APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

JOHN BOISOGOMOFF

v.

MANMATHANATH MALLIK.*

1930

June 26, 30.

Title—Suit for ejectment—Plaintiff's title bad—Plaint, amendment of—Application for amendment by a defendant—Defendant transferred to the category of plaintiff—Subsequent pleadings—Costs.

The question of the title of the plaintiff has to be tried in an action in ejectment when the defendant raises a defence that the plaintiff is as much a trespasser as he is. If the title of the plaintiff is altogether bad, it is improper to allow an amendment transferring a defendant to the category of plaintiff in order to make the suit good.

In a proper case—but not in a case where a man has a hopelessly bad suit—a new plaintiff may be added in order that the substance of the matter may be decided, but very good care should be taken to ensure that the new plaintiff should have no greater rights than he would have had, if he had brought the suit himself at that time : and the plaintiff who had no just claim should be ordered to pay the costs of the defendant.

A plaint should not be amended except on the application of the plaintiff. Wherever a plaint is allowed to be amended, proper pleadings of the new case should be ordered to be set out and the defendant should be given an opportunity to lay out his defence properly in a written statement.

It is undesirable to try questions of title except upon proper pleadings.

APPEAL by the defendant from a judgment of Buckland J.

This was a suit for ejectment. The first defendant was a lessee of the premises in suit and was holding over after termination of the lease.

One Ramgopal Banerji, a Hindu, governed by the Dayabhaga school of Hindu law, was the owner of the premises in question. He died leaving him surviving his widow Jaykali, a childless daughter named Matangini and two grandsons by a pre-deceased daughter Ulangamohini, namely, Priyanath Chatterji and Nanimohan Chatterji. Ramgopal had a brother, Shibkrishna Banerji, who died leaving a widow Annapurna Debi.

*Appeal from Original Decree, No. 8 of 1930, in Suit No. 1966 of 1926.

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On the death of Ramgopal in 1863, Jaykali Debi became entitled to the estate of Ramgopal as a Hindu widow. In 1872, she purported to transfer all her right, title and interest in the widow's estate to Annapurna Debi who then took possession of the estate.

In 1906, Annapurna executed a lease to the defendant Boisogomoff for 40 years from 1914 or during the lifetime of Jaykali, whichever was the least.

Jaykali died on the 11th February, 1920, and thereafter Boisogomoff continued in possession as a trespasser. This suit was brought to recover the possession of the property and for mesne profits.

The plaintiff, Manmathanath Mallik, claimed title to the property as mortgagee-purchaser thereof on a mortgage from Nanimohan, grandson of Jaykali, who was adopted by Annapurna and who, as her reversioner, purported to have mortgaged his interest in the property by successive mortgages or charges in years 1910 to 1914.

The defendant, Prabhabati, claims the property as the widow of Nanimohan and as the *administratrix pendente lite* to his estate. She was transferred to the category of plaintiff on her own application.

Buckland J. decreed the suit in favour of Prabhabati Debi for possession and mesne profits.

Hence this appeal.

A. K. Roy, Standing Counsel, and *P. C. Ghosh* for the appellants.

N. N. Sircar, Advocate-General, and *S. N. Banerjee* for the plaintiffs, respondents.

B. C. Ghose and *B. C. Dutt* for the receiver, respondent.

RANKIN C. J. In this case it appears to me that the suit has been somewhat mishandled and that the proper order is that the suit be dismissed with costs, leaving Sreemati Prabhabati Debi, to bring a suit of her own upon proper materials properly pleaded if she is advised to do so. The suit began in 1926 as a

suit by a Mr. Mallik. The property in question is a house property in Kyd Street which belonged to one Ramgopal Banerji and, after his death, belonged for the estate of a Hindu widow to Jaykali—his widow. Jaykali died on the 11th February, 1920, having in the meantime assigned this property to a lady called Annapurna who in 1906 gave a forty years' lease thereof to the defendant. Mr. Mallik brought a claim, the foundation of which was carefully concealed in the plaint, but which was this: He had taken title under certain mortgages made by Nanimohan Banerji in the lifetime of Jaykali. The suit, therefore, was a suit by a person who had *prima facie* got no title whatever. He had purported to derive title from a man who had a mere *spes successionis*. When this suit, brought in August, 1926, was coming on for trial in or about July, 1929, it is very intelligible that the plaintiff's advisers had to do something to reconstruct the suit which stood in manifest peril of being dismissed with costs.

