

LETTERS PATENT APPEAL.

Before Shadi Lal, C. J. and Broadway J.

KALLU MAL (PLAINTIFF) Appellant

versus

MAMAN *alias* MUHAMMAD ISHAQ (DEFENDANT)

Respondent.

Letters Patent Appeal No 141 of 1928.

Indian Limitation Act, IX of 1908; Article 144: Suit for possession—of immovable property—title with plaintiff—Burden of proof—on defendant to prove adverse possession—Second Appeal—finding of fact—conclusiveness of.

Held, [following *Secretary of State for India v. Chelli-Kani Rama Rao* (1)], that in suits for possession of immovable property, where title to the property in suit is found to be with the plaintiff, it lies on the defendant to prove adverse possession for the period of twelve years. The *onus* is not on the plaintiff to prove possession within twelve years. It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

Held further, that the finding by the lower appellate Court that the respondent's possession had never been more than permissive could not be reargued in second appeal.

Appeal under clause 10 of the Letters Patent from the decree of Jai Lal J. passed in C. A. No. 3229 of 1927, on 8th June, 1928, reversing that of Mr. D. Johnstone, District Judge, Delhi, dated the 30th July, 1927, and restoring that of Sheikh Abdul Ali, Subordinate Judge, 4th class, Delhi, dated the 14th January, 1927, dismissing the plaintiff's suit.

KISHEN DAYAL, for Appellant.

SHAMAIR CHAND, QABUL CHAND and MUHAMMAD AMIN, for Respondent.

BROADWAY J.

BROADWAY J.—This appeal has arisen in the following circumstances: One Kallu Mal instituted

a suit against Maman for ejectment from a house and for the recovery of arrears of rent, alleging that Maman was his tenant. Maman denied the tenancy and in February 1926 Kallu Mal's suit was dismissed, it being held that he had failed to prove that the relation of landlord and tenant existed between him and Maman. Thereupon Kallu Mal instituted a suit for possession of the premises and for recovery of Rs. 25-4-3 as *mesne* profits. This sum was equivalent to the amount of rent at the rate claimed in the former suit.

The trial Court came to the conclusion that Kallu Mal was the owner of the house, but dismissed his suit on the ground that he had failed to prove that he had been in possession within twelve years of his suit. Kallu Mal appealed, and the Additional District Judge, while agreeing with the trial Court that Kallu Mal had proved his title to the property in suit, considered that it was incumbent on Maman to prove that he had been in adverse possession for the statutory period. He, therefore, remanded the case for a decision on the point whether Maman had been in adverse possession for twelve years prior to the suit. The result of the remand was that the Subordinate Judge found that Maman had failed to discharge the *onus* which had been placed on him. The case then came up before the learned District Judge, who confirmed the finding as to Kallu Mal being the owner of the property.

On the question of possession he found as follows:—

“It is apparent that the respondent has never set up an adverse title against the appellant. The mere non-payment of rent by itself proves nothing.

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Whether rent was paid or not, the respondent's possession has never been more than permissive * * *. Kallu Mal's suit was thereupon decreed. Maman then preferred a second appeal to this Court which came up before a learned Judge in Chambers who on the question of possession took a different view, saying "In my opinion if the defendant succeeds in proving his exclusive possession for more than twelve years, he is entitled to a decree unless the plaintiff can prove affirmatively that such possession was derived from him or was with his permission. In this case therefore, the defendant having proved his possession for more than thirty years, and the plaintiff having failed to prove the permissive nature of such possession, the suit should have been dismissed. Maman's appeal was accordingly accepted, and Kallu Mal's suit dismissed.

Kallu Mal then preferred this appeal under clause 10 of the Letters Patent and on his behalf Mr. Kishen Dial has urged that inasmuch as it has been found that the plaintiff Kallu Mal is the owner of the house it was for Maman to prove that his possession had been adverse for a period of at least twelve years. Mere possession, it was contended, could not deprive the real owner of his title. In this connection he cited various authorities, the principal one being *Secretary of State for India v. Chellikani Rama Rao* (1), where their Lordships of the Judicial Committee say, "Nothing is better settled than that the *onus* of establishing title to property by reason of possession for a certain requisite period lies upon the person, asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it

(1) (1916) I. L. R. 39 Mad. 617, 631 (P. C.).

were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions * * * * *. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.'"

Mr. Shamair Chand for the respondent relied on section 110 of the Evidence Act and urged that the view taken by the learned Judge in Chambers is correct. I do not think it necessary to discuss the various authorities cited by the learned counsel as in my judgment the appeal must succeed on the ground that the finding arrived at on the question of possession by the learned District Judge was a finding of fact which could not be reargued in second appeal. As already pointed out the finding of the learned District Judge was that the respondent Maman had never set up adverse title against the appellant and that the respondent's possession had never been more than permissive. On this finding, coupled with the finding as to title, Kallu Mal was clearly entitled to a decree, and I would, therefore, accept this appeal with costs throughout, and, setting aside the order of dismissal passed by the learned Judge in Chambers, restore the decree of the learned District Judge, dated the 30th of July 1927.

SHADI LAL C.J.—I concur.

SHADI LAL C.J.

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Appeal accepted.

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