P. C.*
1882
March 17.

CHANDI CHURN SHASHMAL (DEFENDANT,) *v.* DURGA CHURN MIRDUA (PLAINTIFF.)*

[On appeal from the High Court at Fort William in Bengal.]

Appeal—Failure to produce evidence at hearing.

At the hearing of a suit a party, though he had sufficient warning of what was necessary, did not take the proper steps to cause the production of the documentary, and only admissible, evidence of a material fact which had to be proved by him; and the decision was against him.

The record of another proceeding would, it was said, have supplied this evidence; and an application had been previously made on which the order of the Judge was that "the matter would be decided when the case was tried, and the record would be sent for, if necessary." No further application to the Court was made, and no attempt to supply this evidence. *Held*, that if there had been, as there might have been, an oversight by the party in not calling the attention of the Judge to the above order, and in not tendering the evidence, there had been no omission on the Judge's part affording ground for appeal.

APPEAL from a decree of a Divisional Bench of the High Court (26th June 1878) affirming a decree of the Judge of the Midnapur District, (31st December 1877) affirming a decree of the Subordinate Judge of the same district (18th November 1876.)

The question raised on this appeal, preferred by a defendant against whom a decree for the possession of land had been made, related to the proceedings at the hearing of a suit in the Court of the Subordinate Judge of the Midnapur district, who finding no proof of a material fact, the affirmative whereof was a necessary part of the defendant's case, had decided against him.

All the facts relevant to this report are fully stated in their Lordships' judgment.

After an appeal to the District Court had been dismissed by the Officiating Judge, a special appeal was dismissed by a Divisional Bench of the High Court (L. S. JACKSON, and TOTTENHAM, J.J.)

Among the grounds of appeal filed in the High Court was one to the following effect *viz.*, that even if the non-filing of the record (which would have supplied the required evidence), had

* *Present:* SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

arisen through the inadvertence of the defendant's pleader, yet it would have been the duty of the District Judge, under the circumstances, to have admitted the same in regular appeal, as he was asked to do; and that as he had not done so, the Divisional Bench of the High Court should have remanded the case.

On this appeal—

Mr. *R. T. Doyne* appeared for appellant.

Mr. *C. W. Arathoon* for the respondent.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This suit is brought for two parcels of land, containing 290 bighas, which are part of a parcel of 632 bighas. The case of the plaintiff is, that Mohunt Hoigrib Dass had obtained a money decree against Adjudhianath Manna and Sambhunath Manna, who held the 632 bighas on the 14th of January 1863, and had purchased the lands at the sale in execution thereof, and sold them to the plaintiff.

The defendant claims under a lease from the Government which was made in December 1871 for three years, and was renewed in April 1874.

The facts with regard to the 632 bighas, of which the 290 in suit form a part, are these:—The Government before 1816 was in possession of a large tract of land along the sea shore in the district of Midnapur, which was used for the purpose of making salt. In 1816 it granted a perpetual lease of 632 bighas of that land to Komolokant Manna, the predecessor in title of the above mentioned Mannas. The Government after that made an embankment by which the land thus leased was left outside next to the sea, and subsequently, in 1858, there was an arrangement between the Government and the Mannas by which, as the lands which were left outside the embankment became less valuable for the purpose of cultivation, but were valuable for the purpose of making salt, the Mannas were to have an equal portion of land inside the embankment, and the Government was to take the lands which were outside. Before this a local Rajah, who (and whose successor) was called in the suit "the Rajah," had brought a suit against the Government to recover the lands

1882

CHANDI CHURN SHASHMAL v. DURGA CHURN MIRDUA.

which lay outside the embankment, and had obtained a decree for all the lands which were outside. In consequence of this the Government directed the Mannas to pay to the Rajah the rent which had been reserved on the lease; and thus after the arrangement the Mannas were in possession of 632 bighas lying inside the embankment, but paying rent to the Rajah as for the land which was outside. The Mannas having allowed their rent to fall in arrear, the Rajah brought a suit, on the 19th of July 1862, to recover arrears of rent from 1855 to 1862. The suit was brought for a moiety of the rent, as, in consequence of death, it would seem that the Rajah's estate had become divided. A decree was obtained by him on the 27th of March 1863, and an order for attachment and sale was made on the 18th of August 1863. It was contended by the defendant that on the 27th of February 1865, at the sale under that attachment, the whole of the 632 bighas outside the embankment was sold, and the Government was ousted from it, and that in consequence thereof the Government ejected the Mannas from the land which had been taken in exchange, and which was inside, the suit having been brought about, and the loss of the outside land by the Government having been caused by the failure of the Mannas to pay the rent. Therefore the material question in the case was, whether the outside land originally leased had been sold at the auction on the 27th February 1865, and an issue was framed raising that question. It was the third issue, "Whether or not, in consequence of Sambhuram and another's"—that is the name used for the Mannas—"non-payment of the rent of their mal lands, the zemindar obtained a decree and effected the sale of those lands; and the Government, again taking the disputed lands from Sambhuram and another,"—being the lands inside the embankment,—"were in possession from 1865, and settled the lands with the defendant," referring to the lease in 1871. An application appears to have been made shortly before the suit came on for hearing on the part of the defendant in which he asked to have the documents relating to the exchange of the land in dispute, which had been filed in another suit numbered 141, referred to in this suit, and the order made on that occasion was, that the matter would be decided when the case

was tried, and the record would be sent for, if necessary. The other suit was one which had been brought by the defendant against a brother of the plaintiff, and related to another portion of the 632 bighas. It was said that the exhibits in that suit would furnish evidence of what was sold on the 27th February 1865.

