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the execution of decrees, and that without any counterbalancing advantages. For if the sale is eventually held, and a material irregularity in publishing or conducting it is proved and loss has thereby been caused to the objector he can get the sale set aside; whereas even if there has been an irregularity but no loss has resulted it is contrary to the policy of the Code (section 311) to interfere with the sale.

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## APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,  
and Mr. Justice Bhashyam Ayyangar.*

1903.  
November  
3, 4, 5, 13.

KOCHERLAKOTA VENKATAKRISTNA ROW (DEFENDANT),  
APPELLANT,

v.

VADREVVU VENKAPPA AND ANOTHER (PLAINTIFFS), RESPONDENTS.\*

*Limitation Act—XV of 1877, s. 28, sched. II, art. 142—Suit between third parties—  
Delivery of present defendant's land in execution—Present defendant not a party—  
Knowledge of delivery—Acquiescence—Failure to apply for reinstatement—  
Dispossession for more than twelve years—Extinction of title.*

The title to a piece of land was (apparently) vested in defendant prior to 1877, and defendant, till then (apparently) had possession of the land. In 1867, a suit was brought by the father of the present first plaintiff against a third party for the recovery of land. The present defendant was not a party to that suit. In 1874, in execution of the decree in that suit, passed in favour of the plaintiff therein, the Subordinate Court appointed a Commissioner to make a local investigation and submit a report showing the land to be delivered to the plaintiff therein. The Commissioner personally inspected the land, and, in his report, mentioned that the present defendant, though not a party to that suit, raised the objection that the boundaries fixed by the Commissioner of the land to be delivered to the plaintiff therein included land belonging to the present defendant. The report was considered by the Subordinate Judge, but the present defendant apparently did not appear before him, and the Subordinate Judge heard the parties to that suit and confirmed the plan prepared by the Commissioner and ordered delivery to be given to the plaintiff in that suit of the land shown in the plan. That order was modified by the District Court, and in 1877, a warrant of delivery was issued by the District Judge to the Nazir, directing him to deliver possession of the property to the plaintiff therein and to eject the person in enjoyment of the land if he should refuse to quit. This

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\* Appeal No. 148 of 1901, presented against such portion of the decree of J. H. Munro, District Judge of Godavari, in Original Suit No. 33 of 1899.

warrant was executed but, as the marks which had previously been placed on the land had been washed away, the Nazir fixed the boundaries again, and on this occasion also the present defendant's officials appeared before the Nazir and objected to his delivering over the land, and requested him to communicate their objection to the Court. The delivery was, however, made to the plaintiff in that suit, in the presence of the present defendant's officials, and in spite of their objections raised on his behalf. In 1899, the present suit was instituted by the son of the plaintiff in the former suit (and another) to recover possession of the same piece of land, when it was objected for the defendant that, though the delivery of the land in 1877, might be operative as a transfer of possession to the decree-holder as against the defendant in that suit, it did not amount to a dispossession of the present defendant, if possession was then in fact and in law with him:

*Held*, that the defendant had been dispossessed. The contention now raised on his behalf might have prevailed if the delivery of possession had been made without the present defendant's knowledge. But inasmuch as such delivery had been made in the presence of the present defendant's officials and in spite of their objections, it could not be said that the present defendant had not been dispossessed simply because possession was not delivered by enclosing the land with fences, though the boundaries were marked. Having regard to the nature of the land, nothing had to be done beyond what was done to effect delivery of possession. If, therefore, possession and title were really with the defendant at the time, he could have applied to the Court under section 230 of Act VIII of 1859, complaining of the delivery of possession and praying for his reinstatement. Defendant had, however, taken no action in the matter but had acquiesced in the proceedings, either because he really had no title to possession or because he was indifferent, and he had not cultivated the land since delivery of possession had been given. The defendant's title, if any, had therefore become extinguished in favour of the plaintiff in or about 1889, under the combined operation of article 142 and section 28 of the Limitation Act.

*SUIT FOR LAND.* The facts and arguments are fully set out in the judgment. The District Court allowed the plaintiffs' claim in part and disallowed the rest.

Defendant preferred this appeal. Plaintiffs preferred a memorandum of objections.

*V. Krishnaswami Ayyar, N. Subba Rao and S. Gopalswami Ayyangar* for appellants.

*C. Ramachandra Rao Saheb and K. Venkatalingam* for respondents.

*JUDGMENT.*—The respondents sue to eject the appellant from an island in the Godavari; the Court of First Instance allowed the claim in part and disallowed the rest. The appellant has preferred this appeal in respect of the portion decreed to the respondents, viz., the tract referred to by the District Judge as the triangle ABC; the respondents have lodged a memorandum of objections.

