Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice L. S. Jackson and Mr. Justice Macpherson.

1868
Sep. 8.

PRANKRISHNA DEY AND ANOTHER (PLAINTIFFS) BISWAMBHAR SEN AND OTHERS (DEFENDANTS.*

Lessor and Lessee—Possession.

Where a lessor, who had never been in possession, granted a potta of lands to which his title was disputed, and the lessee was kept out of possession by the defendants who disputed lessor's title, *held*, that the lessee could maintain his action for possession of the lands, and need not make his lessor a co-plaintiff.

See also 14 B. L. R, 312

THIS suit was instituted in the Court of the Moonsiff of Dewanny, by Pramkrishna Dey and another, against Madhu Ram and seven others, also against Bishwambhar Sen and Kashi Chandra Sen.

The plaintiff sought to obtain possession of certain land which they claimed to hold as talookdars under a potta granted to them on the 4th Ashar 1228, by the two last-named defendants. These, it was said, had inherited the zemindari title in the land from one Shampurna, the second wife of their grandfather Kebal Krishna, who died five years ago in 1223 Maghi.

It was admitted that the grandfather of Biswambhar and Kashi Chandra and one of the defendants Durgadas held the zemindari in the proportion of seven annas by the former, and nine annas by the latter, but Durgadas maintained that neither they nor Shampurna ever had possession of the lands claimed by plaintiff. Their share, it was asserted, was comprised of land situated in other mauzas of the taraf. This, however, was not proved; on the contrary it had been proved, on behalf of Biswambhar before the Moonsiff, that Shampurna used to receive paddy, and that the lands in question were measured in the names of Shampurna and Durgadas.

* Appeal No. 9 of 1868, under section 15 of the Letters Patent of 28th December 1865, against a judgment of Mr. Justice Loch prevailing against that of Mr. Justice Mitter, dated the 26th May 1868, in Special Appeal No. 2282 of 1867, from a decree of the Additional Judge of Chittagong, dated the 28th June 1867.

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Durgadas was unable to point out the mauzas in which, as he asserted, Kebal's 7 -anna share was situated. It appeared that the land in question belonged to Kashi Chundra, Biswambhar's maternal grandfather Kebal Krishna, and it was proved that, after the death of Kebal's widow Shampurna, the defendants Kashi and Biswambhar were the rightful heirs according to Hindu law: and it was admitted by these heirs that they gave plaintiff a talook of the land, and that the defendants had not divided their former possession; and on those grounds "it was decreed that the plaintiffs should get joint possession with defendant Durgadas of the land of their talook hereby confirmed."

From this decision defendant Durgadas appealed to the Judge of Chittagong, who reversed the Moonsiff's decision, and dismissed the plaintiff's suit, on the ground that his lessors had never been in possession, and that the lessors could not, by a suit of this kind brought through a so-called tenant, and for property of a comparatively trifling value, obtain a decision on the question of their title as heirs to the property which the appellant Durgadas alleged to be worth 50,000 Rs. In support of this view, the Judge relied on the case of *Dinomonee Banerjee* v. *Gyrutoollah Khan*. (1).

The plaintiffs Prankrishna Dey and Ram Manikya Dey then appealed to the High Court. The Judges of the Divisional Bench, LOCH and MITTER, J. J., differed in opinion, and the present appeal was from the decision of the senior Judge (LOCH J.) which prevailed:—

LOCH, J.—The question before us in special appeal is, whether a lessee, whose lessors have never been in possession of the lands comprised in the lease, can bring an action to establish the title of his lessors, who are made by him co-defendants in the suit along with the defendants in possession.

There is a case, *Dinomonee Banerjee* v. *Gyrutoollah Khan* (1) (TREVOR and CAMPBELL, J. J.), which ruled that it was not competent to a superior holder, by the grant of that which is not in his possession to give opportunity to a party, to raise the

(1) 2 W. R., 138

question of his title, and have it indirectly decided. In order to enable a lessee to defend any action, his grantor must be in possession at the time of the grant; otherwise a suit for possession, at the tenant's instance alone, cannot be supported.

It appears to me that this judgment lays down a correct principle. The lessors might be plaintiffs with their lessees, and bring a joint action for possession; but if they be made defendants by him, the substantial defendant in possession cannot plead limitation against them. Any finding on the point of limitation in such a suit, would not be conclusive against the lessors, who, in fact, are collusively introduced into the case as defendants, in order to support the claim of their lessee, by admitting the execution of the lease to him by them. I would, therefore, confirm the order of the Judge, and dismiss this appeal with costs.

MITTER, J.—I am extremely sorry to differ from my learned calleague in this case. It appears to me that the mere fact of the lessors of the plaintiffs, not having been in possession of the lands in dispute at the time when the talookdari lease was granted to them, is not an all-sufficient reason for the dismissal of the suit. If the lessors of the plaintiffs, have got a good title to these lands, and that title is not barred by limitation, I do not find any reason why the plaintiffs should not be permitted to maintain this action. Every person has a right to sue for the protection of his own interest; and if, for the determination of those interests, it becomes necessary to enquire into the title of the person through whom he claims, the Court is bound to make the enquiry. The decision of this Court that has been referred to by the Judge below, is certainly in support of his view; but with the utmost deference to the learned Judges who passed that decision, I am constrained to say that I cannot subscribe to the doctrine laid down therein. Properly speaking, the lessors of the plaintiffs ought to have been made co-plaintiffs, instead of being made defendants in the cause; and I think that the lower appellate Court might have rectified this error, by placing them in the former position under the provisions of section 73 of the Code. At any rate I am of opinion that the suit ought not to have

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been dismissed altogether, inasmuch as I think that the plaintiff, are competent by themselves to maintain it. I would, therefore remand this case for fresh decision.

Baboo *Srinath Doss* for appellants.

Baboo *Ashutosh Chatterjee* for respondents.

The judgment of the Court was delivered by

PEACOCK, C. J.—We think that the reasons given by Mr. Justice Dwarkanath Mitter in this case are quite correct. The lease gave to the plaintiff a right of possession, assuming that the lessors had a right of possession, but were not in possession. If they transferred the right which they had to the lessee, and the lessee was kept out of possession by the defendants, the lessee had a right of suit against the defendants, to recover the possession from him. If the lessors had no right of possession, as for instance, if they were barred by limitation, they could not convey to the plaintiff that to which they themselves were not entitled, and the suit would, of course, fail on the ground that the lessors had nothing which they could convey.

It is said that the lessors ought to have been made co-plaintiffs, but the Court cannot compel a man to become a plaintiff against his will. The judgment of the senior Judge appealed from is reversed, and the case is remanded to the lower appellate Court to be tried on the merits. We express no opinion as to whether, under the circumstances, the plaintiff is entitled to a decree against the lessors. His object is to obtain possession from those who keep him out of possession.

The appellants will be declared entitled to the costs of the appeal to the Division Bench and the costs of this appeal.