

PRIVY COUNCIL.

SATISHCHANDRA JOARDAR

v.

BIRENDRANATH RAY.

P. C.*
1929*April 19, 22, 26,*
29; June 6, 7.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Dispossession—Land emerging after diluvion—Constructive possession of owner till dispossession—Evidence of possession—Order for mesne profits—Indian Limitation Act (IX of 1908), Sch. I, Art. 142.

In 1915, the High Court made a decree, declaring the title of the plaintiffs to a plot of land, which had emerged, shortly before 1905, after many years' diluvion. A decree for possession was not made, the High Court finding that, in 1908, when the suit was instituted, there had been no dispossession by the defendants. On June 23, 1917, the plaintiffs sued the same defendants for possession. The defendants contended that the suit was barred by the Indian Limitation Act, 1908, Schedule I, Article 142, as the plaintiffs had been dispossessed by third parties, against whom, on June 27, 1905, the defendants had obtained an order for possession of the plot under a decree ejecting the third parties from a larger area. There was no direct evidence of possession of the plot by the third parties, but the defendants relied upon an order against them for mesne profits based upon the plot having been cultivable in 1904.

Held that the order for mesne profits was not evidence that the third parties cultivated or were in possession of the plot, and that the plaintiffs remained in constructive possession until dispossessed by the defendants, which, by the decree of 1915, took place within twelve years of the present suit; the suit, therefore, was not barred by Article 142.

Decree of the High Court reversed.

APPEAL (No. 69 of 1928) by special leave from a decree of the High Court (March 5, 1926), reversing a decree of the District Judge of Krishnagar (June 30, 1925), which reversed a decree of the Subordinate Judge of Nadiya.

The suit was brought by the appellants on June 23, 1917, against defendants, including the respondent, described as the Natores, for possession of a plot of land of 155 *bighas*, which had emerged, after diluvion, shortly before 1905.

The plot in suit formed part of an extensive *mehal*, which had been diluviated for many years, and had emerged later than the rest of the *mehal*. In a

*Present : Lord Blanesburgh, Lord Tomlin and Sir John Wallis.

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suit commenced in 1897, the Natores had ejected defendants, described as the Tagores, from the *mehal*, and, on June 27, 1905, had obtained against them an order for possession of the plot now in suit; they had also recovered mesne profits against the Tagores, based upon the report of a commissioner, which, as they contended, showed that, for the year 1904, the mesne profits payable included a sum in respect of the plot. In a suit brought in 1908 by the appellants' father against the Natores, claiming title to the *mehal*, the High Court in 1915 held that the Natores had acquired a title by adverse possession to the land other than the plot now in question, but declared the title of the appellants to that plot; an order for possession was not made, the Court finding that the defendants (the Natores) had not taken possession in 1908, when the suit was commenced, and being of opinion that possession of the plot had not been asked for in the suit.

In the present suit, the appellants claimed under the decree of 1915; they also alleged a dispossession less than twelve years before suit. The defendants pleaded that the suit was barred by limitation, also by *res judicata* and under Order II, rule 2.

The Subordinate Judge, at the first hearing, dismissed the suit as barred by *res judicata* and under Order II, rule 2. The District Judge reversed that decision and remanded the suit for trial, and the High Court (Richardson and Suhrawardy JJ.) affirmed that decision.

On the remand, the Subordinate Judge dismissed the suit, holding that it was barred by limitation. The District Judge reversed that decision, but the High Court (Cuming and Page JJ.) restored the decree of the trial judge.

The facts and the grounds of the decisions of the High Court appear fully from the judgment of the Judicial Committee.

Dunne K. C. and *A. M. Talbot*, for the appellants. The suit was not barred by the Indian Limitation Act, 1908, Schedule I, Article 142. The High Court,

by its judgment in 1915, found that there had been no dispossession of the plaintiffs before 1908, and on that finding refused them an order for possession. The date of the order for possession against the Tagores, namely, June 27, 1905, is the earliest date at which it can be contended that the defendants took possession, and that is just less than twelve years before the present suit. The High Court, in 1915, found that there had been no dispossession by the Tagores at an earlier date; there was no evidence in this suit of possession by them. The report of the commissioner as to mesne profits was not admissible as against the plaintiffs, who were not parties to those proceedings. In any case, it is evidence of no more than that the lands were cultivable earlier than 1905, but does not show that the Tagores were in actual possession. The title being in the plaintiffs, they remained in constructive possession during the diluvion and until there was an actual possession by somebody else: *Basanta Kumar Roy v. Secretary of State for India* (1). Further, the title of the plaintiffs was established by the decree of 1915, and it was, therefore, not necessary for them to show a dispossession twelve years before suit; the onus was upon the defendants to displace their title by proof of twelve years adverse possession under Article 144: *Radha Gobind Roy v. Inglis* (2), *Secretary of State for India v. Chellikani Rama Rao* (3). The defendants failed so to prove. The issues as to *res judicata* and under Order II, rule 2 were decided in the plaintiff's favour.

