MISCELLANEOUS CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Gokaran Nath Misra.

1926 *December*, 23.

GAYADIN (DEFENDANT-APPELLANT) *v.* LODHI (PLAINTIFF-RESPONDENT).*

Oudh Rent Act, section 108, *clause* 10—*Jurisdiction of civil and revenue courts—suit for recovery of occupancy in a civil or revenue court, essentials of.*

The heading "Jurisdiction of courts" refers to suits brought either by an under-proprietor or a tenant against the superior proprietor or the landlord. If, therefore, a suit has been brought by a person alleging himself to be a tenant against another person who has prevented him from taking possession of the holding, having himself taken possession of the same forcibly and illegally, the suit is not one contemplated to be cognizable by the revenue court under section 108 of the Oudh Rent Act.

Held, that the words "recovery of the occupancy" in section 108, clause 10 of the Oudh Rent Act, indicate recovery of actual possession of the land as distinguished from merely constructive possession and the words "illegally ejected" imply that the tenant was previously in possession and had subsequently been ejected. [*Chandika Bakhsh Singh* v. *Raghunath Kuar* (1); *Raghubar Dayal* v. *Chandan* (2); *Gayadin Singh* v. *Chauharja Pande* (3); *Ashiq Ali* v. *Ghulam Sarwar* (4), and *Kalak Nath* v. *Mata Din* (5), relied upon.]

Held, that where a tenant has never been in possession of his holding but merely tries to recover that holding whether from the landlord or from any other person whom he alleges to be in illegal possession thereof, the suit cannot be considered to be one cognizable by the revenue court. In order that a suit should be cognizable by the revenue court, it must be alleged and found that the plaintiff was at some time previous to the institution of the suit in actual possession of the land whether himself or through his sub-tenants and had subsequently been ejected by the landlord. If somebody else

* Miscellaneous Appeal No. 45 of 1926, against the order, dated the 1st of September, 1926, of Ganga Shankar, Subordinate Judge of Unao, reversing the order, dated the 30th of April, 1926, of Sitla Sahai, Munsif South, Unao, returning the plaint for presentation to the proper court.

(1) (1913) 16 O.C., 105. (2) (1907) 10 O.C., 23.
(3) (1923) 10 O.L.J., 178. (4) (1924) 11 O.L.J., 18.
(5) (1915) 18 O.C., 48.

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besides the landlord has illegally taken possession of the holding, the remedy must be sought in the civil court and not in the revenue court.

In order to have a suit cognizable by the revenue court under section 108, clause 10, it must be one where the tenant must have been previously in possession and where his ejectment must have subsequently taken place owing to an act of the landlord. Unless these two elements are established a suit cannot be considered to fulfil the description of a suit covered by section 108, clause 10, which would be cognizable by the revenue court and revenue court alone.

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Mr. *Ali Uddin Ahmad*, for the appellant.

Mr. *Mahabir Prasad Srivastava*, for the respondent.

STUART, C. J., and MISRA, J. :—This is an appeal from the order of the Subordinate Judge of Unao setting aside the order of the Munsif South, Unao. The learned Munsif held that the suit was triable by the revenue court, but the learned Subordinate Judge has taken a contrary view and remanded the case to the trial court for decision on merits.

The sole point for decision in this case is whether the suit is triable by the civil court or by the revenue court. It would be proper to state the allegations on which the plaintiff came to court in order to determine the question in issue. The plaintiff stated in his plaint that one Mathura Kurmi was originally the tenant of the plot in dispute holding under defendant No. 2, the landlord of the village. Mathura Kurmi is alleged to have died some five years ago; and after his death the said plot is stated to have been entered in the name of his widow, Musammat Rukmin, who died heirless. It was also stated in the plaint that defendant No. 2, the landlord, took possession of the land on her death and on the 19th of May, 1923 executed a *patta* of the said land in favour of the plaintiff on an annual rent of Rs. 6 giving him permission to cultivate it from 1331 F. It was further

alleged in the plaint that defendant No. 1 forcibly cultivated the said plot of land in spite of a protest by defendant No. 2, the zamindar. It was also alleged that the landlord had realized from the plaintiff Rs. 12 on account of rents for two years, namely, 1331 and 1332 F., in spite of the fact that he was never in possession of the holding in dispute. The cause of action was stated in the plaint to have accrued on the 19th of May, 1923, the date of execution of the *patta* in favour of the plaintiff, and in July, 1923, the beginning of 1331 F., when he ought to have got possession but could not obtain it owing to defendant No. 1 having forcibly cultivated the land. The suit was brought on the 26th of January, 1926.

