1905 FEB. 14.

CIVIL RULE.

32 C. 572=1 C. L J 265.

have to consider is not what the decree decided, but what the order, against which it is sought to appeal, decided. Section 153 speaks of "decree or order." Speaking for myself, I do not think it makes the slightest difference whether the decrees were or were not *ex-parte*, if that which is sought to be appealed against is not the decree, but an order. We are freed from sending this to a Full Bench, as the circumstances are not the same, there being [575] nothing in the present case to show that the decree in the rent suit was made *ex-parte*. Let us look at the section. "An appeal shall not lie from any . . . . . , *order* passed whether in the first instance or *on appeal* in any suit instituted by a landlord for the recovery of rent where, ... (I need not read paragraphs 'a' and 'b' as nothing turns upon them), unless in either case the . . . . . *order* has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto."

The effect of the order of the Munsif was practically to hold that the purchaser, under the purchase of the 18th of May 1903, had no title to the land; and the order certainly decided a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto. Here the parties had conflicting claims to the land. The opposite party says: "This is my land, because the sale to me is a good sale." The petitioner says: "It is my land because the sale to you is a bad one;" and that was the question which was decided by the order which was under appeal to the Additional District Judge. One has only to read the judgment of the Munsif to see that he did decide a question relating to the title to the land. In my opinion an appeal did lie to the Additional District Judge, and consequently he was not acting without jurisdiction, when he made his order.

I now pass to the second point, namely, that the Additional District Judge was wrong in holding that the petitioner had, as he calls it, no *locus standi*, by which, I suppose, he means that he was not a representative of any of the parties within the meaning of section 244. If he was wrong in that he was wrong upon a question of law, and not of jurisdiction, and the case would not fall within section 622, Civil Procedure Code.

The same observation applies as to whether or not the petitioner was a person whose immoveable property has been sold within the meaning of section 311, Civil Procedure Code.

The Rule therefore is discharged with costs.

HOLMWOOD, J. I agree.

Rule discharged.

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32 C. 576 (=2 C L. J. 73.)

[576] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Brett.

SHEO SARAN SINGH *v.* MOHABIR PERSHAD SAHA.*

[17th January, 1905.]

Mortgage—Equitable set off—Redemption—Usufructuary mortgage—Accounts, mode of taking—Surplus receipts—Civil Procedure Code (Act XIV of 1882), s. 111.

*Appeal from Appellate Decree, No. 2536, of 1902, against the decree of G. Gordon, District Judge of Sarun, dated September 3, 1902, reversing the decree of Moti Lal Haldar, Subordinate Judge of Chapra, dated June 19, 1900.

1905
JAN. 17.

APPELLATE CIVIL.

32 C. 576=2 C. L. J. 73.

The law of equitable set-off applies where the cross-claims, though not arising out of the same transaction, are closely connected together.

Where, after making the payments stipulated in a deed of usufructuary mortgage, a surplus began to accumulate in the hands of the mortgagee, he would be entitled to set-off against such accumulations a claim for rents subsequently accruing due to him from the mortgagor in respect of a holding owned by the latter and included in the mortgaged property, notwithstanding that such rents might be barred by limitation.

Nursingh Narain Singh v. *Lukputty Singh* (1) referred to.

[Ref. 25 M. L. J. 561=1914 M. W. N. 198=21 I. C. 701; 53 I. C. 284=37 M. L. J. 193=10 L. W. 183=1919 M. W. N. 628=26 M. L. T. 276; Rel 19 C. W. N. 1183=21 I. C. 716.]

SECOND APPEAL by the plaintiff Sheo Saran Singh.