DeGruyther K. C. and *Parikh*, for the respondent. If, in the suit of 1908, possession of the plot was claimed, the present suit is barred by *res judicata*, as possession was refused; if they did not then claim possession, the suit is barred by Order II, rule 2. In any case, the suit is barred by Article 142 of the Limitation Act. The appellants, by their plaint,

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(1) (1917) I. L. R. 44 Calc. 858 (871); (2) (1880) 7 C. L. R. 364, 368
L.R. 44 I. A. 104 (113). (P.C.).

(3) (1916) I. L. R. 39 Mad. 617; L. R. 43 I. A. 192.

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alleged a dispossession and the onus was upon them to prove that it was within twelve years of the suit: *Muhammud Amanulla Khan v. Badan Singh* (1), *Dharani Kanta Lahiri Chowdhuri v. Gabar Ali Khan* (2). The order of June 27, 1905, obtained against the Tagores, itself raises a presumption that the Tagores were in possession previously. The report of the commissioner shows that the mesne profits recovered from the Tagores included a sum for 1904 or earlier in respect of this very plot. That was an official report as to possession of the land and was admissible against everybody: *Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani* (3). The whole of the evidence is not upon the record; if there is a doubt as to possession by the Tagores, the case should be remanded.

Dunne K. C., in reply. In the 1908 suit, it was not held that if the plaintiffs were not in possession of this plot they were not entitled to possession. The High Court found that, in 1908, nobody was in actual possession. *Dinomoni's case* (3) referred to a police report made under Act X of 1872 and does not apply.

The judgment of their Lordships was delivered by

SIR JOHN WALLIS. The present suit relates to a triangular piece of land forming the southern portion of the *mouza* Bhairabpara, a small permanently settled estate consisting of a long narrow strip of land, liable to diluvion by the river Padma on the north and by the river Gorai on the south. At times the whole *mouza* has been completely submerged, and when above water would appear to have been the subject of incessant litigation.

About the year 1882, it was totally submerged, and when it reformed and became fit for cultivation, the Tagores, who are the owners of an adjoining estate, entered upon it. Thereupon, the present defendants, the Natoes, who own another adjoining estate, instituted a suit, No. 127 of 1897, in the Court of the Subordinate Judge of Nadiya against the

(1) (1889) I. L. R. 17 Calc. 137; (3) (1901) I. L. R. 29 Calc. 187;
L. R. 16 I. A. 148. L. R. 29 I. A. 24.

(2) (1912) 17 C. W. N. 389 (P. C.).

Tagores, claiming that the lands on which the Tagores had entered belonged to their own *mouza* of Kishorepur or Bhairabpara. For the purposes of that suit, a map was prepared by a commissioner, Mr. J. N. Ray, which showed that in 1898, at the date of the report, the river Gorai had moved northward and then ran through the *mouza* of Bhairabpara, thus separating the southern portion, which is the subject of the present suit, from the rest of the *mouza*.

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In that suit, the Subordinate Judge held that the plaintiffs had proved their title, but that the suit was barred except as to 350 *bighas*.

On appeal, the District Judge, whose decree was affirmed by the High Court on Second Appeal, held that the defendant Tagores had no title, that the plaintiffs had shown that Bhairabpara was identified with their *mouza* of Kishorepur, and, even if it were not, they had acquired a title by adverse possession through their *jotedars* or tenants. He, accordingly, gave the plaintiffs a decree for possession and mesne profits.

In the execution of this decree, the Natoes, the present defendants, were put in possession on the 26th June, 1905. They were also awarded mesne profits on the estimated cultivable lands in the *mouza* in accordance with the report of a commissioner, which was duly confirmed by the court.

On the 15th April, 1908, the present plaintiffs' father, claiming as *patnidar* under the Majumdars, another family, who, he alleged, were the owners of the *mouza* of Bhairabpara, instituted suit No. 308 of 1908 in the same court against the Natoes, the present defendants, for possession and mesne profits, alleging that, when the lands of the *mouza* had reformed and had become fit for cultivation and he attempted to take possession, he was obstructed by the defendants, who had taken possession in execution of their decree against the Tagores in the suit already mentioned.

The Subordinate Judge held that the plaintiff had proved his title, but that he was barred as to 600

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bighas, forming the northern portion of the *mouza*, the defendants having acquired a title by adverse possession for twelve years before the last submergence of the *mouza*.

