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NAFAR CHANDRA PAL CHOWDHURI v. RAM LAL PAL.

Special Appeal, 87 of 1889, decided by the Chief Justice and Banerjee, J., on the 27th February 1890, affords an example), or it may be to complete extinction by custom; but failing the proof of such a custom his right, as it formerly existed, seems to us to subsist unimpaired.

In the present cases the plea was that the defendants were entitled by local custom to appropriate the trees when felled. But the Subordinate Judge has properly, we think, placed the burden of showing the existence of such a custom on the defendants, and has found that they have not established it. That finding was not questioned here, and is binding on the defendants, and the result is that the rules must be discharged with costs.

Rules discharged.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

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April 9.

SURENDRA NARAIN SINGH (PLAINTIFF) *v.* BHAI LAL THAKUR AND OTHERS (DEFENDANTS).*

Immoveable property—Hát, Lease of—General Clauses Act (I of 1868), section 2, clause 5—Transfer of Property Act (IV of 1882), section 107—Suit for rent, Decree for use and occupation in—Plaint, Amendment of—Civil Procedure Code (Act XIV of 1882), section 53.

A suit was brought for rent of a *hát* on the basis of a verbal settlement

follow that a *raiyat* has a right to cut down trees without anybody's consent, and consequently any injunction restraining them from doing so must be wrong, and so far as the learned Subordinate Judge has granted an injunction, his decree must be varied and this appeal must be allowed. Then he has not in this case allowed any damages, and there is a cross-objection by the plaintiffs on that ground. It is said here that the value of the trees cut down is Rs. 18, and that amount is not disputed, and it is admitted upon these findings of fact that the zemindars are entitled to a quarter share of that, so that they must have a judgment and decree for a quarter share of Rs. 18, which is Rs. 4-8. The judgment then of the learned Subordinate Judge will be varied in this way: that the plaintiffs' claim for an injunction will be dismissed, and, on the other hand, they will have judgment for Rs. 4-8, being the quarter share of the value of the timber which the defendants have cut down on this holding; but as the parties in this case seem to have mistaken their rights and to have overstated them all through, we think in the result that the fairest course we can take is to say that each party should pay his own costs all through.

*Appeal from Appellate Decree No. 1792 of 1893, against the decree of Babu Huro Gobindo Mookerjee, Additional Subordinate Judge of Bhaugulpore, dated the 13th of July 1893, reversing the decree of Babu Uma Churn Kar, Additional Munsif of Madhepura, dated the 27th March 1893.

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for three years at an annual *jama* of Rs. 370. The defendants denied the settlement. The first Court found for the plaintiff; but, on appeal, an objection having been raised by the defendants that the verbal lease was illegal under the Transfer of Property Act, the suit was dismissed.

Held:—A *hât* is a benefit arising out of land, and, therefore, within the definition of immoveable property as given in section 2, clause 5 of the General Clauses Act (I of 1868). The lease of a *hât* comes within section 107 of the Transfer of Property Act (IV of 1882), and can be effected only by a registered instrument.

Held, also, that a decree for use and occupation of the land by the defendants could not be granted in this case, as that would amount to an amendment raising issues of an entirely different character from those on which the trial was held in the Courts below as a suit for rent, and necessitating a trial upon fresh evidence. Such an amendment could not be allowed under section 53 of the Civil Procedure Code. *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (1), *Eshan Chunder Singh* v. *Shama Churn Bhutto* (2), and *Narainee Dossee* v. *Nurrohurry Mohonto* (3), referred to.

THE plaintiff as the owner of a 9-annas' share in a *hât* brought this suit on the following allegations:—

2. "That the defendants having obtained a verbal settlement of 16 annas of the *hât* in Jhakrika Patti Pargana Malohni Gopal from 1294 to 1297, on an annual *jama* of Rs. 370, promising to pay the rent in Bhadro of each year, remained in joint possession thereof.

3. "That the plaintiff's 9-anna share was separated in 1296.

4. "That the defendants, being in collusion with the 7-anna shareholder, have not paid the rent, the plaintiff is, therefore, entitled to damages at Rs. 25 per cent. against the defendants."

The plaintiff then prayed for his share of the rent with cesses and damages amounting to Rs. 536-9 for 1296 and 1297.

The defendants denied the verbal settlement, and stated that they had been appointed by the plaintiff's co-sharer to collect rent on his behalf, and they only collected the rents which they remitted to him. The defendants also stated that the annual income of the *hât* for the whole 16-annas was only Rs. 100.

The issues raised were, "(1) whether plaintiff can sue alone?

(1) 13 B. L. R., 243; 21 W. R., 208.
(2) 11 Moo. I. A., 20. (3) Marshall, 70.

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(2) whether plaintiff is entitled to recover from the defendants, 1st party, the amount in claim ?" The co-sharer (owner of the 7-annas share) was made defendant, 2nd party, by an order of Court.

