

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SHEO KUMAR (DEFENDANT) v. NARAIN DAS (PLAINTIFF).*

1902
June 14.

Act No. I of 1877 (Specific Relief Act), section 9—Civil Procedure Code, section 43—Summary suit for possession—Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits—Burden of proof.

One Lachmi Narain died possessed of certain immovable property. He left him surviving a widow, Mukhta Kunwar. Narain Das obtained possession of some portion of the said immovable property, as he alleged, under a lease from Mukhta Kunwar, and held possession, at any rate, for some months, down to the 27th of November, 1897. After the death of Mukhta Kunwar, one Sheo Kumar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process, dispossessed Narain Das. Narain Das thereupon instituted a suit under section 9 of the Specific Relief Act, and, having obtained a decree in that suit, was restored to possession. He then instituted a suit against Sheo Kumar to recover mesne profits for the time during which he was out of possession. As to this suit it was *held* (1) that the suit was not liable to be defeated by reason of section 43 of the Code of Civil Procedure; and (2) that as to the other issues arising in the suit, the first was, whether the defendant was the true owner of the property, the burden of proving which was on him; and, secondly, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant.

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

Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of an order of the District Judge of Cawnpore, remanding the case to the Subordinate Judge, under the provisions of section 562 of the Code of Civil Procedure, for the determination of the suit on the merits. The facts are shortly as follows:—One Lachmi Narain was the owner of the property which is now in dispute. He died leaving a widow Mukhta Kunwar, and the plaintiff respondent Narain Das claims to hold the property in dispute under a lease which was granted by Mukhta Kunwar in her lifetime. His name was recorded as lessee on the 17th of April, 1897, and he remained in possession until the 27th November, 1897. What the nature and the terms of the letting made by

* First Appeal No. 9 of 1902 from an order of H. P. Dupernex, Esq., District Judge of Cawnpore, dated the 18th of November 1901.

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Mukhta Kunwar to Narain Das are have not been determined by either the Court of first instance or the lower appellate Court, and we are in ignorance as to these matters. Mukhta Kunwar having died on the 16th of July 1897, the present defendant, Sheo Kumar, claiming to be the adopted son of Lachmi Narain, by some means other than by legal process, dispossessed the plaintiff of the property in question. It is obvious that if the plaintiff was not entitled to possession under the lease made by Mukhta Kunwar, the defendant ought to have dispossessed him by regular process of law, and not in the illegal way in which he appears to have done so. Narain Das thereupon instituted a suit for possession of the property under the provisions of section 9 of the Specific Relief Act, and he obtained a decree, and on the 5th of February, 1899, re-entered into possession. The present suit was instituted by him for recovery of mesne profits during the time he was out of possession, namely, from the 27th of November, 1897, to the 5th of February, 1899. The defence set up to the suit was, amongst others, firstly, that the suit was barred by reason of the provisions of section 43 of the Code of Civil Procedure; and secondly, that the plaintiff was a lessee under a parol lease, which was for a term of more than one year, and had therefore no title to remain in possession, the lease being invalid, having regard to the provisions of section 107 of the Transfer of Property Act.

The Court of first instance sustained both these defences and dismissed the suit, but upon appeal the lower appellate Court has held that the plaintiff, having got a decree under the Specific Relief Act, had at least a possessory title, and that the Court of first instance ought to have determined the suit on the merits, and accordingly remanded the case for trial upon the merits, suggesting the determination of two issues, namely an issue as to the amount due to the plaintiff during the period of dispossession; and, secondly, as regards the alleged adoption of the defendant Sheo Kumar and the respondent's consequent title to possession as against the appellant during the latter's dispossession.

Now, on the first defence, the lower appellate Court held that section 43 of the Code of Civil Procedure did not bar the claim

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for mesne profits, and we think that in this finding the Court was perfectly correct. Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make *in respect of the cause of action*. The cause of action under the Specific Relief Act is an entirely different cause of action from the cause of action set up in the present suit. Under the Specific Relief Act the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and therefore was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. In a suit, however, for mesne profits other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case the Court could not award mesne profits as against the true owner. Therefore we think that the defence under section 43 of the Code of Civil Procedure fails.

As regards the defence set up under the provisions of section 107 of the Transfer of Property Act, it is impossible to determine the rights of the parties without knowing what were the nature and provisions of the lease which was granted by Mukhta Kunwar. Nor is it possible to determine whether or not the plaintiff is entitled to mesne profits unless it has first been ascertained whether or not the defendant is the true owner of the property. If he be not the true owner, then, even though the plaintiff had only a possessory title, it appears to us that he would be entitled to recover mesne profits against the defendant who had no title whatever. If, on the other hand, it turns out that the defendant is the true owner of the property, different considerations would arise. The plaintiff has already established his possessory title. Therefore it will lie upon the defendant to establish that he is the true owner of the property, and if he establish this, then the *onus* will be thrown on the plaintiff of showing that he has an interest in the property, under the lease which was granted to him or otherwise, which would entitle him to remain in possession as against the defendant.

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The order, therefore, of the District Judge in remanding the case is correct, but he has not directed the attention of the Court of first instance to all the issues which it is necessary to determine for the purpose of fully adjudicating upon the rights of the parties as indicated above. We therefore dismiss the appeal, and confirm the order of remand of the District Judge; but in doing so and in confirming the order of remand, we should direct the Court of first instance to have regard in the determination of the suit, to the matters which we have dealt with in our judgment. The costs of this appeal will abide the event.

Appeal dismissed.

1902
June 16.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RANJIT SINGH AND ANOTHER (PLAINTIFFS) v. NAUBAT AND OTHERS
(DEFENDANTS).*

Act No. IX of 1872 (Indian Contract Act), sections 134 and 137—Principal and surety—Creditor allowing remedy against principal debtor to become barred by limitation—Discharge of surety.

“Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him” as these words are used in section 137 of the Indian Contract Act, 1872, indicate a forbearance for a more or less limited period to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation.

Hence where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by instalments, certain persons becoming sureties for the due payment of such instalments, and, the judgment-debtor having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, it was held that the creditor had forfeited his remedy against the sureties also. *Hazari Lal v. Chunni Lal* (1) and *Radha v. Kinlock* (2) followed. *Hajari-mal v. Krishnarav* (3) dissented from.

The facts of this case are as follows :—

On the 30th of March 1885 Ranjit Singh and others obtained a decree against one Harnam. The decree was transferred to the Collector for execution on the 28th of May 1886, the property which the decree-holders sought to sell being ancestral.

* Second Appeal No. 813 of 1899 from a decree of Munshi Sheo Sahai, Additional Subordinate Judge of Meerut, dated the 20th of July, 1899, reversing a decree of Babu Daya Nath, Munsif of Meerut, dated the 20th of March 1899.

(1) (1886) I. L. R., 8 All., 259. (2) (1889) I. L. R., 11 All., 310.

(3) (1881) I. L. R., 5 Bom., 647.