

Before Mr. Justice Phear and Mr. Justice Ainslie.

1873
March 1.

SHEIKH WALLAH ALLEE AND OTHERS (PLAINTIFFS) v. SHEIKH
GOLAM GOUS (DEFENDANT).*

Landlord and Tenant - Ejectment of a Ryot - Onus Probandi.

THIS was a suit to recover possession of 1 beegah and 7 cottahs of land in Mouzah Lutchnowtab, on the ground that the former ticcadar of the mouzah had granted a lease to the defendant for a period of seven years, and that the period had expired. The defendant set up in his written statement that he did not hold the land under any lease from the former ticcadar; that he was a kudeemeq ryot, and held under the jummabundee; that he could not now be ousted; and that the kabuliat filed by the plaintiffs was a fabrication.

The Munsiff found that the kabuliat was not proved, but that the defendant had failed to prove his right of occupancy, and held that, when the defendant's right of occupancy was not proved, the plaintiffs were entitled to possession. He accordingly passed a decree in favor of the plaintiffs.

On appeal, the Judge held that, as the plaintiffs had failed to prove the kabuliat, they were not entitled to recover possession. He, accordingly, dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboos *Moheshchunder Chowdhry* and *Gopaul Chunder Mookerjee* for the appellants.

Moonshee *Mahomed Yusoof* for the respondent.

Baboos *Moheshchunder Chowdhry* for the appellants contended that, when the relation of landlord and tenant is admitted, and the defendant has failed to prove his right of occupancy, the plaintiffs are entitled to recover. The defendant having admitted the plaintiffs to be the landlords, the *onus* is on him to prove that he is entitled to retain possession. [PHEAR, J.—What if the defendant had said nothing?] Then, if the plaintiffs could prove that they were the owners of the land, it would be sufficient to entitle them to recover possession—*Ramdhan Khan v. Haradhan Paramanick* (1). [PHEAR, J.—The material allegation in the plaint is that the defendant is a tenant, but that his tenancy has expired.] The plaintiffs have an undisputed right to the land, and the non-existence of any right in the defendant to oppose their entry would be sufficient to entitle them to recover—*Raja Sahib Prahlad Sen v. Baloo Budhu Sing* (2)

* Special Appeal, No. 518 of 1872, from a decree of the Judge of Sarun, dated the 30th December 1871, reversing a decree of the Munsiff of that district, dated the 16th June 1871.

(1) 9 B. L. R., 107, note.

(2) 2 B. L. R., P. C., 111.

Moonshee *Mahomed Yusoof* for the respondent was not called upon.

The judgment of the Court was delivered by

PHEAR, J.—It appears to us that the decision of the Court below is correct. The plaintiffs sue to eject the ryot from his holding admitting that he is a ryot but alleging that he held only for a limited term of years under a *stotta*, and that that term had come to an end. The defendant totally denies having given the *kabuliat* which the plaintiffs state that he had given and sets up that he had acquired a right of occupancy. It appears that the plaintiffs failed to prove the *kabuliat*; and on that ground the lower Appellate Court has come to the conclusion that the plaintiffs' claim fails.

It has been urged before us very forcibly that the defendant also failed to prove his right of occupancy, and that because he had set up this right against the plaintiffs' claim, and had failed to prove it, therefore the plaintiffs were entitled to recover immediate possession of the land. It appears to me that there is no authority for this position. Neither the case of *Ramdhan Khan v. Haradhan Paramanick* (1), nor *Raja Sahib Pahlad Sen v. Baboo Budhu Sing* (2), seems to be in point. It is nowhere, as far as I know, laid down that a zemindar coming into Court and admitting that the defendant has been his tenant can succeed in ejecting him upon any other ground than that the period of tenancy has elapsed, or in some way terminated. The plaintiffs here only sought to prove one mode of termination of the tenancy and in that they failed. It seems to me that there is nothing whatever in the case to afford even a suggestion in favor of the plaintiffs upon any other ground. The defence set up was not such as to relieve them from the obligation of proving their case because it admitted the tenancy. I think the appeal must be dismissed with costs.

1873

SHEIKH WAL-
LAH ALLEE
v.
SHEIKH
GOLAM GOUS,

Before Mr. Justice Phear and Mr. Justice Glover.

1873
April 18.

NEPOOR AURUT v. JUKAI.*

Maintenancce, Order for—Criminal Procedure Code (Act X of 1872), ss. 536, 537—Mahomedan Law—Divorce.

THE following case was referred under s. 296 of the Code of Criminal Procedure by the Magistrate of Pubna:—

"Nepoor Aurut prayed for and obtained an order for maintenance, on the 18th May 1872, in the Court of a full-powered Magistrate, Moulvie Amiruddin, who at that time declared that the plea of divorce set up by the husband had not been proved.

"On the 20th June following, the woman petitioned saying, that the husband had failed to carry out the orders of the Court, and the case was made over

* Reference under s. 296 of the code of Criminal Procedure by the Magistrate of Pubna.

(1) 9 B. L. R., 107, note.

(2) 2 B. L. R., P. C., 111.