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have been sought in the suit. The provisions of s. 78 of Bengal Act VII of 1876 prevent the recovery of such arrears until registration of names is complete.

This point alone is in our judgment sufficient for the determination of the case. It is not clear, upon the plaint and written statement and the judgments of the Courts below, whether, as a matter of fact, there were two separate applications to register—one in respect of the mal, and another in respect of the lakhiraj land. We are inclined to agree in the view presented to us by the learned Counsel for the appellant that, as a matter of fact, there was but one application, and that was in respect of the lakhiraj land. But whether that is so or not, and whether it makes any difference in the plaintiffs' position, it is not necessary to inquire, for the point was not taken in the Courts below, and we do not think we ought to allow it to be taken here. We are also of opinion that it may fairly be assumed that if the plaintiffs' title with regard to both the mal and lakhiraj land rested on the same basis, and if the defendants were interested in denying and did, as a matter of fact, deny the plaintiffs' right to have their names registered with respect to the lakhiraj land, they were certainly persons who were interested in denying the plaintiffs' legal character or right in respect of the mal land.

These being our views, we think that this appeal ought to be dismissed with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Norris.

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June 7.

SUNDURI DASSEE (DEFENDANT) *v.* MUDHOO CHUNDER SIRCAR (PLAINTIFF).*

Possession, Suit for—Adverse possession—Case made in plaint—Issues—Variance between title alleged and proved in suit for possession.

The plaintiff sued to recover possession of certain land, alleging that it was lakhiraj land, which he had purchased from a third party. The Court of first instance found that he had not proved the title he alleged, and, although it had been contended at the hearing that a title by twelve

* Appeal from Appellate Decree No. 2284 of 1886, against the decree of Baboo Rajendro Coomar Bose, Subordinate Judge of Beerbhoom, dated 13th of July, 1886, reversing the decree of Baboo Janoki Nath Dutt, Munsiff of Bolepore, dated the 30th of September, 1885.

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years' adverse possession had been proved, the Court held that it was not proved, and as it was not alleged in the plaint and no issue was raised as to it, the plaintiff was not entitled to succeed and accordingly dismissed the suit. The plaintiff appealed, and one of his grounds of appeal was that he was entitled to succeed by virtue of the title of adverse possession proved. The lower Appellate Court considered that the plaintiff had proved that he and his vendor had held adverse possession for a period of over twelve years and gave the plaintiff a decree on the strength of that title.

The defendant appealed to the High Court, and it was contended on his behalf that the plaintiff was not entitled to succeed upon a title of adverse possession when it was not alleged in his plaint and no issue had been laid down in respect of it.

Held, that, as the suit was one for possession and the defendant had express notice in the lower Appellate Court that the plaintiff relied on the title of adverse possession, and as he took no objection on the ground that he should be allowed an opportunity to call evidence to rebut it, and as he had consequently not been prejudiced by the course adopted by the lower Appellate Court, the decree of that Court should be confirmed.

Bijoya Debia v. *Bydonath Deb* (1) and *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2) distinguished. *Joytara Dassee* v. *Mahomed Mobaruck* (3) discussed.

IN this case the plaintiff sued to establish his right to, and to recover possession of, 2 bighas of land on the allegation that it was the lakhiraj land of one Deno Bhundoo Poramanick, from whom he had purchased it in the month of Assin 1284 (September-October, 1877) by a registered kobala, and that he had been in possession of it by letting it out to one Kali Das Das, the son of a previous tenant Madhub Chunder Das; but that he had been wrongfully dispossessed by the defendant in Joisto 1291 (May-June, 1884), when he had gone to cultivate it on the tenants relinquishing it.

The defendant pleaded that the suit could not proceed without making the zemindar a party, and that it was barred by limitation; that the disputed land was not lakhiraj and did not belong to Deno Bhundoo Poramanick, and that the kobala set up by the plaintiff was collusive; that neither Madhub Chunder Das nor his son Kali Das Das had ever been in possession of the land, and that it was the mal land of the mehal which had been let out to him in 1288.

