1881

SHAFKAT-UN-NISSA v. SHIB SAHAI.

second clause of s. 43, Act X of 1877. In this view of the law as applicable to the peculiar facts of this case, the decree of the lower appellate Court is affirmed, and this appeal is dismissed with costs.

Appeal dismissed.

1881
December 20.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BHOLAI (DEFENDANT) *v.* THE RAJAH OF BANSI (PLAINTIFF).*

Land-holder and Tenant—Planting trees—Ejectment.

A tenant planted trees on one of the plots of land comprising his holding, an act which rendered him liable to ejectment. He paid rent, not in respect of each plot of land, but in respect of the entire holding. *Held* that he was liable to ejectment, not merely from the plot on which he had planted the trees, but from his entire holding.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case for the trial of the issue set out in such order.

Lala *Lalta Prasad* and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, Maulvi *Mehdi Hasan*, and Shaikh *Maula Bakhsh*, for the respondent.

The High Court (TYRRELL, J., and DUTHOIT, J.,) made the following order of remand:—

DUTHOIT, J.—This is an appeal from a decree of the Judge of Gorakhpur, reversing a decree of an Assistant Collector of the first class (Mr. J. H. Carter), by which a suit brought by the Raja of Bansi against Bholai, Kurmi, under s. 93 (*b*) of Act XVIII. of 1873 was dismissed. The plaint alleged that the defendant, a tenant with right of occupancy, had forfeited his rights, and was liable to ejectment, by reason of his having, in Asadh, 1286 fasli, on plot No. 1177 (17 biswas in extent), being part of his holding, (i) planted trees of various kinds: (ii) dug a well: (iii) built a house. For the defence the planting of any trees upon the land referred to, at the time stated, and the construction of a well proper were denied; it was alleged that all, as regarded trees, that the defendant

* Second Appeal, No. 108 of 1881, from a decree of R. Saunders, Esq., Judge of Gorakhpur, dated the 29th November, 1880, reversing a decree of J. H. Carter, Esq., Assistant Collector of the first class, Basti, dated the 17th July, 1880.

had done was to re-plant vacant spaces in a grove which (with the permission of the zamindar) he had laid out four years before; it was admitted that he had dug a "*chaunda*" (1) well, and built a hut upon the land; but it was pleaded (i) that the suit was barred by limitation (s. 94 of Act XVIII of 1873); (ii) that the plaintiff was estopped by the terms of a compromise made with the defendant on the 17th June, 1879; (iii) that nothing done by the defendant is detrimental to the land in his occupation or inconsistent with the purpose for which the land was let. The following issues were framed for trial by Deputy Collector Harnam Chandar Seth before whom the suit was originally heard: (i) Whether defendant has planted a grove and built a house and well during the last twelve months, or that grove was planted by him four years ago together with the well; and the house was prepared sixteen months ago; if the latter, is the claim barred by limitation? (ii) Whether defendant's action meets the requirement of cl. (*b*), s. 93, or not? (iii). Should defendant's action meet the requirements of cl. (*b*), s. 93, is he liable to ejectment from his entire holding, or only of a part? Evidence on both sides was recorded, and a local inquiry, upon five points noted by the Deputy Collector for investigation, was held by a naib-tahsildar. The suit was almost ready for decision when it came before Mr. Carter, and was disposed of in these words: "I have no sympathy for suits of this tenor: I am able to throw it out on a legal ground: Lala Balkaran Lal is vakil, not accompanied by any one who has personal knowledge of the facts of the case: defendant is present: no order as to costs."

The plaintiff appealed to the Judge, who decided that the Assistant Collector's order was illegal, and that the plaintiff's case being fully satisfied, he was entitled to a decree.

In second appeal it is contended that the suit was barred by limitation, and that, even on the facts found by the lower appellate Court, the defendant (appellant) should not have been ejected from his entire holding.

The former of these pleas depends upon the determination of the date of the acts on the allegation of which the suit is based, and from the evidence in the record we see no reason to doubt

(1) A well of a temporary nature.

1881

BHOLAI v. THE RAJAH OF BANSI.

that the date assigned to them by the plaintiff is the true one. The compromise, though not referred to in the written grounds of appeal, has been pleaded in the argument. It has no connection with the matter now in suit. The acts complained of are of date subsequent to it. The digging of a well is certainly not an act detrimental to the land, or inconsistent with the purposes for which it was let; but the same cannot be said of the building of the house, or of the planting of the trees.

