

not barred from bringing his suit by limitation. Substitute for Issue 1 the following issues:—

IA. Is the plaintiff (having regard to the foregoing declaration) proprietor of the land on which the bazar called Amaniganj in Sandila is situate?

IB. Have the residents of the bazar any and, if so, what rights and interests in the houses and shops therein occupied by them?

Remand the case to the Subordinate Judge for trial of the above issues, and also (if and so far as necessary) of Issues 4 and 5. Direct that the costs of the trial which has already taken place and of the appeals to the District Judge and Judicial Commissioner respectively abide the result of the suit. And they will humbly advise His Majesty accordingly.

Their Lordships observe that the Issue 4 does not accurately follow the words in which the custom is pleaded in paragraph 4 of the plaint, inasmuch as it speaks of "the value of the materials of the tenant's house" whereas the plaint says "its" (*i.e.* the house's) "estimated price." But no doubt the variance was deliberately made and is the result of explanations given at the time of the settlement of the issues. Their Lordships content themselves with pointing out the variance and will not advise any alteration to be made in the language of the issue.

Their Lordships will direct that the costs of this appeal also do abide the result of the suit and be disposed of by the Courts below accordingly.

Appeal allowed; suit remanded.

Solicitors for the appellant:—Messrs. *Watkins and Lemprière*. C. B.

GANGA BAKHSI SINGH (PLAINTIFF) v. DALIP SINGH AND OTHERS (DEPENDANTS).

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[On appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. XIV of 1891 (Oudh Courts Act), section 8—Appeal—Jurisdiction—Appeal below heard by a Court not properly constituted—Practice.

The Oudh Courts Act (XIV of 1891), section 8, enacts that "an appeal from a decree or order of a Subordinate Judge to the Judicial Commissioner shall be heard by the Judicial Commissioner and the Additional Judicial Commissioner

Present:—Lord Hobhouse, Lord Davey, Lord Robertson and Sir Richard Couch.

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sitting together: provided (i) that the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and the amount or value of the matter in dispute or appeal to the Judicial Commissioner is the same sum or upwards; or (ii) that the decree or order appealed from involves directly or indirectly some claim or question to, or respecting property of, like amount or value." Where to an appeal before the Privy Council an objection was taken as a ground of appeal that a case coming within the above enactment had been heard on appeal by the Additional Judicial Commissioner sitting alone, the Judicial Committee allowed the appeal and remanded the case to be tried by a court properly constituted in accordance with the provisions of section 8 of Act No. XIV of 1891.

APPEAL from a judgment and decree (17th August, 1896) of the Additional Judicial Commissioner of Oudh, whereby a decree (30th June, 1894) of the Subordinate Judge of Rae Bareilly dismissing the appellant's suit, was confirmed.

The plaintiff-appellant was the heir and successor of Sarabjit Singh, taluqdar of the Tikari estate. The defendants-respondents were the sons and grandsons of Sheopal Singh. Sheopal Singh, Binda Sewa, Raghunath Singh and Amir Singh were four brothers, sons of Jang Bahadur. Binda Sewa left a son, Sheoambar Singh. Raghunath Singh left a son, Sarabjit Singh. Amir Singh had no issue. After the confiscation of Oudh the second summary settlement of the taluq was made by the Government with Sarabjit Singh. Amir Singh, Sheopal Singh, and Sheoambar Singh sued him for their shares of the taluq, but their claims were dismissed by the Settlement Courts. They then preferred claims before the British Indian Association, or Committee of Taluqdars. These claims were eventually by agreement of parties disposed of by the Financial Commissioner, who, on the 9th of January, 1869, decided that Sheoambar Singh might be left to derive his maintenance from his own son's taluq, Shabwan. As to Amir Singh and Sheopal Singh, the Financial Commissioner decided that Amir Singh, being childless, should receive for his life a two-annas share in Tikari, and that Sheopal Singh should receive in perpetuity a three-annas share in that taluq; and that on the death of Amir Singh his share should be equally divided, one-anna reverting to Sarabjit Singh and the other going to Sheopal Singh and his heirs or successors.

Amir Singh died on the 23rd of September, 1869, before the decision of the Financial Commissioner had been given effect to,

and Sheopal Singh then applied to be put into possession of lands equivalent to the share allotted to him for maintenance as increased by Amir Singh's death to four annas. Accordingly certain villages "free from rent and liability to revenue" were made over to Sheopal Singh in lieu of Rs. 2,503-8-0 annual maintenance, which, "according to calculation, had been held to be equivalent to a four-anna share in the net profits of taluq Tikari."

Sheopal Singh died on the 11th of February, 1891; and on the 28th of January, 1892, the plaintiff instituted the suit out of which the present appeal arose, claiming in his plaint that from the date of Sheopal's death "the plaintiff acquired a right according to the principles embodied in the rules of maintenance laid down by the Committee of the British Indian Association to receive from the defendants one-fourth of the maintenance amount as an annual rent".

