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RAGHOJI BHIKA'JI v. ABDUL KARIM.

The judgment of the Court was delivered by

MELVILL, J. :—The alteration in the former law (Section 4 of Act XIV. of 1859) made by the introduction, into Section 20 of Act IX. of 1871, of the words "promise," and "before the expiration of the prescribed period," gives some colour to the argument that it was the intention of the Legislature that a debt once barred by lapse of time should not, under any circumstances, be recovered. But the supposition of any such intention is contradicted by Section 25, Clause 3, of the Indian Contract Act: from which it is clear that the "promise" referred to in Section 20 of Act IX. of 1871 is a promise introduced, by way of exception, in a suit founded on the original cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. The distinction is pointed out in the cases cited at the bar: *Mulchand* v. *Girdhar*,(1) *Hargopál Premsukdás* v. *Abdul Khán Háji Muhammad*,(2) and also in *Gopeekishen Goshamee* v. *Brindabunchunder Sircar*.(3)

The decree of the Court below must be affirmed with costs.

Decree affirmed.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Kemball and Mr. Justice Nánábhái Haridás.

1876. March 8.

RA'MBHAT AGNIHOTRI (PLAINTIFF, APPELLANT) *v.* THE COLLECTOR OF PUNA (DEFENDANT, RESPONDENT.*)

Prescription—Possession—Adverse possession—Limitation—Regulation V. of 1827—*Act XIV. of* 1859—*Act IX. of* 1871.

Some lands in the village of Shirasgám in the Puna Collectorate, commonly called "Kolhati Báwas Inám," originally belonged to His Highness Scindia. Plaintiff's family were proved to have been in actual possession of them from 1841 to 1854, and in constructive possession during their attachment by the Inám Commission from 1854 to 1863, when, by a mistake in carrying out the orders of the British Government, the lands passed into the possession of Scindia, and remained with His Highness till 1872, in which year the British Government, by exchange of lands, came into possession. In a suit brought on 29th July 1872,

(1) 8 Bom. H. C. Rep. 6, A. C. J. (2) 9 *Idem* 429.

(3) 13 Moore I. A. 37; see page 54. A.C. 12 W.R. 36 (P.C.)

* Regular Appeal No. 18 of 1876.

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Held that the plaintiff's possession, not extending over 30 years, gave him no proprietary title under Section 1 of Regulation V. of 1827, which, as a law of positive prescription, is not repealed by Act XIV. of 1859. Under the former Limitation Act, 12 years' adverse possession barred the suit without extinguishing the title: so that if a proprietor who had been out of possession for more than 12 years happened to regain it, the person who had been in adverse possession must fail in any suit to eject the proprietor, unless he sued within six months under Section 15 of the Act. The effect of Act IX. of 1872, Section 29, however, is not merely to bar the remedy, but to extinguish the title of the original proprietor after 12 years of a possession adverse to him.

THIS was an appeal from the decree of Baron De Larpent, Judge of the district of Puna.

Shántárám Nárayán for the appellant.

Honourable V. N. Mandlik, Acting Government Pleader, for the defendant.

The facts and arguments, in so far as they are material for the purposes of this report, fully appear from the judgment of the Court, which was delivered by

KEMBALL, J.:—The plaintiff brought this suit to recover possession of 4,800 *bighas* of land, forming the Kolhāti Bāwā's Inām in the village of Shirasgām, together with mesne profits including certain *haks* acquired from the Pant Sachiv. It appears from the Judge's judgment that at one time the Peishwa, Scindia, and Pant Sachiv, all possessed certain rights in this land, as also, presumably, in all the land of the village. The Peishwa's rights came to the British Government after the conquest of the Deccan, while those of the Pant Sachiv were made over to the plaintiff's family. With regard, however, to Scindia's rights, it appears that in 1852-53 a dispute arose between Scindia's Government and the plaintiff's family. The agent for His Highness Scindia applied to the Collector of the district for assistance to levy the full assessment on the land, contending that the case set up, that Scindia's rights had been made over to plaintiff's family, was false; but as the assessment had already been taken for that year, Scindia's agent was told to apply in good time in respect of the following year's assessment; he did so, and the required assistance was given. The plaintiff's family thereupon appealed to the Revenue Commissioner, who reversed the Collector's proceedings, and ordered that the assessment levied with the Collec-

