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BEHARI
v.
RAJA SYED
AHMAD ALI
KHAN

holds an intermediate position between the owner and the occupier of the land. We accordingly overrule the contention.

*Srivastava
and
Nanavatty,
J.J.*

Next, it was argued that the claim was barred by limitation. The statement in the plaint is rather ambiguous but it is quite clear from the account books produced by the plaintiff that the whole of the rent for 1937 Fasli has been realised. The suit is, therefore, in substance only for the arrears of 1938 Fasli and the amount decreed by the lower Court also represents the same arrears. No question of limitation therefore arises.

Lastly it was also argued that the defendant had paid a sum of Rs.100 in addition to the amount for which credit has been given to him. This plea was not raised in the lower Court and raises a question of fact which we cannot allow to be raised for the first time in revision.

The application therefore fails and is dismissed with costs.

Application dismissed.

APPELLATE CIVIL

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February, 1936

Before Mr. Justice Bisheshwar Nath Srivastava

BRIJ BHUSHAN (DEFENDANT-APPELLANT) v. COLLECTOR OF ALLAHABAD (PLAINTIFF-RESPONDENT)*

Oudh Rent Act (XXII of 1886), section 127—Defendant in possession under a bona fide title—Defendant prima facie not trespasser—Section 127, Oudh Rent Act, applicability of.

Where the defendants are in possession under a *bona fide* claim of title and have made out a strong *prima facie* case that they are not trespassers, the provisions of section 127 of the Oudh Rent Act are not applicable. *Sri Autar v. Special Manager, Court of Wards, Berwa Estate* (1), relied on.

Mr. S. N. *Srivastava*, for the appellant.

The Assistant Government Advocate (Mr. H. K. *Ghosh*), for the respondent.

*Second Rent Appeal No. 29 of 1934, against the decree of Mr. E. N. Wanchoo, District Judge of Rae Bareilly, dated the 9th of February, 1934, setting aside the decree of Pandit Gur Charan Niwas, Assistant Collector, First Class, Partabgarh, dated the 21st of September, 1933.

(1) (1931) 8 O.W.N., 1101.

SRIVASTAVA, J.:—This is a second rent appeal arising out of a suit under section 127 read with section 108, clause (2) of the Oudh Rent Act. It relates to a plot No. 265.

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The plaintiff's case was that the defendants had taken possession of the plot without any title and were mere trespassers. The defendants resisted the suit on the ground that they were ex-proprietary tenants of the said plot. The lower appellate Court has found that the share of the defendants in the *mahal* in which this plot is situated was sold in July, 1908, and that the plot in suit was included in the share sold. It has further found that at a partition which took place in 1898 the plot in question was allotted to the share of Musammât Harnathi, mother of the defendants, as *khudkasht*. It was of opinion that in the circumstances the defendants' possession may be presumed from July, 1898, but as this was within ten years of the sale therefore it was not sufficient to prove that the defendants or their predecessor had held the plot as *khudkasht* for a full period of twelve years before the sale. The defendants examined two witnesses to prove their possession as *khudkashi* before the partition but their evidence did not find favour with the lower appellate Court. Section 127 of the Oudh Rent Act allows a landlord to proceed under that section against a person taking or retaining possession of land without being entitled to such possession. In *Sri Autar v. Special Manager, Court of Wards, Berwa Estate* (1), it was held that when the defendant sets up a *bona fide* claim of title or when adverse proprietary possession of the land is claimed by the defendant against the landlord and such claim appears to be a probable one, the defendant cannot be treated as a person coming under the provisions of section 127 of the Oudh Rent Act. In the present case there can be no doubt of the defendants having been in possession of the plot in suit for about the last thirty-eight years from July, 1898. It is also clear that their predecessor was in possession

(1) (1931) 8 O.W.N., 1101.

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of the plot in 1898 under an allotment made at a revenue partition. In the circumstances there seems little doubt that the defendants are in possession under a *bona fide* claim of title and have made out a strong *prima facie* case that they are not trespassers. I am, therefore, of opinion that the provisions of section 127 of the Oudh Rent Act are not applicable to the present case.

I, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs throughout.

Appeal allowed.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

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SITLA BAKHSI SINGH (APPLICANT) v. BAIJ NATH
 (OPPOSITE-PARTY)*

Contract Act (IX of 1872), section 148—Silver entrusted to goldsmith for making ornament—Theft—No negligence and want of proper care—Bailment—Contract, whether one of bailment—Goldsmith, whether liable for damages.

Where some silver and cash are given to a goldsmith for making an ornament and there is a theft at the shop of the goldsmith and the silver is lost not due to his carelessness or negligence, *held*, that the contract between the parties is one of bailment within the meaning of section 148 of the Contract Act and the goldsmith is not liable for the loss of the silver. *Maung San Myaing v. Maung Po Hman* (1), relied on.

Mr. Pirthipal Singh, for the applicant.

Mr. Bani Bilas Misra, for the opposite party.

SRIVASTAVA, J.:—This is an application in revision under section 25 of the Small Cause Courts Act against the order and decree, dated the 20th of August, 1935, of the learned First Additional Judge of the Court of Small Causes, Lucknow.

*Section 25 Application No. 126 of 1935, against the decree of Babu Shiva Gopal Mathur, First Additional Judge, Small Cause Court, Lucknow, dated the 20th of August, 1935.

(1) (1912) 15 I.C., 451.