Before Mr. Justice Mitra and Mr. Justice Caspersz.

1907
March 8.

RATAN LAL GIR
v.
FARSHI BIBI.*

Ejectment, suit for—Ejectment of under-raiyat—Delay in suing—"Holding over," presumption of—Overt act—Bengal Tenancy Act (VIII of 1885) s. 49—Recording evidence in English—Irregularity—Civil Procedure Code (Act XIV of 1882) s. 578—Practice.

After the expiry of a written lease, a mere delay in the institution of a suit by the lessor for ejectment of the lessee without notice to quit, is no reason for dismissal of the suit on the ground that the lessee was allowed to 'hold over.'

In a suit for ejectment, the recording of evidence in English—which is not the language of the Court—is merely an irregularity, which may be cured by the application of s. 578 of the Code of Civil Procedure.

SECOND APPEAL by Ratan Lal Gir Sanyasi, the plaintiff.

The facts are shortly these. The plaintiff instituted suits for recovery of *khas* possession of the defendants' holdings under s. 49 of the Bengal Tenancy Act, on the allegations that the defendants were under-tenants; that they were admitted into the occupation of the holdings by registered kabuliats; and that as the terms of the lease had expired about a year and seven months ago; there should be a decree of ejectment against the defendants.

The defendants contended, *inter alia*, that the suit was not maintainable as the plaintiff did not serve any notice to quit on the defendants; that the defendants had paid rents after the expiry of the terms of the kabuliat and therefore they could not be ejected without notice to quit; and that they were entitled to compensation for the improvements made by them of the holdings, &c.

* Appeal from Appellate Decree, No. 1850 of 1905, against the decree of J. Johnston, Offg. District Judge of Rangpur, dated June 23, 1905, reversing the decrees of Jagadish Chandra Sen, Munsif of Nilphamari, dated April 25, 1905.

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The learned Munsif, after recording the evidence in English as if the suit was one for rent, held that no notice to quit was necessary in this case as the defendants were not allowed to "hold over," and that they were liable to be ejected; and he accordingly decreed the plaintiff's suit.

On appeal, the learned District Judge dismissed the plaintiff's suit mainly on the ground that a notice to quit was necessary, there being a fair presumption that the defendants were allowed to 'hold on.'

The judgment of the learned Judge was as follows:—

"Two principal grounds have been taken in these appeals, *first*, that the lower Court erred in law in recording the evidence in English, and, *second*, that the suits are not maintainable in the absence of notice. It is not disputed that the first contention is correct. Section 148 of the Bengal Tenancy Act under which the lower Court seems to have thought itself empowered to record the evidence in English only applies to suits for rent. This being a suit for ejectment does not fall under that section, and must be held to be governed by the ordinary provisions of the Code of Civil Procedure. Neither side has been able to cite any authorities to the exact legal effect of this error, but I fear on the analogy of cases tried summarily under the Criminal Procedure Code, when not properly so triable, that I should have no option but remand the case for fresh hearing.

Before doing so, however, it is advisable to consider the other contention of the appellants that the suits are not maintainable without notice. Under section 49 (*a*) of the Bengal Tenancy Act, a suit for ejectment may be brought at the expiration of the term of a written lease, without notice. The case law on the subject, however, is that, if on the expiry of such a lease the tenant is allowed to hold on notice becomes necessary. Everything depends on what is a reasonable time from the expiry of the lease within which to bring the suit. In the present case the interval between the expiry of the leases and the institution of the suit was a year and seven months. I am of opinion that the interval was unreasonably long, and affords a fair presumption that on the expiry of the leases the appellants were allowed to hold on, and that in consequence of some fresh disagreements the suit have been brought. The appeals are accordingly allowed with costs."

The plaintiff thereupon appealed to the High Court.

Babu Shibaprasanna Bhattacharjee, for the appellant.

Babu Baikantha Nath Das, for the respondents.

MITRA AND CASPERSZ. JJ. This is an appeal in a suit by a raiyat to eject an under-raiyat. The defendants held the land

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under a registered lease for a term of years. The term expired and the present suit was brought one year and seven months after the expiry of the lease.

The defendant pleaded want of notice and acceptance of rent as proof of his having been allowed to hold over.

He also demanded compensation.

The Munsif framed issues on these points and recorded the evidence in English as if the suit had been one for rent under the Bengal Tenancy Act. He gave the plaintiff a decree on the finding that the defendant was not allowed to hold over and that no notice was necessary.

On appeal by the defendant, the learned Officiating District Judge of Rungpore held that the record of evidence having been made in English, there had not been a proper trial of the suit, and he was disposed to remand the case to the first Court for a fresh hearing. But he dismissed the suit and decreed the appeal on the ground that as the suit had been instituted one year and seven months after the termination of the written lease there was a presumption that the defendant was allowed to hold over.

As regards this last point, there is no authority for the proposition that simply because a landlord does not institute a suit for a time, the presumption is that the tenant was allowed to hold over. The expression "holding over" is well understood. It means that the relation of landlord and tenant continued with the assent of both parties, and the overt acts, by which the relation might be continued, are either the receipt of rent by the landlord or his assenting to the continuance of the tenancy by other acts or words. In the present case, the learned Judge has not come to any distinct finding as to facts, which would induce a Court to hold that the defendant was allowed to hold over. Mere delay in the institution of the suit is no reason for the dismissal of the suit on the ground that the defendant was allowed to hold over. The lower appellate Court, therefore, erroneously dismissed the suit.

As regards the order of remand, it is true that the Munsif ought to have recorded the evidence in full in the language of the Court, the suit not being one for rent. But that is merely

an irregularity—an irregularity which may be cured by the application of section 578 of the Code of Civil Procedure.

The analogy of a case tried summarily under the Code of Criminal Procedure is not applicable to civil suits, if there be no defect of jurisdiction. When a Criminal Court tries a case summarily under the special powers conferred by that Code, and tries the case, when it has no jurisdiction to do so, the matter is different. There the question is one of jurisdiction, it is not merely an irregularity not affecting jurisdiction, the lower appellate Court was therefore wrong in thinking that it ought to remand the case for a fresh trial.

We accordingly set aside the decree of the lower appellate Court, and as that Court has not come to any distinct finding on the evidence as to whether rent had been received after the expiry of the lease for any period subsequent to the lease, the case must go back for a rehearing on the evidence already on the record. If that Court comes to the conclusion that the plaintiff had not received any rent from the defendants since the expiry of the lease for any period subsequent to the lease, the suit should be decreed, otherwise the suit should be dismissed. Costs of this appeal will abide the result.

Case remanded.

B. D. B.