(1) 21 W. R., 444. (2) I. L. R., 2 Calc., 418.

(3) I. L. R., 8 Calc., 975.

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The Munsiff found that the zemindars were not necessary parties and that the plaintiff had proved that, Kali Das Das and his father Madhub had been in possession of the land within twelve years of suit and had paid rent to the plaintiff, who was consequently in possession, and that the suit was therefore not barred by limitation. On the merits, however, he decided the case against the plaintiff. He held that the plaintiff had not adduced any evidence to show that the land was lakhiraj and belonged to his vendor Deno Bhundoo Poramanick, but merely proved that Deno Bhundoo had sold it to him as lakhiraj. It was contended on behalf of the plaintiff that Deno Bhundoo had acquired a title by twelve years' adverse possession, but upon that the Munsiff observed that this case was not set up in the plaint and that there was not sufficient evidence to support it.

The first Court, therefore, held that the plaintiff had failed to prove that the land was the lakhiraj of Deno Bhundoo, and that he had acquired a title to it by his purchase from him, and the suit was accordingly dismissed.

The plaintiff then appealed to the Subordinate Judge, and in his grounds of appeal amongst other matters contended that he was entitled to succeed on the ground of adverse possession for twelve years.

The Subordinate Judge found that it had been proved clearly that the plaintiff had purchased the land from Deno Bhundoo Poramanick with other lands for a consideration of Rs. 321, and that after the purchase in 1877 he had been in possession by receipt of rent from Madhub's son, who had been the tenant on the land from the time when Deno purchased it, and that the plaintiff had so held possession down to Joisto 1291 (May-June, 1884), when he was dispossessed by the defendant; that prior to 1877 Deno had been in enjoyment of the land by receipt of rent from the tenant for a period of five or seven years; and that therefore the possession of the plaintiff and his vendor prior to the ouster had extended to a period of over twelve years.

That Court therefore found that, as the defendant had not been able to show that he had a right to remain in possession of the land in suit and that it formed the mal land of the village, the fact that the plaintiff and his vendor had been in possession for

twelve years before ouster entitled him to recover possession of the lands in suit, and it accordingly reversed the decree of the Court of first instance and gave the plaintiff a decree for possession.

The defendant now appealed to the High Court.

Baboo *Guru Dass Banerjee* and Baboo *Tarapodo Banerjee* for the appellant.

Baboo *Karuna Sindhu Mukerjee* for the respondent.

Baboo *Guru Dass Banerjee* (for appellant).—Plaintiff having failed to prove his lakhiraj title the Court below ought not to have decreed his suit upon a title by twelve years' adverse possession—*Bijoya Debia* v. *Bydonath Deb* (1); *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2); *Joytara Dassee* v. *Mahomed Mobaruck* (3).

Baboo *Karuna Sindhu Mukerjee* (for respondent).—The plaintiff in this case asks for possession as well as a declaration of his title. He alleged in his plaint that he had been in possession as lakhirajdar since 1877, and previously his predecessor in title was in possession. The first Court found his title proved. The plaintiff being in peaceful possession has been dispossessed by a person who has been found to be a trespasser, and he is therefore entitled to a decree—*Mohabeer Pershad* v. *Mohabir Singh* (4); *Brojo Sunder Gossami* v. *Koilash Chunder Kur* (5); *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (6).

The Privy Council case of *Wise* v. *Ameerunnissa Khatoon* (7) does not apply to the facts of the present case, as there the plaintiff relied upon *bare* possession, while the Government was *primâ facie* entitled to the land in suit.

The cases of *Bijoya Debia* v. *Bydonath Deb* (1) and *Shiro Kumâri Debi* v. *Govind Shaw Tanti* (2) are distinguishable, as in those cases the plaintiff merely sued for a declaratory decree, and the Courts were therefore justified in not allowing the plaintiff to change his case. In the case of *Joytara Dassee* v.

