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view, either to affirm or to quash the sanction which had been granted. He was seized of the case on the merits and the real question which he had to determine was whether this was a proper case in which the interest of justice required that sanction should be granted to the successful plaintiff to prosecute the unsuccessful defendants. In refusing, as he says, "to try the other issues" raised before him, the Additional Judge has declined to exercise a jurisdiction vested in him by law. We think it is a proper case to exercise the revisional jurisdiction of this Court. We accordingly allow this application, set aside the order of the Additional Judge, and direct that the application contesting the order of sanction granted by the Assistant Collector be returned to the court of the Additional Judge of Meerut, with orders that it be re-admitted on to the file of pending applications and disposed of according to law. Under all the circumstances of the case we make no order as to costs of this application.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BAID RAM AND ANOTHER (DEFENDANTS) v. TIKA RAM (PLAINTIFF).*

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Act No. I of 1872 (Indian Evidence Act), section 92—Mortgage with possession—De facto substitution of other property for part of that included in the mortgage deed—Suit for redemption—Evidence.

The plaintiff mortgaged to the defendants three specific items of property for a sum of Rs. 99. The mortgage was registered, and it was a possessory mortgage, but the defendants never in fact got possession of more than one of the items mentioned in the deed. They did, however, get possession as mortgagees of another piece of property not mentioned in the deed, apparently by virtue of a subsequent oral agreement with the plaintiff and they held this piece of property in mortgagee possession for a number of years.

Held on suit by the plaintiff for redemption that the plaintiff was entitled to lead evidence to prove two facts: (1) that the possession of the defendants over the plot not mentioned in the mortgage deed was that of mortgagees and had never been adverse to himself and (2) that the right of mortgagee possession was terminated by the payment of Rs. 99 which had been duly tendered by him.

* Second Appeal No. 1772 of 1914, from a decree of Kshirod Gopal Banerji, Subordinate Judge of Budaun, dated the 20th of August, 1914, modifying a decree of Manmohan Sanyal, Munsif of Bisauli, dated the 15th of April, 1914.

THE facts of this case were as follows:—

The property comprised in a deed of usufructuary mortgage executed on the 24th of March, 1875, was a kachcha house and seven plots of occupancy tenure; but the only property of which the mortgagee ever took possession was two plots, numbered 385 and 1248 respectively, of which the former was, and the latter was not, included in the deed. The lower courts found that by a mutual oral agreement between the mortgagor and mortgagee plot No. 1248 was substituted for the six plots, other than No. 385, comprised in the deed, so that possession of No. 1248 was delivered to the mortgagee in lieu of those six plots. The mortgage was for a sum of Rs. 99, and was registered, although its registration was not compulsory. The mortgagor sued for possession of the two plots, 385 and 1248, by redemption of the mortgage of the 24th of March, 1875. The plaint set out that in place of the property comprised in the mortgage-deed only two plots, namely 385, entered in the deed and 1248, not entered in the deed, remained in the possession of the mortgagees as such by mutual consent. The defence, *inter alia*, was that plot No. 1248 had not been mortgaged under the said deed and could not be redeemed. The court of first instance gave effect to this plea. The lower appellate court decreed the whole suit. The mortgagee appealed in respect of plot No. 1248.

Babu Lalit Mohan Banerji, for the appellants:—

The terms of a registered mortgage-deed cannot be varied by oral agreement or mere mutual consent, section 92, Evidence Act. Proviso (4) of that section does not help the plaintiff, because the mortgage was registered. It is immaterial that registration was not compulsory; the document was in fact registered. The identity of the property mortgaged is unquestionably one of the terms thereof, and a variation of the property which is to be the subject of the mortgage is certainly a variation of the terms of the mortgage. If there be a novation it must be effected by a registered document; *Sadar-ud-din Ahmad v. Chajju* (1). The plaintiff himself is setting up a variation of the contract upon which he comes to Court. The suit as framed is one for the redemption of the mortgage of the 24th of March, 1875. It is not a suit based on any fresh contract but on the registered mortgage

(1) (1908) I. L. R., 31 All., 13.

