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MAHARANI ADHIRANI NARAN KUMARI, RAJRANI OF BURDWAN v. PARIKHIT RAWTRA.

of *Kristo Inder Roy Chowdhry* v. *Roopince Bebee* (1), in which case the learned Judges finding that the appeal had been preferred *bonâ fide* under a mistake to the wrong Court, ordered the case to be transferred to the right Court—that is to say, to the Court of the Collector—for disposal. In the other case—*Erskine* v. *Gholam Khezur* (2)—the learned Judges did not go quite so far, but they gave the parties twenty days from the date of the High Court's judgment to prefer an appeal in the Court having jurisdiction.

We think that under the circumstances of this case the plaintiffs are entitled to some consideration, and following the precedent of the last of the two cases above mentioned, we allow the plaintiffs thirty days from the date of this judgment to prefer an appeal, if they are advised so to do, in the Court of the Collector. With reference to costs we think that each party should pay his own.

Before Mr. Justice Bayley and Mr. Justice Mitter.

MAHARAM SHEIKH (DEFENDANT) *v.* NAKOWRI DÁS MAHALDAR (PLAINTIFF).*

1870 *Nov.* 21.

Special Appeal—Remand—Conclusions not Warranted by Law or Reason—Omission to try Material Issue.

Special appeal allowed and case remanded for re-trial where the lower Appellate Court had drawn conclusions from the evidence not warranted by law or reason and had failed to try a material issue in the case.

THE plaintiff stated that he had held possession of the lands in dispute in this suit as a dar-jotedar, and that the land was situated in the midst of a bazar, on which there had been a shop. He sued to recover possession of this land from the defendant, who, he said, had forcibly dispossessed him of it. The defendant stated that neither the plaintiff nor his lessors, the jotaders, had ever been in possession of the disputed lands, and that therefore the plaintiff's suit was barred by the law of limitation; that the plaintiff never had a shop on his land, but that it had always been used by vegetable-sellers, who paid rent for its use to the zemindar; that he (the defendant) had now obtained a lease of it from the zemindar, who had put him into quiet possession; and that the allegation of forcible ouster was false.

The first Court, on the evidence, found the plaintiff's allegation both as to his and his lessor's title and possession to be wholly false. It also found that the defendant had proved his patta from the zemindar. The plaintiff's suit was therefore dismissed. The plaintiff appealed, and the Subordinate Judge,

*Special Appeal, No. 1354 of 1870, from a decree of the Subordinate Judge of Rajshahye, dated the 26th April 1870, reversing a decree of the Moonsiff of that district, dated the 12th August 1869.

(1) 6 W. R., Act X Rul., 56 (2) 9 W. R., 529.

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laid down one issue for determination,—*viz.*, whether the plaintiff's dar-jote patta and possession were true or not. He was of opinion that the question of the plaintiff's lessor's title was not at issue; and that as they were not parties to this suit, the Moonsiff was wrong in going into that point. On this simple issue of fact, the Subordinate Judge said:—"In proof of his dar-jote "we find that the plaintiff has produced a patta bearing date the 17th Asar "1259 (30th June 1852) and from the evidence of Bhola Nath Das, one of the "subscribing witnesses to the said deed, and of Ram Chandra Roy, a witness, who "was present in the *majlis* (Court), the fact of the plaintiff's having obtained "the dar-jote patta has been shown and established. Moreover, the authenti-"city of the patta is made out from the very circumstances attending it. "Had the patta been spurious, then what was there to prevent the insertion "in it of the names of more than one witness? The very absence of this "feature in the patta proves it to be genuine." Then, again, as to possession he said:—"From the evidence of Gopal Saha and Baikanth Saha, witnesses "for the plaintiff, it is evident, and it seems to be established, that the plaintiff "has been in possession of the land in dispute for a period of more than "twelve years." The Subordinate Judge reversed the decree of the Moonsiff and gave a decree for the plaintiff.

Against this decision the defendant preferred the present special appeal to this Court.

Baboo *Mohini Mohan Roy*, for the appellant, contended that the Court below should have enquired into the title and possession of the plaintiff's lessor; also as the defence that the suit was barred was raised, the plaintiff was bound to prove possession within twelve years, either by himself or his alleged lessor. He urged that, although there was apparently a finding of fact by the Court below on the authenticity of the patta, still, as that finding was clearly based upon a presumption not warranted by law, it was bad, and ought to be set aside. He further contended that, even if the plaintiff failed to establish the special title set up by him, yet he was not in a position to acquire one from mere length of possession, as he was not a ryot with a right of occupancy his land being situated in the midst of a bazar, and used for the purpose of erecting a shop.

Baboo *Girish Chandra Chuckerbutty*, for the respondent, contended that, as the suit was for possession between two lessees, the lower Appellate Court was not wrong in not going into the question of the plaintiff's lessor's title. He contended that the finding of the Court below, on the authenticity of the plaintiff's dar-jote patta, was one of fact, and therefore this Court was not competent in special appeal to interfere with it. The finding, however, was correct. The Court below placed implicit reliance upon the testimony of the single attesting witness, which was corroborated by a person who was a mere looker-on at the place and in the assembly when the document was said to have been

executed. He further contended that, putting aside the dar-jote patta, the Court below had found as a fact that the plaintiff had been in possession for more than twelve years, which alone gave him the right of occupancy contemplated by section 6 of Act X of 1859, and that therefore the superior landlord, the zemindar, was not competent either directly himself or through another, to oust him from his holding.

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The appellants were not heard in reply.

The judgment of the Court was delivered by

BAYLEY, J.—We think the judgment of the lower Appellate Court in this case must be reversed.

The plaintiff's case was that he received a dar-jote lease from one Brajanath Saha, the zemindar, and held possession under the same until ousted by the defendant; but it appears that Brajanath's title, though disputed, has not been enquired into by the Subordinate Judge, who quite wrongly holds that such an enquiry is immaterial. In proof of the plaintiff's dar-jote lease, it is true the Subordinate Judge relies upon the evidence of two witnesses, one of whom attests the document; but, reading the whole judgment, it is difficult to say that he rests his finding on that alone. On the contrary, there seem to be three or four additional reasons, the sum total of which forms the basis of his judgment; and not only are some of these reasons weak in themselves, but incorrect in law. For instance, the inference drawn of the genuineness of the patta from the fact of its being attested by one witness, on the supposition that, had it been a spurious deed, more witnesses might have been easily called to attest it, is certainly not warranted by law or reason. It might as well be argued on the other side, from this circumstance, that the deed is spurious, and that the object of having one witness to it, instead of more, was to avoid multiplying the chances of detection. We think, therefore, that the arguments of the lower Appellate Court or not correct in law, and that both the lessor's title and the legal effect of the evidence in support of the lessee's patta must be fully gone into.

It is pressed by the special respondent's pleader that his client has, under the finding of the lower Appellate Court, acquired a right of occupancy, but section 6, Act X of 1859,—which, by the bye, is not mentioned in the judgment,—does not refer to lands like those in question in this suit.

On the general point of limitation raised by the special respondent, we have to observe that a sub-lessee without title cannot plead any Law of Limitation against his landlord, either himself or through his lessor. In re-trying the case therefore, the lower Appellate Court should also consider the legal effect of the kabuliat of the special appellant. The case is remanded for re-trial, with reference to the foregoing remarks.