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v.
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on the plaint was insufficient in view of the provisions of section 17 of the Court Fees Act. That section provides that "where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaint or memorandum of appeal in suits embracing separately each of such subjects would be liable under this Act." A court fee was paid only in respect of the claim for specific performance. No fee was paid on the claim for pre-emption. Mr. Wallach ingeniously argued that the suit did not embrace two or more distinct subjects; that the claim was in reality a claim to recover possession of property either on the ground that the plaintiff was entitled to possession by reason of the agreement for sale or by reason of his right of pre-emption. When we look into the position of matters we find that this is not so. The claim for specific performance is a claim in respect of the proprietary interest in the land. Whereas under the claim for pre-emption the plaintiff respondent could only obtain such interest as the mortgagees of the defendant Hashmat-un-nissa possessed. Their claim in fact is to stand in the shoes of the mortgagees, taking over their bond and obtaining possession as usufructuary mortgagees. These two claims appear to us to be separate and distinct claims, and, as such, to fall within the purview of the section to which we have referred. This being so, the plaint having been insufficiently stamped, there is no alternative for us but to allow the appeal. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BANWARI LAL AND ANOTHER (PLAINTIFFS) v. NIADAR (DEFENDANT).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 201—Suit for profits—Receipt of profits within 12 years of suit denied—Plaintiffs recorded co-sharers—Burden of proof.

The plaintiffs—recorded co-sharers—sued another co-sharer for profits. The defendant pleaded that the plaintiffs or their predecessors in title had not received profits within twelve years preceding the institution of the suit, and that the suit was time-barred. *Held* that it was not for the plaintiffs to

*Second Appeal No. 352 of 1905, from a decree of Mr. A. C. Chatterji, Additional District Judge of Saharanpur, dated 23rd of January 1905, reversing a decree of Munshi Maksud Ali Khan, Assistant Collector of the first class, dated the 6th June 1904.

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prove by evidence of receipt of profits within twelve years that the right subsisted; and that section 201 of the Agra Tenancy Act, 1901, raised a presumption in their favour. *Mihin Lal v. Badri Prasad* (1) referred to.

The plaintiffs in this case sued as recorded co-sharers to recover from the defendants who were other co-sharers in the village their share of profits. The defendants pleaded, *inter alia*, that neither the plaintiffs nor their predecessors in title had received any profits for more than 12 years preceding the suit, and that the claim was time-barred. The Court of first instance (Assistant Collector, Saharanpur) overruled this plea and decreed the claim in part against two of the defendants. One of these appealed. On this appeal the additional District Judge of Saharanpur set aside the decree of the Assistant Collector and dismissed the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit for profits brought by the plaintiffs, who are co-sharers in the village, against other co-sharers under chapter XI of the Tenancy Act, 1901. The first plea raised in answer to the claim was that the plaintiffs or their predecessors in title had not received profits within 12 years preceding the date of the suit, and that the claim was time barred. The Assistant Collector overruled this plea and decreed a part of the claim against two of the defendants. One of these appealed, and on his appeal the learned Additional Judge set aside the decree of the Court of first instance and dismissed the suit. The plaintiffs come here in second appeal. The learned Judge observes:—"It was for the plaintiffs to show that they or their predecessors had within twelve years from the institution of the suit collected any profits," and refers to two rulings. Those rulings were anterior to the passing of the Tenancy Act, 1901. We may also invite his attention to the recent decision of this Court in *Mihin Lal v. Badri Prasad* (1). The learned Judge has overlooked the provisions of section 201, sub-section (3), of the Tenancy Act, which

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provides that if the plaintiff is recorded as having the proprietary right entitling him to institute a suit under chapter XI, the Court shall presume that he has that right. We gather from the record that the plaintiffs are recorded co-sharers. Consequently the presumption referred to in the section arises in their favour, and it was not for them to prove, by evidence of receipt of profits within twelve years, that the right subsisted. It was for the defendant to rebut the presumption which the law raised in the plaintiffs' favour. For the above reasons we allow the appeal; set aside the decree of the Court below, and remand the case to the Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit it to its original number in the register and dispose of it according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

BENI PANDE AND OTHERS (PLAINTIFFS) v. RAJA KAUSAL KISHORE PRASAD MAL BAHADUR (DEFENDANT).*

Act (Local) No. II of 1901 Agra Tenancy (Act), section 199—Determination by Revenue Court of question of proprietary title—Res judicata.

Where in a suit filed in a Revenue Court a question of proprietary title is raised and the Court, acting under section 199 of the Agra Tenancy Act, elects to determine such question itself, such decision of the Revenue Court will operate as *res judicata* in respect of a subsequent suit in a Civil Court for determination of the same question. *Sahib Dube v. Deoki Dube* (1) followed.

THE defendant in this case in 1902 took proceedings in the Revenue Court to eject the plaintiffs on the ground that they were his tenants and that their lease had expired. He obtained an order for their ejection, which the plaintiffs contested by appealing to the Commissioner and the Board of Revenue. The Board of Revenue confirmed the order for the plaintiffs' ejection on the 2nd of October 1903. The plaintiffs then brought the present suit in the Court of the Subordinate Judge of Gorakhpur asking for a declaration that the property in suit was their

* First Appeal No. 272 of 1904, from a decree of Munshi Achhal Bihari, Subordinate Judge of Gorakhpur, dated the 17th of August 1904.

(1) Weekly Notes, 1907, p. 1.