

the appellants' suit had been dismissed by the trial court but this did not relieve the appellants of the necessity of putting forward their claim in the partition court. Had they put forward their claim in the partition court, partition would probably have been stayed till final decision of their suit in the civil court. In any case as the plaintiffs' claim title to the property it was incumbent on them to bring a claim in the partition case to which they were parties but not having done so, their claim is barred by section 233(k) of the Land Revenue Act. We have allowed the respondents to file papers relating to the partition case in this Court, as they are papers that were not in existence and could not therefore be filed in the trial court.

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

Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice
J. R. W. Bennett*

EWAZ MOHAMMAD, HAJI, AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* NAGESHWARI PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS)*

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Under-proprietary right—Grove-land—Under-proprietors' right in grove—Superior proprietor holding decree for one-fourth produce of grove—Injunction restraining under-proprietor from cutting trees, whether can be allowed to superior-proprietor.

An under-proprietor has a heritable and transferable interest in the land and is to all intents and purposes proprietor of the land with the only restriction that he is liable to pay rent to the superior proprietor. Where, therefore, a decree entitled a superior-proprietor to one-fourth of the produce of the fruit trees growing in an orchard he cannot get an injunction against the under-proprietor of the grove restricting his use of the trees. The trees of the grove are the property of the under-proprietor and there is no reason why he should be

*Second Civil Appeals Nos. 258 and 259 of 1936, against the order of S. M. Ahmad Karim, Esq., District Judge, Fyzabad, dated the 14th July, 1936.

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enjoined not to deal with the trees which are his property in any manner he likes. *Raza Mohammad v. Abdul Rahman Khan* (1), relied on.

Messrs. *Mohd. Wasim* and *Faiyaz Ali*, for the appellants.

Messrs. *Niamatullah, Mohd. Ayub* and *S. N. Srivastava*, for the respondents.

ZIAUL HASAN and BENNETT, JJ.:—These appeals against decrees of the District Judge of Fyzabad in cross-appeals in the same suit have been brought by the plaintiffs to the suit.

The dispute in the case relates to a grove of fruit trees having an area of 3 bighas odd and situated in village Rauza Bijli, pergunah Tanda of the Fyzabad District.

Nageshwari Prasad, respondent No. 1, is the under-proprietor of the grove, having succeeded his father Kamta Prasad, who obtained a decree of under-proprietary rights from the Revenue Court and finally in appeal from the Court of the Judicial Commissioner of Oudh on the 18th April 1889. The plaintiffs claimed to be the superior proprietors of the grove and though this claim was disputed by both the respondents, it has been found by both the courts below that they are the superior proprietors of the grove and this finding is not now challenged before us. As in the course of proceedings for correction of the khewat respondent No. 2 was represented by respondent No. 1 to be the superior proprietor of the land and as those proceedings terminated in the revenue courts in favour of respondent No. 2, the plaintiffs impleaded him also in their suit. Their allegation was that according to the decree of the Judicial Commissioner referred to above, they were entitled to get one-fourth of the price of the fruit of the grove in suit from the under-proprietor and in their suit they prayed for the following reliefs:

“(a) A decree for declaration of right be passed in favour of the plaintiffs against the defendants specifying

that only the plaintiffs and not the defendant No. 3, are entitled to recover from the defendants Nos. 1 and 2 as superior proprietors the one-fourth share in the fruits and wood of the orchard in suit or any other produce or crop of the orchard in suit as detailed at the foot of this plaint or the one-fourth share of those annual profits or produce which may be obtained from the use of the land of the orchard in suit in any other way.

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(b) If the court thinks it fit that a decree for possession is necessary, then, in accordance with the prayer in the aforesaid relief (a) decree for possession of the superior proprietary rights in the land of the orchard in suit as detailed at the foot of the plaint be granted to the plaintiff against the defendants.

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(c) In the case of a decree respecting the aforesaid relief (b) Rs.300 or more, the mesne profits, i.e. the value of fruits of the trees and other produce and profit of the superior proprietary right in the land of the orchard in suit for three years prior to the filing of this suit, which may be found due after enquiry, be recovered from the defendant No. 3, for the plaintiffs on payment of the deficit of the court-fee, if any, and proper orders be passed respecting the recovery of the mesne profits during the pendency of this suit.

(d) A decree for the perpetual injunction be passed in favour of the plaintiffs against the defendants specifying that the defendants should not cut down any tree in the orchard in suit, neither cause damage to any tree, nor erect any building which they intend to construct as mentioned in the map prepared by the Commissioner and filed on the 5th February, 1935, nor fix any machinery on the said plots of land or any other portion of the orchard in suit, nor erect any other structure in any portion of the orchard in suit, also they should not use the land of the orchard in suit in any other way detrimental to the rights of the plaintiffs."

The learned trial court decreed the plaintiff's suit in the following terms:

"The plaintiffs' claim for proprietary possession with respect to the grove in suit is hereby decreed with Rs.15 against defendants Nos. 1 and 3 (respondents Nos. 1 and 2). The defendant No. 1, is enjoined not to cut or injure in any manner the trees shown by the Commissioner as existing on the land in suit. The plaintiffs shall get their pro-

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portionate costs of the suit from the defendants Nos. 1 and 3, who shall bear their own costs. The claim for plaintiffs' declaration of title fails and is hereby dismissed with no order as to costs."

