

pay additional court-fee and the view taken by the Stamp Reporter appears to be correct.

The deficit court-fee having just been paid, the appeal will be heard.

Ross, J.—I agree.

1921

JAMUNA RAI
v.
RAMTAHAL
RAUT.

APPELLATE CIVIL.

Before Das and Adami, J.J.

KHUB LAL UPADHYA

v.

JUGDISH PRASAD SINGH.*

1921.

August, 1.

Limitation—how to be pleaded—when facts not alleged and no issue raised question not to be entertained in second appeal.

Where the defendant in a suit pleads that the suit is barred by limitation he is entitled to shew that upon the allegations made in the plaint the suit is so barred. But if he intends to raise any question of fact in connection with the plea of limitation it is obligatory on him to state the facts on which he relies in the written statement and to invite the court to frame an issue on the facts so stated.

Where this was not done, *held*, that the defendant was not, in second appeal, entitled to argue that he had a good title to the land by adverse possession and that the suit was also barred under Article 137 of the Limitation Act, 1908.

The facts of the case material to this report were as follows:—

Ramsunder Tewari owned a 2-annas 8-pies share in village Machhagara. On the 21st April, 1900, Bhukhal and Bhawan, sons of Ramsunder, and Binda the son of Mangal, the third son of Ramsunder, executed two mortgage bonds for Rs. 1,500 and

* Appeal from Appellate Decree No. 155 of 1920, from a decision of G. J. Monahan, Esq., District Judge of Saran, dated the 30th July, 1919, confirming a decision of Maulavi Wali Muhammad, Additional Subordinate Judge of Chapra, dated the 30th May, 1918.

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Rs. 250, respectively, in favour of Munga Singh, father of Jagdish, plaintiff No. 1, in the *farzi* name of Musammammat Ram Jharo Kuer, daughter-in-law of Ramdhan Singh, plaintiff No. 2, in respect of a 2-annas share in the above-mentioned property. On the 3rd July, 1903, Munga obtained a decree on the mortgage which had been executed for Rs. 1,500. In execution of that decree he purchased the share in the property which was covered by the bond, on the 8th September, 1904, and obtained delivery of possession in January, 1905. When the plaintiff sought to take actual possession he was resisted by Khublal Tewari, who claimed to have purchased the property from a person who had bought it at a certificate sale for arrears of road cess.

The plaintiff therefore instituted the present suit for possession of the 2-annas share covered by his mortgage decree and for possession. Khublal was impleaded as defendant No. 1. Sheo Sahay Dubey, who claimed to hold a *mukarrari* from defendant No. 1 in respect of the disputed property, was impleaded as defendant No. 2. The latter did not contest the suit.

Paragraph 4 of Khublal's written statement ran as follows:—"4. The plaintiff's claim is barred by limitation". He also attacked the genuineness of the bond and the validity of the decree obtained on it and denied that Ramsunder had died before the certificate sale on which he based his own title.

The trial court found that the certificate sale was a nullity and granted the plaintiff a decree for recovery of possession of the share which was recorded in the name of defendant No. 1 in the Land Registration Department's Register. Defendant No. 1 appealed to the District Judge who found that a sale certificate for arrears of road cess was first obtained against Ramsunder in 1899 and that in execution of that certificate the property was purchased by Ramautar Lall in February 1900; that the latter's name was never registered in respect of his purchase and that the share was again sold for arrears of road cess on the 4th April,

1901, in execution of another certificate issued against Ramsunder; that the defendant No. 1 had bought Ramautar's interest on the 18th April, 1904. It was also found that Ramsunder died on the 16th March, 1899, and that consequently both the certificate sales were null and void. The mortgage was held to be valid. The decision of the trial court was affirmed.

Defendant No. 1 appealed to the High Court.

Sambhu Saran, for the appellant.

Sivanandan Roy and Jalgobind Prasad Sinha, for the respondents.

DAS, J.—The only question which has been argued before us is one of limitation. The learned Vakil appearing on behalf of the appellant puts his case in two ways: *first*, he says that he has a clear and good title to the land in dispute by adverse possession, and, *secondly*, that under Article 137 the plaintiff's suit is barred by limitation.

Now it seems to me that on the pleadings in the case it is not open to him to take up either of these points. The only point which he has raised in the written statement is that the plaintiff's suit is barred by limitation. It is an issue in bar and entitles the defendant to argue that upon the allegations made in the plaint the plaintiff's suit is barred by limitation. Upon the allegations made in the plaint the plaintiff's suit is clearly within time. If it was the object of the defendants to raise any questions of facts in connection with the issue as to limitation, then it was obligatory on them to state those facts in the written statement and invite the Court to raise an issue on the particular facts alleged by them. This has not been done and I do not think it is open to the appellant in this Court which is not a Court of facts to raise questions of facts. The question of adverse possession is essentially a question of fact and the injustice to the respondents is apparent because there is no finding by the Courts below as to when the appellants took possession of the

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DAS, J.

property and in order to enable the Courts below to determine this point we would have to remand the case to the Court below.

The same argument may be advanced with reference to the point as to Article 137. It is true that the Court of first instance did say that even from the point of view of Article 137 the suit was within time but still the necessary allegations were not made in the written statement, and I do not think it proper to remand the case for the ascertainment of the facts upon which alone these questions of law can be determined. It has been held by the Court below that the purchase made by the appellant did not give them any title at all and that the respondents have a perfectly good title to the property, having purchased it in execution of a mortgage decree against the parties who are entitled to the property. In my opinion it is not open to the appellant to raise the question of limitation in this Court, and I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Courts and Macpherson, J.J.

BRIJBEHARI LAL

v.

CHAIRMAN OF THE MUNICIPALITY, DALTONGANJ.*

Bengal Municipal Act, 1884 (Bengal Act III of 1884), sections 237 and 241—verandah, whether is an "erection or re-erection"—building sanctioned subject to reservation, whether reservation valid in absence of bye-laws.

A municipality which has not framed any bye-law under section 241 of the Bengal Municipal Act, 1884, is not competent to insert reservations in a sanction to build but must either refuse the sanction or grant it without reservation.

* Appeal from Appellate Decree No. 897 of 1920 from a decision of A. Tuckey, Esq., Judicial Commissioner of Chota Nagpur, dated the 11th August, 1920, confirming a decision of Babu Lakshmi Narayan Pattnaik, Munsiff of Palamau, dated the 13th June, 1919.