1932

RATAN BARHAI v. KISHEN DEI

defendant claims a right to make constructions on the courtyard, he must adduce evidence to establish that permission to build extended not only to the site of the house but to the open space in question. The mere fact that he is in possession of both does not justify the inference that seems to have been made in some of the reported cases to which my learned brother has referred, namely, that he is entitled to make construction on every portion of the land which is in his occupation. If the terms of the grant have to be inferred from the use of the land in dispute, there is nothing in the circumstances of this case which can justify the inference that the defendant is entitled to construct on any portion of the courtyard in his possession. I am clearly of opinion that no general rule can be laid down as regards a riaya's right to build on land, not within the enclosed portion of the house which is generally called "*sahan andaruni*", which may appertain to his residential house. The question whether he has a right to build on any land appertaining to his house is one of fact to be determined on proof of the terms of the license, by direct evidence or by inference from the conduct of the parties and the use to which the land has been put. For these reasons I concur in the order dismissing the appeal with costs.

Niamat-ullah J.

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

KALLAN AND OTHERS (DEFENDANTS) *v.* MUHAMMAD NABI KHAN (PLAINTIFF) *

1932 *November*, 29.

Limitation Act (IX of 1908), articles 142 and 144—Suit for possession of immovable property based on title—Defendant alleging ownership but not proving any title—Adverse possession—Burden of proof on defendant.

Article 144 of the Limitation Act, and not article 142, is applicable when plaintiff sues for possession of immovable property on the basis of title; and where the plaintiff proves his

* Second Appeal No. 154 of 1931, from a decree of Pran Nath Agha, Additional Subordinate Judge of Moradabad, dated the 30th of October, 1930, reversing a decree of Kaustubha Nand Joshi, Munsif of Moradabad, dated the 14th of June, 1930

1932

KALLAN v. MUHAMMAD NABI KHAN

title he is entitled to a decree unless the defendant succeeds in establishing his adverse possession for more than 12 years.

Where a purchaser of a house sued for possession on the allegation that the defendant was a tenant of the plaintiff's vendor, but the defendant alleged that he was the owner and denied that he ever was a tenant, but the defendant failed to prove any title, and on the other hand the plaintiff proved his title but did not prove any tenancy, it was *held* that the case came under article 144 of the Limitation Act and it was for the defendant to establish adverse possession for over 12 years and not for the plaintiff to prove that he or his predecessor in interest was in possession within 12 years preceding the suit.

Mr. *A. M. Khwaja*, for the appellants.

Messrs. *Mukhtar Ahmad* and *S. K. Dar*, for the respondents.

NIAMAT-ULLAH and BENNET, JJ. :—This is a second appeal by defendants Nos. 1, 3 and 4 against a decree of the lower appellate court granting the plaintiff possession of a certain house. The suit of the plaintiff was brought on the 31st of July, 1929, on a sale deed, dated the 23rd of May, 1929, by defendant No. 2, Mst. Ahmadi Begam, of the house in question along with other property to the plaintiff. The plaint set forth that defendant No. 1, Kallan, was a tenant of the vendor, Mst. Ahmadi Begam, paying rent to her and liable to be ejected at any time. The plaintiff issued a notice on the 6th of June, 1929, to defendant No. 1 to vacate the house and defendant No. 1 sent a reply denying that he was a tenant and alleging that he was the owner. The written statement of defendant No. 1 was that he was the absolute owner of the house and had been in adverse proprietary possession for more than 17 years and that Mst. Ahmadi Begam had never been in possession and had never been the owner of the house. Subsequently, the parties made statements under order X, rule 1, and Kallan stated that he did not know who was the owner of the house, that his

father-in-law, Hamid Ullah, used to reside in the house and had no issue and died 20 or 22 years ago. The statement that the father-in-law had no issue apparently means that the father-in-law had no issue other than the wife of Kallan. Accordingly amendments of the plaint were allowed on the 30th of January, 1930, and the 7th of February, 1930, and Mst. Shahzadi, the daughter of Hamid Ullah and wife of Kallan, was added as defendant No. 5 and their two sons as defendants Nos. 3 and 4. The court of first instance framed issues as follows:

(1) Is plaintiff the owner of the house in suit?

(2) Have defendants acquired any right to it by adverse possession?

(3) To what sum, if any, is plaintiff entitled as mesne profits?

(4) Is plaintiff or his predecessor in interest in possession within 12 years, and, if not, is the suit barred by time?

The court of first instance dismissed the suit of the plaintiff on the ground that the plaintiff had to prove that he was in possession within 12 years before the institution of the suit and that plaintiff had failed to prove this. It was also found by that court that "To me it appears that Ahmadi Begam, finding that she had lost her claim to the house by being kept out of possession for over 12 years, sold the house to plaintiff with a view that plaintiff might try his chance by a law suit." The plaintiff appealed and the lower appellate court has decreed the suit. The lower appellate court held, following a ruling in *Kanhaiya Lal* v. *Girwar* (1), that article 144 applied to this suit as the plaintiff sues for possession of an immovable property on the basis of his title, and in such a suit if the plaintiff proves his title he is entitled to a decree unless the defendant succeeds in

(1) (1929) I.L.R., 51 All., 1042.

1932

KALLAN v. MUHAMMAD NABI KHAN

establishing his adverse possession for a period of more than 12 years, and that article 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title, and the burden of proving in such cases that the plaintiff was in possession and was dispossessed within 12 years from the date of the suit lies on the plaintiff.

