Before Mr. Justice Loch and Mr. Justice Markby.

1869
May 14

GRIDHAR HARI AND ANOTHER (PLAINTIFFS) *v.* KALI KANT ROY CHOWDHRY AND OTHERS (DEFENDANTS.)*

Title—Onus Probandi

In a suit to recover possession of land and wasilat under a ganti jumma, which had originally belonged to the defendants, the main question was as to 10 kathas, of which possession by receipt of rent only was claimed from the defendants whose dwelling-house was thereon. The defendants alleged that the 10 kathas were not included in the ganti jumma under which plaintiffs claimed.

Held, that the onus was on the plaintiff to prove that the 10 katas were included in the ganti jumma under which they claimed. It was not on the defendants to show the extent of that tenure while it was in their possession and when it was transferred to the plaintiff; although the fact was one peculiarly within their knowledge.

THE plaintiffs sued to recover possession as to ten kathas of land by receipt of rent from the defendants Golak Chandra Dutt and others whose dwelling-house was thereon, and khas possession with wasilat of other lands, alleging that the whole were included in a ganti jumma of rupees 180-4, which had belonged to the defendants, but had been put up by them for sale by auction in 1866, and purchased by one Kali Kant Roy, who rented it to the plaintiffs. The plaintiffs therefore claimed under the ganti jumma of Kali Kant Roy.

The main question was to the 10 kathas of the land on which the dwelling-house of the defendants was situated. This, as the defendants alleged, constituted their jummai right under a separate tenure, and was not included in the ganti jumma under which the plaintiffs claimed. The Court of first instance, on the ground that the defendants had failed to prove their allegation with respect to these 10 kathas of land, gave a decree for the plaintiffs in the following terms: "That the suit be decreed; "that, out of the lands under claim, the plaintiffs recover posses- "sion of the 10 kathas occupuied by thedefendants' dwelling-

* Special Appeal, No. 2348 of 1868, from a decree of the Subordinate Judge of Jessore, dated the 25th June 1868, modifying a decree of the Additional Sudder Moonsiff of that district, dated the 15th August 1867.

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"house by being in receipt of rent from them, and of the remaining lands in the usual way; that they also recover the the costs "of Court and mesne profits from the date of suit to date of "recovery of possession." The defendants appealed to the Subordinate Judge of Jessore against the above decision so far as it related to the 10 kathas mentioned in the decree. He said, "although the defendants have failed, to show by satisfactory "evidence, that the disputed land for ms part of a separate jumma, still this circumstance could not be corroborative of the "plaintiffs' evidence;" and as he did not consider on the evidence that the plaintiffs had succeeded in proving their title to the 10 kathas of land, on which the dwelling-house of the defendants was situated, under the ganti jumma set up by them, it was ordered "that the appeal be decreed; that the decision of "the lower Court in so far as the lands in plots 1 and 5 of the "10 kathas are concerned be amended; that the plaintiffs get "possession of the lands remaining, after deduction of those "included in the above two plots; and that the costs of the "defendants' appeal be paid by the plaintiffs, respondents, with "interest at one per cent. per mensem *till* date of realization."

The plaintiffs then appealed to the High Court.

Baboo *Debendra Chandra Ghose* (Baboo *Bhowani Charan Dutt* with him) for appellants, contended that the onus should have been thrown upon the defendants to prove the extent of their tenure while it was in their occupation, and that the disputed 10 kathas of land were portion of their other tenure. *Ram Cumar Roy* v. *Beejoy Gobind Bural* (1); *Nobokishen Mookerjee* v. *Promothonath Ghose* (2); see Taylor on Evidence, section 347 and cases there cited. As the plaintiffs' right had been admitted by the superior landlord, the lower Appellate Court should not have interfered with the decree of the Court of first instance, the defendants having failed to prove their allegations. *Memrakhan Roy* v. *Ram Dhyan Misser* (3).

The respondents were not represented.

(1) 7 W. R., 535. (2) 5 W. R., 148. (3) 2 W. R., 324.

LOCH, J.—In this case I see no reason why the usual course should be departed from, which requires the plaintiff to prove his case. The lower Appellate Court has found that the plaintiffs have failed to do so, and it is contended before us in special appeal that as the defendants held the tenure (part of which is now in dispute) up to the year 1866, he being best acquainted with the circumstances of the case, should have the onus thrown upon him of proving what was the extent of that tenure. In support of this ground a judgment of a Division Bench of this Court, in the case of *Ram Cumar Roy* v. *Beejoy Gobind Bural* (1) has been quoted. But we think it is not applicable to the facts of the case. In that case the dispute was between the zemindar and tenant; the tenant defendant held lands of considerable extent under the zemindar, but objected that one of the two plots occupied by him had been held under a different title. The Court held that under such circumstances it was for the defendant to prove a matter which was peculiarly within his knowledge. In the present case the defendant, as regards the plaintiff, is not a tenant; he has been charged as a trespasser and wrong-doer, and therefore the case quoted does not apply.

A second case, *Nobokishen Mookerjee* v. *Promothnath Ghose* (2) has been quoted. That also we think has no bearing on the present case. That was a suit brought by a party claiming to be a lakhiraj holder, and it was held that "the peculiar circumstances of the case seem to take it out of the general rule, and to require that, when the plaintiff has from his former circumstances special facility for showing the exact position of the village during his tenure of it, it is for him to show first the proof for his contention, and on his having done this, it then remains for the defendant to substantiate the plea raised by him." This case also is one which cannot be applied to the case before us, there being no peculiar circumstances in this case.

