APPELLATE CIVIL

Before Mr. Justice A. H. deB. Hamilton and Mr. Justice Radha Krishna Srivastava

1939
October, 9

JAI MANGAL TEWARI AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* BINDESHURI SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), articles 142 and 144—Suit for possession based on proprietary title—Article 142, whether applies only to suits based on possessory title or applies also to suits based on proprietary title—Determination of article applicable to a case—Facts and circumstances of the case, whether to be considered with allegations in plaint.

Article 142 is very general in its scope and application. There is no reason to confine the word "plaintiff" in this article to plaintiffs bringing their suits on possessory title only. Article 142 will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his posessory title. *Mohammad Mahmud* v. *Mohammad Afaq* (1), and *Sheo Moorat* v. *Chhangoo* (2), over-ruled. *Bindhyachal Chand* v. *Gharib Chand* (3), relied on. *Abdul Latif* v. *Nawab Khajeh Habibullah* (4), distinguished. *Kanhaiya Lal* v. *Girwar* (5), *Wadero Warsidono Allahdino* v. *Bhai Pursumal Bhai Parvmal* (6), *Naru Shidu Guikwad* v. *Krishna Shidu Gaikwad* (7) and *Mehtab Singh* v. *Dayal Singh* (8), referred to.

It is incorrect that a court in discovering the article of the Indian Limitation Act applicable to a suit is tied to the statements in the plaint. In order to determine the particular article applicable to a suit it is the duty of the court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of dispossession in the plaint but the facts show that the defendants entered or must have entered on the land while it was in possession of the plaintiffs the article applicable would be article 142. It would be absurd to hold that a plaintiff can at his sweet will avoid the operation

*Appeal No. 15 of 1937, under section 12(2) Oudh Courts Act, against the order of the Hon'ble Mr. Justice Ziaul Hasan, Judge, Chief Court of Oudh, Lucknow, dated the 1st March, 1937.

(1) (1934) A.I.R., Oudh, 21.
(2) (1938) I.L.R., 13 Luck., 266.
(3) (1934) I.L.R., 57 All., 278(F.B.)
(4) (1939) A.I.R., Cal., 354.
(5) (1929) I.L.R., 51 All., 1042.
(6) (1937) A.I.R., Sind, 226.
(7) (1938) A.I.R., Bom., 210.
(8) (1939) A.I.R., Lahore, 172.

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of article 142 by framing his suit in such a manner as if there was no disposession. The defendant cannot on any principle be precluded from showing that on true facts of a case the article applicable to the suit is article 142.

Messrs. *Ram Bharose Lal* and *Murli Manohar Lal*, for the appellants.

Mr. *Mohammad Ayub*, for respondent Nos. 1, 2 and 3.

HAMILTON and RADHA KRISHNA, JJ.:—This is a plaintiffs' appeal under section 12(2) of the Oudh Courts Act. The plaintiffs-appellants brought a suit for possession of three plots in dispute on the allegation that they were the proprietors of the plots in suit with which the defendants had no concern and that the defendants were in illegal possession of plot No. 582/2, for the last eight years and of plots Nos. 582/1 and 583/2, for the last ten years. The defendants-respondents alleged that they had been in adverse possession of the said plots for the last 25 years or 30 years. In paragraph 8 of the written statement they pleaded that in 1910 there were proceedings under section 145 of the Code of Criminal Procedure between the parties in which their possession was upheld and no suit having been filed within time by the plaintiffs, their suit now was time barred.

The trial court framed the following issues:

(1) Are the plaintiffs owners of the plots in suit?

(2) Whether defendants have perfected their title by adverse possession?

(3) Is the suit barred by limitation, as alleged in paragraph 8 of the written statement?

(4) To what relief, if any, are plaintiffs entitled?

On issue No. 1, it held that the plaintiffs were the proprietors of the land in suit. Issue No. 2 was decided in the negative and on issue No. 3 it was held that the plea that the suit was barred by article 47 of the Indian Limitation Act had no force. The learned

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Munsif did not consider article 142 of the Indian Limitation Act obviously for the reason as indicated above that it was not raised in the written statement. In the result the suit was decreed.