The Munsif, who first tried the case, decided both the issues in favour of the plaintiff. His finding on the evidence was that the defendants were *ticcadars* holding the *hât* for Rs. 370 for the 16-annas' share during the period in claim. On appeal, the defendants raised the objection that the verbal lease alleged by the plaintiff was illegal under the provisions of section 107 of the Transfer of Property Act, and that the plaintiff could not have any rent on the strength of that lease. The Subordinate Judge allowed the objection and dismissed the suit.

The plaintiff preferred a second appeal to the High Court.

Babu *Sarada Charan Mitra* for the appellant.—The lease in question was not a lease of immoveable property. It conferred only the right to collect certain dues known as *sayer* compensation. That is not of the nature of rent. *Surendro Prosad Bhuttacharji* v. *Kedar Nath Bhuttacharji* (1). The landlord retains possession of the land, and the dues levied are not on immoveable property within the definition of the General Clauses Act, and the lease does not fall within the terms of section 107 of the Transfer of Property Act ; but, assuming that the lease was void under that section, the plaintiff would be entitled to compensation for use and occupation. A void lease does not make the tenant a trespasser. Oral evidence may be admitted as to what the rent paid was, and that was the proper compensation in this case. Under such circumstances the tenant may be treated as tenant from year to year. *Walsh* v. *Lonsdale* (2) ; Woodfall's Law of Landlord and Tenant, 14th edition, pp. 102 and 570.

Babu *Jogesh Chandra Dey* for the respondents.—The interest leased is a benefit arising out of land, and it comes within the definition of immoveable property as given in the General Clauses Act, section 2. Section 107 of the Transfer of Property Act clearly applies to this case. Then there is nothing to show that

(1) I. L. R., 19 Calc., 8. (2) L. R., 21 Ch. D., 9.

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the *hât* in question existed in 1793, and the case of *Bungshodhur Biswas* v. *Mudhoo Mohuldar* (1) applied to it. On the question of conversion of this suit into one for use and occupation a Full Bench of this Court ruled in the case of *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddin Lusker* (2), that such conversion could not be allowed.

Babu *Sarada Charan Mitra* was heard in reply.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows :—

Plaintiff, as proprietor of a share, claimed rent, under a verbal agreement, for a *hât* from defendants, his co-sharer being made a defendant by order of the Court, and the Munsif gave him a decree. On appeal the suit was dismissed by the Subordinate Judge on the ground that a "*hât*" being immoveable property, and the lease being for more than one year, no verbal agreement could be proved ; hence it could, under section 107 of the Transfer of Property Act, be effected only by a registered instrument.

In second appeal plaintiff contends that a *hât* is not immoveable property, and that consequently section 107 of the Transfer of Property Act does not apply. But a *hât* is a benefit arising out of land, and therefore within the definition of immoveable property as given in section 2, clause (5) of the General Clauses Act, and consequently the lease of a "*hât*" comes within section 107 of the Transfer of Property Act, and can be effected only by a registered instrument.

Plaintiff, appellant, however, contends in the alternative, that, if this view of the law be adopted, he should obtain a decree for use and occupation, as admittedly the defendants are found to be in possession of the *hât* of which he is the part-proprietor. That would amount to an amendment of his plaint. The question, therefore, arises, whether this is permissible, and specially in the present stage of the proceedings, that is, in second appeal, when the suit has been tried in two Courts as originally brought as a suit for rent upon an alleged contract. The matter for our consideration, in the first instance, is whether this would be an

(1) 21 W. R., 383. (2) 13 B. L. R., 243 ; 21 W. R., 208.

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amendment so as to convert a suit of one character into a suit of another and inconsistent character (section 53, Code of Civil Procedure).

The leading case on the subject is *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (1), which was decided by a Full Bench of this Court, in which it was held that in a suit for rent the plaintiff landlord was not entitled to have a further trial of the question, whether any, and, if so, what amount of rent is due on account of use and occupation of the land by the defendant. The amount due in the case before us, whether for use and occupation, or for rent, is not admitted. The defendant admits being in receipt of the collections from this *hât*, but he denies that he was under any lease, and he says that he acted merely as *tehsildar* for the proprietors. He also denies that any money is due from him on that account. The suit, therefore, if tried as one for use and occupation, would raise issues of an entirely different character from those on which the trial as a suit for rent has been held, and would necessitate a new trial of the case by the lower Court upon fresh evidence. See, in this connection, *Eshan Chunder Singh* v. *Shama Churn Bhutto* (2) and *Narainee Dossee* v. *Nurrohurry Mohonto* (3).

We, therefore, feel bound to refuse to allow such amendment of the claim. It is, we think, at all times undesirable to allow such amendment in second appeal, when the plaintiff has in two Courts never contemplated it, and has even gone so far as to persistently maintain his case as originally brought.

The appeal is, therefore, dismissed with costs.

S. C. C. *Appeal dismissed.*

(1) 13 B. L. R., 243 ; 21 W. R., 208.
(2) 11 Moo. I. A., 7 (20).
(3) Marshall, 70.