A second objection taken to the judgment of the lower Appellate Court is, that the plaintiffs' right being admitted by the superior landlord, and the defendants having failed to prove their allegation, the lower Appellate Court should not

(1) 7 W., R., 535. (2) 5 W. R., 118.

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have interfered with the finding of the first Court; and a case *Memrakhan Roy* v. *Ram Dhyan Misser* (3), was quoted to show that where the landlord had acknowledged the title of the claimant, the Court held that the onus was thrown upon the defendant to prove his title to the land. That case however is entirely different from the present one. For there both parties claimed the same lands from the same zemindar, and the zemindar having acknowledged the plaintiffs' case and denied the case propounded by the defendant, the Court under those circumstaces very properly decided that it was for the defendant to prove his case.

We think therefore that there are no grounds for interfering with the judgment of the lower Appellate Court, and accordingly dismiss this appeal without costs, the opposite party not appearing in the case.

MARKBY, J.—I am of the same opinion. The facts of the case have not been very fully stated but, as I understand them, they appear to be shortly these; that the plaintiffs claim to recover possession of land from the defendants; the defendants admit that the tenure of certain lands which they formerly heldhas passed to the plaintiffs, but they deny that the particular lands in dispute were included in the tenure; they say they held these by another title, and that they did not therefore pass to the plaintiffs. The plaintiffs say that under these circumstances, they are entitled to a decree, unless the defendants can establish their allegation that these lands did not pass with the others.

The cases that have been quoted from the Weekly Reporter do not, as I understand them, lay down any general rule upon this subject. It appears to me that all the judgments are expressly confined to the peculiar circumstances of the cases under consideration. The Judges held that under the special circumstances of those cases it lay upon the defendants to substantiate the allegations made by them. But I conceive that no such special circumstances have been shown in this case. It is not shown that the lands which the plaintiffs now claim to take

(3) 2 W. R., 321.

from the defendants were ever held by the defendants as part of that tenure which passed to the plaintiffs; it is not shown that they were contiguous to any part of the lands which were the undisputed lands of the tenure, and there is no sort of reason why the defendants should not hold these lands now claimed which comprise their homestead, by a title wholly distinct from the tenure which was purchased by the plaintiffs.

But the case has been put upon another ground. It is contended that the defendants must know exactly what lands were comprised within their tenure and had passed to the plaintiffs; and this being peculiarly within their knowledge, the onus should be thrown upon them to prove whether the disputed lands were in their possession as portion of this tenure.

In support of this contention the vakeel for the appellants refers us to a passage in Taylor on Evidence, section 347, and I must admit that the principle there laid down, and which, when I heard it read, took me a good deal by surprise, does go pretty nearly to the extent, if not to the whole extent here contended for. But on refering to it I find that all the cases there quoted, except one of which I have not access to the full report, do not bear out the proposition laid down by Mr. Taylor. In all the cases except that one the plaintiff charges some wrongful acts done, and having established that the defendant had done some act which *primâ facie* was wrongful, he then according to a well-known principle calls upon the defendant to show that the wrongful act was excused.

But on referring to another work on the same subject, Best on Evidence, section 276, I find that the principle of law which Mr. Taylor has laid down is discussed at great length, and very great doubt is thrown upon it by that learned author. I think he might have gone further than express a doubt, for I find that in a case which he quotes it has been expressly repudiated. That was a case, where the plaintiff alleged that the defendant had hired a house from him, and had bound himself to keep the house insured from fire in some insurance office in or near London, and alleged forfeiture by breach of the said covenant. The plaintiff proved the contract, but produced no evidence of the omission to insure; but he relied upon the same supposed rule of

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law that has been relied upon this case. Lord Denman, C. J., in delivering the judgment, distinctly repudiated any such doctrine. He says that "the proof may be "difficult where the matter is peculiarly within the knowledge "of the defendants; but that does not vary the rule of law." *Doed Bridger* v. *Whitehead* (1.) It therefore seems to me that the principle laid down by Mr. Taylor is not a principle of law as it is administered in England, nor do I think that it is a correct principle here.

I think that before the plaintiffs could turn the defendant out of possession, they were bound to show not only that some land passed to themselves from the defendants, but also some facts which would lead to the inference that this very land had so passed, and not having done so, I think there was no case for the defendants to answer. Under these circumstances I agree that the appeal must be dismissed, but without costs, the respondents not appearing in the case.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

KARTIK CHANDRA SIRKAR (PLAINTIFF) *v.* KARTIK CHANDRA DEY AND ANOTHER (DEFENDANTS).*

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May 21.

Right to outlet for Water—User.

In a suit to close up an outlet of water opened by the defendant, the lower Appellate Court found that the "outlet or *seuch* সেঁউ" was used *barabar* বরাবর all along, and that therefore the defendant had a right of user.

Held, that an enjoyment for at least 12 years is necessary to create a right by user and that user by the defendant for that period, at least had been found.

Baboo *Anukul Chandra Mookerjee* for appellant.

Baboos *Chandra Madhab Ghose, Ramesh Chandra Mitter*, and *Anand Chandra Ghosal* for respondents.

* Special Appeal, No. 381 of 1869, from a decree of the Subordinate Judge of East Burdwan, dated the 16th November 1868, reversing a decree of the Officiating Sudder Ameen of that district, dated the 27th August 1868.

(1) 8 A. and E. 571.