

Before Mr. Justice Bayley and Sir C. P. Hobhouse, Bart.

1869
July 20

MOHAMED AZSSAR ALI (PLAINTIFF) v, NASSIR MOHAMED
AND OTHERS (DEFENDANTS).*

Suit for arrears of rent—Defence—Onus Probandi.

In a suit for arrears of rent at an enhanced rate, where the defendant set up that he had relinquished all the mal land in his occupation, and that the residue of the land in dispute was lakhiraj, held, that the onus was upon the plaintiff to prove that the land for which he sued for enhanced rent was rent-paying, and not on the defendant to make good his defence.

Beebe Ashruffunnissa v. Umung Mohun Deb Roy (1) *Nehal Chand Mistree v. Hurry Persaud Munda* (2) and *Rajah Suttochurn Ghosal v. Mohesh Chunder Mitter* (3) distinguished.

Baboo *Gupi Nath Mookerjee* for appellant.

Moulvi *Marhammat Hossein* for respondent.

The facts sufficiently appear in the judgment, which was delivered by

HOBHOUSE, J.—This was a suit for arrears of rent at enhanced rates. The defendants alleged that as regards one portion of the lands in suit they had relinquished it in Chaitra 1273, that is previous to the year for which the arrears were claimed. In regard to the rest of the lands, the defendants alleged that they were rent-free.

The lower Appellate Court has dismissed the plaintiff's case.

In special appeal, it is urged that the Court was wrong, firstly in not throwing the onus upon the defendants:

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As regards the first objection, the lower Appellate Court has held that when the plaintiff sued for arrears of rent upon the lands in question, and when the defendant alleged, so far as

* Special Appeal, No. 929 of 1869, from a decree of the Judge of Tippera, dated the 20th January 1869, reversing a decree of the Officiating Deputy Collector of that district, dated the 1st September 1868.

(1) 5 W. R., Act X. Rul., 48. (2) 8 W. R., 183. (3) 3 W. R., 178.

regards the only lands of which he admitted and the Court has found possession, that they were rent-free, it was on the plaintiff to start his case by shewing that he had before received rents from those lands. This judgment of the lower Appellate Court seems to us to be in strict accordance with *Hurryhur Mookerjee v. Gomane Kaze* (1), and is correct. *Beebe Ashruffunnissa v. Umung Mohun Deb Roy* (2), *Nehal Chand Mistree v. Hurry Persaud Mundul* (3), and *Rajah Suttochurn Ghosal v. Mohesh Chunder Mitter* (4) on which the pleader for the special appellant relies, are all cases in which the defendant held lands of two descriptions, principally mal, but partly alleged lakhiraj; and in these cases it was held that as the allegation of lakhiraj was evidently an after-thought, and as the greater portion of the lands was admittedly mal, so it was for the defendant to prove his allegation that the balance of the lands he held was lakhiraj. But without stating whether we concur in those decisions that is not the case here. Hence the Judge has found that the ryot has relinquished all the lands that were mal, and that the only land that he now holds are those which he alleges to be lakhiraj.

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We therefore dismiss this special appeal with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

PYARILAL AND Co. (PLAINTIFFS) v. E. G. ROOKE (DEFENDANT)*

Public Road—Criminal Procedure Code s. 320—Finding of Civil Court:

A magistrate³ finds, under section 320 of Criminal Procedure Code, on a dispute between R. and P., that the public have been in the habit of using a certain road over P.'s land, for carts, &c., and accordingly directs it to be opened (*i. e.* by removal of obstructions). P. brings a regular suit against R. in which the issue

* Application for Review, No. 174 of 1869, against the judgment of Mr. Justice L. S. Jackson and Mr. Justice Markby, dated the 5th May 1869, in Special Appeal No. 3094 of 1868.

(1) Mar., 523.

(2) 5 W. R., Act X. Rul., 48.

(3) 8 W. R., 183, 184

(4) 3 W. R., Civ. Ru¹., 173

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