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design, it is difficult to say. He does not mention from whom he purchased the design, and the plaintiffs' learned counsel admits that it is not known who the author or proprietor of the design is. This being so, the plaintiffs have failed to establish that they were the proprietors of the design within the meaning of the section to which we have referred. A further requirement is, that the design shall be a new and original design. It is perfectly manifest from the evidence that this design is not a new and original design. The fact that it was in the possession of Jehangir Framji in 1897, two years before the registration of the design by the plaintiffs, is conclusive evidence on this point. For these reasons we must allow the appeal, set aside the decree of the learned District Judge, and dismiss the suit with costs in both Courts.

We also discharge the injunction. The objections which have been filed by the plaintiffs under section 561 of the Code of Civil Procedure fall to the ground, and are dismissed with costs, the suit having, on the merits, been decided against the plaintiffs.

Appeal decreed.

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April 2.

FULL BENCH.

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

BALMAKUND (PLAINTIFF) *v.* DALU (DEFENDANT).*

Practice—Pleadings—Failure of plaintiff to prove the whole case upon which he came into Court—Plaintiff entitled to succeed on case proved if sufficient to support a decree.

The plaintiff came into Court alleging (1) that he was the proprietor of a certain building, and (2) that he had leased a part of the said building to the defendant, who, however, refused to pay the rent agreed upon, and he sought to have the defendant ejected and to recover possession of the portion of the building occupied by him. No specific issue dealing with the plaintiff's title was framed, but evidence as to title was given on both sides.

Held that even though the plaintiff had failed to make out his case as to the letting, he nevertheless should get a decree on his title unless the defendant could show a better one. The fact that no distinct issue as to the plaintiff's title had been framed could not be construed to the prejudice of the plaintiff inasmuch as the issue had in fact been tried, and it could not be said that the defendant had been in any way taken by surprise.

* Appeal No. 48 of 1901 under section 10 of the Letters Patent.

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Abdul Gani v. *Babni* (1) followed. *Haji Khan* v. *Baldeo Das* (2) referred to. *Naiku Khan* v. *Gayani Kuar* (3) overruled, *Lakshmibai* v. *Hari-bin Ravji* (4), *Ramchandra* v. *Vasudev* (5) and *Bajrang Das* v. *Nand Lal* (6) distinguished.

IN the suit out of which this appeal arose the plaintiff came into Court alleging that he was the owner of a certain cattle-shed which he had built at his own expense; that the defendant had rented from him a portion of this shed; that after a while he had ceased to pay rent, and that when the plaintiff asked him to vacate the shed he refused to do so. The plaintiff asked for two reliefs, (1) that a decree should be passed against the defendant for five months' arrears of rent for the shed, and (2) that the defendant should be ejected from the portion of the shed which he occupied, and the plaintiff put in possession. The defendant traversed the allegations in the plaint. He pleaded that the plaintiff was not the owner of the cattle-shed, and that he (the defendant) had been in proprietary and adverse possession of it "for several generations." He also denied that he had rented "the land of the house" from the plaintiff. The Court of first instance (Munsif of Muttra) framed only one issue, namely, whether the defendant had rented from the plaintiff a part of the "nohra" in question. Notwithstanding this, evidence as to title was adduced on both sides, and the Munsif came to the conclusion that although the plaintiff had failed to prove the lease of part of the catte-shed to the defendant, there probably had been a lease of some sort, and in any case the cattle-shed belonged to the plaintiff and he was entitled to eject the defendant therefrom. The Court accordingly decreed the plaintiff's claim for ejectment, but not for rent.

The defendant appealed. The lower appellate Court (Small Cause Court Judge of Agra, with powers of a Subordinate Judge) held that "the plaintiff could succeed only if he succeeded in proving the tenancy. He could not succeed on any other ground which was not in issue between the parties." The lower appellate Court agreed with the findings of the

(1) Weekly Notes, 1903, p. 18.
(2) Weekly Notes, 1901, p. 188.
(3) (1893) I. L. R., 15 All., 186.
(4) (1872) 9 Bom., H. C. Rep., 6.
(5) (1886) I. L. R., 10 Bom., 451.
(6) Weekly Notes, 1884, p. 285.

