providing that he shall quit the land if he changes [1066] its condition. It has been contended that this clause only precludes the tenant from altering the class (*bira*) of the land. But in any case we think the period of limitation is two years, because the plaintiffs sued to eject the tenant for misusing the land and not for breaking a condition of the lease. Even if the landlord binds the tenant down not to alter the condition of the land, this does not reduce the period of limitation allowed him by the law from two years to one, when the tenant misuses the land and renders it unfit for the purpose for which it was demised.

We accordingly decree the appeal with costs in proportion. The decree of the Munsif is restored, save as to costs.

The defendant will have two months' time from this date to fill up the hole, or pay Rs. 40 damages. The record will be sent down to the first Court at once.

Appeal allowed.

30 C. 1066 (=8 C. W. N. 118.)

APPELLATE CIVIL.

BHARAT PROSAD SAHI *v.* RAMESHWAR KOER.*

[3rd July, 1903.]

Set-off—Decretal amount as set-off—Civil Procedure Code (Act XIV of 1882) s. 111, Ill. (d).

In a suit for recovery of arrears of rent the defendant's claim to set-off the amount of a decree obtained by him against the plaintiff was disallowed by the Court below on the ground that the decree had not been attempted to be enforced :—

Held, that the Lower Court was wrong in not entertaining the claim of set-off raised by the defendant; Ill. (*d*) of s. 111 of the Civil Procedure Code makes it perfectly clear that the Court can entertain such a claim.

[Dist. 11 C. W. N. 215.]

APPEAL by the defendant, Bharat Prosad Sahi.

The plaintiffs instituted this suit for the recovery of the sum of Rs. 5,303-5-11 due for arrears of rent together with damages for the years 1304 to 1307 Fusli, in respect of a mokurari [1067] tenure held under them by the defendant. In the written statement the defendant alleged that the plaintiffs had in 1894 instituted two suits for arrears of rent against him which were decreed in favour of the plaintiffs by the Court of First Instance, but on appeal the High Court reversed the said decrees and awarded the defendant costs in both the suits; the judgment of the High Court was affirmed by the Privy Council and the costs of the appeal amounting to Rs. 6,125 was by the decree of the Privy Council dated the 17th June 1899 awarded to be paid by the plaintiffs to the defendant. A further sum of Rs. 170 was due to the defendant from the plaintiffs under an order of the High Court, being the costs of enquiry as to security in the appeal to the Privy Council. The defendant claimed to set-off against the plaintiffs' demand, these two sums as well as a sum of Rs. 500 for alleged damages suffered by the defendant on account of the plaintiffs having taken wrongful possession of a certain property and another sum of Rs. 107-14-9 alleged to have been paid by the defendant on account of a certain *zarpeshgi* lease and a further sum of Rs. 152-7-0 alleged to have

* Appeal from Original Decree No. 241 of 1901, against the decree of Prosanna Chundra Roy, Subordinate Judge of Gaya, dated July 5, 1901.

1903
JULY 3.

APPELLATE CIVIL.

30 C. 1066 = 8 C. W. N. 118.

been paid by the defendant to a former lessee of the plaintiff on account of mouzah Ghatera Babubigha.

The Subordinate Judge of Gaya declined to entertain the plea of set off raised by the defendant and decreed the plaintiff's claim in full with the following observations :—

" I think this Court, having no power to enter full satisfaction on the Privy Council decree, cannot set off the amount due on it to a claim made in this suit. That is not the object of section 111 of the Civil Procedure Code. This Court has no power to execute that decree. The defendant also asks to set off the amount due on a High Court decree, but a copy of that decree has not been filed. It is said that the plaintiff agreed to set off the amount But her witness says that one of her servants said so. But it is not shewn whether that servant had authority to do so.

The evidence of the defendant's witness shews that the amount of *wasilat*, if due, is not ascertained. Therefore section 111 does not apply.

The defendant's witness has not given the amount of the *zarpeshgi* if there be one."

