1878

RUNGO LALL MUNDUL v. ABDOOL GUFFOOR.

Then again the learned Judge appears to think that because no rent was proved to have been received by the present plaintiff, or his predecessors, since the decree of 1863 was passed, he is entitled to assume that the defendants are no longer the plaintiff's tenants. But here again we think he was clearly wrong. So long as the relationship of landlord and tenant has once been proved, the mere non-payment of rent, though for many years, is not enough to show that the relationship has ceased to exist. The defendant is bound to show that it has ceased by some affirmative proof; and more especially in a case of this kind, where the defendants do not expressly deny that they still continue to hold the lands in question.

It may be, however, that there are some portions of the evidence which here, in special appeal, we have not had an opportunity of examining, or of appreciating at its due weight, and this consideration induces us to send the case back for re-trial, having regard to the foregoing observations.

So far as we can see at present, there is no reason why the plaintiff should not be entitled to recover the rent which he claims; but we think it safer on the whole to remand the case for re-trial.

The costs will abide the result.

Case remanded.

Before Mr. Justice Ainslie and Mr. Justice Maclean.

1878
Sept. 4.

IN THE MATTER OF DOYAL MISTREE *v.* KUPOOR CHUND AND OTHERS.*

Act XI of 1865, *s.* 21—*Non-appearance of Defendant's Pleader at hearing—"Ex parte" Decree—Application for rehearing—Deposit of Debt and Costs.*

There is nothing in the first part of s. 21 of Act XI of 1865 showing that an application in accordance with that portion of the section is limited to the first occasion on which a defendant puts in an appearance to a suit.

Where, therefore, a case is adjourned from the date fixed in the summons to any later date, and on such later date a defendant is prevented by sufficient

* Rule, No. 766 of 1878, against an *ex parte* judgment of Baboo P. N. Bannerjee, Judge of the Bankipore Court of Small Causes, dated 8th March 1878.

cause from appearing, and in default of such appearance an *ex parte* decree is given against him, he may apply under the first part of s. 21 for an order to set aside such decree.

IT appeared that one Kupoor Chund had been sued in the Bankipore Court of Small Causes by one Doyal Chund for the sum of Rs. 279, for goods sold and delivered; and that on the case coming on for hearing (an adjournment having once been allowed), neither the defendant nor his vakeel, nor his witnesses were present in Court, and the Judge thereupon decided the case *ex parte* in the following words:—"The defendants do not appear to contest the claim; the first defendant has put in a vakalatnamah, but his vakeel is not forthcoming. The defendants are proved to have taken fruits from the plaintiffs, and to owe, therefore, the sum of Rs. 279; the case is accordingly decreed *ex parte* with costs."

On the same day on which the case was so decided, *viz.*, on the 8th day of March 1878, the defendant applied to the Court to set aside the *ex parte* judgment, setting forth good and valid reasons for his non-appearance. But the Judge declined to entertain the application, on the ground that the amount of the decree with the costs thereon had not first been deposited. The defendant thereupon applied to the High Court.

On the 8th July 1878, Mr. *Sandel* for the petitioner obtained a rule calling upon the plaintiffs to show cause why the order of the Judge of the Small Cause Court at Patna, dated 4th April 1878, should not be quashed, and why he should not be directed to rehear the suit on its merits?

The rule came on for hearing on the 4th September 1878.

Moulvie *Mahomet Yusoff* appeared to show cause against the rule. The defendant having filed a vakalatnamah, it cannot be said that the suit was an *ex parte* one; when he once put in an appearance and failed to attend when the suit came on, he cannot, under such circumstances, rely on s. 21 of Act XI of 1865; but if he does so rely, he is bound to pay into Court the amount of debt decreed against him and the costs occasioned in obtaining the decree.

1878

IN THE MATTER OF DOYAL MISTREE v. KUPOOR CHUND.

Mr. Sandel, in support of the rule, was not called upon.

The decision of the High Court was delivered by

AINSLIE, J. (MACLEAN, J., concurring) :—On the 8th day of March 1878 a decree was made by the Small Cause Court of Patna for 279 rupees in a suit by Doyal Mistree against Kupoor Chund and another. The decretal order is in these words :—"The case is accordingly decreed *ex parte* with costs." An application for rehearing was made on the ground that the defendants' pleader had been unable to attend Court at the time when the suit was heard. On that the Judge makes an order, in which he states that "this case was not decided *ex parte* under s. 100 of the Civil Procedure Code; the defendant applying for a new trial had put in a vakalatnamah; he only did not appear when the case was called on for hearing." He then goes on to say, that as the defendant did not pay in the amount of the decree with his application for a new trial, he was unable to entertain it. He, therefore, holds "that the application does not fall under the first part of s. 21 of the Small Cause Court Act, and that it falls under the second part of that section, and as the applicant has not complied with the condition required by the Act he is unable to deal with the case." The question now before us is, whether in fact the case does not come under the first part of the section, and whether the Small Cause Court, under a misapprehension, has not refused to exercise jurisdiction and determine whether the defendant was prevented by sufficient cause from appearing when the suit was heard. It is unnecessary to notice the discrepancy between the terms of the decree and the decision of the Judge on the subsequent application as to the case being *ex parte* or not. We think that the Judge was in error in holding that this was not a case coming within the description of cases decided *ex parte*, and that, therefore, he had no jurisdiction to deal with it under the first part of s. 21. That section says :—"If it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was heard, the Court shall pass an order setting aside the decree, etc."

It does not appear from these words that the legislature intended to limit these provisions to the first occasion on which the defendant might have put in appearance, but it seems to us that if a case is adjourned from the date fixed in the summons to any later date, and on such later date the defendant is prevented by sufficient cause from appearing, he may make an application under that section. Section 100 of the new Civil Procedure Code must be read with s. 98, and when so read it appears to be exactly consonant with the provisions of s. 21 of the Mofussil Small Cause Courts Act.

But the matter is not new. A similar case (1) came before Mr. Justice Paul on the Original Side of the Court. In that case counsel appeared, but the defendant was not in Court on the day on which the case was called on, and his counsel had not been instructed, and withdrew from the case; the learned Judge there held that the fact that the defendant had answered to the summons and had engaged counsel, did not deprive him of the right to make an application to the Court under s. 119 to set aside the judgment passed, as an *ex parte* judgment.

We must, therefore, set aside the order of the Judge of the Small Cause Court, and direct him to exercise the jurisdiction vested in him by the first part of s. 21 of the Mofussil Small Cause Courts Act, and determine whether the defendant has shown sufficient cause for his non-appearance at the time when the suit was heard. The petitioner is entitled to his costs.

Rule absolute.

(1) *The Administrator General of Bengal* v. *Lala Dyaram Das*, 6 B. L. R., 688.