APPELLATE CIVIL.

Before Chatterjea and Cuming JJ.

1921

Aug. 22.

PANNA LAL BISWAS

v.

PANCHU RUIDAS.*

Possession, suit for—Dispossession of plaintiff's land by defendant,—Attachment thereof by Magistrate, subsequently, effect of,—Continuing wrong, —Title—Specific Relief Act (I of 1877) s. 42,—Limitation,—Limitation Act (IX of 1908) s. 23, Sch. I, Arts. 120, 142—Criminal Procedure Code (Act V of 1898) s. 146.

Where the plaintiff had been dispossessed about two months before the date of attachment of the land (in suit) by the Magistrate under section 146 of the Code of Criminal Procedure, in a suit brought by the plaintiff more than 12 years after the dispossession by the defendant for recovery of possession thereof :—

Held, that the defendant's possession was determined upon the Magistrate taking possession under the attachment, as the possession of the Magistrate was in law the possession of the true owner, in other words, the plaintiff must be taken to have been restored to possession constructively on the date of the attachment. He therefore got a fresh starting point and the case could be treated as one of continuing wrong under section 23 of the Limitation Act.

Secretary of State v. *Krishnamoni Gupta* (1), and *Brojendra Kishore Roy Chowdhury* v. *Sarojini Roy* (2) followed.

Held, also, that in *Deo Narain's Case* (3) the effect of the attachment upon the question of possession, so far as the true owner was concerned, did not appear to have been considered.

Deo Narain Chowdhury v. *C. R. H. Webb* (3) distinguished.

* Appeal from Appellate Decree, No. 2417 of 1919, against the decree of Paresh Nath Ray Chowdhury, Additional District Judge of 24-Parganas, dated Aug. 9, 1919, affirming the decree of Kumud Kanta Sen, Munsif of Barasat, dated July 31, 1918.

(1) (1902) I. L. R. 29 Calc. 518. (2) (1915) 20 C. W. N. 481, 484.
(3) (1900) I. L. R. 28 Calc. 86.

Held, further, that the property being in legal custody for the benefit of the true owner a suit for recovery of possession under the above circumstances was to be treated as one for declaration of title under section 42 of the Specific Relief Act, and article 120 of the 1st schedule of the Limitation Act (and not article 142) was applicable.

Rajah of Venkatagiri v. *Isakapalli Subbiah* (1), *Brojendra Kishore Roy Chowdhury* v. *Sarojini Roy* (2), *Beni Prasad* v. *Shahzada Ojha* (3), *Karan Singh* v. *Bakar Ali Khan* (4) and *Khagendra Narain Chowdhury* v. *Matangini Debi* (5) referred to.

SECOND APPEAL by Panna Lal Biswas, the plaintiff.

The facts are briefly as follows :—In April 1904 the plaintiff had been dispossessed of the lands in suit, which on 10th June 1904 were subsequently attached by the Magistrate under section 146 of the Code of Criminal Procedure in consequence of disputes between the plaintiff's predecessor and the defendant. In 1904 the plaintiff's mother had brought a suit for declaration of her title to the lands now in suit, but it was dismissed as she was really *benamidar* for her husband who in 1907 also brought a suit which was withdrawn with liberty to bring a fresh suit. Accordingly, on 2nd May 1916, the plaintiff instituted the present suit for recovery of possession of the lands attached by the Magistrate, stating that the cause of action had arisen on the 10th June 1904, *i. e.*, the date of attachment. The trial Court held that the plaintiff had been dispossessed in April 1904 and that he could not get a fresh start for limitation from the date of attachment and dismissed the suit as time-barred. On appeal, that decision was confirmed. Thereupon the plaintiff preferred this second appeal to the High Court urging that his suit was not really barred by limitation.

(1) (1902) I. L. R. 26 Mad. 410.
(2) (1915) 20 C. W. N. 481, 484.
(3) (1905) I. L. R. 32 Calc. 856.
(4) (1882) I. L. R. 5 All. 1.
(5) (1890) I. L. R. 17 Calc. 814.