The rule referred to was one of those laid down for the guidance of the Committee, and approved of by the Financial and Chief Commissioners. It provided that where lands rent-free had been allotted as maintenance, in such a case as was the present one, the holders in the second generation should pay 25 per cent. of the profits as rent, and in the third generation 50 per cent.

The plaintiff therefore claimed Rs. 625-14-0 annual rent in respect of the villages held by the defendants.

Various questions were raised by the defence as to the capacity in which the Financial Commissioner gave his decision, as to the applicability of the rules of the British Indian Association and as to whether Sheopal Singh held the villages in perpetuity as proprietor and shareholder and not only for maintenance; but as the appeal to the Judicial Committee was decided on a preliminary ground, those questions are not material to this report.

The plaintiff valued his suit at Rs. 6,258 under section 7, cl. 2 of the Court Fees Act (VII of 1870) and instituted it in the Court of the Subordinate Judge with reference to sections 17 and 18 of Act XIII of 1879.

The suit was dismissed by the Subordinate Judge as not being maintainable; an appeal from that decision was heard by the Additional Judicial Commissioner sitting alone, and he affirmed

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the decree but not the decision of the Subordinate Judge. Section 8 of Act No. XIV of 1891 enacts that "an appeal from a decree or order of a Subordinate Judge to the Judicial Commissioner shall be heard by the Judicial Commissioner and the Additional Judicial Commissioner sitting together: provided (i) that the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to the Judicial Commissioner is the same sum or upwards; or (ii) that the decree or order appealed from involves directly or indirectly some claim or question to or respecting property of like amount or value."

From the decree of the Assistant Judicial Commissioner the plaintiff applied for a certificate of appeal to the Privy Council, and in support of his application he filed affidavits that his claim was worth 20 years' purchase of the annual rent. The first and second Judicial Commissioners who heard the application said "we have no doubt that the amount or value of the subject-matter of the suit in the Court of first instance and of the matter in dispute in appeal to Her Majesty in Council is Rs. 10,000 or upwards, and they granted a certificate that the case was a fit case in point of value for appeal to Her Majesty in Council.

The first and preliminary ground of appeal was—"Because under section 8 of Act No. XIV of 1891 the Additional Judicial Commissioner had no jurisdiction to hear the appeal, which should have been heard by him and the Judicial Commissioner sitting together."

Mr. *Leslie DeGruyther* contended on the above ground that the Additional Judicial Commissioner had no jurisdiction to hear the appeal alone. Section 8 of Act No. XIV of 1891 is express in its terms, and this case would come within cl. (b) proviso-ii of that section; that is, the decree appealed from involved indirectly "a claim or question to or respecting property of Rs. 10,000 or upwards." The appeal should be allowed on this ground. In cases where a similar kind of objection has been taken by a respondent, it was held that the objection must prevail, unless withdrawn or waived—*Ex parte Anderson* (1), where an objection was taken by the respondent that an appeal in bankruptcy had not been heard

(1) (1870) L. R., 5 Ch. Ap., 473.

by the proper court, it rendered the appeal liable to be dismissed, but the objection was withdrawn. In *Hardeo Bax v. Jawahir Singh* (1), where a similar objection was taken, the dismissal of the appeal was avoided by the Judicial Committee granting special leave to appeal and the case proceeded. The objection here is taken as a ground of appeal by the appellant. Act No. XIII of 1879 (the Oudh Civil Courts Act, 1879), sections 17 and 18, as amended by Act No. XX of 1890 (the N.-W. P. and Oudh Act, 1890) sections 39 and 40, was referred to.

Mr. *J. D. Mayne* for the respondents, admitted that the case appeared to be wrongly before the Judicial Committee, the respondents had themselves taken this very point at a former stage of the case.

1901, June 20th.—The judgment of their Lordships was delivered by LORD HOBHOUSE :—

In this case their Lordships will humbly advise His Majesty to discharge the decree of the Additional Judicial Commissioner of Oudh of the 17th of August, 1896, to allow the appeal, and to remand the case to the Court of the Judicial Commissioner of Oudh, to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together, as provided by law.

Their Lordships give no costs of the present proceedings.

Appeal allowed; case remanded.

Solicitors for the appellant :—Messrs. *Watkins and Lempiere*.

Solicitors for the respondents :—Messrs. *T. L. Wilson and Co.*

J. V. W.

BATUL BEGAM (PLAINTIFF) v. MANSUR ALI KHAN AND OTHERS
(DEFENDANTS).

[Appeal from the High Court, North-Western Provinces, Allahabad.]

Act No. XV of 1877 (Indian Limitation Act), schedule ii., articles 10, 120, 144.—*Suit for pre-emption against heir of mortgagor by conditional sale—“Physical possession,” meaning of—Accrual of cause of action in suit for pre-emption of property mortgaged by conditional sale—Expiration of year of grace.*

A suit brought to declare a right of pre-emption against the heir of a mortgagor by conditional sale, who has foreclosed, is governed, where the

Present :—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON and
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(1) (1877) L. R., 4 I. A. 178 : I. L. R., 3 Calc., 522.

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