdiction of the High Court which has seisin of the matter, and that the District Judge in this case instead of dismissing the appeal on a technical point ought to have treated the appeal as an original application to itself as the court of first instance and granted it. Sitting as a court of appeal I think I ought to do what the court below should have done and I make an order for restitution under section 144. The Privy Council clearly held that it might be done by summary process of suit; *Doorga Purshad* v. *Tara Purshad* (2). It seems to me further that there is an alternative method by which the prevailing injustice in this case can be cured. If an application cannot be made to a Revenue Court under sub-section (1) of section 144, the provisions of sub-section (2), which prohibits a suit, has no operation, and, following the decision to which I have referred, I am of opinion that a suit might be

(1) (1903) I. L. R., 26 All., 149. (2) (1865) 3 W. R. (P. C.), 11.

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brought. A suit has been brought, although not in a correct form. I am prepared further to treat the application to the Revenue Court as a proper suit, in which case an appeal (the question of title being involved) would lie to the District Judge, and the point being one of law, an appeal lies to this Court and I think I ought to allow it and direct the defendants to give up possession.

There is a further method by which this wrong may be righted in my opinion. This Court clearly has jurisdiction to enforce its own decrees as against parties who appeared before it. As I have said the respondent in this Court is in contempt and is defying the decree of the High Court. Under section 151 of the Code and under the general powers of superintendence conferred upon this Court I treat this appeal, in the alternative, as an original application, and under the inherent power of the Court make an order in the ends of justice and to prevent the abuse of the process of the Court I direct the respondent to give possession of the land within three weeks from to-day and to pay all the costs of the proceedings here and in the court below. In my opinion there is ample justification for taking this course to be found in the case of *Kulada Prasad Tewari* v. *Sadhu Charan Tewari* (1) and the Privy Council case above-mentioned: *Doorga Purshad* v. *Tara Purshad* (2). I, therefore, make a formal order allowing the appeal of the plaintiffs, or the application of the applicants, as the case may be, and direct the defendants to hand over possession to the appellants forthwith. If they do not do so within three weeks from the date of this order, I shall direct proceedings to be brought against them for contempt of court. Report must be made to me by the appellants within three weeks from the date of this order as to whether possession has been delivered to them. I direct further that the plaintiffs are entitled to mesne profits from the 23rd of March, 1914, the date of the final decree in this Court, down to the 23rd of March, 1917, the date of the making of this application, and from that date forward until the delivery of possession, and I refer the following issues to the lower appellate court as a matter separate from and

(1) (1917) 3 Pat. L. J., 435. (2) (1865) 3 W. R. (P. C.), 11.

independent of the order which I have made against the defendants for delivery of possession.

1. What are the mesne profits of the land, having regard to the then value of the land, to which the appellants are entitled from the 23rd of March, 1914 to the 23rd of March, 1917?

2. What are the mesne profits of the land, having regard to the then value of the land, to which the appellants are entitled since the 23rd of March, 1917?

The answers to these issues should be stated at a rate per mensem. The parties will be at liberty to produce any further or additional evidence. The usual ten days will be allowed for filing objections.

This is not the original judgment I delivered, but I have had to deliver it again, owing to the original being lost.

The defendants appealed.

On this appeal—

Dr. *Kailas Nath Katju* and Munshi *Kamla Kant Varma*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

MEARS, C. J., and BANERJI, J. :—This litigation appears to have had a very chequered career. In the year 1910 a suit was brought in the Revenue Court by the present appellant for the ejectment of the defendants from certain plots of land. The court of first instance, that is, the Assistant Collector of the first class, decreed the claim and ordered ejectment. An appeal was preferred from that decree to the Commissioner and the appeal was dismissed. The case was then taken to the Board of Revenue, and the Board of Revenue held that the appeal from the decree of the court of first instance ought to have been preferred to the District Judge. Accordingly an appeal was preferred in the court of the District Judge and it succeeded and the claim of the plaintiff was dismissed in 1912. A second appeal to this Court was also dismissed. Meanwhile, after the passing of the decree of the court of first instance that decree was put into execution and the present appellant obtained possession of the holding by ejectment of the tenants. After the decree of the District Judge and the High Court, the respondent applied to the Assistant Collector under section 144 of the Code

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of Civil Procedure for restitution, that is, for restoration of possession to them. This application was rejected by the Assistant Collector, who was of opinion that the remedy of the respondents was one under section 80 of the Agra Tenancy Act. From this order the respondents appealed to the District Judge. The District Judge considered that the decision of the court of first instance rejecting the application was not correct, but he held that the order of the court of first instance was final and no appeal lay to him. On this ground he dismissed the appeal. A second appeal was preferred to this Court and was heard by a learned Judge of this Court. He set aside the orders of the courts below and directed possession to be restored within a term fixed by him in his order. From this decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent.

