Before Mr. Justice Prinsep and Mr. Justice Field.

1881
July 4.

KRISHNA CHURN BAISACK AND OTHERS (PLAINTIFFS) *v.* PROTAB CHUNDER SURMA, *alias* RAJENDRO LALL, AND OTHERS (DEFENDANTS).*

Declaration of Title—Adverse Possession—Case made in Plaint—Summons to compel attendance of Witnesses—Summons to produce Documents, Refusal of—Civil Procedure Code (Act X of 1877), s. 137.

Where a specific title has been alleged, but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of Appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness, to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged.

In all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under s. 137 of the Code of Civil Procedure, the Court ought not to refuse such application, merely because in its opinion the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial.

IN this case the plaintiffs sued to recover possession of a mirasi taluk, named Chupsara, on the allegations that one Gopal Pershad Thakur was the former owner of the property; that he granted a miras lease of it to his daughter Fulkumari, and that she was owner and in possession thereof; that, on the 17th Jeyst 1276, corresponding with 29th May 1869, she sold it to the plaintiffs' father, who entered on, and continued in, possession until his death, and that they (the plaintiffs) then entered into possession of it; that the defendants instituted a suit against them in respect of this property, which was ultimately decided against them, the defendants, in the High Court; but that notwithstanding this they applied to the Magistrate, who attached the property under s. 531 of the Criminal Procedure Code, and directed

* Appeal from Appellate Decree, No. 471 of 1880, against the decree of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 24th November 1879, reversing the decree of Baboo Gunga Churn Sircar, Subordinate Judge of that district, dated the 25th July 1878.

it to be let out in ijara; and that, consequently, they were obliged to institute this suit to establish their right to, and recover possession of, the land. The defendants, among other pleas, contended, that Gopal Pershad had no personal right in the property, which was debutter land devoted to the maintenance of the idol Lukhi Narain and to other religious purposes, and that he, consequently, could not alienate it; that he did not really, and in good faith, execute the miras lease in favor of Fulkumari, and that she was never owner and in possession; that, by the alleged miras patta set up by the plaintiffs, Fulkumari had only a life-tenure, and therefore could not transfer it; that the plaintiffs' father never purchased it, and that neither he, nor the plaintiffs, had been in possession within twelve years previous to the institution of the suit, but that the property passed from Gopal Pershad Thakur to his son Kishen Pershad Surma, *alias* Raja Babu, and ultimately to the defendant Protab Chunder, who had been in possession for a long time; that Raja Babu was a man of immoral character and extravagant habits, and that even if a miras patta had been granted and Raja Babu had admitted it, they were not bound by his acts, as they were not his personal representatives, but his successors in the post of shebait.

The miras patta was not produced at the hearing. The Subordinate Judge found that the miras title had not been established, but gave the plaintiffs a decree, holding that, they had been a long time in possession, and that, in addition, they were in the position of *bonâ fide* purchasers for valuable consideration. On appeal, the District Judge was also of opinion that the miras title had not been established, and proceeded to dispose of the question of title by twelve years' possession, and held that, on this ground also, the plaintiffs were not entitled to succeed, but he did not specifically deal with the question as to whether or not they were *bonâ fide* purchasers for valuable consideration. He, accordingly, reversed the decision of the Subordinate Judge. The plaintiffs now specially appealed to the High Court against that decision.

Baboo *Hem Chunder Banerjee* and Baboo *Hurry Mohun Chucherbutty* for the appellants.

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Baboo *Opendro Nath Mitter* for the respondents.

The judgment of the Court (PRINSEP and FIELD, JJ.) was delivered by

PRINSEP, J.—This case arose out of a proceeding under s. 530 of the Code of Criminal Procedure. Under that proceeding the present plaintiffs were, as they allege, turned out of possession, and they have brought this suit to recover possession, alleging the following title: They say that the property originally belonged to one Gopal Pershad Thakur, who granted a miras lease of it to his daughter, Fulkumari. In the plaint the date of this lease is not given, but from subsequent proceedings it appears that the date is Aghran 1244, corresponding with December 1837. They then say that Fulkumari was in possession of this property under this lease, and that, on the 7th Jeyst 1276, corresponding with 17th May 1869, she sold it to the plaintiffs' father, who obtained possession, and that the plaintiffs succeeded him in possession, and remained in possession until they were ousted by the proceedings under s. 530 of the Code of Criminal Procedure.

The Subordinate Judge was of opinion that the miras title had not been established, but he thought that, as the plaintiffs had been for a long time in possession, they ought to recover in this suit; and he further expressed an opinion that the plaintiffs are in the position of *bonâ fide* purchasers for valuable consideration.

Now, with reference to the finding of the Subordinate Judge that the plaintiffs had been in possession for a long time, we think that a judicial officer of the standing of Baboo Gunga Charan Sircar ought to be well aware, that this indefinite language and the indefinite form in which the fifth issue was framed are wholly inadequate for a judicial decision upon a question of title. In consequence of this indefinite language and of the inexact form of the fifth issue, a considerable amount of unprofitable discussion has arisen in this Court upon a point which is sufficiently simple.

The District Judge, on appeal, was also of opinion, that the miras title had not been established. For this finding he has

given a number of reasons, in all of which we are not prepared to concur. It is not, however, necessary for us to enter specifically into these reasons, because we think that there are some of them upon which his finding in respect of the miras patta as a finding of fact can properly be supported.

The District Judge then proceeded to consider the question of title by twelve years' possession, and he was of opinion, upon certain authorities which he has quoted, that the plaintiffs ought not to be allowed to succeed upon a title by twelve years' adverse possession, because this title had not been set out with sufficient distinctness in their plaint.

