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contemplated in the several clauses of the mortgage deed, and therefore it is impossible to say that those clauses impose fetters on the mortgagor's right to redeem. In our opinion the argument is not sound. The true test is not to look to the events as they have or have not happened, but to see whether such events might have happened in the past, or may happen in the future. The same view was taken by the Lahore High Court in *Faujdar Khan* v. *Abdulsamad Khan* (1) There can be little doubt that if the mortgagee exercises all his powers with which he is clothed by the deed of mortgage, the sum of money which the mortgagor will be unable to pay at the end of 55 years to secure the equity of redemption, will be far in excess of the value of the property mortgaged. Such an eventuality would clearly impede the exercise of, if not wholly extinguish, the equity of redemption. As observed by Lord MACNAGHTEN in the case of *Bradley* v. *Carrit* (2) "You cannot impose on the equity of redemption a fetter operating indirectly when you cannot impose a fetter which operates directly."

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice J. J. W. Allsop

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September, 20

RAJA AVDHESH SINGH (PLAINTIFF-APPELLANT) *v.* LACHHMAN SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Land Revenue Act (III of 1901), sections 32(a), (b), 44 and 233(i)—Khewat—Defendants entered in khewat as perpetual lessees of proprietary rights—Suit in Civil Court for declaration that defendants were not lessees with heritable non-transferable rights—Jurisdiction of Civil Courts to maintain the suit.

Where the defendants' names were entered in the khewat as perpetual lessees of proprietary rights and the plaintiffs

*First Civil Appeal No. 30 of 1932, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 8th of March, 1932.

(1) (1924) A.I.R., Lah., 129. (2) (1903) L.R., A.C., 253.

brought a suit in the Civil Court for a declaration that the defendants were not lessees with heritable and non-transferable rights, *held*, that the cognizance of the suit by the Civil Court is not barred. The defendants who claim to be lessees of the village possessed of heritable and non-transferable rights with a liability to pay rent must be treated as "tenants" and, therefore, the declaration, if granted by the Civil Court, will be tantamount to the determination of the class of tenants to which the defendants belong, and the cognizance of the relief for such a declaration by the Civil Court is barred by the substantive enactment contained in clause (i) of section 233 of the Land Revenue Act, 1901, but the case falls within exception 1 to section 233 and is covered by section 44 of the Land Revenue Act, inasmuch as the interest which the defendants claim is required by law to be recorded in the registers prescribed under clauses (*a*) and (*b*) of section 32. *Raja Udit Narain Singh* v. *Mubarak Ali* (1), relied on.

Messrs. *M. Wasim* and *Khaliq-uz-Zaman*, for the appellant.

Messrs. *Hyder Husain* and *Naim Ullah*, for the respondents.

HASAN, C.J. and ALLSOP, J.:—This is the plaintiff's appeal from the decree of the Subordinate Judge of Partabgarh, dated the 8th of March, 1932.

The learned Subordinate Judge has dismissed the plaintiff's suit on a preliminary issue as to whether its cognizance by a Civil Court was barred and whether a Revenue Court had exclusive jurisdiction to try it. He has, however, partly decreed the suit in respect of one of the reliefs "that the defendants are neither proprietors nor under-proprietors of village Anehra." This village is situate within the Kalakankar estate in the district of Partabgarh and the plaintiff is the Taluqdar of that estate and admittedly as such the superior-proprietor of the village in question.

The necessary facts for the decision of this appeal are these:

In the year 1912 the estate of Kalakankar was under the supervision of the Court of Wards. The ziladar, an

(1) (1928 L.R., 56 I.A., 86.

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official of the Court of Wards, made a report in that year that the predecessor-in-interest of the defendants was in possession and claimed some kind of inferior proprietary right. The Court of Wards made an inquiry and as a result of it directed Shamsher Bahadur Singh, brother of the defendants Lachhman Singh and Beni Bahadur Singh, to make an application to the Revenue Court that his name should be entered in the records as a *thekadar* holding heritable non-transferable rights in the village. This application was made to the Court of Revenue, that is, the Assistant Collector, on the 2nd of October, 1912 (exhibit A-7). At the hearing of the application the general agent of the Court of Wards, one Sital Prasad, appeared and admitted the claim of Shamsher Bahadur Singh. The rent payable by the *thekadar* was also fixed by agreement. The Assistant Collector then recorded the order dated the 11th of October (exhibit A-8) that "The perpetual *thekadari* khewat with heritable rights without power of transfer be prepared." The khewat was accordingly prepared and a certified copy is produced in this case as exhibit A-18. We need hardly state that "khewat" for the purposes of revenue administration means register of proprietors, under-proprietors and perpetual lessees, that is to say, the expression connotes the register prescribed by clauses (*a*), (*b*) and (*c*) of section 32 of the Land Revenue Act, 1901. In exhibit A-18 the name of Beni Bahadur Singh, defendant No. 1, is entered as holding "under a perpetual *theka* (lease) without power of transfer" and in column 5 the rent of Rs.599-10-8 is entered as was agreed to in the proceedings of the 11th of October, 1912 (exhibit A-8). Subsequently in the year 1929 when the settlement of the village came to be made the rent was fixed by the Settlement Officer and the entry as to this was made in the same khewat as is clear from the endorsements in columns 6 and 7 of exhibit A-18 and also from exhibits AA-1 and AA-2.