Mussammat Dhanwanti Kunwar as guardian of the plaintiff executed a *zurpeshgi ticca patta* in favour of Sheo Golam Shah father of the defendant, Mohabir Pershad Shah, on the 23rd February 1871 in respect of certain properties belonging to the plaintiff on receipt of a sum of Rs. 600 as *zurpeshgi* money, at a consolidated and fixed annual *jama* of Rs. 153-9. The deed stipulated that out of the said *jama* of Rs. 153-9 the *zurpeshgidar* would pay Rs. 50-13½ on account of the revenue for the *zurpeshgi* properties, Rs. 72 on account of maintenance to three ladies, Ajnasi Kunwar, Sonebanti Kunwar and Badamo Kunwar, and appropriate the remaining Rs. 30-11-6 as well as whatever profit he might [577] make out of the properties in lieu of interest for the *zurpeshgi* money; it was further stipulated in the deed that on the death of one or more of the three ladies the *zurpeshgidar* should from after their death pay annually the portion of the maintenance allowance that was payable to the deceased, and after the death of all the three ladies, pay the whole sum of Rs. 72, as the *ajiri* right, to the mortgagor. The *purnamasij* day of Bhadro 1282 was fixed as the due date. Within the mortgaged property the mortgagor continued to hold as a tenant some land for which he was liable to pay Rs. 27-2-9 a year as rent. The *zurpeshgi* deed made no mention of this rent. One of the ladies died on the 20th March 1881, another on the 27th April 1881, and the third died on the 21st July 1885.

The plaintiff brought this suit on the 23rd August 1898 praying for a decree for the recovery of possession of the *zurpeshgi* properties with mesne profits, on the allegation that the entire *zurpeshgi* money had been paid off out of the money payable by the *zurpeshgidar* as *ajiri* right as aforesaid, or in the alternative for redemption, should any portion of the mortgage money be upon an account, found due.

The defendant pleaded that the plaintiff held various plots of land as tenant under him, and that he, the defendant, had been paying the money payable to the plaintiff as *ajiri* right by setting off the same against the rent. He alleged that the total amount due to the plaintiff as *ajiri* right from the year 1288, in which the right began to accrue, was Rs. 1,126; against this he claimed to set off Rs. 805-9-10 due as rent from the year 1288, leaving only Rs. 320-6-10 to the credit of the plaintiff. He therefore pleaded that the *zurpeshgi* money had not been fully paid off and that the suit should fail.

The Court of first instance held that the defendant being a mortgagee in possession was not entitled to add the rents to the mortgage money, and that, if he was entitled to any set-off at all, he could only set-off the rent

(1) (1879) I. L. R. 5 Cal. 333.

1905 JAN. 17.

APPELLATE CIVIL.

32 C. 576=2 C. L. J. 73.

due in respect of the holding included in the mortgaged property, viz., Rs. 27-2-9 per annum, from the year 1288; in either view the *zurpeshgi* money would be satisfied out of the money due to the plaintiff as *ajiri* right.

The plaintiff's suit was accordingly decreed.

[578] On appeal by the defendant the learned District Judge held that the defendant was entitled to set-off the rent of Rs. 27-2-9 per annum from the date of the *zurpeshgi* lease, and in that view he found that the *zurpeshgi* money had not been paid off and he dismissed the suit.

The plaintiff then appealed to the High Court.

Babu *Mahendra Nath Roy* (Babu *Jnanendra Nath Bose* with him), for the appellant. The mortgagee was entitled to rent from the mortgagor, but the rent could not be added to the mortgage debt; the right of a mortgagee to add to the mortgage money is dealt with in s. 72 of the Transfer of Property Act, which lays down no new law; the principle according to which accounts are taken between mortgagor and mortgagee is contained in s. 76 of the Transfer of Property Act; at all events rents due prior to 1288 B. S. should not have been set-off; the defendant in his written statement claimed a set-off only in respect of rents due from 1288. In no event should the suit, which was one for redemption as well, have been dismissed.

Babu *Dwarka Nath Mitter*, for the respondent. The *zurpeshgi* provides that, until payment of the full amount the plaintiff cannot get back possession: the finding is that the amount has not been paid off, the suit is therefore premature, the suit is really for ejectment, in the plaint the mortgagee is said to be a trespasser and in the lower Court the plaintiff made no offer to pay. As to setting off and accounts, see *Hunooman-persaud Panday* v. *Babooee Munraj Koonwaree* (1) in which at p. 421 of the report the question is discussed. The Transfer of Property Act has no application, the *zurpeshgi* being dated in 1871.

