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cannot be supported. I must accordingly modify the decree which has been passed by the learned Subordinate Judge and direct that the sale of the 4-annas share in Mauza Parmanandpur, bearing *Touzi* No. 126, must be subject to the prior mortgage lien of the appellants to the extent of Rs. 4,192-11-9.

The appellants will be entitled to their costs both in this Court and in the Court below from the plaintiffs.

ADAMI, J.—I agree.

Decree modified.

LETTERS PATENT.

Before Dawson Miller, C. J. and Jwala Prasad, J.

GOPAL RAI

v.

RAMBHAJAN RAI.*

1922.

Jan. 18.

Execution of Decree—decretal amount paid to decree-holder by one judgment-debtor and payment certified—decretal amount again deposited in court by another judgment-debtor and withdrawn by decree-holder—application for recovery of second payment, maintainability of—Code of Civil Procedure 1908 (*Act V of* 1908), *section* 47, *Order XXI, rule* 2.

Where one of the judgment-debtors paid the decretal amount into court, not knowing that another of the judgment-debtors had already paid the full amount to the decree-holder, and that the payment had been certified under Order XXI, rule 2, of the Code of Civil Procedure, 1908, and the decree-holder withdrew the amount so paid, *held*, that the judgment-debtor was entitled to succeed in an application made to the court for recovery from the decree-holder of the amount paid although the payment had not been recorded by the court, and that a separate suit was not necessary inasmuch as the application fell within the scope of section 47 of the Code.

Collector of Jaunpur v. *Bithal Das*(1), applied.

* Letters Patent Appeal No. 9 of 1921.

(1) (1902) I. L. R. 24 All. 291.

The facts of the case material to this report are stated in the judgment appealed from which was as follows :—

There was a decree against the appellants for Rs. 95. The court below has found that one of the judgment-debtors paid the whole of this amount to Ram Bhanjan Singh who was the plaintiff in the action. Now it appears that this payment was neither certified under the provision of paragraph (1) of Order XXI, rule 2, or recorded as certified under paragraph (2) of Order XXI, rule 2. The decree-holder then levied execution for the decretal amount. The other two judgment-debtors, Ram Kripal and Gopal, paid into court Rs. 95, and this money was withdrawn by the decree-holder. This occurred in May 1915. In June 1918, the judgment-debtors made an application under section 47, Code of Civil Procedure, for an order that the plaintiff, Ram Bhanjan Singh, may be compelled to refund the amount which he had withdrawn from the court. The courts below have dismissed that application.

In my view the decision of the courts below is correct and ought to be upheld.

The learned Vakil on behalf of the appellant relies upon the case of *Partab Singh Beni Ram*(1). In that case the Full Bench of the Allahabad High Court held that "excess money unduly collected, as due under a decree, is recoverable by application to the court executing the decree and not by separate suit". The position here is somewhat different. Here if the judgment-debtors had brought the matter to the notice of the court, the court would have no power to recognize the payment under the provision of the court. The payment was made out of court. The payment was not certified by the decree-holder nor did the judgment-debtor inform the court of such payment or adjustment. Paragraph (3) of Order XXI, Rule 2, is mandatory and is as follows :— "A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree". Therefore if when the decree-holder made his application to withdraw the money from court, the judgment-debtors had brought to the notice of the court that the decree-holder had already received the money out of court, the court would have no power to recognize such payment. Are the judgment-debtors in a better position by bringing the matter to the notice of the court three years after the withdrawal of the money by the decree-holder? I am clearly of opinion that the only remedy available to the judgment-debtors is by suit.

I would dismiss this appeal with costs.

The plaintiffs appealed under the Letters Patent.

Sheonandan Roy, for the appellants.

Lachmi Narain Sinha, for the respondents.

DAWSON MILLER, C. J.—In my opinion this appeal ought to be allowed. The appellant is one of the judgment-debtors in a suit in which the respondent

(1) (1880) I. L. R. 2 All. 61 (F.B.).

