APPELLATE CIVIL.

Before Mallik and Jack JJ.

KIRANCHANDRA RAY.

v.

PRASANNAKUMAR CHAKRABARTI.*

1933
Dec. 21;
1934
Jan. 3,4,8,12,22.

Possessory Suit—Previous possession—Dispossession—Specific Relief Act (I of 1877), s. 9.

Mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under section 9 of the Specific Relief Act.

Purmeshur Chowdhry v. *Brijo Lall Chowdhry* (1), *Nisa Chand Gaita* v. *Kanchiram Bagani* (2) and other cases referred to.

SECOND APPEAL by the plaintiffs.

The material facts of the case and the arguments in the appeal appear from the judgment.

Gunadacharan Sen, *Hemendrachandra Sen* and *Surendranath Basu* (*Senior*) for the appellant.

Radhabinode Pal and *Holiram Deka* for the respondents.

Ramendramohan Majumdar for the Deputy Registrar.

Cur. adv. vult.

MALLIK J. This appeal arises out of a suit for recovery of possession of some lands, about 150 *bighâs* in area, on a declaration of title thereto. The allegations, on which the suit was instituted, were briefly these:

The lands in suit were reformations *in situ* of some lands in the plaintiff's estate *touzi* No. 178 of

*Appeal from Appellate Decree, No. 1479 of 1931, against the decree of P. C. De, District Judge of Jessore, dated Nov. 25, 1930, affirming the decree of Gopalchandra Biswas, Subordinate Judge of Jessore, dated Sep. 20, 1927.

(1) (1889) I. L. R. 17 Calc. 256. (2) (1899) I. L. R. 26 Calc. 579.

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the Jessore Collectorate in villages Sreepur and *britti* Barhdaha, which were on the left bank of the river Kumar, the village Phulbârhi being on the right bank thereof. A diluvion on the left bank of the river began in the year 1893 and the river Kumar began to wash away the lands in Sreepur and *britti* Barhdaha. The diluvion continued till the lands diluviated began to reform on the other side of the river Kumar in 1904 and the lands in suit, which were reformed lands of the plaintiff's estate, became fit for cultivation in 1915-16. In 1918, the plaintiffs settled tenants on the lands and these lands were in the possession of these tenants until they were dispossessed by the defendant in 1919.

The defence was a denial of the plaintiff's story of diluvion and reformation and according to the defendant the lands in suit were the *âsali* lands of *mouzâ* Phulbârhi.

A commissioner was appointed to relay the *thâk* and the revenue-survey and settlement maps and to ascertain whether the lands in suit were originally the *âsali* lands of *mouzâs* Sreepur and *britti* Barhdaha within the plaintiff's estate. The commissioner prepared a map and submitted his report. According to this map and report, the lands in suit were the *âsali* lands of *mouzâs* Sreepur and *britti* Barhdaha. But, in the *mouzâs*, there were some *chaks* also, which were outside the estate of the plaintiffs and which appertained to estates other than the plaintiffs' estate.

The court of first instance, on the basis of the commissioner's map and report, held that the plaintiffs had not succeeded in establishing their title to the land, inasmuch as there was nothing to show that the lands in suit appertained to the plaintiffs' estate and not to the *chaks* lying within the *mouzâs* Sreepur and *britti* Barhdaha and finding also that, although the plaintiffs' suit was not barred by limitation, the lands on reformation were taken possession of by the defendants first and that, after them, the plaintiffs took *kabuliyats* from the tenants,

dismissed the plaintiffs' suit. This decision was affirmed on appeal—the learned District Judge holding that the plaintiffs' title had not been established and that the plaintiffs had failed to prove any possession at all. The plaintiffs are the appellants before us.

The commissioner's map and report, which were accepted as correct by both the courts below, can leave no room for doubt that the lands in suit were within *mouzâs* Sreepur and *britti* Barhdaha. But, as within those two *mouzâs*, there were some *chaks* (appertaining to other estates) besides the estate of the plaintiffs, the lower courts, in my opinion, were perfectly justified in holding that the plaintiffs had failed to prove that the lands in suit were parts of their estate and thus to establish their title to the lands.

Mr. Sen for the appellants contended that, as the defendants, according to the commissioner's map and report, had no title whatsoever to the lands in suit, they were clearly trespassers and the plaintiffs, having had previous possession of the lands, were entitled to a decree for possession against the defendants in the present case. This contention, in my opinion, is wholly untenable. The lower appellate court found the question of possession clearly against the plaintiffs. Mr. Sen contended that this finding was wrong, based as it was on incorrect *data*. He drew our attention to the observation of the learned District Judge at page 16 of the paper-book, where the judge says:

> From the evidence adduced by the defendants, the view is more acceptable that river action was more or less continuous till the source of the river Kumar silted up. Any subsequent river action seems improbable. The plaintiffs' definite allegations, that diluvion took place about 1300 B.S., and the reformation took place in 1321 and the suit lands became culturable in 1323, are improbable and not borne out by evidence.

