THE

INDIAN LAW REPORTS

PATNA SERIES.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.

MATUK SINGH

v.

TIAN SAHU *

1922.

May, 18.

Ejectment—possession, evidence as to, unsatisfactory—presumption arising from title and probabilities to be taken into consideration.

In a suit for ejectment, where the evidence adduced by both parties as to their possession is of such a nature as to make it difficult to determine who was actually in possession, or where the evidence, although unsatisfactory, is not altogether valueless, the court is entitled to take into consideration the presumption arising from title and the probabilities of the case.

Raja Shiva Prasad Singh v. *Hira Singh*(1) and *Ranjeet Ram Pandey* v. *Goburdhan Ram Pande*(2), referred to.

Appeal by the plaintiff.

*Letters Patent Appeal No. 77 of 1921 from a decision dated the 25th July, 1921, reversing a decision of A. P. Middleton, Esq., Additional District Judge of Muzaffarpur, dated the 18th November, 1919, and restoring a decree of Babu K. B. Saran, Munsif of Muzaffarpur, dated the 28th June, 1919.

(1) (1921) 6 Pat. L. J. 478, F.B. (2) (1873) 20 W. R. 25, P.C.

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This appeal arose out of a suit for ejectment. The trial court found that the plaintiff had failed to prove possession and dispossession within 12 years from the date of the suit. The District Judge, on appeal, held that the evidence of possession was not satisfactory on either side but he decreed the suit on the ground that the defendants had failed to prove possession for 12 years before suit. The defendants appealed to the High Court, and it was held by a Judge, sitting singly, that on the finding of the District Judge the suit should have been dismissed. The appeal was decreed.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Bhagwan Prasad, for the appellants.

Har Narayan Prasad, for the respondents.

DAWSON MILLER, C. J.—In this case the plaintiff who is the appellant before us purchased the land in suit from one Mulchand Sahu in June, 1917, and according to his case came into possession and was a few months later dispossessed by the defendant Matuk. He thereupon instituted the present suit claiming a declaration of his title and possession after ejectment of the defendant Matuk.

The learned Munsif before whom the case came for trial found upon the facts that neither the plaintiff nor his predecessor Mulchand had in fact been in possession of the land at any period within 12 years antecedent to the suit and he dismissed the claim. The case put forward by the defendant Matuk and supported to some extent by Mulchand was that in the year 1903, Mulchand had transferred this very land in exchange for another piece of land to the defendant Matuk and that Matuk had been in possession of the land ever since. The plaintiff questioned the genuineness of that transaction and the defendant questioned the genuineness of the *kabala* executed in favour of

the plaintiff in 1917. On the finding come to by the Munsif it did not become necessary for him in his opinion to decide any question about the genuineness of the title of either party.

The case then went on appeal to the District Judge who considered that the oral evidence of the parties as to possession was not satisfactory on either side. He referred to certain discrepancies in the evidence which had been pointed out by the Munsif, and the view which the learned District Judge arrived at was that, in so far as the oral evidence went, although he nowhere says that it was of no value, it was not such as without reference to probabilities and other circumstances arising in the case would be sufficient in itself to enable him to come to a satisfactory decision on the question of possession. He had no doubt however that the exchange transaction set up by the defendant in 1903 was not genuine and in dealing with that part of the case he says :

"The land which is said to have been given in exchange is also said to have been the abandoned holding of Budhu Kurmi and others, "

that is, that the land which Matuk is said to have given in exchange for the land in suit did not belong to Matuk at all. He then goes on

" but action under section 87 of the Bengal Tenancy Act was not taken till 1917. Moreover the date of the *chithi* " (that is the *chithi* which evidenced this transaction of 1903) "has certainly been altered : and though it is not possible to say what the real date was the inference to be drawn from the alteration must be hostile to the defendants-respondents."

Now that seems to me to be a distinct finding that upon the evidence before him which was put forward in support of the defendant's possession and title (I mean the defendant Matuk) the natural inference must be drawn that Matuk's possession was in fact not as long as he alleged, and as it was necessary for him to allege, in order to obtain a title by adverse possession. The inference drawn from this by the learned Judge seems to me to be that it was certainly not more than 12 years ago and must have been within 12 years that Matuk ever had anything to do with the land. Then he deals

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with certain huts and structures upon the land which had been dealt with by the learned Munsif as evidence in support of the defendant Matuk's possession and came to the conclusion that no satisfactory inference could be drawn from their appearance as to how long they had been upon the land, and therefore that part of the evidence was treated by him as being of really no assistance. He then further says,

> "the story of the exchange having failed" (that is the exchange by which Matuk claimed his title) "the possession of Matuk is probably much later than he asserts."

The learned Judge then finds that in his opinion Matuk had entirely failed to prove possession for 12 years before the suit. Then on the question of the plaintiff's title he came to the conclusion that as Mulchand's previous title and possession were admitted by Matuk and as Mulchand admitted the execution of the *kabala* in favour of the plaintiff and as Mulchand had failed to prove that the *kabala* was void for any reason and as Matuk had failed to prove adverse possession for 12 years he therefore held that the appellant's claim should be decreed and he allowed the appeal.

