1888
November 12.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

MAHADEO SINGH AND OTHERS (PLAINTIFFS) *v.* BACHU SINGH AND OTHERS (DEFENDANTS).*

Jurisdiction—Civil and Revenue Courts—Suit by co-sharers in a joint undivided mahál for declaration of title to receive proportionate share of rent and for recovery thereof—Denial of plaintiffs' title by co-sharers-defendants—Suit not maintainable—Act XII of 1881 *(North-Western Provinces Rent Act), ss.* 93 *(h),* 106, 148—*Act I of* 1877 *(Specific Relief Act), s.* 42—*Civil Procedure Code, s.* 11.

The effect and intention of the proviso to s. 148 of the North-Western Provinces Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under s. 42 of the Specific Relief Act (I of 1877), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided mahál for a declaration of their title to receive a proportionate share of the rent payable by the tenants.

Having regard to s. 11 of the Civil Procedure Code, a suit for the recovery of certain sums of money as the plaintiffs' share of rent alleged by them to have been wrongfully received by the defendants, their co-sharers, and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 *(h)* of the North-Western Provinces Rent Act. That provision does not contemplate suits in which such claims of title are so made and resisted.

But a suit by some of the co-sharers in a joint and undivided mahál for such declaration and such recovery of a proportionate share of rent as above referred to, is barred by the provisions of s. 106 of the North-Western Provinces Rent Act, in the absence of proof of local custom or special contract authorising such suits.

THE plaintiffs in this case formed one of three sets of co-sharers of a village, and they instituted a suit against one of the tenants, alleging that although the village was held in joint and undivided shares, each co-sharer of the *taluka* collected rents from the tenants to the extent of his share. The suit was instituted under the N.-W. P. Rent Act (XII of 1881) in the Revenue Court, and the tenant defendant in that case pleaded payment of the full amount of rent

* Second Appeal No. 1950 of 1886 from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 2nd August, 1886, confirming a decree of Maulvi Inamul-Haqq, Munsif of Ballia, dated the 24th December, 1885.

to another set of co-sharers in the *taluka*, and thereupon those co-sharers were impleaded as defendants and pleaded that they were entitled to collect the entire rent from the tenant against whom that suit was instituted. That suit was dismissed by the Rent Court upon the ground that the *mahál* being joint and undivided, the plaintiffs were not entitled to sue for their share of rent only, and that their proper remedy was to sue for settlement of account against their co-sharers.

The plaintiffs, dealing with the Rent Court's decision as one under the latter part of s. 148 of the North-Western Provinces Rent Act, instituted this suit in the Civil Court under the proviso to that section, with the object of obtaining a declaration of their title to receive one-third of the rent payable by the tenant, and for recovery of certain sums of money alleged to be their share of the rent paid by the tenant to the other co-sharers, the first set of defendants.

The suit was resisted upon various minor pleas, but the main pleas urged in defence were that such a suit was not maintainable, as the decision of the Rent Court was not such as s. 148 contemplated, and that the plaintiffs had no right to receive any share of the rent from the tenant in question.

The Court of first instance (Munsif of Ballia) dismissed the suit, holding that the Rent Court's decision was based on s. 106 of the North-Western Provinces Rent Act prohibiting separate rent suits by co-sharers for their respective shares of rent; that the decision was not of the nature contemplated by s. 148 of the Act; and that the Civil Court therefore had no jurisdiction to entertain the suit. The Munsif further held that "no attempt has been made and no evidence has been adduced to prove the existence of" any local custom or special custom authorising the maintenance of such a suit in this particular case.

On appeal, the District Judge of Ghazipur affirmed the Munsif's decree. Upon the question of local custom, he observed:—"Custom was not set up in the Revenue Court. There is no sufficient proof of the alleged harassing and destructive custom, and partial

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admissions of some of the respondents, if embodied in the *wajib-ul-arz*, would not convince me that such monstrous custom prevailed."

The plaintiffs instituted a second appeal from the decrees of the Munsif and the District Judge.

Munshi *Jwala Prasad*, for the appellants.

The Hon. *T. Conlan* and Mr. *J. E. Howard*, for the respondents.

MAHMOOD, J. (after stating the facts, continued) :—Upon appeal by the plaintiffs to the lower appellate Court, the learned Judge of that Court, whilst concurring in the general conclusions of the first Court, has recorded some observations which go beyond the exigencies of the case and with which I am not concerned here. The only point which has been urged before me in second appeal, on behalf of the plaintiffs-appellants, is that the Courts below have erred in law in holding that the suit did not lie, and that they should have decided it on the merits.