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as it stands. The only property which can be redeemed in this suit is the property comprised in that mortgage. The case set up is not that there was a fresh contract but that there was a substitution or alteration in the terms of the original contract. The alteration could not be proved by evidence of an oral agreement, and the decision of the lower courts has been arrived at upon inadmissible evidence.

Pandit *Kailas Nath Katju*, for the respondent :—

Section 92 of the Evidence Act does not apply to this case. An additional mortgage or security is not a variation of the terms of the original mortgage. I am entitled to give oral evidence to show that plot No. 1248 was given to the mortgagees as security for the advance of Rs. 99. I am supported in principle by the cases of *Behari v. Shri Sahai* (1), *Ram Bakhsh v. Durjan* (2), *Autu Singh v. Ajudhia Sahu* (3), *Kamla Sahai v. Babu Nandan*, (4) and *Kedar Singh v. Sumer Singh* (5). In the second place, the parties have acted upon the agreement for nearly 40 years, and in such cases not only will evidence relating to conduct and part performance be received to prove the agreement but, further, the agreement will be binding and be given full effect to notwithstanding any defects in formality, such as want of writing or want of registration. The principle has been laid down in the case of *Mahomed Musa v. Aghore Kumar Ganguli* (6) which followed the ruling in the case of *Maddison v. Alderson*, and repelled the objections which were urged on the basis of section 92, proviso (4), of the Evidence Act: *vide* arguments at pp. 810, 811. The whole question in this case is, what is the nature of the defendant's possession over plot No. 1248? It has been found that their possession was mortgagee's possession. The mortgage money, Rs. 99, having been deposited in court by the mortgagor, he is entitled to get back possession of the plot from the mortgagees. The case of *Sadar-uddin Ahmad v. Chajju* (7) cited by the appellants is distinguishable; there, a term of the contract, viz. period for redemption, was sought to be altered. Moreover, that case has now to be considered in the light of the Privy Council ruling mentioned above.

(1) (1913) 18 Indian Cases, 324.

(4) (1909) 11 C. L. J., 89.

(2) (1887) I. L. R., 9 All., 392.

(5) (1909) 10 Indian Cases, 196.

(3) (1887) I. L. R., 9 All., 249.

(6) (1914) I. L. R., 42 Calc., 801.

(7) (1908) I. L. R., 31 All., 13.

Babu *Lalit Mohan Banerji*, in reply :—

In the case of *Mahomed Musa v. Aghore Kumar Ganguli* (1) the original mortgage was wiped out altogether; nothing remained to be done on that mortgage. It was wiped out by a decree. That distinguishes the case from the present one, where the original mortgage subsists, and a modification thereof is set up.

PIGGOTT, J.—This is an appeal by the defendants in a suit for redemption. The facts as finally ascertained, after an order of remand by this Court, may be stated as follows. In the month of March, 1875, there was a mortgage by the plaintiff to the defendants, under which possession was agreed to be given of three items of property, namely, (1) a plot of land, forming part of an occupancy holding, now represented by field No. 385 in the village map, (2) a number of scattered plots appertaining to the same holding, and (3) a residential house. The consideration for the mortgage was an advance of Rs. 99, so that the mortgage-deed was not required by law to be registered. It was a document of which registration was optional; but as a matter of fact it was registered. The mortgagee, however, did not enter into possession of all the property specified in the deed. He never took possession of the residential house or of the scattered plots; but of the property specified in the deed he took possession only of plot No. 385. This happened in the month of July next following the execution of the mortgage-deed. In that very same month the mortgagee took possession of another plot, now No. 1248 in the village map, forming part of the same occupancy holding and representing an area of land roughly equivalent to the total area of the scattered plots comprised in the original mortgage-deed. The possession thus obtained over plot No. 1248 was mortgagee possession. It was recognized as such in the entries made in the village papers at the time, and it has been found by the courts below to have been mortgagee possession and nothing else. In the plaint as drafted it is alleged that these transactions of the month of July, 1875, were the result of an oral agreement between the parties, and that it was a part of the agreement that the possession of the defendants over plot No. 1248, should be in consideration of the original loan of Rs. 99, advanced under the

