APPELLATE CIVIL.

Before Nasim Ali J.

1935

Feb. 13, 14.

UPENDRANATH RAY

v.

JITENDRANATH KUNDU CHAUDHURI.*

Limitation—Tenant—Rent-free title, Acquisition of—Requirements—Knowledge—Overt possession—Secret assertion insufficient—Constructive notice—Vigilance—Limitation Act (IX of 1908), Sch. I, Art. 144.

The starting point of limitation under Article 144 of the Limitation Act is the date, when the possession of the defendant becomes adverse.

Now to apply this Article, it must be determined first what was the nature and effect of defendant's possession. This would depend on the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it.

Ishan Chandra Mitter v. *Ramranjan Chakrabutty* (1) referred to.

The classical requirement is that the possession should be *nec vi nec clam nec precario*. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercise due diligence, to be aware of what is happening; adverse possession need not be shown to have been brought to his knowledge.

Secretary of State for India in Council v. *Debendralal Khan* (2) followed.

The mere registration of a *kabâlâ* in favour of the defendant by the tenant does not constitute constructive notice to the landlord.

Though it is not necessary for the defendant to prove actual knowledge of the plaintiff about his possession, he is bound, nevertheless, to show that his possession was overt and without any attempt at concealment so that the plaintiffs, against whom time was running, could have been aware of what was happening, if they had been vigilant.

The onus of proving adverse possession is on the defendant in such a case.

Where the facts and circumstances do not disclose that the plaintiffs either knew or could have known with due vigilance the secret assertion of *nishkar* or rent-free right by the tenant, defendant, and it does not appear that defendant by any overt act asserted his rent-free title, the suit is not barred by limitation though not instituted within the statutory period.

*Appeal from Appellate Decree, No. 1961 of 1932, against the decree of R. L. Chakrabarti, Additional Subordinate Judge of Howrah, dated May 7, 1932, reversing the decree of Charuchandra Ganguli, Additional Munsif of Howrah, dated Dec. 18, 1928.

(1) (1905) 2 C. L. J. 125.

(2) (1933) I. L. R. 61 Calc. 262; L. R. 61 I. A. 78.

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SECOND APPEAL by one of the defendants.

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

Bijankumar Mukherji and *Sanatkumar Chatterji* for the appellants.

Kshiteendrakumar Mitra for the respondents.

Cur. adv. vult.

NASIM ALI J. The respondents Nos. 1 and 2 instituted a suit in the court of the Munsif at Howrah for declaration of their title to certain lands and for recovery of arrears of rent from the appellant. The plaintiffs' case shortly stated is as follows:—The disputed land was originally *nishkar* land of Khetramohan, Manikchandra and Nafarchandra. One Paranchandra held these lands as a tenant under them. Bijaykeshab, the predecessor-in-interest of the plaintiffs, purchased the eight annas share of these lands from Khetra and Manik and used to realise rent of Rs. 1-4 in his share from Paran. Bijaykeshab subsequently acquired 16 annas interest in the disputed land on the 17th *Ashâr*, 1300 and raised rent of Paran to Rs. 6. Paran died leaving his son Gour. Bijaykeshab instituted a rent suit against Gour in the year 1904, obtained a decree on contest and, in execution of that decree, purchased the lands on the 28th November, 1911, and got possession of the same through court. Priyanath, the father of defendants Nos. 2 to 4, thereafter took settlement of the lands from Bijaykeshab at a rental of Rs. 7-8. On the death of Priyanath, the defendants Nos. 2 to 4 are in possession of the disputed land. Bijaykeshab died leaving the plaintiffs as his heirs. The plaintiffs brought Rent Suit No. 339 of 1923 against the defendant Nos. 2 to 4, which was decreed in the first court and was dismissed on appeal on the 2nd September, 1926. In the course of that rent suit, the plaintiffs came to know for the first time that, although Gour had no

nishkar right in the disputed land, he transferred the same to the defendant No. 1 alleging that the lands were *nishkar*. The plaintiffs' case is that defendant No. 1 has simply purchased the tenancy right of Gour. On these allegations the plaintiffs prayed for declaration of their title to the lands and for recovery of arrears of rent from the defendant No. 1.

The defence of the defendant No. 1 was that the disputed land was *nishkar* land of Paran and that the plaintiffs' suit was barred by limitation. The trial court held that the plaintiffs had succeeded in proving their *nishkar* right to the disputed land but dismissed the suit on the ground that it was barred by limitation.

On appeal by the plaintiffs to the lower appellate court, the learned judge found :—

(*i*) that defendant No. 1 was never in actual possession of the land;

(*ii*) that Priyanath was in possession of the land by actual cultivation under Gour before he sold his right to defendant No. 1;

(*iii*) that defendant No. 1 never gave notice of his purchase or possession by realisation of rent from Priyanath or his heirs to the plaintiffs;

(*iv*) that defendant No. 1 never publicly and notoriously asserted Priyanath's possession to be his possession and that his possession through Priyanath and his heir was secret;

(*v*) that plaintiffs came to know of the claim of defendant No. 1 for the first time in 1923, *i.e.*, within 12 years from the date of the suit when the heirs of Priyanath set up defendant No. 1 as their landlord;

(*vi*) that defendant No. 1 never asserted his possession as possession in rent free title to the knowledge of the plaintiffs.

He, accordingly, decreed the plaintiffs' suit. Hence this Second Appeal by defendant No. 1.

