

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BUNWARI LALL (ONE OF THE DEFENDANTS) *v.* CHOWDERY DRUP
NATH SINGH AND OTHERS (PLAINTIFFS.)*

1885
August 5.

Appeal—Costs—Order in discretion of Court—Special Appeal.

When a question of costs is purely in the discretion of the lower Court no appeal will lie, but when a matter of principle is involved an appeal will lie.

Where *A* was sued upon the allegation that he had instigated his co-defendant *B* to refuse to deliver up a document, for the recovery of which the suit was brought, and where no relief was prayed as against *A*, but the lower Courts awarded a decree in favour of the plaintiff directing *A* to pay half the costs of suit :

Held, that the question was one of principle, and that a second appeal lay to the High Court against the decree directing *A* to pay such costs.

IN this case there were two defendants, Khedu Naik, the minor son of one Urjun Naik, deceased, and Bunwari Lall, a pleader's mohurrir, who alone appealed against the decisions of the lower Courts.

The suit was brought for the recovery of a deed under the following circumstances :—

Urjun Naik, who was the proprietor of a certain mouzah during his lifetime, being in difficulties, had created encumbrances over the mouzah on several occasions, some of such encumbrances consisting of *zuripeshgi* leases granted to the plaintiff in respect of various portions of the mouzah. Ultimately, falling into arrears with his rent of the mouzah, a decree was obtained against him, and the mouzah was about to be sold, when an arrangement was come to by which the plaintiffs agreed to take a mokurari lease of twelve annas of the mouzah in consideration of the sum of Rs. 3,300, leaving the remaining four annas to Urjun Naik free of encumbrances, and it was agreed that the Rs. 3,300 was to be applied to paying off the *zuripeshgi* leases and other encumbrances, and also to liquidating the amount of the decree.

* Appeal from Appellate Decree No. 320 of 1885, against the decree of G. E. Porter, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 20th November 1884, affirming the decree of A. W. Maokie, Esq., Assistant Commissioner, with powers of a Subordinate Judge, of Ranchee, dated the 1st of May 1884.

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In accordance with this arrangement the mokurari lease was executed, the encumbrances paid off, and a balance of Rs. 65 out of the consideration money, according to the plaintiffs, remained payable to Urjun Naik.

The plaint went on to allege that Urjun Naik was under the control of Bunwari Lall, and that after the execution and registration of the mokurari lease he refused to make over either the lease or the registration receipt to the plaintiffs; that Bunwari Lall asked for a bribe of Rs. 200 on the lease being demanded, and on the plaintiffs refusing to pay him anything he instigated Urjun Naik not to give up the lease; that criminal proceedings were instituted against Urjun Naik and Bunwari Lall, which resulted in the former being imprisoned and the latter fined Rs. 200, and that Urjun Naik died in jail; that, notwithstanding, the criminal proceedings the lease was not given up by Khedu Naik, although it was demanded of him. The plaintiffs, therefore, prayed that Khedu Naik might be ordered to give up the lease and for the costs of the suit, together with such other relief as they might be found entitled to, and deposited the Rs. 65 in Court.

Both defendants contested the suit. The defence raised on the part of Khedu Naik is immaterial for the purpose of this report, but Bunwari Lall pleaded that there was no cause of action against him, and that he had no interest in the suit, and he denied the allegation that Urjun Naik was acting under his control.

The first Court gave the plaintiffs a decree disbelieving the defence set up by Khedu Naik, and finding as a fact that it was through Bunwari Lall that Urjun Naik refused to deliver up the lease, gave costs against both defendants in equal shares. Bunwari Lall appealed, and the lower Appellate Court considered that it was clear that he had instigated Urjun Naik to refuse to give up the lease, and that he had taken an active part in the matter by keeping the registration receipt and obtaining the lease from the registration office, and afterwards filing it in Court in Urjun Naik's name, in a suit then pending in Court. That Court, therefore, held that the first Court was right in directing Bunwari Lall to pay half the costs and dismissed the appeal.

