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on him, and also of showing that he was unable to collect the full rental owing to circumstances which would relieve him of the responsibility of accounting to the shareholders for the full rental. The District Judge allowed this contention; and, as the defendant had not proved that he had not collected the full rental, and had not shown that he was unavoidably prevented from collecting, he gave the plaintiff a decree for the amount he claimed.

The heirs of the lambardár appealed to the High Court.

Mr. *Carapiet*, for the appellants.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

BRODHURST and TYRRELL, JJ.—The burden of proof has been wrongly laid by the appellate Court on the lambardár in this case. When a co-sharer claims a dividend on the full rental, and the lambardár pleads in reply that the actual collection fell short of that rental, it is incumbent on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardár in the sense of s. 209 of the Rent Act, before he can succeed in getting a decree for a sum in excess of the actual collections. The Court below has ruled erroneously to the contrary effect; and we must modify his decree to this extent.

The appeal is allowed, with costs in proportion to the amount by which the decree will be thus reduced.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

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December 12.

CHHIDDU (DEFENDANT) v. NARPAT AND OTHERS (PLAINTIFFS).*

Jurisdiction—Civil and Revenue Courts—Suit by lessee of occupancy-tenant for recovery of possession—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 95 (*a*).

S. 95 (*a*) of the N.-W. P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease, from which the lessor has ejected him; and such a suit is exclusively cognizable by the Revenue Courts. *Muhammad Zaki* v. *Hasfat Khan* (1) and *Ribban* v. *Partab Singh* (2) distinguished.

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* Second Appeal No 189 of 1885, from a decree of Maulvi Muhammad Abdul Basit, Subordinate Judge of Mainpuri, dated the 17th September, 1884, reversing a decree of Maulvi Sakhawat Ali, Munsif of Etah, dated the 27th June, 1884.

(1) Weekly Notes, 1882, p. 61. (2) I. L. R., 6 All., 81.

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THE plaintiffs in this suit, claiming to be the sub-tenants of the defendant, a tenant with a right of occupancy, under a lease in writing, and alleging that the defendant had illegally ejected them, sued for possession of the land leased to them. The suit was instituted in the Court of the Munsif of Etah. The defendants set up as a defence to the suit, amongst other things, that the suit was one cognizable in the Revenue and not in the Civil Courts. Upon the issue framed on this contention the Munsif held, that, the dispute being between two cultivators, the suit was cognizable in the Civil Courts, and, deciding the other issues in favour of the defendant, dismissed the suit. On appeal by the plaintiffs, the lower appellate Court (Subordinate Judge of Mainpuri) gave them a decree, holding also, for the same reason as the Munsif, that the suit was one of which the Civil Courts could take cognizance.

The defendant appealed to the High Court.

Mr. *Simeon*, for the appellant.

Babu *Ram Das Chakarbati*, for the respondents.

OLDFIELD, J.—In this case it is admitted that the defendant has the rights of an occupancy cultivator in this land, and the plaintiff is a lessee from him. The suit is a suit to recover possession of the land under the lease from which the defendant has ejected the plaintiff. The only question before us is, whether the Civil Court has jurisdiction to entertain this suit. In my opinion the finding of the lower Court on this question is wrong. The suit is exclusively cognizable by the Revenue Courts. The lower Court is wrong in holding that when both the parties are cultivators the suit is cognizable by the Civil Courts, because there is no relation in that case of landholder and tenant as contemplated by the Rent Act. This is not so; the matter in suit is a matter on which an application of the nature mentioned in s. 95 (*n*)—"application for recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed"—might be made. The rulings cited by the learned pleader for the respondent—*Muhammad Zaki* v. *Hasrat Khan* (1) and *Ribban* v. *Partab Singh* (2)—are distinguishable. In those cases the suit was brought against the

(1) Weekly Notes, 1882, p. 61. (2) I. L. R., 6 All., 81.

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defendant as a trespasser for a declaration of right. The decree of the Court below is reversed, and the suit is dismissed with costs in all Courts.

PETHERAM, C. J.—I concur.

Appeal allowed.

1885
December 14.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

MUHAMMAD ABID AND ANOTHER (PLAINTIFFS), *v.* MUHAMMAD ASGHAR (DEFENDANT).*

Arbitration—Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code, ss. 508, 509, 511, 523—*Application to set aside award—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 158.

In an agreement to refer certain matters to arbitration, which was filed in court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire, or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

Held that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award, such as the law contemplated. *Lachman Das* v. *Brijpal* (1) referred to.

Held that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

Held that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

Held also that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure

* Second Appeal No. 191 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 21st November, 1884, reversing a decree of Maulvi Nasr-ul-la Khan, Subordinate Judge of Jaunpur, dated the 31st March, 1884.

(1) I. L. R., 6 All., 174.