1893
March 8.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

NAIKU KHAN AND ANOTHER (DEFENDANTS) *v.* GAYANI KUAR (PLAINTIFF).*

Appeal—Pleadings—Case set up in appeal which was not that set up in the Court of first instance.

The plaintiff came into Court on the allegation that she was the owner of a certain house and that the defendants were her tenants at a certain rent, and she sought to eject the defendants for non-payment of rent. The Court of first instance having found her allegations of tenancy to be untrue, she then in appeal endeavoured to support a plea that the defendants were trespassers, such plea having formed no part of the original case. *Held* that the plaintiff could not under the circumstances be heard in support of a new plea of which the defendants had had no notice until the case was in appeal. *Lakshmibai* v. *Hari-bin Raoji* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din* and Mr. *Abdul Majid*, for the appellants.

Mr. *A. H. S. Reid*, for the respondent.

KNOX and BURKITT, JJ.—This is an ejectment suit. The plaintiff-respondent came into Court alleging (1) that she was the owner of a house in the town of Sikandarpur occupied by the defendants-appellants, (2) that she had leased that house at a rent of Rs. 3-0-0 per month to the defendants and (3) that the defendants after paying rent regularly to her for one year had paid nothing in the 2nd and 3rd years. She therefore sued for possession of the house and Rs. 72, rent for two years. The defendants claimed the house as their own property.

Out of the three allegations mentioned above the only one found in favour of the plaintiff-respondent in the lower appellate Court is that she was the owner of the house. That finding is attacked on

* Second Appeal No. 1148 of 1890 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghâzipur, dated the 18th August 1890, reversing a decree of Babu Bhawani Chandar Chackrabati, Munsif of Rasra, dated the 30th April 1890.

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the ground that there is no evidence on record to support it, the plaintiff not having proved the deed on which she founded her title. Into that question we think it unnecessary to enter here, as there are other grounds on which we are of opinion that the suit must fail.

It will be observed that the cause of action set forth by the plaintiff-respondent is that she had let the house on rent to the defendants-appellants, and that the latter had failed to pay rent after the first year and refused to surrender possession. Both the Munsif and the lower appellate Courts are unanimous in finding that the plaintiff-respondent has proved neither the letting nor the payment of rent during the first year. She called witnesses to prove both those alleged facts, but both Courts refused to give any credit to those witnesses and plainly intimated their opinion that those witnesses had spoken falsely. The result therefore is that the plaintiff-respondent has failed to prove the cause of action on which she sought relief from the Court. Had her allegations as to the letting and as to payment by defendants been true, the plaintiff would no doubt have been able to prove those facts by credible witnesses. As she failed to establish them we must (applying the maxim "*de non apparentibus et non existentibus eadem est ratio*") hold that no such letting and payment occurred, and that in fact the plaintiff came into Court with a suit founded on an untrue cause of action. It is to be noticed that she did not allege any alternative cause of action, such as e. g. that the defendants were trespassers.

The question then is, can the plaintiff, having failed to establish the cause of action on which she came into Court, now be permitted to fall back on her alleged title as owner of the house and claim to have the defendants ejected as tresspassers, she having hitherto always described them as her tenants? We think not.

In an almost similar case *Lakshmibai* v. *Hari-bin Raoji* (1), which came before a Full Bench of the Bombay High Court, it was held unanimously that "the general rule is that a party must be limited to the case which he puts forward in his plaint. He may indeed from the commencement of the suit put forward in his suit

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an alternative case, and then the defendant will have notice that he has more than one case to meet and will not be taken by surprise. When plaintiff has not put forward an alternative case he may have leave to amend. * * * * * But as a general rule a plaintiff must abide by his plaint." And the learned Judges who decided the case add the following very significant words. "The adoption by Courts of a general principle of decision other than this would encourage perjury and forgery." Other cases also are referred to in support of their ruling. In the rule of law so laid down we fully concur. Applying that rule to the present case, we are of opinion that the plaintiff who came into Court on an untrue cause of action and who endeavoured to support that cause of action by the evidence of witnesses whom the lower Courts disbelieved, cannot now be allowed to turn round and obtain a decree for the ejectment of the defendants as trespassers on the strength merely of her alleged proprietary title.

It is not for us to say what the result will be if the plaintiff were to institute another suit on another cause of action. All we need say is that this suit, founded on the cause of action set forth in the plaint fails, because that cause of action has not been established.

We therefore allow this appeal. We set aside the decision and decree of the lower appellate Court. We dismiss plaintiff's appeal to that Court, and, restoring the decree of the Court of first instance, we direct that the plaintiff-respondent's suit do stand dismissed with costs of all three Courts.

Appeal allowed.