that on "the tenant failing to do so either from inability or from unwillingness the possession returns to the proprietor, the contract between him and his tenant being no longer in force; *Prosono Koomar Tagore* v. *Rammohun Doss* (1). But the law provides for the re-entry of the landlord in a particular manner, *viz.*, by ejectment upon a decree for arrears under the provisions of s. 22, Beng. Act VIII of 1869, subject however to the occupying tenant's privilege of avoiding the ejectment by payment within fifteen days of (s. 52, Beng. Act VIII of 1869.)

1882

NARAIN ROY v. OTNIT MISSER.

In this view of the law I find that the defendants are not liable to be ejected under notice.

Appeal allowed.

Before Mr. Justice Wilson and Mr. Justice Field.

FUTTEHMA BEGUM AND OTHERS (PLAINTIFFS) *v.* MOHAMED AUSUR AND OTHERS (DEFENDANTS).*

1882
August 1.

Second Appeal—Findings of fact—Procedure of the High Court—Interest—Mortgage bond.

Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of fact which have been arrived at by the lower Appellate Court.

In a suit on a mortgage bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.

THIS was a suit for the recovery of Rs. 1,000 as principal, and a further sum as interset due on a bond executed by defendant No. 1, Mohamed Ausur, and his deceased wife Shurifunnissa Bibi on the 29th Choitro 1274, corresponding with the 10th April

* Appeal from Appellate Decree No. 496 of 1881, against the decree of T. M. Kirkwood, Esq., Judge of Mymensing, dated the 29th December 1880, reversing the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 29th March 1880.

(1) S. D. A., 1855, p. 14.

1882

FUTTEHMA BEGUM v. MOHAMED AUSUR.

1868, in favor of one Khotiza Sultan, the sister of the first two plaintiffs, and the mother's sister of the third plaintiff.

Originally separate suits were brought by plaintiffs Nos. 1 and 2 in the Bazitpur Munsiff's Court, in the year 1875, for their separate shares in this debt, of which they each claimed a 5½-anna share. The Munsiff in both cases decreed the claims, but the Subordinate Judge, on appeal, reversed that judgment, both on the merits and also on the ground that the plaintiffs could not sue separately, the bond being one and the same. The two plaintiffs then preferred a special appeal to the High Court, when all the proceedings were set aside, and they were directed to bring a joint suit, if so advised, on condition of their depositing the costs of the respondents in all Courts within two months. The Subordinate Judge's order was dated the 11th July 1876, and the High Court's conditional order was passed on the 3rd July 1877, and that was made absolute on the 3rd September following, all costs having been deposited. The present suit was instituted on the 30th May 1879 in the Court of the Subordinate Judge.

Several issues were raised by the defendants, and amongst them were the following :—

(1.) Whether the suit could be maintained in the absence of a certificate under Act XXVII of 1860.

(2.) Whether the suit was barred as *res judicata* by reason of the judgment of the Appellate Court in the former suit.

(3.) Whether, assuming the order to withdraw the former claim to have been unjustly made, a second fresh suit could lie.

(4.) Whether by reason of a portion of the money covered by one and the same bond not having been included in the former claim, the same should not now be held to have been relinquished.

(5.) Whether the suit was not barred by limitation.

(6.) Whether the plaintiffs were the rightful heirs of Khotiza Sultan, and whether the solenama was a *bonâ fide* document.

(7.) Whether the money bond was genuine, and the loan had been actually advanced.

The Subordinate Judge found that a certificate under Act XXVII of 1860 had been granted; that the suit was not barred as *res judicata* as the decision had been set aside by the High Court; and also decided the fourth and fifth

issues in favor of the plaintiffs. He also found that plaintiffs Nos. 1 and 2 were the heirs of Khotiza Sultan, who each of them taking a 5½-anna share had given up by a deed of agreement a 5-anna share to the plaintiff No. 3, who was the son of the first plaintiff.

With regard to the bond he held it proved that defendant No. 1 and his wife had borrowed Rs. 1,000 from Khotiza Sultan, the bond being executed on behalf of the wife by one Amzad, by virtue of an am-mokhtarnama, and that the property was mortgaged for the debt. The bond was duly registered. He accordingly decreed the suit with costs.

On appeal this decree was set aside by the District Judge, and the defendants were awarded their costs in both Courts.

The plaintiffs now preferred a special appeal to the High Court.

Mr. *Evans*, Moonshi *Mahomed Yusoof* and Baboo *Girish Chundra Chowdhry* for the appellants.

Moulvi *Serajul Islam* for the respondents.

