ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

1878
July 31, *&*
Aug. 16.

JUGGERNAUTH DOSS (DEFENDANT) *v.* BRIJNATH DOSS (PLAINTIFF).

Lien—Jurisdiction—Suit to recover Title-deeds—Letters Patent, 1865, *s.* 11—*Interest.*

In order that a defendant may set up his right of lien as a defence he must be prepared to show, that when the suit was brought he was ready to give up the property over which he claimed the lien, on being paid the amount due to him, and therefore, he cannot plead his right of lien when he denies and contests the plaintiff's title to the property.

A suit to recover title deeds, although it may involve a question of title, is not a suit to obtain possession of land, or to deal in any way with the land itself within the meaning of s. 11 of the Charter.

In a suit to recover title-deeds and other property the defendant claimed a certain sum as being due to him, and in the plaint the plaintiff offered to pay the defendant all that was due up to that date, provided the deeds and property were given up. The defendant, however, claimed a right to hold them under an adverse title. *Held*, that the defendant was only entitled to interest up to the date of the plaint and not up to the date when the money due was actually paid.

APPEAL from a decision of WHITE, J., dated the 24th April 1878.

This was a suit brought on behalf of Brijnath Doss, an infant, to recover from the defendant, Juggernath Doss, who was a cousin of the plaintiff, the title-deeds of two properties—one, a house No. 75, Burtola Street, and another, a garden in Kakurgachee, and also some articles of jewelry. The plaintiff, Brijnath, claimed these title-deeds and jewelry as heir to his father, Chutterbhooj, who was a first-cousin of the defendant, and the properties, to which the title-deeds belonged, were held under two distinct titles. The house, 75, Burtola Street, had been admittedly purchased many years ago by a person called Kissen Doss, who was a cousin of both the parties to the suit; and it was admitted that it was purchased with Kissen Doss's separate funds. In July 1835, Kissen Doss by lease and release conveyed this house to his wife, Gunga Coomaree, and the

alleged consideration for the conveyance was certain jewellery belonging to her, which was made over to him at the time of the conveyance. On the 25th of September 1852, Gunga Coomaree conveyed this house by a deed of gift to Chutterbhooj, who was then a young man of 24 or 25. She had no children of her own, and it appeared that she had taken charge of Chutterbhooj and treated him, according to the evidence, as her own son. After this Chutterbhooj received, for a time, the rents of the property; and in a will, which Gunga Coomaree made on the 9th of August 1859, seven years after the deed of gift, she distinctly recognised the deed and confirmed it.

The defendant's case was, that both the conveyances from Kissen to Gunga Coomaree, and the deed of gift from Gunga Coomaree to Chutterbhooj, were *benamee* transactions, and that he, as being the nearest male relative of Kissen Doss, was his heir, and entitled to the property after Gunga Coomaree's death; and this contention was supported by Gunga Coomaree, who stated that the deed of gift was a *benamee* transaction, and that she never intended Chutterbhooj to have the property for his own. But she never took any steps to set aside the deed of gift, and the Court considered that until she had done so the plaintiff must clearly be considered for the purposes of the suit as the present owner of the property.

The defendant further stated, that after Chutterbhooj's death, the title-deeds were handed by Gunga Coomaree to him with a view to the house being dedicated to a thakoor. But no actual dedication has taken place, and the Court thought, that the defendant, even assuming that his own account was true, was bound to give up the deeds to the present owner of the property.

There was no doubt as to the due execution of either of the above deeds, and the learned Judge in the Court below came to the conclusion that they were both *bonâ fide* conveyances, and that the deed of gift was intended to pass, and did pass, the property to Chutterbhooj.

The garden in Kakurgachee appeared to have been purchased by Chutterbhooj after Kissen's death in 1849. It was undoubtedly conveyed to him, and he had been the apparent owner of

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it from that time. In 1868 he mortgaged it for Rs. 1,862-6-0 to Gunga Coomar Dutt, and upon that mortgage Gunga Coomar afterwards obtained a decree against Chutterbhooj in the year 1873. Chutterbhooj and his wife were at that time staying away from Calcutta, and it appeared that, for the purpose of preventing the property being sold in execution, Gunga Coomaree applied to the defendant, at Chutterbhooj's instance, to pay the amount of the decree. The defendant agreed to do this upon having the title-deeds of the garden, and also some jewelry, which was in Chutterbhooj's possession, handed over to him by way of security; and in an account, which was afterwards rendered by him to Chutterbhooj, and which was made an exhibit to the plaint, he (the defendant) debited Chutterbhooj with the sum of Rs. 2,689-6-0 as being the amount of principal and interest due to him on the advance, while, on the credit side of the account, he admits that he held as Chutterbhooj's property—1*st*, the title-deeds of the garden, and 2*ndly*, the jewelry which was sought to be recovered in this suit, both of which were deposited with the defendant at the time of the advance.

