

The 3rd January 1868.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Illegal ejectment — Suit for possession — Onus probandi.

Case No. 1532 of 1867.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 10th April 1867, affirming a decision passed by the Moonsiff of that District, dated the 19th April 1866.

Radha Bullub Gossain and others
(Defendants), *Appellants,*

versus

Kishen Gobind Gossain (Plaintiff),

Respondent.

Baboo Issur Chunder Chuckerbutty
for Appellants.

Baboo Tarucknath Sein for Respondent.

In a suit to recover possession, when plaintiff proves possession and illegal dispossession, the *onus* of proving the title is shifted upon the defendant in the first instance; and, if the latter establishes his title, the plaintiff must then be required to prove his.

Loch, J.—THE plaintiff in this case sued to recover possession of certain homestead lands which he alleged had been purchased by his brother Gunga Gobind Gossain from Khettur Mohun Napat. His brother held possession till his death, and was succeeded in possession by the plaintiff who held that possession through one Nil Monec. He alleges that he was ousted in Bhadro 1271 by the defendants who carried off the thatch of the house, and have since retained possession.

The defendants allege that the land appertains to their lakheraj property; that Khettur Mohun held it on a condition of service, *viz.*, of shaving the members of the defendant's family, and that he had no authority to sell it; that, after he left the homestead, they have held possession through Nil Monec.

The Courts below have given plaintiff a decree for possession and the value of the thatch carried off by the defendants, holding that plaintiff had proved his possession and dispossession.

The defendants, in special appeal, urge that, as plaintiff sought to recover possession from their hands, plaintiff was bound to prove his title. A further objection to the

decree of the Lower Courts is raised by Radha Gobind, defendant No. 5, to the effect that, as he is not charged with ousting the plaintiff, and was not originally a party to the suit, but was made so on the representation of the other defendants, it was wrong to give a decree against him, and he is entitled to his costs.

We think the first objection taken by the special appellants is not tenable. The plaintiff has proved possession and illegal dispossession. This was sufficient to shift the onus of proving the title upon the defendants in the first instance, and, had they succeeded in establishing their title, the plaintiff would have been required to prove his. The judgment of the Privy Council reported at page 12 of VI. Weekly Reporter, and the decision of this Court in VII. Weekly Reporter, page 174, lay down this as the proper course to be followed in cases where illegal ejectment is proved. We, therefore, reject the special appeal with costs.

On the ground taken by the defendant Radha Gobind, we think he must get a decree. He was not charged by plaintiff with dispossessing him, and he was made a defendant in the course of the suit, but at whose representation we do not clearly see, as the whole record is not before us. Nothing, however, is proven against him. He must be released, and his costs must be paid by his co-defendants.

The 3rd January 1868.

Present :

The Hon'ble W. S. Seton-Karr and
A. G. Macpherson, *Judges.*

Arrears of rent — Lessees in possession — Real tenants.

Case No. 1471 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 9th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 26th February 1867.

Judoonath Paul (Plaintiff), *Appellant;*

versus

Prosunnonath Dutt and others (Defendants),
Respondents.

Mr. R. V. Doyne and Baboos Onookool Chunder Mookerjee and Hem Chunder Banerjee for Appellant.

Baboos Kishen Kishore Ghose, Ashootosh Chatterjee, and Greeja Sunkur Moojoomdar for Respondents.

A Collector may give a decree for arrears of rent against the real lessees in possession, although no previous realization of rent directly from them is established, and no written agreement is shown to have been executed by them in their own names, another party being the ostensible holder of the lease, and not denying liability.

Selon-Karr, J.—THIS case was a suit for rent against a certain dur-putneedar, and it had been remanded by order of the former Judge for the plaintiffs to elect whether they would proceed against the ostensible holder of the tenure who was one Parbuttia, and afterwards his wife Sonamonee; or whether they would proceed against the Dutts, who were the parties whom plaintiff alleged to hold the real and beneficial interest.

The plaintiffs having elected to proceed against the real, and not the ostensible holders, the Deputy Collector went into the case, and found, as a fact, that the Dutts were actually in possession, and that they were consequently liable to pay the rents in full.

When the case came up in appeal before the Judge, several objections were taken to the finding of the Lower Court, some of which, regarding the plaintiff's title, were clearly irrelevant, while others were certainly not pressed at the hearing of the appeal.

Ultimately, the case was heard, in appeal, on the following question, namely:—

“Whether a Collector, under Act X., can decree arrears of rent against parties, only on the ground of their possession, when no previous realization of rent from them is established, and no written agreement is shown to have been executed, while, at the same time, another party is the ostensible holder of the lease, and does not deny liability for the rents of the mehal.”

The distinct finding of the Deputy Collector that the Dutts had the beneficial interest, and were the parties in possession, appears never to have been questioned; and, certainly, it is not reversed by the Judge

in appeal. In this state of things, I think that there is nothing whatever to debar the plaintiffs, who have elected to proceed against the real holders, from proving their possession, and from, consequently, gaining a decree.

The Judge relies upon a case quoted at page 449. Hay's Reports, 11th November 1862 (Heera Lall Buxshee, defendant, appellant); but this case, which relates to the liability of agent and principal, does not appear to be analogous to the case before us.

The Judge nowhere finds, on the evidence, that in past years credit for the rents was given either to Parbuttia, or to Sonamonee, the ostensible holders; but without coming to such a finding, in clear and distinct terms, it was not competent to him to reverse the decision of the first Court in plaintiff's favor, more especially when he does not question, but rather takes as correct, the finding of the first Court as to the actual possession and enjoyment of the Dutts, against whom the decree was given.

In this state of things, it appears to me that the reasoning of the Judge on the facts found, and not impugned, is erroneous in law, and that there is no reason why the plaintiffs should not retain their decree against the parties whom they had elected to sue, and whom they have shown to be in possession; and, in this view, the decision of the Judge should be set aside, and that of the first Court in plaintiff's favor should be restored with costs and interest.

Macpherson, J.—I think the Judge was wrong in reversing the decision of the Deputy Collector, unless he first found, as a matter of fact, that credit was originally given, not to the real lessees, but exclusively to the person in whose name the lease was granted. The Judge accepts the finding of the Deputy Collector that the respondents were the real lessees in possession; and, if so, the relation of landlord and tenant existed between the plaintiff and them, and they were liable for the rents, unless there was a special contract to the contrary, that is to say, unless there was a special contract that the person whose name was used should alone be liable.

This decision agrees, generally, with the principles laid down in the Full Bench ruling reported at page 428, Volume VIII. of the Weekly Reporter.

The decree of the Lower Court must be reversed with all costs.