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SHARAT DAS
v.
NANDRANI
KUNWAR.

obtained possession of such land by succession within the meaning of section 34 of the Land Revenue Act, No. III of 1901. There seems no reason why there should not equally be considered to be a succession to the original grantee in respect of a rent-free grant. For these reasons we accept this appeal, and, setting aside the orders of the courts below, we direct that the land in suit shall be deemed to be held in proprietary right by the defendant mahant and by the successors in his mahantship, in trust for and on behalf of the temple in question. The Assistant Collector should proceed to determine the land revenue payable by the said trustee in respect of this land. The defendant is entitled to his costs throughout.

Appeal decreed.

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June, 28.

Before Mr. Justice Piggott and Mr. Justice Ryves.

BAKHTAWAR LAL AND ANOTHER (DEPENDANT) v. SHEO PRASAD
(AND OTHERS (PLAINTIFFS)).*

Civil Procedure Code (1908), order XXVI, rules 9, 16, 17 and 18—Act (Local) No. II of 1901 (Agra Tenancy Act), section 164—Suit for profits—Commissioner appointed to report as to actual collections—Evidence—Admissibility of report.

Held that the report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collections in a suit for profits under section 164 of the Agra Tenancy Act is admissible in evidence having regard to rules 9, 16, 17 and 18 of order XXVI of the Code of Civil Procedure.

THIS was a suit for profits under section 164 of the Tenancy Act. The first court allowed profits calculated on 90 per cent. of the gross rental. On appeal, the District Judge remanded the case with directions to calculate and allow profits on the basis of actual collections. The plaintiffs then made an application in the first court for the issue of a commission to ascertain the amount of actual collections. The court appointed a commissioner and gave him certain directions in accordance with which he was to prepare an account of the profits. The commissioner held a local inquiry and submitted his report in which he came to the conclusion that the collections were full, with no

* Second Appeal No. 548 of 1916, from a decree of F. D. Simpson, District Judge of Budaun, dated the 7th of December, 1915, reversing a decree of Shaukat Ali Khan, Assistant Collector, first class, of Budaun, dated the 1st of May, 1915.

arrears, although the copies of the *jamabandis* showed considerable arrears. The defendants took objections to the report and urged that the commissioner had acted illegally and had not complied with the court's directions. The court discarded the report and passed a decree on the basis of the collections as they had been entered in the copies of the *jamabandis*. On appeal by the plaintiffs the District Judge remarked in his judgement as follows:—

“The commissioner did not exactly comply with the instructions. The report is no doubt open to criticism on several points. Nevertheless I am of opinion that the report ought not to have been entirely discarded but should have been accepted for what it was worth as evidence. It appears to be just in the present case to reject the *jamabandis* and to accept the report of the commissioner and the evidence of the patwari showing that collections were in fact full.” The District Judge allowed profits on the basis that the collections were 90 per cent. of the gross rental. The defendants appealed to the High Court. *

Mr. B. E. O'Connor and Munshi Gokul Prasad, for the appellants.

Mr. S. A. Haidar, for the respondents.

PIGGOTT and RYVES, JJ. :—This is an appeal by the defendants in a suit for profits. The plaintiff's claim has been decreed, upon a finding that the evidence on the record is sufficient to prove that at least 90 per cent. of the recorded rental during the years in suit was actually realized by the lambardar, the father of the defendants appellants. We cannot interfere with that finding of fact unless it can be shown to be open to exception on some legal ground. The point taken is that the learned District Judge has based his decision upon the report of a certain commissioner appointed by the Assistant Collector, though the Assistant Collector himself had declined to act upon that report which was open to exception upon various grounds. The learned District Judge has discussed this matter at length, and he has fully realized that the report of the commissioner must be accepted with caution. The question which we have to determine, however, is simply whether it is admissible in evidence. The provisions of order XXVI of the Civil Procedure Code, are applicable

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to suits under the Tenancy Act. In view of rules, 9, 16, 17 and 18 of the aforesaid order we are not prepared to say that the report of the commissioner was inadmissible.

The result is that the appeal must fail, and we dismiss it accordingly with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

1917

June, 28.

Before Mr. Justice Tudball and Mr. Justice Walsh.

JHAMPLU (PETITIONER) v. KUTRAMANI AND OTHERS (OPPOSITE PARTIES).*

Evidence—Unregistered deed—Admissibility of deed for collateral purposes—

Joint owners—Adverse possession.

One of two brothers, joint owners of certain immovable property, executed a deed of relinquishment in favour of the other. The deed was never registered, but the brother in whose favour it was made remained in possession of the entire property. *Hold* that the deed of relinquishment was admissible in evidence to prove the nature of the occupant's possession, and that there was no legal impossibility about one co-owner claiming adverse possession as against the other.

THE facts of this case were as follows :—

One Julphu had two sons, Balku and Jhamplu; they were by different wives. He died leaving property in mauza Banchuri. After his death the names of the two sons were recorded, each as owner of a half share. Balku, however, when a boy went away from the village to live in mauza Debrana, and Jhamplu remained in sole possession of the property. In the year 1901, Balku began to assert his right and he applied to the court for partition of his half share. An amin was deputed to carry out the partition, but he returned his commission unexecuted reporting the fact that the two brothers had come to terms. The suit for partition was withdrawn. About the same time Balku executed a document in favour of Jhamplu, which however was unregistered. It was tantamount to a relinquishment of his rights; but, being unregistered, it did not operate to transfer them, and it was not admissible in evidence to prove such a transfer. In 1911 Balku executed two sale deeds in favour of Kutramani and others purporting to transfer his share in the land to them. The transferees applied for mutation of names some four years

* Civil Miscellaneous No. 150 of 1917.