APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice King

KUNJI AND OTHERS (PLAINTIFFS) *v.* NIAZ HUSAIN AND OTHERS (DEFENDANTS)*

1933
December, 19

Limitation Act (IX of 1908), articles 142, 144—Suit for possession—Plaintiff alleging dispossession by defendant—Defendant pleading not adverse possession but irrevocable license —Burden of proof.

In a suit for recovery of possession of a plot of land in the abadi of a village and the demolition of certain buildings constructed thereon, the plaintiffs zamindars alleged that two months before the suit the defendants began to build a mosque on the land without the plaintiffs' permission and continued to do so in spite of remonstrance; and the defendants alleged that the mosque had been built about 24 years ago with the permission of the then zamindars, and only repairs were being carried out recently. *Held* that the suit was governed by article 142 and not 144 of the Limitation Act, and as the defendants' allegations were found to be true, the dispossession or discontinuance of possession of the plaintiffs occurred more than 12 years before suit, and the suit was barred by limitation.

Where the plaintiff admits that while in possession he has been dispossessed or has discontinued his possession, there the burden is upon him to show that the dispossession or discontinuance of possession took place within 12 years of the suit, and if he fails to show this, his suit would be time barred. In such an event it would be wholly unnecessary for the defendant to lead evidence to establish his adverse possession maturing into complete title.

The defendants in the present case did not assert adverse possession but pleaded possession under an irrevocable license, and it was impossible to apply article 144 to such a case.

Per SULAIMAN, C. J.—Article 142 of the Limitation Act is not confined to suits based on possessory titles only, as distinct from suits in which the plaintiff proves his title as well. There is no justification for introducing new words into the article in order to limit its scope, when the words are general.

*Second Appeal No. 939 of 1929, from a decree of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 4th of March, 1929, reversing a decree of Anand Behari Lal, Munsif of Cawnpore, dated the 14th of October, 1925.

1933

Kunji v. Niaz Husain

Jai Chand Bahadur v. *Girwar Singh* (1), *Mohammad Ishaq* v. *Zindi Begam* (2), *Kanhaiya Lal* v. *Girwar* (3) and *Kallan* v. *Muhammad Nabi Khan* (4), distinguished.

Messrs. *Saila Nath Mukerji* and *M. L. Chaturvedi*, for the appellants.

Mr. *Mushtaq Ahmad*, for the respondents.

KING, J.:—This was a suit for recovery of possession of land in the abadi of a village and for demolition of certain buildings constructed thereon.

The plaintiffs are co-sharers in the village. They alleged that the building in question was situated upon two plots of land, one of which belonged to them and the other belonged to another group of zamindars who refused to join in the suit and therefore have been impleaded as *pro forma* defendants. Their case was that about 7 years before the suit one Mst. Faqiran Jan began to construct a room on the land in dispute and when the zamindars came to know of this, they raised objections and the construction was stopped. Subsequently, the outer walls, about three feet in height, have been lying incomplete for five or six years. Then about two months before the suit the defendants began to build a mosque on the land in dispute without having obtained permission from the zamindars, and refused to stop the construction when the zamindars remonstrated.

The defence was that the mosque had been built about 24 years before the institution of the suit, by one Mst. Nasiban who had obtained permission from the zamindars of that time for building the mosque. Ever since its construction the Moslems of that village and neighbouring villages used to offer their prayers at the mosque. They denied that any new mosque had been built recently but alleged that the old mosque had become dilapidated and had partly fallen down and they had merely reconstructed or repaired it recently. They denied that the plaintiffs had any right to get the mosque demolished. They further pleaded that the plaintiffs

(1) (1919) I.L.R., 41 All., 669.
(2) (1931) 134 Indian Cases, 46.
(3) (1929) I.L.R., 51 All., 1042.
(4) (1932) I.L.R., 55 All., 209.

have not been in possession of the land within 12 years before the institution of the suit and therefore their claim was barred by time.