Whether, however, the appellant has become liable to ejectment from his entire holding of 68 bighas odd, or only from a single plot (No. 1177), is a question the answer to which must depend upon whether each separate plot or number of his holding bears a distinct rent, or the Rs. 115, which he appears to pay as rent, is a lump sum issuing from his entire holding, and the materials for a decision upon this question are not on the record. In the terms, therefore, of s. 566 of the Code of Civil Procedure, we refer the following issue for trial to the lower appellate Court: Does the rent paid by the defendant (appellant) issue from his entire holding, or does each separate plot or number thereof bear a distinct rent? The lower appellate Court will take such additional evidence as may be required, and will return the same with its finding upon the issue to this Court within three weeks. On such return, ten days will be allowed for objections, from a date to be fixed by the Registrar. Costs of the inquiry will be costs in the suit.

The lower appellate Court found on such issue that the defendant's rent was a lump sum assessed upon his entire holding, no separate rate being recorded in respect of any one of his fields. Upon the return of this finding, the High Court (BRODHURST, J., and TYRRELL, J.) delivered the following judgment:

TYRRELL, J.—On the return to our order of remand the respondent is shown to be entitled to the decree he obtained from the lower appellate Court. But under s. 149 of the Rent Act we modify the same, by ordering that it be not executed provided the appellant within thirty days from this date shall remove the house and trees complained of, and restore the site thereof to their former condition. This appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Oldfield.

1881
December 21.

JANKI (PLAINTIFF) *v.* DHARAM CHAND AND OTHERS (DEFENDANTS).*

Suit against minor—Permission to relative to defend—Act XL of 1858, s. 3.

The mother of a minor, who did not hold a certificate under Act XL of 1858, was sued on behalf of the minor. She did not obtain permission to defend the suit on behalf of the minor, but the Court allowed her to answer to the suit on behalf of the minor. *Held* that, under these circumstances, it must be inferred that the Court had given her permission to defend the suit, as required by s. 3 of Act XL of 1858, and therefore the decree made against her in the suit as representing the minor was binding on the latter.

THE plaintiff in this suit claimed Rs. 70 arrears of maintenance, basing her claim on a decree, dated the 21st December, 1870. It appeared that in the year 1870 the plaintiff had sued one Makhum Bahu in her own person and as the mother and guardian of her minor sons, Dharam Chand and Sham Chand, and one Bramha Dat, for maintenance; and that on the 21st December, 1870, she obtained a decree in that suit for a certain allowance by way of maintenance. In the present suit the plaintiff sought to recover from Dharam Chand and Sham Chand, who had attained majority, and Bramha Dat, arrears of such allowance, claiming by virtue of such decree. The defendants Dharam Chand and Sham Chand set up as a defence to the suit that the decree did not bind them, as they were not parties to the suit in which it was made, and such suit had not been defended on their behalf by any one competent to defend it. The Court of first instance framed as one of the issues for trial the issue: "Whether Dharam Chand and Sham Chand, defendants, are bound by the decree which forms the basis of this suit?" The Court held that those defendants were not bound by that decree, and accordingly dismissed the suit as regards them, observing as follows: "According to the rulings noted below, Dharam Chand and Sham Chand were not parties to that suit, and the decree passed therein was therefore not binding on them: even if granted, for the sake of argument, that these defendants were parties to the former suit, inasmuch as Makhum Bahu had no certificate under Act XL of 1858, she had no right to defend the suit for them, and the decree

* Second Appeal, No. 466 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 30th March, 1881, affirming a decree of Babu Mirtonjoy Mukarji, Munsif of Benares, dated the 9th September, 1880.

1881

JANKI v. DHARAM CHAND.

passed therein cannot be held to be binding on them." On appeal by the plaintiff the lower appellate Court affirmed the decision of the Court of first instance, observing as follows: "Makhum Bahu, mother of the defendants, did not obtain a certificate under Act XL of 1858, nor permission from the Court having jurisdiction to defend the former suit on behalf of her sons; and it is clear that the minors, defendants in the present suit, were not made defendants, for there were only two defendants in that case, and they are referred to throughout the proceedings as Makhum Bahu defendant No. 1, and Bramha Dat Misr defendant No. 2."