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under section 561, in respect of the portion disallowed. The appeal was argued at great length, but, in our opinion, it fails on the ground that even if, as contended on behalf of the appellant, the title to the island, including the triangular portion, was in him prior to 1877, and he then had such possession of the triangle as it was capable of, he was in law dispossessed of the same in May 1877 and delivery of possession thereof was, under process of Court (exhibit A) made to the respondents adversely to the appellant, in execution of the decree in Original Suit No. 46 of 1867, though the appellant was no party to that suit, and that his title has been extinguished in favour of the respondents prior to 1891-92, when he entered upon possession of the land.

Original Suit No. 46 of 1867 was brought by the first respondent's father against the proprietor of the Gutala Estate for the recovery of an island in the same part of the Godavari, which, admittedly, was at the time a sandy waste not fit for any kind of cultivation. The suit was dismissed by both the Court of First Instance and the lower Appellate Court, apparently on the ground that the land sued for was mere sandy waste, but on the 24th November 1871, the High Court in second appeal reversed the decrees of the Courts below and ordered and decreed "That the plaintiff is entitled to recover the whole or so much of the island in dispute as lies on his side of the middle line of the river and that, in execution of this decree, an enquiry be accordingly directed and that the whole, or if a portion only of the island appertains to plaintiff that portion marked out by proper boundaries, be delivered to him." For the purpose of carrying out this decree the Court of First Instance (the Subordinate Court of Godavari) by order, dated the 18th March 1874 (not filed), appointed the Nazir of the Court a Commissioner under section 180 of the then Code of Civil Procedure to make a local investigation (*vide* exhibit XXXI) and submit a report (*vide* exhibit H<sub>2</sub>) with a plan showing the portion of the island to be delivered to the plaintiff, according to the directions of the High Court. Exhibit H<sub>2</sub>, dated the 10th August 1874, is the report submitted by the Nazir and exhibit H<sub>1</sub>, the plan prepared by him. The Nazir who personally inspected the island made the necessary measurements and enquiries concerning the boundaries of the lanka. After referring to the disputes raised on behalf of the parties to the suit as to the marking of the boundaries, he adverts to the objection raised in the matter on

behalf of the present appellant, who was no party to that suit, by his Peishkar and other officials in order that the Court may consider such objection. The objection (exhibit VIII, dated the 12th April 1874) was to the effect that the boundaries as fixed by the Nazir included lands belonging to this appellant, the triangular plot ABC already referred to having been included within such boundaries. It appears from the report that the Nazir indicated the boundaries by fixing marks and flagstuffs. The Subordinate Judge, after hearing the objections raised on behalf of both the parties to the suit, confirmed the plan prepared by the Nazir as Commissioner and ordered delivery of the land to the plaintiff in the suit, according to the plan (*vide* exhibit XXXI, dated 6th March 1876). It does not appear from this order that the present appellant was represented before the Subordinate Judge in support of the objection taken on his behalf, and presumably the Subordinate Judge took no notice of the objection. Appeals were preferred to the District Judge against this order and he, by his order (exhibit H<sub>3</sub>, dated the 28th August 1876) modified the order of the Subordinate Court in favour of the plaintiff in that suit and directed delivery accordingly. In execution of the order as thus modified a warrant of delivery was issued by the District Judge to the Nazir of his Court (*vide* exhibit J, dated the 14th March 1877) directing him to deliver possession of the property to the plaintiff and to eject the person in enjoyment of the same if he should refuse to quit. The Nazir of the District Court proceeded to the lanka, executed the warrant by delivering possession of the land to the plaintiff in the suit and obtained his receipt (exhibit A, dated the 21st May 1877), acknowledging delivery of possession of the land according to the boundaries and particulars set forth in the receipt. The Nazir, in making his return to the warrant (on the 18th July 1877—*vide* exhibit J) and forwarding the receipt, stated, among other things, as follows:—“By the time of my visit there were none of the marks, etc., formerly fixed by the late Subordinate Court Nazir for showing the boundaries, etc., according to the plan then filed by him in this matter. On enquiry I learnt from the officials of both parties and from the ryots that they were washed away by subsequent floods in the Godavari. Therefore it became necessary to again fix the boundaries in accordance with the orders of your Court, and make measurements and deliver the suit lanka lands to the plaintiff”

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“ Besides this, the Polavaram Zamindar’s officials inform me, as they informed the late Subordinate Court’s Nazir that, in the land measured (illegible) in the northern portion is included a portion of the said Polavaram Zamindar’s land known as ‘Suryudi lanka,’ and that that also is being delivered possession of to the plaintiff; and they requested me to communicate this matter to the Court. The nature of the lanka reported by them is shown in the Subordinate Court plan. ‘Suryudi lanka’ is shown in plaintiffs’ plan also. But the whole of the site mentioned is inundated by the Godavari floods and is now fully covered by sand, and there is no mark of a lanka. So I have reported the matter.”