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In the year 1928 the plaintiff issued a notice of ejectment under the provisions of the Oudh Rent Act, 1886, as against Lachhman Singh and Beni Bahadur Singh, defendants 1 and 2 respectively in the suit out of which this appeal arises. The remaining four defendants are the other members of the family of Lachhman Singh and Beni Bahadur Singh. Against the notice of ejectment Lachhman Singh and Beni Bahadur Singh instituted a suit in the Revenue Court of the district of Partabgarh under the provisions of clause 8 of section 108 of the Oudh Rent Act, 1886, contesting the notice of ejectment. The suit was decreed on the 30th of September, 1929 (exhibit 22). In the judgment of that date it was held that Beni Bahadur Singh and Lachhman Singh were not the under-proprietors of the village of Anehra but that they were lessees possessed of heritable and non-transferable rights in the whole of the village. The main object of the present suit is to obtain a declaration that the defendants are not lessees with heritable and non-transferable rights in the village in suit, but that they are ordinary *thekadars*. The plaint in this suit is most inartistically drafted and the reliefs prayed for number not less than seven. The last two of these reliefs (*e*) and (*f*) may be wholly discarded from consideration. The substance of the remaining five reliefs is what we have just now stated.

The defendants raised several defences in the suit and on the pleadings the trial court framed eight issues for decision. Issues 1, 2, 4 and 5 have only been decided by the learned Subordinate Judge and the result has been what we have already stated. These issues relate to the question of the jurisdiction of the civil court. In appeal before us the sole point argued is whether the decision of the learned Subordinate Judge that the cognizance of the plaintiff's claim by the civil court as regards the declaratory relief that the defendants are not lessees possessed of heritable and non-transferable rights

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in the village of Anehra is barred is correct. We are of opinion that it is not.

It was agreed before us, and that is also the opinion of the learned Subordinate Judge, that the cognizance of the relief that the defendants are neither the proprietors nor the under-proprietors of the village of Anehra is not barred by any provision of law and that the learned Subordinate Judge was right in granting the declaration to that effect in favour of the plaintiff as against the defendants. But it is contended on behalf of the defendants that the civil court is not possessed of jurisdiction to decide as to what class of the several classes of tenants the defendants belong. In support of this contention reliance was placed upon the provisions of section 233(i) of the Land Revenue Act, 1901.

Section 233(i) of the Land Revenue Act, 1901, is as follows:

> "No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters:
>
> * * * *
>
> (i) Save as provided in section 44, the determination of the class of a tenant, or of the rent payable by him, or the period for which such rent is fixed under this Act."

The word 'tenant' is not specifically defined in the Land Revenue Act, 1901, but it is so defined in the Oudh Rent Act, 1886, and the former Act adopts the definition in the latter. *See* section 4(6). Nor is there any classification of tenants made in the Land Revenue Act but it is to be found in the Oudh Rent Act. As the two enactments are *in pari materia* in this respect we think we can legitimately rely for the purpose of deciding this question on the provisions of the latter enactment. Section 3(10) of the Oudh Rent Act, 1886, is as follows:

> " 'Tenant' means any person, not being an under-proprietor, who is liable to pay rent; and in the following portions of this Act, namely sections 12A,

13, 14, 15, 17, 18, 29, 30A, 32A, 32B, 53 sub-section (2), 54, 55, 56, 59, 60, 61, 62, 108, 126, 138 and 141, but in no others, the expression 'tenant' shall be held to include *thekadar* or person to whom the collection of rents in a village or portion of a village has been leased by the landlord."

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Further, it appears to us that under the provisions of the same Act there are five classes of tenants: (1) occupancy tenants (section 5); (2) ex-proprietary tenants (section 7A); (3) statutory tenants (section 36); (4) tenants under a special agreement or decree of Court (sections 52 and 71) and (5) other tenants—section 53(2).

Clearly the defendants who claim to be lessees of the whole village of Anehra possessed of heritable and non-transferable rights with a liability to pay rent must be treated as 'tenants' and they fall within the fifth class as specified above. The declaration, therefore, if granted by the Civil Court, will be tantamount to the determination of the class of tenants to which the defendants belong. The cognizance of the relief for such a declaration by the Civil Court is consequently in our opinion barred by the substantive enactment contained in clause (i) of section 233 of the Land Revenue Act, 1901. A possible argument against this view may be that the bar enacted in the clause under consideration does not apply to the present case because the defendants cannot be treated 'tenants' within the meaning of that clause as that clause is not included in the definition of tenants. It is not necessary for us, however, to give our opinion on the merits of this argument because, even if the argument is valid, this case falls within the exception as we shall presently show.

