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have been better had the Court executing the decree made the representatives of the deceased decree-holder parties on the hearing of the application for confirmation of sale. At the same time the not doing so seems scarcely sufficient ground for disturbing the order of the Munsif, and I therefore concur with Mr. Justice Oldfield that the appeal should be dismissed and the order confirming the sale upheld.

*Appeal dismissed.*

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May 2.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

NAGAR MAI, (PLAINTIFF) v. MACPHERSON (DEFENDANT).\*

*Return of plaint to be presented to the proper Court—Rejection of plaint—Cause of action—Jurisdiction.*

The plaintiff in this suit claimed in a Civil Court (i) a declaration of his right to certain land ; (ii) that certain leases of such land, so far as their terms exceeded the term of settlement, should be cancelled ; and (iii) arrears of rent for such land. The Court held as regards claim (i) that the plaint did not disclose a cause of action, as it was not alleged that the defendant had disputed the plaintiff's right ; as regards claim (ii) that, with reference to the terms of s. 29 of Act XVIII of 1873, the plaintiff's cause of action had not yet arisen ; and as regards claim (iii) that it was cognizable in a Court of Revenue ; and it directed that under s. 57 of Act X of 1877 the plaint should be returned to the plaintiff to be presented to the Revenue Court. *Held* that under the circumstances the plaint should have been rejected and not returned.

THE plaintiff in this suit, which was instituted in the Court of the Subordinate Judge of Dehra Dún, claimed (i) a declaration of his right as proprietor to certain land ; (ii) the cancelment of certain leases of such land in so far as the terms of such leases exceeded the term of the settlement of such land ; and (ii) Rs. 812-5-6, principal and interest, being the rent due for such land from the 1st July, 1876, to the 30th June, 1879. The plaintiff represented the persons who had originally leased such land, and the defendant represented the persons to whom such land had originally been leased. The Subordinate Judge held that, as regards the claims for a declaration of the plaintiff's proprietary right and the claim for the cancelment of the leases, the plaint disclosed no cause of action ; inasmuch as it was not alleged that the defendant had denied or

\* First Appeal, No. 132 of 1880, from an order of F. H. Fisher, Esq., Judge of the Court of Small Causes at Dehra Dún exercising the powers of a Subordinate Judge, dated the 9th August, 1880.

was interested in denying the plaintiff's title; and inasmuch as s. 29 of Act XVIII of 1873, which made a lease for a period exceeding the term of settlement voidable, expressly deferred the period when the cause of action should arise to the expiration of the term of settlement. As regards the claim for arrears of rent, the Subordinate Judge held that a cause of action was disclosed in the plaint, but that such claim was not one of which a Civil Court could take cognizance. The Subordinate Judge accordingly made the following order:—"I return the plaint to the plaintiff to be presented to the proper Court (*i.e.*, Revenue Court having jurisdiction) under s. 57 of Act X of 1877." The plaintiff appealed to the High Court, framing the appeal as one from an order.

Munshi *Hanuman Prasad*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the respondent.

The following judgments were delivered by the Court:—

STUART, C. J.—In this case the plaintiff appealed from an order by the Judge of the Court of Small Causes at Dehra Dún exercising the powers of a Subordinate Judge by which he returned the plaint to the plaintiff to be presented to the proper Court, that is, to a Revenue Court having jurisdiction. The plaint sets out the plaintiff's title and the sale to the defendant of the rights and interests of a previous lessee, and it prays for a declaration of the plaintiff's right, for the setting aside of certain leases, and thirdly for recovery of certain arrears of rent or "lease-money" as it is called in the plaint with costs and interest. The defendant's written statement traversed these claims, pleading that the plaintiff was not entitled to any declaratory decree; that, as regards the cancelling of the leases, no cause of action had arisen or could have arisen under s. 29 of the Rent Act XVIII of 1873 till the expiration of the term of the settlement; and that with respect to the rent claimed the Civil Court could not entertain the suit, as a suit for rent could only be heard in a Revenue Court under s. 93 of the same Rent Act. After hearing the pleaders for the respective parties the Subordinate Judge made an order by which he found that no cause of action was disclosed in the plaint so far as regards the prayer for a

