1869

KALAM SHEIKH v. PANCHU MANDAL.

Nor can the circumstance of the zemindar refusing to accept rent from the defendant, create a right on the part of the plaintiff to sue the defendant for a kabuliat.

Under such circumstances it appears to us that the mere fact of the zemindar granting to the plaintiff a lease of the whole of the lands appertaining to the *modafut* of Jaga Mohan Sircar, cannot create the relation of landlord and tenant between the plaintiff and the defendant, so as to entitle the former to institute a suit for a kabuliat at an enhanced rate. We, therefore, reverse the Judgment of the lower Appellate Court, and decree this appeal with costs in this Court and in the lower Appellate Court. The decree of the first Court is affirmed.

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

1869 Feby. 15.

DURGARAM ROY AND OTHERS (DEFENDANTS) *v.* RAJA NARSING DEB (PLAINTIFF).*

Limitation—Objection—Special Appeal—Act XIV. of 1859, cl. 5, s. 1—Act VIII. of 1859, s. 246.

An objection, not taken in cross-appeal before the lower Appellate Court, cannot be taken in special appeal. But if the case be remanded for new trial, such objection may then be taken before the Court of first instance.

On attachment of certain property, plaintiff and defendants preferred their respective claims thereto. The plaintiff's claim was disallowed. But the defendants' claim was allowed. The plaintiff, after the lapse of a year from the date of the order disallowing his claim, sued to recover possession of the said property. The defence was that the suit was barred by lapse of time under clause 5, section 1, Act. XIV. of 1859, and section 246, Act VIII. of 1859.

Held, Clause 5, Section 1, Act XIV. of 1859, and section 246, Act VIII. of 1859 do not apply to such a suit.

THIS was a suit for possession of a mauza in Pergunna Bishnupore, a resumed mehal, on the allegation that the said mehal was the ancestral rent-free dewattra property of the plaintiff; that the defendants' ancestors, the late Kamalakant Roy, Panchanan Roy, and Ganganaran Roy, on the allegation that they were purchasers thereof, had obtained a decree, but on the 12th Jaishtha 1236 (1829) on receipt of a sum of Rs. 400

* Special Appeal. No. 1927 of 1868, from a decree of the Principal Sudder Ameen of East Burdwan, dated 7th May 1868, reversing a decree of the Moonsiff of that district, dated the 12th August 1867.

from Maharaja Narsing Deb, the paternal grandfather of the plaintiff, had relinquished their right and interest in the property, and had executed a deed of disclaimer; that since then the plaintiff and his ancestors held possession thereof; that on the suit of the Government for resumption, the said mehal was resumed; that at the time of the settlement the defendants intervened, and on the 18th March 1864 applied for a settlement with them, upon the allegation that the rent-free right in the said mouza had been purchased by their ancestor; that on the 27th May 1864 the Collector of West Burdwan made a conditional settlement with them. The plaintiff, therefore, sued for recovery of possession by cancelment of the said settlement.

The defendants (*inter alia*) set up in their written statement that in a certain proceeding held in execution of a decree, the property in dispute was attached as the property of a third party; that the plaintiff as well as the defendants intervened and preferred their respective claims to the said property; that the claim of the defendants was allowed, but that of the plaintiff was rejected by the order of 31st March 1866; that as the plaintiff had not instituted any suit within a year from the date thereof, the present suit was barred by limitation. That the suit was also barred by limitation, as the plaintiff has been out of possession of the property in dispute for upwards of 12 years.

The Moonsiff held that, as the plaintiff did not institute a regular suit for setting aside the summary order within one year according to the provision of clause 5, section 1, Act XIV. of 1859, his claim was barred.

On appeal the Subordinate Judge reversed this decision, and remanded the case for trial upon the other issues.

Baboo *Ambika Charan Banerjee* for the appellant.

Baboo *Nilmadhab Sen* for the respondent.

JACKSON, J.—It appears to me that the special appeal in this case must fail on the two points which have been taken before us, the first being that the suit, as framed, will not lie. The ground of special appeal, as actually preferred, was that the plaint, as drawn by the plaintiff, is inadmissible. It appeared to

1869

DURGARAM ROY v. RAJA NARSING DEB.

me that a special appeal was not the stage at which the Court could fairly consider whether the plaint was admissible or not, because the plaint had been in fact admitted, and the parties had proceeded to trial. The pleader of the special appellant then, in modification of his ground, contended that the suit would not lie.

It appears that the present suit, which was one for possession of a resumed mehal, by setting aside a settlement granted to the defendants, was at first thrown out by the Moonsiff who tried it, on the ground of limitation. That decision was reversed by the lower Appellate Court, and the suit was remanded for trial on its merits. The defendant did not, in the lower Appellate Court, take any objection under section 348 of the Code of Civil Procedure that the suit was not maintainable, and that question therefore not having been submitted to the lower Appellate Court, there has been no error in its judgment upon that ground. I am at present inclined to think that on the case going before the Moonsiff on the new trial, the defendant would be at liberty to take this objection, amongst others, and if an erroneous decision be come to on this point, possibly further appeal and special appeal may lie.

