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Niamat-ullah, J.

5(1) is an order passed in the suit, which is re-opened, and should be considered to be interlocutory. When an application is made under section 5 the court is bound to re-open the suit and will either vary the decree or refuse to do so. In either case the order is one passed in the suit itself and not apart from it. Since an appeal has been allowed from such an order by section 5(2), it should be considered to be an addition to the list of appealable orders given in order XLIII, rule 1 of the Code of Civil Procedure. Section 104 of the Code of Civil Procedure clearly covers an order of the kind contemplated by section 5 of the U. P. Agriculturists' Relief Act.

The order of reference does not show whether the appeal preferred by the judgment-debtor was from an order refusing to grant instalments or was one from an order granting inadequate relief in that respect. In either view I think the order has not the force of a decree, and the court fee of annas eight paid was sufficient.

ALLSOP, J.:—I agree.

APPELLATE CIVIL

1937
October, 18

Before Sir John Thom, Chief Justice, and Mr. Justice Niamat-ullah

SHEODARSHAN LAL (DEFENDANT) *v.* BALMAKUND AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code, section 11—Res judicata—*Agra Tenancy Act (Local Act III of* 1926), *section* 82—*Suit for ejectment for illegal sub-letting—Question of proprietary right—Decision of such question by revenue court under the former Tenancy Acts whether* res judicata *in suit under present Tenancy Act—Agra Tenancy Act (Local Act II of* 1901), *section* 199.

The plaintiff brought a suit under section 82 of the Agra Tenancy Act in the court of an Assistant Collector, first class,

*Appeal No. 28 of 1936, under section 10 of the Letters Patent.

for ejectment of the defendant on the allegation that the defendant was an occupancy tenant who had made an illegal sub-letting. The defendant pleaded that he was not a tenant but a proprietor, and claimed that the question was *res judicata* by reason of two previous decisions between the parties or their predecessors,—one in 1894 by an Assistant Collector, first class, in a suit for arrears of rent and the other in 1919 by an Assistant Collector, second class, in a suit for arrears of rent—, in both of which it was held that the defendant was a proprietor and not a tenant:

Held that neither of the two decisions operated as *res judicata*. The decision of 1894 was one under the N. W. P. Rent Act of 1881 which did not empower the revenue courts to decide any question of proprietary right. The decision of 1919 was one under the Agra Tenancy Act of 1901, section 199 of which gave concurrent jurisdiction to revenue courts to decide questions of proprietary right, like civil courts; and in the view that the revenue court which decided the question of proprietary right in 1919 must be deemed to have acted as a civil court, it was not competent to try the present suit which was cognizable by the revenue courts; and therefore the requirement of the rule of *res judicata* as contained in section 11 of the Civil Procedure Code, namely that the first court should have been competent to try the subsequent suit, was not complied with.

Mr. *Din Dayal*, for the appellant.

Mr. *Panna Lal*, for the respondents.

THOM, C.J., and NIAMAT-ULLAH, J.:—This is a Letters Patent appeal from an order of remand passed by a learned single Judge of this Court in a second appeal from the decree of the Additional District Judge of Agra. The appellant in this Court was a defendant in the suit which has given rise to his appeal. He was sued by the plaintiff respondent in the court of an Assistant Collector, first class, for ejectment under section 82 of the Agra Tenancy Act (No. III of 1926) from a 4 bigha 18 biswa land situate in village Datoji, mahal Daya Kishan, district Agra. The plaintiff respondent is the proprietor and lambardar of the aforesaid mahal and alleged in his plaint that the defendant appellant was an occupancy tenant of the land referred to and had sublet his holding in contravention of the provisions of the

Tenancy Act, which fact rendered him liable to ejectment. The defendant pleaded that he was not an occupancy tenant but a proprietor and therefore not liable to ejectment for the reason alleged by the plaintiff. The principal question in the case was whether the defendant was a proprietor, as alleged by him. In proof of his allegation the defendant produced copies of three orders of revenue courts. One was passed as far back as 1879 by an Assistant Settlement Officer in proceedings for assessment of rent. The defendant (or his predecessor) pleaded in that case that he was a proprietor. The Assistant Settlement Officer upheld that plea and refused to assess rent. In 1894 the plaintiff (or his predecessor) instituted against the defendant (or his predecessor) a suit for arrears of rent in the court of an Assistant Collector, first class. The suit was dismissed on the defendant's plea, based on the decision of 1879, that he was a proprietor. In 1919 the plaintiff sued the defendant in the court of an Assistant Collector, second class, for arrears of rent. This suit was also dismissed on the defendant's plea that he was not a tenant but a proprietor. There was a controversy before us that in the second and third cases the court did not definitely hold that the defendant was a proprietor. We have referred to the judgments in those cases and are of opinion that the court did hold the defendant to be a proprietor on the strength of the Assistant Settlement Officer's order of 1879. In the suit which has given rise to this appeal the defendant, as already said, again pleaded that he was a proprietor and that the decisions in the second and third of the above three cases operated as *res judicata*, so that as between the parties to this litigation the defendant must be held to be a proprietor and not a tenant.