(1) 24 W. R., 444.
(2) I. L. R., 2 Calc., 418.
(3) I. L. R., 8 Calc., 975.
(4) 9 C. L. R., 164.
(5) 11 C. L. R., 133.
(6) I. L. R., 8 Bom., 371.
(7) L. R., 7 I A., 73.

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Mahomed Mobaruck (1) there was a *bare* allegation of possession, and besides that case was a regular appeal.

In the present case the defendant had sufficient notice in the Court below that the plaintiff also relied upon a title by adverse possession. A distinct ground to that effect was taken in the grounds of appeal, and the Court below decided the point against the defendant, so that it does not lie in the mouth of the defendant now to say he was taken unawares.

Baboo *Guru Dass Banerjee* in reply.

The High Court (TOTTENHAM and NORRIS, JJ.) delivered the following judgment:—

TOTTENHAM, J.—This was a suit to recover possession of land, of which the plaintiff alleged himself to have been dispossessed by the defendant. The title he set up in his plaint was that this was lakhiraj land which he had purchased from one Deno Bhundoo Poramanick. The defendant denied the plaintiff's title altogether.

The lower Appellate Court found that, although the plaintiff's lakhiraj title was not established, it was proved that he had purchased the land as lakhiraj from his alleged vendor; and the Subordinate Judge held that the possession of the plaintiff and of his vendor together extended to twelve years or more; and that that possession was adverse to the defendant. He was therefore of opinion that the plaintiff had established a title by adverse possession and was entitled to recover the land.

On second appeal Baboo Guru Dass Banerjee, for the defendant-appellant before us, raised the question whether the plaintiff was entitled to succeed upon a title of adverse possession when he had not set up that title in his plaint and when no issue had been laid down in respect of it in the first Court. The petition of second appeal does not specifically raise this question, but one of the grounds taken in that petition was that, inasmuch as the plaintiff failed to prove the lakhiraj title set up by him, his suit ought to have been dismissed. We have allowed the appellant therefore to deduce from that ground of appeal the contention which Baboo Guru Dass

(1) I. L. R., 8 Calc., 975.

Banerjee has urged. In support of his contention he has cited the cases of *Bijoya Debia* v. *Bydonath Deb* (1), *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2) and *Joytara Dassee* v. *Mahomed Mobaruck* (3). Those cases support the view that the plaintiff cannot succeed upon a title which he has not set up; but there is a distinction between two of those cases and the present case. In those two cases the suit was for a declaration of title, and the Court there very properly held that, unless the plaintiff proved the title in respect of which he asked for a declaration, he could not obtain such declaration. The present case is not for a declaration of title, but for possession upon proof that the plaintiff is entitled to have the land. The cases which have been cited by Baboo Karuna Sindhu Mukerjee for the respondent support the view that the plaintiff may succeed in obtaining possession on proof of a good title, though that title be not specifically set up. The most that I should have been inclined to do in the present case would be to order a remand if I thought that the defendant-appellant had been prejudiced or taken by surprise in this matter. But I find that, having lost his case in the first Court by reason of his having failed to prove his lakhiraj title, and by reason of his not being, in the opinion of the Munsiff, entitled to a decree on the ground of adverse possession for twelve years because no issue on that point had been raised, the plaintiff, on appeal to the Subordinate Judge, distinctly raised the question and so gave notice to the defendant that he intended to rely upon his title by adverse possession. Had the defendant considered himself prejudiced in this respect he could then have applied to the lower Appellate Court for an opportunity to go into evidence on the point; but he did not do so, and the case was apparently argued out from that point of view and terminated in a decree in favor of the plaintiff. Then, as has been observed, no specific objection was taken in the petition of second appeal to the trial of this issue in the lower Appellate Court. I think, therefore, it cannot be said that the defendant has really been prejudiced by the course adopted in the lower

(1) 24 W. R., 444. (2) I. L. R., 2 Calc., 418.
(3) I. L. R., 8 Calc., 975.