It would thus be clear from the allegations set forth above that the plaintiff never obtained possession of the land granted to him by defendant No. 2 under the *patta*, dated the 19th of May, 1923; that it was not defendant No. 2, the landlord, who prevented him from entering into possession of his holding, but it was really defendant No. 1 who had forcibly cultivated the said land without the consent of the landlord; and that the actual possession of the holding was claimed by the plaintiff from defendant No. 1, who, as stated above, was illegally in possession thereof. The suit is not, therefore, one for recovery of actual possession of the holding by the plaintiff in respect of the land from which he had illegally been ejected by the landlord, but is one for recovery of possession of the said holding from defendant No. 1, who, according to the allegations of the plaintiff, was merely a trespasser. The question which we have, therefore, to decide is whether such a suit is cognizable, or not, by the civil court.

After hearing the arguments in this case and after having perused the orders of the courts below we have

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no hesitation in holding that the suit as brought was clearly cognizable by the civil court and not by the revenue court. Section 108, clause 10, is alleged to bar the present suit. It finds its place under chapter VIII of the Oudh Rent Act (XXII of 1886), the heading of which is " Jurisdiction of the courts ".

There are four classes of suits stated in section 108. They are as follows :—

(A) Suits by a landlord.

(B) Suits by an under-proprietor or a tenant.

(C) Suits regarding the division or appraisement of produce.

(D) Suits by, and against, lambardars, co-sharers and mafidars.

Clause 10 finds its place under heading (B) stated above. To our minds the said heading refers to suits brought either by an under-proprietor or a tenant against the superior proprietor or the landlord. The frame of the entire section justifies this inference. If, therefore, a suit has been brought by a person alleging himself to be a tenant against another person who has prevented him from taking possession of the holding, having himself taken possession of the same forcibly and illegally, the suit, in our opinion, is not one contemplated to be cognizable by the revenue court under section 108 of the Oudh Rent Act. Section 108, clause 10, runs as follows :—

> " Suits for *recovery* of the *occupancy* of any land which has been treated by a landlord as abandoned or from which an under-proprietor or tenant has been *illegally ejected* by the landlord or for possession by a person in whose favour an ex-proprietary tenancy arises under section 7A."

We have purposely italicized the words " recovery ", " occupancy " and " illegally ejected " which

find place in the said clause in order to bring out clearly the meaning of the clause as it stands. In our opinion the words " recovery of the occupancy " indicate recovery of actual possession of the land as distinguished from merely constructive possession. It also appears to us to be clear that the words " illegally ejected " imply that the tenant was previously in possession and had subsequently been ejected.

In the case of *Chandika Bakhsh Singh* v. *Raghunath Kuar* (1), Pandit KANHAIYA LAL, A. J. C., while interpreting section 108, clause 10, held that the word " occupancy " indicated physical possession for there could be no ejectment of a person who had himself not been in possession, and that it should be distinguished from the word " possession " which connoted and included both actual as well as constructive possession. The learned Judge observed that—

> " Section 108, clause 10 of the Oudh Rent Act would not apply if the claimant had not been in actual possession of the said land, but was merely seeking to obtain actual possession on the strength of his alleged title as against the landlord and the person in actual possession. The title of a person in actual occupation or cultivatory possession of a plot of land is capable of being easily determined by a summary adjudication in the revenue court, but where that person is not in actual occupation, the question of the title might involve an elaborate inquiry into its origin and devolution. The application of section 108, clause 10 of the Act is, therefore, confined to cases in which the previous occupancy of the under-proprietor is alleged or acknowledged. The occupancy must,

(1) (1913) 16 O.C., 105.

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however, be physical for there can be no ejectment of a person who has himself not been in occupation."

