Before Mr. Justice Jackson and Mr. Justice Markby.

1869
March 1.

MAHESH CHANDRA BANDOPADHYA (DEFENDANT) *v.* SRIMATI BARADA DEBI (PLAINTIFF.)*

Onus Probandi—Possession—Title.

In a suit to recover possession of certain property, on proof that the plaintiff had been dispossessed by a *benamidar*, in whose favor a conveyance had been executed by the plaintiff's father, *held*, that the presumption arising from the defendant's recent and unexplained possession being rebutted by the plaintiff's prior continuous and peaceful possession, the defendant must shew affirmatively that his title was a valid one, and could not raise the defence, that the plaintiff was prevented from showing it to be invaild

Baboo *Rajendra Nath Bose* for appellant.

Baboo *Girija Sunkar Mozoomdar* for respondent.

THE facts of the case are fully set out in the judgment which was delivered by

MARKBY, J.—In this case the plaintiff sued to recover possession of certain property, which she claimed by inheritance from her father.

It appears that the property in question was attached in 1266 (1859) in some execution proceedings, whereupon the present defendant put in a claim to it, alleging that he had purchased it from the plaintiff's father. The claim was rejected ; and the defendant then instituted a suit against the plaintiff and the attaching decree-holder, in order to establish his right to the property. In that suit the present plaintiff and the decree-holder admitted a formal conveyance from the father of the plaintiff to the defendant, but alleged that it was what is called a *benami* transaction ; that, notwithstanding the conveyance, the original owner was to remain solely entitled to the property. That suit was dismissed ; and on appeal the decree dismissing the suit was

*Special Appeal No 1236 of 1868, from a decree of the Judge of East Burdwan, dated the 13th December 1867, affirming the decree of the Principal Sudder Ameen of that district, dated the 10th of June 1867.

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confirmed by the late Sudder Court; it being considered that he property, notwithstanding the conveyance, belonged to the father of the plaintiff, respondent.

Subsequently to this last suit, the defendant, in the month of Baisakh 1271 (1864), got possession of the property, and the plaintiff in this suit now seeks to recover it back from him. It is not stated how it came to pass that the property remained unsold, notwithstanding the attachment of it in execution, and the decree of the late Sudder Court, which had the effect of establishing that it was liable to be sold under that attachment; but it may be presumed that the plaintiff or her father satisfied the judgment-creditor in some other way. Nor is it stated how the defendant, appellant, got into possession of the property; but it is found, as a fact, in this case, by the Courts below, and that fact must be now accepted by us, that from the date of the *benami* deed in 1260 (1853), down to the time of the dispossession of the plaintiff by the defendant, in 1271 (1864), she and her father before her were continuously in possession.

Both the lower Courts have given the plaintiff a decree, against which the defendant now appeals; and his contention is that the plaintiff cannot succeed, because of the deed of 1260 (1853) which, as against her, must be taken to be a good and valid instrument, on the principle that no person can set up his own fraud. He relies very strongly on his present possession, and argues that the whole *onus* of proving her case is thereby thrown upon the plaintiff. As general principles, the propositions here stated are true, but they carry the defendant a very little way in the case now before us. The mere accident of possession does not necessarily determine cases of this description. The defendant acquired possession quite recently, after a Court of competent jurisdiction had declared that he had no title, and that the plaintiff had a good one; he does not shew how he came into possession; and it may have been, indeed it almost must have been, by force or fraud. I should have considered that there was, under such circumsatnces, a conclusive answer to the presumption arising in favor of the defendant from present possession only; and that, after the prior decision, we were bond to conclude that the defendant's possession was under no title, and that the plaintiff

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had a good title to recover possession. But even if this case had to be decided independently of the former decision between the parties, still I think the plaintiff would succeed. The plaintiff has established, or it has been admitted, that this property was her father's, and that she and her father were continuously and peaceably in possession, until she was recently dispossessed by the defendant. This prior continuous and peaceable possession would completely answer the presumption arising from the defendant's recent and unexplained possession, and would shift back upon him the *onus* of proving that he had acquired this property by a good title from the plaintiff or her father. Thus the defendant would be driven to rely on the *benami* deed, which it is quite manifest that he would be unable to do. The principle of law which would prevent the plaintiff from asserting the invalidity of this deed, applies just as strongly to the defendant asserting its validity; it being admitted to be fraudulent, and he being a party to it; and the question in this case is not to be decided by simply considering who is plaintiff, and who is defendant, but by considering how the matter would stand, if the deed were not in existence. Clearly the plaintiff would then succeed. It is the defendant, therefore, who relies on the deed, and as against him who was a party to the fraud, I think that the invalidity of the deed may be relied on even by the plaintiff, who claims through a party to it. I think the appeal ought to be dismissed with costs.

L. S. JACKSON, J.—I entirely concur.

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

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NABAKRISHNA MOOKERJEE (PLAINTIFF) *v.* THE COLLECTOR OF HOOGHLY AND ANOTHER (DEFENDANTS.)*

Infringement of Right—Damages.

Proof of infringement of a right, without proof of actual loss, does not necessarily entitle a plaintiff in this country to a verdict for nominal damages.

See also, 15 B. L. R. 290.

*Regular Appeal, No. 33 of 1868, from a decree of the Judge of Hooghly, dated the 28th August 1867.