1909

YOUD v. YOUD.

Mr. *Knight*.—I ask for costs as between attorney and client against Meade. *Outhwaite* v. *Outhwaite and Diaz* (1).

HARINGTON, J.—That was a very gross case. I must look to the conduct of the parties. I refuse the application for attorney and client's costs against Meade.

Attorneys for petitioner: Messrs. *Leslie & Hinds*.

C. E. G.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Brett.

1900
August 3, 6.

MADAN MOHUN SHAHA AND OTHERS (PLAINTIFFS) *v.* RAJAB ALI AND OTHERS (DEFENDANTS).*

Co-sharers—Suit concerning joint property—Suit for khas possession—Exclusive possession of one co-sharer—Partition—Denial of title in written statement—Cause of action—Improvement by tenant—Meliorating waste.

Where one co-sharer holds possession of certain land and deals with it in a particular way and in the ordinary course, and another co-sharer objects to that dealing or to that course of conduct, his proper remedy is to sue for partition, by which the rights of all the co-sharers may be adjusted and the loss sustained by one may be made good at the expense of another.

When one co-sharer landlord, in exclusive possession of a waste plot of land, although such exclusive possession may be held with the permission of the other co-sharer landlord, leases it out to a tenant, who improves it without any objection on the part of the latter, it is not open to the latter to obtain *khas* possession of the land so improved, jointly either with the lessor landlord or with the tenant.

A denial of a right in a written statement does not give rise to a cause of action; a cause of action must be antecedent to any allegation made in the pleadings.

Watson and Co. v. *Ram Chund Dutt* (2) explained.

THE plaintiffs alleged that they were entitled to, and in possession of, 3 annas 11 gundas 2 karas 1 krant share of taluq Mudfat

* Appeal from Appellate Decree, No. 2463 of 1898, against the decree of Babu Srinath Pal, Subordinate Judge of Tipperah, dated the 2nd of September 1898, affirming the decree of Babu Debendra Nath Banerjee, Munsif of Nabinagar, dated the 28th of February 1898.

(1) (1900) I. L. R., 28 Calc., 84.

(2) (1890) I. L. R., 18 Calc., 10; L. R., 17 I. A., 110.

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Ganganarayan Deb, the remaining shares belonging to the co-sharer defendants; that within the taluq there was an old tank which lay waste in the *khas* possession of the landlords; that the principal defendants having commenced to excavate the said tank and to raise its embankments, dispossessed the plaintiffs in the month of Falgun, 1303 B. S. (February 1897); and that the said principal defendants had no right and ownership whatsoever in the same. They accordingly prayed for a declaration of their right and for *khas* possession of the disputed land jointly with the co-sharer defendants, or with the principal defendants, if they had obtained the share of the co-sharer defendants.

The principal defendant No. 1 contended that the tank in suit did not belong to the plaintiffs' alleged taluq, but that it belonged solely to the defendants Nos. 6 to 10; that he and the other principal defendants had taken a settlement of the same from the said malik defendants at an annual rent of Rs. 4, on payment of a bonus of Rs. 50, in Falgun 1303 B. S.; that with the consent of the said defendants, they had improved the tank at a cost of Rs. 700, by re-excavating the same and raising embankments, without any opposition from the plaintiffs; and that he, a mourasi resident raiyat, having taken settlement of the tank from persons whom he believed in good faith to be sole proprietors, the plaintiffs could not recover possession thereof. Defendants Nos. 6 to 10 supported defendant No. 1.

The Munsif held that the disputed tank belonged to the taluq of which the plaintiffs were co-proprietors with the co-sharer defendants, and that although the latter might have been in exclusive possession of the same, their possession was permissive and not adverse to the plaintiffs. But he held that inasmuch as the principal defendants had taken settlement of the tank from the defendants Nos. 6 to 10 and had improved it, the plaintiffs were not entitled to khas possession, but they were entitled to get rent according to their shares in the tank. A decree for rent was accordingly passed.

The plaintiffs appealed, and on appeal the Subordinate Judge upheld the finding and decision of the Munsif, holding also that

the plaintiffs had failed to prove that they had opposed the re-excavation of the tank by the principal defendants.

The plaintiffs appealed to the High Court.

1900, AUGUST 3. Babus *Lal Mohan Das* and *Sarat Chandra Dutt* for the appellants.

Babu *Basanta Coomar Bose* (for Babu *Jnanendra Mohan Dass*) for the respondents.

Cur. adv. vult.

1900, AUGUST 6. The judgment of the High Court (AMEER ALI and BRETT, JJ.) was as follows :—

This suit relates to an old silted up tank which has recently been improved at considerable expense by the principal defendants for the benefit of the village at large.