The plaintiff appealed to the High Court, contending that it should be presumed that the Court in the former suit had allowed the mother of the defendants to defend the suit on their behalf, and therefore the defendants had been properly represented in that suit, and were bound by the decree made therein.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the Court (STRAIGHT, J., and OLDFIELD, J.,) was delivered by

STRAIGHT, J.—We think that the mother of the respondents Nos. 1 and 2, having been cited in the suit of 1870 as their representative, and allowed by the Court, in which the proceedings were instituted, to answer, as well for her sons as herself, may fairly be regarded as within the proviso of s. 3 of Act XL of 1858. In other words, we consider that we are justified in inferring that Makhum Bahu was allowed by the Court having jurisdiction to defend the suit on behalf of Dharam Chand and Sham Chand, respondents Nos. 1 and 2, who are therefore bound by the decree of 1870. As the case has been decidod by both the lower Courts erroneously in reference to this point, their decisions must be reversed, and the suit must be remanded to the Munsif of Benares for disposal on the merits. Costs will follow the result.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst

1881
December 23.

BHOLI AND ANOTHER (DEFENDANTS) v. IMAM ALI AND OTHERS (PLAINTIFFS).*

Pre-emption—Joint sale of share of undivided mahál and other property—Act XV of 1877 (Limitation Act), sch. ii, No. 10.

In a suit to enforce a right of pre-emption in respect of a sale of property consisting in part of a share of an undivided mahál, which does not admit of physical possession, limitation will run from the date of registration of the instrument of sale.

THIS was a suit to enforce a right of pre-emption, instituted on the 30th January, 1880, in respect of a sale under an instrument dated the 11th November, 1878, and registered on the 13th November, 1878. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Hanuman Prasad and Munshi *Sukh Ram*, for the appellants.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondents.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD J.—This is a suit for pre-emption in respect of a sale of certain property under a deed of sale dated the 11th November, 1878, and registered on the 13th November, 1878. The property sold consists of a ten-biswa share in a zamindari estate, mauza Mohi-uddin-pur, and the half of certain lands in mauza Shahbazpur, held in common, the price for the whole property entered in the sale-deed being Rs. 2,500. The claim has been decreed; and the material plea taken in appeal is that the suit is barred by limitation, and it is one which we must allow. By art. 10, sch. ii of the Limitation Act, if the subject of the sale does not admit of physical possession, the period will run from the date of registration of the instrument of sale.

It has been held by the Full Bench of this Court in *Unkar Das* v. *Narain* (1) that a share in an undivided mahál, such as is the subject of part of the sale in this case, does not admit of physical possession in the sense in which the words are used in the article;

* Second Appeal, No. 355 of 1881, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 14th January, 1881, affirming a decree of Maulvi Maqsud Ali, Subordinate Judge of Moradabad, dated the 31st August, 1880.

(1) I. L. R., 4 All. 24.

1881

BHOLI v. IMAM ALI.

and following that ruling the whole of the property sold under the sale sought to be impeached will not admit of physical possession, and the period will run from the date of registration of the instrument of sale, and the suit will be barred.

Whether or not there was or could be physical possession of the share of common lands which formed part of the property sold is immaterial, and need not be determined, as the article contemplates the taking under the sale sought to be impeached of physical possession of the whole of the property sold, and there have not been separate sales of different properties, but all together have been the subject of one sale.

It was urged that the plea of limitation was not originally based on the ground that the property did not admit of physical possession, but that such possession had been taken immediately after the sale, but this objection to the plea has no force. The former pleading arose out of a mistake of fact in consequence of an erroneous construction of the words "physical possession," and the objection falls to the ground, with reference to s. 4 of the Act, which requires the dismissal of a suit, although limitation has not been set up as a defence.

The appeal is decreed, and the decrees of the lower Courts reversed, and the suit dismissed with all costs.

Appeal allowed.

1880
May 6.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

BANDA HASAN (DEFENDANT) *v.* ABADI BEGAM (PLAINTIFF).*

Lease by usufructuary mortgagee of mortgaged property to mortgagor—Hypothecation of mortgaged property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court—Act X of 1877 (Civil Procedure Code), s. 43.

The usufructuary mortgagee of certain land gave a lease of it to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court and obtained a decree. Subsequently the mortgagee sued the mortgagor in the Civil Court to recover the amount of such decree by the sale of

*Second Appeal, No. 1063 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 11th July, 1879, affirming a decree of Maulvi Aziz-ud-din, Munsif of Pilibhit, dated the 5th June, 1879. Reported under the order of the Hon'ble the Chief Justice.