

1937

RAM
NATH
v.
KEDAR
NATH

The result is that I must decline in all the circumstances of the case to interfere now with the order of the 2nd May, 1936, for the restoration of the suit, and I dismiss this application with costs.

Smith, J.

Civil Miscellaneous Application no. 607 of 1936 was presented on the 5th of August last, asking that "further proceedings in the case be postponed". This application purported to be made under order XLI, rule 5. It is not obvious what the further proceedings referred to were, in view of the fact that the case had been finally decided long before this application was made. The learned counsel for the applicant says that the proceedings referred to may have been execution proceedings, though they are not so described in the application. In any case, in view of my decision on the application under section 25 of the Provincial Small Cause Courts Act, the miscellaneous application must now be rejected, and I reject it accordingly. I make no separate order about the costs of it. The interim stay order passed by the learned Acting Chief Judge on the 5th of August, 1936, is discharged.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice H. G. Smith

SHEO MOORAT AND ANOTHER (PLAINTIFFS-APPELLANTS) v.
CHHANGOO AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1937
February,
25

Limitation Act (IX of 1908), Articles 142 and 144—Suit for possession both on title and on disturbance of possession—Plaintiff proving title—Burden of proof of adverse possession, if on defendant—Defendant failing to discharge onus—Plaintiff, if entitled to decree.

Where the plaintiff sues for possession both on the ground of title and on the ground of his possession having been disturbed by the defendant, the burden of establishing title by

*Second Civil Appeal No. 137 of 1935, against the decree of Pandit Kishen Lal Kaul, Civil Judge of Sultanpur, dated the 24th of January, 1935, modifying the decree of Babu Bishambhar Nath Chaudhri, Munsif of Amedhi at Sultanpur, dated the 26th of May, 1934.

adverse possession lies upon the defendant, and if the defendant fails to prove his possession for a period of over twelve years, the plaintiff is entitled to a decree. *Mohammad Mahmud v. Muhammad Ajaq* (1), relied on.

Mr. *Parmatma Saran Dwivedi*, for the appellants.

Mr. *Chandra Prakash Lal*, holding brief of Mr. *Radha Krishna*, for the respondents.

SMITH, J.:—This is an appeal from a decision dated the 24th of January, 1935, of the learned Subordinate Judge of Sultanpur, by which he partially allowed an appeal from a decision dated the 26th of May, 1934, of the learned Munsif of Amethi in the Sultanpur District.

The suit was one for possession of certain trees in a grove, the demolition of certain structures said to have been erected by the defendants in that grove, the recovery of the site of those buildings, and damages for the produce of certain trees which the defendants were said to have misappropriated. The learned Munsif gave the plaintiffs a decree for possession of the plot in suit by demolition of the constructions made by the defendants. In the operative portion of the judgment he did not clearly specify the trees, though in his finding on the 7th issue he said that the plaintiffs were "clearly entitled to get possession of the grove no. 565 with the trees standing thereon, by demolition of the constructions made on it." The claim for damages was dismissed in the absence of any proof as to what the amount of those damages ought to have been. The defendants appealed and the learned Subordinate Judge allowed the appeal to the extent that he set aside the decree passed by the learned Munsif for the demolition of the structures in dispute and for the delivery of possession of the site of those structures to the plaintiffs. The plaintiffs have preferred this second appeal in this court.

The learned Subordinate Judge took the view that Article 142 of the First Schedule of the Limitation Act

1937

SHEO
MOORATP.
CHHANGOO

1937

SHEO
MOORAT
v.
CHIANGOO

was applicable and that as the plaintiffs have not proved possession of the site of the structures in dispute within twelve years prior to the date of the suit, they were not entitled to a decree for the demolition of those structures and recovery of possession of the site of them.

Smith, J.

The learned counsel for the plaintiffs-appellants contends that the plaint was based both on the ground of title and on the ground of disturbance of the plaintiff's possession, and in these circumstances he contends that the ruling of a Bench of this court, of which I was a member, reported in *Mohammad Mahmud v. Muhammad Afaq and others* (1), is applicable. The learned counsel for the defendants-respondents cannot show me any reason why the view taken in that ruling should not be applied in the present case. It appears in the present case that the evidence of the plaintiffs as to the time when these structures were made was disbelieved by the learned Munsif, but he also disbelieved the evidence tendered on that point by the defendants, the result being that there has been found to be no reliable evidence as to how long the structures have been in existence. The defendants in other words, have failed to prove that the structures have been in existence for more than twelve years. The learned Munsif found the title of the plaintiffs to be established, and that finding does not seem to have been seriously attacked before the learned Subordinate Judge, before whom arguments appear to have proceeded on the legal question alone that is to say, the question which Article of the First Schedule of the Limitation Act applies. It was said in the ruling of this Court referred to above (vide pages 108-109):

“There may be cases in which the plaintiff sues for possession of immovable property both on the ground of title and on the ground of his possession having been disturbed by the defendant. In such cases, if he proves his title, the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds

(1) (1933) 11 O.W.N., 104.

in proving that fact the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent Article 144 will apply to such a suit. But it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within 12 years. If that be the case, Article 142 will apply and the burden will be on the plaintiff. In short, suits for possession based both on the plaintiff's title and possessory title invite the application of Articles 142 and 144 according to the varying circumstances of each case."

1937

 SHEO
MOORAT
v.
CHHANGOO

Smith, J.

The authority of this ruling seems to me to cover exactly the circumstances of the present case, since, as I have said already, the plaintiff sues for possession both on the ground of title and on the ground of their possession having been disturbed by the defendants. They have proved their title and therefore the burden of establishing title by adverse possession lay upon the defendants, and as the defendants, according to the findings of the courts below, have failed to prove their possession for a period of over twelve years, the plaintiffs were entitled to a decree.

The result is that I allow this appeal, with costs here and in the court below, and restore the decision of the learned Munsif. The costs in the trial court will be paid as was directed by that court.

Appeal allowed.