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Munsif that the plaintiff had failed to prove the lease to the defendant of part of the cattle-shed, and accordingly dismissed the plaintiff's claim altogether.

The plaintiff appealed to the High Court. The appeal came first before a single Judge of the Court, who, in view of an apparent conflict between two rulings of the Court, made a reference to a Division Bench. At the hearing the Judges composing the Bench were divided in opinion. The decree therefore followed the judgment which agreed with the Court below, and the appeal was dismissed.* Against this decree the plaintiff preferred an appeal under section 10 of the Letters Patent of the Court.

Munshi *Haribans Sahai* (for whom Babu *Sital Prasad Ghosh*), for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J.—In this suit the plaintiff claimed to recover possession from the defendant of part of a cattle-shed of the value of Rs. 38, which is in the occupation of the defendant. He also claimed in the suit to recover a sum of Rs. 1-4 alleged to be arrears of rent due for the shed under a contract of tenancy entered into between him and the defendant. It is well to see from the pleadings the nature of the case set up in the claim and also the nature of the defence which was filed by the defendant. In his statement of claim the plaintiff in the first paragraph alleges that he is owner and in possession of a cattle-shed which he had built *kachcha* and *pacca* at his own expense. In the second paragraph he alleges that at the beginning of the month of Jeth, Sambat 1955, corresponding to June, 1898, "the defendant leased from the plaintiff a portion of the said cattle-shed on the West on a rent of 4 annas a month" for the accommodation of his cattle, and then he alleges that the defendant paid rent for a few months, but after that ceased to pay. He further alleges that he requested the defendant to vacate the cattle-shed, but that "he refused to do so and became ready to fight." The prayer of the claim is, first, to recover a sum of Rs. 1-4 on account of rent, and, secondly, to recover possession of the western portion of the cattle-shed, being the portion said to

* See Weekly Notes, 1901, p. 157.

be occupied by the defendant. On this pleading two distinct claims are made, one for recovery of possession of the shed as owner, and the other for recovery of a trifling sum for rent alleged to be due in respect of a letting of a part of the shed which had been determined by notice to quit.

The Court of first instance found that there was no satisfactory proof of any tenancy, and accordingly dismissed the plaintiff's claim for rent. It found, however, that the plaintiff was the owner of the shed, and as such entitled to possession. Comment has been made upon the fact that the only issue which was formally framed by the learned Munsif was the issue, whether or not the plaintiff let any portion of the cattle-shed to the defendant. In the pleadings, however, the question of title was raised between the parties, and evidence was given on both sides in support of their respective cases in regard to it. The defendant in his written statement alleged that the plaintiff was not the owner of the shed, and that he, the defendant, did not take the land which formed the site of the shed on rent from the plaintiff. He also alleged that he (the defendant) was the absolute owner of the land occupied by the shed according to his share in the village site, and that he had been in proprietary and adverse possession of the shed in dispute for more than twelve years. It is obvious from this that the question of title to the property was definitely raised, and it is clear from the evidence in the case that this question was determined after an examination of the evidence which was adduced on both sides upon this question. The mere omission on the part of the Munsif to frame an issue upon this question, which was a material question in the case, and which was, as a matter of fact, tried and decided by him, appears to me not to be a matter to which any great importance can be attached. The question of title was clearly raised in the pleadings, and the evidence on both sides was directed to it. The defendant could not be, and was not, taken by surprise in regard to it.

On appeal the learned Subordinate Judge was of opinion that inasmuch as the only issue definitely raised in the case, as thought, was the issue as to the tenancy, the issue as to title

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could not legitimately be considered, and that inasmuch as the plaintiff had failed to prove the tenancy which he set up, the suit could not be maintained. Accordingly he overruled the decision of the Court of first instance, and dismissed the plaintiff's suit.