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The only point urged by the learned advocate for the appellant is that plaintiffs' suit is barred by limitation.

In order to decide this question it is necessary to determine which Article of the Limitation Act applies to the case. In the first place, it is urged by the learned advocate that Article 120, *i.e.*, the residuary Article applies. Now the question is, when the plaintiffs' right to sue defendant No. 1 for rent accrued. The finding of the judge is that the plaintiffs came to know of the possession and *nishkar* claim of defendant No. 1 for the first time in 1923. In the case of *Bolo* v. *Koklan* their Lordships of the Judicial Committee of the Privy Council observed :—

> There can be "no right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

If the plaintiffs were not aware of the defendant No. 1's claim at all before 1923, it is difficult to see how their right to sue accrued before that year. The present suit was instituted in 1927. Consequently, the plaintiffs' suit is not barred under Article 120. The suit is also not barred under Article 131 of the Limitation Act, as plaintiffs could not possibly demand any rent from defendant No. 1 before 1923, as they were not aware of defendant No. 1's possession through defendants Nos. 2 to 4 and, consequently, there could not have been any refusal of his right to get rent from defendant No. 1. Article 139 of the Limitation Act cannot also apply, as this is not a suit to recover possession from a tenant. Article 142 of the Limitation Act cannot also be invoked, as it is not a suit for recovery of possession of the property from defendant No. 1. Plaintiffs do not want to eject the defendant No. 1 on the ground that defendant No. 1 purchased the non-transferable occupancy holding of Gour without their knowledge and consent. Plaintiffs in the present suit also do

(1) (1930) I. L. R. 11 Lah. 657 (665); L. R. 57 I. A. 325 (331).

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not want to recover possession through the defendants Nos. 2 to 4, who are cultivating the land. The learned advocate, however, placed much reliance upon Article 144. The starting point of limitation under that Article is the date, when the possession of the defendant becomes adverse. Now to apply this Article it must be determined first what was the nature and effect of defendant's possession. This would "depend upon the nature and extent of the "rights asserted by the overt conduct or express "declaration of the person relying on it" *Ishan Chandra Mitter* v. *Ramranjan Chakrabutty* (1). Again their Lordships of the Judicial Committee in *Secretary of State for India in Council* v. *Debendralal Khan* (2) have observed :—

> As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi* v. *Collector of Khulna* (3) at page 140, where his Lordship said that "the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor." The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown but in their Lordships' opinion, there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person, against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening.

In view of the facts, which have been found by the learned judge and which I have already stated, it is clear that the defendant No. 1 has failed to establish the elements, which are necessary to constitute adverse possession. He has failed to prove that he was asserting a *nishkar* right by any overt act or express declaration. He has also failed to show that his assertion of such right, if any, was either open or notorious. The assertion of his right, if any, was secret. The statement of *nishkar* right in his *kabâlâ* could not be an open assertion, as the plaintiffs knew nothing of this *kabâlâ* and, in fact, the finding is that

(1) (1905) 2 C. L. J. 125, 136.
(2) (1933) I. L. R. 61 Calc. 262 (266); L. R. 61 I. A. 78 (82).
(3) (1900) I. L. R. 27 Calc. 943 (950); L. R. 27 I. A. 136 (140).

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plaintiffs were not aware of defendant's purchase or possession before 1923. In the events that have happened in this case the learned judge rightly observed that mere registration of the *kabâlâ*, Ex. A, in favour of the defendant No. 1 by the tenant Gour did not constitute constructive notice. As the possession of the defendant No. 1 in the case was not overt but secret, it was impossible for the plaintiffs to know what was happening. It is true that it was not necessary for the defendant No. 1 to prove actual knowledge of the plaintiffs about his possession. But he was bound to show that his possession was overt and without any attempt at concealment so that the plaintiffs, against whom the time was running, if they have been vigilant, could have been aware of what was happening. The onus of proving adverse possession was upon the defendant No. 1 and he has failed to discharge that onus. If the defendant No. 1 had been actually cultivating the land, the position might have been different. The learned judge has, however, found that the land was all along in the possession of Priyanath or his heir from before the purchase by defendant No. 1. As the possession of the defendant No. 1 in this case was secret the assertion of his *nishkar* right, if any, was secret. He did not assert that right by any overt act and there had been no express declaration by him of such right. The facts and circumstances of this case do not disclose that the plaintiffs either knew or could have known by due vigilance the assertion of *nishkar* right by defendant No. 1. In fact from the judgment of the learned Munsif, who held that plaintiffs' suit was barred by limitation it does not appear that defendant No. 1 by any overt act asserted his rent-free title. The learned Munsif simply held that plaintiffs' knowledge of defendant's purchase and possession could be traced at least to 1912 and the plaintiffs "had constructive notice of the facts". The learned Munsif could not find from the evidence in

the case that defendant No. 1 openly asserted his rent-free title. In fact, excepting the statement in the *kabâlâ*, Ex. A, that the land is *nishkar*, no facts have been found, from which it can be said that defendant No. 1 asserted the *nishkar* right in such a way that plaintiffs knew or could have known the assertion of such right. I have already pointed out that the learned judge from the evidence in the case has come to the conclusion that defendant No. 1's possession was secret and plaintiffs knew nothing of his purchase or possession before 1923. Under these circumstances, I am not prepared to say that the decision of the learned judge is wrong. The appeal is, accordingly, dismissed with costs.

C. S *Appeal dismissed.*