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tor's assistance should be refunded, but at the same time he directed that the Inám Commission should inquire into the title to the land. Consequent upon this order the land was attached by the Inám Commission and placed under the management of the District Revenue Officers, and, subsequently, the Inám Committee found that neither Scindia nor the plaintiff's family had any right to the land, which they decreed belonged to the British Government. The Government, however, refused to confirm this order, and in 1863 the Revenue Commissioner, acting under the orders of Government, directed that the land should be restored to the possession of the person or persons from whom it had been taken. Thereupon the Collector directed that possession should be given to the plaintiff, but, for some reason unexplained, it was given to Scindia. So matters remained till the year 1872, when His Highness Scindia exchanged this disputed land together with the rest of the village with Government for other lands, and, in the year following, plaintiff brought the present suit for the purposes above stated. The Government in their reply contended that the Kolháti Báwá's Inám land contained only 2,663 *bighas*, and not 4,800 as alleged, to no portion of which had plaintiff any title, that the land was given in exchange by Scindia, for whose acts they were in no way responsible, and that plaintiff's family had not been in uninterrupted enjoyment as alleged till they were dispossessed. At the trial the Judge found, upon issues framed by him, that plaintiff was in actual possession at the time of the attachment, and, therefore, in constructive possession when the land was released from attachment, and that the amount of land, of which plaintiff had possession, was 4,800 *bighas*; but he held that the fact that plaintiff's family had had possession from 1841 to 1852, which he considered proved, did not establish plaintiff's title as proprietor, and that, therefore, the Government gave possession to the party entitled thereto.

The Government abandoned at an early stage its defence as regards the Pant Sachiv's rights, so that that question is not now before us, except as to the amount, and also in so far as it affects the matter of costs; the Government having been ordered to bear its own costs in the suit on the ground that the defence raised in respect of the said rights had, in the opinion of the Judge, tended

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most unnecessarily to increase the costs of the suit. Both parties are dissatisfied with the decree of the Court below, the plaintiff contending, among other points, that the District Judge was wrong in holding that his proprietorship was not established, and that long possession for a period of 80 years, continuing down to the time he was dispossessed by the Inám Commission, entitled him to restoration of possession: and the defendant objecting to the Judge's finding as to the extent of land in issue, and his order as to costs. It has been seen that, although the Judge found that the plaintiff's family had been in possession of the whole of the land in dispute from 1841 to 1854, he decreed against the plaintiff on the ground that plaintiff had failed to prove his proprietorship. The Judge based his decision on the grounds, that there was no *sanad* in the case; that the village in which the land was situated was, before the exchange with the Government, undoubtedly Scindia's; that Scindia, before the exchange, had refused to acknowledge plaintiff's title; and that the oral evidence of occupation, either before or after 1841, afforded no proof of plaintiff's title.

In explanation of the name which the land in dispute bears, the Judge speaks of a tradition in the village, that some 400 years ago one Yeshvantráv Kolháti (Kolháti meaning a tumbler or rope-dancer) was allowed to appropriate to himself as much land as he would jump over, and that he jumped with such success that the villagers found it necessary to shoot him while up in the air in order to prevent the whole of the land of their village being included within his jump. The land covered by the jump continued waste for a great many years, and in A.D. 1789 an ancestor of the plaintiff made a proposal to Scindia to build a temple on the banks of the Goor, and prayed that it might be endowed with this land.

The plaintiff's case is that the grant was made, and that thereupon his ancestor entered into possession, continuing there till 1854.

With regard to the grant, it is admitted that no *sanad* is forthcoming, and it is not alleged that a *sanad* ever existed. And it is clear from evidence in the case that Scindia, as the occasion

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arose, uniformly and repeatedly denied the grant set up, and retained absolute possession from 1862 down to 1872, when the exchange was effected with the Government.

As to the long possession as proprietor, it is admitted that there is nothing to show when possession was first obtained by any of plaintiff's ancestors. We have examined all the evidence, which was carefully and ably placed before us by the pleaders on both sides, and we find it is not proved that Keshavbhat, the alleged original grantee, who died in 1830, was ever in possession. Furthermore it is clear from documentary evidence recorded in the case, notably Exhibit 339, a petition of Keshavbhat's son, Yedneshvarbhat, of the 29th March 1841, and Exhibits 43, 39 and 338, that the temple, for the endowment of which the grant was sought, was not built at so comparatively recent a period as 1843. Three witnesses, Nos. 274, 285 and 290, were produced on behalf of the plaintiff for the purpose of establishing possession from a remote period, but they are all illiterate men, and their statements are of so vague and general a character, being on some points also contradictory, that we concur with the Judge in thinking that no conclusion favourable to plaintiff's title as proprietor can be drawn from them.