It will thus be seen that the boundary marks fixed in 1874 by the Nazir of the Subordinate Court in accordance with the plan prepared by him had been washed away by floods in 1877 and that the District Court Nazir had again to fix the boundaries and make the necessary measurements in accordance with the order of the District Court, for delivering possession of the lands thus marked and measured, to the plaintiff and that the appellant’s officials appeared before him also and objected to such delivery, and requested him to communicate their objection to the Court. It is therefore established beyond all doubt not only that the appellant was aware that along with other lands, the triangular plot ABC was included within the boundaries, but that possession of the same was delivered in the presence of the appellant’s officials to the agent of the plaintiff in Original Suit No. 46 of 1867, in spite of the objection raised on behalf of the appellant, which objection, as desired by them, was communicated to the Court, and that prior to making such delivery the boundaries were fixed and marked. The learned pleador for the appellant argues that though such delivery may be operative as a transfer of possession to the decree-holder as against the defendant in that suit, yet it does not amount to a dispossession of the appellant, if possession was then in fact and law with him. This argument would no doubt carry weight, if the delivery of possession had been made without the appellant’s knowledge or objection. But, as already stated, this was not the case. The decree-holder claimed to be put into possession of the land as owner in spite of the appellant’s claiming the same as part of his lands and the Nazir put the decree-holder into possession, in the presence of the appellant’s officials and in

spite of their objections, and reported the matter to the Court. It cannot be contended that the appellant was not dispossessed, simply because possession was not delivered by enclosing the land with fences, though the boundaries were marked. The land was at the time mere sandy waste, on which there was neither cultivation, nor any persons living. Nothing, therefore, beyond what the Nazir did had to be done for effecting delivery of possession. If possession and title were then really with the appellant, he certainly was in a position to have applied to the Court under section 230 of Act VIII of 1859, the Civil Procedure Code then in force, complaining of the delivery of possession and praying for his reinstatement. He, however, took no action in the matter but acquiesced in the proceedings, either because he really had no title to possession or because he was indifferent, as the land was mere sandy waste. A person dispossessed in execution of a decree against another may not be bound to institute proceedings in Court under section 230 of Act VIII of 1859 or even bring a regular suit for recovery of possession but may, if he is able to do so, re-enter and take possession of the land (cf. *Ranjit Singh v. Bunnari Lal Sahu*(1)). We agree with the District Judge that the oral evidence adduced on behalf of the appellant to show that he cultivated the land in question or let the same for cultivation subsequent to 1877, and before 1891-92, is vague and untrustworthy. As regards the documentary evidence relied upon (exhibit VII) there is nothing therein to show that it refers to or includes the land in question.

We are also of opinion that the respondents have failed to show that they or their predecessor in title ever cultivated the land in question or let the same for cultivation prior to 1891-92. The truth is that the land was not fit for cultivation or for any other beneficial use till 1891-92, about which time, owing to the deposit of silt, it became valuable and fit for cultivation. After some disputes between the parties, it has since then been in the possession of the appellant.

If, as we hold, there was an ouster of the appellant in 1877—assuming he was then in possession—to his knowledge under process of Court in execution of a decree to which he was no party, and possession was delivered to the respondents' predecessor in

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(1) I.L.R., 10 Cal., 993.

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title, it is certain that possession in law continued with them (the respondents) till about 1891-92, though no beneficial use of it was made by or on behalf of the respondents till then. The result would be that the appellant's title, if any, would have been extinguished in favour of the respondents in or about 1889 under the combined operation of article 142 and section 28 of the Limitation Act.

The learned pleader, for the appellant, cites the cases of *Juggobundhu Mukerjee v. Ramchunder Bysack*(1), *Ranjit Singh v. Bunwari Lal Sahu*(2), *Joggobundhu Mitter v. Purnanund Gossami*(3), and *Ramchandra Subrao v. Ravji*(4), in support of his contention. In the first of these (*Juggobundhu Mukerjee v. Ramchunder Bysack*(1)), it was held by a Full Bench that, when in execution of a decree awarding possession to the plaintiff, possession is delivered to him either under section 223 or 224 of Act VIII of 1859 (corresponding to sections 263 and 264 of the present Code), such delivery must be deemed equivalent to actual possession as against the defendant, as in contemplation of law both parties must be considered as being present at the time when the delivery is made, but that as against third parties such "symbolical" possession (as it is called) would be of no avail because they are no parties to the proceeding. This ruling was followed in the two later cases in *Ranjit Singh v. Bunwari Lal Sahu*(2), and *Joggobundhu Mitter v. Purnanund Gossami*(3), in both of which the delivery of possession had been made to the purchaser at a sale held in execution of the decree. In *Ramchandra Subrao v. Ravji*(4), it was held by a Full Bench that the delivery of possession which is directed to be given by section 263, Civil Procedure Code, contemplates the decree-holder being placed in actual possession and that the language of section 332 assumes the possibility of a third person being dispossessed in effecting such delivery, but that the mere formal delivery of possession to the decree-holder and taking a receipt from him cannot of itself effect such dispossession of a third party. It was, however, observed "whether what occurs on the occasion of giving such formal delivery has that effect (viz., of dispossessing a third party) is a question of law and fact; but it is clear, we think, on the authorities, that there is no dispossession