In second appeal the correctness of this doctrine of law has been challenged and also it has been shown that the finding of the lower appellate court in regard to title is not supported by evidence, and further that there is no definite finding in regard to the period of possession by the defendants and whether the defendants have done acts which assert adverse possession. We will first look to the points in regard to proof of title and the findings in regard to possession and then we will deal with the law which should be applied by the lower court to this case. [The judgment then discussed the evidence and came to the following conclusion in regard to proof of title.] We consider therefore that in the present case it is necessary to remand this case for a finding on issue No. 1, "Is the plaintiff owner of the house in suit?" On this issue it will be open to the parties to produce further evidence.

Now if the plaintiff succeeds in proving his title, we consider that the article of the Limitation Act to apply will be article 144 and accordingly there should be a clear finding on issue No. 2, "Have defendants acquired any right to the house by adverse possession?" The finding of the lower appellate court is that the defendants have failed to prove that they have acquired any right to the house in dispute by adverse possession. But in discussing the evidence of witnesses who stated that the defendants had been in possession for more than 12 years the lower appellate court has not come to a finding as to whether defendants have or have not

been in possession for more than 12 years. It is necessary that there should be a clear finding on this point. Further, if the lower appellate court finds that defendants have been in possession for more than 12 years, it is necessary that the lower appellate court should come to a finding as to whether that possession has been adverse to the plaintiff and the predecessor of the plaintiff or not. That is, it is necessary for the court to find whether the defendants have asserted their title as owners of the house.

We now turn to the question of law on the subject, and learned counsel for the appellants has challenged the correctness of the law laid down in *Kanhaiya Lal* v. *Girwar* (1). The legal argument of counsel for the appellants was that it is not correct to say that where plaintiff proves his title he is entitled to the benefit of article 144, but that in this case also plaintiff should come under article 142; that the view of law laid down in the ruling in question is incorrect because a suit brought by a person who is dispossessed without his consent from immovable property otherwise than in due course of law can only come under section 9 of the Specific Relief Act and the period for such a suit is limited under article 3 of the Limitation Act to six months from the date of dispossession. He therefore argues that suits for possession on a possessory title are limited to six months by article 3 and they cannot be the only class of suits which come under article 142. Otherwise the period of 12 years would be in conflict with the period of six months laid down by article 3. No direct authority was shown to us for the proposition of law advanced by the learned counsel for the appellants. It is true that a majority of the Patna High Court in the Full Bench ruling in *Raja Shiva Prasad Singh* v. *Hira Singh* (2) held that in a suit for ejectment the plaintiff must not only prove his title but also that he has been in possession within 12 years from

(1) (1929) I.L.R., 51 All., 1042. (2) (1921) 6 Pat. L.J., 478.

1932

KALLAN v. MUHAMMAD NABI KHAN

the date of the institution of the suit. The view of law contained in *Kanhaiya Lal* v. *Girwar* (1) is a view which has been expressed in a number of rulings in this Court, and it is founded on the ruling of their Lordships of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao* (2) where it was held at page 632 that the proper article to apply was 144. We will also refer to *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (3) at page 659 where their Lordships state as follows: "In fact, the evidence shows that the then proprietor of the Raj refused to recognize the defendant's predecessors as his tenants. In these circumstances their Lordships are of opinion that the plaintiff failed to prove that the relationship of landlord and tenant, on which he relied, was in existence within 12 years prior to the institution of his suit, and that, therefore, the plaintiff's suit for possession was barred by the Limitation Act." In this passage their Lordships are apparently applying the principle of article 144 and not of article 142. In *Mohammad Ishaq* v. *Zindi Begam* (4) the following passage occurs in the judgment of a Bench of this Court: "The plaintiffs' title was proved and if the title was with the plaintiffs they were entitled to succeed unless the defendant proved that that title had been lost on account of adverse possession on the part of the defendant." In *Muthoora Palliath* v. *Muthoora Palliath* (5) their Lordships have laid down as follows: "Standing a title in "A", the alleged adverse possession of "B" must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fullness prove in the present case, that he too has been exercising during the currency of

(1) (1929) I.L.R., 51 All., 1042.
(2) (1916) I.L.R., 39 Mad., 617.
(3) (1928) I.L.R., 7 Pat., 649.
(4) (1931) 134 Indian Cases, 461.
(5) (1921) I.L.R., 44 Mad., 883 (890).

his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds." In *Jai Chand Bahadur* v. *Girwar Singh* (1) this principle has also been followed and it has been definitely held that the correct article to apply in cases like the present is article 144 and not article 142. There are also a number of unreported rulings of this Court in which this principle has been followed, e.g. *Mohammad Habibul Rahman Khan* v. *Babu Sant Lal* (2) and *Maharaja Prabhu Narain Singh* v. *Bhagwan Das* (3). Against the numerous rulings of this Court none to the contrary have been shown for the appellant. We therefore consider that there is no reason why we should depart from what has been the established practice of this Court in this matter.

We may mention that the present plaint does not allege that the plaintiff while in possession was dispossessed. On the contrary, the present plaint sets up a title in the plaintiff and alleges that only shortly before the plaint the defendant No. 1, who was in possession as a tenant, wrongfully denied the title of the plaintiff and alleged that he himself was the owner.

Accordingly we remand the case to the lower appellate court to arrive at findings on issues Nos. 1 and 2 in accordance with these directions of law. On both these issues we allow the parties to produce fresh evidence. The finding should be returned to this Court within a period of two months and 10 days will be allowed for objections.

(1) (1919) 17 A.L.J., 814.

(2) S.A. No. 760 of 1929, decided on the 6th of January, 1932.

(3) S. A. No. 154 of 1929, decided on the 18th of December, 1930.