The decree of the Court below was, that the defendant should deliver up the title-deeds and articles of jewelry on receiving from the plaintiff Rs. 1,862, with interest at 12 per cent. to the filing of the plaint. From this decree the defendant appealed.

Mr. *Jackson* and Mr. *Sale* for the appellant.

Mr. *J. D. Bell* and Mr. *H. Bell* for the respondent.

The judgment of the Court was delivered by

GARTH, C. J. (MARKBY, J., concurring), after stating the facts of the case as above, continued:—The defendant now says that the jewelry did not belong to Chutterbhooj, but to his wife, and that the garden, although conveyed to Chutterbhooj, was bought with Kissen's money, or with the proceeds of the house 75, Burtola Street. But, if Chutterbhooj's wife allowed him to deal with the jewelry as his own, and if the defendant received it as being Chutterbhooj's property (as it is clear from the above account that he did), he cannot possibly resist the plaintiff's claim for it in this suit. And with regard to the title-

deeds of the garden, it is equally clear that, as between the plaintiff and defendant, the latter having received them from Chutterbhooj, cannot set up the title of a third party, especially as the plaintiff is the ostensible owner of the property.

The defendant then contends, that although as between him and the plaintiff, the property in the title-deeds to the garden and in the jewels may be in the plaintiff, he has a right of lien upon them for the amount advanced with interest, and that he can set up that right as a valid defence to this suit. But we quite agree with the learned Judge in the Court below, that the course, which the defendant has taken, precludes him from setting up his lien as a defence. In order to avail himself of such a defence, he should have been in a position to show, that at the commencement of this suit he was ready to give up the property upon being paid the amount of his lien: see *Boardman* v. *Sill* (1) and *Dirks* v. *Richards* (2); but it is clear that he was not ready to do this, because he has distinctly denied and contested the plaintiff's title to the property.

Another objection, which perhaps we ought to notice, was taken by the defendant's counsel to the jurisdiction of the Court to try this suit. He contended that, as the garden in Kakurgachee was situated out of the Calcutta jurisdiction, a suit for the title deeds relating to it was a suit for land within the meaning of s. 11 of the Charter, and consequently that, as no leave to bring the suit had been obtained under s. 12, the Court could not entertain it. We think, however, that there is nothing in this objection. A suit to recover title-deeds, although it may involve a question of title, is not a suit to obtain possession of land, or to deal in any way with the land itself, within the meaning of the Charter.

Then another objection, which was taken to the decree in the Court below, was, that interest on the Rs. 1,862-6-0, had been allowed to the defendant only up to the date of the plaint, and that it ought to have been allowed up to the time when the debt was actually paid. But we think that in this respect also the learned Judge in the Court below was quite right.

(1) 1 Camp., 410 note. (2) 4 M. & Gr., 574.

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The plaintiff says, that he actually tendered the money due to the defendant before the suit, and if he could have proved this satisfactorily, the defendant would only have been entitled to interest up to the time of the tender. But as there is not sufficient proof of this, the defendant is entitled to interest up to the time when the plaintiff can show that he was ready to pay the defendant. Now the plaintiff distinctly offers in his plaint to pay the defendant all that was due up to that date, provided the property were given up, and if the defendant had accepted that offer, there would have been an end of the suit. But instead of doing this, the defendant denied the plaintiff's title, and said in effect, that however ready the plaintiff might be to pay the money on those terms, he (the defendant) would not receive it, but insisted on retaining the deed and jewels on the strength of an adverse title.

Under these circumstances we think the defendant is only entitled to interest up to the date of the plaint, and we, therefore, affirm the decree of the Court below, and dismiss this appeal with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Dignam* and *Robinson*.

Attorneys for the respondent; Messrs. *Ghose* and *Bose*.