APPELLATE CIVIL.

Before C. C. Ghose and Chotzner JJ.

ATARMOYI DASI

v.

RAMANANDA SEN CHOWDHURY.*

1922

Dec. 5.

Limitation—Regular title suit, if must be brought within a year of an order under O. XXI, r. 100 of the Code—Limitation Act (IX of 1908), Sch. I, Art. 11A.

Where a person in actual possession of a property makes an application purporting to be one under Order XXI, rule 100 of the Code of Civil Procedure for recovery of possession of the property from one who has obtained symbolical possession of that property after purchase in execution of a decree, and the application was dismissed on the ground that his possession had not been disturbed, that application was one which did not come within the purview of Order XXI, rule 100. It is only when his possession is actually disturbed, *e.g.*, by the person who obtained only symbolical possession taking away crops, that time begins to run against him for dispossession, and the failure to bring a suit for establishment of title and for recovery of possession within a year of the order passed on the application under Order XXI, rule 100, as contemplated by Article 11A of the Limitation Act, does not bar the suit by limitation.

SECOND APPEAL by Atarmoyi Dasi, widow of Pitambar Dey, the defendant No. 1.

The facts of the case are briefly these :

The plaintiff instituted the suit, out of which this appeal arose, for recovery of possession of land, on the allegation that his possession had been disturbed by defendants Nos. 1 and 2 taking away crops grown on the land by defendant No. 3, the *bhag*-tenant under

* Appeal from Appellate Decree, No. 1718 of 1920, against the decree of Nagendra Nath Chatterjee, Subordinate Judge of Bankura, dated June 9, 1920, reversing the decree of Ashwini Kumar Das, Munsif of that place, dated Jan. 28, 1920.

1922

ATARMOYI DASI v. RAMANANDA SEN CHOWDHURY.

the plaintiff. Defendants Nos. 1 and 2 resisted the suit mainly on the grounds that the plaintiff had no title and that the suit was barred under Article 11A of the first Schedule to the Limitation Act.

The primary Court dismissed the suit, finding against the plaintiff on both points. On appeal, the Subordinate Judge reversed the decree of the Munsif and decreed the suit.

Thereupon the defendant No. 1 preferred this appeal to the High Court.

Dr. Dwarkanath Mitra (with him *Babu Pramathanath Bandopadhyaya*), for the appellant. I contend that the suit is barred by limitation under Article 11A of the Limitation Act, seeing that it was not instituted within one year of the order under Order XXI, rule 100. The Court had jurisdiction to pass the order and plaintiff cannot get a relief until the order is set aside: *Nirode Barani Dasi* v. *Manindra Narayan Chandra* (1). The cases of *Umacharan Chatterjee* (2) and *Nagendra Lal Chowdhury* (3) relied on by the Court of appeal below are distinguishable, as the orders passed in those cases were on default. Next point I take is that the Court has made a new case for the plaintiff in holding that plaintiff was entitled to succeed on the basis of settlement, seeing that the case which he made in the claim case was that he claimed title on the basis of the auction purchase. This is a defect of procedure which affects the merits of the case: I rely on *Shivabasava* v. *Sangappa* (4).

Mr. B. K. Chaudhuri (with him *Babu Gopendranath Das*), for the respondents. I contend that my cause of action arose from the dispossession and not

(1) (1922) 26 C. W. N. 853.
(2) (1913) 18 C. W. N. 770.
(3) (1918) I. L. R. 45 Calc. 785.
(4) (1904) I. L. R. 29 Bom. 1 L. R. 31 I. A. 154.

from the date of the order under Order XXI, rule 100. Besides, the said order was made without jurisdiction, as my client was found to be in possession and it was not necessary for him to proceed to an investigation on the merits under Order XXI, rule 100. With regard to the second point, the Court has not made a new case. He set up both titles in the plaint. It is true the title set up in the claim case was different.

Dr. Mitra, in reply. The order under Order XXI, rule 100, was one made with jurisdiction. It was within the competency of the Court to make it. The order might have been erroneous: see *Malkarjun* v. *Narhari* (1). See also *Satindra Nath Banerjee* v. *Shiva Prosad Bhakat* (2). If the order was with jurisdiction, Article 11A surely applies. The plaintiff cannot avoid the Statute of Limitation by dating the cause of action at a subsequent period; if he is already barred by the one year's rule, he cannot fall back on a subsequent dispossession and thereby avoid the statute.

GHOSE AND CHOTZNER JJ. In this case we have had the advantage of hearing a learned and elaborate argument by Dr. Mitra, but after giving our best and anxious consideration to his argument, we have come to the conclusion that this second appeal must be dismissed. This appeal has arisen out of a suit for establishment of the plaintiff's title, for recovery of possession and for damages and for mesne profits. The circumstances which gave rise to the suit, out of which this appeal has arisen, are, briefly stated, these. The appellant No. 1, Atarmoyi, purchased a plot of land about 1½ or 2 bighas in area in execution of a decree against one Kandarpa Chaudhuri and three

(1) (1900) I. L. R. 25 Bom 337; (2) (1921) 26 C. W. N. 126. L. R. 27 I. A. 216.