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declaration of the plaintiff's right and for the cancelment of the leases, and so far the Subordinate Judge in my opinion is right. A declaration of the plaintiff's right was altogether uncalled for, for his title is not only not denied or in any way disputed by the defendant, but the defendant could not possibly call in question the plaintiff's title without imperilling his own, seeing that as lessee the defendant derives his right from the plaintiff's predecessors and in whose shoes he the plaintiff stands. To deny the plaintiff's right and title therefore would be tantamount to a disclaimer of his own right as lessee. And then in regard to the cancelment of the leases I may remark, although this is strictly speaking a question for a Revenue Court, that s. 29 of the Rent Act XVIII of 1873 is conclusive, for it is there enacted:—"If any lease be granted, or if any agreement be entered into, by any land-holder under engagement with Government for his land, fixing the rent of land for any period exceeding the term of such engagement, such lease or agreement shall, on the expiration of the term aforesaid, be void at the option of either party." And meanwhile therefore no cause of action can arise in regard to these leases. But by the same order the Subordinate Judge also found that a cause of action for arrears of rent was disclosed in the plaint, but that it appears to be one not within the cognizance of a Civil Court, and the order ended thus:—"I return the plaint to the plaintiff to be presented to the proper Court (*i.e.*, Revenue Court having jurisdiction) under s. 57 of Act X of 1877". Now on both these last points the Subordinate Judge, in my opinion, is wrong, for in regard to the arrears of rent there is no statement in the plaint that the defendant has refused to pay them or has denied the right of the plaintiff to receive them. All that the plaint states on this subject being that the defendant had not since the date of the plaintiff's acquisition of the property by purchase paid rent to him. The last part of the order I have quoted as to returning the plaint to the plaintiff is clearly erroneous, seeing that the effect of the Judge's finding is that the plaintiff has shown no sufficient cause of action and that the plaint was substantially insufficient. Under these circumstances, the plaint should have been rejected altogether, the plaintiff of course being left to any further remedy he might have, although it was unnecessary

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specify that in the order. The plaint could not be returned to the plaintiff to be presented to another Court seeing there was no other Court which could accept it in its entirety, and could only be entertained as a whole or not at all. On these two last points therefore the Subordinate Judge's order must be corrected. The defendant having been thus successful on all the points considered in the Subordinate Judge's order, the present appeal must be disallowed and the suit as brought dismissed with costs in both Courts.

I wish to add that in my opinion the present appeal has been erroneously entitled as an appeal from an order. No doubt there was an order to return the plaint and present it in another Court, but the order to the effect was erroneous, seeing that the finding that the plaint disclosed no cause of action went to the root of the case on its merits, necessitating its dismissal. The defendant's plea which has thus been successful exactly corresponds to what is called in English pleading a *demurrer*, the meaning of which simply is that, assuming all the statements in the plaint to be true, they yet show no cause of action, and the defendant therefore cannot be called on to plead over, and such a plea when successful, as in the present case, is not merely of a preliminary or formal nature, but a plea on the merits going to the root of the whole case in fact and in law and necessarily therefore involving the dismissal of the whole suit as brought.

OLDFIELD, J.—There are three kinds of reliefs sought by the plaintiff *viz.*, (i) that his right be declared to a four biswas, nine biswansis, four and a half kachwansis share in mauza Niranjapur; (ii) that certain leases so far as they exceed the term of the settlement be set aside, and plaintiffs be put in possession of the property leased after the expiry of the settlement; (iii) that certain arrears of rent due under the leases be awarded.

In regard to the first, the plaint discloses no cause of action against the defendant. There is nothing to show that he has disputed the plaintiff's title. The second part of the claim has reference to s. 29, Act XVIII of 1873, which declares that a lease granted for any period exceeding the term of the settlement shall on the expiration of the term of the settlement be void at the

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option of either party. This part of the claim of plaintiff has been brought prematurely; and the claim for arrears of rent is not cognizable in a Civil Court. The plaint should have been rejected; and I concur with the Chief Justice that the order of the lower Court should so far be corrected, by directing that the plaint be rejected with costs. The appeal is dismissed with costs.

*Appeal dismissed.*

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May 3.

*Before Mr. Justice Spinkis and Mr. Justice Straight.*

HAZARI RAM (PLAINTIFF) v. SHANKAR DIAL (DEFENDANT).\*

*Mortgage—Conditional sale—Pre-emption—Cause of action.*

The cause of action of a person claiming a right of pre-emption in respect of a mortgage by way of conditional sale arises on foreclosure of such mortgage, that is to say, on the expiration of the year of grace without payment by the mortgagor of the mortgage-money, inasmuch as on the expiration of such period the mortgagee acquires a proprietary title to the mortgaged property. Such person can therefore sue to enforce his right of pre-emption on the expiration of such period, and need not wait to do so until the mortgagee has obtained proprietary possession of the mortgaged property.

THE plaintiff in this claimed to enforce a right of pre-emption in respect of a share of a certain village, such right being founded on the terms of the village administration-paper. This share had been mortgaged, by way of conditional sale, by its proprietor to the defendant Shankar Dial. The latter applied for foreclosure of the mortgage on the 14th July, 1877. The notice required by Regulation XVII of 1806 was issued on the 30th July, 1877, and was served on the mortgagor on the 4th August, 1877. After the expiration of the year of grace the defendant Shankar Dial sued the mortgagor for possession of the share, and obtained a decree, in execution of which he obtained possession of the share on the 20th September, 1878. In the meantime, on the 7th August, 1878, the present suit to enforce a right of pre-emption in respect of the share was instituted by the plaintiff. The defendant Shankar Dial set up as a defence to the suit that it had been instituted before the plaintiff had acquired a right to sue, and it was therefore not maintainable,

\* Second Appeal, No. 444 of 1880, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 18th February, 1880, reversing a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Gházipur, dated the 30th September, 1879.