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contract of the month of March previous. The plaintiff paid into court a sum of Rs. 99, and claimed redemption of the two plots Nos. 385 and 1248, on the ground that he, having repaid the entire mortgage-debt in respect of which the defendants were holding those two plots, was entitled to recover possession over the same. On these facts it is clear that the equities of the case are entirely in favour of the plaintiff. The mortgage-debt has been satisfied and the plaintiff is entitled to recover possession. The decision of the lower appellate court is, however, contested before us in second appeal and, as it seems to me, substantially upon two grounds, which require to be considered separately. One is that the facts as above stated have been ascertained in the courts below by the admission of evidence which the plaintiff was not entitled to tender, by reason of the provisions of section 92 of the Evidence Act (I of 1872). The other is that on the plaint as drafted the plaintiff was not entitled to claim redemption of plot No. 1248, because the paragraph of the plaint in which the facts are set forth is so worded as distinctly to allege that the defendant's mortgagee possession over this plot was the result of an oral agreement in modification of the terms of the registered mortgage deed of March, 1875. I do not think that there is any real substance in the latter of these two points. The plaintiff based his cause of action on the broad facts that the defendants were in mortgagee possession over the two plots in suit, that the mortgage debt was no more than Rs. 99, and that there had been a valid tender on his part of the whole of this mortgage debt. In reciting the facts and circumstances under which the defendants came to be in possession of these two plots, the plaintiff may have expressed himself clumsily from a legal point of view and laid himself open to the objection taken with regard to the provisions of section 92 of the Evidence Act; but it does not seem to me that there can be any mistake in substance as to the nature of the relief claimed in the plaint or the grounds upon which that relief is sought. It is not correct to say that the suit as brought is one for redemption of the mortgage of March, 1875, and nothing else. It is a suit for recovery of possession, by redemption of an existing mortgage, in respect of two specified plots, based upon the recital of certain facts regarding

the manner in which the mortgagee's possession over those two plots commenced. There remains the more important question as to the admissibility of the evidence on which the facts have been ascertained. It must be strictly borne in mind that the question is merely one of admissibility of evidence. There is nothing in the proceedings between the parties in the month of July, 1875, obnoxious to the provisions of the Transfer of Property Act. The plaintiff was perfectly entitled to mortgage plot No. 1248 to the defendants by delivery of possession over the same, provided the amount of the mortgage-debt thereby secured did not exceed Rs. 100. The question is whether the plaintiff is trying to prove a subsequent agreement to rescind or modify the contract embodied in the registered instrument of March, 1875. If the question now before the Court were as to the right of the defendants to mortgagee possession over the residential house or the scattered plots specified in the registered deed, it is possible that different considerations would arise. I think, however, that the plaintiff was clearly entitled to lead evidence to prove two facts, (1) that the possession of the defendants over plot No. 1248, was that of mortgagees and had never been adverse to himself, and (2) that the right of mortgagee possession was terminated by the payment of Rs. 99 which had been duly tendered by him. On these grounds I would dismiss this appeal with costs.

WALSH, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR v. KHALI.*

Criminal Procedure Code, section 339—Withdrawal of pardon—Procedure.

Where an accomplice who has accepted a tender of pardon made under section 337 of the Code of Criminal Procedure fails to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence under inquiry, there is no necessity to record any formal order withdrawing the pardon. If the accomplice has forfeited his pardon and

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* Criminal Revision No. 940 of 1916, from an order of A. G. P. Pillan, Sessions Judge of Mainpuri, dated the 2nd of October, 1916.