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30 C. 1060= 7 C. W. N. 914.

It was for the due performance of the decree or order that might ultimately be passed by the Appellate Court that the security [1063] was given and in this view of the matter, the decree-holder could not be regarded as a mortgagee in the strict sense of the term, though no doubt in the event of the appeal being dismissed, he would be entitled to realize his decretal money by sale of the properties given in security. For these reasons we are unable to hold that the decree-holder is a mortgagee within the meaning of section 99 of the Transfer of Property Act. It follows therefore that there is no bar to the decree-holder suing for the remedy he has asked for, in execution of his decree.

The result is that the order of the Court below is set aside with costs, and the case sent back to that Court, so that the execution asked for may be granted.

Appeal allowed; case remanded.

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30 C. 1063.

APPELLATE CIVIL.

BOIDYA NATH PANDAY *v.* GHISU MANDAL.*

[10th February, 1903.]

Notice—Bengal Tenancy Act (VIII of 1885) *s.* 155—*Ejectment, Suit for—Alternative relief—Limitation.*

A suit for the ejectment of a tenant for misuse of the land was dismissed by the Court below on the ground that the notice served on the tenant under s. 155 of the Bengal Tenancy Act was bad, as the compensation claimed in the notice for the misuse was demanded in the alternative :—

Held, that the notice was not bad in law merely because the compensation was demanded in the alternative.

Pershad Singh v. *Ram Pertab Roy* (1) distinguished.

[Ref. 29 C. L. J. 430=51 I. C. 385.]

SECOND APPEAL by the plaintiffs Boidya Nath Panday and others.

This appeal arose out of an action brought by the plaintiffs to eject the defendant, after notice under section 155 of the Bengal Tenancy Act. The allegation of the plaintiffs was that they [1064] were the *darputnidars* of mouzah Chainpore; that the defendant was holding the land in suit, for agricultural purposes in the said mouzah under a settlement taken from the putnidar on the 23rd Joisto 1303 (4th June 1896); that the defendant had no right other than that of holding and cultivating the land; but that he had dug out earth from a portion of the land rendering it unfit for cultivation for which purpose only he took the settlement; that under the terms of the settlement, the defendant, by reason of the excavation, made himself liable to ejectment; that the plaintiffs served upon the defendant a notice, under section 155 of the Bengal Tenancy Act, requiring him on pain of ejectment to fill up the excavation within a certain time or in the alternative to pay to the plaintiffs the sum of Rs. 320 as compensation for the injury done to them; and that the defendant did not comply with the requirements of the notice and hence the suit.

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* Appeal from Appellate Decree No. 198 of 1900, against the decree of W. Teunon, District Judge of Moorshedabad, dated November 6, 1899, affirming the decree of Purna Chandra Banerjee, Munsif of Lalbagh, dated March 15, 1899.

(1) (1894) I. L. R. 22 Cal. 77.

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The defence (for the purposes of this report) mainly was, that the notice was not in accordance with law.

The Court of First Instance decreed the plaintiff's suit in part, allowing Rs. 40 only as compensation. The plaintiffs appealed, and the defendant filed a cross-appeal. The District Judge of Murshidabad dismissed the plaintiff's appeal, but decreed the cross-appeal, holding that the notice did not strictly comply with the requirements of section 155 of the Bengal Tenancy Act, inasmuch as it did not require the tenant to remedy the misuse of the land and also to pay a sum as reasonable compensation.

Dr. *Ashutosh Mukerjee*, Babu *Jnanendra Nath Bose* and Babu *Hemendra Nath Sen*, for the appellant.

Babu *Saroda Charan Mitra* and Babu *Karuna Sindhu Mukerjee*, for the respondent.

RAMPINI AND PRATT, JJ. The defendant occupies a bigha of land under the plaintiffs. The land was let to him for purposes of cultivation. He has made a large excavation in the land, which rendered it unfit for the purpose for which it was demised to him. The plaintiffs therefore served on him a notice calling on **[1065]** him to fill up the excavation or to pay them Rs. 320 damages or failing to do either to quit the land. The defendant did not comply with the terms of the notice and so the plaintiffs have brought this suit to eject him from the land. The District Judge has dismissed the suit, on the ground that the notice was bad as the damages claimed in the notice were claimed in the alternative, whereas in his view the plaintiff should have claimed damages in addition to the compensation demanded in lieu of filling up the excavation.

The plaintiffs appeal. We are of opinion that the view taken by the Judge is not warranted by the terms of section 155. That section requires that the notice should call upon the tenant to remedy the misuse complained of, and should further call upon him to pay compensation for the misuse. The notice served on the defendant complied with these provisions. It no doubt claimed the compensation in the alternative. This does not, we think, render the notice bad. That the claim for damages was in the alternative was in favour of the tenant. We think there is no ground or reason for the view of the District Judge that the notice must call upon the tenant not only to pay compensation to the landlord for the misuse complained of, but also some additional compensation over and above the amount required to remedy the misuse of the land of which the tenant has been guilty.

We have been referred to the case of *Pershad Singh* v. *Ram Pertab Roy* (1) in which it was held that a notice in which no compensation was claimed was bad, and that in every case such compensation must be demanded.

In that case no compensation at all was claimed in the notice. In the notice in this case the defendant was called upon to pay compensation if he did not choose to remedy his misuse of the land. Hence, the ruling cited does not apply. As we have already said, we do not think the notice was bad merely because the compensation was demanded in the alternative.

The respondent's pleader argues that the suit is barred by limitation because the lease of the defendant contains a clause apparently

(1) (1894) I. L. R. 22 Cal. 77.

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.