

STUART, C. J.—I have read the judgment of Straight, J., in this case, and concur in it and in his proposed order. I cannot too strongly express my dissent from the ruling of the Calcutta Court to which the Subordinate Judge refers, but I would further observe that in this particular case the plaint itself shows that in his own mind the plaintiff regarded the additional interest stipulated for as in itself strictly penal, by the allegation that “in case he (the defendant) should fail to pay six-monthly interest, then on account of breach of contract he shall pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond.” Language could not more plainly show that this provision of the contract was and is distinctly intended to be penal.

Decree modified.

Before Mr. Justice Straight and Mr. Justice Duthoit.

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

1881
June 22.

Determination of title by Revenue Court—Res judicata—Jurisdiction of Civil Court—Act XVIII of 1873 (North-Western Provinces Rent Act), ss. 36–39.

The defendants, claiming to be occupancy-tenants of certain land, and alleging that the plaintiff was their sub-tenant, caused a notice of ejectment to be served on the plaintiff under ss. 36–38 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application contesting his liability to be ejected, alleging that he had a right of occupancy in such land jointly with the defendants, and was not their sub-tenant. The Assistant Collector trying the case finally decided that the plaintiff was the sub-tenant of the defendants, and the plaintiff was ejected. The plaintiff then sued the defendants in the Civil Court for a declaration of his right as an occupancy-tenant to such land and possession of the same. *Held* that the decision of the Assistant Collector as to the respective rights of the parties could only be regarded as incidental and ancillary to the main point to be determined by him, *viz.*, whether, assuming the relation of landlord and tenant to exist between the parties, the plaintiff was liable to be ejected, and such decision was not a bar to a fresh determination of such rights in the Civil Court.

The plaintiff in this suit claimed a declaration of his right as an occupancy-tenant to certain land and possession of such land. The suit was instituted in the Court of the Munsif of Etawah. The defendants, claiming to be occupancy-tenants of such land, and alleging that the plaintiff was their sub-tenant, had caused a

* First Appeal, No. 31 of 1881, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 7th February, 1881.

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notice of ejectment to be served on the plaintiff under the provisions of s. 36 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application to the Revenue Court, contesting his liability to be ejected, alleging that he had a right of occupancy in the land jointly with the defendants, and was not their sub-tenant. The Revenue Court trying the case determined that the plaintiff was the sub-tenant of the defendants, and the plaintiff was accordingly ejected. The plaintiff thereupon instituted the present suit. The defendants set up as a defence to the suit that it was not cognizable in the Civil Courts. The Munsif held that the provisions of s. 95 of Act XVIII of 1873 debarred the Civil Courts from taking cognizance of the suit and dismissed it. On appeal by the plaintiff the lower appellate Court held that the Civil Courts were not debarred from taking cognizance of the suit by the provisions of that section, and remanded the case to the Munsif for re-trial.

The defendants appealed to the High Court, again contending that the suit was not cognizable in the Civil Courts.

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The High Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgment:—

• STRAIGHT, J., (DUTHOIT, J., concurring).—This is an appeal from an order of remand passed by the Subordinate Judge of Mainpuri on the 7th February last. The plaintiff-respondent brought a suit for a declaration of his hereditary cultivatory right in 18 bighas 9 biswas of mauzâ Mandari, pargana Auriâ, and for possession. The defendants-appellants pleaded that the suit was not cognizable by the Civil Court; that the plaintiff was dispossessed by an order properly passed by the Revenue Court; and that the 18 bighas 9 biswas in suit was their hereditary holding. The Munsif was of opinion that the plaintiff-respondent's claim was in the nature of that provided for by s. 10 of the Rent Act, and as such, being exclusively cognizable by the Revenue Court, could not be entertained by him. The Subordinate Judge in appeal adopted a contrary view, and reversing the decision of the Munsif, remanded the case for

trial on the merits. It is from this order that the defendants now appeal on the ground that the suit would not lie in the Civil Court ; and that the question as to the rights of the parties having been determined by the Assistant Collector on the 14th June, 1880, in a proceeding under s. 39 of the Rent Act, is *res judicata*.

