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MASEYK v. FERGUSSON.

Attorneys for the defendant Mr. Fergusson: Messrs. *Sanderson and Co.*

Attorney for Mrs. Gilchrist: Mr. *Watkins.*

Attorney for the children of Charles Blake Maseyk: Mr. *Trotman.*

APPELLATE CIVIL.

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

1878
June 27.

RUNGO LALL MUNDUL (PLAINTIFF) v. ABDOOL GUFFOOR AND OTHERS (DEFENDANTS).*

Landlord and Tenant—Onus of Proof—Non-payment of Rent—Suit for Rent.

When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; and a tenant who is sued for rent and contends that such relationship has ceased, is bound to prove that fact by some affirmative proof, and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit.

THIS was a suit brought to recover arrears of rent for the years 1280—1282 (1873—1876).

The plaintiff stated that he was patnidar of a certain piece of land, a portion of which had been sublet to the defendants at a fixed yearly rental. In support of this statement the plaintiff produced a rent-decree obtained by his lessor in the year 1863 against the first and second defendants and their ancestor. Defendants Nos. 1 and 2 stated that they had relinquished their jamma in the year 1270 (1863).

The other defendants contended that rent never had been realized from them, either during the time of the plaintiff or

* Special Appeal, No. 1021 of 1877, against the decree of H. T. Prinsep, Esq., Judge of Zilla Hooghly, dated the 2nd of March 1877, modifying the decree of Baboo Ram Gopal Chakee, Munsif of Uloobariah, dated the 29th November 1876.

his ancestors, and denied the tenancy; and further contended, that as the plaintiff's lessor had withdrawn from a rent-suit instituted against them in 1866, the decree obtained in 1869 was no proof that the relationship of landlord and tenant existed after 1863, and that therefore the plaintiff was debarred from bringing a suit for arrears of rent against them.

The Munsif found that the defendants did hold a jamma in the plaintiff's patni, and that they had entirely failed to prove any relinquishment, and that there was not sufficient ground for saying that all subsequent claim for rent was barred, because the plaintiff's lessor once, in the year 1866, had withdrawn from a suit instituted against them for rent, on being cited to appear as a witness on behalf of the defendants, and he therefore gave the plaintiff a decree.

The defendants appealed to the Judge of Hooghly, who on hearing the appeal found that the defendants had never paid rent to the plaintiff, and that the plaintiff had failed to establish the fact that the defendants were his tenants; and further found that the effect of the decree obtained by the plaintiff's lessor in 1863 was nullified by the plaintiff's withdrawing from the rent-suit instituted in the year 1863, and he therefore allowed the appeal.

The plaintiff thereupon appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Uma Kali Mookerjee* for the appellant.—The defendants were bound by the decree obtained in the year 1863, establishing the relationship of landlord and tenant between the plaintiff and defendants. The onus of proving that the tenancy had ceased is on the defendants; see s. 109 of Act I of 1872. The lower Appellate Court has taken a wrong view of the plaintiff's withdrawal from the rent-suit of 1866; it was quite open to the plaintiff's lessor to refuse to prosecute a suit for rent in 1866, and on further rent accruing due to bring a fresh suit for further rent.

Baboo *Troiloko Nath Mittra* for the respondents.—Under s. 102 of Beng. Act VIII of 1869 this appeal will not lie; the suit is for a sum below Rs. 100. No question on the appeal before the District Judge was determined relating to "any title to

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land as between parties having a conflicting claim;" the only point determined was, that there was no relationship of landlord and tenant existing between the parties, and this appeal ought not to be allowed; see *Hurry Mohun Mozoomdar* v. *Dwarkanath Sein* (1), *Shaikh Dilbur* v. *Issur Chunder Roy* (2), and *Kripa Moyee Debia* v. *Dropudee Chowdrain* (3).

Baboo *Hem Chunder Banerjee*.—The judgment of the lower Courts virtually determines a question of title.

The judgment of the High Court was delivered by

GARTH, C. J. (McDONELL, J., concurring):—Our only doubt in this appeal has been, whether we ought to decide the case upon the materials before us, or to remand it for re-consideration; and we think that perhaps the safest course will be to remand it.

The suit was brought by the plaintiff to recover the rent of certain lands which are specifically described in the plaint as plots 7, 8, 9, and 12. The defendants' case was, that they were not tenants to the plaintiff at all. They do not say that they are not in possession of the lands which are mentioned in the plaint, but they say that they have no concern with any lands which belong to the plaintiff, and that they do not owe the plaintiff any rent.

Now in the Munsif's Court the plaintiff gave evidence of a decree which was obtained in a suit for rent in the year 1863. That suit was brought by Hera Lall Seal, the predecessor in title of the plaintiff, against the predecessors in title of the present defendants, for the rent of these very lands, described precisely as they are described in the plaint in this suit, and in that suit the plaintiff obtained a decree against the defendants for the rent claimed. There is not the least doubt that in point of law that decree did establish the relationship of landlord and tenant in respect of the lands in question between the plaintiff and the defendants in that suit, and the relationship having once been established, we take it to be clear that it

(1) 18 W. R., 42. (2) 21 W. R., 36. (3) 24 W. R., 213.

continues as between the parties to that suit and their representatives in title, until it is proved to have ceased.

It is admitted that the defendants in the former suit are the ancestors in title of the present defendants, and if the latter desire to show that they are no longer the plaintiff's tenants, they must explain and prove the reason.

The Evidence Act, s. 109, confirms what was undoubtedly the previous law upon this subject. That section says, "When the question is, whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively is on the person who affirms it."

Now, it having been established by the decree of 1863 that the relationship of landlord and tenant did exist between the predecessors in title of the parties to that suit, it was for the defendants here, who wished to show that the relationship had ceased, to prove that fact. One means which they took to prove it was this; they showed that Hera Lall Seal, the plaintiff in the suit of 1863, brought another suit, some three years afterwards (in the year 1866), for the rent of these same lands against the predecessors in title of the defendants; and those defendants set up by way of defence that they had relinquished the lands; and they subpœnaed the plaintiff, Hera Lall Seal, to appear as a witness at the trial. Now it is extremely likely that a gentleman in the position of Hera Lall Seal, when he was subpœnaed by his own tenants to appear as a witness in a Court of Justice, and knowing that he would probably have an unpleasant time of it there, would rather sacrifice the rent he was claiming than appear in answer to the subpœna; and it certainly appears that he withdrew that suit. But the withdrawal amounted to no more than this—that the plaintiff gave up his claim for the particular rents for which the suit was brought. It in no wise put an end to the relationship of landlord and tenant, which was established by the decree of 1863. The Judge in the Court below appears to have considered that the withdrawal of that suit had the effect in some way or other of neutralizing the decree of 1863; but we cannot see how it could have had that effect.

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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.

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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.