Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

ASA RAM AND ANOTHER (PLAINTIFFS) *v.* RAM CHANDAR (DEFENDANT)* 1938 *November*, 2

Limitation Act (IX of 1908), section 28— Adverse possession— Waste land—Nature of possession necessary to establish adverse possession.

The plaintiffs had for a long period of years been tethering their cattle and storing their logs of wood on a piece of waste land, belonging to the defendant, in a village. They had also, some considerable time ago, apparently with the intention of building walls to enclose the plot constructed foundations for these walls; but they never went beyond the construction of the foundations and the plot had never been enclosed by them. The plaintiffs sued for a declaration that they had acquired a title by adverse possession: *Held*, that such user of the land was insufficient and inadequate to support a title thereto by adverse possession. The mere tethering of cattle and storing of logs on a piece of waste land does not amount to a denial of title of the true owner. Whatever might have been the plaintiffs' intention in constructing the foundations of the walls, the intention had not been carried out; the walls were never constructed and the land was never enclosed. No act therefore was done by the plaintiffs which amounted to an unequivocal assertion of an intention to appropriate the land.

Mr. *G. S. Pathak*, for the appellants.

Mr. *S. K. Mukerji*, for the respondent.

THOM, C.J., and GANGA NATH, J.:—This is a plaintiffs' appeal against the decree of a single Judge of this Court.

The plaintiffs filed a suit in which they sought for a declaration that they had acquired a title by adverse possession to a plot of land 8 biswas in extent, namely plot No.330 in mahal Baru Mal, mauza Kota.

The trial court dismissed the suit. In appeal however, the learned Civil Judge of Saharanpur reversed the decree of the learned Munsif and granted a decree as prayed for.

*Appeal No. 28 of 1937, under section 10 of the Letters Patent.

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The defendant came in second appeal to this Court and the learned single Judge has allowed the appeal and restored the decree of the learned Munsif dismissing the suit.

The material facts of the case are not in dispute. The title to the land in question is in the defendant. It is a matter of admission, however, that for a long period of years the plaintiffs had tethered their cattle on the land, and further they had been in the habit of storing logs of wood thereon. Furthermore, some considerable time ago the plaintiffs apparently with the intention of building walls to enclose the plot constructed foundations for these walls. They never, however, went beyond the construction of the foundations. The land in dispute has never been enclosed by the plaintiffs.

In these circumstances the learned single Judge held that although the plaintiffs' possession had been open and continuous, it had not been adverse to the defendant or his predecessors and that therefore the plaintiffs had failed to show that they had qualified a title to the land by adverse possession.

We find ourselves in agreement with the learned single Judge. The mere tethering of cattle and storing of logs on a piece of waste land does not amount to denial of title of the true owner of the land. The principle to be applied in cases of this kind was reiterated in a judgment of the Privy Council in the case of *Secretary of State for India* v. *Debendralal Khan* (1). There, their Lordships approved of the principle that the possession required to establish a title to immovable property under the Indian Limitation Act 1908, section 28 and article 144, must be adequate in continuity, in publicity, and in extent, to show that it is possession adverse to the competitor. In our judgment the tethering of cattle on the land in dispute, which is waste land, and the storing of logs thereon, is

(1) (1933) I.L.R. 61 Cal. 252.

no indication of possession which is intended to be adverse to the title of the proprietor of the land. In this connection we would refer to the decision in the case of *Framji Cursetji* v. *Goculdas Madhowji* (1). The facts of that case were that a party claiming to have established a right to land by adverse possession had proved that on the land in dispute he had erected "a privy and sheds for cows, goats, fowls, etc., and a hut for a *ghariwallah*—all, however, structures of a flimsy and purely temporary character." It was held that such user of the land was by itself insufficient to support a title thereto by adverse possession.

Learned counsel, in support of his contention that the possession of the plaintiffs had been adverse to that of the defendant, referred to the case of *Rompicherla* v. *Shaik Ismael Saheb* (2). In our judgment, however, the decision in that case does not advance the plaintiffs' case. It was there decided that "Where one of two owners of neighbouring lands encloses with his own a portion of the other's land, the act is a most unequivocal assertion of the intention to appropriate it. In the absence of any circumstance to show that the occupation was permissive, such possession must be held to be adverse." In the present case the land in dispute was not enclosed by the plaintiffs.

It appears to us that it would be unfortunate if the law were that by tethering cattle and storing logs upon waste land the party to whom the cattle and logs belonged was necessarily asserting a title adverse to that of the true owner of the land. To such user of waste land the proprietor of the land does not generally object. If such were declared to be the law the permission of the use of waste land for tethering cattle and other kindred purpose generally granted to villagers by proprietors would speedily terminate. We are satisfied upon a consideration of the authorities that the law is otherwise.

(1) (1892) I.L.R. 16 Bom. 338. (2) (1913) 21 Indian Cases, 765.

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Learned counsel for the appellants was forced in the end to admit that the one act of the plaintiffs which could be regarded as amounting to an assertion of an intention to appropriate the land by the plaintiffs was the construction of the aforementioned foundations. We are unable to agree with learned counsel that this fact in any way assists his clients. It may well be that when these foundations were constructed the plaintiffs had considered enclosing the land and thereby asserting a claim to it adverse to the title of the defendant or his predecessor. Whatever may have been their intention, it is clear that they never carried it out; it may be because the defendant or his predecessor objected. The fact is, however, that the walls were never constructed and the land was never enclosed. No act therefore was done by the plaintiffs which amounted to an unequivocal assertion of an intention to appropriate the land.

Upon the whole matter we are satisfied that the conclusion of the learned single Judge is sound.

The appeal is accordingly dismissed with costs.

Before Mr. Justice Bennet and Mr. Justice Verma

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SRI THAKURJI MAHARAJ AND ANOTHER (DEFENDANTS) *v.* SUJAN SINGH AND OTHERS (PLAINTIFFS)*

Limitation Act (IX of 1908), articles 10, 120, 144—Pre-emption—Suit for pre-emption against original vendee—Assignment by vendee before suit—Vendee's assignee impleaded as defendant more than one year after the assignment—Limitation as against the assignee—Cause of action, not affected by the assignment.

A suit of pre-empt a sale of the 13th of July, 1932, was brought on the 12th of July, 1933. The vendee, however, had assigned the property on the 22nd of October, 1932, and an application by the plaintiff to implead the assignee as a defendant was granted on the 20th of December, 1933, and the assignee was

*Second Appeal No. 606 of 1935, from a decree of Niraj Nath Mukerji, Additional Civil Judge of Bareilly, dated the 9th of October, 1934, confirming a decree of Jamil Ahmad, Munsif of Hawali, dated the 22nd of February, 1934.