Now the question here raised is one upon which there are numerous decisions of this Court, which, unless carefully examined, may appear to be conflicting; but what these decisions really come to appears to us to be this, that where a specific title has been alleged but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of Appeal upon a title by twelve years' adverse possession, he must be prepared to show, that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness, to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. Now, if we apply this principle to the present appeal, it appears to us that there is little to distinguish this case from that of *Shiro Kumari Debi* v. *Govind Shaw Tanti* (1). Mr. Justice Markby there says:—"It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period." And then, referring to the particular facts of that case, he says in a further portion of his judgment:—"The plaintiff says, that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the possession of

(1) I. L. R., 2 Calc., 418.

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his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years." In the case before us the date of the original miras patta has not been given, and there is no general allegation that the possession of Fulkumari under the miras patta, if added to the possession of the plaintiffs and their father under the kobala, would altogether make up a period of twelve years' adverse possession, which would constitute a good title. Under these circumstances, we are of opinion that, so far as regards this second title of twelve years' adverse possession, we ought not to interfere with the judgment of the District Judge.

The District Judge did not distinctly deal with the question as to whether the plaintiffs were *bonâ fide* purchasers for valuable consideration. He says in the ninth paragraph of his judgment, that a certain decision of the Privy Council, in the case of *Ram Coomar Koondoo* v. *McQueen* (1), has been quoted in support of the contention raised before him, and "no doubt it is a sound one;" but when he reversed the decision of the Subordinate Judge upon four grounds which he has set out at considerable length, he did not proceed to show on what grounds the plaintiffs, if *bonâ fide* purchasers for valuable consideration, ought to fail in this case, the miras patta not having been proved.

Then, as to the title under the miras patta, it is contended before us, and we think with reason, that the plaintiffs were entitled to an order in their favor upon the application made by them to the Subordinate Judge to have the original miras patta sent for, this patta being on the Collectorate record. It appears that this patta was mentioned in the list of documents annexed to the plaint; that an application was made on the 4th June to have the original patta sent for from the Collectorate; and that the Subordinate Judge refused this application, because the examination of witnesses had already commenced.

The District Judge observes that the examination of the witnesses was concluded on the following day,—that is, the 5th June. Now it is quite possible that, if the Subordinate Judge

(1) 18 W. R., 166.

had, on the 4th June, complied with this request and sent for the patta from the Collectorate, it would have been produced in Court before him before the trial was terminated or the plaintiffs had closed their case.

We think that, as a general rule, in all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under s. 137 of the Code of Civil Procedure, the Court ought not to refuse such application, merely because, in its opinion, the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial. In this case there was very grave negligence on the part of the plaintiffs in not applying to have this document sent for at an earlier stage; and the Subordinate Judge would have been perfectly justified in saying that, in consequence of this negligence, he would refuse to grant an adjournment of the case, in order to enable the plaintiffs to do that which they ought to have done at an earlier stage. But we think that the Court was not justified in refusing to send for the document, and so denying to the plaintiffs an opportunity which might perhaps have been fruitful and favorable to them. For these reasons we think that the case ought to be remanded, and that the Subordinate Judge ought now to send for the original patta. When that patta is produced before him, it will be necessary to decide whether the miras title alleged by the plaintiffs has been established by the patta. He must then proceed to consider whether this miras interest is transferable, and must reconsider his decision on this point. When these findings of fact are sent by the Subordinate Judge to the lower Appellate Court, that Court will pronounce its own decision thereupon, and will further proceed to dispose of the question whether the plaintiffs are in the position of *bonâ fide* purchasers for valuable consideration, and, as such, entitled to hold this property, even if the miras patta is not proved, and even if the miras interest should not be found to be transferable. If Fulkumari was allowed by the defendants to hold herself out to the world as the owner of a transferable interest in the property, and so to mislead the plaintiffs, it will be necessary to consider whether the

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defendants are now estopped by their conduct from saying that she had no such interest. We think that, having regard to the culpable delay made by the plaintiffs in applying to the Court to have the miras patta sent for, no costs of this appeal ought to be allowed. As to the costs of the lower Courts, they will abide the final result of the case.

Case remanded.

Before Mr. Justice Miller and Mr. Justice Maclean.

1881
June 2.

MAHOMED AMEER AND ANOTHER (PLAINTIFFS) *v.* PERYAG SINGH AND OTHERS (DEFENDANTS).*

Suit for Cancellation of Mokurari Lease — Forfeiture — Equitable Relief against Forfeiture — Beng. Act VIII of 1869, *s.* 52 — *Act X of* 1859, *s.* 78.

Where, in a mokurari lease, there was a condition, that, in case of nonpayment of one year's rent, and its falling into arrears, the mokurari settlement was to be cancelled, and default was made and a suit for ejectment was brought,—

Held, that, independently of the Rent Act, the defendants should be allowed in equity a reasonable time to pay the landlord's dues in order to prevent forfeiture.

Mothoora Mohun Pal Chowdhry v. *Ram Lall Bose* (1) followed.

Held also, that the provisions of s. 52 of Beng. Act VIII of 1869 are exactly similar to those of s. 78 of Act X of 1859, and applicable to the case of a mokurari lease; and, therefore, that a decree passed in conformity therewith, which allowed fifteen days for the payment of the arrears of rent found due and interest thereon, was a good decree.

THIS was a suit brought by the plaintiffs to recover arrears of rent, for the cancellation of a mokurari lease granted by them to the defendants, and to recover possession of the lands, the subject-matter thereof. The lease contained a clause as follows:—"In case of nonpayment of one year's rent and its falling into

Appeal from Appellate Decree, No. 2310 of 1879, against the decree of J. F. Stevens, Esq., Officiating Judge of Patna, dated the 7th July 1879, affirming the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of that district, dated the 25th January 1879.

(1) 4 C. L. R., 469.