APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901. December 20.

VITHALDAS KANJISHET (ORIGINAL PLAINTIFF), APPELLANT, *v.* SECRETARY OF STATE FOR INDIA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Suit by landlord for possession—Denial of landlord's title by tenant—Effect of payment of rent—Onus of proof—Payment of rent by agent of tenant—How far principal bound—Rent paid by mistake—Adverse possession—Possession—Acts of ownership on part of unclaimed land.

In 1898 the plaintiff brought this suit against the Secretary of State and the Collector of Salt Revenue to recover possession of certain land which had for many years been in actual possession of the Customs officials of Government and for which these officials had paid rent to the plaintiff and his predecessor. In their written statement the defendants claimed that the land belonged to Government, and pleaded that although it was true that they had paid rent for some years to the plaintiff, yet that such payments had been made by mistake.

Held, that the admission by the defendants that they had paid rent to the plaintiff was sufficient in law to raise a *primâ facie* presumption of title in the plaintiff's favour and to throw the *onus* upon the defendants of proving that the land belonged to Government and that the rent had been paid under a mistake.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Ratnágiri, reversing the decree of G. D. Madgaonkar, Assistant Judge.

Suit to recover possession of certain land and for rent and mesne profits.

The plaintiff claimed to hold the land in question under a permanent lease, which had been granted in 1869 to one Dhondu Jagjivan and had been assigned to him (the plaintiff) by Dhondu on the 24th December, 1888.

The Customs officials of Government had been in occupation of the land and had for many years used it for storage purposes.

The plaintiff alleged that although the Government had on several occasions alleged the land to be their own, yet they had paid rent for it first to Dhondu and then to him (the plaintiff) down to the year 1891. In 1893, however, the Government refused to pay rent to the plaintiff and alleged their own title, and

* Second Appeal No. 309 of 1901.

in 1898 the plaintiff filed this suit against the Secretary of State and the Collector of Salt Revenue in Bombay to recover possession of the land and for rent.

In their written statement the defendants alleged the land to be Government property under Act X of 1889, section 4, clause 3, as being within fifty yards of high-water mark and as being unoccupied village land. They further pleaded that although it was true that they had paid rent for some time prior to 1891, yet that such payments had been made by mistake. They also pleaded limitation.

At the hearing, evidence was given of payment of rent by Government to Dhondu Jagjivan and the plaintiff from 1884 to 1891.

The first Court passed a decree for the plaintiff.

On appeal by the defendants the Judge reversed the decree. He was of opinion that the payment of rent by the Customs officials did not make the defendants tenants of the plaintiff: that such payments had not been proved to be made with the defendants' knowledge or consent or with their authority, and therefore had no effect. He held that the plaintiff had not proved his title to the land, and dismissed the suit.

The plaintiff preferred a second appeal.

Mahadev B. Chaubal for appellant (plaintiff):—The lower Court has held that the plaintiff has not proved his title to the land. But the defendants having admitted that their servants, the Customs officials, have paid the rent to the plaintiff, the burden was upon them to show that as against the plaintiff they had a better title. This the defendants have not done.

Further, we say that on the pleadings, the defendants are estopped from denying plaintiff's title. If they desire to claim the land, they should first vacate it and then bring a fresh suit.

In any case the plaintiff has a good title by adverse possession. He and his predecessors have been in possession for much more than twelve years. They have held it since 1869. It is true that Government has from time to time asserted that it was owner of the land. But, nevertheless, it continued to pay rent, and so must be taken to have waived that claim. The fact

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strengthens the position of the plaintiff. There are decrees in former suits, plans and other documents which show that the plaintiff and his predecessors have held the land for many years as owners. Although the decrees are not between the same parties, they are relevant in proof of possession: *Sakharam* v. *Yeshvantrao* (1); *Tepu Khan* v. *Rajani Mohun*(2); *Davies* v. *Lowndes*.(3)

Ráo Bahádur *V. J. Kirtikar* (Government Pleader) for respondents (defendants):—The question of estoppel under section 116 of the Evidence Act (I of 1872) was not raised in the lower Courts, and cannot now be raised in second appeal.

The proof of the plaintiff's possession is not satisfactory. The plaintiff has never had actual possession of part of it, but the defendants have had it for more than fifteen years.

The fact that the Customs officials of the defendants have paid rent to the plaintiff does not make the defendants the plaintiff's tenants. Rent might be paid by a subordinate officer who had no authority from Government to do so, or it might be paid by him in collusion with the plaintiff. Government has been in actual possession and has frequently denied the plaintiff's title, and it is not proved that the rent has ever been paid with the authority or knowledge of the Government. The mere fact that Government has from time to time denied the plaintiff's title shows either collusion or mistake on the part of the officials who have paid rent to the plaintiff. The Judge was right in requiring the plaintiff to prove his title.

