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v.

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it would be a legitimate and fair presumption to draw that such omission was deliberate with an intention to reap the full advantage afforded by section 13 coming into play.

On a consideration of all the circumstances of the case we find no reason to differ from the finding arrived at by the learned Special Judge and dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL

*Before Mr. Justice A. H. de B. Hamilton and Mr. Justice
Radha Krishna Srivastava*

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August, 4

MOHAMMAD UMAR, THAKUR (DEFENDANT-APPELLANT)
v. NASIRA, MUSAMMAT AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Oudh Rent Act (XXII of 1886), sections 108(7) and (9), and sections 116 and 119—Suit under section 108(7) and (9)—Appeal whether lies to the Civil Court or the Revenue Court.

Where a suit under the Oudh Rent Act is not *in toto* one in which an appeal would lie to the Civil Court but is partly under a section in which an appeal would lie to a Civil Court and partly under a section in which an appeal would lie to the Revenue Court, it is not for the Civil Court to hear the appeal, but the Revenue Court is entitled to hear it.

Where, therefore, a suit is filed in the Revenue Court under section 108, clause (7) and clause (9) the appeal against the order will lie to the Commissioner and not to the District Judge.

Mr. *Ramesh Narain Sinha*, for appellant.

Mr. *H. N. Das* for respondents.

HAMILTON and RADHA KRISHNA, JJ.:—This is a reference under section 124 A of the Oudh Rent Act made by the learned Commissioner of the Fyzabad Division enquiring whether he was empowered to hear an appeal.

*Civil Reference No. 4 of 1938, made by A. G. Shirreff, Esq., Commissioner, Fyzabad.

The original suit asked for two reliefs—one for delivery of a *patta* under section 108, clause 7 and the other for compensation on account of withholding a receipt for payment of rent under section 108 clause 9 (b). The suit was wholly triable by an Assistant Collector. Had the suit been merely for a relief under section 108 (7), appeal would have been to the Commissioner while, had the relief claimed been only that under section 108(9) (b), appeal would have been to the Court of the District Judge. The learned Commissioner thinks that the appeal should be decided by the District Judge on the analogy of an original suit partly cognizable by a Civil Court and partly by a Revenue Court in which circumstances the Civil Court tries the whole suit.

The reference came before a learned single Judge of this Court who considered the point of sufficient importance to require a decision by a Bench.

When an original suit is partly cognizable by a Revenue Court and partly by a Civil Court, there is good reason why the Civil Court must try it. Under part of section 108 only certain suit can be heard by Revenue Courts to the exclusion of Civil Courts. Civil Courts, therefore, are precluded from trying those particular suits only and Civil Courts have the residuary power to try suits which do not come under that part of section 108. A suit which as regards one relief comes under that part of section 108 but as regards another relief does not, cannot be said to come within the ambit of that part of section 108 for it does not do so *in toto* but only in part, and therefore, a Civil Court can try it. In the case of appeals, however, we have to consider sections 116 and 119. Section 116 lays down that appeals from Revenue Courts go to higher Revenue Courts except in certain cases which are provided for under section 119. Section 119 applies to appeals from original suits under certain parts of section 108 including (9). If,

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therefore, an appeal is from a suit where the only relief claimed is under section 108(9), appeal will lie to the District Judge or to the Chief Court as the case may be. If, however, a suit partly comes under section 108(9) and partly comes under some section e.g. 108(7), where an appeal lies to a Revenue Court, it cannot be said that the suit comes under section 119 because it does not do so *in toto* but only in part. To put it otherwise, we might say that in view of section 108 the Civil Court is the court that can try all suits save those specifically excepted while as regards appeals from decisions of Revenue Courts the general rule is under section 116 that the Revenue Courts shall hear the appeal and 119 is the exception that certain appeals should be heard by Revenue Courts. Section 119 being the exception, must be strictly construed and, therefore, when only part of the appeal would come under section 119 it cannot be said that section 119 will apply. The analogy of an original suit will really lead to the opposite result from that given by the learned Commissioner. In the present case, there is a further reason for holding that the Commissioner is competent to hear the appeal. The learned counsel both before the single Judge of this Court and before us has made it quite clear that he does not wish to appeal against that part of the suit which came under section 108(9) so his appeal refers only to the decision under section 108(7) and the appeal would undoubtedly have gone to the Commissioner had the suit claimed this relief only.

What we have to consider is whether the Civil Court can try this appeal, and if it cannot, it is immaterial whether the Revenue Court can hear this appeal because the appeal is only about a relief under section 108(7) or whether it could hear the appeal if it was also against a decision on the claim under section 108(9). We are of opinion that as this suit was not *in toto* one under section 108(9), it is not for the Civil Court to

hear the appeal and the Commissioner is entitled to hear it.

We, therefore, return the reference stating that the learned Commissioner has power to hear the appeal.

Reference returned.

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MISCELLANEOUS CIVIL

*Before Mr. Justice Ziaul Hasan, Acting Chief Judge and
Mr. Justice J. R. W. Bennett*

NAZIR HASAN KHAN (APPELLANT) v. GANGA DIN
(RESPONDENT)*

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United Provinces Encumbered Estates Act (XXV of 1934), section 9—Civil Procedure Code (Act V of 1908), order VI, rule 17—Written statement of Creditor filed under section 9 Encumbered Estates Act—Amendment of written statement sought by adding new claims—Application for amendment made long after expiry of time allowed under section 9 for filing of claims—Amendment if can be allowed under order VI, rule 17—Limitation Act (IX of 1908), section 5—Counsel's mistaken advice, whether a ground for extension of time under section 5, Limitation Act.

Order VI, rule 17, Civil Procedure Code, does not enable a party to alter the nature of his suit by the substitution or the addition of a claim founded on a different cause of action.

When long after the expiry of the time allowed under section 9 of the United Provinces Encumbered Estates Act for filing a written statement a creditor made an application for the amendment of his written statement, by adding a claim on the basis of four additional mortgage deeds, *held*, that as there would be a material change in the claim made in the written statement, the applicants cannot rely on order VI, rule 17 to bring his additional claims within time.

The mistaken advice of counsel is not sufficient to justify extension of time under section 5 of the Limitation Act unless the advice was given in good faith, that is with due care and attention. *Amrit Lal and others v. Phool Chand and others* (1) referred to.

*Miscellaneous Appeal No. 75 of 1937, against the order of Pandit Brij Kishan Topa, Special Judge, of 1st grade, Bara Banki, dated the 31st August, 1937.