The case came on to be heard before the Subordinate Judge, and it would appear that no further application was made to him to send for the record of the other suit, and no attempt was made to use the documents which had been filed in that suit, but the case was decided upon the oral evidence, and the Judge held that it had not been satisfactorily proved that the lands outside the embankment had been sold. He said: "It is true that some of the plaintiff's witnesses have said in their depositions that the lands on the outside were sold, but it has not been satisfactorily proved; and upon the said oral evidence it cannot be said that the lands on the outside were sold on account of debts due to the zemindar, nor, supposing they were sold, does it appear for what reason they were sold. "The defendant should have given evidence to prove this matter by means of papers of the Court." If there had been, as there might, an oversight on the part of the pleaders for the defendant in not calling the attention of the Judge to the order which had been made on the 3rd of November 1876, or in not tendering in evidence, which might have been done, the sale proceedings of the 27th of February 1865, he might have applied to the Judge for a review; and if he had refused it, the case might have been carried to the Court of Appeal, and an application made that the evidence should be received. There was an appeal, but in the grounds of appeal, instead of this matter being brought to the attention of the Court, the ground taken was that "it has been proved by the evidence of the witnesses of both the parties that the lands given in exchange by Adjudhianath were sold by auction, and that the sale certificate has been filed." The sale certificate which was filed did not prove it. "The plaintiff does not object on the ground that the said lands were not sold." The issue had been raised on that very point. "Consequently the lower Court should

1822

CHANDI CHURN SHASHMAL v. DURGA CHURN MIRDUA.

have held that the lands given in exchange had been sold by auction." The Court, in the judgment on the appeal, stated that it had been urged before it "that the Subordinate Judge ought to have sent for the record of the suit No. 141 above mentioned, which contains copies of the papers relating to the auction sale of February 1865, in order that it might be seen that the lands formerly held by Adjudhianath"—that is, the Mannas—"outside the embankment were really sold;" and therefore, although the objection was not taken in the grounds of appeal, it seems to have been allowed to be taken at the hearing. The judgment was: "This Court is of opinion that it ought not to interfere with the judgment appealed against. It was the duty of the defendant-appellant, who raised a special plea, to adduce proof in support of it; but he failed to do so; and he neither pressed for the production of the misl of suit No. 141 in the lower Court, nor urged any objection on this subject in his petition of appeal. To allow the objection now would be taking the plaintiff-respondent by surprise. Oral evidence is, of course, inadmissible to prove the particulars of the auction sale of February 1865. No objection in point of law could be taken to that judgment, considering what had been done. It was a perfectly correct judgment. There was a special appeal from it; and the High Court, as might have been anticipated, held that there was no ground for the special appeal. The defendant, the appellant, now comes on appeal to Her Majesty in Council, and says:—

"This appellant now humbly submits there is error in the judgment of the lower Appellate Court, and of the High Court, and that they should be reversed or varied for (among others) the following reasons: because the fact on the supposed non-proof of which the Judge put his judgment was not in issue or disputed; and if supposed to be disputed, this appellant should have been allowed to prove it by the production from the other record of the papers therein relating to the said sale in execution."

Their Lordships have already mentioned that it was put in issue and was disputed, and the present appellant had no right to assume that he need not prove it. He had sufficient warning that it was necessary for him to do so; and as to his saying that he should have been allowed to prove it by the production from

1882

CHANDI CHURN SHASHMAL v. DURGA CHURN MIRDUA.

the other record of the papers, the answer is that if he had produced those papers, or if he had taken the proper steps to have them in the first Court, and had tendered them in evidence, he might, if they had been rejected, have made it a ground of appeal. But he did not do what was proper and necessary, and their Lordships are of opinion that he has shown no ground for reversing the decisions of the lower Courts.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed; and the appellant will pay the costs

Appeal dismissed.

Solicitors for appellant, Messrs. *Miller, Smith* and *Bell.*

Solicitors for respondent, Mr. *T. L. Wilson.*

P. C.*
1882
May 11.

PORESHNATH MUKERJI AND OTHERS, (DEFENDANTS) AND ANATHNATH DEB, (PLAINTIFF.)

[On appeal from the High Court at Fort William in Bengal.]

Estoppel—Evidence Act, s. 115—*Sale in execution of decree—Intervenor in Rent Suit.*

A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage, of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel.

A suit for rent by a zemindar and patnidar against a darpatnidar, was defeated by the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title, and interest therein himself. From the darpatnidar, who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zemindar and patnidar against an ijaradar of lands within the darpatni estate.

Held that, notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit above-mentioned.

APPEAL from a decree of a Divisional Bench of the High Court,

Present: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.