APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

KALI PRASANNA RAI AND ANOTHER (PLAINTIFFS) *v.* DHANANJAI GHOSE (DEFENDANT).* 1885 *June* 8.

Rent Suit—Abatement of rent—Diluvion—Transferee of tenant, Right of, to abatement.

A tenant has a right to, and can claim an abatement of, rent where the area of the land, the subject of his tenure, has been diminished by diluvion, and such right passes to a purchase on a sale of the tenure.

Prosunno Moyee Dossee v. *Doya Moyee Dossee* (1), distinguished.

IN this case the plaintiffs sued to recover the rent in respect of two khadas of land held by the defendant for the years 1286 to 1288 and a portion of the year 1289, together with the road and public works cesses, alleging that the defendant was an auction-purchaser of the rights of the original tenants. The defendant pleaded that the rent claimed was that due on account of four khadas of land formerly held by his predecessors; that out of that amount 2½ khadas had been washed away by the river previous to the year 1286; and that out of the remaining 1½ khadas the plaintiffs had taken possession of some 3 pakhis and let them out to another tenant from whom they had recovered rent, and accordingly they were only entitled to recover rent from him in respect of the balance of the 4 khadas in his possession.

The Civil Court Amin was deputed to measure the lands, and found the amount in existence to consist of some 32 bighas.

The first Court held that there was no sufficient evidence to prove that the original holding comprised 4 khadas, and that none of the land had been washed away since 1286. That Court also found that the plaintiffs had, between the years 1280 and 1285, sued the defendant three times for rent, and the objection

* Appeal from Appellate Decree No. 2885 of 1883, against the decree of F. W. V. Peterson, Esq., Judge of Jessore, dated the 9th of August 1883, modifying the decree of Baboo Krishna Nath Rai, Munsiff of Magura, dated the 5th of May 1883.

(1) 22 W. R., 275.

1885

KALI PRASANNA RAI v. DHANANJAI GHOSE.

now raised had not been taken in any of those suits, and disbelieving the defendant's case gave the plaintiffs a decree for the full amount claimed.

The lower Appellate Court modified that decree, holding that there was sufficient evidence given by the defendant and on his behalf to show that the original holding amounted to 4 khadas, that half the lands had been lost by diluvion, and that there was no evidence to rebut that given on behalf of the defendant, and consequently there was no reason to disbelieve that portion of the defendant's case. It also held that the lower Court was wrong in concluding that the previous rent suits had been brought against the defendant as they, as a matter of fact, had been brought against his predecessor, and it considered that the defendant had failed to prove that any of the 32 bighas found by the Amin still to be in existence was in the possession of other tenants of the plaintiffs. It consequently held that the defendant was bound to pay rent for so much of the tenure as was now in existence at the admitted rate, namely, 8 annas a bigha, and gave the plaintiffs a decree for the rent for the years claimed at that rate in respect of the 32 bighas together with the cesses in respect thereof.

The plaintiffs now specially appealed to the High Court, upon, amongst others, the following grounds:—

(1.) That the defendant being an auction-purchaser at the rent claimed after the alleged diluvion, he could not claim for any abatement of rent on account of such diluvion.

(2.) That the question of abatement ought to have been made the subject of a separate suit, and ought not to have been entertained in this suit.

(3.) That the evidence on the record was not legally sufficient to prove the exact quantity of land comprised in the tenure when first created, and how the rent was then assessed on the same.

Baboo *Rashbehari Ghose* and Baboo *Girja Sunkur Mozoomdar* for the appellants.

Baboo *Gurudas Bannerjee* for the respondent.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

Two points have been argued in this case: the first of these is, that the District Judge is in error in supposing that there is absolutely no rebutting evidence against that adduced by the defendant to show that there was a diminution in the quantity of land contained in his tenure.

The District Judge, it appears to us in the passage referred to above, referred to such evidence as measurement papers, zemindari papers, and other papers of a similar nature. It is not alleged before us that there is any such evidence on the record. There is nothing in the judgment from which we can say that the District Judge has not taken into consideration the circumstance that the defendant's predecessor in title did not claim any abatement upon the ground of diluvion. It is quite possible that the District Judge thought that the predecessor in title of the defendant was not aware of his rights. We are, therefore, of opinion that there is no force in this objection.

The second point that has been argued before us is, that the defendant, as an auction-purchaser, has no right to claim any abatement which may have accrued to the predecessor in title of the defendant, whose rights he purchased in execution of a decree.

In support of this contention the decision in *Prosunno Moyee Dossee* v. *Doya Moyee Dossee* (1) has been cited. That case is clearly distinguishable from this. There the right to the abatement depended upon a contract between the landlord and the original tenant, which provided that there should be an abatement of rent if on measurement at a time fixed by that agreement the quantity of land was found to be less than that stated in the agreement. The original tenant did not claim any abatement for about six years after the accrual of the right, but continued to pay the usual rent, and he then sold to the defendant.

It was held in that case that it was doubtful whether the right to enforce the terms of that contract passed by the sale of the tenure. But in this case the right to abatement did not depend

(1) 22 W. R., 275.

1885

KALI PRASANNA RAI v. DHANANJAI GHOSE.

upon any contract, but upon the general law by which a tenant can claim abatement on account of the diminution of area by diluvion, and that such right we think passes with the sale of the tenure.

We are, therefore, of opinion that this ground is also not valid. The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

MACKERTICH (PLAINTIFF) *v.* REBEIRO (DEFENDANT.)*

1885 *June* 3.

Trustee delaying in assigning the legal estate—Costs—Cestuis que trust, Conveyance by, and suit by purchaser to compel trustee to join in the conveyance.

A trustee who acts unreasonably in delaying to join in a conveyance, though guilty of no actual misconduct, further than that shown by an unwarrantable delay in doing that which he is bound to do, will be made to pay the costs of a suit brought against him for the purpose of compelling him to do his duty, notwithstanding that neither an offer to pay such costs as he might incur attending the conveyance, nor a tender of a release from his position as trustee, has ever been made to him; he, however, will still be allowed his costs attending the conveyance when completed.

THIS was a suit brought by a purchaser from certain *cestuis que trust* to compel the defendant, the sole trustee of a marriage settlement, to execute and register two conveyances of certain property, the subject of the settlement, and asking that he might be ordered to pay the costs of the suit.

Under and by virtue of a marriage settlement dated the 21st June 1856, of which the defendant was the sole trustee, a certain house, No. 10, Gomes Lane, in the town of Calcutta (which under the powers given to the trustee by the settlement had been purchased with the funds originally forming the corpus of the settlement) was held in trust for the benefit of Charles Watkins (the intending husband), and Rosalea Sarah Timmins (the intending wife), the income, therefore, being payable to the wife for life, and on and after her death to the husband for life, and after his death to such child and children of the marriage as the

* Original Civil Suit No. 89 of 1885.