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Dr. Jadu Nath Kanjilal, for the appellant.

Babu Trailakya Nath Ghose and *Babu Jatindra Mohan Ghose*, for the respondent.

Cur. adv. vult.

CHATTERJEA J. This appeal arises out of a suit for declaration of the plaintiff's title to the land in dispute, and for recovery of possession of the same with mesne profits.

It appears that in consequence of disputes between the plaintiff's predecessor and the defendant the land was attached under the provisions of section 146 of the Criminal Procedure Code on the 10th June 1904. The plaintiff's mother brought a suit in 1904 for declaration of title to the land, but that was dismissed on the ground that she was *benamidar* for her husband. The plaintiff's father subsequently brought a suit in 1907, but it was withdrawn with liberty to bring a fresh suit. The plaintiff then brought the present suit on the 2nd May 1916 alleging that the cause of action arose on the 10th June 1904, the date of the attachment.

It was found by the Court of first instance that plaintiff had proved his title to the land, but that he was dispossessed in April 1904, *i.e.*, some time before the date of attachment by the Criminal Court under section 146 and that he could not get a fresh start for limitation from the date of attachment and accordingly dismissed the suit on the ground that it was barred by limitation. On appeal also the learned Subordinate Judge held that the suit was barred by limitation.

It is contended on behalf of the plaintiff appellant that the plaintiff having been found to have title to the land, the legal possession of the land must be taken to have been with him during the time the land was in the possession of the Magistrate and that therefore the suit was not barred by limitation.

The suit as framed was one for recovery of possession. There is some divergence of opinion upon the question whether such a suit is one for possession or for a mere declaration. The Allahabad High Court in *Goswami Ranchor Lalji* v. *Sri Girdhariji* (1) held that it was the former and therefore governed by the 12 years' rule of limitation. In *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2), it was held dissenting from the above view that the suit was one for declaration and governed by Article 120 and further that there was no continuing wrong. In our Court also, in the case of *Brojendra Kishore Roy Chowdhury* v. *Sarojini Roy* (3), it was held that the actual possession being with the Magistrate and not with the defendant, the suit could not be treated as a suit for possession, and was not governed by Article 142 of the Limitation Act, and must be treated as one for declaration of title under section 42 of the Specific Relief Act. The learned Judges were of opinion that, although the suit was brought more than six years after the attachment, the case could aptly be treated as one of continuing wrong within the meaning of section 23 of the Limitation Act, and was not therefore barred.

We agree with the view that the suit though framed as a suit for possession cannot be treated as such, because the possession is not with the defendant but with the Magistrate who is not and cannot be a party to the suit. The Article therefore applicable to the suit is Article 120 of the Limitation Act. Then the question is whether the case can be treated as one of continuing wrong within the meaning of section 23. In *Brojendra Kishore's Case* (3), it was so treated but there the plaintiff was deprived of the enjoyment of the property by the defendant's attempted

(1) (1897) I. L. R. 20 All. 120. (2) (1902) I. L. R. 26 Mad. 410.
(3) (1915) 20 C. W. N. 481, 484.

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interference with his possession in consequence of which the Magistrate intervened and attached it, and there was a continuing wrong from the date of the attachment. There was in that case no dispossession prior to the attachment by the Magistrate, and the cause of action might be said to have accrued from day to day commencing from the date of the attachment. In the present case the plaintiff was dispossessed in April, 1904, *i.e.*, about two months before the date of attachment which took place on the 10th June. 1904. The cause of action, therefore, arose in April, 1904, and the suit was brought not only more than 6 years after but 12 years after that date. Unless therefore the plaintiff acquired a fresh starting point from the date of attachment the suit would be barred under Article 120 and even under Article 142.