Much stress has been laid upon what took place between the plaintiff's ancestor and the British Government subsequent to 1841; but it is clear that this would have no material bearing on the point in dispute. The village belonged, prior to the exchange, to His Highness Scindia, and the only interest the Government had, was in the recovery of its Mokassa dues. In fact, express reference was made to the benefit which would accrue to Government by the receipt of fees when the application (Exhibit 42) of the 24th September 1843 was made by a member of plaintiff's family for permission to bring a portion of the land under cultivation. When the land was first brought under cultivation is not very clear, but it is beyond dispute that it had been previously to 1843 lying waste for a great many years—the application to the Collector, just referred to, says 500 or 600 years; and it is clear that in 1853 His Highness Scindia expressly denied the plaintiff's proprietary right in the land. After the land was restored to His Highness Scindia, plaintiff applied, but without

success, to have his right acknowledged and to get possession, and now that the land has formally passed to the British Government, he seeks redress through its Courts.

It now remains to consider the last, though by no means least important, part of the plaintiff's argument; that the finding of the Judge as to his long possession, independently of other considerations, entitles him to restoration of possession.

The District Judge certainly finds that the plaintiff was in possession of the lands in dispute from 1841 to 1854, when they were attached by the Inám Commission. This is a finding which is based upon a large body of oral as well as documentary evidence referred to in his judgment, and it has not been shown to us that he has in any way misappreciated that evidence.

The evidence as to the plaintiff's possession prior to 1841 is, as we have already observed, exceedingly unsatisfactory, and we are of opinion that he has failed in proving it.

We must then take it as established that the plaintiff was deprived of what he had been in continuous possession of from 1841 to 1854. That the lands in dispute belonged originally to His Highness Scindia, must be regarded as undisputed, since the plaintiff's own case is that they were granted by him to one of his ancestors—a case which he has failed to prove. His possession of those lands, therefore, was without any title; and the question is whether he is entitled, upon the bare fact of such possession, to recover in this suit.

It is contended for him that he is, and in support of such contention we are referred to several authorities, of which the most important are *Raja Baradakant Roy* v. *Prankrishna Paroi*,[1] *Amiraunissa Begum* v. *Umar Khan*,[2] *Gunga Govind* v. *Collector of 24 Pergunnahs*,[3] and *Brassington* v. *Llewellyn*.[4]

It is necessary to observe here that this suit was commenced on the 29th July 1872, before "The Indian Limitation Act, 1871," came into operation, and while Regulation V. of 1827 and Act XIV. of 1859 were in full force.

(1) 3 Beng. L. R., A. C. J. 343.

(2) 8 Beng. L. R. 540; S.C., 17 Calc. W.R. 119, A. C. J.

(3) 11 Moore I. A. 345; S. C. 7 Calc. W.R. 21, P.C. (4) 27 L. J. Exch. 297.

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Regulation V. of 1827, Section 1, was our law both of limitation and prescription. It laid down 30 years as the period within which a suit for immoveable property might be brought. It also laid down that 30 years' adverse possession of such property was to be regarded as conclusive proof of proprietary right in the possessor, except in case of fraud.

This continued to be the state of the law in the Bombay Presidency until Act XIV. of 1859, which received the assent of the Governor General on the 4th May 1859, and came into force on the 4th May 1861. That Act provides a shorter period of limitation, namely, 12 years for suits relating to immoveable property. It, therefore, by implication, repeals Regulation V. of 1827, Section 1, so far as it is a law of limitation. But so far as it is a law of positive prescription, it is left untouched by that Act. Their lordships of Her Majesty's Privy Council, in their judgment in *Maharana Fattehsangji* v. *Desai Kallianraiji*,[1] observe with regard to it that it is "an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV. of 1859, and to stand unrepealed in the Presidency of Bombay."

