APPELLATE CIVIL.

Before Cuming and Mallik JJ.

GAYA PRASAD KARAN

v.

BAKYAMANI DASI.*

1928.

Dec. 18.

Dispossession—What constitutes dispossession—Khas possession—Hostile title—Entry as owner—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144.

The dispossession, contemplated in Article 142 of the first schedule to the Limitation Act, refers to actual physical dispossession; and there is no dispossession under that Article until some one else takes *khas* possession. It is such dispossession when a person comes in and drives out the other from possession.

Entry upon land, in order to be an assertion of hostile title, must be an entry as an owner.

SECOND APPEAL by Gaya Prasad Karan and others, defendants.

This appeal arose out of a suit for declaration of the plaintiff's title to a one-third share of the properties in suit and for recovery of joint possession thereof. The facts of this case appear fully in the following judgment of Mr. Durno, I.C.S., passed on appeal:—

* * * * * *

"Plaintiff alleges that she used to get various usufructuary dues, "paddy rents and religious duties, from defendants Nos. 1 and 2 "and so she has been in joint possession. The plaintiff is said to "have been dispossessed in Baisakh, 1330, by defendants Nos. 1 and "2 acting in collusion with the other defendants. * * * * "The first point raised by appellants is the question of limitation, "which was made issue No. 3 by the learned Sub-Judge and who found "that the suit is in time. Appellants contend that section 142 of the "Limitation Act and not section 144 is applicable. The learned pleader "for the appellants quotes * * * *Rakhal Chandra Ghose* v. *Durga-"das Samanta* (1) and *Suresh Chandra Mukherjee* v. *Shiti Kanta "Banerjee* (2) to prove that in suits for recovery of possession

*Appeal from Appellate Decree, No. 1106 of 1927, against the decree of L. G. Durno, Additional District Judge of Midnapur, dated Dec. 23, 1926, confirming the decree of Nani Gopal Mukherji, Subordinate Judge of Midnapur, dated Nov. 3, 1925.

(1) (1922) 26 C. W. N. 724. (2) (1924) I. L. R. 51 Calc. 669.

"after dispossession, section 142 is applicable and that the onus lies "on plaintiff to prove possession within 12 years. * * * * "There is nothing to show that plaintiff ever knew of the execution "of the *kabalas* in 1316 with respect to these land and *mere possession* "*of the transferred lands apart from the knowledge of the transfers* "*would not amount to notice of adverse possession, even if brought to* "*plaintiff's notice.* Under these circumstances, I find that the "learned Sub-Judge was correct in taking that section 144 was "applicable and that the suit was not barred. * * * * * "I find that there was no surrender. As to the expulsion, the "learned Sub-Judge has sufficiently shown the absurd contradictions "made by witnesses. I find there was no expulsion. I find that the "order of the learned Sub-Judge is correct and the suit will be "decreed and the plaintiff's title be declared and she will get joint "possession as prayed for. The appeal is, accordingly, dismissed."

Being dissatisfied with this decision, the defendants preferred a Second Appeal to the High Court.

Dr. Saratchandra Basak and *Mr. Gopendranath Das*, for the appellants.

Mr. Brajalal Chakravarti and *Mr. Sarojekumar Maiti*, for the respondent.

Cur. adv. vult.

MALLIK J. The facts of the case which have given rise to this appeal are briefly these.

One Kashinath was the owner of some property. He died leaving three sons—defendants Nos. 1 and 2 and Trailokya, the husband of the plaintiff. Trailokya died when the plaintiff was a little girl of 14. After Trailokya's death and after defendants Nos. 1 and 2 had separated in mess, plaintiff began residing for most of her time at her father's house and would occasionally come to live in the house of her father-in-law. While in her father-in-law's house, she was well cared for by her brothers-in-law and maintained out of the usufruct of the *ejmali* property, and, while residing at her fathers place, she was given, at times, some profits by defendants Nos. 1 and 2 for her necessary expenses, and she used to get also, according to the direction of defendants Nos. 1 and 2, some profits from the *bhagchasis* of some properties other than those in suit. Plaintiff continued to be in possession of the *ejmali* property in that manner until 1329 B. S., when defendants

1928.

