

by limitation. The two other pleas refer to the question of the effect of the provisions of s. 115 of the Indian Evidence Act on a pleading made in the name of the plaintiff's guardian in a former suit brought by her on his behalf. But they do not call for consideration as the pleader of the respondent admitted that he was not concerned with supporting the extreme view of the Court of first instance; and the suit being barred by statute it is needless to go into subsidiary questions of law or procedure. We dismiss the appeal with costs.

Appeal dismissed.

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SURJU PRA-
SAD SINGH
v.
KHWANISH
ALI.

CIVIL JURISDICTION.

1882
June 3.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAM PRASAD AND OTHERS (DEFENDANTS) v. DINA KUAR (PLAINTIFF).*

Landholder and tenant—Partition—Sir-land—Determination of rent of ex-proprietary tenant—Suit for damages for use and occupation of land—Act XII of 1881 (N.-W.P. Rent Act), ss. 14, 95 (1)—Act XIX of 1873 (N.-W.P. Land-Revenue Act), s. 125

A co-sharer, in whose mahal, assigned on partition, sir-land belonging to another co-sharer had been included, without having applied to the Revenue Court to have the rent of the latter in respect of such sir-land determined, under s. 95 (1) of Act XII of 1881, sued the latter in the Civil Court for damages for the use and occupation of such sir-land, "without obtaining a lease or having the rent fixed." *Held*, following the principle laid down in S. A. No. 914 of 1879 (1), that such suit was not maintainable.

Sir-land of one sharer included on partition in the mahal assigned to another sharer is to be treated in the same way as sir-land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of ex-proprietary tenancy comes by force of law into existence.

The words "may apply" in s. 14 of Act XII of 1881 mean "shall apply," if the landholder wants to procure such a determination of his tenant's rent, as would give him a title to sue his tenant under that Act for arrears of rent, and if he cannot get the rent arranged between himself and his tenant by other legitimate means, such as an amicable settlement between themselves or the like.

THE plaintiff in this case, who had, by virtue of a partition of a certain mahal of which she and the defendants were co-sharers, become the proprietor of certain land which at the time of partition

* Application, No 13 of 1882 for revision under s. 622 of Act X of 1877 of a decree of Maulvi Muhammad Majid Khan, Subordinate Judge of Ghāzipur, dated the 21st December, 1880.

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was sir-land belonging to the defendants, sued them for Rs. 189, damages for the use and occupation of the land in the year 1285 fasli without obtaining a lease or having the rent fixed. The suit was instituted in the Court of the Munsif of Rasra, zila Balia, who gave the plaintiff a decree for Rs. 31 odd. On appeal the defendants contended that the Munsif had no jurisdiction to entertain the suit, as it was exclusively cognizable in the Revenue Courts, the parties to the suit standing in the relation of landlord and tenant. The appellate Court disallowed this contention on the ground that the suit being one for damages was cognizable in the Civil Courts.

The defendants applied to the High Court to revise the decrees of the lower Courts, contending that the suit was virtually one for rent, and was therefore exclusively cognizable in the Revenue Courts.

Mr. *Conlan*, for the defendants.

Lala Lalta Prasad, for the plaintiff.

The judgment of the Court (STUART, C. J., and TYRRELL, J.) was delivered by

TYRRELL, J.—It has been found as a fact in this case that the plaintiff Dina Kuar is now by virtue of a partition the proprietor of the land mentioned in the plaint, of which the defendants had been the sir-holders previous to partition.

It has also been rightly held that “a sir-holding which under a partition falls to the land of another shareholder is to be treated in the same way as sir-land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of ex-proprietary tenancy comes by force of law into existence.” The defendants then and ever since the partition have been the ex-proprietary tenants of the plaintiff in respect of the land in question. The only question then raised before us in this petition is whether the plaintiff was justified in bringing an action in the Civil Court against her ex-proprietary tenants for damages on the allegation that they had illegally cultivated the land and appropriated its produce. We are of opinion that such a suit was not maintainable.

