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KISHAN PRASAD v. BENI RAM.

as required by the section, but, in fact, notice was served upon the appellants' pleader. If, along with their petition of objections, the respondents had filed a separate application, expressly referring to section 258, it would obviously have been the duty of the Court to decide, first, whether a valid tender had been made. A finding in the affirmative would have been equivalent for the purposes of this case to recording a payment as certified. The Court would then have taken up the application for execution, and would have been bound to reject it in pursuance of its finding that a valid tender, equivalent to payment, had been made. In the present case there was only one proceeding, but this can make no difference. In our opinion there is nothing in section 258 which prevented the Court from trying the question whether a valid tender was made, or from giving effect to its finding that a valid tender was made. We dismiss this appeal with costs.

Appeal dismissed.

1901
August 3.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

HAJI KHAN (DEFENDANT) v. BALDEO DAS (PLAINTIFF).*

Practice—Pleadings—Failure of plaintiff to establish case set up by him—Right to succeed upon facts found differing from those alleged.

The plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff, that the tenancy had commenced some elven years before suit, and that for the last three years the defendant had ceased to pay rent, and had recently denied the plaintiff's title.

The defendant denied that the plaintiff was the owner of the house or that he had leased it to the defendant. He pleaded also that he had been in adverse possession for more than twelve years.

The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that the plaintiff had been in possession within a period of twelve years from the institution of the suit.

Held that, under the circumstances stated above, it being, on the failure of the plaintiff's case as to tenancy, for the plaintiff to prove that he had possession within twelve years, the plaintiff was not entitled to a decree.

Naiku Khan v. *Gayani Kuar* (1), *Ali Husain* v. *Ali Bakhsh* (2) and *Balmakund* v. *Dalu* (3) referred to.

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* Second Appeal No. 581 of 1900 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 21st May, 1900, confirming a decree of Babu Parmatha Nath Banerji, Munsif of Koel, dated the 19th March 1900.

(1) (1893) I. L. R., 15 All., 186. (2) Weekly Notes, 1889, p. 176.
(3) Weekly Notes, 1901, p. 157.

The plaintiff in this case came into Court alleging that he was the owner of a certain house; that ten or eleven years before suit he had leased the house in question to the defendant at a monthly rent; that for three years before suit the defendant had paid no rent, and a few months before suit he had denied the title of the plaintiff.

The defendant in his written statement denied that the plaintiff was the owner of the house or that he had leased it to the defendant. He pleaded that he had been in adverse possession for more than twelve years, and that the suit was barred by limitation.

The Court of first instance (Munsif of Aligarh) found that the lease set up by the plaintiff was not proved, but that the house belonged to the plaintiff and that the defendant was in possession of it with the plaintiff's consent and that his possession was within twelve years from the date of suit. That Court gave the plaintiff a decree for possession, disallowing his claim for rent.

On appeal by the defendant the lower appellate Court (Additional Subordinate Judge of Aligarh) coming to similar conclusions of fact upheld the decree of the Court of first instance.

The defendant appealed to the High Court.

Maulvi *Ghulam Mujtaba* for the appellant. The plaintiff having failed to prove the specific title upon which he based his claim cannot be allowed to succeed upon a different title. The plaintiff failed to prove that the relationship of landlord and tenant ever existed between himself and the defendant, and the lower Courts were wrong in giving him a decree simply because the defendant was unable to substantiate his plea of adverse possession. I rely on *Naiku Khan* v. *Gayani Kuar* (1).

Mr. *Kashi Prasad* (holding the brief of Mr. *S. S. Singh*) for the respondent relied on the decision of Tyrrell, J., in *Ali Husain* v. *Ali Bakhsh* (2), and contended that the plaintiff having been found to be the owner of the house of which the defendant was in occupation, and that defendant being found to have no title either as lessee or licensee or by virtue of adverse possession for more than twelve years, the Court below was right in giving him a decree for possession.

(1) (1893) I. L. R., 15 All., 186. (2) Weekly Notes, 1889, p. 170.

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Judgment was as follows:—

BURKITT, J.—In this case the plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff; that the tenancy had commenced some eleven years before; that for the last three years the defendant had ceased to pay rent, and had denied the plaintiff's title. Both the Courts have found that the allegations as to the tenancy are untrue, and have found that the relationship of landlord and tenant has not been shown to have existed between the plaintiff and the defendant. They have therefore dismissed the suit, so far as it was founded on the allegation of tenancy, but have given the plaintiff a decree for possession as owner. Now it seems to me that this decree cannot be supported on the allegations of the plaint. The only way the plaintiff stated himself to be in possession of the property in suit was by alleging that the defendant was his tenant. Had the tenancy been proved, it would have followed that the plaintiff was in possession through his tenant. But it has been found that the defendant was not his tenant. The position therefore is this, that the plaintiff has failed to prove possession over the disputed premises within twelve years before suit. It is alleged, of course, that he was in possession before the commencement of the alleged lease to defendant; of such possession there is not a scrap of evidence, and I am of opinion that in a case like this, where plaintiff's principal allegation has been proved to be untrue, we should not send down an issue to the Lower Court to enable him to establish a subsidiary line of attack. I would therefore allow this appeal, setting aside the decrees of the Lower Court, and dismiss his suit with costs.

