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IN THE MATTER OF KO SHWAY AUNG v. STRANG STEEL AND CO.

certain conditions: and the mortgagees are given a power of sale. No doubt a special agreement giving a power of sale does not necessarily operate so as to show that the transaction is not a pledge, but must be construed to be a mortgage: (Fisher on Mortgage, article 22.) But here we think the whole character of the instrument points one way, and that it is a mortgage; there is no provision for anything in the nature of a delivery actual or constructive; there is no pledge.

That being so, article 44 applies. We think the distinction between articles 29 and 44 is correctly stated by Mr. Donogh in his book on the Stamp Act, in the note to article 44, "*Article* 44 *distinguished from art.* 29." 'Article 44 deals with cases in which the interest in, or right over, property is transferred whether possession is given or not, for the purposes of the mortgage; art. 29 is limited to cases where moveable property only is given in pledge, coupled with an agreement securing the repayment of a loan.'

The Government notification of 5th June 1885, referred to in the note to article 29 in that book, is worth noticing; but as to this, it need only be observed that in professed exercise of the powers conferred by the Act, Government permitted the levy of a stamp of the value required under article 29, upon this particular sort of mortgage referred to in the notification.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

1898. *December* 13.

LEP SINGH KHASIA AND OTHERS (DEFENDANTS) *v.* NIMAR KHASIA AND OTHERS (PLAINTIFFS).*

Possession—Proof of possession—Title, proof of—Suit for damages for value of fruit taken from garden—Right of suit.

A suit for damages for the value of fruit crops taken away by the defendant from a garden alleged to be in the plaintiff's possession, can be sustained on the finding that the plaintiff was in possession up to the date

* Appeal from Appellate Decree, No. 781 of 1892, against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 2nd of February 1892, affirming the decree of Babu Atool Chunder Ghose, Subordinate Judge of that district, dated the 17th of February 1891.

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of the institution of the suit; it is not necessary for him to prove his title to the land, unless the defendant shows a better title.

In this case, there being no sufficient findings of the plaintiffs' possession to the date of suit, nor that the defendant had failed to show the better title, the suit was remanded for such findings.

THE suit out of which this appeal arose was brought to recover Rs. 1,489, the value of oranges and betelnuts which the plaintiffs alleged were wrongfully taken from their garden by the defendants.

The defendants denied the plaintiffs' title, and alleged that they themselves were owners of the garden.

The first Court, the Subordinate Judge, made a decree in favour of the plaintiffs, on the grounds that they had made the garden and were in possession of it. He found that "it is not necessary to determine the question of title in this suit."

The Judge on appeal said:—

"The defendants contend that the plaintiffs are not the owners of the garden; that some of the defendants own it; that it was made by Joymoni Roy and Jasmant Roy; that certain persons styled sirdars dispossessed Joymoni and Jasmant; that Joymoni sued to recover possession, and obtained a decree for an 8-anna share of the garden and took possession in execution of the decree. The defendants further contend that the plaintiffs are acting on behalf of the sirdars who were sued by Joymoni.

"When the land was surveyed, it was shown as jungle land, and the names of Joymoni and Jasmant were entered as proprietors in the *wajib-ul-arz*. The defendants claim to be the representatives of Joymoni and Jasmant.

"The two important points for consideration seem to be, what is the effect of the decree obtained by Joymoni and of the possession which he took in execution of the decree; secondly, have plaintiffs possessed the garden.

"In the suit brought by Joymoni, the sirdars asserted that they had caused the garden now in suit to be made: they did not say that other persons were in possession of it. The claim in that suit referred also to another garden to the west of the public road, to the east of which the garden now in suit lies. The sirdars in that suit asserted that the garden west of the road had been settled with them: the claim for the garden west of the road was dismissed. It is clear that the sirdars set up different titles to the different gardens. It has not been shown in this suit that the sirdars among Khasias represent all the villagers. I do not find in the

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record any document which clearly defines the duties, powers, and rights of sirdars. It seems that they are sometimes dismissed. There is every reason for holding that they are in no sense proprietors of the lands of the village by virtue of their post as sirdars. It has not been shown that they represent the proprietors.

"It is clear that the decree obtained by Joymoni cannot affect any rights the plaintiffs may have had in the land. Joymoni took possession of the land for which he obtained a decree under section 264 of Act XIV of 1882. Such delivery of possession would not in any way affect any rights or possession of the plaintiffs. The Subordinate Judge holds that the plaintiffs have proved that they made the garden and possessed it. There is the evidence of independent witnesses on this point. A European gentleman, who knows the neighbourhood well, has stated that he has seen some of the plaintiffs look after the garden and take fruit: there is also other evidence on this point. I can see no reason for differing from the decision of the Subordinate Judge. I attach no importance to the fact that the names of Joymoni and Jasmant are in the *wajib-ul-arz*: it seems pretty clear that they did not own all the land shown in their names, for they did not have the garden west of the road. There is no doubt, too, that the land was covered with jungle, and entries in the *wajib-ul-arz* with reference to the possession of such land are not of much value. I think the sum allowed in the original suit is not too high. The appeal is dismissed with costs."

From this decision the defendants appealed to the High Court. The grounds of appeal so far as they are material to this report, and the arguments, are sufficiently stated in the judgment of the Court.

Mr. *W. C. Bonnerjee*, Babu *Taruk Nath Pandit*, and Babu *Joy Gobindo Shome* for the appellants.

