APPELLATE CIVIL.

Before Mr. Justice Pratt, and Mr. Justice Mya Bu.

1927

Feb. 7.

MA PWA ZON AND TWO

v.

MA PAN I AND ONE.*

Possession, suit for—Prior possession and dispossession other than in due course of law—Prior possession sufficient in suits against trespassers.

Where the plaintiff who was in peaceful occupation of immoveable property was dispossessed otherwise than in due course of law, held that even if the suit for possession filed by him was not under the provisions of section 9 of the Specific Relief Act, he could rely on his possessory title.

Ismail Ariff v. *Mahomed Ghouse*, 20 Cal. 834, *Ma Saw* v. *Maung Shwe Gan*, 11 L.B.R. 415 ; In re *Maung Naw* v. *Ma Shwe Hmut*, 8 L.B.R. 227—*followed.*

Nga Tha Zan v. *Sunder Singh*, 3 U.B.R. 125—*dissented from.*

San Wa—for the Appellants.

S. *Mukerjee* and *Sanyal*—for the Respondents.

PRATT, J.—Plaintiffs sued to recover possession of a Nat shrine and the land on which it stood and obtained a decree in the Township Court.

On appeal the District Court reversed the decree of the Township Court on the ground that there was a deed of partition, which had been in the possession of plaintiff, Ma Pan I and as she failed to produce it, the presumption was that, if produced, it would have proved defendants' case.

On second appeal a Judge of this Court held that Ma Pan I was not in possession of the document and had not suppressed it and therefore the presumption did not arise against her.

The learned Judge was of opinion that secondary evidence would be admissible regarding the contents

* Letters Patent Appeal No. 56 of 1926.

of the document, but held that in any case as plaintiffs were dispossessed whilst in peaceful possession, and defendants were clearly trespassers, the presumption under section 110 of the Evidence Act was in their favour.

He accordingly restored the decree of the trial Court.

Permission to appeal under the Letters Patent was granted on the ground that the case of *Nga Tha Zan* v. *Sunder Singh* (1) was not considered, although the Judge was doubtful whether, had he considered the ruling in question, he would have come to a different conclusion.

Two main points have been taken before us—

(1) that secondary evidence of the deed of partition has been wrongly admitted and (2) that the Judge of this Court, who heard the second appeal, has not considered the case of *Nga Tha Zan* already referred to; in other words that the suit as framed did not lie apart from the claim on the deed of partition of which secondary evidence was inadmissible. With regard to secondary evidence of the contents of the deed of partition a perusal of the plaint and evidence shows that plaintiff did not rely on a deed of partition.

The evidence of the witnesses for plaintiff goes to show that the document drawn up was a deed of reference to arbitration and that the actual partition or award was oral. The expression deed of partition was obviously put into the mouths of plaintiff and her first witness by the cross-examining pleader.

The evidence of the fourth witness Maung Kan U was definite that all the heirs signed the deed of agreement asking the elders to partition the estate of their parents and the next witness Maung Lu Gale

(1) (1918) 3 U.B.R. 125.

1927

MA PWA ZON AND TWO v. MA PAN I AND ONE.

PRATT, J.

stated that the actual partition was oral and that all the heirs signed the deed of agreement regarding the partition. Obviously the deed is that of reference to arbitration.

It was the defence case that there was a deed of partition executed by four arbitrators but the evidence about it was most contradictory and was disbelieved by the trial Court.

Third defendant in evidence says plaintiffs were given the shrine in dispute for three years at the time of partition, but it was not included in the actual partition of property.

The evidence of the first witness Maung Mo Zan who professed to have been one of the arbitrators was to the effect that the arrangement for occupation of the shrine and site in turn was made as part of the award and he deposes that certain paddy lands were excluded from the partition.

The next professing arbitrator Lu Oh stated that the Nat shrine and site were excluded from the partition but, later, his evidence suggests that it was part of the award.

The evidence of the next witness suggests that the arrangement regarding the shrine formed part of the award or alleged deed of partition.

The trial Court was quite justified in disbelieving the defence evidence.

As a matter of fact, even supposing there was a deed of partition of which secondary evidence was inadmissable for lack of stamping or registration, plaintiffs were still at liberty to produce oral evidence to show that they came into possession lawfully as a consequence of a family arrangement, when the estate was divided up between the heirs.

As regards the contention that the learned single Judge, who decided the second appeal, overlooked

the ruling in *Nga Tha Zan's* case (1), that ruling was not binding on him. I am not satisfied that it is sound law, and I am not prepared to hold that in a suit for possession, not under section 9 of the Specific Relief Act, where plaintiff relies on a possessory title, he must prove possession for a minimum of twelve years.

I took a different view in *Ma Saw* v. *Ma Shwe Gan* (2), following the Full Bench ruling in *In re Maung Naw* v. *Ma Shwe Hmut* (3), which accepted the principle that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will or by execution sale, just in the same way as it could be dealt with, if the title were unimpeachable.

In that case the suit was based on a superior possessory title obtained by clearing State land and was held not to be debarred by section 9 of the Specific Relief Act, the full bench declining to follow the Calcutta case of *Nisa Chand Gaita* v. *Kanchiram Bagani* (4), which was relied upon by Saunders, J.C., in *Nga Tha Zan's* case (1).

As I said in *Ma Saw's* case, I consider the principle enunciated in the earlier Calcutta case of *Ismail Ariff* v. *Mahomed Ghouse* (5) that lawful possession of land is sufficient evidence of right as owner against a person who has no title.

In the present suit plaintiffs sued to recover possession of land of which they had been dispossessed other than in due course of law by defendants.

(1) (1918) 3 U.B.R. 125. (2) (1922) 11 L.B.R. 415.
(3) (1915) 8 L.B.R. 227. (4) (1899) 26 Cal. 579.
(5) (1893) 20 Cal. 834.

1927

MA PWA ZON AND TWO v. MA PAN I AND ONE.

PRATT, J.

They claimed to have taken the land as their share, when the estate was divided amongst the heirs.

The suit obviously lay as based on title apart from the provisions of section 9 of the Specific Relief Act.

As the learned Judge, who decided the second appeal, found, plaintiffs had admittedly been in peaceful possession for over three years and were dispossessed by defendants, who were mere trespassers.

Under section 110 of the Evidence Act the presumption was that they were the owners. Moreover there was evidence, which the trial Court accepted, and which there is no reason to disbelieve, which proved that the estate was divided up amongst the heirs, and that plaintiffs received the suit property at this division by family arrangement.

That evidence was admissible apart from the question of oral evidence of the contents of the alleged deed of partition.

Plaintiffs proved a good possessory title as against defendants, and the appeal was correctly decided in their favour.

I would dismiss this appeal with costs.

MYA BU, J.—I concur.