It appears that before the tank was leased to these defendants it lay practically useless, and the rank grass which grew thereon was taken by the second party defendants for feeding their elephants. Now that the silted up tank has been improved by the principal defendants, the plaintiffs bring this suit for the purpose of obtaining khas possession jointly with the lessors, or with the lessees as the Court may direct. Their case is that they are fractional sharers of the land in which this tank is situated. According to their own statement they are owners of a three anna eleven gunda share only, whilst the lessor defendants own more than twelve annas. It has been found by both the Lower Courts that the lessor defendants were in exclusive possession of this silted-up tank, and made use of it for their elephants, the services of which the plaintiffs sometimes obtained. Written statements were filed on behalf of both sets of defendants, in which they denied that the plaintiff had any interest in the land in suit, alleging that it belonged to another taluq. They also contended that as there was a great want of drinking water for the tenants of the village, the principal defendants took a settlement of the tank on an annual jama of Rs. 4 and payment of a nazzur or bonus of Rs. 50, that they re-excavated the tank at the expense of Rs. 700, and raised embankments and improved it, and made it fit for the supply of water to the village.

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The Munsif found that the tank belonged to the plaintiffs as well as to the lessor defendants. He also found that although it was all along in the exclusive possession of the latter, such possession was with the permission of the plaintiffs. And considering that the lessee defendants had improved it at their own expense, and that the plaintiffs had not raised any objection at the time of the excavation, he made a decree declaring the plaintiffs' right, and giving possession through the tenants. The claim for khas possession was accordingly dismissed.

The plaintiffs appealed, and the Subordinate Judge has affirmed the judgment of the First Court.

In second appeal to this Court a most ingenious argument has been raised by the learned pleader for the appellant on the basis of the case of *Watson and Co.* v. *Ramchund Dutt* (1). To this contention we shall presently refer. In order to deal with this argument it is necessary however to mention the findings of fact arrived at by the Lower Appellate Court. It has been found that the silted up tank was all along in the possession of the lessor defendants ; *that* possession was no doubt of a permissive character so far as the plaintiffs were concerned. It has also been found that the plaintiffs never raised rany objection when the lessee defendants were excavating and improving the tank. They allowed them to spend their money for its improvement, and now that the property has been improved and has become really valuable, they turn round and ask that joint possession be given to them along with the lessee defendants.

The silted up tank was yielding no profit to anybody. If the lessor defendants acted beyond what they were entitled to, it was what would be called in English Law ameliorating waste. They settled the tank with the lessee defendants who improved it, and a rent of rupees 4 is now derived therefrom. The Courts below have given the plaintiffs a decree for their share of the rent.

Babu Lal Mohun Das for the plaintiffs contends, however, that inasmuch as their Lordships of the Judicial Committee in the case referred to above had used the expression that when one

(1) (1890) I. L. R., 18 Calc., 10 ; L. R., 17 I. A., 110.

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co-sharer exercises right "not in denial of the right" of the other co-sharer, his act cannot be impugned by the latter, it must be taken that the principle laid down by their Lordships is not applicable to a case where there is a denial of the co-sharer's title as in this case; and consequently the plaintiffs are entitled to recover khas possession in respect of their share.

The argument is ingenious but when examined has no substance. An assertion or denial of a right in a written statement does not give rise to a cause of action. A cause of action must be antecedent to any allegation made in the pleadings. In the second place, their Lordships of the Privy Council were dealing with the facts of that case and the special expressions must be confined to those facts. We have only to concern ourselves with the principle laid down; and the principle which we gather from that and other cases is this, that when one co-sharer is holding possession of a certain land and deals with it in a particular way and in the ordinary course, if the other co-sharers are not satisfied with that dealing or with that course of conduct, their proper remedy is by partition. In a partition suit the rights of all the parties are adjudged upon a proper basis, and any loss or damage suffered by one set of partners is made good at the expense of the other.

It seems to us therefore that the view taken by the Lower Courts is correct, and we accordingly dismiss this appeal with costs.

M. N. R. *Appeal dismissed.*

Before Mr. Justice Ameer Ali and Mr. Justice Brett.

ADMINISTRATOR-GENERAL OF BENGAL, EXECUTOR TO THE ESTATE OF THE LATE KUMAR INDRA CHUNDER SINGH (PLAINTIFF) *v.* ASRAF ALI AND OTHERS (DEFENDANTS).*

1900 *July* 3, 13

Bengal Tenancy Act (VIII of 1885), ss. 67, 178 (3) (h)—Landlord and tenant—Interest on arrears—Rate of interest specified in lease—Ordinary incidents of holding—Holding over after expiry of lease—Tenancy from year to year—Transfer of Property Act (IV of 1882), ss. 116, 117.

An agricultural tenant held under a lease for six years, the term of which expired in 1881, and had been holding over since. The rate of interest

* Appeal from Appellate Decree No. 427 of 1898, against the decree of Babu Kali Prosanna Mukerjee, Subordinate Judge of Tipperah, dated the 3rd of December 1897, affirming the decree of Babu Behary Lall Mukerjee, Munsif of Comnilla, dated the 17th of February 1897.