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Chinchwad, given to Chimna Maharaj by Bhavanibai on the day that she adopted Nana Maharaj it could only amount to a sale of the property. But a Hindu father is not competent to sell joint ancestral property to the detriment of his sons, except for an *antecedent* debt, which had been contracted for a purpose neither illegal nor immoral. In the present case, there was no debt at all; in fact, even if there had been an antecedent debt of Chimna Maharaj, Nana Maharaj had ceased to be his son legally liable. For these reasons the decree appealed from must be confirmed with costs.

HEATON, J.:—I concur.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1910. *September* 27.

RANCHODLAL VANDRAVANDAS PATVARI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Evidence Act (I of 1872), section 115—Estoppel—Acquiescence—Both parties equally conversant with true state of facts—Vague allegations—Real controversy to be ascertained by the Judge.

Where parties make vague and loose allegations, it is always essential to the correct determination of the suit that the real controversy between them should be ascertained by the Judge by questioning their legal advisers as to what is exactly their position in the matter.

Where both parties to a suit are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel.

In the year 1871 Government granted to the defendants' predecessor-in-title a certain plot of land situate at Dhandhuka. The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted. This statement was repeated in a mortgage-deed executed by the

* First Appeal No. 169 of 1909.

defendants' predecessor-in-title to the defendants themselves in the year 1893. In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it. Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants' encroachment. The suit was brought in the year 1908. The defendants' plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality and they wished to lead evidence to prove their plea.

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Held, that the defendants' title-deeds having brought to their knowledge the title of the Government the doctrines of estoppel and acquiescence were not applicable, and the suit was governed by sixty years' limitation, the Government being a party to it.

FIRST Appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad, in original Suit No. 103 of 1908.

Suit by the Secretary of State for India in Council to recover possession of a Naveli (small strip of land) 68 feet in length and 2 feet in breadth, for removal of defendants' encroachment and for a permanent injunction.

The whole plot of land including the Naveli was at one time the property of Government. A portion of the plot to the north of the Naveli was sold by Government to the defendants' predecessor-in-title in the year 1871 and another portion to the south to one Dullabh Damodar, the predecessor-in-title of Harjivandas in 1862. The sale-deed passed by Government to the defendants' predecessor recited that the Naveli was the southern boundary of the portion purchased by him from Government. Similarly the Naveli was described as the northern boundary of the portion purchased by Dullabh Damodar, predecessor of Harjivandas. In the year 1893 the defendants' predecessor-in-title passed a mortgage-deed to the defendants which stated that the Naveli was the southern boundary of the mortgaged property. Harjivandas built a Dharmsháln on the site purchased by him from the said Dullabh Damodar and one Bapuji Jagannath was the trustee in possession of the said Dharmshála. The defendants purchased their land from their predecessor in the year 1895 and thereafter they encroached on the Naveli by extending their building on it. Hence the suit which was filed in the year 1908.

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The defendants set up their ownership but the allegations made by them in their written statements being very vague and loose, the District Judge questioned their pleaders to determine the real point involved in the case and raised the following issue :—

Has the Government intentionally caused or permitted defendants and their predecessors to believe that the land was theirs and to act upon such belief?

The Judge found on the said issue in the negative and awarded the plaintiff's claim. His reasons were as follows :—

But where is the estoppel in the case? The Crown makes its meaning quite clear in its grant. It has always been the practice of every enlightened Government when selling land in lots to provide for light and air and for easy access. The rules framed under section 214 of the Bombay Land Revenue Code on the subject of building sites contain clear provisions on the subject. In this particular case Government sold two plots and reserved a space 2 feet broad between them. The defendants' predecessors were expressly told so. The defendants, if they read the original grant, must have seen at once that that place was reserved and was not included within those boundaries. Does it lie in their mouths to say that they attached no importance to their own title-deed? Is the Government, after making its meaning quite clear in the grant, bound to go on telling every grantee about the terms of the written grant and about their meaning? Are its officers to attend to such minute matters as the user of Navelis 2 feet broad by neighbouring house owners? It is because Government cannot well prevent encroachments on such small pieces of land and because their functions are multifarious, that the limitation period of 60 years is allowed to the Crown. Its acquiescence for a shorter period does not bar its suit (see 27 Bom. at page 532 where the authorities are quoted). Had defendants pleaded adverse possession for 59 years, 11 months and 29 days they would not have succeeded. Their possession being not so long they have not set up the plea of adverse possession. But whose case would be the harder of the two—that of a man who was actually in possession for nearly 60 years and was then dispossessed, or that of a man who knew what the Government had granted to him encroached on what was not his own for about 48 years and being unable to show possession for 60 years was dispossessed? The defendants' plea of estoppel has been put forward only because the limitation of 60 years protects the Government.