CHAMIER, J.—The plaintiff's case was, that he was the owner of the house in suit; that ten or eleven years before the suit he had leased it to the defendant at a monthly rent; that for three years before suit the defendant had paid no rent, and that a few months before the suit he had denied the title of the plaintiff.

The defendant in his written statement denied that the plaintiff was the owner of the house, or that he had leased it to the defendant. He pleaded that he had been in adverse possession

of the house for more than twelve years, and that the suit was barred by limitation. Both the Courts below have disbelieved the evidence as to the alleged lease, but they have passed a decree in favour of the plaintiff for possession on the ground, apparently, that the defendant has not proved twelve years' adverse possession. Mr. *Ghulam Mujtaba*, on behalf of the defendant, relying upon the decision of this Court in *Naiku Khan* v. *Gayani Kuar* (1) contends that as the plaintiff failed to prove the case stated in his plaint, the suit should have been dismissed. On the other hand, counsel for the plaintiff has referred us to the judgment of Tyrrell, J., in *Ali Husain* v. *Ali Bakhsh* (2) and to the judgment of Aikman, J., in an unreported case—S. A. No. 634 of 1899, *Balmakund* v. *Dalu*, decided on July 10th last (3).

I am most unwilling to bind a plaintiff too closely to his plaint in a case of this kind, and I agree with the opinion expressed by Aikman, J., that a suit like the one before us should not be dismissed merely because the plaintiff fails to prove that he leased the premises to the defendant, and that if a Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his plaint, the Court should give that relief, if the defendant would not thereby be taken by surprise.

In the present case, however, if the plaintiff's allegation about the lease be eliminated, the suit must be regarded as one for the possession of immovable property of which the plaintiff has discontinued possession. He alleges that he discontinued possession less than twelve years before the suit, but this is denied by the defendant. It was for the plaintiff to prove that he had been in possession within twelve years before suit. Counsel for the plaintiff does not suggest that, apart from the evidence which has been disbelieved by both the Courts below, there is any evidence on the record that the plaintiff was in possession within twelve years before suit. Looking at the record of the first Court I find that he sought, by means of the evidence as to the grant of a lease, both to prove his possession within limitation

(1) (1893) I. L. R., 15 All., 186. (2) Weekly Notes, 1889, p. 176.
(3) Since reported, Weekly Notes, 1901, p. 157.

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and to prevent the defendant from disputing his title. It is contrary to the practice of this Court to remand a case in order to give a plaintiff a second opportunity of proving his case, except for special reasons, and I see no reason why such a course should be adopted in this case. This is not a case in which the Court can see that the plaintiff is entitled to the relief which he claims on a ground other than that stated in his plaint. Nor is it a case in which any evidence tendered by the plaintiff has been wrongly excluded. There is no ground whatever for the admission of fresh evidence. On the evidence now on record the plaintiff's case fails, and should have been dismissed. I therefore concur in the order proposed by my learned colleague, namely, that this appeal should be accepted and the suit dismissed with costs.

BY THE COURT.—The appeal is allowed, and the decrees of the Lower Courts are set aside with costs.

Appeal decreed.

PRIVY COUNCIL.

P. C.
1901
June 21.
November 8 *and* 30.

BAHADUR SINGH AND OTHERS (PLAINTIFFS) *v.* MOHAR SINGH AND OTHERS (DEFENDANTS).

[Appeal from the High Court, North-Western Provinces, Allahabad.]

Title—Evidence and proof of Title—Effect of arrangement made by Settlement Officer between the widow in possession and the ancestors of the plaintiff—Recognition of relationship and heirship—Act No. I of 1872 *(Indian Evidence Act), section* 32, *clauses* (5) *and* (6)—*Evidence of pedigree—Statements* post litem—*Estoppel.*

The plaintiffs claimed certain lands on the death in 1892 of the widow of the last male owner as his collateral heirs. The last owner was, they alleged, descended in the same degree from a common ancestor as the persons of whom the plaintiffs were themselves descendants in the direct line. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in possession of the lands in dispute). On that occasion (it being uncertain whether she had an absolute or only a life estate in the property, though she claimed to be the absolute owner) she was asked by the Settlement Officer who would be her heirs on her death. Her reply was:—"If the claimants undertake to pay the

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON AND LORD LINDLEY.