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passed, has gone beyond its jurisdiction. But even if it has, it would not be necessary for us to consider that point, as it was not taken below, and I think that no harm has been done to any body by that paragraph in the lower Court's decree, as I understand that decree is only in the nature of a declaration that the act of the defendant was a trespass, inasmuch as the land on which the new road was constructed was the plaintiff's private property. All questions as to whether the new or the old road was most convenient are altogether immaterial.

KEMP, J.—I am of the same opinion, and concur in dismissing the special appeal; but I do not wish to commit myself at present to any opinion with reference to the question of the Civil Court's jurisdiction in cases of public roads, as the point is not taken in special appeal before us, nor raised in the Court below.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

COURT OF WARDS (PLAINTIFF) v. NITTA KALI DEBI AND ANOTHER (DEFENDANTS.)*

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Aug 7.

Vendor and purchaser—Refund of Purchase-Money—Set-off—Registration.

The plaintiff agreed to purchase land and paid down the purchase-money taking from the vendor an agreement that if he did not register the conveyance, he would return the purchase-money. The plaintiff entered into possession; but the vendor failing to register the conveyance, he sued to recover back his purchase-money. *Held*, that he was entitled to a refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstances of the case, be liable to pay the vendor a reasonable amount for the occupation of the land; but when no set-off is pleaded, the vendor could only claim such amount by a separate action.

THIS case was referred to the High Court by the Judge of the Small Cause Court of Jessore under the circumstances stated in the following order of reference.

This is an action brought by the Court of Wards to recover from the defendants rupees 156-5-6, under the circumstances mentioned in the plaint, which runs as follows:—

For the recovery of rupees 156-5-6 due on an *ikrar*, or agreement, dated the 21st Chaitra 1272, which Braja Lal Banerjee,

* Reference from the Judge of the Court of Small Causes at Jessore.

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the predecessor of the defendants, had executed in favor of Raja Pratab Chandra Sing Bahadur, the predecessor of the minor plaintiffs. The said *ikrar* was executed on account of *salami* and advance received on granting an incomplete *maurasi* lease in the name of Benodi Lal Sing. The clause contained in the *ikrar* was that if the lease were not duly registered in time, the whole amount was to be recovered with interest in Sraban 1273, but as the deed is incomplete on account of it not being duly registered, the minors are entitled to recoves the amount claimed with interest.

At the trial I found, as a fact, that the *ikrar* sued upon hap been executed by Braja Lal Banerjee, and that he had received the amount mentioned therein as *salami* and advance rent; that in Assar or Sraban of 1273, he, as well as Guru Charan Baners jee and the parties who granted the patta, accompanied by Benodi Lal Sing, the party to whom the *maurasi* patta ir addressed, and who in exchange granted a *kabuliat*, proceeded to Narral, in order to have the patta registered; that there Benodi Lal was given to understand by the *amlas* of the Registrar's Office and other parties that the patta could not be registered without a *bundwara* or boundary paper; consequently it was not presented to the Registrar or Sub-Registrar for registration; that Braja Lal, Guru Charan, and their sharers promised to supply the same; but that it was not supplied, and the time for registration passed away without the patta or *kabuliat* being registered; that, notwithstanding the Court of Wards took possession of the property mentioned in the patta from Jaishta of 1273, and continued in possession down to Aghran 1275, when they voluntarily relinquished it as the same proved unremunerative, and by their zemindari books they show a loss of rupees 17 annas 5 sustained, as follows:—

Total jumma due to six shareholders for 4 years, at Rs. 201-4-0 per year	Rs.	805	0 0
Deduct on account of Sudder rent paid by the lessees	Rs.	598	1 6
Balance ...	Rs.	206	14 6

Carried over					Rs.	206	14	6
Deduct on account of Kachubarea, &c., which have been decreed to a third party, Rs.	97	10	6					
Deduct on account of jammas denied by the ryots	Rs.	104	13	0				
Deficit after collating the *kustbood*	Rs.	21	12	0	Rs.	224	3	6
						17	5	0

The question therefore arises whether, on the facts as found, the present suit is maintainable.

When the patta was granted, the Registration Act No. XVI. of 1864 was in operation, and under the provisions of section 13 the *maurasi* patta was an instrument which, unless registered according to the provisions of that Act, could not be received in evidence in any civil proceeding. I therefore think it was incumbent on Benodi Lal Sing to have peesented the patta to the Registrar or Sub-Registrar of Narral, under section 15, and if he refused to register the same, on the ground that no boundaries were set forth, and if the objection was not well founded, Benodi Lal Sing could, under that section, have brought a regular suit to enforce registration. However as it appears that the sharers consented to furnish boundaries and did not do so, I think, in the absence of possession having been taken by the plaintiffs, the present suit would have been well maintainable on the breach of the agreement to register; as it is, I do not think the suit is maintainable in its present form.