It has been laid down by the Privy Council (see ii W. R. P. C. 61) that "the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government in fact or in law, directly or by implication ratifies the excess." Had it been alleged by the defendants that after seeing the original grant they had gone to the Collector or the Com-

missioner and been told that the grant, though it reserved the 2 feet, meant that the 2 feet were the defendants' would the Government have been bound by such a statement? I doubt very much. The Collector or the Commissioner would be held, I think, to have exceeded their authority in ascribing a meaning to the words of Government which those words plainly did not bear at all. The defendants, however, do not say that any statement was made to them by any of the officers of Government to the effect that the Navcli was the defendants'. It is not even alleged that the Government land registers of survey records were allowed to be examined by the defendants or their predecessors, or that copies were taken of the entries and those entries were misleading. Had such copies been taken they would have been produced with the documents put in by the defendants.

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Now I think this brief history of the case proves that the defendants did not know their own mind either when they put in their written statement or when the issues were framed or amended—or even when they came to argue the case. There has been continual see-sawing—"The land was sold to us by Government."

"The land was not sold to us—it was reserved—but Government have intentionally permitted us to believe that the land is ours and to act on that belief."

"The land has been considered by Government appurtenant to our tenement." "Section 115 of the Evidence Act does not apply and we rely upon other facts constituting estoppel, section 115 not being exhaustive."

These various statements hardly indicate a belief even on the defendants' part that Government have misled them to their prejudice. Had they been really misled they would have spoken with no uncertain voice on the point.

There is also another confusion in the defendants' mind. The acts and omissions of the Dhandhuka Municipality are not the acts and omissions of Government. Notice to that Municipality is not notice to Government. Notice to Bapuji who is merely an attorney of Government for this suit and who was never an attorney of Government before, is not notice to Government.

The truth is defendants have had the misfortune to be hauled up before the 60 years' period and they are doing their best to wriggle out of that unpleasant situation by means of plea of estoppel. Their main complaint really is: "Why did not the Government sue us earlier." To that the Government reply: "We had 60 years." They charge Government with negligence but they forget their own negligence in not examining the original title-deed.

The defendants appealed.

D. A. Khare and *M. K. Mehta* for the appellants (defendants).

Coyaji, with *G. N. Thakore,* for the respondent (plaintiff).

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Ranchodlal Vandravandas Patvari v. The Secretary of State for India.

Batchelor, J.:—This is an appeal against a decree made by the District Judge of Ahmedabad in favour of the plaintiff the Secretary of State for India in Council.

The suit was filed to recover possession of a small strip of land about 68 feet long and about 2 feet broad with a Naveli or passage which ran between the defendants' properties on the north and the Dharmshála, of which one Bapuji Jagannath was the trustee in possession, to the south. Although the nominal plaintiff is thus the Secretary of State for India in Council, the real plaintiff who is substantially interested in the fate of the suit is Bapuji the trustee in possession of the Dharmshála.

The plaintiff claimed to recover possession of this strip of land after removing from it certain encroachments made on it by the defendants' buildings.

Great difficulty was experienced in the Court below in ascertaining the real ground upon which the defendants sought to meet the plaintiff's case. They began by setting up their own title, then they abandoned this ground and in lieu of it relied upon certain allegations as to acquiescence and estoppel on the part of the servants of the plaintiff. Their allegations however upon this head were so vague and loose that the learned District Judge found it necessary to question their legal adviser as to what exactly his position was in this matter.

As this action of the District Judge has been subjected to some little criticism here, we take occasion to say that in our opinion that action was not only justifiable but laudable. It was essential to the correct determination of this suit, as it always is essential, that the real controversy between the parties should be ascertained by the learned Judge. After giving the pleader time to consider his attitude, the Judge asked him to explain clearly what he meant by saying that the suit was barred by estoppel and acquiescence. Exhibit 38 records the pleader's answer in full and from it we extract the following sentences. "The land is not entered in the Government records in any of the land registers relating to the town of Dhandhuka. The land has been in our possession and enjoyment for the last more than 48 years. We built on the land after receiving permission from the Muni-

cipality in 1895. All the Government Officers at Dhandhuka are aware of the fact that we built at Dhandhuka. The building was inspected from time to time by Municipal Officers when it was being erected and they have made reports to that effect. In various maps made by the order of the Municipality and by the orders of the Revenue Authorities, the land has been shown as ours, and the Commissioner and the Government have also decided that they cannot eject us. They have not said in those orders that the land is ours."