The position of the Magistrate no doubt was that of a stake holder [see *Khagendra Narain Chowdhury* v. *Matangini Debi* (1)], and during the continuance of the attachment the property was in legal custody which must be held to be for the benefit of the true owner [see *Beni Prasad* v. *Shahzada Ojha* (2), and *Karan Singh* v. *Bakar Ali Khan* (3)]. The question, however, is what was the effect of the attachment so far as the possession of the land was concerned. In the case of *Raja Venkatagiri* v. *Isakapalli* (4), it was held that "for purposes of limitation the seizin or legal "possession will during the attachment be in the true "owner and the attachment by the Magistrate will not "amount either to dispossession of the owner or to "his discontinuing possession." In the present case, however, as stated above the plaintiff, the true owner, was dispossessed of the land before the attachment. Limitation having commenced from the date of such

(1) (1890) I. L. R. 17 Calc. 814.
(2) (1905) I. L. R. 32 Calc. 856.
(3) (1882) I. L. R. 5 All. 1.
(4) (1902) I. L. R. 26 Mad. 410.

dispossession the fact of attachment would not give him a fresh start unless it had the effect of determining the defendant's possession.

In the case of *Ramaswamy Ayyar* v. *Muthuswamy Ayyar* (1), it was held that where property is seized by a Magistrate the property passes into legal custody and such custody is for the benefit of the rightful owner. It was further held that time begins to run against such owner only when by an erroneous order of the Magistrate the property is delivered to some other persons, and it is so even when such other person had been in wrongful possession previous to the seizure by the Magistrate. In that case the property seized was paddy and the Magistrate made it over to the other party. We refer to the case for showing that notwithstanding the defendant's wrongful possession previous to the seizure of the Magistrate it was held that the possession of the Magistrate was for the benefit of the rightful owner and that a fresh cause of action arose when the property was delivered to the defendant by an erroneous order of the Magistrate.

As pointed out in *Agency Company* v. *Short* (2), if a person enters upon the land of another and holds possession for a time and then without having acquired title under the statute, abandons possession the rightful owner, on the abandonment is in the same position in all respect as he was before the intrusion took place. Here there was no abandonment. Possession was taken out of him by the Magistrate who held it for the true owner. But at the date of the attachment the plaintiff was out of possession only for about two months, he had, therefore, a subsisting title at that time, and if the Magistrate's possession was constructive possession of the true owner, the case might

(1) (1906) I. L. R. 30 Mad. 12. (2) (1888) 13 App. Cas. 793.

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come within the principle of the *Secretary of State* v. *Krishnamoni Gupta* (1), where it was held that dispossession by the *vis major* of floods had the same effect as voluntary abandonment. If the possession of the Magistrate was in law the possession of the true owner, as we think it was, the defendant's possession was determined upon the Magistrate's taking possession under the attachment, in other words, the plaintiff must be taken to have been restored to possession constructively on the date of the attachment. He, therefore, got a fresh starting point, and that being so, the case would fall within the principle of *Brojendra Kishore's Case* (2) and the case can be treated as one of continuing wrong under section 23 of the Limitation Act.

In the case of *Deo Narain Chowdhury* v. *C. R. H. Webb* (3), it was no doubt held that limitation having already commenced to run from the date of actual dispossession, the plaintiff could not have a fresh start of limitation from the date of the subsequent attachment by the Criminal Court, but the effect of the attachment upon the question of possession, so far as the true owner is concerned which was dealt with in the cases cited above, does not appear to have been considered by the learned Judges.

The result is that the decrees of the Courts below are set aside, and the suit is decreed to this extent that plaintiff's title to the land will be declared. Regard being had, however, to the frame of the plaint, we direct that each party bear its own costs throughout.

CUMING J. agreed.

G. S. *Appeal allowed.*

(1) (1902) I. L. R. 29 Calc. 518. (2) (1915) 20 C. W. N. 481, 484.
(3) (1903) I. L. R. 28 Calc. 86.