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JETHA MULCHAND v. GULRÁJ JASRUP.

Bench with the opinion of this Full Bench, that the costs of a successful defendant in a pauper suit are, as in all other cases, in the discretion of the Court under section 412 of the Code of Civil Procedure of 1882.

The other Judges concurred.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

July 9.

TUKA'RA'M AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SUJANGIR GURU (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Adverse possession—Attachment of vatan lands—Peshwá's Government—Resumption by British Government—Restoration—Inability to sue during attachment and resumption—Bombay Act I of 1865, Sec. 34—Contra non valentem agere non currit præscriptio, application of.

In the year 1806-7 the Peshwás attached certain *vatan* lands belonging to the plaintiff's family. The attachment continued till the year 1866, when the British Government made them *khálsa*, or resumed them. The defendant in the meanwhile entered upon them as tenant to the Government, and paid assessment thereon.

In the year 1871 the lands were ordered to be restored to the plaintiffs. After this order of restoration the plaintiffs brought a suit against their co-parceners for partition, and obtained a decree. In the execution of this decree they were obstructed by the defendant, who claimed the lands as his own. The plaintiffs thereupon brought a suit against the defendant in 1881 to eject the defendant and to obtain possession of the lands. The Court of first instance held the plaintiffs entitled merely to such assessment as might remain after payment of *judi* to Government. It further held that the defendant's possession had become adverse to the plaintiffs, as the latter did not bring their suit within twelve years from the resumption of the lands by Government in 1866, since which time the defendant was to be considered as tenant or occupant under Government. From this decree the plaintiffs appealed, and the lower Appellate Court was of opinion that by the order of restoration the plaintiffs were restored to the right of such assessment as was left after deduction of *judi*, and that their claim to that even was barred, as it was brought after twelve years from the date of resumption. On appeal to the High Court,

Held, restoring the decree of the Court of first instance, that the claim of the plaintiffs was not barred. After the attachment of the lands in dispute the Peshwá's Government held the same as constructive trustees for the plaintiffs, and when that Government was succeeded by the British Government the same relation continued. The British Government, having succeeded to the trust,

* Appeal, No. 24 of 1884.

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continued to hold as trustee for the family of the plaintiffs; their possession, therefore, could not be made adverse by intimation or notice to the plaintiffs. It was not found that the defendant held the lands before the attachment by the Peshwás, and the British Government could not, as guardian or bailiff for the real owners the plaintiffs, put the defendant into a better position than their own. The plaintiffs' right having never been extinguished, had the same legal force in 1870, when the lands were restored, as it had before attachment in 1806. From 1871 onwards the plaintiffs could act; and as the suit was commenced within the term computed from that time, it was not barred—the inability of the plaintiffs to sue before 1871 falling within the purview of the maxim *contra non valentem agere non currit præscriptio*.

It was contended for the defendant that section 34 of Bombay Act I of 1865 applied in the present case.

Held that, if it could apply, it would apply only in the sense of limiting the rights acquired under the Collector's management to the term of that management, and nothing further.

THIS was a second appeal from the decision of W. H. Crowe, Acting District Judge of Poona, reversing the decree of the Joint Subordinate Judge at the same place.

The plaintiffs' family were holders of a *pátilki vatan* at the village of Rihe, in the Poona District. In 1806-7 the Peshwá's Government, in consequence of dissensions between the members of the family of the plaintiffs, assumed the guardianship of the property of the family, and took possession of the *vatan* lands, and from that time forward the rayats paid rent to Government.

Subsequently an application was made to the British Government, which had then succeeded the Government of the Peshwa, by the legal representatives of the grantees of the *vatan*, stating that the family dissensions had ceased, and praying for an order of restoration. This application was referred by Government to the Alienation Settlement Officer and the Revenue Commissioner, both of whom recommended that the property should be restored. The Government concurred, and in the year 1871 orders were transmitted, through the Mahálkari at Mulsi Petha, to the effect that the Government did not guarantee the restoration of the physical possession of any of the lands, but merely declared the grantees to be entitled to the balance of the assessment after deducting the amount of *judi*,—that is, a certain portion out of the income of the *vatan* payable to Government.

In the meanwhile the defendant had entered upon these lands as tenant—whether under the Peshwá's Government or the British Government was not precisely known, and he had paid the assessment.

