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AMIR SINGH v. NAIMATI PRASAD.

were the titles and the proprietary rights of other pattidárs in their own *pattis* ever questioned. The question was, how was the common land to be divided, and what were the rights of the parties as to the *quantum* of common land to which they were entitled? That question must necessarily be decided by some custom or rule of law, and if it is to be decided by custom or by rule of law, it must involve a question of title or proprietary right. The plaintiffs, in order to succeed, must have said that by custom or rule of law they were entitled to a larger area in the common land than was allotted to them. I cannot see how this could have been determined without a question of title or proprietary right being raised between the owners of the various *pattis*, not in respect of their *pattis*, but in respect of the common land. That being so, I think this case falls within s. 13 of the Civil Procedure Code, and this action is barred. I agree with the Judge below in the observation made by him that any mistakes of procedure did not affect this question. The appeal is dismissed with costs.

BRODHURST, J.—In my opinion the suit has been properly dismissed by the lower appellate Court, and I concur in dismissing the appeal with costs.

Appeal dismissed.

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February 5.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAM BAKHSH (PLAINTIFF) *v.* DURJAN AND OTHERS (DEFENDANTS)*.

Evidence—Bond—Contemporaneous oral agreement providing for mode of repayment—Act I of 1872 *(Evidence Act), s.* 92.

In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of the execution of the bond, it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents; that, in accordance with this agreement, the plaintiff obtained possession of the land; and that he had thus realized the whole of the amount due.

Held that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence.

THE plaintiff in this case, one Ram Bakhsh, sued to recover a sum of money, principal and interest, due on a bond executed in

* Second Appeal No. 57[illegible] of 1886, from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 8th January, 1886, reversing a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 31st January, 1884.

his favour by Durjan and others, on the 12th November, 1871. The amount secured by the bond was Rs. 1,200, and it was stipulated that this should be repaid by instalments, as follows:—Rs. 100 to be paid at the end of Magh Sambat 1928, and Rs. 25 in Baisakh and Katik of every year, and interest on unpaid instalments to be charged at Re. 1 per cent. per mensem. In the event of default in payment of four instalments, the whole amount due under the bond was to be recoverable in a lump sum with interest at Re. 1 per cent. The bond further contained a hypothecation of immoveable property. The plaintiff alleged that nothing had been paid under the bond, and he claimed Rs. 1,300 from the defendants by enforcement of lien against the hypothecated property.

The defendants pleaded that at the time of the execution of the bond an oral agreement was made that the plaintiff was to have possession of certain land which was included in the hypothecation, until the amount due on the bond should have been liquidated from the yearly rent of the land, which was fixed at Rs. 50; that, under this agreement, the plaintiff obtained possession of the land and received the rents; and that in this way the whole amount due had been realized.

The Court of first instance (Subordinate Judge of Aligarh) decreed the claim. The lower appellate Court (District Judge of Aligarh) set aside the decree and dismissed the suit, finding that the arrangement alleged by the defendants as to the mode of repayment had been proved, and that the conditions of the bond had been satisfied by a payment of Rs. 100 in January, 1872, and by the receipt of rents equivalent to the yearly instalments of Rs. 50. The plaintiff appealed to the High Court.

Mr. *Habib-ul-lah* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Ram Prasad* and Lala *Durga Charan Banerji*, for the respondents.

EDGE, C. J.—In this case the only question is, the action being in respect of a bond payable by instalments, and the defendants in answer to the action saying that at the time of the giving of this bond it was orally agreed to let the creditor have possession in lieu of instalments, whether the evidence of that contract, which

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was not in writing, is admissible. I think it is. It was a contract which did not detract from, add to, or vary the original contract. It was only providing for the means by which the instalments were to be paid. The appellant got possession in accordance with the oral agreement. The appeal is dismissed with costs.

TYRRELL, J., concurred.

Appeal dismissed.

1887
February 8.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Oldfield, and Mr. Justice Brodhurst.

GOBIND RAM (DEFENDANT) v. NARAIN DAS (PLAINTIFF)*.

Landholder and tenant—Suit for rent where the right to receive it is disputed—Third person who has received rent made party—Jurisdiction of Rent Court to pass decree for rent against such party—Question of title—Act XII of 1881 (*N.-W. P. Rent Act*) s. 148.

In a suit by a landholder for recovery of rent in which a third person alleged to have received such rent is made a party under s. 148 of the N.-W. P. Rent Act (XII of 1881), the question of title to receive the rent cannot be determined between the plaintiff and such person, but can only be litigated and determined in a subsequent suit in the Civil Court. The only question between the plaintiff and the person so made a party which can be determined in the Rent Court under s. 148 is the actual receipt and enjoyment of the rent.

A party who is brought in under s. 148 of the Rent Act cannot be made subject to the decree for rent so as to allow execution to be taken out against him, whether his *bonâ fide* receipt and enjoyment of the rent is proved or not. The only person against whom such a decree can be passed is the tenant. *Madho Prasad* v. *Ambar* (1) referred to.

Per EDGE, C. J., *semble*, that the intention of the Legislature in allowing a third person who claims under s. 148 of the Rent Act to be made a party to the suit may possibly have been that, by bringing him in, he may be bound by a declaration in the suit that he had in fact received the rent, so as to prevent him in the civil suit from denying the fact that he had received it.

In a suit by a landholder for recovery of rent, the defendants pleaded that they had paid the rent to a co-sharer of the plaintiff. The co-sharer made a deposition in which he alleged that he was entitled to the rent, not only as a co-sharer, but also as the appointed agent of the plaintiff. The Court thereupon made him a party to the suit under s. 148 of the Rent Act, and passed a joint decree against him and the tenant for rent.

Held that the Court was justified in making him a party under s. 148 of the Rent Act, but was not competent to pass a decree for rent against him.

* Second Appeal No. 504 of 1886 from a decree of C. W. P. Watts Esq., District Judge of Moradabad, dated the 25th November, 1885, reversing a decree of Maulvi Muhammad Usman, Assistant Collector of Moradabad, dated the 19th March, 1885.

(1) I. L. R., 5 All. 503.