By the second clause of s. 125 of Act XIX of 1873 it is enacted that “if sir-land belonging to a co-sharer become included on par-

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tion in the mahal assigned to another co-sharer, and after partition such original co-sharer continue to cultivate it, he shall be an occupancy-tenant of such land and his rent *shall be fixed* by order of the Collector of the District or of the Assistant Collector." Again, we find in s. 14, Act XVIII of 1873 (now XII of 1881) that "where the rent of any ex-proprietary tenant has not been fixed by order of a settlement officer under Act XIX of 1873, or by an order under this Act, the landholder may apply to determine the rent of such tenant as if he were an occupancy-tenant &c." Such an application would be the application (1) of s. 95 of Act XVIII of 1873 (XII of 1881) and could be entertained by a Court of Revenue alone under the mandatory terms of that section. It may be said that the terms of s. 14 cited above—"the landholder may apply"—are permissive or discretionary only, and that they do not operate to restrict him to this remedy. But it has been ruled by a Bench of this Court in S. A. 914 of 1879 (1) that under circumstances where a *quondam* proprietor retains cultivatory rights in land once his sfr "no suit for arrears of rent can legally lie until the rent rate on the land has been judicially determined by a competent Court: the plaintiff (zamindar) therefore, until he has filed an application under s. 95 of the Rent Act, has no *locus standi* in a suit for recovering arrears of rent said to be due from the ex-proprietary tenant." This principle, which we approve and follow, will apply with increased force to a suit such as that now before us, in which the newly invested proprietor, without taking any of the steps by law provided for ascertainment, determination, and record of the rent properly exigible from the ex-proprietary, *i. e.*, "occupancy-tenant," in the sense of s. 14, drags him into a Civil Court with a claim for damages, as against a wrong-doer or trespasser. We read the words "may apply" of s. 14 as meaning "shall apply" if the landholder wants to procure such a determination of his tenant's rent as would give him a title to sue his tenant under the Rent Act for arrears of the same; and if he cannot get the rent arranged between himself and his tenant by other legitimate means, such as an amicable settlement between themselves or the like. The law does not say "shall apply," for such a phrase would exclude the possibility of private settlement, or of a remission of his

(1) Unreported.

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claim to rent, if the landholder were minded to waive his claim in favour of a relation, or friend, or valued servant.

We allow this application and set aside as made without jurisdiction the decrees of the Courts below with costs.

Application allowed.

1882
June 8.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

ALI HASAN AND ANOTHER (DEFENDANT*) v. DHIRJA (PLAINTIFF)*

Mortgage—Condition against alienation—First and second mortgagees—Purchase by mortgagee of mortgaged property.

A transfer of mortgaged property in breach of a condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee, and, with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee. *Chunni v. Thakur Das* (1); *Mul Chand v. Balgobind* (2); and *Lachmin Narain v. Koteskar Nath* (3) observed on.

A mortgage is not extinguished by the purchase of the mortgaged property by the mortgagee, but subsists after the purchase, when it is the manifest intention of the mortgagee to keep the mortgage alive, or it is for his benefit to do so. *Gaya Prasad v. Salih Prasad* (4) and *Ramu Naikan v. Subbaraya Mudali* (5) followed.

It is not absolutely necessary for the first mortgagee of property, when suing to enforce his mortgage, to make the second mortgagee a party to the suit. If the second mortgagee is not made a party to the suit, he is not bound by the decree which the first mortgagee may obtain for the sale of the property, but can redeem the property before it is sold; but if he does not redeem, and the property is sold in execution of the decree, his mortgage will be defeated, unless he can show some fraud or collusion which would entitle him to defeat the first mortgage or to have it postponed to his own. The ruling of TURNER, J. in *Khud Chand v. Kalian Das* (6) followed.

In July, 1874, a usufructuary mortgage of certain immoveable property was made to *D.* In July, 1875, a portion of such property was again mortgaged to *D.* The instrument of mortgage on this occasion contained a condition against alienation. In July, 1877, the whole property was mortgaged to *N.* In October, 1877, it was again mortgaged to *D.* *N.* sued the mortgagor on his mortgage in July, 1877, and on the 29th September, 1879, obtained a decree against him for the sale of the property. In October, 1879, the mortgagor sold the property

* Second Appeal, No 1275 of 1881, from a decree of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 5th August, 1881, modifying a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 13th April, 1881.

(1) I. L. R., 1 All. 126.
(2) I. L. R., 1 All. 610.
(3) I. L. R., 2 All. 826.

(4) I. L. R., 3 All. 682.
(5) 7 Ind. H. C. R., 229.
(6) I. L. R., 1 All. 240.