And contended that there was nothing on the record to show that the source of the river Kumar silted up in such a way as to make it impossible for any river action taking place even during the rainy

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season. That may be so. But it was not on this ground that the lower appellate court found the point of possession against the plaintiffs. The learned judge observed that the *kabuliyats* from the plaintiffs' tenants were obviously unreliable as proving actual possession. It was said that there was nothing so obvious in the case. But, if one would look a little carefully into the *kabuliyats*, one would have no difficulty in holding that the learned District Judge was not unjustified in saying that the documents were obviously unreliable. The *kabuliyats* were all executed only a few days before a criminal case was instituted, in which the plaintiffs' men were convicted for rioting and trespassing, and the documents were all executed within a period of four or five days. The lower appellate court was, therefore, in my judgment, not very wide of the mark when it found that the plaintiffs had had no possession of the lands in suit.

Conceding, for the sake of argument, that the finding of the lower appellate court on the question of possession was not satisfactory and cannot, therefore, be maintained, there would remain, on the question of possession, the finding of the court of first instance. That finding is that when the land reformed, it was the defendants who first possessed it and after them the plaintiffs took *kabuliyats* from the tenants of the disputed land. Mr. Sen contended that this was sufficient for the plaintiffs obtaining a decree for possession and, in support of this contention, he relied on a number of decisions of the Allahabad, Bombay, Madras and Patna High Courts and also, to a certain extent, on some decisions of this High Court. It is well known that, on the point whether a plaintiff can, apart from section 9 of the Specific Relief Act, obtain a decree for possession on previous possession alone, there is a conflict of decisions between the High Courts of Bombay, Allahabad, Madras and Patna, on the one hand, and the High Court of Calcutta, on the other. So far as this High Court is concerned, it is well settled,

by decisions which are binding upon us, that mere previous possession will not entitle a plaintiff to a decree for recovery of possession, except in a suit under section 9 of the Specific Relief Act. [See the cases of *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (1), *Nisa Chand Gaita* v. *Kanchiram Bagani* (2), *Shama Churn Roy* v. *Abdul Kabeer* (3) and *Manik Borai* v. *Bani Charan Mandal* (4)] Mr. Sen wanted to place reliance on three decisions of this Court in *Mohabeer Pershad Singh* v. *Mohabeer Singh* (5), *Banka Behary Christian* v. *Raj Chandra Pal* (6) and *Satishchandra De* v. *Madanmohan Jati* (7) for the proposition that previous possession alone may entitle a plaintiff to obtain a decree for recovery of possession. But, in all these cases, the previous possession had been of a peaceful nature and had been for a long period of time. Peaceful possession for a long period of time may, under certain circumstances, give rise to an inference of title in the plaintiff as against a trespasser and entitle him to obtain a decree for recovery of possession against such a trespasser, who has no right to possession whatsoever. But, in the present case, the plaintiffs' possession, if the plaintiffs had had any possession at all, was not only for a short period of time but was far from peaceful. As observed before, the *kabuliyats* the plaintiffs obtained from the tenants were all executed only a few days before the institution of the criminal proceeding, which resulted in the conviction of the plaintiffs' men. The cases of this High Court relied upon by the learned advocate for the appellants cannot, therefore, be of any avail to them.

As a last resort, Mr. Sen, on behalf of the appellants, while admitting that his clients had been ill-advised by their pleaders in not having made the owners of the *chaks* in *mouzâs* Sreepur and *britti* Barhdaha parties to the suit, suggested that the case

(1) (1889) I. L. R. 17 Calc. 256.
(2) (1899) I. L. R. 26 Calc. 579.
(3) (1898) 3 C. W. N. 158.
(4) (1910) 13 C. L. J. 649.
(5) (1881) I. L. R. 7 Calc. 591.
(6) (1909) 14 C. W. N. 141.
(7) (1930) I. L. R. 58 Calc. 29.

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might be sent back to the court of first instance for a decision, after making the owners of those *chaks* parties in the case, offering at the same time to pay to the respondents all costs incurred by them in the present litigation. Mr. Sen's contention was that it would be in the interest of justice if the case be thus sent back to the first court now. This prayer, however, does not commend itself to me, in view of the fact that it is made at a very late stage of the proceeding. The suit, it appears, was instituted so long ago as 1923 and the prayer, which is made now, is made in this Court for the first time about 10 years after the institution of the suit.

The result is that the appeal fails and it is, accordingly, dismissed with costs.

JACK J. I agree.

Appeal dismissed.

A.K.D.