The next question therefore which arises for decision is as to whether the case falls within the exception provided at the beginning of the clause, that is, "save as provided in section 44." After a careful and prolonged

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consideration of the question we have come to the conclusion that the case is covered by section 44 of the Land Revenue Act which is as follows:

> "All entries in the annual register made under sub-section (3) of section 33 shall be presumed to be true until the contrary is proved; and, subject to the provisions of sub-section (3) of section 40, all decisions under sections 40, 41 and 42 shall be binding on all Revenue Courts in respect of the subject-matter of the dispute, but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by clauses (*a*) to (*d*) of section 32."

The proceedings of the year 1912 which resulted in the entry of the name of the second defendant in the khewat were clearly proceedings under section 33(3) of the Land Revenue Act, 1901. Section 44 therefore gives the Civil Court jurisdiction to determine the 'interest' of the defendants in the village Anehra provided the entry of their names is required by law to be recorded in any one of the registers prescribed by clauses (*a*) to (*d*) of section 32 of the same Act. The question therefore to be decided is whether the interest which the defendants claim in the lands of the village of Anehra falls to be recorded within one or other of the registers prescribed by clauses (*a*) to (*d*) of section 32 of the Land Revenue Act. In our opinion it does. It is agreed that clauses (*d*) and (*e*) are inapplicable to this case; but we think that clauses (*a*) and (*b*) both apply. They are as follows:

> "(*a*) a register of all the proprietors in the mahal, including the proprietors of specific areas, specifying the nature and extent of the interest of each:
>
> (*b*) in Oudh, for all mahals or pattis held in subsettlement or under a heritable non-transferable lease, the rent payable under which has been fixed

by the Settlement Officer or other competent authority, a register of all the under-proprietary co-sharers or co-lessees, specifying the nature and extent of the interest of each of them."

Clause (*b*), it appears to us, literally covers the present case. It is agreed that the whole of the village of Anehra is either a mahal by itself or is a patti (portion) of a larger mahal and the defendants claim to hold it under a heritable non-transferable lease and we have already stated that the entry of their names as such lessees was made in the khewat in the year 1912. We have also seen that the rent was fixed at that time by agreement of the parties. Further it is in evidence that when the settlement of the district came to be made in the year 1929 the Settlement Officer fixed the rent payable by the defendants to the proprietor for the whole of the village of Anehra (exhibit A-18).

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As we have already said this case falls within clause (*a*) also because the defendants must be deemed to be "the proprietors" of the whole village Anehra within the meaning of that clause because the explanation appended at the end of section 32 says:

> "In this section the words 'proprietor' and 'under-proprietor' include a person in possession of proprietary or under-proprietary rights under a mortgage or lease."

The defendants' names have been entered in the khewat as lessees of proprietary rights, though the nature and extent of these rights is not co-extensive with that of a proprietor, and it is not disputed that they are in possession of that interest by virtue of a claim as lessees. This view is in our opinion wholly covered by the decision of their Lordships of the Judicial Committee in the case of *Raja Udit Narain Singh* v. *Mubarak Ali* (1).

We accordingly allow this appeal and reverse the decree of the court below and remand the case to that

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court with directions that the suit be readmitted under its original number in the register of civil suits and that the said court shall proceed to determine it according to law. The appellant's costs of this appeal shall be borne by the respondents in all events. The liability for other costs hitherto incurred or hereafter to be incurred shall be determined by the lower court.

Appeal allowed.

REVISIONAL CIVIL

Before Mr. Justice Muhammad Raza and Mr. Justice H. G. Smith

1933
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SHEIKH ALA BAKHSH (APPLICANT) *v.* THAKUR DURGA BAKHSH SINGH (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), Sections 151 and 152, and Order 20, rule 7—Preliminary decree in mortgage suit —Decree laying down that if sale-proceeds insufficient plaintiff will be entitled to personal decree—Defendant not challenging it in appeal—Application for amendment of decree about clause for personal decree—Correction, if can be allowed—Evidence Act (I of 1872), Section 114—Presumption about correctness of court proceedings.

There is no right in any party under section 152 of the Code of Civil Procedure to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court and the discretion has to be exercised in view of the peculiar facts of each case.

Where, therefore, in a suit for sale on a mortgage a preliminary decree is prepared in the form presented by Appendix D, Form no. 4, Code of Civil Procedure, and a clause in it provides that if the net proceeds of the sale are insufficient then the plaintiff shall be entitled to a personal decree and the defendant does not question that in appeal and the decree becomes final, the defendant cannot subsequently apply for its amendment under section 152 by questioning the correctness of that clause. Even section 151 of the Code of Civil Procedure cannot help the defendant in such a case when he had his remedy in appeal, but did not avail himself of it.

*Civil Miscellaneous Application No. 238 of 1933, in First Civil Appeal No. 69 of 1924, under section 152, Order XX, rule 6, Civil Procedure Code.