The defendants appealed, and the plaintiff filed cross-objections, and, while the appeal was pending, the plaintiff died, and his sons and legal representatives, who are the plaintiffs in the present case, were substituted for him.

On appeal, the learned Judges of the High Court were of opinion that it was impossible to locate the 600 *bighas*, which the Subordinate Judge had held to have been in possession of a factory holding under the defendants. They came to the conclusion, however—it is said, for the respondents, quite wrongly—that the defendants in their 1897 suit against the Tagores had not claimed the southern triangle of Bhairabpara, which the learned Judges said was then in the bed of the river Gorai, and hence they concluded that the factory holding under the defendants had been in possession of the whole of Bhairabpara minus the small southern triangle, and they, accordingly, held the suit to be barred except as to the southern triangle.

On the footing that the defendants in their 1897 suit had neither asked for nor obtained possession of the southern triangle, they found that the defendants had not been shown to have been in possession of it, and that, consequently, a decree for possession and mesne profits should not be passed against them, but that the plaintiffs should have a declaration of their title to the southern triangle.

It will, however, be better to state their conclusions in their own language, as so much has turned on it in the present suit.

The defendants in their title suit against the Tagores in 1897 claimed the lands north of the then current Gorai river as their Kishorepur lands. They did not claim the triangular portion of Bhairabpara, which was then in the bed of the Gorai. The defendant got a decree accordingly, and we do not think that there is any satisfactory evidence definitely pointing to the possession of this triangular portion when it reformed after northward progress of the Gorai; in fact, it was not claimed in the title suit of 1897.

We think, therefore, that the decree in favour of the plaintiff must be confirmed to the triangular portion of *mouza* Bhairabpara to the south of the northern bank of the Gorai river, as shown in the map of J. N. Ray. The defendants retain the entire fruits of their decree against the Tagores. The present suit was brought expressly for the lands which the defendants obtained in execution of their decree against the Tagores. There was no allegation of dispossession in respect of any other lands, but the triangular portion was shown as disputed to the commissioner. The defendants in their written statement generally stated that *mouza* Bhairabpara was the name fraudently given to their *mouza* Kishorepur and they also relied upon their decree against the Tagores as the basis of their possession. The decree, therefore, will be for a declaration of the rights of the plaintiff as *patnidar* to that portion of Bhairabpara which is south of the northern bank of the Gorai, as shown in the map of J. N. Ray. The suit for recovery of possession of the lands decreed to the defendants in their Title Suit No. 125 of 1897 is dismissed. As the defendants, however, denied the title of the plaintiff to the portion in respect of which he gets a declaration, the plaintiff will be entitled to his costs in proportion to the area.

The plaint in that suit had claimed a declaration of title and a decree for possession and mesne profits of the *mouza* of Bhairabpara, and the judgment is to be read as finding, not that the southern triangle was not the subject of the suit, in which case no declaration about it could have been given, but that the plaintiffs had only been dispossessed of the lands north of the Gorai as shown in the map made by J. N. Ray in 1898.

It would have been well if both parties had been content to accept this adjudication of their rights. Unfortunately, this judgment was the starting point of fresh and protracted litigation. The plaintiffs were resisted by the defendants when they attempted to take possession, and having made futile attempts to get possession in execution, a relief not given by the decree, and to amend the decree, which was in strict accordance with the judgment, on the 23rd June, 1917, they filed the present suit for possession of the southern triangle, which, after having been twice before the Subordinate Judge, the District Judge and the High Court, has now come before this Board from the decree of the High Court dismissing the suit.

In the plaint in the present suit, the plaintiffs ignored the fact that the High Court in the previous suit had refused to give them a decree for possession

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and mesne profits in respect of the southern triangle, and alleged in paragraph 5 that the High Court had held that the defendants had wrongfully taken possession of the southern triangle on 12th Ashar, 1312 (the 26th June, 1905), in execution of their decree in the 1897 suit against the Tagores. They did, however, allege in paragraph 7 that, in consequence of the establishment of their right to the southern triangle in the previous suit, they were entitled to maintain a suit for possession and mesne profits, and in paragraph 8 they stated their causes of action as having arisen on the 12th Ashar, 1312 (26th June, 1905), when the defendants took wrongful possession, and on the 8th May, 1917, when their execution petition in the previous suit for possession of the southern triangle was dismissed.

The case first came before the Subordinate Judge, who dismissed the suit, holding, with reference to the fifth issue, that it was barred under section 11, explanation V, of the Code of Civil Procedure, on the ground that possession had been asked for and refused in the previous suit.

