

tiff has been for more than twelve years in possession of the land paying rent to the trustee of the endowment, and that he has therefore acquired a right of occupancy.

There appears therefore no ground for interfering with this decision. The special appeal must be dismissed with costs.

MITTER, J.—I concur.

1869
GAURHABI
SING
v.
BEHARI RAUT

Before Mr. Justice Glover and Mr. Justice Mitter.

BHAIRO SING AND ANTOHER (PLAINTIFFS) v. UDIKARAN SING
(DEFENDANT.) *

1869
Aug. 6.¹

Act X of 1859, s. 23—Suit for Declaration of Title—Act VIII of 1859, s. 2.

In a suit for declaration of title to land, from which a ryot has been ejected at the suit of his zemindar, by the order of a Collector, under section 23, Act X. of 1859, and wherein the genuineness of the patta upon which the suit is brought is at issue, the order of the Collector cannot be pleaded in bar

Mr. C. Gregory for appellants.

Baboo Chandra Madhab Ghose for respondent.

GLOVER, J.—The plaintiff in this case sued for confirmation of possession and for a declaration of his title in 8 bigas 10 katas of *jerat* land; his cause of action being the slur cast upon his title by the decision of the Collector in a suit brought by the defendant under clause 6, section 23, Act X of 1859, in which the defendant was declared to have been illegally ejected by the zemindar.

In that suit the defendant got a decree on the strength of a patta said to have been given to him by the plaintiff's vendor. The Judge on appeal has held that the present suit is identical with the one already decided by the Collector, inasmuch as in both the genuineness of the patta was the point at issue, and has dismissed plaintiff's suit as barred by section 2, Act VIII. of 1859.

There is no doubt a decision of this Court in the case of *Ram Bhujjun Bhuggut v. Ketai Ram Chowdree* (1) in favor of this position, but the decision has been subsequently overruled by the Full Bench in the case of *Gooroo Doss Rai v. Ramnarayan Mitter* (2), in which it was laid down that clause 6, section 23, Act X. of 1859, refers only to possessory actions against the persons entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given in pursuance of that title. "Full meaning," the learned Judges say, "may, and we think must, be given to the words illegally ejected without treating them as giving a wider sense

See SUP.
VOL F B R

* Special Appeal, No. 1160 of 1869, from a decree of the Judge of Tirhoot, dated the 15th March 1869, reversing a decree of the Moonsiff of that district, dated the 28th. August 1868.

(1) 6 W. R., Act X. Rul., 22. (2) Case No. 137 of 1864; Feb. 22nd, 1867.

1869
BHAIBO SING
v.
UDIKARAN
SING.

to the words above mentioned ;" and another case, *Araikun Dey v. Golam Hossein* (1), is exactly in point with this, and rules that a Collector's judgment as to the genuineness of a patta cannot be pleaded as an estoppel in the Civil Court in an action for ejectment.

There appears to be no difference as to the principle involved between an action for ejectment and one for declaration of title, and we therefore think that the Judge's decision was wrong.

The appeal is allowed with costs, and the case remanded to the lower Appellate Court for trial on the merits.

Def re Mr. Justice Macpherson and Mr. Justice Glover.

1869
Aug 9

FISWANATH MUKHOPADHYA AND ANOTHER (TWO OF THE
DEFENDANT) v. GOSAIN DAS BARA MADAK (PLAINTIFF)*

Suit to enforce a Lien on Land—Sale of Mortgaged Premises.

SEE ALSO
14 B. L. R.,
41.

A suit to enforce a lien on land which has been mortgaged will lie, and the land as it stood at the time of the mortgage free from subsequent incumbrances may be sold, although a decree for money due upon the mortgage has been obtained, and the right, title, and interest of the mortgagor thereto has under such been once sold.

Baboo *Krishna Sukha Mookerjee* and *Nilmadhab Sen* for appellants.

Baboo *Hem Chandra Banerjee* and *Mahesh Chandra Bose* for respondent.

THE facts of the case sufficiently appear in the judgment of

MACPHERSON, J.—The facts are these: The defendants, Kanto and Radha Sayam Madak, on the 4th of Falgun 1263 (1856), gave the defendant, Krishna Mohan Mookerjee, a bond, to secure the repayment of a certain sum of money. By that bond they hypothecated or mortgaged the lands which are now in suit, by way of further security.

On the 21st Baisakh 1268 (1861), Kanto and Radha Sayam Madak sold those same lands to the defendants, Biswanath and Bholanath.

In 1269 (1862) Krishna Mohan Mookerjee brought a suit on the bond, for the money due to him, and got a decree, no allusion being made to the lands or the existence of a mortgage. This decree is dated the 21st May 1863.

In execution of the decree Krishna Mohan attached the lands covered by his bond, and applied to have them sold. He was opposed by Biswanath and Bholanath, who claimed under their purchase of 21st Baisakh 1268 (1861).

Their claim was disallowed, the lands were actually sold in June 1866, and Krishna Mohan himself purchased them at the sale in execution of his own decree.

* Special Appeal, No. 890 of 1869, from a decree of the Judge of West Burdwan, dated the 19th January 1869, affirming a decree of the Subordinate Judge of that district, dated the 29th October 1868.