

may institute a suit to establish the right which he claims to the property "in dispute, but subject to the result of such suit, the order shall be conclusive". Now the question arises whether it was at all necessary for the petitioner to apply under Order XXI, rule 53. The learned Munsif says that the applicant "could come" under Order XXI, rule 58, and as he "did come" he cannot now apply under Order XXI, rule 100. Now this view is quite erroneous. He could only apply under Order XXI, rule 58, on the ground that the property was not liable to attachment. But then his position as a mortgagee did not entitle him to come to court and argue that the property was not liable to attachment. The order passed by the court in no way touched the interest of the mortgagee. He is now prejudiced because he has been dispossessed by the order of the Civil Court and in my opinion it was obligatory on the learned munsif to dispose of the application in accordance with law. I hold that Order XXI, rule 63, does not bar the application of the petitioner.

1921
 ———
 Biswanath
 Patra
 vs.
 Lingaraj.
 ———
 Das, J.

I must allow the application, set aside the order of the learned Munsif and remand the case to him for disposal according to law.

ADAMI, J.—I agree.

Application allowed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

KANDURI SAHU

v.

ARJUN SAHU.*

1921

December, 1.

*Orissa Tenancy Act, 1913 (B. S. O. Act II of 1913), section 236—
 under-tenant of homestead land, whether liable to ejection on
 notice to quit.*

*Circuit Court, Cuttack. Appeal from Appellate Decree No. 7 of 1921 from a decision of D. H. Kingsford, Esqr., District Judge of Cuttack, dated the 5th January, 1921, reversing a decision of Babu Baidya Nath Das, Additional Munsiff of Jaipur, dated the 24th February, 1920.

1921.
 ———
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Section 236 of the Orissa Tenancy Act, 1913, applies to the tenancy of an under-tenant of homestead land, and, therefore, such a tenant is not liable to ejectment on mere notice to quit.

Mohim Chandra Day v. Baidyanath Kapali (1), followed.

The facts of the case material to this report were as follows : —

In the Settlement operations of 1898 the 33 decimals of land which formed the subject-matter of this suit was recorded in the names of Kusun and Bishun. In 1909 Kanduri Sahu, the plaintiff, purchased it. Subsequently Gouranga Sahu, eldest son of Kusun, sued the plaintiff and others for specific performance of an alleged contract to sell the land to him. The suit was compromised in 1910 as between Gouranga and Kanduri, the former getting 4 decimals and the latter 29 decimals.

In the *khatian* of the Revisional Settlement, published in 1911, the defendants were recorded as *shikmi* tenants in respect of the entire area.

Afterwards the plaintiff instituted an ejectment suit against the defendants, the sons of Kusun, as his under-tenants. The suit was dismissed on the ground that the land was homestead land and that, therefore, the provisions of section 57 of the Orissa Tenancy Act, 1913, did not apply to it.

On the 18th December, 1918, the plaintiff served the defendants with notices to quit the land. The notices were not accepted. On the 20th January, 1919, plaintiff instituted the present suit in the Civil Court, as an occupancy *raiyat*, for ejectment of the defendants. He also prayed that the defendants should be ordered to remove a small thatched house which was on the land.

Defendant No. 1, Gouranga Sahu, did not contest the suit. The first court found that the compromise of 1910 was collusive and had never been acted upon, and decreed the suit.

Defendants 2 to 4 appealed to the District Judge who found that the defendants were *raiyats* of the village and were in possession of some *thani pahi* lands,

including homestead and paddy land, and that in respect of these lands their right had been recorded as *sthitiban*; that the land in dispute was homestead; that the disputed land was held by the defendants otherwise than as part of their holding as *raiyats*, viz, that they held it as under-*raiyats*; that the provisions of section 236 of the Act applied to the land, and that, there being no proof of local custom and usage, the incidents of the tenancy in the land in dispute were regulated by the provisions of the Act applicable to land held by a *raiyat*. The District Judge accordingly held that the defendants were not liable to be ejected upon mere notice to quit and reversed the decree of the trial court.

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The plaintiff appealed to the High Court.

Bichitrananda Das, for the appellants.

Subodh Chandra Chatterji, for the respondents.

ADAMI, J.—The contention raised by the learned Vakil in this second appeal is that the District Judge was wrong in applying the provisions of section 236 of the Orissa Tenancy Act to the present case which was one in which the plaintiff as an occupancy *raiyat* tried to eject the defendants who were *shikmi* tenants under him from the homestead land which they were occupying under him. It is argued that section 236 cannot apply to the case of an under-tenant and can only apply to a case where a *raiyat* holds homestead land which is not a part of his occupancy holding. The case, however, is concluded by the finding in the case of *Mohim Chandra Day v. Baidyanath Kapali* (1). That decision upholds the finding of the District Judge and, therefore, there is no reason to find that his decision was wrong. The appeal must accordingly be dismissed. There will be no order as to costs.

DAS, J.—I agree.

Appeal dismissed.