After the order of restoration of the land the plaintiffs brought a suit against their co-parceners for partition, and obtained a decree. The defendant obstructed the execution of the decree, and claimed the lands as his own.

The plaintiffs thereupon brought a suit against the defendant in 1881 in the Subordinate Court at Poona to eject the defendant and to recover possession of the land from him.

The defendant answered that the lands in dispute were his ancestral property, and had been in his possession ever since the Peshwá's time; that the plaintiffs' claim was barred; that the plaintiffs were, as *inámdár deshmukhs*, entitled to the assessment on the lands only, which the defendant had paid for seventy-five years to the pátil and kulkarni of the village; that, therefore, the plaintiffs had no right to claim the assessment from him; and that the plaintiffs were not entitled to recover possession of the lands. He claimed to hold the lands subject to the payment of Government assessment, but denied the plaintiffs' right to eject him, and alleged that he had held the lands as owner for seventy-five years.

The lower Court held the plaintiffs entitled merely to the balance of assessment which might remain after deducting the *judi* payable to Government, but rejected the claim to recover possession of the land in dispute, being of opinion that the defendant's possession had become adverse to the plaintiffs, the suit not having been instituted within twelve years since they were resumed by Government in 1866. It further held that since that year the possession of the defendant was to be treated as that of a tenant or occupant of Government lands, subject to the payment of the Government assessment, and such tenancy was to be looked upon as hereditary so long as the defendant did not forfeit it by default in payment under the provisions of the Land Revenue Code of 1879; and as the defendant had been paying assessment, and still offered to pay it, he could not be ousted.

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From this decision the defendant appealed to the District Judge of Poona, who reversed the decree of the lower Court, and held that what the plaintiffs were restored to, was the right to assessment subject to the *judi*, and that the claim of the plaintiffs for the same was barred, not having been brought within twelve years from the date of the resumption of the land by Government in 1866, or that their right had never accrued, as it dated subsequent to the time when the defendant was in possession as tenant from Government.

The plaintiffs appealed to the High Court.

Ganesh Rámchandra Kirloskar for the appellants.—The possession of the lands by the Government was but the possession of the plaintiffs. The Government held them in constructive trust. The defendant as tenant from Government could not get a better title than that which the Government had. The Government without giving notice to the plaintiffs could not make the possession adverse. What the plaintiffs were informed of at the time of restoring the property was that the lands were restored to the plaintiffs. Mere assertion by a person in possession of property, that he holds the property adversely, does not constitute adverse possession—*Ali Muhammad* v. *Lalata Bakshi*[1]. Mere length of time does not do so—*Dadoba* v. *Krishna*[2]. The restoration of the lands was not a new grant; it amounted to restoration to the former status of the plaintiffs.

Gokuldás Kahándás for the respondent.—The possession of the defendant was adverse. The plaintiffs did not sue within twelve years—article 144 of Act XV of 1877. Section 34 of Bombay Act I of 1865 gave the Collector power to dispose of property come under his control temporarily. That section may, therefore, be held to govern the present case.

WEST, J.—It appears from the report of Colonel Etheridge, adopted and acted on by the Government, that in 1806 the lands in question were taken possession of by the Peishwá's Government. There was a dissension in the family of the *vatandár* owners, and the Government assumed the guardianship of the

(1) I. L. R., 1 All., 655. (2) I. L. R., 7 Bom., 34

property at the request of some of the contending parties. The property thus taken possession of, appears to have been in part the actual land, not the mere revenue of the land, and the land thus attached included that now in question. It is a familiar fact that *vatans* under the Marátha Government were estates looked on as especially subject to private ownership and disposition, though subject, also, to the support of the offices to which they were dedicated. The *vatandárs*, in order to enable them the better to maintain the dignity and importance of their offices, were allowed to deal freely with their *vatan* lands for temporary interests, and did so in many instances by letting them to tenants-at-will, or from year to year, on the best terms they could obtain. There is nothing improbable, therefore, in what Colonel Etheridge's report states as literally construed, *viz.*, that the lands, not the mere revenues, were attached in 1806 as already stated. From that time forward the rayats paid their rent to the Government, and holding under the Government continued the Government's constructive possession.