On appeal to the High Court (see Weekly Notes, 1901, page 157), the case was heard before my brothers Knox and Aikman, who differed in opinion. Mr. Justice Knox held, that, inasmuch as the plaintiff had failed to establish the case set up by him and had come to Court, as he says, on a false case, he was not entitled to any relief. Mr. Justice Aikman held that on the facts established the plaintiff was entitled to a decree for possession, although he may have failed to prove the whole case set up by him. The result of this difference of opinion was that the decision of the lower appellate Court was upheld and the appeal dismissed. From that decision an appeal has been preferred under the Letters Patent.

The finding of the Munsif on the question of the alleged tenancy is as follows :—" I find that the plaintiff built the whole *nohra* (*i.e.*, the cattle-shed) two years ago. I also believe that the defendant keeps his cattle in the western part of it since Jeth last year. It is not proved to my satisfaction that the defendant contracted to pay 4 annas a month rent, or any rent at all, though it is probable that the quarters were hired to him—because the only alternative is that they were lent to him, but that is not pleaded, whereas there is evidence of the plaintiff's witnesses that they were hired." It does not follow from this finding that the plaintiff put forward any false case. He merely failed to establish to the satisfaction of the Court the letting of the shed stated in the plaint. It does not follow from that that the Court found that he had put forward a false case. It merely found that he had failed to establish his case in this respect. It appears to me that the finding upon this issue did not amount to a finding upon which the Court would be entitled to dismiss the plaintiff's suit *in toto*. In addition to the issue as to the letting of the shed there was the further issue, really, though not formally, knit between the parties, in regard to the ownership of the shed, and that issue the Munsif has found in favour of

the plaintiff. Reliance has been placed by the learned Advocate for the respondent upon a case in this High Court, which came before a Bench of which one of us was a member, namely, the case of *Naiku Khan* v. *Gayani Kuar* (1). It is difficult to distinguish the facts of that case from the present case. It was an ejectment suit. The plaintiff respondent came into Court, alleging that she was the owner of a house occupied by the defendants appellants, that she had leased that house at a rent of Rs. 3 per month to the defendants, and that the defendants after paying rent regularly to her for one year, had paid nothing in the second and third years. She therefore sued for the possession of the house and Rs. 72 rent for two years. The defendants claimed the house as their own property. In that case it was held that the plaintiff coming into Court on the allegation that she was the owner of the house, and that the defendants were her tenants at a certain rent, and having failed to prove the existence of the tenancy, could not be allowed to support her case on the plea that the defendants were trespassers, such plea having formed no part of the original case. In that case, as in the present, as appears from the record of it, the plaintiff had served notice upon the defendants as her tenants to vacate the property alleged to have been leased to them. This fact is not stated in the judgment. The claim is treated as being one based upon tenancy, and upon a tenancy alone. In their judgment the learned Judges say :—"It is to be noticed that she (*i.e.*, the plaintiff) did not allege any alternative cause of action, such as, for example, that the defendants were trespassers." In the present case before us on appeal there is impliedly a statement as it seems to me that the defendant was a trespasser, inasmuch as it is expressly stated that notice was served upon him to vacate the cattle-shed, but he refused to do so. Likewise in the case under review, from the fact that notice was served upon the defendants to vacate the property there was an implied allegation that the defendants were in possession of it as trespassers. The learned Judges in that case appear to me to have based their decision largely, if not entirely, upon the ruling in the case of *Lakshmibai* v. *Hari-bin Ravji* (2).

(1) (1893) I. L. R., 15 All., 186. (2) (1872) 9 Bom., H. C. R., 6.