GAYA PRASAD KARAN v. BAKYAMANI DASI.

MALLIK J.

Nos. 1 and 2 began to ill-treat her and when she, with her father's help, attempted to possess separately her one-third share in the property, the defendants dispossessed her in Jaistha, 1330, by refusing to allow plaintiff's father to possess the same and denying the plaintiff's title. Thereafter, the plaintiff gradually came to know that defendants Nos. 1 and 2 had executed *kabalas* in favour of defendants Nos. 3 to 14 in respect of the property in suit. On these facts, the plaintiff, who is a *pardanashin* Hindu lady, brought the suit for a declaration of her title to a third share in the property and for joint possession of the same.

The defence *inter alia* was that the plaintiff and defendants Nos. 1 and 2 were completely separate in 1313, that, in 1313, plaintiff surrendered the property allotted to her to defendants Nos. 1 and 2, but taking advantage of the absence of a deed of surrender, she again claimed her share in 1315, but was driven out by defendants Nos. 1 and 2. The plea of limitation was another point raised by the defence. This defence, however, was negatived by both the courts below, and both the courts below, holding that the plaintiff's suit was in time, gave her a decree. Defendants Nos. 3 to 11 have appealed to this Court.

The only point in controversy before us has been on the question of limitation. Dr. Basak, for the appellants, contended that, as the plaintiff had come to court with a story of possession and subsequent dispossession, Article 142 of the Limitation Act was the Article applicable to the case and the lower courts were wrong when they held that it was not applicable. I do not think this contention is sound. Plaintiff, no doubt, in her plaint, used the word " dispossession " (*bedakhal*), but her story was not a story of dispossession of the kind as is contemplated in Article 142. Dispossession contemplated in Article 142 refers to actual physical dispossession, and there is no dispossession under that Article until some one else takes *khas* possession. Dispossession is, when a

person comes in and drives out the other from possession. In the present case, as would appear from the facts of the case set out before, the only dispossession alleged by the plaintiff was in the way that the plaintiff's father was resisted in his attempts to possess separately the one-third share of the plaintiff in the property. This dispossession, if it was any dispossession at all, was not, in my judgment, such dispossession as is contemplated by Article 142. I am, therefore, of opinion, that Article 142 of the Limitation Act was not the Article applicable to the present case.

If Article 142 does not apply to the present case —and I have held that it does not apply—the claim of the plaintiff, who was undeniably the one-third co-sharer of the property, to have a declaration of her title to that extent and to have joint possession of the same could be defeated only if the defendants had succeeded in establishing their adverse possession for 12 years. But herein the defendants, in my opinion, were wholly unsuccessful. There was no assertion by them of any hostile title to the plaintiff, and the only thing that there is, on the point in the case, is that defendants Nos. 1 and 2, the plaintiff's co-sharers through whom the plaintiff had been getting her share of the property, began to ill-treat her in 1329 and the attempt of her father to possess separately the plaintiff's one-third share in the property was resisted by the defendants in Jaistha, 1330. Dr. Basak, for the appellants, contended that the mere fact that defendants Nos. 3 to 14 had entered upon the property and were in possession of the same was an assertion of hostile title. But such entry upon land, in order to be an assertion of hostile title, must be an entry as an owner. In the present case, there is, in the first place, nothing to show that the plaintiff was, until a recent date, even aware of the entry of defendants Nos. 3 to 14 upon the land and even when the plaintiff came to know that defendants Nos. 3 to 14 were holding the land, it was quite possible, for all that we know, that she took them

1928.

GAYA PRASAD KARAN v. BAKYAMANI DASI.

MALLIK J.

to be only *bhagchasis* under her co-sharers, defendants Nos. 1 and 2. I would, therefore, hold that there was no such adverse possession by the defendants in the present case as could defeat the lawful claim of the plaintiff to a declaration of her one-third share in the property in the suit and to joint possession of the same.

The lower appellate court, in my judgment, was in these circumstances, right in giving a decree to the plaintiff.

The appeal is, accordingly, dismissed with costs.

The cross-objection, which is not pressed, is also dismissed, but without costs.

CUMING J. I agree.

Appeal dismissed.

G. S.