ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1892. *January* 29; *February* 5.

FRA'MJI CURSETJI, (ORIGINAL DEFENDANT), APPELLANT, *v.* GOCULDA'S MA'DHOWJI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Vacant land—Encroachment—Temporary occupation—Adverse possession—Acts of user necessary to establish.

A small piece of land being of no present use to its owner and being convenient in many ways to his neighbour, the latter made use of it, in various ways, without objection for more than twelve years. A privy and sheds for cows, goats, fowls, &c., and a hut for a *ghárawálláh*—all, however, structures of a flimsy and purely temporary character—were said to have been constructed and maintained for many years on the said piece of land. Such user, it was contended, amounted to adverse possession.

Held, that such user as this was insufficient to give a title to the land by adverse possession. User of this sort, under similar circumstances, is common in this country and excites no particular attention. It is neither intended to denote, or understood as denoting—on the one side or the other—a claim to the ownership of the land, and where this, and no more, is the case it would be wrong to hold that a claim by adverse possession has been made out.

THE plaintiff sued for a declaration of the boundary of his land, and for a declaration that the defendant was not entitled to any portion of the land to the north of such boundary; and also that the defendant might be ordered to remove certain buildings which encroached upon plaintiff's land, and restrained from erecting any building on the said land.

The plaintiff's predecessors in title had held, in addition to the land now owned by the plaintiff which was called "garden land," a small plot at the south-east, which in May, 1800, the then owner, Kuvarji Rustomji, granted to a Pársi, Nasservánji Dádábhoy Patel, (reserving as pension an annual payment of Rs. 9) for the purpose of building an *agiáry*. To the north of this plot, and on the piece of land now in dispute, was a well, and by the lease the use of this well was granted to the holder of the *agiáry* land.

The defendant was now the owner of the *agiáry* then erected, and the plaintiff in this suit complained that in 1889 the defend-

* Suit No. 468 of 1890.

ant encroached on the land to the north of the *agiáry*, and was proceeding to build upon it. The defendant pleaded adverse possession for fifty years at least.

The land to the north of the *agiáry*, which the defendant claimed as his own, was a small plot in which the well was situated. It was (as found by Farran, J.) "about the size of a large room, and was a neglected, deserted and disagreeable corner of the garden land than which it was considerably lower, and was used for nothing in particular."

The defendant claimed that his predecessors and himself had been for many years in adverse possession of this piece of land; that they had erected, and for many years maintained, sheds upon it for cattle and goats and a hut for a *ghárwálláh*. He alleged also that there was for many years on this land a privy, built of *cadjans*, which was only removed in 1845 because it was found to be too near to the well and in danger of contaminating it. This old privy, he alleged, was used by the occupants of his premises down to the time of its removal. The new privy, however, a substantial construction, was built just outside of the land in dispute. For the last twenty years or thereabouts the only user alleged was in using the plot of land as a place to store spare articles of furniture, &c., and to throw rubbish upon.

In 1884 the defendant applied to the Collector to have this land together with some other land transferred to his name. It was accordingly transferred to his name in the books of the Collector, and had ever since stood in his name. No notice, however, was given to the then holder of the garden land, (the plaintiff's predecessor), of this application.

At the hearing the Judge (Farran, J.) found that the legal title to the land had been proved to be in the plaintiff. The legal title to the land in dispute having been thus found to be in the plaintiff, but there being no legal impediment to bar the occupants of the *agiáry* from obtaining title to the land in dispute by adverse possession, the learned Judge proceeded to consider whether they had done so.

After carefully reviewing all the evidence adduced to prove adverse possession, and stating that he was not inclined on the

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whole to give credit to it, the learned Judge thus concluded:—"The result at which I have arrived is that the defendant has not established that prior to 1884 there has been on his part any adverse possession of the land in dispute. If there had been any doubt as to the title to the land, much of the evidence called would have been valuable as tending to prove that it was in the defendant, but the title being quite clear, I think it would need much stronger evidence to deprive the plaintiff of that which he has purchased. It may be said that I am requiring too strict proof of adverse possession, but I think that before a neighbour can filch a part of the land of his adjoining land-owner, he must show some act of an unequivocal character to put the latter on his guard, and that the latter does not lose his rights by not perambulating the offensive corners of his estate at fixed intervals. In this case had Mervánji done so, he would have seen nothing to arouse his suspicion. At the utmost he would have seen what one witness describes as rubbish thrown upon his land.