I do not think it is necessary for me to decide whether the Rent Court's decision in this case dismissing the plaintiffs' suit for rent was an adjudication such as s. 148 of the Rent Act contemplates, because whether it was so or not, a decision under that section is not in my opinion an essential condition precedent to the maintainability of a declaratory suit in the Civil Court, for such matters are dealt with under s. 42 of the Specific Relief Act (I of 1877). The effect and intention of the proviso to s. 148 of the Rent Act seems to be to preserve the Civil Court's jurisdiction, while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as the section contemplates. But neither the section nor the proviso aims at laying down any rules governing questions of the jurisdiction of the Civil Court in connection with declaratory suits. The suit therefore, so far as it sought a declaration of the plaintiffs' right to collect their one-third share of rents was maintainable as a suit of civil nature, and there was no want of jurisdiction in its strict sense. Nor do I think that the suit, so far as it sought to recover certain sums of money as the plaintiffs' share of the rent alleged to have been wrongfully realized by their

co-sharers, the first set of defendants, fell beyond the jurisdiction of the Civil Court. To oust such jurisdiction, the provisions of s. 11 of the Civil Procedure Code require the existence of a legislative enactment. In the present case all that has been suggested is that the claim for money, being between two co-sharers, partook of the nature of a suit such as that contemplated by cl. (*h*) of s. 93 of the Rent Act and that it was therefore not cognizable by the Civil Court. But in the present case, the right of the plaintiffs to receive any portion of the rents claimed is denied by their co-sharers the defendants, and the form of the suit itself seeks establishment of title, and consequent recovery of such portions of the rents as the plaintiffs allege themselves entitled to by virtue of their disputed right. In my opinion cl. (*h*) of s. 93 of the Rent Act does not contemplate suits in which such claims of title are made and resisted upon denial of the plaintiffs' right.

For these reasons I am of opinion that both the Courts below were wrong in holding that the Civil Court had no jurisdiction to entertain the suit.

But this view of the preliminary points in the case does not go far to help the plaintiffs-appellants, for their case is bad on the merits. The relief they pray for both in point of declaration of title and recovery of money, cannot be granted to them unless they show that such relief can be granted in accordance with the law.

Now, in the first place, it has been found by the Courts below as a matter of fact that the *mahál* of which the plaintiffs are co-sharers is joint undivided property within the meaning of s. 106 of the Rent Act, which lays down that :—

"No co-sharer in an undivided property shall, in that character, be entitled separately to sue a tenant under this Act, unless he is authorised to receive from such tenant the whole of the rent payable by such tenant; but nothing in this section shall affect any local custom or any special contract."

The rent-law of these Provinces is therefore clearly opposed to the declaration which the plaintiffs seek, namely, that they are

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entitled to recover from each tenant of the *mahál* their proportionate share of rent, leaving the remainder to be collected by the other co-sharers in proportion to their respective shares in the *mahál*. The section says that such is not to be the case, unless local custom or special contract is established. Now, in the present case the Court of first instance observes :—"No attempt has been made and no evidence has been adduced to prove the existence of any such custom in this case," and the lower appellate Court has used even more emphatic language. The learned Judge of that Court observed :—

"Custom was not set up in the Revenue Court. There is no sufficient proof of the alleged harassing and destructive custom, and partial admissions of some of the respondents if embodied in the *wajib-ul-arz* would not convince me that such monstrous custom prevailed."

Sitting here as a Judge of second appeal I must accept these concurrent findings of fact, and must hold that the plaintiffs have failed to prove any such custom as would entitle them to the declaration that they have a right to realize or claim only their proportionate share of rent from tenants in the *mahál* in opposition to the general rule of the rent-law of these Provinces enunciated in s. 106 of the Rent Act. It follows that neither the declaration nor the money which they claim in this suit as the consequence of such declaration can be awarded to the plaintiffs-appellants.

For these reasons the grounds urged in appeal cannot prevail and I dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Mahmood.

MUHAMMAD SULAIMAN (JUDGMENT-DEBTOR) *v.* JHUKKI LÁL (DECREE-HOLDER).*

Execution of decree—Compromise—Estoppel—Civil Procedure Code, ss. 257A, 375, 647.

Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of s. 375 read with s. 647 of the Civil Procedure

* Second Appeal No. 1408 of 1887 from a decree of R. G. Hardy, Esq., Deputy-Commissioner of Jhánsi, dated the 12th July, 1887, confirming a decree of Pandit Gopal Rao, Deputy Collector of Jhánsi, dated the 30th May, 1887.