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In the case of *Raghubar Dayal* v. *Chandan* (1), decided in 1906, a Bench of the late Court of the Judicial Commissioner of Oudh, consisting of Mr. CHAMIER (now Sir EDWARD CHAMIER), A. J. C., and Mr. EVANS, A. J. C., took the same view. On page 26 Mr. CHAMIER observed as follows :—

"Nor do I think that it is a 'suit for the recovery of the occupancy of any land from which a tenant has been illegally ejected.' These words seem to imply that the plaintiff must have been in possession and had been ejected by the landlord. The plaintiffs do not suggest that they have ever been in possession. The plaint shows that the question for decision is whether the plaintiffs are entitled to succeed to a right already declared to exist by competent authority. This is not a question which is reserved for the revenue courts."

On page 29 Mr. EVANS observed :—

"It is not alleged that plaintiffs ever obtained actual possession. They were, therefore, never ejected. As pointed out by my learned colleague the wording of section 108, clause 10 of the Oudh Rent Act implies that the particular kind of suit to which this section refers is a suit in which there has been an actual ejectment of the plaintiff. In this case there has been no such ejectment and what plaintiffs practically ask for is possession of this land as against defendant, whose predecessor they

(1) (1907) 10 O.C., 23.

assert took possession as heir of the deceased Pancham."

The same view was taken by Mr. DANIELS, A. J. C., in the case of *Gaya Din Singh* v. *Chauharja Pande* (1), and by Mr. DALAL, A. J. C., in the case of *Ashiq Ali* v. *Ghulam Sarwar* (2). In *Kalap Nath* v. *Mata Din* (3), Pandit KANHAIYA LAL, A. J. C., held that section 108, clause 10 of the Oudh Rent Act had no application where the contest was between rival tenants claiming to cultivate the same land.

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We are, therefore, clearly of opinion that where a tenant has never been in possession of his holding but merely tries to recover that holding whether from the landlord or from any other person whom he alleges to be in illegal possession thereof, the suit cannot be considered to be one cognizable by the revenue court. In order that a suit should be cognizable by the revenue court it must be alleged and found that the plaintiff was at some time previous to the institution of the suit in actual possession of the land whether himself or through his sub-tenants and had subsequently been ejected by the landlord. If somebody else besides the landlord has illegally taken possession of the holding the remedy must be sought in the civil court and not in the revenue court. This, so far as we know, has been the law consistently followed in the province of Oudh, and we have thought it proper to make it clear so as to avoid unnecessary litigation.

It was contended before us that because the rent had been realized by the landlord from the plaintiff in respect of 1331 and 1332 F., it must be deemed that the plaintiff had been put into possession of the holding. We regret we are unable to accept that view. The mere fact that the plaintiff paid the rent and the landlord accepted it does not, in any way, show that

(1) (1923) 10 O.L.J., 178. (2) (1924) 11 O.L.J., 18.
(3) (1915) 18 O.C., 48.

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the plaintiff actually had at any time obtained possession of the holding which had been let out to him by the landlord.

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It was also contended that because the landlord was a defendant in the case the suit must be treated as one between a tenant and a landlord and thus cognizable only by the revenue court. This contention also, in our opinion, has no substance. According to the allegations of the plaintiff himself the landlord did not at any time dispossess him; rather it was alleged in the plaint that defendant No. 1 had forcibly cultivated the land in spite of a protest from the landlord. The mere fact that the landlord was impleaded cannot, in our opinion, convert this suit into a suit of the class contemplated by the legislature to be one cognizable by the revenue court under section 108, clause 10. In order to have a suit so cognizable it must be one where the tenant must have been previously in possession and where his ejectment must have subsequently taken place owing to an act of the landlord. Unless these two elements are established a suit cannot be considered to fulfil the description of a suit covered by section 108, clause 10, which would be cognizable by the revenue court and revenue court alone.

We are, therefore, of opinion that the view taken by the learned Subordinate Judge is correct and the suit must be tried in the civil court.

We, therefore, uphold the order of remand and dismiss this appeal. The costs of this appeal and of the lower appellate court will abide the result.

Appeal dismissed.