

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Maharajah Rajendur Kishwur Sing v. Sheopurshun Missur, from the late Sudder Dewanny Adawlut of Calcutta; delivered 10th February, 1866.*

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Present :

LORD CHELMSFORD.

SIR JAMES W. COLVILE.

SIR EDWARD VAUGHAN WILLIAMS.

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SIR LAWRENCE PEEL.

THIS is an Appeal from a decision of the late Sudder Dewanny Adawlut, of Bengal, which reversed a decision of the Zillah Court in favour of the Appellant, the Plaintiff in the suit. The decision of the Sudder Court proceeded solely on the ground of misjoinder of causes of action in the Plaintiff's suit. That objection had been raised in and overruled by the Court below. It is necessary for the due consideration of this objection to ascertain carefully what are the causes of action which are stated in the plaint. The Plaint states them with sufficient precision in the first paragraph. It alleges that the Plaintiff sues, not summarily, but in due form, for possession of certain mouzahs which it describes by names and boundaries, and which it alleges to be his hereditary property; and also to recover certain arrears of rent, amounting to 1,030 rupees 9½ annas for 1260 Fuslee, for which a summary suit was pending; and 2,305 rupees 13 annas 2 pice, the rent for 1261 Fuslee inserted in the Kabooleut dated 5th of the month of Assin, 1258 Fuslee, by the annulment of a summary award of the Deputy Collector of the district Chumparun, dated

29th May, 1854, and by the cancellation of a letter affirming the Bhakee Birt tenure, dated 17th of the month Assin, 1232. This specification of the causes of suit is accompanied with statements of the falseness of the claim to the Birt tenure, of the danger which the Plaintiff apprehends to his proprietary title from the summary decision above mentioned, that its annulment is impossible without a regular suit, and he concludes the paragraph by stating that he sues, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the Defendant respecting the Bhakee Birt.

The case, then, as alleged in the plaint, if the plaint be regular, must be brought within the principles stated in Mr. Macpherson's book on Civil Procedure, page 111, third edition, where he says, "A plaint may have an appearance of doubleness when it prays not only for possession, but that the transactions upon which the Defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and in fact forms part of, the former, because possession cannot be given without first removing the existing impediments." This question is distinct from any that relates merely to defect or proof or error in law, in a Plaintiff's view of his case in the whole or part. That may warrant a dismissal at the hearing wholly or in part. The question here relates to unity of title, and connexion and dependence between the claims of the Plaintiff. In this suit the Plaintiff's title is one; it is his proprietary right as Zemindar. We must look to the Plaintiff's admitted title as Zemindar and to the interference with such title by an established tenure of this kind, to learn what is meant by the term "possession." The Mouzahs are part of the Plaintiff's Zemindary; the Plaintiff is the assessed proprietor, under the Decennial Settlement. The Defendant claims that which would, if established, be a dependent tenure, the Zemindar being his immediate superior in the holding. It is not a Ryotwary tenure at all, and no question as to Ryot's titles to occupancy can arise in this dispute. All the distinct portions of the Plaintiff's claim flow from, support, and have relation to and connexion with his proprietary title, which *prima facie* entitles him to the collections. The farming lease supports

it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it.

If this tenure be not interposed between the Zemindar and the cultivators, the ordinary relation between him and them exists ; but if it be interposed, the Zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jumma from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a Zemindar, and may materially interfere with his successful management of his Zemindary. Such an intermediate tenure cuts off the possession, that is, the Zemindar's title to the rents and profits immediately derived from the cultivators. In this sense, the term possession is used in this plaint. Now this injury, supposing the claim to the Birt tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right, derived from the Zemindar ; as, for instance, by a farmer of a portion of the Zemindary. If such a claim were preferred by a person having such an interest, it would certainly be competent to the Zemindar, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also ; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

A Zemindar, or landlord, may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture.