—Against this decree both the parties appealed to the District Judge. The learned Judge dismissed the appeal of the plaintiffs but allowed respondent No. 1's appeal in part and dismissed the plaintiffs' suit so far as it related to any injunction against defendant (respondent) No. 1.—Against this decree, as said above, the plaintiffs bring these appeals and respondent No. 1, has filed cross-objections.

We have heard the learned counsel for the parties at length and are of opinion that the appeal must be allowed in part. As will be seen from relief (a) claimed by the plaintiffs and reproduced above, the plaintiffs claimed a declaration not only of their proprietary rights in the grove but also a declaration to the effect that they were entitled:

"as superior proprietors to the one-fourth share in the fruits and wood of the orchard in suit or any other produce or crop of the orchard in suit as detailed at the foot of this plaint or the one-fourth share of those annual profits or produce which may be obtained from the use of the land of the orchard in suit in any other way."

We do not think that the decree of the Judicial Commissioner entitled the plaintiffs to any portion of the wood of the trees or to a share in profits which may be obtained from any use of the land of the grove; but they are undoubtedly entitled to one-fourth of the produce of the trees standing in the grove. There was to our minds no reason why a declaration to this effect should not have been made in their favour.

As regards the injunctions sought in clause (d) of the reliefs claimed, the learned counsel for the appellants does not press for an injunction restraining the under-proprietor from erecting any building or fixing any machinery on the land or to put the land to any use other than of an orchard, but he strongly protests against

the learned District Judge's order setting aside the injunction granted by the trial court by which the under-proprietor was restrained from cutting down or causing any damage to any tree in the orchard. We do not however agree with this point of view in this matter. An under-proprietor has a heritable and transferable interest in the land and is to all intents and purposes proprietor of the land with the only restriction that he is liable to pay rent to the superior proprietor. In *Raza Mohammad v. Abdul Aahman Khan* (1) it was held that the superior proprietor has no right of re-entry on the under-proprietary tenure and he is not entitled to a decree in ejectment, even if the actual possession is with trespassers without any title, and that the under-proprietary tenure carries with it both transferability and hereditability, the two essential elements of ownership and the ownership thus vests in the original under-proprietor and not in the superior proprietor whose only right is to receive rent and no more. This being so the trees of the grove are undoubtedly the property of the under-proprietor and there seems to be no reason why he should be enjoined not to deal with the trees which are his property in any manner he likes. It is true that the decree of the Judicial Commissioner entitles the superior proprietor to one-fourth of the produce of the fruit trees growing on the land but if the trees cease to exist, the superior proprietors can seek any remedy that may be available to them at the time. In fact as pointed out by the learned counsel for the respondents they ought to have in their own interest got rent fixed on the land in question at the settlements that followed the decree of the Judicial Commissioner. Anyhow this is the look out of the plaintiffs themselves and what we have to see in the present case is whether the plaintiffs were entitled to get an injunction against the under-proprietor in regard to the trees of the grove. As we have said, the under-proprietor is the absolute owner of the trees and he cannot be restricted in his use

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of those trees. Nor does the decree of the Judicial Commissioner contemplate that the under-proprietor should always maintain the land as a grove.

We therefore decree these appeals in part and modify the decree of the lower appellate court by giving the plaintiffs a declaration of their proprietary right to the grove in suit and to the effect that as superior proprietors they are entitled to get a one-fourth share in the produce of the trees growing in the grove. The rest of the appeals is dismissed.

The learned counsel for the respondents does not press the cross-objections. They are also dismissed.

We order each party to bear his own costs in this Court. This judgment will govern both the appeals.

Appeals decreed in part.

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Before Mr. Justice Ziaul Hasan and Mr. Justice J. R. W. Bennett

BANKEY LAL AND OTHERS (DEFENDANTS-APPELLANTS) *v.* NAND LAL AND OTHERS (PLAINTIFFS-RESPONDENTS)*

Res judicata—One judgment disposing of two appeals—Second appeal against decree in one of those appeals only—Decree in the other appeal, whether operates as res judicata.

It is too broad a proposition that when there is one and the same judgment disposing of two separate appeals in which two separate decrees were prepared then if there is an appeal against one of the two decrees only, the judgment and the decree in the other appeal, against which no appeal is filed and which thus becomes final, would constitute *res judicata*, and is not applicable to each and every case in which the lower court disposes of two appeals by one and the same judgment.

Where two appeals were disposed of by the same judgment and a second appeal is filed against the decision in one of those appeals only on a point which was involved in that appeal alone and not in the other appeal and the decision in the other appeal did not affect the point arising for decision in this appeal, there is no legal bar to the hearing of the appeal.

*Second Civil Appeals Nos. 175 and 196 of 1936, against the order of Rai Bahadur Pandit Manmath Nath Upadhyay, District Judge of Sitapur, dated the 4th February, 1936, modifying the decree of Mr. Pearey Lal Bhargava, Additional Civil Judge, Sitapur, dated the 29th October, 1934.