1900

QUEEN-EMPRESS v. BHOLU.

of proving the contrary would, in accordance with the provisions of section 106 of the Indian Evidence Act, rest upon the accused. In the view we take of this case we are supported by the precedents :—*The Deputy Legal Remembrancer* v. *Karuna Baistobi* (1), *Balmakund Ram* v. *Ghansam Ram* (2) and *Queen-Empress* v. *Papa Sani* (3). We dismiss the appeal.

1900
December 22.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

HARBANS LAL (PLAINTIFF) *v.* THE MAHARAJA OF BENARES (DEFENDANTS).*

Evidence—Presumption—Tenant at fixed rate—Ownership of trees standing on fixed rate tenant's holding.

A tenant at fixed rates having a transferable right in his holding, the presumption is that the trees standing thereon are the property of the tenant and not of the zamindar.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Haribans Sahai*, for the appellant.

Babu *Satya Chandra Mukerji* (for whom Mr. *Abdul Raoof*), for the respondent.

AIKMAN, J.—This appeal arises out of a suit brought by one Harbans Lal against the Maharaja of Benares. The case of the plaintiff was, that three tamarind trees stood in the holding, of which he was a tenant at fixed rates, that the defendant three years previously had taken the fruit of the said trees, and in the month of June preceding the institution of this suit, had sold by auction some branches of the trees and appropriated the proceeds thereof. He accordingly prayed for a declaration of his right to the trees, and asked for a decree of maintenance of possession. In the alternative he prayed that if the Court were of opinion that he was out of possession, a decree might be given for possession. He also asked for damages. For the defendant it was pleaded that neither plaintiff nor his ancestors ever had anything to do with the trees, which, it was asserted, were in the possession of the defendant; that the plaintiff had not been in possession of the

* Second Appeal No. 604 of 1898, from a decree of Babu Mohan Lal, Subordinate Judge of Benares dated the 21st June 1898, reversing a decree of Babu Srish Chander Bose, Munsif of Benares, dated the 15th December 1897.

(1) (1894) I. L. R., 22 Calc., 164. (2) (1894) Ibid, p. 391.
(3) (1899) I. L. R., 23 Mad., 159.

trees within twelve years preceding the suit, and that the trees stood, not in the plaintiff's holding as alleged by him, but on waste land, the property of the defendant. The Court of first instance gave the plaintiff a decree for possession. In appeal by the defendant a plea was taken that as the trees in question were recorded in the Government papers as the property of the Government, the Secretary of State was a necessary party to the suit. In disregard of the clear provisions of section 34 of the Code of Civil Procedure the lower appellate Court entertained this plea, set aside the decree of the Munsif and remanded the case under provisions of section 562 of the Code of Civil Procedure for trial on the merits after making the Secretary of State a party. When the case went back to the Munsif, Government did not dispute the plaintiff's claim. The Munsif then disposed of the case as he had previously done, giving the plaintiff a decree for possession of the trees. This decree was appealed. One of the pleas taken by the defendant is to the effect that the evidence on the record does not prove the plaintiff's possession of the trees within twelve years. The Subordinate Judge finds that the trees grow on the land of which the plaintiff is a tenant at fixed rates, and of which the defendant is the zamindar. He states that this being so, the presumption is that the property in the trees is with the zamindar, and that the plaintiff could only become owner of the trees by prescription; further, that to establish his ownership the plaintiff had to prove his possession for full twelve years, ending on the date of institution of the suit. The Subordinate Judge goes on to say that the allegations in the plaint are of themselves sufficient to establish the defendant's possession and the plaintiff's dispossession. I am unable to agree with the proposition laid down by the Subordinate Judge that the presumption regarding trees on land held by a tenant at fixed rates is that the trees belong to the landholder. In my judgment the presumption is the other way. The general rule is that trees go with the land. A tenant at fixed rates has a transferable right in his holding, and the presumption is that he has also a transferable right in the trees thereon and is the owner thereof. Still, had the Subordinate Judge come to any definite finding on the plea raised by the defendant to the effect that the plaintiff has

1900

HARBANS LAL v. THE MAHARAJA OF BENARES.

been out of possession of the trees twelve years prior to the suit, that would have been sufficient to dispose of the claim. I have carefully studied the judgment, and I am unable to find in it any clear finding, or in fact any finding at all, on this issue. In order to enable us to dispose of the appeal I would therefore refer the following issue to the lower appellate Court for trial under the provisions of section 566 of the Code of Civil Procedure, namely, whether the plaintiff was in possession of the trees in suit at any time within twelve years prior to the 23rd of October, 1895, on which date this suit was instituted. In my opinion this issue should be tried upon the evidence already on the record.

BANERJI, J.—I agree with my learned colleague that the Subordinate Judge was wrong in the view that in the case of trees existing on the holding of a tenant at fixed rates the presumption is that they belong to the landholder. As has been pointed out by my learned colleague, since a tenant at fixed rates has a transferable right in respect of his holding, he has a similar right in respect of the trees which grow on the holding. The Subordinate Judge is clearly in error when he says that unless such a tenant can prove that he planted the trees, or that he acquired a title by prescription, he cannot be deemed to be the owner of the trees. Still, in order to entitle the plaintiff to a decree, he is bound to prove his possession within twelve years of the suit. I should have taken the finding of the lower Court on the question of possession to be a finding that the plaintiff has not proved such possession. But as my learned colleague is of opinion that the finding is not very clear, I have no objection to the order proposed by him. The order of the Court is, that the issue mentioned in the judgment of my brother Aikman be referred to the Court below under section 566 of the Code for trial on the evidence already on the record. On return of the finding ten days will be allowed to either party for filing objections.

Issue referred under section 566 of the Code of Civil Procedure.

On return being made that the plaintiffs had been in possession within twelve years, the appeal was allowed, the decree of the lower appellate Court set aside, and that of the first Court restored with costs.