1882

GAURI PROSAD KOONDOO v. REILY.

Fakharuddin Mahomed Ahsan Chowdhry v. *Official Trustee of Bengal* (1), for we find from an inspection of the record that the successful party obtained a larger sum as *wasilat* than he had claimed in his plaint. At the same time we would observe, that if it should appear that, in making his original claim for mesne profits, a plaintiff has special means of knowledge for determining the amount due, the judgment-debtor can fairly use as evidence against him his own statements embodied in his plaint. Applying this principle to the present case, we think that it must be remanded for reconsideration by the lower Appellate Court. Costs to abide the result.

Case remanded.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882
April 24.

LUKHYNARAIN CHUTTOPADHYA (PLAINTIFF) *v.* GORACHAND GOSSAMY (DEFENDANT).*

Special Appeal—Revenue Sale Law—Evidence—Registration—Common Registry—Act XI of 1859, s. 39.

The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of itself *primâ facie* evidence that such a tenure exists.

In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court:—

"The circumstances in connection with the suit out of which this appeal has arisen are these. Asura Madhanpore and other mauzas formed a revenue-paying estate, and they were registered in the Collector's towji under two numbers, *viz.*, 61 and 325, each of them representing a moiety of the estate. When the estate was advertised for sale on account of arrears of revenue, the plaintiff informed the Collector that he held the property in mokurari and was in possession, and prayed to have the sale stopped by offering to pay the arrears due.

* Appeal from Appellate Decree, No. 495 of 1881, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of Bankura, dated the 30th December 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 15th October 1879.

(1) L. R., 8 I. A., 197.

1882

LUKHY-NARAIN CHUTTO-PADHYA v. GORACHAND GOSSAMY.

That application is dated the 1st of November 1878. The order of the Collector (Mr. Waller) runs as follows: 'I cannot, as Collector, interfere. Applicant's remedy will lie in the Civil Court.' That order was made on the 2nd November 1878. The plaintiff appealed to the Commissioner, and he was informed by a written notice, bearing date the 3rd December 1878, that his appeal had been rejected. In the meantime the property was sold on the 18th November 1878, and purchased by the defendant, who was put in possession by order of the Collector. After obtaining possession, the defendant collected rents from the tenants and took some fruits from the mangoe and jack trees. There could not, therefore, be any mistake that the object of the defendant was to ignore the mokurari right of the plaintiff to the mouza if he had any. Under such circumstances a suit to have the mokurari right established would have been intelligible, but the plaintiff did not want to have such broad relief. His suit was peculiar in its nature. It was a suit to have his title to two mangoe trees and one jack tree, and to the land on which they stand, established, and to recover damages without applying for leave of the Court under s. 44 of the Procedure Code. He valued the land on which the three trees stood, at 1 anna and six pie, the value of the trees at Rs. 13, and the value of the fruits taken at Rs. 6, 10 annas; total value of the claim was Rs. 19 annas 11 pie 6. The defendant denied his liability to pay damage and put the plaintiff to the proof of the patta set up by him. The plaintiff offered no evidence to prove the patta, but showed that, in 1862, he had his tenure registered under the provisions of Act XI of 1859, and contended that he was, therefore, protected by the provisions of s. 37 of that Act.

"Now it ought to be observed, that the fact of a tenure having been registered under the sale-law does not show that the patta which is said to have been granted is proved. The procedure to be followed for getting a tenure under Act XI registered is laid down in s. 40. That section does not even impose upon the applicant for registration an obligation to file the patta before the Collector. It is just like an application for foreclosure of a mortgage. Because a mortgagee has applied for foreclosure, and the year of grace has expired, it does not follow that the mortgagee is to get a decree without proof of the mortgage when the truth of the deed is not admitted. If a tenure-holder is able to prove that the tenure was in existence, that it was actually created by the late proprietor, the fact of the registration would protect him; but if he fails to show that the tenure existed, the

1882

LUKHY-NARAIN CHUTTO-PADHYA v. GORACHAND GOSSAMY.

fact of his having registered the existence of something which never existed, would not create a right which he never possessed. The patta put forward by him bears date the 29th of March 1855. It is, or purports to be, only twenty-six years old, so it has to be proved. The plaintiff made no attempt to prove it.

It has to be noted that the alleged lessor, by her petition of the 3rd January 1866 presented before the Settlement Authorities, appears to have distinctly denied having granted any such patta. The defendant distinctly alleged, in his written statement, that the father of the plaintiff was a servant under the employ of Raja Gopal Singh, the husband of the alleged lessor. There is, indeed, no evidence properly so called to show that he was the servant; but there is every reason to believe that he was so. My ground for believing it is this. The first Court distinctly finds it in its judgment that the plaintiff's father was in the employ of Raja Gopal Singh. If it were not the fact, the appellant would have instructed his pleader to take exception to it most prominently in his memo. of appeal; but the appellant did not even make the slightest suggestion in his petition of appeal that that finding was wrong.

