CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 117 *of* 1871.

1872. Feb. 5.

LAKSHMIBA'I, widow, and another ...*Appellants.*
HARI bin RA'VJI ....*Respondent.*

Ejectment Suit by Landlord—Failure to prove lease—General title—Case put forward in plaint—Alternative case—Amendment of plaint.

Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease, and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title as though he had not set up and failed to prove the alleged lease.

A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise.

Where the plaintiff has not put forward an alternative case in the plaint, he may have leave to amend his plaint and to state his case correctly therein, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátára, in Regular Appeal No. 127 of 1870, confirming the decree of the Subordinate Judge of Karár.

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The following are the facts of the case:—

The plaintiffs, Lakshmibái and Lakshuman, instituted this suit on the 10th January 1867 in the Court of the Munsif of Karár in the Sátára District. They alleged in the plaint that they were the *Inámdárs* of the lands therein described; that the defendant, Rávji bin Bháguji, was their tenant under an agreement No. 3, dated the 20th June 1861; and that he would neither pay rent nor vacate the lands, and therefore prayed that the said defendant might be directed to deliver up possession of the lands and pay the rent due.

The defendant denied the execution of the agreement of June 1861, and set up two other agreements, Nos. 7 and 8, dated respectively October 1848 and June 1852, passed by him to Durgo Balvant, husband of the first, and father of the second plaintiff, and contended that, according to the terms of these documents, he had become a perpetual tenant of the lands in question, liable only to a rental of Rs. 35 per annum.

The Munsif found at first that the agreement No. 3 was proved, but on remand from the Court of Regular Appeal, he came to a different conclusion, and rejected the plaintiffs' claim. The District Judge on a second appeal affirmed this decree, he being also of opinion that the plaintiffs' lease No. 3 was not proved, and that the defendant's leases, Nos. 7 and 8, were proved.

A special appeal having been preferred and registered, it came on for hearing on the 14th August 1871 before GIBBS and WEST, JJ.

Shántárám Náráyan for the appellants.—The Lower Court dismissed the appellants' claim solely upon the ground that the agreement No. 3 was not proved; but, this being an action of ejectment, the Court ought to have determined whether, apart from the agreement, the appellants' title to eject the respondent, or to recover rent from him, was not made out. In a case like this, the plaintiff should, I submit, be permitted to fall back upon his general title when he fails to prove his lease: S. A. No. 235 of 1864 (per TUCKER and

GIBBS, JJ.), S. A. No. 140 of 1863 (per ARNOULD and FORBES, JJ.), and S. A. No. 356 of 1866.

Bhairavnáth Mangesh for the respondent:—The plaintiff's claim was based solely on Exhibit No. 3. He must stand or fall by that alone. As he failed to prove the agreement, the Lower Courts very properly threw out his claim. He cannot shift the ground of his action—*Narainee Dosee* v. *Nurrohury Mohonto (a)*; *Mohendronath Mookeerjee, Overseer (b)*; *Mudhoosooddun Gossamee* v. *A. Hills (c)*.

Upon the above contention, the Court made the following reference to the Full Bench on the 8th November 1871:—

WEST, J.:—The Judge below has found that a lease set up by the plaintiff (No. 3) as that under which the defendant had become his tenant is not proved. He has further found that the leases Nos. 7 and 8, produced by the defendant, are proved. For the plaintiff, special appellant, it is now urged that, notwithstanding his failure to establish No. 3, his suit, being one for ejectment, rested on his title generally, and that he is entitled to fall back on the documents Nos. 7 and 8 if he pleases, and from them, taken with the other evidence, prove, if he can, that he is now entitled to eject the defendant. The defendant (respondent), on the other hand, contends that the suit having been expressly based on lease No. 3, and an alleged violation of its conditions, the plaintiff is not at liberty, now that he has failed in proving that document, to take up a ground of action differing from that originally selected by himself; and that, having been defeated on that ground, he must bring another action if he wish to rely on any other.

In Special Appeal No. 235 of 1864, decided on the 8th August 1864, the plaintiff had sued to recover possession of a piece of land let by him to the defendant as his tenant. The claim was thrown out by the Principal Ṣadr Amín, whose decree was confirmed by the District Judge in regular appeal; but in special appeal these decisions were

(a) Marsh. Calc. Rep. 70; see also pp. 47, 57, 236.
(b) 9 Calc. W. Rep. Civ. R. 206. (c) 10 *Ibid*, 242.

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reversed on the ground stated by the learned Judges:—"The issue therefore simply is, whether the plaintiff, Bahirji, proved his right to recover possession of the land; and the determination of that issue depended on ascertaining the point whether the plaintiff's grandfather let the land to the defendant's father as tenant, as alleged." Here it would seem that the view of the law taken by the Court was that he, plaintiff, suing as landlord, ought to prove his demise and its expiration as under the English Law (*d*), though a direction is added that the Judge "should inquire and determine whether Bahirji (the plaintiff) has a proprietary right to the land, subject to the payment of certain dues to the temple."

In Special Appeal No. 140 of 1863, decided on the 13th October 1863, it seems probable, though the precise ground of the decision is not stated, that the judgment of the Court proceeded on the ground that the plaintiff having failed, in the opinion of the Assistant Judge, who tried the regular appeal, to prove the tenancy he alleged, except in part, his claim to eject the defendant must fail, except as to that part.