The parties agreed that they would not produce any oral testimony and that the court should decide on the basis of documentary evidence after inspection of the locality. The learned Munsif therefore made a local inspection and recorded his notes. The principal issue was whether the plaintiffs have not been in possession of the land, on which the mosque is built, for more than 12 years before the suit and whether the suit was barred by time.

The trial court came to the conclusion that the plaintiff's case was substantially correct and that the mosque, as it stands at present, had been newly constructed and only the lower portion of it is about 10 years old and that the whole of the mosque lies within the plaintiffs' zamindari. He held that it was for the defendants to have proved that they had been in adverse possession of the land for more than 12 years before the suit. There was no documentary evidence that the mosque had been built with the permission of the zamindars. The court accordingly came to the conclusion that the suit was not barred by limitation and decreed the plaintiffs' claim.

The defendants appealed and the learned District Judge took the view that the matter should be decided upon a strictly literal interpretation of the pleadings. As the plaintiffs clearly alleged their dispossession within two months of the filing of the suit, article 142 of the Indian Limitation Act was applicable and it was incumbent upon the plaintiffs to prove that they had been dispossessed within 12 years. He further observed that the defendants never expressly raised the question of adverse possession, as they had alleged that the mosque had been built 24 years ago with the permission of the zamindars. He held that the suit was barred by limitation and dismissed the plaintiffs' claim.

1933

KUNJI v. NIAZ HUSAIN

King, J.

When the plaintiffs came to this Court in second appeal the case was originally heard by a learned single Judge who agreed with the District Judge that article 142 of the Limitation Act was applicable, but as there was no definite finding by the lower appellate court that the plaintiffs had been dispossessed or had discontinued possession more than 12 years before the suit, he remitted an issue to the court below for a definite finding on the question whether or not the plaintiffs were dispossessed or had discontinued their possession 12 years before the suit.

The court below has now submitted its finding which is as follows: "I have not the least doubt in my mind that the case for the defendants respondents is true and that the mosque being much more than 12 years old, the plaintiffs were dispossessed long before the 12 years preceding their suit."

The principal contention for the appellants is that article 142 of the Limitation Act is not applicable to the facts of this case and that the onus is upon the defendants to prove adverse possession for more than 12 years and not upon the plaintiffs to prove possession within 12 years. As the contention is that the learned single Judge who remitted the issue to the court below on the question of possession was wrong in holding that article 142 was applicable, the case has been heard by a Bench of two Judges.

The appellants have referred to a number of authorities in support of their contention that article 142 is not applicable and that the onus was not upon the plaintiffs to prove possession within limitation but was upon the defendants to prove adverse possession. In the case of the *Secretary of State for India* v. *Chellikani Rama Rao* (1) their Lordships of the Privy Council observed at page 631: "Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person assert-

(1) (1916) I.L.R., 39 Mad., 617.

ing such possession." This observation must be read in the light of the facts of that case. That suit was not for possession of immovable property. It was a claim under the Forest Act against the Secretary of State for India, and their Lordships observed that persons preferring such claims were in the same position as persons bringing a suit in an ordinary court for a declaration of right and article 144 of the Limitation Act was applicable. The onus of establishing possession for the required period was upon the claimants. It must be observed that the claimants or plaintiffs were in possession of the land and were seeking a declaration of proprietary title on the ground of long continued possession. In such a case their Lordships held that the onus was upon the plaintiffs to establish their adverse possession for the required period. The facts of this case are totally different. The persons in possession of the land, namely the defendants, are not seeking for any declaration of title, they are merely resisting the plaintiffs' claim to eject them. Moreover, the defendants in the present case did not even set up a claim to adverse possession. Their case was that the builder of the mosque had been *permitted* by the zamindars to build upon the land. Their position therefore was that of licensees whose license was irrevocable because the licensee acting upon the license had executed a work of a permanent character and had incurred expenses in the execution; see section 60(*b*) of the Easements Act. The case of *Jai Chand Bahadur* v. *Girwar Singh* (1) can also be distinguished. In that case, a zamindar sued for the ejectment of the defendant on the ground that the latter was a licensee. The defendant denied the license and set up adverse possession. It was held that the defendant having set up adverse right, the question whether the license was ever given or revoked was immaterial. The plaintiff was entitled to succeed simply on the strength of his *prima facie* title as zamindar, and it was unnecessary for him

(1) (1919) I.L.R., 41 All., 669.

