

1902

BAQAR
ALI KHAN
v.
ANJUMAN
ARA BEGAM.

the Appellate Court upon the first and differ upon the second. But the result is that the suit of the plaintiffs, the present respondents, fails and was rightly dismissed by the First Court, though not upon the right grounds.

Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner's Court should be set aside with costs; and that of the Additional Civil Judge of Lucknow affirmed. The respondents will pay the costs of these appeals.

Appeals allowed.

Solicitors for the appellants:—Messrs. *Watkins & Lempriere.*

Solicitors for the respondent:—Messrs. *T. L. Wilson & Co.*
J. V. W.

1902
December 19.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox and Mr. Justice Blair.

ABDUL GHANI (PLAINTIFF) v. MUSAMMAT BABNI (DEFENDANT).*

Practice—Pleadings—Failure of plaintiff to prove the case set up by him in his plaint—Right to succeed upon a case different from that alleged.

The plaintiff came into Court alleging that the defendant had, about eight years previously, hired a house from him at a monthly rent of one rupee, but latterly had failed to pay the rent, and that the plaintiff had given the defendant notice to quit the house. The plaintiff claimed possession and damages, but not arrears of rent.

The defendant denied the tenancy alleged by the plaintiff, and asserted that she had been in adverse possession for a period of seventeen years. She also asserted that she had purchased the land upon which the house stood, and had herself built the house.

The findings in first appeal of the Court below, after a remand of issues by the High Court, were, that the plaintiff was the owner of the house, and that the defendant occupied the house as a friend with the permission of the plaintiff; that the defendant had never before this asserted her title to the house, and that her possession was permissive.

* Second Appeal No. 828 of 1900, from a decree of Munsifi Muhammad Siraj-ud-din, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 20th day of April, 1900, reversing the decree of Babu Baidya Nath Das, Officiating Munsif of Allahabad, dated the 12th day of February, 1900.

Held, that the plaintiff was entitled upon the facts found to a decree for possession notwithstanding that his case had been that the defendant was his tenant.

Bajrang Des v. Nand Lal (1) and *Balmirkund v. Dalu* (2) distinguished.

IN the suit out of which this appeal arose the plaintiff sought to recover possession of a house which was in the possession of the defendant. The plaintiff alleged in his plaint that about eight years previously the defendant had hired the house at a monthly rent of one rupee, that the defendant failed to pay any rent from February 1899 to the 30th of November 1899, and that on the 8th of November 1899, the plaintiff had given the defendant notice to quit the premises. The plaintiff claimed possession of the house and damages, but made no claim for rent. The defendant filed a written statement, in which she set up the case that she and her sons had been in adverse possession of the house in question for a period of seventeen years, and she relied upon the Statute of Limitation. She denied that she ever hired the house from the plaintiff. She further alleged that she had purchased the land which formed the site of the house, and had built the house upon it, and in fact denied *in toto* the title of the plaintiff. Upon these pleadings certain issues were joined, and amongst them the issues whether the plaintiff was the owner of the house in dispute, and whether the defendant had been in adverse possession for more than twelve years. The Court of first instance (Munsif of Allahabad) found that the plaintiff had not succeeded in proving the tenancy alleged by him, but found that the plaintiff had all along been in proprietary possession of the house, and that the defendant's possession was merely permissive. The Munsif accordingly decreed the plaintiff's claim. On appeal the lower appellate Court (Small Cause Court Judge exercising the powers of a Subordinate Judge) reversed the decision of the Court of first instance upon the sole ground that inasmuch as it had been established that the defendant's possession of the house was permissive, and the plaintiff had not come into Court upon an allegation that the defendant's possession was permissive, but had alleged in the plaint that the defendant was a tenant and

1902

ABDUL
GHANI
o.
MUSAMMAT
BABUL.

(1) Weekly Notes, 1884, p. 285.

(2) Weekly Notes, 1901, p. 157.

1902

ABDUL
GHANI
v.
MUSAMMAT
BABNI.

had failed to prove this, he could not succeed in the suit. Against this decree the plaintiff appealed to the High Court.

By the High Court certain issues were referred to the lower appellate Court, namely: (i) What was the nature of the occupation of the house in dispute by the defendant? (ii) was the defendant's possession adverse or permissive? If adverse, for how long did the defendant hold such possession? On these issues the Court below found that the plaintiff was the owner of the house, and that the defendant occupied the house as a friend with the permission of the plaintiff; that the defendant had never before asserted a title to the house in dispute, and that her possession was permissive.