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

WILSON, J.—It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the lower Appellate Court; but we are well within the scope of the authorities in holding that where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere. Now in this case there were several material questions to be decided; the first was whether the bond sued upon was executed by Ausur. As to that the Judge of the lower Appellate Court said in his judgment at page 15 of the Paper Book: "It appears to me that the evidence as to Ausur's signature to the bond is most unsatisfactory, and that that signature is in no way proved; (s. 67) Evidence Act." If that finding stood by itself it might probably be that we should not interfere with it,

1882

FUTTEHMA BEGUM v. MOHAMED AUSUR.

but it clearly refers to an earlier paragraph in the judgment, and that earlier paragraph shows that the reason why the lower Appellate Court was dissatisfied with the evidence of the witnesses was that he did not think they were present at the time, for he observes that not one of them says that he saw Ausur execute the bond; in other words he understands them not as speaking of something which was done while they were present, but of a transaction, the description of which they had heard from others. It appears to us that this is a clear misapprehension on the part of the Judge, and that these witnesses clearly intended to speak as of a thing they had themselves seen. That seems to us clear from their direct examination, and in the case of several of them it is made still more clear from their cross-examination, from the tenor of which it seems to us that all parties present at the trial understood that they were speaking of a transaction effected in their presence. This misapprehension on the part of the Judge in the lower Appellate Court justifies us in remanding the case for him to reconsider his finding upon that point. The next point is as to the execution of the bond by Amzad on behalf of Shurifunnissa. As to that the case stands on precisely the same footing as it does as regards the execution of the bond by Amzad. Then there remains the question as to the existence of the mokhtarnama, under which it is said that Amzad executed the bond on behalf of Shurifunnissa, and there the Judge in the lower Appellate Court appears to us to have again fallen into somewhat similar errors. The most important witness as regards this is Gour Chunder Dass, and the learned Judge distrusts the evidence of this witness as to the mokhtarnama on the ground that it was not produced in the 1875 suit. That is an observation that would be entitled to great weight if it was suggested that it had been fabricated since 1875, but when it is clear on the evidence that it existed long before 1868, it appears that the Judge has been seriously misled. Then, again, speaking of the evidence of the same witness, he says that according to him the mokhtarnama was given by Shurifunnissa only and not by her and Ausur; and in this he finds a discrepancy between the evidence of this and the other witnesses. That is also clearly a mistake. The witness only says that a mokhtarnama on the part of Shurifunnissa was produced, and he is

speaking of a time at which the only question of the slightest importance would be whether it was executed by Shurifunnissa. Ausur the husband went there to execute for himself, and the question was how was the wife represented. Then according to him the mokhtarnama on his behalf is produced to prove her authority for the execution of the bond. There is, therefore, a clear misapprehension on the part of the Judge as to the meaning of this evidence. Then speaking of the same document he says that one of the witnesses, Mohurrum Mir, to whom a power was given to register the document, and who may have been presumed to have some acquaintance with its contents, has been examined, but has not been asked a word about it, while it appears on the evidence that Mohurrum was examined about it, and made certain statements concerning it. These seem to be the considerations which led the Judge of the lower Appellate Court to reject the truth of the story as to this mokhtarnama, and as they seem to us to be founded on mistakes of fact, the learned Judge should have an opportunity of reconsidering his views. In remitting the case to him and asking him to reconsider his findings, we think it right to point out that the matters mentioned by him at page 18 with regard to the registration in 1868, and the use of the mokhtarnama during the same year, and the other evidence in the case as to the existence of this document at and about that time that these matters appear to us entitled to very great weight.

The case will, therefore, go back to the Judge in the Court below for reconsideration. That being so, it becomes necessary to deal with two questions that have been raised before us—one the question of certificate, and the other the question of interest. If the ultimate finding in the lower Appellate Court should be still in favour of the defendants, these two questions do not arise; otherwise they do. It was held in the lower Appellate Court that this suit could not be maintained for want of a certificate to the estate of Rabia. But on the facts of the case it does not appear to be so, because, under the exception in the section in question, no certificate is required when there is no doubt as to the title of the party claiming the money. Section 2, Act XXVII of 1860 says: "Unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not

1882

FUTTEHMA BEGUM v. MOHAMED AUSUR.

from any reasonable doubt as to the party entitled." Now if the plaintiff's story be true, then the defendants who deny their liability must be acting fraudulently, as there can be no reasonable doubt that all the parties who may be entitled to these sums of money are plaintiffs in the suit. Then the question of interest arises in this way. The Judge says (page 13 of the Paper Book): "But for my finding on the certificate matter, and supposing the bond to be genuine, I should allow 18 per cent. per annum interest from the 10th April 1868 to the 10th October 1868, and (as damages) six per cent. per annum from the date on which the 1875 suit was instituted, to the date of decree in the present suit;" and so on: that is to say, he disallows the interest at the rate agreed in the bond for a certain very considerable period. That, it appears to us, is wholly irregular and contrary to law. If the bond be genuine, the plaintiffs are entitled to recover the agreed rate of interest without any deduction. It would be a grave injustice if it were not so, as the defendants would thereby be allowed to keep the money in their pockets without paying interest for it. The costs will follow the result.

As the case has been pending for a very long time, the record will be sent down at once.

Appeal allowed and case remanded.