1933

KUNJI v. NIAZ HUSAIN

King, J.

to prove that he had been in actual possession within 12 years. The important distinction is that in that case the defendant set up adverse possession and denied the license, whereas in the present case the defendants never set up adverse possession but did plead a license. The case of *Mohammad Ishaq* v. *Zindi Begum* (1) was decided by a Bench of this High Court, but that is also distinguishable. It was a suit for the ejectment of a person who had been holding as a lessee, but who continued in possession after the expiry of his lease. On the plaintiff's case, article 142 would clearly not be applicable and, on the other hand, article 144 clearly would be applicable, because it was alleged that the defendant's possession became adverse from the time of the expiry of his lease. It was held in that case that the burden was upon the defendant to prove adverse possession for more than 12 years; but that ruling has no direct application to the facts of this case. In a recent case decided by a Bench of this Court, *Kanhaiya Lal* v. *Girwar* (2) it was held that the article of the Limitation Act applicable to a suit in which the plaintiff sues for possession of immovable property on the basis of his title is article 144 and if in such a suit the plaintiff proves his title he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years. It was also held that article 142 has no application to cases in which the plaintiff claims relief on the basis of his title. This ruling does no doubt, *prima facie*, support the appellants' contention, but the propositions laid down in this ruling must be interpreted with reference to the facts of the case. In that case, the defendant clearly set up a plea of adverse possession for a period of more than 12 years. I think we must take their Lordships to mean that when the plaintiff sues for possession on the basis of his title and proves his title and when the defence consists merely of a plea of adverse possession for more than 12

(1) (1931) 134 Indian Cases, 461. (2) (1929) I.L.R., 51 All., 1042.

years, then the onus is upon the defendant to prove his adverse possession for the requisite period. The propositions are certainly laid down in very wide terms, but I cannot take their Lordships to mean that if the defendant does not assert adverse possession but sets up some other defence, such as the right of a lessee, he must nevertheless be compelled to prove an assertion which he never made and which is moreover inconsistent with the assertions which he has made. In my opinion this ruling cannot be applied to a case like the present, where the plaintiffs pleaded dispossession two months before the suit and the defendants did not assert adverse possession but pleaded an irrevocable license. The case of *Kallan* v. *Muhammad Nabi Khan* (1) can also be distinguished. That was a suit for the ejectment of a tenant. The defence was a denial of the alleged tenancy and a plea of adverse possession. In such circumstances it was held that article 144 was applicable and the defendant must prove adverse possession for the requisite period. I think this ruling does not apply to the facts of this case. *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (2) does not seem to support the appellants' contention. It was a suit for possession against the assignee of a lessee. Apparently, the assignee was willing to pay rent to the plaintiff, provided that his name was entered as the holder of the *mukarrari* interest and that he was given receipts in his own name, but the plaintiff refused to do this. The defence was that he had been in adverse possession for more than 12 years before the suit. Their Lordships of the Privy Council held that the plaintiff had failed to prove that the relationship of landlord and tenant existed between the parties within 12 years before the suit and the suit was barred by limitation. This ruling may be distinguished on the ground that the defendant pleaded adverse possession; but in any case, the decision seems to be rather against the appellants than in their favour.

(1) (1932) I.L.R., 55 All., 209. (2) (1928) I.L.R., 7 Pat., 649.

1933

KUNJI v. NIAZ HUSAIN

King, J.

Looking to the language of article 142 of the Indian Limitation Act, it seems to me applicable to the facts of this case. The plaintiffs alleged not merely their title to the land in dispute but their possession within limitation. They clearly alleged that they had been dispossessed by certain specified wrongful acts of the defendants only about two months before the institution of the suit. It is therefore a case where the plaintiff, while in possession of the property, has been dispossessed. The dispossession was caused by the building of the mosque which, according to the plaintiffs' own case, was begun only two months before the suit. Their allegations have been found to be quite false as the mosque was built more than 12 years before the suit.