Mr. *R. Mittra* and Babu *Jagendra Chandra Ghose* for the appellant.

Babu *Umakali Mukerji*, Babu *Saligram Singh* and Babu *Lakshmi Narain Singh* for the respondent.

[1068] GHOSE AND PRATT, JJ. This appeal arises out of a suit for rent in respect of the years 1304 to 1307 F. S. due on a mokurari tenure held by the defendant under the plaintiffs. The latter sought to recover the sum of Rs. 4,242-11-2 as due with damages in the amount of Rs. 1,060-10-9, in all Rs. 5,303-5-11. The defendant pleaded that he was entitled to set off against the plaintiff's claim certain sums of money due to him, and that far from there being anything due to the plaintiffs, a considerable amount was payable by the plaintiffs to him. The sums in respect of which set-off was claimed were *first*, Rs. 6,125 recoverable under a decree passed by the Privy Council on the 17th of June 1899 between the very same parties; *secondly*, the sum of Rs. 170, being the costs of enquiry as to security in the appeal to the Privy Council under the orders of the High Court ; *thirdly*, a certain amount due to the defendant as damage on account of the plaintiffs having taken possession of a certain property when they were not so entitled ; *fourthly*, the sum of Rs. 107-14-9 on account of certain *zarpeshgi* which the defendant had paid ; and *lastly* the sum of Rs. 15-2-7 on account of mouza Ghatera Babubigha, which the defendant had paid to the former lessee of the the plaintiff.

The Subordinate Judge has declined to entertain the plea of set-off thus raised and has decreed the plaintiff's claim in full. With respect to the amount of costs recoverable under the decree of the Privy Council, to which we have already referred, the Subordinate Judge makes the following observations :—" I think this Court having no power to enter full satisfaction on the Privy Council decree, cannot set off the amount due on it to a claim made in this suit. This is not the object of section 111 of the Civil Procedure Code. This Court has no power to execute that decree." We do not quite understand what the Subordinate Judge here means. He was perhaps under the impression that the matter fell under section 246 of the Code of Civil Procedure, and that because the decree of the Privy Council was not under execution in his Court, he could not entertain the plea of set-off raised by the defendant. In this respect, we think he is clearly in error. Section 111 of the Code provides, " If in a suit for the recovery of money the **[1069]** defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in

1903
JULY 3.

APPELLATE CIVIL.

30 C. 1066=
8 C. W. N. 118.

such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set off."

"The Court shall thereupon inquire into the same and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set off does not exceed the pecuniary limits of its jurisdiction, the Court shall set off the one debt against the other." And so on.

There can be no question here that the amount which the defendant claims to set off so far as the costs awarded by the Privy Council are concerned, is an ascertained sum, which is legally recoverable, and there is also no question that both parties fill the same character in this suit as also in the claim which the defendant sets up. It is obvious therefore that the question of set-off pleaded by the defendant can be entertained under section 111. And this is made perfectly clear by illustration (*d*) of the same section, which says:—"A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims, being both definite pecuniary demands, may be set off."

No doubt, if the decree of the Privy Council had been put into execution in the Court of the Subordinate Judge, he would be bound to deal with the claim of the defendant under section 246 of the Code, provided, of course, that the plaintiff had recovered judgment in this suit, and applied for execution of his decree. It does not however follow from this, that the Subordinate Judge cannot entertain the claim of the defendant under section 111 of the Code, when the decree of the Privy Council has not been, as we understand, attempted to be enforced by execution.

In this view of the matter, we are of opinion that the Court below was wrong in not entertaining the claim of set-off raised by the defendant so far as it is covered by the decree of the Privy Council.

[1070] As regards however the other claims set up by the defendant, we agree with the Subordinate Judge for the reasons given by him in declining to entertain them under section 111 of the Code.

