

because in the present suit there was no previous permission to plant.

It is usual that in cases like the present there is evidence of custom and a finding of custom, and we consider that it lay on the defendants to plead and prove a custom by which they could be entitled to take the wood of this tree. In the absence of any proof of custom, we consider that *prima facie* the presumption is in favour of the zamindar. The zamindar is the owner of the soil of a *parti* and presumably the tree which is grown on that *parti* land and attached to the soil is transferable with a transfer of land and presumably therefore the tree goes with the land and must be regarded as pertaining to the land. In the absence therefore of a pleading and proof that the defendants had a right to cut the tree, we hold that the defendants had no such right. We accordingly consider that the decision of the lower courts is correct and we dismiss this second appeal with costs.

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 RAM  
 CHARAN  
 v.  
 GAJADHAR

Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
 Mr. Justice Bennet

GOVIND PRASAD (PLAINTIFF) v. KANDHAI SINGH AND  
 OTHERS (DEFENDANTS)\*

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 1935  
 February 22
 

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*Agra Tenancy Act (Local Act III of 1926), sections 99, 121—  
 Dispossession of sub-tenant by landlord (owner)—Suit by sub-  
 tenant against the landlord—Jurisdiction—Civil and revenue  
 courts.*

A sub-tenant of certain occupancy tenants, who after granting the sub-lease abandoned their holding, was dispossessed by the landlords. *Held*, that a suit by the sub-tenant against the landlords or landholders-in-chief was covered by sections 99 and 121 of the Agra Tenancy Act and was cognizable by the revenue court.

Mr. S. N. Seth, for the appellant.

Mr. Shiva Prasad Sinha, for the respondents.

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\*Second Appeal No. 1184 of 1931, from a decree of Ganga Prasad Verma, Subordinate Judge of Fatehpur, dated the 8th of June, 1931, modifying a decree of N. P. Sanyal, Munsif of Fatehpur, dated the 4th of July, 1930.

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GOVIND  
FRASAD  
v.  
KANDHAI  
SINGH

SULAIMAN, C.J., and BENNET, J.:—This is a second appeal by a plaintiff against a decree of the lower appellate court finding that the suit of the plaintiff lies in the revenue court. The plaintiff filed a suit alleging that defendants 5 to 7 were occupancy tenants and that they had executed a registered sub-lease on the 7th of July, 1928, for a term of five years in favour of the plaintiff and put him in possession, and that defendants 1 to 4, who were trespassers, had interfered with his possession. The plaint was filed on the 20th of December, 1928. The defence was that the occupancy tenants had abandoned their holding and that the defendants 2 to 4 were zamindars and defendant 4 was a lambardar and that the suit lay in the revenue court. On the question of fact the lower appellate court has found that the defendants 2 to 4 are zamindars and defendant 4 is a lambardar. On this finding it held that the suit lay in the revenue court. On the strength of the ruling in *Shyam Lal v. Hira Nath* (1) learned counsel for the appellant plaintiff argues that the suit lay in the civil court. Sections 99 and 121 of the Agra Tenancy Act (Act III of 1926) according to him do not contemplate a suit by a sub-tenant against the original landholder through whom the plaintiff's own landholder claims. We cannot agree with this argument because it is set out in section 99(1)(a) that the suit lies in the revenue court for dispossession by "his landholder or any person claiming as landholder to have a right to eject him". We consider that a distinction is drawn between the actual landholder of the plaintiff, who was in this case the occupancy tenant, and the landholder-in-chief, who are in the present case defendants 1 to 4. Learned counsel argued that the distinction was not on those lines in the section but rather on the question of whether the defendant was actually the landholder or only a person claiming to

(1) [1934] A.L.J., 566.

be a landholder. If that had been so, the section would have said "or any person claiming as his landholder". But the word "his" is omitted and therefore we consider that the latter part of this sub-section is intended to cover a case like the present where the defendant claims not to be the immediate landholder of the plaintiff but to be the landholder-in-chief.

Similarly under section 121 the suit may be brought against "*the* landholder or any person claiming to hold through the landholder"; that is, the suit may be brought against the landholder-in-chief or against any person claiming to hold through the landholder-in-chief. We think, therefore, that there is ample provision in the Tenancy Act for a suit such as the present. The lower appellate court has allowed the plaintiff a period to amend his plaint. He has not taken advantage of that period as he desired to file a second appeal.

We dismiss this second appeal with costs throughout and we allow the plaintiff one month from the date of this order to amend his plaint, in which case the order of dismissal will be replaced by an order that the plaint should be returned to the plaintiff for presentation to the proper court, if the plaint is amended as directed by the lower appellate court.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

OFFICIAL RECEIVER, ALIGARH (DECREE-HOLDER) *v.*  
HIRA LAL (JUDGMENT-DEBTOR)\*

*Limitation Act (IX of 1908), article 182(5)—"Application in accordance with law"—Fakalatnama not containing name of pleader nor signed by him—Application for execution filed by such pleader not in accordance with law—Judgment-debtor not appearing and objecting—Order for execution passed ex parte—Subsequent application for execution—Limitation—Whether open to judgment-debtor to show that former application was not in accordance with law and did*

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GOVIND  
PRASAD  
*v.*  
KANDHAI  
SINGH

1935  
February, 28.

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\*Appeal No. 73 of 1934, under section 10 of the Letters Patent.