In Special Appeal No. 356 of 1866, on the other hand, in which the suit was to recover land alleged to have been "let to the defendant on condition that he should give it up on demand," the Court held that the District Judge, having decided that the tenancy of defendant under plaintiff was not proved, should have proceeded to determine—

(1) Whether plaintiff had established his original proprietary title to the land in dispute;

(2) If so, whether defendant had established adverse possession as proprietor for more than twelve years; and, that this might be done, reversed the decree of the District Court and remanded the cause for re-trial.

In Special Appeal No. 111 of 1867, decided on the 28th March 1867, a case very similar, as it would seem, in its

(*d*) Cole on Ejectment, pp. 393, 438; Roscoe on Evidence, p. 621, (11th edn.)

essential features to the one with which we have now to deal, the late learned Chief Justice and Warden, J., reversed the decree of the Assistant Judge, who had thrown out the claim, on finding that the agreement sued on was not proved, and directed that the second issue should be tried, viz., whether the ownership of the plaintiff was proved by other documents in the case.

The action of ejectment under the English Law is one of a peculiar nature. Section 26 of the Code of Civil Procedure, requiring "the cause of action" as well as the "relief sought" to be set forth in the plaint, seems to intend that not only the right of the plaintiff, whether it arose from or was independent of contract, should be set forth, but also the particular violation of that right which, in his opinion, entitles him to a remedy at the hands of the Court. This is so in other cases, and no distinction seems to be contemplated between a suit for ejectment and any other suit. When, therefore, the plaintiff has stated as his ground of action a particular breach of a contract of tenancy which has given to him a right of re-entry, the defendant has denied the contract or the breach complained of, and the issues drawn upon this footing have been accepted as sufficient by the parties, it would seem that "the determination of the cause," to use the words of Lord Westbury, "should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made." This is, I think, the view generally acted on by the Lower Courts; but the plaintiff is sometimes allowed to shift his ground, as he seeks to do here, in a way hardly consistent with the general system of the Code of Civil Procedure. The matter is of practical importance, and as the views held by the Division Courts have not been uniform, I should wish to refer the question to a Full Bench,—whether A, suing as landlord or lessor to eject B as his tenant on the expiry of his term or for breach of his contract, is at liberty to rely, as the ground of his right, on a relation between him and B that has not arisen out of the alleged contract?

GIBBS, J.:—I have followed the precedents of the Court,

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some of which have been set out by my brother West; but I have always had a doubt in my own mind as to the propriety of allowing the general question of title to be gone into when the lease, the document sued on, was found not proved.

I believe the practice took its rise in suits by *Inámdárs* on verbal leases. The Court considers that it would be unfair to let the *Inámdár* suffer the loss of his *Inám* land, simply because he could not prove a verbal lease, and the feeling, I will not say principle, which induced the Court to rule in favour of the *Inámdár* appears to have been extended to other cases. I quite agree in thinking the matter one deserving the consideration of a Full Court, and therefore agree in this reference.

Accordingly, the question proposed by the above reference was argued before a Full Bench, consisting of WESTROPP, C.J., GIBBS, LLOYD, MELVILL, and KEMBALL, JJ., on the 5th February 1872.

Shántárám Náráyan for the special appellant.

Bhairavnáth Mangesh for the special respondent.

PER CURIAM:—We are of opinion that in this case the question referred must be answered in the negative. The plaintiff has sued on a document which the Court below has believed to be a forgery. The general rule is that a party must be limited to the case which he puts forward in his plaint. He may indeed, from the commencement of the suit, put forward in his plaint an alternative case, and thus the defendant will have notice that he has more than one case to meet and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such order as may to it seem just, regarding the adjournment of the hearing and costs. But, as a general rule, a plaintiff must abide by his plaint. The adoption by the Courts of a general principle of decision other

than this would encourage perjury and forgery. Our view is supported by the observations of Sir B. Peacock in *Narinee Dassee* v. *Nurrohury Mohonto*, Marshall, Calc. R. 70, quoted in pp. 78, 79 of Broughton's Civil Procedure Code, 4th edition, and other cases there mentioned, and *Govind Rámchandra* v. *Shekh Ahmed* (e).

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 414 *of* 1871.

Feb. 15.

CHAKU MODAN ISA'NA'................. *Appellant.*
DULLABHI DWA'RKA'.................... *Respondent.*

Mesne Profits—Interest on Mesne Profits.

In a suit for mesne profits (not being a suit for land and its mesne profits) interest on mesne profits cannot be recovered.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge of Ahmadabad, amending the decree of the Subordinate Judge of Dhandúka.

The facts appear from the judgment of the Court.

The appeal was heard by WESTROPP, C.J., and LLOYD, J., on the 12th of February 1872.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Nagindás Tulsidás for the respondent.

Cur. adv. vult.

WESTROPP, C.J.:—The defendant Chaku's grandfather, who was originally the owner of a field, mortgaged it in A.D. 1812 to Karsan Ranchhod and another. The plaintiff's father, Dwárká, purchased the mortgagees' interest and became transferee of the mortgage on the 22nd August 1853, but permitted the original mortgagees to remain in possession of the field. About the 4th of June 1859, the defendant, Chaku, who had succeeded to the mortgagor's interest in the field, although aware of the transfer of the mortgage to Dwárká, paid off the money due upon the mortgage to

(e) 5 Bom. H. C. Rep. A. C. J. 133.