Babu *Tara Kishore Chowdhry* for the respondents.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows:—

Two questions have been raised in this appeal on behalf of the defendants, appellants; *First*, whether there is in the judgment of the Lower Appellate Court any finding that the plaintiffs have made out their title to the garden in dispute, and, *second*, whether if there is no such finding, the decree that the plaintiffs have obtained for the value of fruits wrongfully taken away by the defendants can be sustained upon the finding that the plaintiffs have planted the trees and made the garden and were in possession of it.

Upon the first point there are, it is true, passages in the judgment which, if they stood alone, might be taken as amounting to a finding of title in favour of the plaintiffs. But when we find in the judgment of the first Court an express statement that "it is not necessary to determine the question of title in this suit," and when the Lower Appellate Court affirms that judgment, and states that the two important points for consideration are "what is the effect of the decree obtained by Joymoni (through whom the defendants claim) and of the possession which he took in execution of the decree, and, secondly, have plaintiffs possessed the garden," we do not think we can hold that the Court of Appeal below has found title for the plaintiffs.

It becomes necessary, therefore, to consider the second point. For the appellants it is urged that the plaintiffs are not entitled to any decree for the value of the fruits taken away from the garden, unless they can make out their title to the garden; while the other side contend that the decree given to them can be sustained upon the finding arrived at in this case that they made the garden and possessed it.

No authority was cited in support of the appellants' contention; but the learned Counsel for the appellants argued that, just as in an ordinary suit for possession of land, the plaintiff is not entitled to a decree unless he establishes his title to it, so in a suit for the value of the produce of land wrongfully taken away, the plaintiff cannot get a decree unless he can show that he is entitled to the land. We do not see how this at all follows. The reason why in an ordinary suit for possession of land the plaintiff cannot succeed except upon proof of his title is because the party in possession is considered to be entitled to retain such possession against every one except the rightful owner. And for that very reason it would follow that the party in possession of any land must be held entitled to recover the value of the produce of the land from any person who has taken it away, unless such person is the rightful owner. Such a rule appears to us to be in accordance with reason and common sense. For if the party in possession were to be held not entitled to maintain a suit for the value of the produce misappropriated by a wrong-doer, there would be very little real protection afforded to possession, and

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there would often arise the most unseemly struggle to misappropriate produce, whenever it is of such a nature as to be easily carried away, and there is known to be some flaw in the title of the party in possession.

The learned Vakil for the respondent cited the case of *Ram Mohun Dass* v. *Jhupproo Doss* (1) as favouring his view. That case does not go far enough, but so far as it goes it is in his favour. There is, however, another case, not cited in the argument, which lends greater support to his contention. It is the case of *Radha Charan Ghatak* v *Zamirunnissa Khatun* (2), which was decided by a Bench of three Judges on an appeal under section 15 of the Letters Patent, and in which the question was whether a person who had obtained a decree in a possessory suit under section 15 of the Limitation Act of 1859, could maintain a suit for mesne profits. Sir Barnes Peacock, in delivering the judgment of the Court observed:—"The defendant in the suit for mesne profits had a right to have the question of title tried; but the prior possession of the plaintiff, to which he had been restored under the Act XIV decree, was sufficient *primâ facie* evidence of his title to warrant a decree in his favour against the defendant for mesne profits unless she could prove a better title." If in place of the previous possession, intermediate ouster, and subsequent recovery of possession under the Act XIV decree, we had here continuous possession in the plaintiffs, and an intermediate act of trespass not amounting to ouster and carrying away of the produce, the two cases would be governed by the same principle. The Act XIV decree in the case referred to would make no difference, as it could give the plaintiff in that case no higher rights than those possessed by the present plaintiffs (if they are in possession), that decree being based not upon title, but only upon previous possession. And if the plaintiff in that case could maintain a suit for mesne profits, the plaintiffs in the present case must be held to be entitled to maintain this suit for damages.

Both upon reason as well as upon authority, we think the plaintiffs would be entitled to a decree for damages without proof of title, if it is found *first* that they had been in possession from

(1) 14 W. R., 41. (2) 2 B. L. R., A. C., 67; 11 W. R., 83.

before and up to the date of institution of this suit, and *secondly* that the defendants have failed to make out a better title to the garden than the plaintiffs. Upon these two points, however, we do not think that the judgment of the Lower Appellate Court is at all clear. The Lower Appellate Court has not determined the second point, and as to the first, all that it finds is that the plaintiffs have proved that they made the garden and possessed it, but possessed it down to what date the judgment does not show. If the first point is decided in favour of the plaintiffs, they will be entitled to a decree, unless the defendants make out a better title; and if the first point is decided against the plaintiffs, they will not be entitled to a decree unless they make out their title to the garden in dispute.

The decrees of the Courts below will therefore be set aside, and the case remanded to the Lower Appellate Court for a fresh decision, in accordance with the directions contained in this judgment. Costs will abide the result.

Case remanded.

J. V. W.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

SURESH CHUNDER MAITRA, CHAIRMAN OF COMMISSIONERS, RAMPUR BOALIAH MUNICIPALITY (DEFENDANT), *v.* KRISTO RANGINI DASI (PLAINTIFF).*

1893 *Aug.* 7.

Second appeal—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882), ss. 586, 646B.

Notwithstanding section 16 of the Provincial Small Cause Courts' Act, the High Court has, on a case being submitted to it under section 646B, Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial.

Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *Held* on a second appeal to the High Court that section 646B of the Civil Procedure Code must be read with s. 16 of the Provincial Small Cause Courts' Act, so as to modify its full effect in a case wrongly tried by an

* Appeal from Appellate Decree No. 964 of 1892, against the decree of Alfred F. Stanbery, Esq., District Judge of Rajshahi, dated the 1st April 1892, modifying the decree of Babu Fani Bhooshun Mukerjee, Munsif of Boaliah, dated the 19th of May 1891.