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I am of opinion that this objection has no force, and that it cannot be sustained. It is true that the defendants-appellants obtained an order from the Revenue Court for the ejection of the plaintiff-respondent from the 18 bighas 9 biswas, on the ground that he held the land as their shikmi, and that this proceeding was had under s. 95 of the Rent Act, and purported to be of a nature exclusively cognizable by the Revenue Court. The defendant-appellant had given a notice of ejection to the plaintiff-respondent under s. 36, and he had made application to the Assistant Collector contesting his liability to be ejected under s. 39; and the Assistant Collector determined the question between the parties under this latter section. But it seems to me that his decision as to their respective titles can only be regarded as incidental and ancillary to the main point to be determined by him, namely, whether, assuming the plaintiff-respondent and the defendants-appellants to hold towards one another the relation of landlord and tenant, the former was liable to ejection. The case of the plaintiff-respondent is that he has a joint hereditary cultivatory title with the defendants appellants, so that it cannot be said that any question of proprietary title to land between parties making conflicting claims there-to was raised which could give him an appeal to the Judge. Moreover, orders under s. 95 of the Rent Act, cl. (d), into which category applications under s. 36 fall, are excluded from appeal, the effect of which would be that the order of an Assistant Collector could, if no suit in the Civil Court were entertainable, finally dispose of a question of title. It appears to me that the words in s. 39, "the tenant may contest his liability to be ejected," assume the relation of landholder and tenant to exist. It certainly cannot be said that the present suit is in the nature of an application under s. 10 of the Rent Act by a tenant to have his class of tenure declared as against the landholder; on the contrary, it is a suit by one alleged joint cultivator against another to have his joint cul-

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tivatory right declared and possession given him in that character and to that extent. Under these circumstances I cannot hold that the order of the Assistant Collector of the 14th June, 1880, excluded the plaintiff-respondent from asserting his right by a civil suit. I therefore think that the order of remand impugned by the appellants was a right and proper one, and that this appeal should be dismissed with costs.

Appeal dismissed.

1881
June 23.

Before Mr. Justice Straight and Mr. Justice Duthoit.

HAR SAHAI AND ANOTHER (DEFENDANTS) v. CHUNNI KUAR AND ANOTHER
(PLAINTIFFS) *

Mortgage—Covenant to give the mortgagee possession—Suit for possession after expiration of term—Registration of mortgage deed in district in which the mortgaged property is not situate—Admissibility of document in evidence—Act III of 1877 (Registration Act), ss. 28, 49, 60.

An instrument of mortgage on land, which required to be registered, was presented for registration to a Registrar within whose district no portion of the land was situate, and was registered by such Registrar. In a suit to enforce such mortgage it was objected that such instrument, not having been properly registered, could not be received in evidence. *Held*, following the opinion of Broughton, J., in *Sheo Shunkur Sahoy v. Hirdey Narain Sahu* (1), that, when a document which purports to have been registered is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law. Moreover, that the mortgagor could not be allowed to take advantage of an objection which would not have been available but for his own wrongful act.

A mortgagor covenanted to give the mortgagee possession of the mortgaged property, but did not do so, and the mortgagee consequently sued him for possession, but not until the term of the mortgage had expired. The mortgagor set up as a defence to such suit that it was not maintainable after the expiration of the mortgage-term. This defence was rejected on the ground that the mortgagor had, by his breach of the mortgage-contract, put himself out of Court.

HAR SAHAI, one of the defendants in this suit, mortgaged certain immovable property situated in the Fatehpur district, in the North-Western Provinces, to one Girdhar Lal, whom the plaintiffs in this suit represented, for Rs. 900, promising to give the mortgagee possession of the mortgaged property. The mortgagor

* Second Appeal, No. 1264 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 31st July, 1880, affirming a decree of Pandit Kashi Narain, Munsif of Fatehpur, dated the 20th June, 1879.

(1) I. L. R. 6 Calc., at p. 29.