In appeal the learned Subordinate Judge (now Civil Judge) of Gonda held that on the allegations in the plaint the suit was governed by article 142 of the Indian Limitation Act. He framed a fresh issue as follows and remanded the case for a fresh decision of the point of limitation:

> "Have the plaintiffs been in possession of the plots in suit within limitation?"

An appeal against the said order of remand was dismissed by a single Judge of this Court from whom the appellants obtained leave to appeal to a Bench of this Court under section 12(2) of the Oudh Courts Act and the present appeal is the appeal filed in pursuance of that leave.

We have heard the learned counsel for the parties at length. On behalf of the appellants the following points have been argued:

> (1) That the article of the Indian Limitation Act applicable to a suit must be discovered on the allegations in the plaint. It is not open to a court to hold an enquiry on that point by going into evidence.
>
> (2) That the present suit is a suit for possession on title alone and is not based upon dispossession by the defendants and is governed by article 144 and not by article 142 of the Indian Limitation Act.

On the first point we are of opinion that the suit is clearly based upon an allegation of dispossession of the plaintiffs by the defendants. The allegation in paragraph 2 of the plaint that the defendants are in illegal possession of some property in suit for the last eight years and of the rest for the last ten years amounts

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clearly to an allegation that the plaintiffs were dispossessed of the plots in dispute eight or ten years ago. The language of paragraph 2 is not capable of bearing any other interpretation. In fact one of the plaintiff who was examined as P. W. 4, stated that he had been formerly in possession of the plots in dispute and the defendants had taken possession about 9 years ago. This is the view taken by the learned single Judge of this Court who heard the second appeal and we find ourselves in full agreement with him. It is thus clear that the only article applicable is article 142.

Hamilton and Radha Krishna, JJ.

Even assuming that there was no allegation of dispossession involved in paragraph 2 of the plaint we are of opinion that the contention of the learned counsel for the appellants that the court in discovering the article of the Indian Limitation Act applicable to the suit is tied to the statements in the plaint, is incorrect. In our opinion in order to determine the particular article applicable to a suit it is the duty of the court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of dispossession in the plaint but the facts show that the defendants entered or must have entered on the land while it was in possession of the plaintiffs the article applicable would be article 142. It would be absurd to hold that a plaintiff can at his sweet will avoid the operation of article 142 by framing his suit in such a manner as if there was no dispossession. We are aware that in some cases observations have been made to the effect that article 142 cannot apply to cases in which the plaintiff has not alleged in the plaint his possession and dispossession and that article 144 would apply to such a suit. But we are of opinion that such a view is not correct on principle. It involves the shutting out of a defence by the defendant to the effect that on true facts the suit is governed by article 142.

The defendant to a suit for possession cannot on any principle be precluded from showing that on true facts

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of a case the article applicable to the suit is article 142. Further, the interpretation of law urged by the learned counsel for the appellants is against the plain language of article 142 of the Indian Limitation Act. Article 142 applies to suits for possession when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession, i.e., when on the facts proved in a particular case the plaintiff while in possession, has been dispossessed or has discontinued the possession. To accept the argument of the learned counsel for the appellants that article 142 would apply where on the face of the plaint there is an allegation of dispossession would be reading certain extra words into the section which do not find a place therein.

On the second point it was argued that as the present suit was for recovery of possession on the basis of title article 142 of the Indian Limitation Act was inapplicable inasmuch as that article applied to suits on possessory title only. Article 142 is applicable on its terms and language to all suits for possession of immovable property where the plaintiff while in possession of the property has been dispossessed or has discontinued his possession. Article 144 is a residuary article and is applicable to suits for possession not otherwise specially provided for in the Act. If article 142 is applicable to a case then it is obvious that article 144 would be inapplicable. Article 142 is very general in its scope and application. There is no reason to confine the word "plaintiff" in this article to plaintiffs bringing their suits on possessory title only. In our opinion article 142 will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his possessory title. There is nothing in the article itself, as we have observed above, to make it applicable to suits on possessory title only. The learned counsel for the appellants has placed great reliance upon two decisions of this Court.