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They say, towards the end of their judgment, referring to the rule laid down in that case, as follows:—"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 causes 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." I turn now to the case of *Lakshmibai* v. *Hari-bin Ravji*, upon the ruling in which reliance was placed. In that case a lessor sued to eject his tenant on the expiration of the term of the lease or for the breach of the conditions of the lease, and failed to prove the lease; and it was held that the lessor was not at liberty in the same suit ignoring the lease to fall back upon his general title, as though he had not set up and failed to prove the alleged lease; that the lessor must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case from the commencement. In this case the following question was referred to a Full Bench by West, J., namely, "Whether *A*, suing as landlord or lessor to eject *B* as his tenant on the expiry of his term or for breach of his contract, is at liberty to rely as the ground of his right on a relation between him and *B* that has not arisen out of the alleged contract." In the judgment of the Court the learned Judges say:—"We are of opinion that in this case the question referred must be answered in the negative. The plaintiff has sued on a document which the Court below has believed to be a forgery. 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 plaint an alternative case, and thus the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case he may have leave to amend his plaint, and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, or misconstruction of documents." That case seems to me entirely different

from the one before the Court. The plaintiff there relied upon a deed which proved to be a forgery, and no alternative case was put forward. Here we have clearly put forward as the foundation of the plaintiff's case an allegation of ownership of the property in dispute. We have in the defence a denial of the plaintiff's title and an allegation by the defendant that he is the owner of the property. These are matters entirely independent of any relation of lessor and lessee or of landlord and tenant. It cannot therefore be said that the defendant was taken by surprise in the case. Evidence was given on both sides upon the question of ownership, and the issue upon it was found in favour of the plaintiff. Another case upon the same question is that of *Haji Khan* v. *Baldeo Das* (1). That case is distinguishable from the present. There the plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to him, that the tenancy had commenced some eleven years before suit, but that for the last three years the defendant had ceased to pay rent and had denied the plaintiff's title. The defendant denied that the plaintiff was the owner of the house, or that he had leased it from the plaintiff. 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 he had been in possession within a period of twelve years from the institution of the suit. This being so, it was held that on failure of the plaintiff's case as to tenancy it lay on the plaintiff to prove that he had been in possession within twelve years, and not having proved that fact, he was not entitled to a decree for possession. It was on the ground that the plaintiff had failed to prove that he had been in possession within twelve years as also the alleged tenancy that the judgment against him was based. I am unable to distinguish the case now before the Court from a case which was recently decided by a Full Bench of this Court (of which I and also Mr. Justice Knox, who was one of the Judges who decided the case reported in I. L. R., 15 All., 186, were members), namely, the case of *Abdul Ghani* v. *Musammat Babni* (2). In that case

(1) Weekly Notes, 1901, p. 188. (2) Weekly Notes, 1903, p. 18.

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the plaintiff came into Court, alleging that the defendant had about eight years previously rented a house from him at a monthly rent of one rupee, but latterly had failed to pay the rent, and that he had given the defendant notice to quit the house. He claimed possession and damages, but not arrears of rent. The defendant denied the tenancy, and asserted that she had been in adverse possession for a period of seventeen years. It was found after a remand of issues to the lower Court by the High Court, that the plaintiff was the owner of the house, that the defendant occupied the house as a friend with the plaintiff's permission, that she had never before asserted her title to it, and her possession was merely permissive. It was held that the plaintiff was entitled, upon the facts established, to a decree for possession, notwithstanding that he had failed to prove that the defendant had been his tenant. In the judgment of the Court in that case reference is made to the case which is now before the Court. It was distinguished from the case then under consideration by the observation which appears in the judgment that the only issue in that case was the issue whether or not there was a letting of the property in dispute. Now that we have before us the pleadings in this case, we find that this was not the only issue which was, as a matter of fact, heard and determined by the learned Munsif. Although he did not, no doubt through inadvertence, frame an issue on the question of title, he undoubtedly heard evidence upon it at length, and after a careful hearing determined it. I am unable to distinguish the two cases. I see no reason whatever for altering the view which I entertained after the arguments which we heard in the former case. It appears to me that the case of *Abdul Ghani* v. *Musammat Babni* was correctly decided. I am unable to distinguish the present case from it, and I therefore think that the decision of the lower appellate Court is erroneous. As the issue as to title has not been decided by the lower appellate Court, I would refer that issue to that Court, and upon the return of the finding on it decide this appeal.