1922

ATARMOYI DASI v. RAMANANDA SEN CHOWDHURY.

others in February, 1913. She obtained symbolical possession thereafter on the 12th August, 1914. The respondent Ramananda Sen Chaudhuri filed, on the 12th September, 1914, an application purporting to be one under Order XXI, rule 100, of the Code of Civil Procedure, for recovery of possession of the property which had been sold in execution and which had been purchased by Sreemati Atarmoyi. That application has been tendered in evidence and is exhibit (F) in this case. The learned Munsif who heard that application came to the conclusion that inasmuch as symbolical possession had only been given to Sreemati Atarmoyi and inasmuch as the respondent Ramananda Sen had not been disturbed in his actual possession of the property, the application was one which failed and he dismissed the application. That was on the 17th April, 1915. In July, 1915, the present appellant brought a suit against the respondent Ramananda for recovery of damages on account of crops grown on the disputed land having been taken away. She lost the suit after contest on the 20th September, 1915. Thereafter on the 16th July, 1917, the present respondent filed the present suit alleging that he had in 1868 taken settlement of this property and that he and his four brothers were in joint possession thereof, that his brothers had separated and divided the property more than 12 years before the suit, that the property in question fell to the share of the present respondent, that he had been in exclusive possession thereof and that the crops grown on the land had been taken away by Sreemati Atarmoyi and that his possession had thereby been disturbed. Two points were discussed in the Courts below, namely, whether the present respondent had got his alleged right to the land in suit and whether his suit was barred by the Statute of Limitation. So far as the last question is

concerned, the lower Appellate Court has held that the suit was not barred by the Statute of Limitation and, in particular, was not barred under Article 11A of the first Schedule of the Indian Limitation Act. So far as the first question is concerned, it has been found by the lower Appellate Court that the plaintiff had established his title to the land in suit. It is argued, however, by Dr. Mitra that on the question of the title to the land a decree has been made by the lower Appellate Court on a case which was not set up by the present respondent, that is to say, on a case which was not set up by the respondent, when he came and applied under Order XXI, rule 100 of the Code of Civil Procedure. As regards the question of limitation, Dr. Mitra has argued that Exhibit (F) and the order thereon taken together conclusively show that the application which the present respondent made under Order XXI, rule 100 was decided against him and that therefore it was his clear duty if he wanted to contest the validity of the order under Order XXI, rule 100 to come in with a proper plaint in respect thereof within the period mentioned in Article 11A of the first schedule of the Limitation Act, and that the present respondent not having done so, he cannot be heard now to say that his suit is not barred by the Statute of Limitation, nor should he be allowed to fall back on his argument that the subsequent dispossession gave a fresh start to the period of limitation for this class of suits. The argument is further put in this way, namely, that the Court which decided the case under Order XXI, rule 100 had an undoubted jurisdiction to decide the matter, the grounds of the decision being matters with which we are not concerned, and that the fact that the decision went against the present respondent is sufficient for the purpose of establishing this contention, that if he wanted to get

1922

ATARMOYI DASI v. RAMANANDA SEN CHOWDHURY.

rid of the effect of the decision he should have come within the period mentioned in Article 11A of the first schedule of the Limitation Act. We have examined the record for ourselves and we are satisfied that although it is undoubtedly true that a person claiming to get rid of the effect of an order under Order XXI, rule 100 is bound to bring his suit for such a purpose within the period mentioned in Article 11A of the first Schedule of the Limitation Act, the present suit is not one of that nature, for the cause of action which is alleged by the present respondent in his plaint is a cause of action which has arisen subsequent to the date of the order made on the application under Order XXI, rule 100. The present respondent's application under Order XXI, rule 100 was dismissed on the ground that inasmuch as his possession had not been disturbed, the application was one which did not come within the purview of Order XXI, rule 100.

It is the question of possession with which the present respondent was concerned and he having remained in possession down to the date when his crops were taken away as alleged by him in his plaint, he was not under any necessity, as far as we can see, to go to a Civil Court for the useless formality of asking for possession of the property in question when as a matter of fact he remained in possession thereof. It is the subsequent dispossession which arose by reason of the present appellant taking away the crops grown on the property by the present respondent which has given rise to the cause of action alleged in the plaint. That cause of action, on the findings arrived at by the lower Appellate Court, the present respondent must be taken to have established to the satisfaction of the Court. In our opinion, this suit is not one for getting rid of the effect of an adverse order under Order XXI, rule 100. Therefore, in our opinion, there

is no substance, in the contention which has been put forward before us that the present suit is barred by the Statute of Limitation. We think the view taken by the lower Appellate Court is correct and so far as that point is concerned it fails.

As regards the second question, namely, whether a decree has been made on an allegation which was not set up, it is necessary to examine the plaint in the suit. As has been stated above, the cause of action which is alleged in the present plaint is that the plaintiff was allotted a certain share in the property in suit, that the plaintiff remained in possession thereof, that the plaintiff grew crops on the land, that these crops were taken away by the present appellant and that by the taking away of the crops of the plaintiff by the present appellant dispossession has taken place. These allegations we must take, on the judgment of the lower Appellate Court, have been established by the plaintiff to the satisfaction of the lower Appellate Court which was the final Court of facts. In these circumstances, it is difficult to say that relief has been granted by the lower Appellate Court on a state of facts different from the pleadings with which the plaintiff came to Court.

In our opinion this point also fails and this appeal must be dismissed with costs.

Appeal dismissed.

S. M.