From that decision the defendant appealed to this Court and the appeal was heard before a single Judge. The learned Judge before whom the case came was of opinion that the findings arrived at by the learned District Judge in first appeal were not sufficient to entitle the plaintiff to a decree and he considered that the decision of the Full Bench of this Court in *Raja Shiva Prasad Singh* v. *Hira Singh* (1), governed the case. He therefore allowed the appeal and dismissed the plaintiff's suit.

The reason why the learned Judge of this Court came to that conclusion was because the District Judge had held that the oral evidence of possession was not satisfactory on either side and he appears to have thought that in such a case it was not open to the learned District Judge, who was the ultimate judge of fact, to

(1) (1921) 6 Pat. L. J. 478, F.B.

take into account either the probabilities of the case or any presumption that might arise in favour of possession remaining in the person who had proved his title. The Full Bench case to which I have referred did not lay down the proposition that in no case could the probabilities and presumptions be taken into account. The rule there laid down was that it is only in cases where there is no evidence of the plaintiff as to dispossession or, what amounted in the opinion of the Full Bench to the same thing, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession, but it must not be considered, merely because, where evidence was given by both sides, the learned Judge who had to determine the case had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. I think it would be extending the doctrine laid down in that case too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence of possession or because he did not consider the evidence altogether satisfactory, he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiff's title.

What happened in the present case was that the learned Judge considered that although there was evidence on both sides it was not altogether satisfactory. He then dealt with the probabilities. He pointed out that from the defendant's own evidence an adverse inference must be drawn against him as to the actual date when this exchange transaction set up by him took place. The date had been altered and that I think was a very important point in assisting the learned Judge to come to a conclusion upon this vital matter in

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the case namely, when did the defendant Matuk first have anything to do with this property. If you find him putting in a document in support of his claim intending thereby to show that he had in fact been in possession of the property for over 12 years and you then find that the date of that document has been deliberately altered, I think a very strong presumption must arise against him. This is not a case where no evidence has been given. It is a case where both parties have spoken to their possession although the actual oral evidence is such that the Judge had great difficulty in coming to a conclusion upon it. There were however, as I said, the other circumstances in the case and there was the fact that the plaintiff's title was proved and the plaintiff's predecessor's possession was admitted at all events up to the period when Matuk first had anything to do with the property. There was the further point that the Judge entirely failed to believe the evidence put forward by Matuk and that was a matter which he was entitled to take into consideration just as their Lordships of the Privy Council did in the case of *Ranjeet Ram Pandey* v. *Goburdhan Ram Pandey* (1) where they observed: "It may also be observed that their Lordships are not disposed to give credit to the evidence brought forward by the appellant, inasmuch as his case which rested upon the theory that he had acquired his property for himself, has been found to be wholly untrue." That was a case where their Lordships had difficulty in coming to a conclusion upon the facts of the case. In that case there was undoubtedly evidence and strong evidence upon both sides but in the contradictory state of the evidence they said that it was difficult to come to a conclusion which was satisfactory to the mind where the evidence was so conflicting and in that case they regarded the probabilities of the case and they further regarded the fact that the appellant's evidence upon another part of the story had been entirely disproved. This is not in my opinion a case in which

(1) (1873) 20 W. R. 25, P.C.

there is no evidence or where, what amounts to the same thing, the evidence is absolutely valueless. There was evidence on both sides and I think the learned Judge was entitled to arrive at the conclusion he did by taking into consideration and weighing that evidence and the probabilities of the case coupled with the fact that the plaintiff originally, or rather his predecessor, was undoubtedly proved to have been in possession of the land. The result is that the appeal is allowed, and the plaintiff's suit is decreed with costs here and in the courts below.

MULLICK, J.—I agree. The only point is whether the findings in this case bring it under the rule propounded in the Full Bench decision of *Raja Shiva Prasad Singh* v. *Hira Singh* (1). In my opinion the findings are not sufficient to attract the operation of that rule.

Appeal allowed.

APPELLATE CIVIL.

Before Coutts and Das, J.J.

SHAIKH SAJJAD HUSAIN

v.

SAKAL RAI.*

1922.

July, 21.

Guardian ad litem—*Appointment of, necessity for consent—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXXII, rule* 4(3).

Unless the person appointed as guardian *ad litem* consents to act as such the appointment is invalid and an *ex-parte* decree obtained against the minor in such circumstances is inoperative against him.

*Appeal from Appellate Decree No. 578 of 1920, from a decision of Babu Narendra Nath Chakravartti, Officiating Subordinate Judge of Saran, dated the 29th March, 1920, modifying a decision of Babu Bhuvaneshvar Prashad Panda, Additional Munsif of Chapra, dated the 23rd December, 1918.

(1) (1921) 6 Pat. L. J. 478, F.B.