

APPELLATE CIVIL.

Before Judge J.

SATISHCHANDRA DE

v.

MADANMOHAN JATI*.

1930

Feb. 11.

Ejection—Trespasser—Plaintiffs' possession—Evidence of title.

In a suit for ejection by the plaintiffs, who had been in peaceful possession of the lands in suit before being dispossessed by the defendants, who were trespassers,

held, on appeal, that the plaintiffs' possession was *prima facie* evidence of title, and that the plaintiffs were entitled to recover the land from the defendants, who were mere trespassers.

SECOND APPEAL by the defendants.

This suit for ejection was instituted by four plaintiffs, of whom plaintiffs Nos. 3 and 4 were respectively the husbands of plaintiffs Nos. 1 and 2. The land in suit was in the possession of the plaintiffs. Plaintiffs Nos. 3 and 4 claimed that they and their forefathers had been in possession as tenants under co-sharer *málíks*, one of whom, Tarapada Mukherji, admitted the tenancy. The plaintiffs, however, did not prove that they had paid any rent and no *páttá* or *kabuliyat* was forthcoming. The plaintiffs Nos. 1 and 2 claimed to be the purchasers of the 16 annas *málíki* right from Tarapada. Tarapada was only an 1/5 owner of the *málíki* right and purported to execute a *kabálatá* for the 16 annas share. The other co-sharer *málíks* did not object to the transfer, but acquiesced in it. The four plaintiffs were dispossessed by the defendants in 1923. Thereafter, in 1925 the plaintiffs brought this suit. The defendants denied the plaintiffs' title, and claimed to hold as purchasers from the heir of one Bhulu Dasi, who they allege was the tenant under Tarapada and his co-sharers.

*Appeal from Appellate Decree, No. 2842 of 1927, against the decree of Bimalchandra Chatterji, 1st Subordinate Judge of Howrah, dated Sept. 1, 1927, affirming the decree of G. K. Ghosh, 2nd Munsif of Howrah, dated Feb. 28, 1925.

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The learned Munsif found against the defendants and decreed the suit; against that decree defendant No. 1 appealed to the Subordinate Judge and the appeal was dismissed. On that, this Second Appeal was filed before the High Court.

Jadunath Kanjilal and *Subodhchandra Dutta* for the appellants.

Hiralal Chakravarti for the respondents.

Cur. adv. vult.

PAGE J. In my opinion this appeal is concluded against the appellants by the findings of fact.

The suit is to recover possession of certain lands from the appellants, who are mere trespassers.

It has been found that the plaintiffs and their predecessors, for a very long time, had been in possession of the lands in suit, with the assent of the whole body of *mâlîks*, before they were dispossessed by the appellants in 1923. It follows that "their possession was lawfully attained, in this sense, that "it was not procured by force or fraud, but peaceably, "no one interested opposing;" see per Lord Watson in *Sundar v. Parbati* (1), and there was an issue raised and evidence upon which this finding could reasonably have been based.

In these circumstances, it matters not, for the purposes of this suit, whether the plaintiffs' possession can be ascribed to a tenancy or to a transfer of the *mâlîki* interest, for the defendant appellants, who were trespassers, were not entitled to dispossess the plaintiffs of the lands in 1923, and the plaintiffs, who were found to be in possession within 12 years of the suit, are entitled to recover the entirety of the lands from the appellants upon the footing that they were in peaceable possession of the premises before the defendants ousted them therefrom.

Mohabeer Pershad Singh v. Mohabeer Singh (1), *Currimbhoy & Co., Ltd. v. L. A. Creet* (2), *Iachho v. Har Sahai* (3), *Sundar v. Parbati* (4), *Ismail Ariff v. Mahomed Ghous* (5), *Pemraj Bhavaniram v. Narayan Shivaram Khisti* (6), *Krishnarav Yashvant v. Vasudev Apaji Ghotikar* (7), *Shyama Charan Ray v. Surya Kanta Acharya* (8), *Narayana Row v. Dharmachar* (9), *Banka Behary Christian v. Raj Chandra Pal* (10), *Sahodra Kuer v. Gobardhan Tewari* (11), *Asher v. Whitlock* (12). See also Pollock and Wright on Possession, pages 22 and 93. No doubt there are authorities, among them *Nisa Chand Gaita v. Kanchiram Bagani* (13), to the effect that mere possession for less than 12 years would not entitle the person dispossessed by a trespasser to recover possession otherwise than in the manner provided by section 9 of the Specific Relief Act (I of 1877). But in numerous decisions it has been pointed out that these authorities are based on what I also, with all due deference to the learned Judges who decided them, conceive to be a misapprehension of the judgment of the Judicial Committee in *Wise v. Ameerunnissa Khatoon* (14), and if the only evidence of the plaintiff's title consisted of their peaceable possession, though unexplained, I should hold without hesitation that the plaintiffs were entitled to recover possession against the defendants who are trespassers.

In suits under section 9 of the Specific Relief Act, questions of title are irrelevant, for, like the old assize of novel disseizin in Plantagenet times, section 9 was enacted to afford a summary remedy against persons who had taken the law into their own hands and had ejected those in possession of land otherwise than through process of law.

(1) (1851) I. L. R. 7 Calc. 591.

(2) (1929) I. L. R. 57 Calc. 170.

(3) (1887) I. L. R. 12 All. 46.

(4) (1889) I. L. R. 12 All. 51 ;
L. R. 16 I. A. 186.

(5) (1893) I. L. R. 20 Calc. 834.

(6) (1882) I. L. R. 6 Bom. 215.

(7) (1884) I. L. R. 8 Bom. 371.

(8) (1910) 15 C. W. N. 163.

(9) (1902) I. L. R. 26 Mad. 514.

(10) (1909) 14 C. W. N. 141.

(11) (1917) 2 Pat. L. J. 280.

(12) (1865) L. R. 1 Q. B. L.

(13) (1899) I. L. R. 26 Calc. 579.

(14) (1879) L. R. 7 I. A. 73.

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It appears, however, that the possession of the plaintiffs Nos. 3 and 4 was admitted by Tarapada, one of the co-sharer *mâlîks*, to be that of tenants under him and his co-sharers, and that the transfer of the *mâlîki* interest in the land to plaintiffs Nos. 1 and 2 by Tarapada was assented to by the whole body of co-sharer *mâlîks*.

In these circumstances, I am of opinion that there was evidence from which the lower courts were justified in concluding that the right of the plaintiffs to eject the defendants did not rest merely on bare and unexplained prior possession, but was that the possession of the plaintiffs in virtue of a title derived from the *mâlîks* of the lands which gave them a right for possession. *Adhar Chandru Pal v. Dibakar Bhuyan* (1). That is sufficient to dispose of this appeal. *Naresh Chandra Basu v. Haydar Sheikh Khan* (2) is not *ad rem*, for in that case the plaintiffs were never in actual possession of the lands in dispute, and it is unnecessary in the present case to consider whether a co-sharer can eject a trespasser from the entirety of the joint lands, see *Currimbhoy & Co., Ltd. v. L. A. Creet* (3). This appeal is dismissed with costs.

Appeal dismissed.

N. G.

(1) (1913) I. L. R. 41 Calc. 394. (2) (1928) 49 C. L. J. 83.

(3) (1929) I. L. R. 57 Calc. 170.