We find it difficult to agree with the reasons given by the learned Judge for his decision. Those reasons were summarized to us by Dr. *Sen* on behalf of the respondents, and he supports them, but without assigning any reasons for doing so. The learned Judge held that 'the court of first instance' referred to in section 144 was not a Revenue Court, but the Civil Court which heard the appeal from the order of the first court. With this view we cannot agree. In a suit under the Tenancy Act the court of first instance is the Revenue Court which heard the suit, and not the court of appeal. The learned Judges ays that the decree of the High Court was a decree directing possession to be restored. This is not so. The decree of this Court only dismissed the appeal preferred to it from the decree of the District Judge in the suit for ejectment. The effect of the decree of the District Judge was to entitle the respondents to be restored to possession, and for recovering possession the remedy of the respondents was to apply under section 144 of the Code of Civil Procedure, and this application for restitution is to be made to the court of first instance under the provisions of the section. The section further provides that no separate suit will lie for recovery of possession where the decree of the court of first instance has been reversed by a higher court. The learned Judge's opinion that a separate suit could be brought and the

application was to be deemed to be a suit cannot be supported in view of the provisions of section 144 itself, which forbids the institution of a separate suit. The learned Judge of this Court further held that the appeal to the High Court might be deemed to be a regular suit for possession or an application for delivery of possession. As we have pointed out, an application for delivery of possession could only be made to the court of first instance and not to this Court. This Court does not execute its own decree and even if the decree of this Court was a decree directing possession to be restored, the application for restoration of possession could only have been made to the court of first instance and not to this Court. Therefore, in our opinion, the learned Judge of this Court was not entitled to make an order for restitution. Dr. *Sen*'s main contention was that the order of the court of first instance refusing to grant the respondent's application was a decree within the meaning of section 2 of the Code of Civil Procedure, and that, therefore, an appeal lay to the District Judge. This contention is concluded by the principle of the ruling of the Full Bench in the case of *Zohra* v. *Mangu Lal* (1). That was, it is true, a case in which the question was whether an appeal lay from an order in execution of a decree passed by an Assistant Collector of the first class. It was held that under the whole scheme of the Tenancy Act a distinction was made between an "order" and a "decree" and that the word "decree" in section 177 of that Act was a decree in a suit and did not include an order which, if the definition of a decree applied to the case, might be deemed to be a decree under the Code of Civil Procedure. The learned Judges who decided the Full Bench case made a distinction between a decree in a suit and an order. It was held that an appeal lay from a decree in a suit, but an order passed by an Assistant Collector of the first class was not a decree and was not open to appeal. The principle laid down in the Full Bench case equally applies to the present case and upon that principle we must hold that the learned District Judge was right in holding that no appeal lay to him. In this view the appeal to this Court ought to have been dismissed. No doubt it is a hard case, but under

(1) (1906) I. L. R., 28 All., 753.

the provisions of the law we are unable to interfere in the matter.

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We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court. In the circumstances of this case we direct the parties to pay their own costs of the two appeals to this Court.

Appeal allowed.

1922
January, 5.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

REOTI LAL AND ANOTHER (DEFENDANTS) *v.* MANNA KUNWAR (PLAINTIFF).*

Act No. XXVI of 1881 *(Negotiable Instruments Act), section* 78*—Promissory note—Suit on note not maintainable by a* benamidar.

The provisions of the Negotiable Instruments Act, 1881, do not admit of a suit being brought upon a promissory note by a *benamidar* whose name does not appear upon the document. *Dori Lal* v. *Sewak Ram* (1) and *Ramanuja Ayyangar* v. *Sadayopa Ayyangar* (2) followed. *Gurumurti* v. *Sirayya* (3) dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Panna Lal*, for the appellants.

Mr. *G. W. Dillon*, for the respondent.

RYVES and GOKUL PRASAD, JJ. :—The plaintiff Musammat Manna Kunwar sued to recover a sum of money due on a *ruqqa* executed by the defendants in favour of one Kishori Lal. The plaintiff's allegation was that the money was advanced by her and that Kishori Lal, in whose name it was drawn, was merely her *benamidar* as she was parda-nashin. Kishori Lal had died without heirs and the plaintiff was entitled to recover the money on this *ruqqa*. The defence was, so far as we are now concerned, that the plaintiff could not maintain the suit. The trial court found all the issues of fact in favour of the plaintiff, namely, that she had advanced the money in cash to the defendants who had executed the *ruqqa benami* in the name of Kishori Lal who was a near relation of the plaintiff. The trial court, however, dismissed the suit on the ground that under section 78 of the

* Second Appeal No. 27 of 1920, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 22nd of July, 1919, reversing a decree of Nawab Husain, Munsif of Haveli, dated the 9th of May, 1919.

(1) (1915) 13 A. L. J., 695. (2) (1904) I. L. R., 28 Mad., 205.
(3) (1897) I. L. R., 21 Mad., 391.