The Assistant Collector, and on appeal the Additional District Judge, upheld the plea of *res judicata* and dismissed the plaintiff's suit. In second appeal the learned single Judge, whose decision is now in question, took a

contrary view, holding that neither of the two decisions relied on by the defendant operates as *res judicata*. Accordingly he set aside the decrees of the first two courts and remanded the suit for decision of the question of proprietary right on the merits. The defendant has appealed under the Letters Patent and reiterates his plea of *res judicata*. The only question we are called upon to decide is whether one or the other of the two decisions above referred to concludes the question of proprietary right in favour of the defendant.

The question whether the decision of 1894 operates as *res judicata* presents no difficulty. It was given at a time when the N. W. P. Rent Act (No. XII of 1881) was in force. That Act did not empower the revenue courts to decide any question of proprietary right, except incidentally, nor was an ejectment suit of the nature contemplated by section 82 of the present Agra Tenancy Act provided for by Act XII of 1881. The decision of 1894 cannot operate as *res judicata* now, when revenue courts have been empowered by the Tenancy Act to decide conclusively a question of proprietary right arising between the parties to a rent suit. Section 199 of the Tenancy Act II of 1901 empowers the revenue courts either to decide a question of proprietary right raised before it or to direct one of the parties to obtain a declaration of his right from a civil court and stay the proceedings before it. The Tenancy Act III of 1926, which is now in force, empowers the revenue court to remit an issue to a competent civil court for the decision of the question of proprietary right raised before it and to decide the question finally on receipt of the finding of the civil court. It is clear to us that the decision of a revenue court under Act XII of 1881 on a question of proprietary right was no bar to the revenue court adopting the procedure under Act II of 1901, nor is it a bar now to such court taking action under the Tenancy Act III of 1926. Accordingly we hold that the decision of 1894 does not operate as *res judicata* on

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the question of proprietary right. We may note that this decision was not relied on before the learned single Judge who heard the second appeal as a bar of *res judicata.*

As to whether the decision of 1919 operates as *res judicata* is somewhat complicated by certain decided cases of this Court. Untramelled by these cases and viewing the matter in the light of the plain provisions of section 11 of the Civil Procedure Code, there is little difficulty in holding that that decision does not operate as *res judicata* According to section 11, unless the court which heard and decided the former suit was competent to decide also the subsequent suit or the suit in which such issue has been subsequently raised, its decision cannot operate as *res judicata* in the subsequent suit on the issue subsequently raised. The court deciding the former suit should have been competent not only to decide the issue which arose in the subsequent suit but the subsequent suit itself. This is perfectly clear from the language of section 11. This was emphasised by their Lordships of the Privy Council in *Gokul Mandar* v. *Pudmanand Singh* (1). Applying this proposition to the case before us, it will be found that the decision in 1919 was that of an Assistant Collector, second class, who was not competent to decide ejectment suits of any kind which were cognizable by an Assistant Collector, first class, under the Tenancy Act No. II of 1901. The law in that respect has not undergone any change, and under the Tenancy Act III of 1926, which is now in force, the position is the same. It follows that the decision of the Assistant Collector, second class, in a suit for arrears of rent *inter partes*, that the defendant was a proprietor, is no bar to the Assistant Collector, first class, before whom the present suit under section 82 of Act III of 1926 has been instituted, referring an issue to the civil court and deciding it on the merits. In any case, the civil court to whom the issue of proprietary

(1) (1902) I.L.R. 29 Cal. 707.

right is to be referred is not bound by the decision of the Assistant Collector, second class, given in 1919.

On behalf of the defendant reliance was placed on *Amin Uddin* v. *Abdul Shakoor* (1). A learned single Judge of this Court held that the decision of an Assistant Collector, second class, on a question of proprietary right operates as *res judicata* in a subsequent ejectment suit before an Assistant Collector, first class, on the same question. The learned Judge observed that as the Assistant Collector, second class, was empowered under section 199 of Act II of 1901 to decide a question of proprietary right, his decision should be considered to be that of a Munsif; and that in the subsequent suit if the Assistant Collector, first class, decided the question of proprietary right himself his decision would also be that of a Munsif; and that it followed that the decision of the Assistant Collector, second class, being equivalent to that of a Munsif, operated as *res judicata* in the second suit in which also the decision of the question of proprietary right would be that of a Munsif. The learned Judge went on to say that in deciding the question of proprietary right the Assistant Collector, whether of the first class or of the second class, did not act as a revenue court but as a civil court. It is possible to argue that the revenue court acted as such, though the special provisions of Act II of 1901 gave the same effect to its decisions on the question of proprietary right as the Munsif's decision would have had. As against this, a contrary view was taken by SULAIMAN, J., in *Kumari* v. *Adit Misir* (2). Neither of these decisions is binding on us sitting in Division Bench; but there is a Full Bench case, viz. *Bed Saran Kunwari* v. *Bhagat Deo* (3), which is strongly relied upon by the learned advocate for the appellant. We consider ourselves bound to follow it, but are of opinion that it is distinguishable from the case before us. The plaintiff in that case sued the

(1) A.I.R. 1923 All. 556. (2) A.I.R. 1926 All. 34.
(3) (1911) I.L.R. 33 All. 453.