(1) I.L.R., 5 Calc., 584.

(3) I.L.R., 16 Calc., 580.

(2) I.L.R., 10 Calc., 993.

(4) I.L.R., 20 Bom., 351.

in the eye of the law, unless the deprivation of possession is complete as a fact, a conclusion which the Court has to form on the whole of the evidence (see Lindley's 'Introduction to the Study of Jurisprudence,' appendix, page cxxiii), although what may occur may amount to a disturbance or obstruction of possession. Again, he who occupies land in the absence of the possessor does not, according to Savigny, 'at the moment acquire juridical possession'; (Savigny, on 'Possession,' translated by Perry, page 261). In other words, it must be followed up by other acts of possession of which the third party has notice . . . . for as regards a third person—assuming, as we do, that he was not affected by the decree it cannot matter that the decree was in a partition suit. In *Ramaji Govind v. Yaswada*(1) it is quite possible that the Court considered that the third person was present and did not obstruct."

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In none of the above cases was possession delivered by the officer of the Court to the decree-holder or the purchaser, as the case may be, in the presence of, or to the knowledge of the third party or, as in this case, adversely to him in spite of his protest. In the Full Bench decision of the Bombay High Court, it is however distinctly stated that delivery of property under section 263, Civil Procedure Code, might amount to a dispossession, in the eye of the law, of a third party; if such delivery takes place in the presence of the third party and he does not obstruct or if the delivery takes place hostilely to him, and that the question of such dispossession is a mixed question of law and fact to be determined with reference to the state of things attending the delivery.

In the Calcutta case above referred to, as well as in some other reported cases, a delivery of possession under section 263 or 264, Civil Procedure Code, or section 318 or 319 is referred to as "symbolical" or "formal" possession and sometimes even as "proper" possession. In all cases of delivery of possession of immovable property, whether to the decree-holder or to an execution purchaser, the officer entrusted with the warrant of delivery proceeds to the spot and delivery of possession is effected on the land or at a spot near enough to command a view of the land with its boundaries (see Savigny on 'Possession,' page 150), in the presence of the decree-holder or purchaser or their agent and generally in the presence also of several others, including village officers; and, after the

(1) Bom. P.J., 1878, p. 56.



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delivery is thus effected, a receipt acknowledging delivery of possession and attested by witnesses is obtained and forwarded to the Court along with the return to the warrant. If the judgment-debtor be the party in possession, it is difficult to see what else has to be done to put the decree-holder or purchaser in actual possession. The officer of the Court, by effecting delivery as above indicated, puts the decree-holder or purchaser in actual possession of the land. If, however, the judgment-debtor be not the party in possession, but a third party is in possession, a delivery thus made in the absence of the third party and not hostilely to him cannot by *itself* affect his possession, nor amount to an ouster or dispossession of him, and his possession will continue uninterrupted. The delivery of possession, therefore, under any of the above sections cannot legally be characterised as "symbolical" or "formal" either as against the judgment-debtor in possession or against a third party in possession. If the judgment-debtor is in possession, such delivery operates as a delivery of actual possession. If a third party is in possession, it is no delivery of possession at all, as against him, if made in his absence and without his knowledge but it is operative as an ouster or dispossession of him and placing of the decree-holder or purchaser in actual possession, if such delivery takes place in the presence of and adversely to the claim of such third party.

If, as we hold, the appellant was dispossessed in 1877 in favour of the respondents' predecessor in title and the respondents were dispossessed by the appellant in 1892-93, they will be entitled to eject the appellant as a wrong doer, even if the title to the island in question be in the Crown and the respondents had not, in 1892-93, acquired title against the Crown by sixty years' possession (vide *Narayana Row v. Dharmachar* (1)). It is therefore unnecessary to consider and decide the other questions arising in the case which have been argued before us.

The appeal therefore fails and is dismissed with costs.

We also fully agree with the District Judge, for the reasons given by him, that the respondents have entirely failed to establish their title to the portion of the island disallowed by him. The memorandum of objections is also dismissed with costs.