Upon consideration of the pleadings supplemented by the statement given by both pleaders from one of which the foregoing passage is extracted, the learned District Judge came to the conclusion that the defendants had made no case to entitle them to go into evidence inasmuch as their own title-deeds informed them of the fact that the ownership of the disputed strip of land was with the Government and the Government had 60 years' period of limitation within which to assert its rights.

The defendants now appeal here contending that the learned Judge was wrong in shutting them out from the possibility of leading evidence and they urge that, whether they are able or not to establish the proposition for which they contend, they ought at least to be provided with full opportunity of doing so.

It seems to us, however, that the District Judge was right in the view which he took of the case. The defendants' own title-deed is exhibit 61, which we have read and which in plain terms sets out that the strip of land in suit is the property of the Government. The defendants must be taken to be acquainted with their title-deed which is dated 1871, and in consequence to be aware that the Government is the owner of this land. The same statement, moreover, is made also in exhibit 31, the title-deed of Bapuji, and also in exhibit 29, the mortgage-deed, executed in 1893 by the defendants' predecessors to the defendants themselves.

With these statements of the Government's title brought to the defendants' knowledge by these deeds, it seems to us that the ground for invoking such doctrines as estoppel and acquiescence is cut away from under the defendants' feet.

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As appears from the language of section 115 of the Evidence Act itself and as was observed by Sir Charles Farran in *Honapa* v. *Narsapa*[1] "when both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel."

Reference may also be made with advantage to what was said by the Privy Council in *Beni Ram* v. *Kundan Lal*[2] where their Lordships regretted that a loose and inadequate statement of the rule of equity had obtained currency in the lower Courts. They go on to explain that "the proposition of acquiescence if it were supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected."

The same propositions were also considered at length by Lord Cranworth in *Ramsden* v. *Dyson*[3]. His Lordship says "But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights." And in such a case as we have here, where the building was done with the knowledge that the land belonged to another, there, his Lordship says of the builder, "He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

(1) (1898) 23 Bom. 406 at 409. (2) (1899) 21 All. 496 at 502.
(3) (1865) 1 E. and I. A. C. 129 at 141.

We are of opinion, as the learned Judge below was of opinion, that the case before us is aptly described in the foregoing passages; in other words, that it is a case where the defendants, being perfectly aware that the land in suit was the property of the Government and that they, the defendants, had no rights over it beyond certain easements encroached upon it in the hope that their encroachment upon this small inconspicuous strip of land might escape the notice of the agents of the plaintiff in the town of Dhandhuka. In fact it would seem to have escaped their notice for a period of 13 years, but the Government have a period of 60 years under the law of limitation and there is no question that the suit is in time.

We would observe also that accepting the case as put by the defendants' pleader in the words which we have cited, we think that it makes no case for the admission of evidence. The Secretary of State is in no way concerned with anything which may have been done by the Municipality or the officers of the Municipality. It cannot in the circumstances of this case assist the defendants if in certain maps of the Revenue Authorities made by those Authorities for their own guidance, this strip of land is inaccurately described.

As to the assertion that the Commissioner and the Government have decided that they cannot eject the defendants, that is obviously beside the mark. For, the Commissioner's order referred to is exhibit 30, and all that that Officer decided is that the contending parties, that is to say, Bapuji and the defendants would be wise to decide their difference by a Civil Suit, and in the meanwhile that it was unnecessary for Government to fight the battle of the Dharmshála, and all that the Government did was to approve and confirm this very non-committal order of the Commissioner.

Upon the whole, therefore, we are of opinion that the case made by the defendants themselves put them out of Court and that the learned Judge was right in so deciding and in refusing to allow them to give evidence which could lead nowhere and serve no useful purpose.

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We, therefore, dismiss this appeal with costs confirming the decree with this variation that instead of possession being awarded for the usage mentioned in paragraph 2 of the plaint, possession will be awarded subject only to the easements existing over the land in favour of defendants as owners of the northern premises.

Decree varied.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1910. *October 5.*

KISHANDAS SHIVRAM MARWADI, PLAINTIFF, *v.* NAMA RAMA VIR, DEFENDANT.*

Compromise—Decree in terms of the compromise—Application for decree—Terms of the compromise opposed to law—Public policy—Instalments—Default—Payment of whole sum—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B, clause (2).†

A suit brought against an agriculturist-defendant to recover money by sale of mortgaged property was compromised on the terms that the defendant should pay the amount in equal annual instalments, and that on failure to pay any two

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* Civil Reference No. 3 of 1910.

† The Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B, runs as follows :—

(1) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (*y*) or clause (*z*), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and where the mortgagee is in possession, as to the appropriation of the profits and accounting, therefore, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.