A number of rulings have been relied upon by the learned advocate for the respondents in support of his contention that article 142 is applicable and that the learned District Judge and the learned single Judge of this Court were correct in applying the provisions of that article.

Mohima Chunder Mozoomdar v. *Mohesh Chunder Neogi* (1) was a suit to recover possession of land on the basis of title and the plaintiffs proved anterior title. They had been admittedly dispossessed some years before the suit and the land was occupied by the defendants who denied the plaintiffs' title. In such circumstances it was held by their Lordships of the Privy Council that the burden of proof was on the claimants to prove their possession at some time within the 12 years prescribed by article 142. It was further held that although the plaintiffs had certainly shown an anterior title, this was not enough, without proof of their possession within 12 years, to shift the burden of proof on the defendants to show their title to retain possession. It is not clear whether the defendants expressly claimed title by adverse possession. The whole dispute was whether the plaintiffs had been able to prove possession within limitation.

(1) (1888) I.L.R., 16 Cal., 473.

1933

KUNJI
v.
NIAZ
HUSAIN

King, J.

Maharajah Nitrasur Singh v. *Nund Loll Singh* (1) was a suit to recover possession of land alleged to belong to the plaintiffs. The defendants admittedly had been in possession for 10 years before the suit. The defendants claimed that they were the rightful owners of the land and in any case the plaintiff had been out of possession for more than 12 years. Their Lordships of the Privy Council held that the burden was upon the plaintiff to prove that he had been dispossessed within 12 years before the suit and that no proof of anterior title could relieve him from this onus or shift the onus on to the defendants by compelling them to prove the time and manner of their possession. *Innasimuttu Udayan* v. *Upakarath Udayan* (2) is another Privy Council case The suit was to recover possession on the basis of title. Defendant had been admittedly in possession for 7 years before the suit and he claimed to have been in possession for a longer period. It was held upon the evidence that the plaintiff had not been in possession within 12 years before the suit and the suit was time barred under article 142. *Mahammud Amanulla Khan* v. *Badan Singh* (3) is also a decision by their Lordships of the Privy Council. In that case the plaintiffs claimed possession on the basis of an anterior title. The defence was that they had been dispossessed more than 12 years before the suit. It was held that they had been dispossessed more than 12 years before the suit and their claim was barred under article 142. In *Rani Hemanta Kumari* v. *Maharaja Jagadindra Nath Roy* (4) it was held by their Lordships of the Privy Council that it was for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession. In the question of evidence the initial fact of the plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence. This is a clear authority for the proposition that in a suit for ejectment the burden of proof is

(1) (1860) 8 Moo. I.A., 199.
(2) (1899) I.L.R., 23 Mad., 10.
(3) (1889) I.L.R., 17 Cal., 137.
(4) (1906) 3 A.L.J., 363.

1933

KUNJI
v.
NIAZ
HUSAIN

King, J.

upon the plaintiff to prove that he had been dispossessed or discontinued possession within 12 years before the suit.

It appears that none of the rulings relied upon by the appellants is directly in point, and there are several weighty authorities against their contention. If the defendants set up a plea of adverse possession, then the onus may be on them to prove their plea. But when, as in the present case, the plaintiffs allege that they have been dispossessed two months before the suit, and the defendants do not assert adverse possession but plead possession under an irrevocable license, it seems impossible to apply article 144. Article 144 can only apply when article 142 is not applicable; and when the plaintiffs clearly stated that they had been dispossessed by the building of the mosque about two months before the suit, I think that article 142 is applicable and agree with the learned District Judge and the learned single Judge of this Court on this point.