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DAWSON MILLER, C. J.

was the plaintiff. A decree for Rs. 95 was made in favour of the respondent. One of the defendants settled the matter out of court by paying to the decree-holder the full amount of his claim on the 21st May, 1915. After the decree-holder had been paid a petition was presented to the Court in accordance with the provisions of Order XXI, rule 2, of the Civil Procedure Code certifying that the full decretal amount had been paid. Subsequently the appellant in this suit not knowing that the decree-holder's claim had been satisfied paid the money into court and this was taken out by the decree-holder. The appellant afterwards discovered that the decree had previously been satisfied by one of his co-debtors. He thereupon made an application to the executing court for a refund of the money which had been taken out of court by the decree-holder. In that application the facts were not in dispute. It was admitted by both sides that the decree had been satisfied before the decree-holder took the money out of court which is now claimed back and indeed the petition certifying the payment is signed by the decree-holder himself. The court therefore which had the record before it must have been aware that the payment of the debt had been properly certified within the meaning of Order XXI, rule 2. The learned Munsif, however, came to the conclusion that as the matter had been disposed of sometime before, it was too late then to apply to the executing court to have it set right.

The matter then went on appeal to the District Judge and the District Judge took the same view and dismissed the appeal.

When the case came on second appeal to this Court the learned Judge did not deal with the question which had been raised in the lower courts but found that even assuming the appellant to be right upon the contention previously raised by him in the lower courts still the position here was different because he said it had not been proved that any payment or adjustment

had been certified as provided by Order XXI, rule 2, and that, therefore, even if the money had been paid to the decree-holder, there was nothing to show that it had been certified and, therefore, the executing court was not entitled under Order XXI, rule 2, sub-rule (3), to recognize the payment. With great respect to the learned Judge I think that he was in error in introducing this matter. It was admitted in both the lower courts that the facts were not in dispute and it was never suggested that the payment had not in fact been certified within the meaning of Order XXI, rule 2. That was taken for granted.

On appeal to this court under the Letters Patent the appellant has produced a certified copy of the petition which was before the executing court showing quite clearly that the decretal amount had been paid before the appellant had paid the same sum into court and that this had been accepted by the decree-holder in full satisfaction of his debt. The result is that the decree-holder has obtained payment twice over, a thing which he was clearly not entitled to do. The only question therefore which arises before us is whether, seeing that the decree had in fact been executed, it was the proper procedure which was adopted, that is to say whether the judgment-debtor could have this matter determined by the executing court, or whether he was bound to bring a separate suit. In the case of *Collector of Jaunpur* v. *Bithal Das* (1), it was laid down that an application to recover property which had been improperly sold in excess of the decretal amount was a matter relating to the execution, satisfaction or discharge of the decree, and further that the executing court was the proper court in which to have the matter decided notwithstanding that the decree had already been executed some time before. I see no reason to differ from the opinion there expressed which is supported by other cases and in my opinion this appeal

(1) (1902) I. L. R. 24 All. 291.

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ought to be allowed. The orders of the lower courts will be set aside and the case will be sent back to the executing court and reinstated on the file to be tried according to law. The appellant is entitled to his costs of this appeal and in all the courts below.

JWALA PRASAD, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

1922.

Jan. 20.

MAHANT JAGARNATH DAS

v.

JANKI SINGH.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 3(3), 4 *and* 116, *and Schedule III, Article* 1(a)—*Proprietor's private land, acquisition of non-occupancy rights in—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 139.

A lessee of *zerait* land is a tenant within the meaning of section 3(3) of the Bengal Tenancy Act, 1885, only during the continuance of the term of the lease. Upon the expiry of the term he becomes a trespasser.

The mere fact that a lessee of a proprietor's private land is neither a *raiyat* holding at fixed rates nor an occupancy *raiyat* does not raise a presumption that he is a non-occupancy *raiyat*.

Article 1(*a*) of Schedule III does not apply to a suit to eject a lessee of a proprietor's private land.

The term "non-occupancy *raiyat*" in Article 1(*a*) refers to a person who, before the expiry of the term of the lease, has acquired the status and rights of a non-occupancy *raiyat* under Chapter VI.

Ganpat Mahto v. *Rishal Singh*(1), disapproved.

Dwarkanath Chowdhry v. *Tafazar Rahman Sarkar*(2), approved.

* PRESENT.—Lord Buckmaster, Lord Carson and Sir John Edge.

(1) (1915-16) 20 Cal. W. N. 14(18). (2) (1915-16) 20 Cal. W. N. 1087.