APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1888. Nov. 2, 20.

SUBBARAYA (DEFENDANT No. 1), APPELLANT,

v.

KRISHNAPPA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 116—Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant.

The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the revenue authorities. In a suit by plaintiff to eject the defendant:

Held, (1) That the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him;

(2) That the plaintiff was not entitled to eject the defendant.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Mangalore, in appeal suit No. 278 of 1887, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 210 of 1886.

Suit to recover possession of certain land. The land in question was *kumaki* waste land adjacent to the *wargs* of plaintiff No. 1 and defendant No. 1, respectively. The *warg* of plaintiff No. 1 was an old *warg*, while the *warg* of defendant No. 1 was *hosagame* or new *warg* created out of waste lands granted by Government to him and one Sankaranarayana in 1857 and 1865, respectively. In 1880 plaintiff No. 1 granted a *mulgenichit* of the land in question which was then a barren sand hill to Ranga Bhatta, the father of plaintiff No. 2, who converted it into paddy fields and remained in occupation until 1882; the land not being assessed in the name of any of these persons. In 1882 plaintiff No. 2 let into possession defendant No. 2, who subsequently assigned his rights to defendant No. 1. In 1885 a

* Second Appeal No. 128 of 1888.

revenue enquiry took place, and the tahsildar finding that the land was *kumaki* to the first plaintiff's *warg* and partly reclaimed by him or his tenant, ordered that the revenue should be assessed in his name; but the Collector reversed this order and granted the patta to defendant No. 1.

The plaintiff now sued to eject the defendants, the Collector not being brought on to the record.

The District Munsif dismissed the suit; but on appeal the Subordinate Judge passed a decree in favor of the plaintiffs, against which defendant No. 1 preferred this second appeal.

Narayana Rau for appellant.

Subba Rau for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C. J., and Parker, J.).

JUDGMENT.—We are constrained to hold that defendant No. 1 is not estopped by the provisions of section 116 of the Evidence Act from denying the title of the plaintiffs. It may be true that he originally got in with the connivance of defendant No. 2 who had obtained possession by permission of plaintiff No. 2, but the tenancy of defendant No. 2, if not determined before, was at any rate determined when the plot was declared by the revenue authorities to be at the disposal of Government and granted to defendant No. 1. Since that date the interest of defendant No. 1 has been adverse. See *Ammu* v. *Ramakishna Sastri*(1).

It may be true, as pointed out by the Subordinate Judge, that had the Collector rightly understood all the facts of the case he would have granted the lands in dispute to the plaintiffs instead of to defendant No. 1. The question for us however is whether plaintiffs had acquired any legal right.

The principle to start from is that waste lands belong to the State. (See *Vyakunta Bapuji* v. *Government of Bombay*(2), *Bhaskarappa* v. *The Collector of North Canara*(3), and in this case it is not denied that the land was a bare sand hill up to 1880. The plaintiffs then cultivated it, but did not get it assessed in their names, and it is impossible to hold that such cultivation for a couple of years will take away from the State its right to grant the land to such applicant as it pleases. It may be that accord-

(1) I.L.R., 2 Mad., 226. (2) 12 Bom., H.C.R., App. 1.
(3) I.L.R., 3 Bom., 452.

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ing to departmental rules the plaintiffs should have had the land, but the breach of a departmental rule will not create a legal cause of action.

We are of opinion therefore that the District Munsif was right in holding that plaintiffs have no title to the disputed land either by grant or prescription. The appeal must be allowed and the decree of the Lower Appellate Court reversed, the suit being dismissed with all costs throughout.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1889. July 26.

THE MADRAS HINDU UNION BANK (LIMITED) (PLAINTIFF),

v.

C. VENKATRANGIAH AND OTHERS (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, s. 78—Priority of mortgages—Gross negligence—Estoppel—Agency.

On the 20th of February 1888, defendant No. 1 executed a mortgage in favor of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to.

On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff, or return the title-deeds if they failed in raising the loan. On the 28th April 1888 defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs. 4,000; and on the 7th May 1888 he executed an instrument creating a further charge in her favor for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances:

Held, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff Company.

THIS was a suit in which the plaintiff Company alleged *inter alia* that by an instrument, dated the 20th February 1888, defendant No. 1 mortgaged to the plaintiff Company certain of his immovable

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Civil Suit No. 140 of 1888.