

from the Public Prosecutor. This objection must prevail. In the absence of this certificate no prosecution can be sanctioned. I accordingly reject the application and direct that the record be returned.

1929
KING-
EMPEROR
v.
GHASNEY

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice A. G. P. Pullan.

MOHAMMAD ISMAIL KHAN (DEFENDANT-APPELLANT) v. 1929
ABDUL GHAFFAR BEG, PLAINTIFF AND ANOTHER, October, 17.
(DEFENDANTS-RESPONDENTS).*

Oudh Rent Act (XXII of 1886), section 70, applicability of—Presumption that there was no patta, where rent is paid on appraisalment—Admissibility of oral evidence showing acceptance of new rent by tenant where no patta—Civil Procedure Code (Act V of 1908), order XLI, rule 27—Appellate court's power to admit additional evidence—Additional evidence when to be admitted by appellate court—Guardian ad litem—Confession of judgment by guardian ad litem, admissibility and value of—Guardian and ward—Nazir's appointment as guardian of minor, propriety of.

Section 70 of the Oudh Rent Act applies to those tenants who have already received a *patta*.

Where, therefore, it is not alleged that any *patta* had been granted previously, and because admittedly rent was paid on appraisalment it must be presumed that there was no *patta*, it is possible to admit oral evidence showing that the tenant had accepted the new rent.

An appellate court is no longer bound by the specific provisions of order XLI, rule 27 of the Code of Civil Procedure but is given wide discretion to admit additional evidence under the general principles of law. But before admitting such evidence the court must ascertain that it is necessary

*Second Rent Appeal No. 56 of 1928, against the decree of S. Asghar Hasan, District Judge of Gonda, dated the 31st of July, 1928, reversing the decree of Babu Bhagwati Prasad Sinha, Assistant Collector, 1st Class and Treasury Officer, Bahraich, dated the 25th of February, 1928, dismissing the plaintiff's suit.

1929
 MOHAMMAD
 ISMAIL
 KHAN
 v.
 ABDUL
 GHAFFAR
 BEG.

in order that justice may be done and in every case when such evidence is admitted it should record the reasons for doing so. *Indarjit Pratap Sahi v. Amar Singh* (1), relied on.

A confession of judgment by a guardian *ad litem* is inadmissible in evidence and should be totally disregarded.

The appointment of a Court Nazir as the guardian of a minor is objectionable. Court officials have neither the time nor the opportunity to do justice to the cause of minors and they should not be required to risk their own good name and the minor's interests by receiving these appointments.

Mr. *Haider Husain*, for the appellant.

Messrs. *M. Wasim* and *Khaliq-uz-zaman*, for the respondents.

PULLAN, J. :—This second appeal arises from a suit brought by a thekadar, holding under the Court of Wards representing the Nanpara estate, against two persons who are alleged to be joint tenants of a certain holding. The tenancy of the first defendant Mohammad Ismail is admitted by him and he denies the tenancy of the second defendant Faruq Ahmad who is a minor. He also denies that the rent assessed on the holding is Rs. 102-8-3 in cash but states that the rent of this holding is paid in kind and has already been paid in full. The first Court, the Assistant Collector, dismissed the plaintiff's suit finding that Faruq Ahmad had no share in the holding and that no cash rent had been assessed as against Mohammad Ismail who had paid off the sum due for the grain rent in the years in dispute. In the lower appellate court, the learned District Judge of Gonda, allowed the appeal and decreed the plaintiff's suit jointly against both defendants. It was admitted that up to the year 1329 F. inclusive rent of this holding was payable in kind under the *batai* system but it is stated that from the year 1330 the system was changed in respect of this village and cash rent assessed on almost all the holdings including the one in dispute.

(1) (1923) L. R., 50 L. A., 183.