Maulvi *Muhammad Ishaq*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

STANLEY, C.J. and KNOX and BLAIR, JJ.—The suit out of which this appeal has arisen was brought by the plaintiff to recover possession of a tile-roofed house which was in the possession of the defendant. In his plaint the plaintiff alleged that about eight years ago the defendant hired the house in dispute at a monthly rent of one rupee, that the defendant failed to pay any rent from February, 1899 to the 30th of November, 1899, and that on the 8th of November, 1899, the plaintiff gave to the defendant a notice to quit the premises. He claims possession of the house and also damages. It is noticeable that no claim in respect of rent is made. The defendant filed a written statement, in which she set up the case that she and her sons had been in adverse possession of the house in question for a period of seventeen years, and she relied upon the *Statute of limitation*. She denied that she ever hired the house from the plaintiff, and said that the allegation as to her being a tenant was false. She also alleged that she purchased the land which forms the site of the house, and built the house upon it, and in fact denied *in toto* the title of the plaintiff. Upon these pleadings certain issues were joined, and, amongst others, these issues, *viz.* whether the plaintiff was the owner of the house in dispute, and whether the defendant had been in adverse possession for more than twelve years. The Court of first instance found that the evidence given by the plaintiff to prove the tenancy was of a

fimsy nature, and rejected it, and found that the tenancy set up by the plaintiff was not proved. It found, however, that the plaintiff had all along been in proprietary possession of the house, and that the defendant's possession was simply permissive. Accordingly, it decreed the plaintiff's claim. On appeal the lower appellate Court reversed the decision of the Court of first instance upon the sole ground that inasmuch as it had been established that the possession of the house by the defendant was permissive, and the plaintiff had not come into Court upon an allegation that the defendant's possession was permissive, but alleged in the plaint that the defendant had been a tenant and had failed to prove this, he could not succeed in that suit. The Subordinate Judge relied upon the ruling in the case of *Bajrang Das v. Nand Lal* (1). Now it is to be observed that the plaintiff here sued, not in respect of any subsisting tenancy, nor did he sue for arrears of rent. His allegation is, that whatever the nature of the occupation of the premises by the defendant was, her right of occupancy had determined prior to the institution of the suit. The case, as we have pointed out, as set up by the defendant, was a denial of the proprietary title of the plaintiff, and the setting up of an adverse title in the defendant under the Statute of limitation. This Court, having regard to the dismissal of the claim by the lower appellate Court upon the ground to which we have referred, considered it necessary to refer certain issues to that Court for determination. These issues are—(i) What was the nature of the occupation of the house in dispute by the defendant? (ii) Was the defendant's possession adverse or permissive? If adverse, for how long did the defendant hold such possession?

The learned Subordinate Judge has found upon the first issue that the plaintiff is the owner of the house, and that the defendant occupied the house as a friend with the permission of the plaintiff. Upon the second issue his finding is that the defendant never before this asserted her title to the house in suit, and that her possession was permissive. It is now contended before us by the learned Vakil for the respondent, notwithstanding these findings, that inasmuch as the plaintiff did no

1902

ABDUL
GHANI
v.
MUBAMMAT
BARNI.

(1) Weekly Notes, 1884, p. 286.

1902

ABDUL
GHANI
v.
MUHAMMAD
BARNI.

establish the case which he set up, namely, that there had previously been a subsisting tenancy, his suit must fail. We cannot accede to this contention. It is clear that the defendant was not taken by surprise. She clearly understood the case which she had to meet, namely, the case set up by the plaintiff that he was the owner of the house. In the case relied upon by the lower appellate Court, one of the claims made by the plaintiff was to recover arrears of rent in respect of the property in dispute. That case was based upon the existence of a tenancy, and therefore is different from the present case, for here there is no claim for rent. The claim is confined to the recovery of possession of the property and damages. This is sufficient to differentiate the two cases. We may observe as regards the case in this Court, which was also relied upon in argument, namely, the case of *Balmakund v. Dalu* (1), that in that case the only issue which was framed by the Court of first instance was—"Did the plaintiff let part of the property in dispute to the defendant at the rent of four annas a month?" The only issue framed was as to the existence of a tenancy. That is not the present case. Cases of this kind must be decided according to the circumstances of each particular case. We think that there was nothing in the claim and in the issues which were raised which could possibly have taken the defendant by surprise, and now that the true facts have been ascertained by the Court, the technical difficulty which has been relied upon cannot, we think, be allowed to defeat the plaintiff's claim. We therefore think that the decision of the Court of first instance was correct, and that the decree of the lower appellate Court cannot stand. We allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance. The defendant must pay the costs of this appeal, and also the cost in the lower appellate Court.

[See also *Haji Khan v. Baldeo Das* (2).—ED.]

Appeal decreed.

(1) Weekly Notes, 1901, p. 157. (2) Weekly Notes, 1901, p. 188.