The result is that the case will be sent back to the Court below, so that the claim of the defendant may be as already stated dealt with under section 111 of the Code. It should, however, be understood that if the defendant has applied to the Court of the Subordinate Judge for the execution of the decree of the Privy Council, the matter should not be dealt with under section 111.

There is, however, one other matter that we desire to refer to, and that is as regards the decree for damage or compensation, which has been allowed by the Subordinate Judge. It appears that the decree of the High Court which was affirmed by the Privy Council on the 17th of June 1899 was passed on the 15th May 1894 corresponding to Baisak 1301. Under that decree, a considerable sum of money was due to the defendant as costs, and it further appears that during the years in suit (1304 to 1306) considerable sums of money were paid by the defendant at different times to the plaintiff as rent, such being the case this was not a case in which damages should have been awarded to the plaintiff as the Court below has done. All that the plaintiff is entitled to is the

1903 JULY 3.

APPELLATE CIVIL.

30 C. 1066= 8 C. W. N. 118.

ordinary rate of interest, that is to say, at the rate of 12 per cent. per annum from the end of each quarter in which the instalment falls due.

With these observations we send the case back to the Court below so that the claim set up by the defendant and as covered by the decree of the Privy Council might be dealt with under section 111, Code of Civil Procedure, and a proper decree made.

In the circumstances of the case we think that each party should bear his own costs in all the Courts up to the present stage. Subsequent costs will abide the result.

Case remanded.

30 C. 1071.

[1071] APPELLATE CIVIL.

AFZUL HOSSAIN *v.* RAJBUNS SAHAI.*

[20th March, 1903.]

Revenue Sale—Act XI of 1859, *ss.* 13, 14, 28, 29, 37, 54—*Share of estate, sale of—Mokurari lease—Rights of purchaser of share of estate—Merger—Encumbrance.*

The sale of a share of an estate for arrears of revenue, under the provisions of Act XI of 1859, does not affect, wholly or in part, a valid *mokurari* lease of lands comprised in the estate, notwithstanding the fact that the lease is held by some of the defaulting proprietors of the share sold, having a fractional proprietary interest therein.

Kasinath Koowar v. *Bankubehari Chowdhry* (1) and *Madhub Chunder Chowdhry* v. *Promotho Nath Roy* (2) referred to.

APPEAL by the defendants, Afzul Hossain and others.

Separate accounts having been opened at the instance of some of the proprietors of taluk Turwan, the remaining *ijmali* share remained liable for payment of Government revenue to the amount of Rs. 1,840. This *ijmali* share having fallen into arrears of Government revenue, it was put up to sale by the Collector and purchased by the plaintiff No. 1 on the 25th March 1897, and the said plaintiff was duly put in possession of the same.

The defendants are the heirs and legal representatives of one Syed Mahomed Hossain, who obtained a *mokurari* pottah of the entire taluk Turwan, dated the 3rd November 1838, from one Rani Amirunnissa, the original proprietress of the taluk whereby an annual profit of Rs. 216 only was reserved in her favour. Subsequently the defendants Nos. 1 and 2 and their brother, who was the predecessor in interest of the other defendants, acquired 5 annas 4 pies of the proprietary interest in some villages comprised in the said taluk. The defendants were thus amongst the proprietors for whose default *ijmali* share was sold.

[1072] It appears that the defendants and the other defaulting proprietors instituted a suit to set aside the revenue sale, but that the suit failed. In the course of the said suit, the defendants had set up the *mokurari* lease aforesaid.

The present suit was instituted for a declaration that after the revenue sale dated the 25th March 1897, the defendants had no valid, subsisting *mokurari* lease or other encumbrance within the purview of Act XI of 1859, the cause of action being alleged to have arisen on the 11th

* Appeal from Original decree No. 387 of 1899, against the decree of H. Holmwood, District Judge of Gaya, dated November 6, 1899.

(1) (1869) 3 B. L. R. (A. C.) 446; (2) (1873) 20 W. R. 264. 12 W. R. 440.