Such being the case, until Regulation V. of 1827, Section 1, was expressly repealed by Section 2, Act IX. of 1871, on 1st April 1873, the state of the law in the Bombay Presidency was this:—A person who, without title, had been in adverse possession of any immoveable property for 12 years could, under Clause 12, Section 1 of Act XIV. of 1859, resist any suit brought to recover it from him; but no such possession short of 30 years could create a title in his favour under Regulation V. of 1827, Section 1. The proprietor's title, therefore, did not become extinguished by 12 years' adverse possession of another, though his right of suit against that other became barred by Act XIV., of 1859. That Act in terms only bars the remedy, but does not extinguish the right,[2] as does Act IX. of 1871, Section 29. Accordingly, if such person happened to lose his possession, and the proprietor to regain it,

(1) L. R. 1 Ind. App. 34, 51; S. C. 10 Bom. H. C. Rep. 281, 288.
(2) 1 Mad. H. C. Rep. 85, 89.

Note.—In England, before the passing of 3 and 4 Will. IV. c. 27, the state of the law was the same. It barred the remedy but did not extinguish the right; see 9 L. J. K. B. 262; 16 L. J. Q. B. 355; 19 L. J. Exch. 177; 1 Mac. H. L. Cas. 317.

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the former, unless he sued within 6 months under Section 15 of that Act, must fail in any suit to eject the latter, having no title to stand upon. [See *Savalgiapa* v. *Basvanapa*.(1)]

Of the four cases cited by Mr. Shántáram for the appellant, the first three are Bengal cases; still if it appeared to us that the learned Judges who decided them had considered the effect of such a separate law of prescription as the Bom. Reg. V. of 1827, Sec. 1, we should probably feel ourselves bound to follow them, and hold that 12 years' adverse possession by the plaintiff extinguished the proprietor's title and transferred it to him, especially as one of them is a case decided by Her Majesty's Privy Council on appeal from Bengal. But it does not appear from those cases that they had any such law to consider in any of them. No doubt, as their lordships of the Privy Council observe, "as between private owners contesting *inter se* the title to lands, the law has established a limitation of twelve years." But to hold here, as they have done in the Bengal case, that "after that time it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor," would, in our opinion, be to entirely ignore Regulation V. of 1827, Section 1, which, in their lordships' own words, in a later case "seems to be unaffected by Act XIV. of 1859, and to stand unrepealed in the Presidency of Bombay."(2)

The remaining case of *Brassington* v. *Llewellyn*(3) turned upon the English Statute of Limitations 3 and 4 Will. IV., C. 27, SS. 2 and 34, the effect of which, as laid down in it, is that "after twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or revested by a re-entry after that period, upon the doctrine of remitter; because such an application of the doctrine requires that the former title should be in existence at the time of the re-entry." But Section 34 of that statute is in effect the same as Section 29 of Act IX. of 1871, the like of which is not to be found in Act XIV. of 1859. The absence of a similar provision in that Act and the express provision in Regulation V. of 1827, Section 1, had, in our opinion, the effect of preventing adverse possession for less than 30 years from working an extinguishment of title.

(1) 10 Bom. H. C. Rep. 399. (2) L. R. 1 Ind. App. 34, 51.
(3) 27 L. J. Exch. 297.

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The plaintiff's possession, actual from 1841 to 1854, and constructive during the attachment, namely, from 1854 to 1863, had not extended over 30 years, when the lands in dispute, instead of being returned to him as originally intended, were made over to His Highness Scindia. He had not, therefore, acquired any prescriptive title to them under Regulation V. of 1827, Section 1; and since the title was still in His Highness Scindia, as soon as they were made over to him, he had both his unextinguished title and his possession to oppose to any claim that might be made against him. The plaintiff, having delayed bringing his suit for more than 6 months, has lost such benefit of his previous possession as he might have had under Section 15 of Act XIV. of 1859; and Government, represented by the defendant, having taken an assignment of His Highness Scindia's right, title, and interest in those lands, are now entitled to resist this suit upon whatever grounds their assignor would have been entitled to do so.

The result is that we concur with the Judge in thinking that the plaintiff has failed to establish his title to recover possession, and must, therefore, uphold that portion of his decree which throws out the claim to possession of the land with mesne profits.

With regard to the Pant Sachiv's rights, we hold that the plaintiff is entitled to the profits for 6 years at the rate of Rs. 56-1-10 per annum, and to that extent we amend the District Judge's decree.

We confirm the order as to costs, and direct that the costs of this appeal be borne by the appellant.

Decree amended.