Bunwari Lall now preferred a special appeal to the High Court, upon the ground that he was not liable to pay any costs, and that no decree should have been passed against him.

Baboo *Umakali Mookerjee*, for the appellant.

Baboo *Kishori Lal Gossami*, for the respondents.

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

This appeal relates only to an order for costs.

The appellant is described in the plaint as defendant No. 2 ; and the Courts below, in giving the plaintiff a decree, have ordered that the costs be paid by both the defendants in equal shares.

For the respondent it is contended that no second appeal lies on a question of costs ; and in support of this contention the vakeel refers to the cases of *Futeek Parooee v. Mohender Nath Mozoomdar* (1) and *Gridhari Lal Roy v. Sundar Bibi* (2). Those cases, however, go to support the proposition that, when a question of costs is purely in the discretion of the lower Court, no appeal will lie. A very recent case [*The Secretary of State for India in Council v. Marjum Hosein Khan* (3)] shows that on a question of principle an appeal will lie against an order for costs ; and the same view was in fact laid down in the Supplemental Volume to the Bengal Law Reports, Full Bench Rulings. Here the question of principle involved amounts to this, that as against the defendant No. 2, the appellant before us, the plaintiff had no cause of action and sought no relief against him in the plaint, and therefore could not receive costs from him. The suit was to get possession of a document executed in favour of the plaintiff by the father of the defendant No. 1, but of which delivery had been denied him. In connection with this matter, it seems that a criminal prosecution was had against the father of the defendant No. 1, as also against the defendant No. 2, for abetting in the attempt to extort money from the plaintiff in connection with the delivery of the document. Both these individuals were punished. The father of

(1) I. L. R., 1 Calc., 385.

(2) B. L. R., Sup. Vol., 496.

(3) I. L. R., 11 Calc., 359.

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the defendant No. 1 has since died. It appears to us on the plaintiff that the plaintiff's suit to recover the document was only against the defendant No. 1. The document was found to be under his control; and, although it is said that the withholding of the document by his deceased father was chiefly owing to the instigation of the defendant No. 2, we think there was no cause of action against the latter.

The appeal is allowed, and the order for costs as against the appellant must be set aside with costs in this Court and the lower Court.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

1885
 July 29.

NARENDRA NARAIN RAI (PLAINTIFF) v. BISHUN CHUNDRA DAS
 AND OTHERS (DEFENDANTS.)*

*Onus probandi—Resumption, Suit for—Lakheraj—Mal—Rent-free lands—
 Landlord and Tenant.*

In a suit for resumption of lands where the defendants allege that the lands are *lakheraj*, the onus is on the plaintiff, in the first instance, to show that the lands are *mal*, and if he fails to make out a *prima facie* case the suit should be dismissed.

Bacharam Mundul v. Peary Mohun Banerjee (1) followed.

Newaj Bundopadya v. Kali Prosono Ghose (2); and *Akbur Ali v. Dhya Lal Jha* (3) cited and distinguished.

In this case the plaintiff sued to obtain possession of some 24 bighas of land situate in a mehal called Lukhipur. He alleged that the whole mehal was put up to sale for arrears of Government revenue on the 6th April 1871, and purchased by him, and that by reason of such purchase he was entitled to obtain possession of all *mal* lands within the zemindari. The plaintiff went on to state that the defendants held a jote of some 15 bighas under the plaintiff, paying rent for the same, and that in addition to such 15 bighas the plaintiff had ascertained that the

* Appeal from Appellate Decree No. 1839 of 1884, against the decree of B. L. Gupta, Esq., Officiating District Judge of Birbhoon, dated the 30th of June 1884, reversing the decree of Baboo Menn Lal Chatterji, Subordinate Judge of that District, dated the 14th of December 1883.

(1) I. L. R., 9 Calc., 813.

(2) I. L. R., 6 Calc., 543.

(3) I. L. R., 6 Calc., 666.