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Appellate Court. And being of opinion that the Subordinate Judge was entitled, upon finding facts which established the plaintiff's title, to give him a decree, I do not think that we ought to interfere in this Court.

The appeal is dismissed with costs.

NORRIS, J.—I should like to add just a word. This was an action of ejectment. The plaintiff based his title upon the allegation that the land which he sought to recover was his lakhiraj land. It is not quite clear, but I take it that he failed to prove that title. In the progress of the case, however, he proved a title which entitled him to a decree for ejectment.

It is urged that he ought not to be allowed to obtain a decree upon the strength of a title, which, though he has proved, he did not, as a matter of fact, set up in his plaint; and in support of that contention Dr. Guru Dass Banerjee has cited three cases. Two of those cases, as pointed out by my learned colleague, are clearly distinguishable from the present case. The cases of *Bijoya Debia* v. *Bydonath Deb* (1) and *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2) were cases where the suit was for a declaratory decree. It is plain, it is common sense, that a man ought not to be allowed to obtain a declaratory decree except in respect of the very title which he asserts and upon which he goes to trial. The case of *Joytara Dassee* v. *Mahomed Mobaruck* (3) is no doubt at first sight an authority in Dr. Guru Dass Banerjee's favor. But I think, when one comes to examine it, it is really not at all antagonistic to the view which we are prepared to take in the present case. That was a case on appeal from an original decree in which the plaintiff had succeeded, and a decree had been given him in the first Court upon the strength of a title which he had not set up; and Mr. Justice Field, who delivered the judgment of the Court, says: "Cases must be tried and determined *secundum allegata et probata*, and it is contrary to this principle, and may be fraught with injustice, to decide a cause upon a point not raised in the pleadings nor embodied in an issue, and to which in consequence the attention of the parties was not directed at the trial

(1) 24 W. R., 444. (2) I. L. R., 2 Calc., 418.
(3) I. L. R., 8 Calc., 975.

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so as to enable them to produce all the evidence relevant thereto, which was available to them." In the present case the plaintiff's suit was dismissed in the first Court. He appealed, and in his grounds of appeal to the lower Appellate Court he distinctly gave notice to the other side that he would rely upon a title which had been proved in the course of the trial, namely, a title by adverse possession. It was open then to the defendant either to say "I object to this point being taken because it was not raised in the pleadings" or, "if this point is gone into, I ought to have an opportunity of adducing evidence with regard to it." If that opportunity had been asked and denied I should unhesitatingly have been inclined to remand this case; but that opportunity was not sought by the defendant, and I cannot therefore bring myself to think that he has been at all damnified or that his rights have been prejudicially interfered with, by the course adopted by the lower Appellate Court.

Upon this ground I agree in dismissing the appeal with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Norris.

MOHABIR PERSHAD NARAIN SINGH (DEFENDANT) *v.* GUNGADHUR PERSHAD NARAIN SINGH (PLAINTIFF.)*

1887 *May* 10.

Mortgage—Foreclosure, Suit for—Conditional Sale—Regulation XVII of 1806—*Transfer of Property Act* (*IV of* 1882), *s.* 2, *cl.* (*c.*) *and ss.* 86, 87—*Procedure.*

A suit was brought on the 24th January, 1885, by a mortgagee upon a mortgage by conditional sale asking for a declaration that the mortgagor's right to redeem had been extinguished and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April, 1881, and the mortgage money was repayable on the 13th May, 1881. On the 9th July, 1881, the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of ss. 7 and 8 of Regulation XVII of 1806. The year of grace expired on the 10th July, 1882. It was contended by the mortgagor that, as the Transfer of Property Act came into force on the 1st July, 1882, the proceedings taken by the mortgagee should be regulated

*Appeal from Appellate Decree No. 2005 of 1886, against the decree of H. W. Gordon, Esq., Judge of Sarun, dated the 19th of July, 1886, affirming the decree of Moulvie Mahomed Nural Hossein, Subordinate Judge of that district, dated the 17th of August, 1885.