The following authorities were cited during argument: Taylor on Evidence, pages 90, 103; *Cornish* v. *John Searell*(4); *Gravenor* v. *Woodhouse*(5); *The East India Company* v. *Oditchurn Paul*(6); *Karan Singh* v. *Raja Bakar Ali Khan*(7); *Fatimatulnissa Begum* v. *Sundar Das*.(8)

CHANDAVARKAR, J.:—The appellant in this case seeks to recover possession of 4½ gunthas of land in survey No. 766, situate in

(1) (1899) P. J. p. 226.
(2) (1898) 25 Cal. 522.
(3) (1843) 6 M. & Gr. 471.
(4) (1828) 8 B. & C. 471.
(5) (1822) 1 Bing. 38.
(6) (1849) 5 Moore's I. A. 43.
(7) (1882) 9 I. A. 99; 5 All. 1.
(8) (1900) 27 Cal. 1004.

mauje Málvan, with rent and mesne profits from Government, who are represented by the Secretary of State for India in Council and the Collector of Salt Revenue, Bombay.

Shortly stated, his case is that Banawlikar, the owner of the land, having given it under a permanent lease to one Dhondu Jagjivan, the latter assigned the lease to the appellant on the 7th December, 1888, and that Government having held the land as tenants, had gone on paying rent first to Dhondu and then to the appellant from 1872 to 1891. After that year, however, he alleges, Government denied his title, and set up their own title to the land and refused to pay rent. Hence the suit out of which this second appeal has arisen.

In their written statement Government claimed the land as their own, and pleaded that though it was true that they had paid rent for some years before 1891, yet that payment had been made under a mistake.

In this state of the pleadings Mr. Chaubal has for the appellant urged before us that Government having admittedly held possession of the land as tenants were, under section 116 of the Indian Evidence Act, estopped from denying the appellant's title and must first vacate the land and then establish their title, if any, in a separate suit. This contention, however, was not raised in either of the Courts below, nor do we find it among the grounds in the memorandum of second appeal before us. The appellant having allowed the suit to be tried in the Court of first instance on the question of title must be taken to have waived the point, and we cannot allow it at this stage of the case.

The admission, however, of Government in their written statement that they had paid rent for some years to the appellant was, we think, sufficient in law to raise a *primâ facie* presumption of title in his favour and to throw the *onus* of proving that the land belonged to them, and that they had paid the rent under a mistake, upon Government. The District Judge has indeed found, differing from the Assistant Judge, that the land in dispute did not belong to Banawlikar, under whom the appellant claims as a permanent lessee. But in arriving at that finding the District Judge appears to us to have dealt with the question of title as if the *onus* lay in the first instance on the appellant. When

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Government admitted the payment of rent in their written statement, it was for them to get rid of the legal effect of that admission. The District Judge has, it is true, held that "the payment of rent from 1884 to 1891 to plaintiff and his vendor by the Customs officials" has not "the effect of making defendants, especially defendant 1, tenant of the plaintiff," because "the payment was not made with the consent or even with the knowledge of defendant 1, and it cannot be taken to have been authorized by the defendant 1." But, assuming that such was the case and that the payment of rent was made without the consent or knowledge of Government by the Customs officials, it was still incumbent on the Government to prove that the title to the land was theirs. For, on the assumption that the land did not belong to Government, the Customs officials who acknowledged the appellant's title to the land and paid rent for Government to him must be taken to have acted as the agents of Government in the matter. It is not the case of Government that these Customs officials were not acting within the scope of their authority and for their master's benefit in at least taking possession of the land for customs service. So far as the act of possession goes, Government wish to adopt it. But Government were in possession of the land through these officials who used the land for the purposes and on behalf of Government. If, therefore, Government wish to ratify the act of possession, they must ratify the act of payment also. They must ratify the whole of the transaction of which such act formed a part (see section 199 of the Indian Contract Act). They cannot be heard to say that they are entitled to take the benefit of the possession of the land held by their agents, *i.e.* the Customs officials, but at the same time disown the acts of those officials so far as those acts have been to their prejudice, because they were done without their consent or knowledge. The Customs officials were either acting within the scope of their authority or not. If they had authority to take possession of land not belonging to them but belonging to another for customs service, *i.e.* for the benefit of Government, they must be presumed to have had authority to take that possession legally and not as trespassers. Their agreement, therefore, to pay rent to the real owner would in that case bind Government, if Government wished to take the benefi

o the possession acquired by the Customs officials on their behalf. If, on the other hand, those officials had no authority to act as the agents of Government in the matter without the knowledge or consent of Government, they must be presumed to have had no authority either to take possession of the land or pay rent. If the Government declined to be bound by their payment of rent, they must also give up the benefit of the possession held by them through the Customs officials. The rule of law bearing on this question has been pointed out by the Privy Council in *Bombay Burmah Trading Corporation, Limited*, v. *Mirza Mahomed Ally Sherazee and another*.(1) At page 135 of that volume their Lordships approvingly refer to some expressions of Mr. Justice Willes in the case of *Barwick* v. *The English Joint Stock Bank*(2) as containing "as clear an exposition of the law upon this subject as is anywhere to be found." Those expressions are as follows: "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." Applying these principles to the present case, it appears to us that if the Customs officials had authority to take and hold possession of land for customs service on behalf of Government, their authority to bind Government by payment of rent for that land followed as a matter of course, and Government cannot claim the benefit of the former and repudiate the latter.