There are many cases in the law books which show that the count for money had and received is not maintainable, if the contract has been in part performed, and the plaintiff has derived some benefit, and by recovering a verdict the parties cannot be placed in the exact situation in which they respectively stood when the contract was entered into; and I think the present is one of those cases, as plaintiff by having continued in possession of the property down to Aghran 1275 deprived the sharers of the use and enjoyment of the same and of the rents and profits which they might have derived, had no such possession been taken.

It is urged that the *ikrar* does not provide for possession being taken of the property by the plaintiffs, and that if they did take

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possession of it, they in their turn will be liable to the sharers for any damage they may have sustained by such occupation. I cannot assent to this reasoning, as it appears to me that the agreement to register was a condition precedent to plaintiffs' taking possession of the property, but it ceased to be so by the subsequent conduct of the plaintiffs in having taken possession of the property; and every contract is to be interpreted in connection with surrounding circumstances, and the acts done by the contracting parties in fulfilment of the contract may be regarded, in order to see what interpretation they have themselves put upon it, and what conditions have been waived or performed, and the construction of the instrument may thus be varied by matter *ex post facto*.

Thus it appears to me that, as there has been no failure of consideration, the present suit, as laid, is not maintainable: I have therefore given a verdict in defendants' favor subject to the opinion of the High Court.

The judgment of the Court was delivered by

PEACOCK, C. J.—It appears to the Court that the plaintiffs are entitled to recover the sum claimed, *viz.*, rupees 156-5-6. The defendants agreed that if they should fail to register the deed they would refund to the plaintiffs that amount. The plaintiffs took possession of the land, and it is therefore said that the plaintiffs are not entitled to enforce the agreement. We think that the plaintiffs are entitled to enforce the agreement notwithstanding that they took possession. They may be liable, however, to the defendants to pay them a reasonable amount for the use and occupation of the land during the time that they were in possession. This case appears to me to stand on the same footing as that of a purchaser. If a purchaser should agree to purchase and should pay down the purchase-money, taking an agreement from the vendor, that if he should not register the conveyance, he should return the purchase-money, the purchaser would be entitled to receive his purchase-money back if the vendor should fail to register the conveyance. If the purchaser should have been let into possession of the land agreed to be purchased, he might be liable to the vendor to pay him a reasonable amount for

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the occupation of the land, but that would depend upon the particular circumstances of the case.

In this case there is no set-off pleaded charging that the plaintiffs were indebted to the defendants for the use of the land, and under those circumstances if the defendants are upon the whole facts of the case entitled to any remuneration for the use and occupation of the land, they must resort to a cross action, in which that question, as well as the amount, if any, which they may be enttiled to recover, will be settled.

The only answer we can give to the Judge of the Small Cause Court is that the defendants were bound to return the money in default of registering the *maurasi;* and not having registered it, the plaintiffs are entitled to recover the amount which the defendants stipulated to pay.

There will be no costs of the argument before this Court.

Before Mr. *Justice Kemp and* Mr. *Justice Markby.*

1869
Aug. 9.

BHAIRAB CHANDRA MADAK (PLAINTIFF) *v.* NADYAR CHAND PAL AND OTHERS (DEFENDANTS.)*

Apportionment—Purchasers of Mortgaged Premises—Decree, form of.

See also 15 B. L. R 304.

In execution of a decree, the right, title, and interest in two parcels of property of a judgment-debtor, who had previous to the attachment executed a simple mortgage thereof to A, was sold; and B and C respectively purchased them at different prices.

A sued the mortgagor and the purchasers B and C, for enforcing his lien on the two parcels of property. The suit was dismissed by the first Court; but on appeal, the order was "appeal decreed." A entered into a compromise with B, and entered satisfaction of a moiety of the decree. He afterwards issued execution of the other moiety against C, and compelled him to pay.

C now sues B for recovery of the proportion of the amount paid by him to A, but which, according to the valuation of the respective properties, should have fallen into the share of B.

Held, that the proper decree in the suit of A against the mortgagor and B and C would have been a money-decree against the mortgagor only, with a declaration that the two properties were liable to be sold, clear of subsequent incumbrances, in satisfaction of the mortgage bond-debt.

* Special Appeal, No. 276 of 1869, from a decree of the Subordinate Judge of West Burdwan, dated the 16th December 1868, reversing a decree of the Moonsiff of that district, dated the 6th July 1868.