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defendant in the court of an Assistant Collector, first class, for ejectment. The defendant pleaded that he was not a tenant but had proprietary right in the land in dispute. Act II of 1901 was then in force. The Assistant Collector chose, under section 199 of that Act, to decide the question of proprietary right himself instead of directing one of the parties to institute a civil suit. The suit was dismissed. The plaintiff did not appeal but applied to the revenue court for correction of the entries in the revenue records. His application was dismissed. He then instituted a suit in the civil court for ejectment of the defendant and for a declaration of his proprietary right. It was held by the Full Bench that the decision of an Assistant Collector, who had jurisdiction to decide the question of proprietary right under section 199, operated as *res judicata* in the subsequent civil suit. It was observed: "The decree was pronounced, it is true, by a revenue court, but by a revenue court which, as we have held in previous decisions, and as we now hold, is *pro tanto* a civil court of competent jurisdiction to decide the question of title." On the authority of this Full Bench ruling we must hold that when the revenue court decided the question of proprietary right under section 199 in a case arising under Act II of 1901 the decision should be assumed to be the decision of a civil court. This view may present difficulties in some cases; but in the circumstances of the present appeal no difficulty can arise. Where a court has exclusive jurisdiction to decide a question its decision is binding on all courts under the general principles of *res judicata*. For example, if a revenue court decides the question as to which class a tenant belongs to, its decision is binding not only on the revenue court but also on the civil court, though the revenue court deciding such question is not competent to decide the civil suit in which the question subsequently arises. Similarly, where a question of proprietary right was decided by the civil court before the passing of Act II of 1901,

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its decision was binding on the revenue court on the same question, even though the civil court which decided such question was not competent to decide the case in the revenue court. This result is arrived at not by the application of section 11 of the Code of Civil Procedure, which is not in terms applicable, but on general principles of the rule of *res judicata*. Section 11 of the Code of Civil Procedure applies where the two courts whose decisions are in question have concurrent jurisdiction. In cases arising under Act II of 1901 the civil courts and the revenue courts had concurrent jurisdiction as regards questions of proprietary right where they arose between landlord and tenant. The rule of *res judicata* applicable to that class of cases is section 11. Unless, therefore, the court which decided the former suit was competent to decide not only the issue which arose in the subsequent suit but also the subsequent suit itself, the decision in the former suit of the question of proprietary right will not be *res judicata* in the subsequent suit on the same question. Applying this rule to the case before us, we have to take it that the decision of 1919 by the Assistant Collector, second class, on the question of proprietary right raised before him should be taken to be the decision of a civil court. Now, a suit under section 82 of the Agra Tenancy Act (No. III of 1926), i.e., a suit for ejectment of a tenant on the ground that he has sublet his holding in contravention of the provisions of that Act, is not within the competence of the civil court. It may be that the issue of proprietary right arising in the present case should have been decided by the Assistant Collector, second class; but, as already stated, one of the important requirements of section 11 of the Code of Civil Procedure, which is applicable, is that the court which decided the former suit was competent to decide the subsequently instituted suit. This being so, the decision

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of the learned single Judge, challenged in appeal, is right.

The result is that the appeal fails and is dismissed with costs.

Before Mr. Justice Bennet

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CHHUTTAN LAL (DEFENDANT) *v.* DWARKA PRASAD (PLAINTIFF)*

Limitation Act (IX of 1908), section 14—"Court of appeal" includes court of revision—Time occupied in revision should be excluded—Period between dismissal of appeal and the filing of revision, whether should be excluded—Period between dismissal of revision and subsequent filing of the plaint in the proper court.

The words "court of appeal" in section 14 of the Limitation Act are not meant to exclude a court of revision, and the words "civil proceeding" are wide enough to include not only an appeal but also a revision, and therefore the time taken in a civil revision in a High Court may be excluded under section 14.

Neither the period between the dismissal of the appeal and the filing of the revision, nor the period between the dismissal of the revision and the subsequent filing of the plaint in the proper court, can be excluded under section 14 or any other section of the Limitation Act.

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

Mr. *Vishwa Mitra*, for the respondent.

BENNET, J.:—This is a first appeal by the defendant against an order of the lower appellate court remanding the suit for decision. The facts are that the plaintiff and defendant had a partnership ending on 31st March, 1928, and on 30th March, 1931, the plaintiff brought a suit in the court of the Civil Judge of Lansdowne for accounts. The defendant pleaded want of jurisdiction and on 9th May, 1932, the court ordered the plaint to be returned to the plaintiff for presentation to the proper court. An appeal was filed in the court of the District Judge by the plaintiff and on 17th May, 1933,

*First Appeal No. 260 of 1936, from an order of C. I. David, First Civil Judge of Meerut, dated the 2nd of September, 1936.