In this view of the case, it is clear that Government were bound to prove not merely that the payment of rent by the Customs officials on their behalf had been made without their knowledge or consent, but also that it had been made under ignorance of the fact that the land really belonged to Government and that the appellant had no right to it. The District Judge has, however, not dealt with the question of the title of Government to the land. There is evidence in the case to show that for more than twelve years before 1884, when

(1) (1878) 5 I. A. 130; 4 Cal. 116. (2) (1867) L. R. 2 Ex. 59.

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rent began to be paid on behalf of Government, Government had been using the land and had denied the title of Banawlikar and his original lessee, Dhondu. If that evidence is believed, it must follow that before 1884 Government had, through the Customs officials, acquired a title to the land by adverse possession. In that case the subsequent payment of rent from 1884 to 1891 would not avail the plaintiff, his title having been extinguished by the previous twelve years' user of the land by Government as owners. All that the District Judge says on the question of possession is that "the oral evidence of possession is not satisfactory. The plot in question is not enclosed. Plaintiff has never exercised any right on the land in dispute in the way of actual occupation of any definite portion of it. So far as appears, he has placed his boat on the piece occasionally and he once stored some materials for a short time on it. On the other hand, defendants have kept their boats and buoys on the land for fifteen years or more." Now, we can hardly treat this as a finding upon the evidence by the District Judge that Government had acquired a title to the land by adverse possession during the statutory period.

To constitute a title by adverse possession, the possession required to be proved must be, as pointed out by the Privy Council in *Radhamoni Debi* v. *Collector of Khulna*,[1] adequate in continuity, in publicity and in extent, and it is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed. "In order to constitute possession, it must be a complete possession exclusive of the possession of any other person" (per Cairns, L.C., in *Lows* v. *Telford*[2]). "If there are two persons in a field, each asserting that the field is his and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser" (per Lord Selborne in the same case). The District Judge has, we think, not dealt with the question of possession from the point of view laid down as the law on this subject by these authorities. He says that the land in dispute is not enclosed

(1) (1900) 27 I. A. 136; 27 Cal. 943. (2) (1876) 1. A. C. 415 at p. 423.

and that the "plaintiff has not been in actual occupation of any definite portion" of the land; but it is not necessary that a person should use any definite portion of an unenclosed land in assertion of his ownership. As observed by Parke, B., in *Jones* v. *Williams*(1)—a decision approvingly cited by Lord Blackburn in *Lord Advocate* v. *Lord Blantyre*(2)—"ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself. But it is impossible, in the nature of things, to confine the evidence to the precise spot on which the alleged trespass may have been committed: evidence may be given of acts done in other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did." In other words, where land is unenclosed, acts of ownership in one part may be presumed to be acts of ownership over the whole, unless there are circumstances rebutting that presumption. Moreover, the District Judge finds that plaintiff occasionally placed his boat on the land and once stored materials on it. If these acts had been done during the time that Government had held the land adversely before the payment of rent commenced, they would be sufficient in law to displace the Government's title to it by adverse possession. But it is not clear from the judgment of the District Judge whether he meant to find that the plaintiff's occasional user of the land had been made before rent came to be paid to his vendor and to him or afterwards. Nor is it clear whether in finding that Government had kept their boats and their buoys on the land for fifteen years or more, the District Judge meant to hold that those fifteen years or more included the six years when rent had been paid for the land. We are unable, therefore, to accept his finding on the question of possession.

We must, on these grounds, reverse the decree and remand the case for a proper determination with reference to the above remarks. We ought to say that it is the District Judge who has to find on evidence, and this judgment is intended only

(1) (1837) 2 M. & W. 326 at p. 331. (2) (1879) 4 A. C. 770 at p. 792.

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to point out the principles of law which he should bear in mind in dealing with the question of fact which he will have to determine in this case. Costs to abide the result. As the question of title acquired by Government by adverse possession was not raised distinctly in the Courts below, the parties are to be at liberty to adduce fresh evidence.

Decree reversed. Case remanded.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

1902.
January 6.

EMPEROR *v.* PURSHOTTAM KARA AND FOUR OTHERS; EMPEROR *v.* DHARAMSHI GHELA AND THREE OTHERS.*

Criminal Procedure Code (Act V of 1898), sections 257, 177, 110—Security for good behaviour—Witness—Magistrate—Summons—Refusal to summon—Procedure.

Section 257 of the Criminal Procedure Code (V of 1898) is imperative in its terms. It leaves to a Magistrate no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice; such ground, however, must be recorded by him in writing. The discretionary power of refusing to summon any particular witness is vested in the Magistrate, but the order of refusal must be such as to show in writing the ground of refusal as applied to each individual.

APPLICATION for revision under section 435 of the Criminal Procedure Code (Act V of 1898).

In December, 1900, information was lodged by the police against the accused twenty-four persons in the Court of the First Class Magistrate at Bhiwndi, praying that action be taken against them under section 110, clauses (*d*) and (*e*), of the Criminal Procedure Code (Act V of 1898). The allegations against them were that they formed a gang under the leadership of one Kara Devraj

* Criminal Applications for Revision, Nos. 183 and 184 of 1901.