As regards the finding of the court below on the question of possession, it has been urged that the finding is vitiated because the court has taken into consideration an affidavit filed on behalf of the defendants alleging that the mosque in question has been in existence for about 25 years. It appears that the plaintiffs had prayed for a temporary injunction under order XXXIX, rule 1 to restrain the defendants from continuing to build the mosque pending the decision of the suit. For the purposes of contesting this application the defendants had filed the affidavit in question and the plaintiffs apparently had not troubled to file any affidavit by way of rejoinder. I doubt whether this affidavit could properly be taken into consideration as substantive evidence in the suit. The affidavit was filed merely for contesting the application for an injunction and was not, I think, intended to be treated as evidence in the suit itself. This point however is not of much importance, as even

if it is left out of account, it is quite clear that the plaintiffs have failed to prove their dispossession within 12 years before the suit. If the onus is on them, then they have certainly failed to discharge that onus. I would accordingly dismiss the appeal with costs.

Sulaiman, C. J.

SULAIMAN, C. J.:—I concur. It is quite obvious to me that article 144, which is a residuary article for suits for possession of immovable properties not otherwise specially provided for, cannot apply to a case for which there is a special article. There cannot be any manner of doubt that if a suit falls within the four corners of the language in the first column of article 142, it is specially provided for and cannot possibly fall under the general article 144. Now suits to which article 142 is applicable are suits for possession of immovable property when the plaintiff, while in possession of the property, has either (1) been dispossessed or (2) has discontinued the possession. In such a case the suit must be brought within 12 years of the date of the dispossession or the discontinuance. It seems to me to be quite clear that where the plaintiff admits that while in possession he has been dispossessed or has discontinued his possession, then the burden is upon him to show that his dispossession or discontinuance took place within 12 years of the suit. If he fails to show that his suit has been filed within 12 years from the date when he was dispossessed or he discontinued his possession, then his suit would be time barred. In such an event it would be wholly unnecessary for the defendant to lead evidence to establish his adverse possession maturing into complete title. The legislature has laid a burden on a person who, while in possession, is dispossessed or who discontinues possession. He has obviously notice of the fact of his possession or discontinuance of possession and must sue before the expiry of 12 years.

This view has been laid down by their Lordships of the Privy Council in the cases referred to by my learned

1933

KUNJI v. NIAZ HUSAIN

brother, which I need not discuss: *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1); *Mahammud Amanulla Khan* v. *Badan Singh* (2); *Rani Hemanta Kumari* v. *Maharaja Jagadindra Nath Roy* (3); *Innasimuttu Udayan* v. *Upakarath Udayan* (4).

Sulaiman, C. J.

These authorities would also show that article 142 is not confined to suits based on possessory titles only, as distinct from suits in which the plaintiff proves his title as well. There seems to be no justification for introducing new words into the article in order to limit its scope, when the words are general.

I agree that the appeal should be dismissed.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Young and Mr. Justice King

1933 December 19

NAIMA KHATUN (PLAINTIFF) *v.* SARDAR BASANT SINGH (DEFENDANT)*

Transfer of Property Act (IV of 1882), section 55, clauses (4) and (5)—Sale of mortgaged property—Money left with vendee to pay off a mortgage comprising the property sold as well as other properties—Covenant in contemporaneous security bond by vendee to discharge a mortgage debt of vendor by a certain date or to return the money to the vendor—Special contract—Specific performance—Vendor's lien.

The plaintiff in 1923 executed two simple mortgages of three items of property. In 1925 the plaintiff sold to the defendant one of the three aforesaid properties and left with him, out of the sale consideration, a sum of Rs.19,800 for payment to the two mortgagees; and simultaneously the defendant executed a security bond in favour of the plaintiff, undertaking to pay the Rs.19,800 to the mortgagees by a certain date, and in case of failure to do so to be liable to pay to the plaintiff Rs.15,000 as damages in addition to the Rs.19,800. The defendant did not make any payment to the mortgagees, who brought suits on their mortgages and obtained decrees

*First Appeal No. 493 of 1929, from a decree of Pran Nath Agha, First Subordinate Judge of Saharanpur, dated the 22nd of June, 1929.

(1) (1888) I.L.R., 16 Cal., 473. (2) (1889) I.L.R., 17 Cal., 137.
(3) (1906) 3 A.L.J., 363. (4) (1899) I.L.R., 23 Mad., 10.