On appeal, the District Judge set aside the decree of the Subordinate Judge and remanded the suit for trial on the remaining issues, and his decree was upheld by the High Court on Second Appeal. Richardson J., who delivered the judgment of the High Court, observed that the plaintiffs had not framed their plaint artistically, as they had not contented themselves with a new cause of action based on the decree of the High Court in the suit of 1908, but had alleged dispossession in the year 1905, and had included this alleged dispossession anterior to that suit as part of the cause of action in the present suit. He then proceeded to deal with the judgment of the High Court as follows:—

If, then, the judgment of the learned Judge is referred to, it is obvious that the learned Judges did not decide that, if the plaintiff was not in possession, he was not entitled to possession. The learned Judges put their own construction on the pleadings and they formed their own conclusions as to the facts. It appears to me that the parties to the present suit are as much bound by the learned Judges' construction of the pleadings and conclusions of fact as they are by the decree itself. Whether they were

right or wrong is now immaterial. The decree follows from the reasons given for it, whether they were right or wrong, and must be understood and interpreted in the light of those reasons. The judgment standing as it does, the parties are governed by it and are estopped from making averments which would be contrary to the record.

The plaintiffs' true cause of action in the present case is the High Court decree of 1908, coupled with the fact that they are out of possession. Allegations in the plaint which go beyond this cause of action may be regarded as surplusage.

In spite of this clear pronouncement, the Subordinate Judge, when the case went back to him on remand, held that the suit was barred under Article 142, as the defendants and the Tagores before them had been in continuous possession for more than twelve years before the institution of the present suit in June, 1917, thus ignoring the finding of the High Court in the previous suit that neither the Tagores nor the defendants had been in possession before June, 1908, when that suit was filed.

On appeal, the District Judge applied Article 144 instead of Article 142. Treating the question as one of adverse possession under Article 144, he held that the defendants were not entitled to tack on the Tagores' possession to their own for the purposes of the Article. In the result, he allowed the appeal and decreed the suit.

The case then went to the High Court on Second Appeal, when Cuming J. agreed with the Subordinate Judge that the suit was barred under Article 142 and should be dismissed. Page J. concurred in allowing the appeal and dismissing the suit, but on different grounds. After referring to the judgment of the High Court in the previous suit and to the judgment of Richardson J. in this suit, he observed :—

Now the matter stands thus : the plaintiffs have been declared entitled to the triangular portion in dispute ; but up to 1908, the date of the title suit brought by the plaintiffs against the Natoes, it must be taken that there is no evidence, upon which the court can rely, to justify a finding that the defendant respondent, the Natoes, or anybody else, were in actual possession of this 155 *bighas*.

It was unnecessary for the plaintiffs to prove "actual possession," in the sense of occupation, after the submergence, as their possession in law continued until they were dispossessed. In the opinion of their

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Lordships, as already stated, the finding on which the judgment of the High Court in the previous suit was based was that there was no such dispossession prior to the 15th April, 1908, when that suit was filed. Whether that finding was right or wrong, it is *res judicata* and the defendants are estopped from questioning it, and it necessarily follows that the present suit which was filed within twelve years was in time.

Page J. was apparently of opinion that the suit was not barred, but he held it must be dismissed as there was no evidence that the defendants had taken possession between 1908, the date of the earlier suit, and 1917, the date of the present suit. No such evidence was needed, as it was common ground and expressly admitted in the written statement that the defendants were in possession in June, 1917, when the present suit was filed. This being so, the plaintiffs, having established their title in the previous suit, and not being barred by limitation, are entitled to a decree.

Further, even if the defendants could be heard to say that the plaintiffs were dispossessed by them for 11 years 11 months and 27 days from the 26th June, 1905, down to the institution of the present suit, their Lordships are of opinion that there is no evidence to support the finding of the Subordinate Judge, which the District Judge apparently accepted, that prior to the 26th June, 1905, the Tagores were in possession of the southern triangle. It is no doubt the case that the defendants recovered mesne profits in their suit of 1897 against the Tagores in respect of a tract of land which included the southern triangle, but the report of the commissioner was based on the finding that the lands in question had again become culturable after the diluvion, and not on the ground that they had been actually cultivated. The commissioner's report, on which the learned Judge relied, is not evidence of dispossession by the Tagores, and their Lordships have not been referred to any other evidence in support of such a finding. It must, therefore, be held that it

is not shown that the plaintiffs were dispossessed by the Tagores prior to June 23rd, 1905, and, indeed, it was held in the suit of 1908 that the Tagores had never been in possession of the southern triangle. On this ground also the suit must be held not to be barred.

For these reasons, their Lordships are of opinion that the appeal should be allowed, the decree of the High Court reversed, and the decree of the District Judge restored, with costs throughout, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondent : *W. W. Bow & Co.*

A. M. T.

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