If the Birt tenure be valid, the Plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract, or estoppel, even from a Birt tenant, if the latter accepted a lease, but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a Birt tenure, therefore, be removed, the Plaintiff cannot have the "possession" which he seeks, since, in some way or other, the Defendant

stands between the Plaintiff, as owner of the *prima facie* proprietary right, and the cultivators. Had the defendant admitted the tenancy under the Kabooleut, the Plaintiff's title to the rent would have been established, but that admission, unless qualified, would also have removed those impediments to the Plaintiff's proprietary title which he desires to have removed; but as the Defendant repudiates that tenancy altogether, he, at least when the Plaintiff fails to prove it, cannot urge it against the Plaintiff's title. See in the case of Rajah Oodit Purkash Singh against Martindell and another (4 Moore's Indian Appeals, p. 444), Lord Kingsdown's Judgment in affirmance of the general principle.

This lease being removed (the Plaintiff having failed to prove it, and the Defendant renouncing it) what bar is there to the assertion of the proprietary right to the collections, unless the Birt tenure interpose one. On that bar the Defendant does rely, and unless it be removed, the Plaintiff can scarcely expect to lease or otherwise manage his Zemindary with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the Sudder Ameen's Court for overruling the objection seem to be unsatisfactory; for as the title to mesne profits supposes a wrong, and the title to rent proceeds on contract, the union of such causes of action would be contrary to principle. But as these Courts have the divided jurisdiction of a Court of Law and a Court of Equity substantially united in one Court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth the claim to rent under the farming lease supports the proprietary title.

No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent in fact raised them all, and they were dealt with without confusion or difficulty.

Their Lordships think therefore that the Sudder Court should have heard the Appeal upon the merits. Their Lordships ought, upon general principles, to give now the decision which the Sudder Court should have given; but a difficulty has been interposed in the Court of the Sudder Ameen, which renders a decision on the Birt tenure impos-

sible by this Board. The question of this Birt tenure has not been adjudicated upon in the Court below. The Sudder Ameen should have allowed the Defendant to get his documents stamped, and, if necessary, should have adjourned the hearing for that purpose. The Court, however, excluded them from evidence, as unstamped, and as documents which were inadmissible unless stamped. The Plaintiff ought not in any way to be prejudiced by this neglect of the Defendant, and to allow the Defendant to re-agitate these questions as to the Birt tenure in another suit would be a serious injustice and wrong to the Plaintiff. The proper course, then, to be adopted is to reverse the decisions of the Sudder Court and of the Sudder Ameen, and to remand the cause to the Lower Court, not for the purpose of taking further evidence, or of hearing the cause on fresh materials other than the stamped documents; but to enable the Defendant to get the instruments stamped. The Inferior Court should then decide on the evidence already taken in the cause, and on those documents, if stamped, with reference to all the issues raised on the cause, giving a complete decision on them all. Their Lordships will forbear from expressing any opinion upon the validity of the Birt tenures, on the evidence in its present imperfect state; but they think it proper to observe that if the Birt tenure be displaced, that displacement will tend considerably to fortify the Plaintiff's proof of the Kaboolent; for the Defendant's possession would then have no apparent title, unless one derived from a lease from the Zemindar, the sole proprietor; no person (on that hypothesis) intervening between the cultivators and the proprietary title of the Zemindar.

This order for remanding the cause to be thus re-heard, will entitle the Plaintiff to have the matter of his Appeal to the Sudder on the Kaboolent reopened. It is in favour of his Appeal so far as to subject the decision against the Kaboolent to review upon the re-consideration of the whole case upon the merits. The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim or defence, be viewed in con-

nexion with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted.

Their Lordships will recommend to Her Majesty that the Decrees of the Sudder Court and of the Sudder Ameen be reversed; that the Appellant should have the costs of the Appeal; that the cause be remanded to the High Court, with directions to send the cause back to the Zillah Court for re-trial on the issue of the existence of the Birt tenure, giving the Respondent an opportunity of having the unstamped documents stamped if he shall be so advised, but making him liable for the costs of the first trial, which his omission to have those documents stamped has made abortive.

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