The patta appears to direct the lessee to pay Rs. 40 annas 8 to the Collector as revenue, Rs. 4 annas 6 to one Ram Das, and Rs. 10 to the lessor herself. The plaintiff has not been able to file a single receipt to show payment of any portion of the rent to the lessee or to Ram Das. He has filed some receipts to show payment of revenue. But it is quite intelligible why, as a servant of the rani, his father should be the custodian of such receipts, and why he should, from time to time, collect rent as a servant of the raja. Everything turns upon the proof of the patta, and there is no proof whatever. The suit is, it ought to be remembered, to have a declaration that the plaintiff has a good title to the trees and the land on which they stand, and the basis of that title remains unproven. So far as possession is concerned, there is no proof that the plaintiff was in possession under his alleged patta. There is some evidence to show that his father sometimes collected rent, but that is not conclusive. He, as servant of the raja, would be the proper person to collect the rent. It is needless to enter into a discussion of the question as to whether the patta granted, as it purports to have been, by Rani Churomani would have created a valid title in plaintiff's favour if it had been proved."

Baboo *Bungshee Dhur Sen* for the appellant.

Baboo *Umbica Churn Bose* and Baboo *Rash Behary Ghose* for the respondent.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

TOTTENHAM, J.—A preliminary objection is taken by the respondent's pleader in this case, that no second appeal lies, the subject of the suit being, as he submitted, one of the Small Cause Court class. For the appellant, however, it was contended, and, as we think, rightly contended, that the question of right to the land was raised by the plaintiff, and that the suit was treated by both the Courts below as one for title. We therefore hold that the appellant has a right to have the second appeal heard and the question of title decided.

The suit was brought against an auction-purchaser under Act XI of 1859 for an alleged trespass and damage done by him to the plaintiff by appropriating the fruit of certain trees said to be upon the plaintiff's mokurari tenure, which mokurari tenure is alleged to have been registered in the Common Register under Act XI of 1859. He, however, did not produce any further evidence of the existence of the tenure beyond filing a mokurari patta, and of that patta he adduced no proof.

For the appellant it is contended that the fact of registration under Act XI of 1859 is in itself *primâ facie* proof of the existence of a tenure registered in the Common Register. We think that this is not so. If the tenure in this case had been specially registered, then, under s. 50 of the Act, entry in the Special Register would apparently have been *primâ facie* good evidence of the existence of the tenure, but no such provision is made in the Act with regard to registration in the Common Register. It may be observed that, in any case in which a registered document is produced, the fact of registration is not accepted as *primâ facie* evidence of the genuineness of that document. It has to be proved independently. We see no reason to hold that the registration of a tenure in the Common Register under Act XI of 1859 relieves the person alleging such tenure of the necessity of proving its existence in the regular way. Section 37 of the Act provides, that certain

1882

LUKHY-NARAIN CHUTTO-PADHYA v. GORACHAND GOSSAMY.

tenures, if registered, are protected from being set aside by auction-purchasers. The effect of this is, that a *bonâ fide* tenure actually proved is not protected unless it is registered. It does not provide that the registration of an alleged tenure will have the effect of proving it. We think, therefore, that the registration of the tenure alleged in this case is not a sufficient proof of the plaintiff's title.

The appellant's pleader, however, contended that there was further evidence in an admission by the lessor of the genuineness of the patta, such admission being contained in a petition made to the Collector at the time of the execution of the patta, or shortly afterwards, praying the Collector to enter the tenure in his books, and to hold the lessee responsible for a certain portion of the Government revenue. It turns out, however, that the petition here referred to is only a copy of the petition made, not by the lessor, but by a person calling himself the mooktear of the lessor. The petition, therefore, is of very little importance in this case, especially when we find that another petition made by the lessor before the Settlement Officer expressly repudiates any such patta as is now set up by the appellant.

It is unnecessary for us to go into the merits of the case, but we think that the lower Appellate Court was right, as a matter of law, in confirming the decision of the first Court.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882 *May* 3.

BISSORUP GOSSAMY AND OTHERS (PLAINTIFFS) *v.* GORACHAND GOSSAMY AND OTHERS (DEFENDANTS).*

Suit for Possession—Co-defendants—Res Judicata—Civil Procedure Code (Act X of 1877), s. 13.

A leased lands to *B*, who sued *C* for possession of a certain mauza, alleging it to be a portion of the lands leased. *A* was made a defendant, and supported the case of the plaintiff, who obtained a decree. *C* appealed, making *A* and

* Appeal from Appellate Decree, No. 2235 of 1880, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of Bankura, dated the 28th June 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 21st March 1879.