

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

PARAMESWARAM MUMBANNOO, P. A., AND ANOTHER

(PLAINTIFFS), APPELLANTS,

v.

KRISHNAN TENGAL, C. I., AND EIGHT OTHERS (DEFENDANTS),

RESPONDENTS.*

1902.
October 21,
22.

Limitation Act—XV of 1877, sch. II, art. 144—Suit to recover land—Claim that defendants were holding over as yearly tenants on expiration of lease—Previous suit on another lease—Claim by tenants as permanent lessees—Dismissal of suit except as to rent—Payment of rent since—Limitation—Prescriptive right as permanent lessees.

Plaintiffs sued on behalf of their devasom for land, basing their claim on a lease of 1862, for four years, and alleging that the defendants had been holding over as tenants and paying rent as such, since the expiration of that term in 1865. In 1881, plaintiffs' devasom had sued to eject the defendants from the same land, basing their suit on an alleged lease of 1865. The defence was set up by the predecessor of the present defendants Nos. 4 to 7 that he was a permanent tenant at a fixed rent. That suit was dismissed on the ground that the alleged lease of 1865 had not been proved, but the plaintiffs obtained a decree for the rent which the then defendant admitted to be due by him as a permanent tenant:

Held, that even assuming that the defendants had held over as yearly tenants, after the expiration of the alleged lease of 1862, such tenancy must have been determined prior to plaintiffs' suit in 1881. The possession of the defendants, subsequently to that suit was therefore, according to the plaintiffs' case, that of trespassers claiming a permanent right of tenancy. The payment of rent under the decree in the suit of 1881, and subsequently at the same rate, could be construed only, so far as the defendants were concerned, as payment by them of the rent admitted by them to be due as permanent tenants, and not as a renewal of the alleged lease of 1862, with a variation of the amount of rent. Inasmuch as the defendants had set up their adverse possession at a time when, according to plaintiffs' case their yearly tenancy had been determined, and such adverse possession had continued down to the date of the present suit, namely, for a period of more than twelve years, the defendants had acquired, by prescription, a right to hold possession as permanent tenants at that rent.

Seshamma Shettati v. Chickaya Hegade, (I.L.R., 25 Mad., 507 at p. 513), referred to.

SUIT for land. Plaintiffs sued on behalf of the Tiruvengad devasom to recover certain land which they alleged belonged to the

* Appeal Suit No. 134 of 1900 presented against the decree of A. Thompson District Judge of North Malabar, in Original Suit No. 18 of 1899.

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devasom and was leased to the karnavan of the third defendant's tarwad in 1862, for four years. The facts are set out, sufficiently for the purposes of the point decided, in the judgment of the High Court. The District Judge refused to allow the claim and passed a decree for payment of a small sum of money as against defendants Nos. 3 and 4.

Plaintiffs preferred this appeal.

Mr. K. Brown, T. R. Ramachandru Ayyar and V. Ryyu Nambiar for appellants.

Mr. C. Krishnan for fourth defendant.

Hon. Mr. C. Sankaran Nayar for seventh respondent.

J. L. Rosario for fifth and sixth respondents.

C. V. Anantakrishna Ayyar for tenth respondent.

JUDGMENT.—We think that the plaintiffs' suit is barred by limitation.

In Original Suit No. 3 of 1881 the plaintiffs' devasom sued to eject the defendants Nos. 4 to 7 from the same land that the plaintiffs' devasom now seek to recover. That suit was based on an alleged lease of 1865. The predecessor of defendants Nos. 4 to 7 pleaded that he was a permanent tenant at a certain fixed rent. The plaintiffs' suit in ejectment was dismissed on the ground that the alleged lease was not proved but they got a decree for the rent which the defendant admitted to be due by him as a permanent tenant. The present suit is based on an alleged lease of 1862 for a term of four years, and it is contended by plaintiffs that subsequent to 1866 the defendants must be held to be holding over as tenants paying rent from year to year under the lease of 1862. Assuming that from the expiry of the lease of 1862 the defendants were holding over as yearly tenants under the alleged lease of 1862 such tenancy, according to the plaintiffs' case, must have been determined prior to the institution of Original Suit No. 3 of 1881, in which the plaintiffs sued to eject the defendants, who, if the lease of 1865 was either not true in fact or was invalid in law for want of registration, must be regarded as having been holding over, after 1866, under the lease of 1862. The defendants' possession, at any rate subsequent to that suit, was therefore, according to the plaintiffs' case, that of mere trespassers claiming a permanent right of occupancy. The payment of rent under the decree in Original Suit No. 3 of 1881 and the subsequent payment of rent at the same rate can be construed only, so far as defendants are

concerned, as payment by them of the rent admitted by them to be due as permanent tenants and not as a renewal of the alleged lease of 1862, with a variation only of the amount of rent. The adverse possession of the defendants having been set up by them at a time when, according to the plaintiffs' case their yearly tenancy had been determined and such adverse possession having continued down to the date of the present suit, that is for much more than 12 years, the defendants have acquired by prescription a right to hold possession as permanent tenants at that rent (*Seshamma Shettati v. Chickaya Hegade*(1)).

The appeal must therefore be dismissed with costs payable to respondents Nos. 4 and 5 and 6 and 7 according to their respective interests. Separate costs for each set of printed papers for respondents.

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v.
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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

GOVERDHANA DOSS, R. S. M. (THIRD DEFENDANT), APPELLANT,

v.

VEERASAMI CHEPPI, G., AND TWO OTHERS (PLAINTIFF AND
SECOND DEFENDANT), RESPONDENTS.*

1902.
September 8,
9.
October 7.

Transfer of Property Act—IV of 1882, s. 74—Mortgage of property—Subsequent mortgage to same mortgagee—Third mortgage with possession—Decree obtained by first mortgagee—Usufructuary mortgagees not a party—Subsequent suit by first mortgagee against usufructuary mortgagees for amount of decree.

The owner of land mortgaged it to plaintiffs, and, at a subsequent date, gave plaintiffs a second mortgage over it. At a still later date, the mortgagor gave a further usufructuary mortgage over it to the predecessor in title of the third defendant. Plaintiffs then sued the mortgagors on their two mortgages, obtained a decree and brought the property to sale, when it was purchased by the second plaintiff, the undivided brother of the first plaintiff. The third defendant was not made a party to this suit. Plaintiffs now sued the mortgagors as well as the third defendant, and prayed that the third defendant might be decreed to pay

(1) I.L.R., 25 Mad., 507 at p. 513, where *Budesh v. Hanmanta*, (I.L.R., 21 Bom., 509), is considered.

* Original Side Appeal No. 28 of 1901 against the decree of Mr. Justice Boddam in Civil Suit No. 158 of 1900.