When the Peishwá's was succeeded by the British Government its obligations to subjects in the position held by the plaintiffs or their ancestors were undoubtedly taken along with the subjects' property. The argument that no obligation descends to a conqueror is opposed to the humane spirit of modern times, and can find no acceptance in a Court of justice, even should the Court be unable to enforce its adjudication on the sovereign. The land held and the revenue received on trust by the Peishwa passed with his sovereignty, but as a trust, to the British Government. In this relation to any of its subjects a Government stepping down from its throne of command submits itself to the ordinary laws, and there is not the slightest reason to suppose that the first stroke of policy of our Government in the Deccan consisted in a repudiation of the obligations of common honesty and in a gross fraud against individuals whose property was held in trust.

The British Government, then, having succeeded to the trust, continued to hold as a trustee for the family in those relative shares which might eventually be settled by authority or mutual agreement. No intimation was or could have been conveyed to the plaintiffs of a holding adverse to them and their family as

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an aggregate, and eventually in 1868 the family dispute having been brought to a close, the Government restored the *vatan*. After some intermediate proceedings this resolution was eventually communicated with the requisite fiscal instructions to the mámlatdár by the Collector on the 21st October, 1870. The Collector added that as to the possession of the lands not retained as their property by the applicants in their own hands it was not within his competence to make any order. His instructions were limited to the land-tax and the revenue accounts in which the right of the plaintiffs was for the future to be recognized.

In the meantime the defendant's predecessor had come in as a rayat of part of the lands held in attachment. The precise time does not appear, but it is not of consequence. He does not say that he holds by any right constituted before the attachment; and subsequently to the attachment by the Government the Government could not, as guardian or bailiff for the real owners, give to the defendant rights contradicting those of the real owners. He has held, no doubt, for many years with a notion that he was a tenant of Government with the rights of an occupant under the survey regulations. The transactions between him and the Government may or may not have given him a right to recompense from the public treasury, but they cannot possibly have made his right carved out of, and derived from that of the Government adverse to the right to which that of the Government was not adverse. The section 34 of Bombay Act I of 1865, to which we have been referred, if it could apply to this case at all, would apply only in the sense of limiting the rights acquired, under the Collector's management to the term of that management. A different construction would expose every landholder to the loss of all the distinctive qualities of his ownership through his estate falling, for even a short period, under the care and management of the Collector.

The plaintiffs' right never having been extinguished had the same legal force in 1870, when the order was given (and presumably carried out) for restoration of their property as it had had in 1806, when the attachment took place. They would be excused by all legal principles from having taken any legal steps in the

meantime against an occupant, not only on the ground of their individual rights being in suspense—*in custodiâ legis* in a particular sense—but because they could not act or sue, and thus came within the rule *contra non valentem agere non currit præscriptio*. From 1871 onwards the plaintiffs could act, and they commenced the present suit within the term of limitation computed from that time. We must reverse the decree of the District Court, and restore the decree of the Subordinate Judge, with costs in all the Courts.

Decree reversed.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

QUEEN EMPRESS *v.* SHIVRA'M AND OTHERS.* *July* 10.

Removal of earth from gavthan (Government land)—Rule III of Clause 1, *Item (d) of Rules framed under Section* 214 *of the Land Revenue Code Act V (Bom.) of* 1879—*Magistrate of the Second Class—Magistrate of the First Class, jurisdiction of, to try offence under Rule III—General Clauses (Bom.) Act X of* 1866, *Sec.* 1, *Cl.* 7.

The offence committed in contravention of Rule III, clause 1, item (*d*)† of the Rules framed under section 214 of the Land Revenue Code (Bom. Act V of 1879) is exclusively triable by a Magistrate of the First Class. Accordingly a conviction and sentence by a Second Class Magistrate were set aside by the High Court.

THIS was a review from the monthly return submitted by the District Magistrate of Khándesh.

The accused were charged before the Second Class Magistrate of Sháháda with having removed earth from Government land without due authority, thereby committing an offence under Rule III, clause 1, item (*d*) of the Rules framed under section 214 of the Land Revenue Code (Bombay) Act V of 1879, and convicted. From this conviction an appeal was preferred to the First Class

* Criminal Review, No. 120 of 1884.

† Rule III, Clause 1, Item (*d*).—Whoever without due authority shall dig or remove, or attempt to dig or remove, any earth, stone, kankar, sand or muram, or any other material from land belonging to Government shall be punished with imprisonment of either description, which may extend to one month, or with fine which may extend to five hundred rupees.