"It must be remembered, also, that under the terms of the original lease the user of the well had been allowed to the occupants of the *agiáry*, and that their being on the land for that purpose and keeping the gap open would be within 'the terms of the document.'"

His Lordship passed a decree for the plaintiff.

The defendant appealed.

Jardine and *Russell*, for the appellant, contended that the learned Judge was wrong in not being satisfied with the evidence of user adduced by the defendant. That evidence, if believed, was more than sufficient to establish adverse possession.

Latham (Advocate General) and *Anderson* for the respondent.

SARGENT, C. J.:—In this case there is no doubt as to the original title to this land: the Judge below has fully gone into that question, and no exception is now taken to his finding in that respect. This is important to bear in mind; for the acts of user which are relied on in this case might, as Mr. Justice Farran has himself pointed out, have been important

evidence as to the title if that was a matter upon which there was any doubt: their bearing on the question of adverse possession is another thing altogether.

The defendant's case, then, is one of alleged encroachment. People in this country are constantly encroaching on their neighbours, under more or less similar circumstances to those existing in this case. A bit of land is of no present use to its owner, and happens to be of use for various temporary purposes to an adjoining land-holder, and he accordingly so uses it. In this country such a user excites no particular attention. It is neither meant to denote, nor understood as denoting—on the one side or the other—a claim to the ownership of the land. Where such and no more is the case, it would be altogether wrong to hold that a claim to title by adverse possession has been made out. These cases are even more frequent in the mofussil than in Bombay itself, and there such acts of user are never construed as founding a claim to the land by adverse possession.

Now what is the nature of the user alleged in this case? It is said that a privy of the defendant once existed on this land, being removed in 1845. This old privy, if it ever existed, was a mere *cadjan* shed, with no walls. Purely temporary structures of the same nature were the alleged sheds or structures for *ghárivállá*, cows, goats and fowls. The learned Judge, who heard the evidence given and saw the witnesses, after carefully weighing all the evidence, has disbelieved the evidence as to the existence of these various structures. We should be slow, in such a case, to come to an opposite conclusion on the evidence from the learned Judge who heard it and observed the demeanour of the witnesses who gave it. But in any case we consider the evidence falls very short of what should be required before it can be said that adverse possession has been made out. As I have said before, temporary accommodation of this sort would not necessarily mean, or be understood to mean, a claim to the ownership of the land.

Furthermore in this case, the position and nature of the land being what it is, and the defendant having admittedly a right of passage across part of the land for the purpose of access to

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the well, such a temporary user might well pass entirely unobserved by the owner of the land. If it were observed, it would not occur to a native proprietor that a claim to deprive him of his land was intended to be set up.

These remarks apply, of course, with even greater force to the acts of user alleged to have occurred subsequently to the year 1867, *e. g.*, throwing rubbish on the land, and placing thereon pieces of furniture, scaffolding, building materials, &c. Such acts are done every day in almost every part of Bombay, without any claim to ownership being thereby intended. If it were a question of easement the case would be different. Some acts, it is true, constantly repeated, may under some circumstances ripen into a right to continue them for ever, but that is a wholly different question to this, where a claim to the soil of the land itself is set up.

In 1884 it is true the defendant did, admittedly, put forward a claim to the ownership of this land, because he had the land transferred to his name in the Collector's books. What might have been the legal effect, after that date, of acts of user such as these over the land, we need not enquire in this case, because the period which has elapsed since that time is not twelve years, and does not bar the plaintiff.

For these reasons we confirm the decree with costs.

Decree confirmed.

Attorneys for the plaintiff:—Messrs. *Little, Smith, Frere and Nicholson.*

Attorneys for the defendant:—Messrs. *Payne, Gilbert and Sayáni.*