The first ground of appeal is that the lower court admitted certain evidence which was inadmissible under section 70 of the Oudh Rent Act. Now this objection cannot be sustained because section 70 applies to those tenants who have already received a "patta". It is not alleged that any "patta" had been granted previously to the appellant, and it must be presumed that there was no such patta because he admittedly paid rent on appraisalment. It was, therefore, possible to admit oral evidence and oral evidence has been admitted and apparently believed by the court below showing that the appellant accepted the new rent. Unfortunately the lower appellate court admitted in evidence an application made by the appellant to the Court of Wards after a decree in his favour had been passed by the court of first instance, and a very proper objection is taken in appeal that this application was not admissible in evidence. No doubt a wide discretion is given to the appellate court by the judgment of their Lordships of the Privy Council in the case of *Indarjit Pratap Sahi v. Amar Singh* (1), and the court is no longer bound by the specific provisions of rule 27 of order XLI, of the Code of Civil Procedure, but is allowed to admit additional evidence also under the general principles of law. As their Lordships observe "rules of procedure are not made for the purpose of hindering justice." But it is assumed that before admitting such evidence an appellate court must ascertain that it is necessary in order that justice may be done, and it is specifically laid down in order XLI, rule 27 that when such evidence is admitted the court should record the reasons for so doing. In the present case it is difficult to see how an application made by the appellant after the decree was passed can have any bearing on the case under appeal, and I ought certainly to have had the advantage of seeing the reasons why the Judge admitted it. I have read the application in

1929

 MOHAMMAD
 ISMAIL
 KHAN
 ?.
 ABDUL
 GHAFAR
 BEG.

Pullan, J.

(1) (1929) L. R., 50 I. A., 183.

1929

MOHAMMAD
ISMAIL
KHAN
v.
ABDUL
GHAFFAR
BEG.

Pullan, J.

order to ascertain whether I could myself supply the reasons which the learned Judge did not think fit to give, and I have failed to do so. Apparently the appellant was satisfied with the decree of the first court and decided that it would be for his own interest to pay cash rents from the year 1335. Even so, he did not say that he agreed to a cash rent of Rs. 102-8-3 but only that he would agree to rent assessed at the village rates whatever they might be. This document therefore does not amount to an admission and in any case, in my opinion should not have been admitted in evidence. But it appears that there is sufficient evidence on the record apart from this to justify the decision of the lower appellate court, and I cannot say that the finding of fact as to the acceptance of this rent depends upon the erroneous admission of this piece of evidence. I am also bound by the lower court's findings as to the payments which have been made and I am, therefore, unable to disturb the decision against the appellant on this point.

A second question has been raised relating to the joint tenancy of Faruq Ahmad. I has been urged that in this matter also the learned court below has relied upon inadmissible evidence. I find that when the mother of the minor refused to act, the plaintiff's nephew Iftikhar Husain was appointed as guardian *ad litem* and confessed judgment. He was subsequently removed from the guardianship and the Nazir of the court was appointed, who denied that the minor had any share in the tenancy. Clearly the admission of Iftikhar Husain was inadmissible in evidence and should have been totally disregarded and the objection raised by the Nazir should have been considered. But when I turn to the conclusion of the judgment of the court below I find that, inspite of the remarks made earlier in his judgment, he states himself that he has decided the question on the

evidence of the Patwari and the plaintiff's agent Mumtaz Ahmad who are, in his opinion, absolutely truthful witnesses. He expressly states that he is passing a decree against the minor on their statements apart from the statement of Iftikhar Husain. Thus, this also is a finding of fact based upon admissible evidence which has been believed by the court below. I cannot say that the evidence has been wrongly believed. The main point for disbelieving it is alleged to be an entry in one Khatauni showing that the joint tenant was named Shuja'at. The Patwari knows Hindi but not Urdu and consequently he did not write this entry, and it appears to be a manifest mistake probably caused through the Patwari's ignorance of Urdu. There is no evidence that there is any person named Shuja'at, and the name Sajjad is shown in all the earlier papers. In this connection, however, I should like to remark that the appointment of a Court Nazir as the guardian of a minor is objectionable. Court officials have neither the time nor the opportunity to do justice to the cause of minors and they should not be required to risk their own good name and the minor's interests by receiving these appointments.

Thus, although the procedure of the lower appellate court laid the judgment open to criticism, I am not prepared to interfere with the decision and I dismiss this appeal with costs.

Appeal dismissed.

1929

MOHAMMAD
ISMAIL
KHAN
v.
ABDUL
GHAFFAR
Dada.

Pullan, J.