

given. The judgments of both the Appellate Courts will be reversed, and the judgment of the First Court restored, with costs in each Court.

1877
GOGON MANJY
v.
KASHISHWARY
DEBY.

Appeal allowed.

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

HEERA LALL PRAMANICK AND OTHERS (PLAINTIFFS) v. BARIKUN-
NISSA BIBEE (DEFENDANT).*

1878
June 18.

Evidence Act (I of 1872), ss. 101, 103, 106—Onus of Proof.

In the year 1862, the plaintiff brought a resumption suit against *A*, in respect of the lands in dispute in this case, upon the ground that she was holding them by an invalid lakheraj title, and obtained a decree. After some years the plaintiff brought the present suit against *B*, who derived her title through *A*, to have the rent assessed. *B* pleaded by way of bar to the jurisdiction, that the lakheraj grant, under which *A* claimed, was made previously to 1790. *Held*, that the onus of proving this plea was upon *B*.

Baboo *Gooroodass Banerjee* for the appellants.

Mr. *H. E. Mendies* for the respondent.

THE facts material to the point decided in this appeal were sufficiently stated in the judgment of the Court, which was delivered by

GARTH, C. J.—So far as the merits of this case are concerned we are not called upon here to adjudicate upon them. The Munsif has determined the rate of rent which is payable by the defendant, and the District Judge, in his judgment of the 14th February 1877, says, that as regards the Munsif's decision on remand, in which the merits of the case were discussed and settled, the appellant did not raise any question before him.

The only point, therefore, which could be, or has in fact been, raised on special appeal in this Court is that of jurisdiction,

* Appeal under cl. 15 of the Letters Patent against the decree of Mr. Justice Ainslie, dated the 1st August 1877, in special Appeal No. 967 of 1877.

1878

HEERA LALL
PRAMANICK
v.
BARIKUNNISSA
BIBEE.

which was determined in a former judgment of the Officiating Judge, dated the 13th of May 1876, in favor of the plaintiff. That judgment has been reversed by the learned Judge of this Court, and we have to consider the correctness of his judgment upon that point only.

The question arises in this way. The plaintiffs, in the year 1862, brought a resumption suit against the defendant's mother (under whom the defendant claims) in respect of the land in dispute, upon the ground that she was holding them by an invalid lakheraj title. The defendant in that suit contested the claim, but the plaintiff obtained a decree.

It does not appear from the proceedings in that suit, whether the lakheraj grant under which the defendant claimed, was before or after the year 1790 ; but it was distinctly stated in the decree, that the plaintiff (the decree-holder) was entitled to assess the property.

The plaintiff then, after a lapse of some years, brought this suit against the present defendant (who claimed under the defendant in the resumption suit), to have the rent assessed, and the defendant then set up (by way of plea to the jurisdiction of the Civil Court) that the lakheraj grant under which the defendant in the resumption suit claimed, was previous to 1790.

The Munsif, accordingly, framed the ninth issue in the case in these words: "whether the resumed lakheraj was of anterior date to the 1st of December 1790?"

The Munsif considered that the onus of proving the negative of this issue was upon the plaintiffs, apparently because he thought, that the plaintiffs ought to prove that the Civil Court had jurisdiction to try the suit, and as the plaintiffs did not prove the negative of the issue, the Munsif dismissed the suit.

On appeal, the Officiating Judge reversed the Munsif's decision, and remanded the case to be tried upon the merits. He considered that the case of *Ranee Shama Soonderee v. Situl Khan* (1) was an authority in the plaintiff's favor, and that the onus of proving the ninth issue lay upon the defendant.

On special appeal, the learned Judge of this Court thought the Officiating Judge was wrong, and he restored the Munsif's

(1) 8 B. L. R., app. 85, S. C., 15 W. R., 474.

first judgment, upon the ground, that as the jurisdiction of the Court to entertain the suit had been impugned, it was for the plaintiff to prove that the Court had jurisdiction.

After fully considering the point, we are unable to agree in the learned Judge's conclusion. The objection made to the jurisdiction of the Court was raised affirmatively by the defendant, by a statement, that the lakheraj grant was previous to 1790. The affirmative of the ninth issue, which was framed to meet that allegation, was asserted by the defendant, and by the 101st and 103rd sections of the Evidence Act, the burthen of proving any particular fact in issue lies upon the party who asserts that fact.

Moreover, in this case, the rule laid down in s. 106 of the Evidence Act is in favor of the plaintiffs' view, because if the defendant and her ancestors held and claimed to hold this property under a lakheraj grant, the terms and the date of that grant would certainly be rather within the knowledge of the defendant than of the plaintiff.

It is perfectly true, as observed by the learned Judge, that if the grant had in fact been made previously to 1790, the Collector's Court would have had jurisdiction to assess the revenue upon the property (1). But this fact raises no presumption in favor of the grant having been made prior to 1790. On the contrary, if any presumption were to be made as regards jurisdiction, it would be in favor of the ordinary and general tribunals of the country, to the exclusion of any special jurisdiction exercised under a particular Statute by the Collector, and if any presumption could be made in this case from the proceedings in the resumption suit, it would certainly be in favor of the plaintiff, because the decree in that suit contains a declaration "that the plaintiff is entitled to assess the lands."

We think, therefore, that having regard to the rules laid down by the Evidence Act, as well as to the general law and the circumstances of this particular case, the onus of proving the affirmative of the ninth issue was upon the defendant.

1873
 HERRA LALL
 PRAMANICK
 v.
 BARKUNNESA
 BIDER.

(1) See Reg. XIX of 1793, ss. 6 to 9.

1878
 HERRA LALL
 PRAMANICK
 v.
 BARIKUNNISSA
 BIBER.

The judgment of the High Court will, therefore, be reversed, and the judgment of the District Court restored with costs in both Courts.

Appeal allowed.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

1878
 Feby. 26.

CHUNDER NATH CHOWDHRY (PLAINTIFF) v. TIRTHANUND
 THAKOOR AND ANOTHER (DEFENDANTS).*

*Suit for Possession—Fraud—Limitation Act IX of 1871, sched. ii, art. 95—
 Sale for Arrears of Government Revenue.*

Art. 95 of second Schedule to Act IX of 1871 was not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act.

THIS was a suit for possession of certain lands. One Juggadanund, the paternal grandfather of the plaintiff, and Nobo Kishore, were uterine brothers, and were jointly entitled to the property in question. On the death of Nobo Kishore, his widow Annopoorna Chowdrain became entitled to a life-interest in her husband's share of the joint estate. On the 24th Bysakh 1269 B. S. (6th May 1862) Annopoorna Chowdrain granted to one Kharoo Lall Thakoor, the father of the first and second defendants, a patni lease of the property in dispute, in which she was jointly entitled with Gournath Chowdhry, the father of the plaintiff. A dispute took place, and the Collector made a settlement with Gournath and Annopoorna as widow of Nobo Kishore. Gournath Chowdhry thereupon brought a suit contesting the validity of the patni lease, and by a decree of the 7th August 1867, it was declared the patni lease should enure only during the lifetime of the widow. Subsequently, on execution of a money-decree obtained against Annopoorna Chowdrain, the right, title, and interest of the judgment-debtor in the lands in

* Special Appeal, No. 1052 of 1877, against the decree of J. D. Ward, Esq., Judge of Zilla Purneah, dated the 5th April 1877, affirming the decree of S. Wright, Esq., Subordinate Judge of that district, dated the 10th January 1877.