[BRETT, J. The accounting must be limited to the mortgage transaction; you say that this rent is within that transaction, how do you show that?]

[RAMPINI, J. You cannot set-off a barred debt; *Rookminy Bullub Roy* v. *Muln Jamania Begum* (2).]

[579] Regard being had to the relationship between the parties and the running accounts there is no limitation: *Nursingh Narain Singh* v. *Luk-putty Singh* (3).

[BRETT, J. What possible running account could there be till the maintenance of one of the widows fell in?]

The mortgagee would remain responsible for the consolidated *jama* of Rs. 153 odd fixed by the *zurpeshgi* even if the plaintiff did not pay the rent of the holding included in the mortgaged property, that would be inequitable.

Babu *Mohendra Nath Roy*, in reply.

RAMPINI, J. The plaintiff in this suit is a mortgagor. The defendant advanced to him in 1871 the sum of Rs. 6,000 on a usufructuary mortgage and was put in possession of the property. The plaintiff now sues to recover possession of the property and mesne profits on the allegation that the advance has long been paid off.

(1) (1856) 6 Moo. I. A. 393.
(2) (1883) I. L. R. 9 Cal. 914.
(3) (1879) I. L. R. 5 Cal. 333.

1905 JAN. 17.

APPELLATE CIVIL.

32 C. 576=2 C. L. J. 73.

The defendant alleges that the advance has not been paid off. The property yielded Rs. 153-9 per annum, and under the terms of the deed the defendant had to pay Government revenue Rs. 50-13-6, for the maintenance of three widows Rs. 72-0-0 and to appropriate the balance Rs. 30-11-6 as interest on the loan. Total Rs. 153-9.

The widows died successively in 1881 and 1885, so that a surplus began to accumulate in the defendant's hands from the former of these years.

Admittedly the debt would now have been paid off, but against that the defendant claims to set-off a sum of Rs. 27-2-9, which the plaintiff had to pay to him for rent of a holding in the mortgaged property and which it is not shown that the plaintiff ever paid.

The District Judge has allowed the defendant credit for this rent from the commencement of the occupation of the mortgaged property under the deed. The plaintiff now appeals.

On his behalf it is urged that the rent cannot be set-off against the debt, (1) because these cross-claims do not relate to the same transaction, (2) that the defendant's claim for rent, or the greater [580] part of it, is barred by limitation. It is further contended that even if the defendant's cross-claim can be set-off, the set-off should be allowed only from the date of the first widow's death, and it is pointed out that the defendant in his account appended to his written statement only claims the set-off from this date, and that if the set-off be allowed from this date only, then the debt has been wiped out and the plaintiff is entitled to succeed.

It appears to me that the set-off must be allowed. The law of equitable set-off as laid down in section 111 of the Code of Civil Procedure has been much widened by the case of *Clark* v. *Ruthnaveloo Chetti* (1) and the numerous cases in which that decision has been followed. The present case would appear to me to be one in which it would be inequitable to drive the defendant to a cross-suit. The cross-claims, if they do not, strictly speaking, arise out of the same transaction, are closely connected together. The plaintiff's holding for which the rent of Rs. 27 is due is part of the mortgaged property. The rent becomes payable to the defendant owing to the deed of 1871 and the defendant having been put in possession under that deed.