In the plaint, there was some curious pleading. Sreemati Prabhabati Debi had originally been made a defendant. The reason of making her a defendant is explained in the plaint itself and it is this: "Inasmuch "as it may be contended that the defendant Sreemati "Prabhabati Debi had or has some interest in the said "premises (which contention the plaintiff does not "admit), the plaintiff has been advised for the sake of "greater safety to make her a party defendant to this "suit." That means that the plaintiff was making her a party defendant in the suit in order that in her presence his title might be established as good so as to bind her. But the plaint goes on to say: "The "third defendant has, however, no objection to a "decree for ejectment being passed in favour of the "plaintiff against the first and second defendants in "respect of the said premises and the plaintiff does not, "therefore, claim any relief against her in this suit." In my judgment this paragraph should have been struck out. It was for Prabhabati by her written statement to say whether she would object or not

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object to the plaintiff's claim and whether she objected or not, the plaintiff had to show title in himself in order to succeed.

When the suit was nearing its appointed end, a very curious application was made before the learned Judge. It was not made by the plaintiff but it was made by this defendant, Prabhabati, who, up to that time, had not even entered appearance or filed a written statement. The petition, which was presented to the Judge, recited paragraph 15 of the plaint and went on to say that, so far as the reliefs claimed in the suit are concerned, the defendant, Prabhabati, and the plaintiff have not any adverse interest and "in fact she informed the plaintiff that "she had no objection to a decree for ejectment being "passed against the first and second defendants * * * "and that any question regarding title to the said "premises as between your petitioner and the plaintiff "might be decided in other proceedings if such dispute "was not amicably settled between them." In other words, this defendant had bargained with a man, who had no title, that he might recover against the trespasser and that afterwards they might, if necessary, have a little fight between themselves. The petition then says that this defendant admits certain paragraphs in the plaint and that "she "adopts the rest of the plaint for the purpose "of these proceedings"—not that they are true or that she will treat them for all purposes as true, but that she adopts the rest of the plaint for purposes of these proceedings, *i.e.*, merely in so far as they will serve the purpose of ejecting the other defendants. She then sets out her real contentions and in so doing is studiously vague. Clause (*a*) of paragraph 5 is simply to the effect that the premises devolved upon and became vested in her husband, Nanimohan Banerji, on the death of Jaykali. It does not say in what right he became entitled, whether as daughter's son of Ramgopal or as son adopted to Shibkishen, the brother of Ramgopal. It does not say that Nani was adopted into another family or

whether the adoption was good or bad. It does not say whether Nani was a Banerji or a Chatterji. It then deals with a suit which Nanimohan brought against her daughter-in-law, Pramoda Debi, and it deals with Nanimohan having left a will and she (petitioner) herself having been made *administratrix pendente lite*. She then says that "it clearly appears "that the abovenamed plaintiff and your petitioner "are jointly or severally the owners of the said "premises" and that "your petitioner submits that, "for the purpose of disposing of the real issue in this "suit, it is not necessary to go into the question of "title as between the abovenamed plaintiff and your "petitioner." Then she asks to be transferred from the category of defendant to the category of plaintiff and says that necessary amendments should be made in the cause title and the body of the plaint to that effect. Just as the plaintiff in his plaint answered for her that she had no objection, so she goes on to answer for the plaintiff by saying that "she "has been informed that the plaintiff has no objection "to your petitioner being joined with him as a "co-plaintiff in this suit." On this application the plaintiff does not seem to have even appeared, though doubtless it was made with his full approval, and the learned Judge, instead of dismissing it as in my judgment he should have done, made an order which I am bound to say I cannot quite understand. The order made was to this effect that the lady was to be added as a plaintiff and struck out from the list of defendants with consequent amendments of the plaint. But what was to be put in the body of the plaint by way of a case made by this lady was in no way ascertained or decided, and when a few days later the case came on for trial, the lady had been transferred from one category to another; and save for that the plaint remained as before. Nor were any terms whatever imposed as a condition of the order: indeed the costs were made costs in the cause. It was impossible at the hearing to try the suit between the lady and the defendant on this plaint

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and, the sooner somebody discovered what the case to be tried was, the better. On this, the learned Judge, looking at the affidavits, made an order to the effect that the allegations made by the lady in the fifth paragraph of her petition should be deemed to be inserted somewhere in the middle of Mr. Mallik's original plaint. Nothing was said about the lady's right to adopt the rest of the plaint for the purposes of these proceedings; but it was arranged that somewhere and somehow this paragraph 5 of the petition should be deemed to be part of the plaint and, in the same way, finding that this paragraph 5 had been answered by an affidavit of the defendant, it was ordered that paragraph 16 of the defendant's affidavit should be deemed to be part of his written statement. An adjournment was refused and particulars were refused.