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Mohammad Mahmud v. *Mohammad Afaq* (1) and *Sheo Moorat* v. *Chhangoo* (2). The latter case followed the former. The former case was decided by a Bench consisting of the late Mr. Justice RAZA and the late Mr. Justice SMITH. It is difficulty to gather all the facts of this case except that the suit was for possession of a house in a town. It is enough to say about this case that the learned Judges based their judgment upon a decision of the Allahabad High Court reported in *Kanhaiya Lal* v. *Girwar,* (3) which case has been held as not laying down the correct law in the latest Full Bench case of that Court in *Bindhyachal Chand* v. *Gharib Chand* (4). We are in full agreement with the view of law contained in the Full Bench case of the Allahabad High Court if we may say so respectfully. The second case of this Court reported in *Sheo Moorat* v. *Chhangoo* (2) is a single Judge decision of this Court and followed *Mohammad Mahmud* v. *Mohammad Afaq* (1). In our opinion the two decisions mentioned above do not lay down correct law. The learned counsel for the appellants also relied upon the following cases: *Wadero Warsidono Allahdino* v. *Bhai Pursumal Bhai Parumal* (5), *Nasu Shidu Guikwad* v. *Krishna Shidu Gaikwad* (6); *Abdul Latif* v. *Nawab Khajeh Habibullah* (7) and *Mehtab Singh* v. *Dayal Singh* (8).

The Sind decision in *Wadero Warsidino Allahdino* v. *Bhai Pursumal Bhai Parumal* (5), is based upon the decision in *Mohammad Mahmud* v. *Muhammad Afaq* (1) about which we have already said that it does not lay down correct law. This case, therefore, need not detain us any further.

The cases reported in *Naru Shidu Guikwad* v. *Krishna Shidu Gaikwad* (6); and *Mehtab Singh* v. *Dayal Singh* (8) are single Judge decisions and are not helpful on the particular point arising in this case.

(1) (1934) A.I.R., Oudh, 21.
(2) (1938) I.L.R., 13 Luck., 266.
(3) (1929) I.L.R., 51 All., 1042.
(4) (1934) I.L.R., 57 All., 278(F.B.).
(5) (1937) A.I.R., Sind, 226.
(6) (1938) A.I.R., Bom., 210.
(7) (1939) A.I.R., Cal., 354.
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Abdul Latif v. *Nawab Khajeh Habibullah* (1), was a suit in respect of lands subject to alluvion and diluvian. The land had begun to rise above water from ten or twelve years before the suit and had become fit for cultivation seven or eight years before the suit. The land had never been in the physical possession of the plaintiffs themselves or of persons who held under them at any time after the land had reformed. Having regard to the nature of the land in that case it was held that there could be no question of any possession or discontinuance of possession in the case and the suit would be governed by article 144. This case is clearly distinguishable from the facts of the present case.

In the result we find ourselves in complete agreement with the view of law taken by the single Judge of this Court, who heard the second appeal. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice G. H. Thomas, Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice J. R. W. Bennett

MAHIPAL SINGH, THAKUR (APPLICANT) *v.* KAMTA PRASAD (OPPOSITE-PARTY)*

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United Provinces Agriculturists' Relief Act (XXVII of 1934), section 5(2)—Order of appellate court, refusing instalments under section 5(2)—Revision—High Court's power to interfere in revision.

The concluding sentence in sub-section (2) of section 5 of the Agriculturists' Relief Act does by necessary implication divest the High Court or the Chief Court of the revisional jurisdiction conferred by section 115, Civil Procedure Code. The provision contained in that sub-section which makes the decision of the appellate court final, not only debars a further appeal

*Section 115 Application for revision No. 85 of 1936, against the order of Babu Gopendra Bhushan Chatterji, District Judge of Gonda, dated the 14th April, 1936.

(1) (1939) A.I.R., Cal., 354.