The next point taken was that the lower Appellate Court was wrong in holding that the suit was not barred by section 1, clause 5, Act XIV. of 1859, and section 246 of the Code of Civil Procedure.

This ground also, it appears to me, is bad. The order which it is sought to make binding against the plaintiff, so as to bar the present suit, was an order passed on a claim which he preferred against the sale of the property in dispute which had been attached at the instance of an execution-creditor; and as the property of a judgment-debtor, neither of whom is the defendant in the present suit.

It seems that in that execution case, the present plaintiff and the present defendant both set up claims to the property in question. The claim of the present plaintiff was disallowed, and the property was ordered to be sold. But owing to subsequent circumstances, the sale did not take place. The claim of the defendants was at first also disallowed, but was subsequently admitted.

1869

DURGARAM ROY v. RAJA NARSINGH DEB.

The argument for hearing the present suit appears to have been based on the fact that the present plaintiff's claim was disallowed, and the present defendant's claim ultimately admitted, and the property released. But that, I think, will not make the order of the Moonsiff a binding order as between these parties, so that a suit must be brought within one year to set it aside. I think that in proceedings under section 246 of the Code of Civil Procedure the question for the Court to consider is, whether the property attached was in the possession of the party against whom execution is sought or not; and if it appears to the satisfaction of the Court that the property was not in such posssession, the Court is to release the property; and the execution-creditor who is affected by that order may, if he think fit, bring a suit within a year to have it set aside, and cause the property to be sold. In like manner, if the Court should be satisfied, as against the claimant, that the land was in possession of the party against whom execution was sought as his own property, and the Court should disallow the claim, then the claimant will be at liberty, as against the execution-creditor, to bring a suit within one year to set aside the order, and to establish his right to the property.

In this case, although, no doubt, an order was made setting aside the present plaintiff's claim, yet the Court did not go on to sell the property. I think, therefore, that there was no binding order in force between the present plaintiff as claimant, and the execution-creditor, and also there was no order which in any respect finally decided any question of right between the present plaintiff and the present defendant.

I think, therefore, that that order was not in any sense binding as between these parties, and that the plaintiff was not bound to bring his suit to set it aside within a year. On this ground I think that the contention of the special appellant cannot be maintained, and that the special appeal ought to be dismissed with costs.

MARKBY, J.—Upon the first point taken in this special appeal, I entirely concur in the judgment which has been delivered by Mr. Justice Jackson, and I do not think it necessary to add

1869

DURGARAM ROY v. RAJA NARSING DEB.

anything on that point. Upon the second point, so for as regards the construction which is to be put upon section 246, Act VIII. of 1859, I should wish for further opportunity of consideration before concurring in the opinion which has been expressed by Mr. Justice Jackson, and in this case it does not seem to me necessary to express any final opinion upon that point, because upon another ground the objection taken by the appellant, I think, fails. The two applications of the defendants, and the plaintiffs, respectively, were disposed of by two different orders, but the order which disposed of the application of the plaintiffs referred to the order which disposed of the application of the defendants for the ground upon which it was based. Upon turning to that order, it appears that the Moonsiff, after reciting a number of facts which had transpired with reference to these proceedings, and in which the plaintiffs were more or less concerned, goes on to say:—"All these disputes cannot be settled in one suit;" and then he disposes of the application of the defendants, without any further allusion whatever to the application of the plaintiff. It seems to me quite clear, therefore, that the Moonsiff has distinctly abstained from adjudicating in any way upon the claim of the plaintiff, and therefore, in accordance with the cases of *Monohur Khan* v. *Troyluckhonath Ghose* (1), and *Rutnessur Koondoo* v. *Majeda Bibee* (2), it seems to me clear that whatever be the construction put upon section 246, the limitation of one year does not apply to this case. I, therefore, concur in thinking that the special appeal ought to be dismissed.

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

1869
Feby. 17.

AMBIKA CHARAN DUTT AND OTHERS, (DEFENDANTS) *v.* NADIR HOSSEIN (PLAINTIFF.)*

Special Appeal—New Title.

The defendants in the Court below unsuccessfully claimed to retain possession of some land under a kabala from a Mohammedan widow, who was alleged by them to have been absolutely entitled thereto under her right of dower.

Held that the defendants could not, in special appeal, set up for the first time that the widow was entitled to a share by inheritance, if not as denmohur, no case

* Special Appeal, No. 1936 of 1868, from a decree of the Judge of Hooghly, dated the 9th April 1868, reversing the decree of the Second Principal Sudder Ameen of that district, dated the 14th November 1867.

(1) 4 W. R., 33. (2) 7 W. R., 252.