It is said on behalf of the plaintiffs respondents that this order cannot now be complained of because it was assented to by the late Mr. B. K. Ghosh, who was the defendant's counsel. I do not so read the minutes at all. It seems to me that Mr. Ghosh was in this position that he could not object to the amendments which had been made by the previous order. That being so, what he wanted was that proper pleadings should be set out. The learned Judge was not willing to give him that. It was suggested that he should go on with the additional paragraph 5 and, not desirous of being obstructive, apparently Mr. Ghosh said that he did not mind that but that he wanted certain particulars. He particularly wanted to raise an issue—"Have the plaintiffs or any of them "any title to the property in suit." He wanted to know whether it was the case of the lady that there never had been an adoption or whether her case was that there had been an adoption, which was a good adoption—or whether her case was that there had been an invalid adoption in which event he desired to contend that it destroyed Nanimohan's right in both the families. In these circumstances, certain evidence was given and the learned Judge by his judgment

has decreed the suit on Prabhabati's title. Before him Mallik's title was discreetly dropped altogether. The defendant's documents contained evidence to the effect that there had been an alleged adoption of Nanimohan into the family of Shibkrishna Banerji. On this the learned Judge takes the view that the adoption has not been proved on behalf of the plaintiff and that it is not admitted as valid on behalf of the defendant; and he says "but no admission is sought "or required" and, "in my judgment, no question "based on the adoption arises in this case." It is typical of the confusion that results when cases are tried with pleadings in an impossible condition. The learned counsel for the defendant was suddenly asked to do all the work that ought to have been done carefully in writing by making statements to the court instead of getting an opportunity to lay out his defence properly in the written statement replying to a properly laid case. At one time and at one period of this very trial, the learned Advocate-General—for the plaintiffs—was undoubtedly running as alternatives both of two cases (1) that Nanimohan was the reversioner apart from any adoption and (2) that there had been an adoption, under which equally he was a reversioner. Paragraph 5 of the lady's petition is vague and inconclusive on the subject and the learned Judge has found against the defendant without even purporting to decide the question whether there ever was the alleged adoption, whether it was good or bad and whether, if it was bad, it would not take away Nanimohan's right in both families as Mr. B. K. Ghosh contended. I fail in these circumstances to see that there is any *substratum* for the decision.

On the question of mesne profits and on the question of costs, the learned Judge's judgment is also in my opinion open to objection. In a very different kind of case—not a case where a man has a hopelessly bad suit and wants to substitute another person's suit upon a different title but in another kind of case—it may be right to let in a new plaintiff in order that the

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substance of the plaintiff's claim may really be decided, but even then it would be only right to take care to make it clear that the new plaintiff should have no greater right than he would have, if he had brought the suit himself at that time, and to provide for the defendant's costs making that plaintiff, who had no just claim, answerable for the defendant's costs. [*Ayscough* v. *Bullar* (1); *A. G.* v. *Pontypridd* (2).] It would have been possible, if the learned Judge had made a careful order of that sort, to say that at least no great harm was done by the order giving leave to amend. But, in this case, not only was no precaution taken in the order giving leave to amend but, when the time came to give judgment in this suit, the learned Judge gave mesne profits from May, 1924, far more than three years before the date of the amendment, and made no provision at all, so far as I can see, that Mr. Mallik should pay any costs of the defendant. In my judgment, this case is a very good example of the extreme undesirability of trying questions of title except upon proper pleadings. Adoption was part of an alternative case of the combined plaintiffs after the amendment. It is dropped at the trial. The burden shifted to the defendant to prove (1) an adoption, (2) its invalidity, (3) its effect to destroy Nani's right in his original family. This last question as to the effect of an invalid adoption must be decided before Prabhabati's claim can be allowed. That question may or may not be an easy one but it is a very important one and it has to be tried. I do not in any way regard it as no part of the merits when the defendant in an action in ejectment raises a defence that the plaintiff is as much a trespasser as he is. That seems to me to be a very good defence on the merits in an action in ejectment. It is now suggested that we should decide this question as an abstract question of law, though the learned Judge has not dealt with the facts at all. I should be very sorry to decide such a matter in such a way. In my judgment we should not now

(1) (1889) 41 Ch. D. 341. (2) [1908] 1 Ch. 388.

remand this case for a further trial. No doubt one year has been lost by these exceptional proceedings under the order to amend. But we should now in effect make the order, which the learned Judge should have made at the time the application for amendment was made, namely, to dismiss it with costs; and then the only order to make is that which the learned Judge should have made at the trial, and that is to dismiss the suit with costs. In my judgment, the suit must be dismissed with costs. We may make it clear that, if Prabhabati wants to bring a suit properly framed for ejectment of the defendant on the ground of her own title, she is entirely at liberty to do so and this decision will not stand in her way. The appeal is allowed with costs. The receiver will not be entitled to his costs of this appeal.

GHOSE J. I agree

Appeal allowed.

Attorney for appellant: *P. C. Ghose.*

Attorneys for respondent: *M. N. Sen & I. D. Jalan.*

S. M.