1921.

Present : Shaw J.

DINESHAMY *v.* SIDORIS.

275—C. R. Balapitiya, 13,299.

Notarial lease—Lessor unable to give possession in terms of lease—Subsequent oral agreement to waive rent for eighteen months as plantation was damaged by previous lessee—Proof of oral agreement—Evidence Ordinance.

By a notarial deed plaintiff leased to defendant his cinnamon land for six years commencing from May, 1919. A previous lessee refused to give up possession for some months thereafter, and the cinnamon plantation was also greatly damaged. It was agreed between the plaintiff and defendant that the defendant should have the land free for the first year and a half.

Held, in an action for rent, that the defendant could lead oral evidence to prove the agreement.

"The agreement entered into at the time the defendant agreed to take possession was not a variation of the terms of the original lease, but was a new agreement entered into after the plaintiff had been found unable to carry out the terms of the lease. This is a verbal lease, and so long as possession is held under it, its terms must be carried out. It may be that not being notarial, either party could refuse to carry out the terms."

THE facts appear from the judgment.

Ameresekera, for the appellant.—The Commissioner of Requests is wrong in admitting in evidence an alleged oral agreement between the parties contrary to the terms of the deed of lease dated May 9, 1919, in contravention of the provisions of section 92 of the Evidence Ordinance. In *De Silva v. De Silva*[1] it was held that an agreement made orally and subsequently to a deed of lease to accept a smaller amount as rent than that stipulated in such deed is a distinct variation of the obligation of the lease, and cannot be proved by other evidence than by a notarial instrument.

F. de Zoysa (with him *Weerasinghe*), for the respondent. The case of *De Silva v. De Silva*[1] was considered and over-ruled in the case of *Kiri Banda v. Ukku Banda.*[2] Lascelles C.J. there held that the old rule of evidence that notarial documents can be modified or varied only by notarial writings does not obtain in Ceylon since the Evidence Ordinance came into operation.

[1] *(1907) 1 A. C. R. 107.* [2] *(1911) 14 N. L. R. 181.*

The defendant's position in this case is that he never took possession of the land under the lease, but that he did so on the oral agreement. He is, therefore, entitled to ask the Court to enforce the terms of that agreement.

Ameresekera, in reply.—The position taken up by the defendant in this Court as regards the circumstances under which he came to possess the land is not borne out by the facts proved in the case.

Kiri Banda v. Ukku Banda[1] can be distinguished from the case of *De Silva v. De Silva.*[2] *Kiri Banda v. Ukku Banda*[1] only decides that under certain circumstances the variation or modification of a notarial instrument may be proved by a non-notarial document. But the rule in *De Silva v. De Silva*[2] says that parol evidence cannot be led to vary or modify the terms of a written agreement except under circumstances provided for in section 92.

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The plaintiff claimed Rs. 60 being two instalments of rent payable under a lease dated May 9, 1919. He also claimed Rs. 40 being the amount of two penalties for non-payment of the instalments of rent, and he claimed Rs. 75 damages for the defendant having allowed two houses on the land to fall down and for his having appropriated to himself the materials of the houses. It appears that a lease was entered into between the plaintiff and the defendant, which was to commence on May 9, the subject-matter being certain cinnamon land, for which the lessee was to pay for the term of six years six bales of cinnamon or Rs. 360 cash. This had to be paid in twelve instalments, each of Rs. 30. From the evidence that has been accepted by the Commissioner, it appears that the plaintiff was unable to put the defendant in possession of the land under the lease. A man named Podi Singho was in possession of the land and refused to give it up, and he was not turned out until four months after possession should have been given to the defendant. During this time Podi Singho had damaged the cinnamon on the land to such an extent that the evidence shows that the land was worthless for a year and a half. Thereupon a new arrangement was come to between the plaintiff and the defendant, and the defendant entered into possession on the plaintiff undertaking that he should have the land free for the first year and a half. The evidence also shows that the houses in respect of which the plaintiff claims had tumbled down before he took possession of the land. The Judge having accepted these facts has dismissed the plaintiff's action. It is urged on his behalf on appeal that it is not open to the defendant to show a subsequent agreement by which the plaintiff undertook to waive the rent for eighteen months, because that would

[1] *(1911) 14 N. L. R. 181.* [2] *(1907) 1 A. C. R. 107.*

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be to allow parol evidence to vary the terms of the written agreement, and the case of *De Silva v. De Silva*[1] is cited in support of this contention. This case was considered and discussed in the case of *Kiri Banda v. Ukku Banda.*[2] But it is not, in my opinion, necessary in this case to go into the question of the principle of that decision, because the agreement entered into at the time the defendant agreed to take possession was not, in my opinion, a variation of the terms of the original lease, but was, in fact, a new agreement entered into after the plaintiff had been found unable to carry out the terms of the lease he had agreed to grant the defendant. The verbal agreement appears to have been that the defendant should take the land on the terms of the original lease proposed, subject to this variation in its terms that no rent should be payable for the first eighteen months. This is a verbal lease, and so long as possession is held under it, its terms must be carried out. It may be that not being notarial, either party could refuse to carry out the terms. I agree with the Commissioner that the plaintiff has failed to make out the cause of action sued on, and the appeal must consequently be dismissed, with costs.

Appeal dismissed.

[1] *(1907) 1 A. C. R. 107.*

[2] *(1911) 14 N. L. R. 181.*