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 WILAITI
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 v.
 NUR KHAN.

plaint, saying "one-half of the kiln is owned^d by the plaintiff from before." But it is no less true that in her written answer to that plaintiff Wilaiti Begam pleaded in express terms that the "entire brick kiln solely belonged to Muhammad Yar Khan, her father; that the plaintiff had no *right in it*; and he is entirely wrong in saying that half of the said property belonged to him exclusively," *i.e.*, in saying then what he now again alleges in the suit before us in revision. And the issue thus raised formed the first issue proposed for determination in the suit of 1878. It was "whether the kiln was joint property (of Muhammad Yar Khan) or was situate on separate land exclusively belonging to Muhammad Yar Khan?" This issue was decided by the Court of first instance in favour of Nur Khan. The defendant Wilaiti Begam appealed to this Court, and her 6th plea was that Nur Khan's "claim to a share in the kiln upon the ground of joint interest therein is not supported by sufficient evidence." This appeal was decreed, and the decree of the Subordinate Judge negating Wilaiti Begam's exclusive pretensions to the entire brick-kiln was set aside. I cannot but hold that s. 13 of the Civil Procedure Code is applicable to the case. Nur Khan's allegation of a joint interest with Muhammad Yar Khan in the kiln was expressly made by him and denied by Wilaiti Begam in the suit of 1878 (Exp. I, s. 13). The decree which expressly decided that question in Nur Khan's favour has been cancelled altogether. And I therefore think with the Hon'ble and learned Chief Justice that the bar of *res judicata* applies to this issue as much as it indubitably would to the other issue more directly arising out of the "claim of the plaintiff" in his suit. I therefore concur in the order allowing this application with costs.

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 April 20.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHIBBA (DEFENDANT) v. HULASI (PLAINTIFF).*

Small Cause Court suit—Suit by landholder against purchaser of produce of tenant's land for rent—Damages.

B, who held a decree for money against G, a cultivator, brought to sale in execution of his decree the produce of certain land occupied by G, and such

* Second Appeal No. 1391 of 1882, from a decree of J. L. Denniston, Esq., Judge of Ferozabad, dated the 10th October, 1882, reversing a decree of Munshi Manmohan Lal, Munsif of Kanauj, dated the 11th July, 1882.

produce was purchased by S. The landholder, to whom G owed rent for land, sued G and S for the amount of the rent, on the ground that under s. 56 of the N.-W. P. Rent Act the produce of the land was hypothecated for therent. *Held* that the defendant could only be held responsible *ex delicto*; and the suit was therefore one for damages, and, the amount claimed being under Rs. 500, one cognizable in a Court of Small Causes.

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THE facts of this case as alleged by the plaintiff Hulasi were that Bandi, a *pro formâ* defendant in the suit, held a decree for money against Ganesh, another defendant. In execution of this decree he brought to sale the produce of certain land cultivated by Ganesh, and the same was purchased by the defendant Shibba. At the time of this auction-sale Ganesh owed the plaintiff Hulasi, who was the proprietor of the land, certain arrears of rent. The plaintiff contended that, in accordance with s. 56, Act XII of 1881, until such arrears of rent had been satisfied, no other claim could be enforced on the produce of the land by sale in execution of decree or otherwise, and therefore claimed to recover the amount of such arrears (Rs. 63-7-0) from Ganesh and Shibba, the auction-purchaser. The Court of first instance dismissed the claim, but in appeal the District Court reversed the judgment of the lower Court and gave the plaintiff a decree against Shibba and Ganesh.

Against this decree of the District Judge the defendant Shibba appealed to the High Court.

Mr. Simeon, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment :—

STRAIGHT, J.—It cannot be contended, nor, indeed, is it urged for the plaintiff-respondent, that any liability on the part of the defendants 1 and 3 arose *ex contractu*; on the contrary they could only be held responsible *ex delicto*. The suit there was one for damages below Rs. 500, and cognizable by a Small Cause Court. The preliminary objection taken by the respondent's pleader, that no second appeal lies is fatal to the appeal, and it must be dismissed with costs.

Appeal dismissed.