BANERJI, J.—I think the question raised in this appeal is practically concluded by the ruling in *Abdul Ghani* v.

Musammat Babni (1), decided by a Full Bench of three Judges, with which I agree. That ruling fully supports the view adopted in this case by my brother Aikman. As observed by Mr. Justice Chamier in *Hají Khan* v. *Baldeo Das* (2), 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 claim, the Court should grant that relief, if the defendants were not thereby taken by surprise. This is not a case in which the defendant was, or could be, taken by surprise if the question of the title set up by the plaintiff in his plaint was determined. The claim for the ejectment of the defendant from the cattle shed in question was based upon two grounds—(1) that the plaintiff was the owner of it, that the defendant had no title to it, and that he had wrongly withheld possession from the plaintiff; and (2) that the defendant had been the plaintiff's tenant and the tenancy had been determined by notice. If the plaintiff could succeed in proving either of the two grounds set up by him he would be entitled to a decree for ejectment; but his failure to prove the second ground would not preclude him from asking the Court to try the other ground put forward in the plaint. That distinguishes this case from the ruling of the Bombay High Court in *Ramchandra* v. *Vasudev* (3), upon which the learned advocate for the respondent has relied. As in this case the plaintiff alleged that he was the owner of the property, and that allegation was denied by the defendant, who also denied that he was the plaintiff's tenant, it was not necessary for the plaintiff to establish the tenancy except for the purpose of proving his claim for arrears of rent. In order to enable him to succeed in his claim for ejectment, it was enough for him to prove the first ground of his claim. The lower appellate Court therefore ought to have proceeded to try the issue raised by that ground of the plaintiff's claim. The view adopted in this case by the first appellate Court has, no doubt, the support of the ruling of this Court in *Naiku Khan* v. *Gayani Kuar* (4). On referring to the paper-book it appears that that case was exactly similar to the present. With all deference I am

(1) Weekly Notes, 1903, p. 18.
(2) Weekly Notes, 1901, p. 188.
(3) (1886) I. L. R., 10 Bom., 451.
(4) (1893) I. L. R., 15 All., 186.

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unable to concur with the view of the learned Judges who decided it, and, as pointed out by the learned Chief Justice, it is not supported by the decision of the Bombay High Court in *Lakshmibai* v. *Hari-bin Ravji* (1) to which reference is made in the judgment. The only other case which was relied upon on behalf of the respondent was that of *Bajrang Das* v. *Nand Lal* (2). From the report of that case it is difficult to gather whether in that case the plaintiff alleged his title to be that of the owner of the property. That case, therefore, is no authority for the view for which the respondent contends. For these reasons I am of opinion that the Court below was wrong, and I agree in the order proposed by the learned Chief Justice.

BURKITT, J.—In my opinion this appeal is governed by the decision of the Full Bench of this Court in the case of *Abdul Ghani* v. *Musammat Babni* (3). In view of that decision the judgment now under appeal cannot be supported. I concur in the order proposed by the other members of this Bench.

BY THE COURT.—Having regard to the views entertained by us in this appeal, the appeal cannot be satisfactorily disposed of without having the following issue determined by the lower appellate Court, namely, "who is the owner of the *nohra* or cattle-shed, the subject-matter of the suit?" We refer this issue to the lower appellate Court under section 566 of the Code of Civil Procedure. The Court will try the issue upon the evidence which is already on the record. Upon return of the finding upon this issue the parties will have the usual ten days for filing objections.

Issue referred.

(1) (1872) 9 Bom., H. C. Rep., 6. (2) Weekly Notes, 1884, p. 285.
(3) Weekly Notes, 1903, p. 18.