The facts of the case are similar to those of *Nursingh Narain Singh* v. *Luckputty Singh* (2), which is also an authority for holding that such rents can be set-off, even though they may be barred by limitation. The question then arises "from what date is the set-off to be allowed"? I am of opinion that the Judge is wrong in holding that it should be allowed from the date of commencement of the occupation under the deed. In my opinion it should be allowed from the date of the deaths of the widows, (1) because the defendant in his account appended to his written statement claims the set-off only from this date: (2) because it is only from that date that he can reasonably be allowed a set-off; up to that date, he had no surplus funds in his hands. The income of the property was allotted by the deed. If he did not choose to collect the rent of the plaintiff's holding from the plaintiff, he had till then no excuse for not doing so. He must suffer for his laches. After the death of the widows, a surplus began to accumulate in his hands, and he had then some reason for not collecting the [581] rent of the holding from the plaintiff, viz., that he owed money

(1) (1865) 2 Mad. H. C. 296. (2) (1879) I. L. R. 5 Cal. 383.

1905 JAN. 17.

APPELLATE CIVIL.

32 C. 576=2 C. L. J. 73.

to the plaintiff and did not need to collect from the plaintiff what the plaintiff owed him.

I would therefore allow this appeal with costs, and would direct that the accounts be made up between the parties on this principle.

This can be done when the question of mesne profits is entered into in the execution of the decree. But it is admitted that if accounts be made up on this principle, the debt has been wiped out. So the plaintiff is entitled to immediate possession of the property.

BRETT, J. I agree.

Appeal allowed.

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32 C. 582 (=9 C. W. N. 421.)

[582] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

PEARY MOHAN MUKERJEE *v.* NARENDRA NATH MUKERJEE.*

[24th February, 1905.]

Parties, addition of—Limitation—Debutter property—New defendant—Limitation Act (XV of 1877), s. 22.—Civil Procedure Code (Act XIV of 1882), s. 32.—Sebait—Right of, to be indemnified.

Where relief is originally claimed against a party who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a " new defendant " to the suit.

Plaintiffs instituted a suit praying *inter alia* for a decree for a sum of money against a *debutter* estate, the defendants to the suit being, among other persons, P. who was impleaded as Receiver of the *debutter* estate and also in his personal capacity; no one of the defendants was impleaded as representing the *debutter* estate. Subsequently, and after the expiry of the period of limitation prescribed for the suit, the plaint was amended and P. was impleaded also as *sebait* and representing the *debutter* estate.

Held, that this was not adding a new defendant to the suit and that the claim against the *debutter* estate was not barred by limitation.

Khem Karan v. *Har Dayal* (1); *Prosunno Kumar Sen* v. *Mahabharat Saha* (2) approved. *Imamuddin* v. *Liladhar* (3); *Weldon* v. *Neal* (4); *Manni Kasaundhan* v. *Crooke* (5) referred to.

A *sebait*, who is obliged to pay money of his own for the benefit of the *debutter* estate, is entitled to have the same made good out of the estate.

[**Ref.** 25 M. L. J. 452=14 M. L. T. 437=21 I. C. 421; 16 M. L. T. 251=25 I. C. 945; 18 C. W. N. 464=19 I. C. 963; 17 C. W. N. 964=18 I. C. 394; **Fol.** 29 I. C. 680=20 C. W. N. 49=22 C. L. J. 279; **Affirm.** 37 Cal. 229.]

APPEAL by the defendant Raja Peary Mohan Mukerjee.

The facts of the case relevant to this report were as follows: Jagamohan Mookerjee, the common ancestor of the parties, died on the 4th Aswin 1247, leaving four sons: Joykrishna and Rajkrishna by his first wife, Bejoykrishna by his second wife and [583] Navakrishna by his third wife. By his will, dated the 28th Bhadra 1247, he set apart certain properties to provide for the *seba* of the deities Sri Sri Ishwar Gopaleshwar Shiva and Sri Sri Ishwar Sridhar and for the performance of certain

* Appeal from Original Decree, No. 359 of 1903, against the decree of Akhoy Kumar Bose, Subordinate Judge of Hooghly, dated June 30, 1903.

(1) (1881) I. L. R. 4 All. 37.
(2) (1903) 7 C. W. N. 575.
(3) (1892) I. L. R. 14 All. 524.
(4) (1887) 19 Q. B. D. 394
(5) (1879) I. L. R. 2 All. 296.