APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

VASTA *alias* BHAGWAN BALWANT (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT *.

1920. *September* 1.

Indian Evidence Act (I of 1872), section 110—Unoccupied village site—Presumption of title vesting in Government—Onus of proof—Party in possession to prove better title—Adverse possession—Land Revenue Code (Bom. Act V of 1879), section 37.

The land in dispute was a *gabhan* or unoccupied village site. The plaintiff alleged that the land came to him at a partition of joint family property and he was in possession of it for twenty years. In 1912 the Collector held that the site belonged to Government and ordered the plaintiff to pass a lease. The plaintiff, thereupon, sued for a declaration that the site was of his ownership and that the order passed by the Collector might be cancelled. It was contended that as the plaintiff was shown to have been in possession for a period of twenty years the onus of proving that the plaintiff was not the owner was thrown on the Government under section 110 of the Evidence Act, 1872.

Held, that under old customary law and section 37 of the Bombay Land Revenue Code the presumption arose that the title to the village site was vested in the Government and in order to oust the Government the plaintiff had to prove either that he had got a title better than the title of the Secretary of State or that he had obtained a title by adverse possession of sixty years.

Hanmantrav v. *The Secretary of State for India*[1], discussed.

Secretary of State for India v. *Chellikani Rama Rao*[2], referred to.

FIRST appeal against the decision of Motiram S. Advani, District Judge of Broach, in Suit No. 2 of 1919.

Suit for a declaration and injunction.

The plaintiff alleged that he was the owner of a *gabhan* in the village of Vadhala in Broach District

* First Appeal No. 258 of 1918.

(1) (1900) 25 Bom. 287. (2) (1916) 39 Mad. 617, P. C.

1920.

VASTA v. SECRETARY OF STATE FOR INDIA.

which he alleged fell to his share on a partition of the one entire *gabhan* which belonged to the joint family; that he built a house in the *gabhan*; that in 1912 the Collector on inquiry held that the site belonged to the Government and ordered the plaintiff to pay Rs. 3-14-8 as rent and Rs. 400 fine; that he was further ordered to pass a lease and failing compliance the Government was to take possession of the site; that he made payments under protest; that his appeals to the Collector, Commissioner and finally to the Government of Bombay were dismissed. He, therefore, prayed that the Court might be pleased to declare that the house site was of the ownership of the plaintiff and that the orders passed by the Government of Bombay might be cancelled.

The defendant denied that the plaint *gabhan* belonged to the plaintiff or his ancestors; that the plaintiff had recently encroached upon the *gabhan* by constructing a house thereon; that he had not acquired a title to it by adverse possession and that the inquiry made by the Revenue Officers was proper and legal.

The District Judge held that it was not proved that the *gabhan* belonged to the plaintiff's family; that the plaintiff was proved to have been in possession for twenty years but that was not sufficient to give him a title by adverse possession against Government: *Secretary of State for India* v. *Chellikani Rama Rao*[1]. He, therefore, dismissed the suit.

The plaintiff appealed to the High Court.

Munshi, with *M. H. Mehta*, for the appellant:—The plaintiff was admittedly in possession of the land in dispute for twenty years as an owner. As the defendant wants to eject him he must prove a good title in

[1] (1916) 39 Mad. 617, P. C.

himself: see *Gangaram* v. *Secretary of State for India*[1]. This was followed in *Hanmantrav* v. *The Secretary of State for India*[2]. The remarks of Sir Lawrence Jenkins C. J. apply to this case that the Secretary of State should not be treated as in a position any way higher than an ordinary litigant: see also *Ismail Ariff* v. *Mahomed Ghouse*[3]. The onus was on the Secretary of State under section 110 of the Indian Evidence Act. The case of *Secretary of State for India* v. *Chellikani Rama Rao* has no bearing.

[MACLEOD, C. J.:—If no title is established to any land by a private owner the land would belong to the Crown.]

It would be so if the case fell within the purview of section 37 of the Bombay Land Revenue Code, but this case is different as the claimant is in possession for many years as a rightful owner. The Secretary of State has failed to make out any title to this land.

S. S. Patkar, Government Pleader, for the respondent, not called upon.

MACLEOD, C. J.:—The plaintiff sued the Secretary of State for a declaration, an injunction, the refund of certain payments made and costs as stated in the plaint. He claims to be the owner of a certain *gabhan* in the village of Vadadla in the Broach District which he alleges came to him on partition of joint family property. He says that he built a house on the *gabhan* and that the said house is still in existence, but in 1912 some of his enemies made a false application to Government and there was a departmental inquiry and the District Deputy Collector held that the site belonged to Government and consequently the plaintiff was ordered to pay Rs. 3-14-8 as rent and local fund

(1) (1895) 20 Bom. 798. (2) (1900) 25 Bom. 287.
(3) (1893) L. R. 20 I. A. 99.

1920.

VASTA v. SECRETARY OF STATE FOR INDIA.

cess and Rs. 4 as fine, and was further ordered to pass a lease, and failing compliance the Government was to take possession of the site. Thereupon he made payments under protest, while appeals to the Collector and to the Commissioner and finally to the Government of Bombay were dismissed. He prayed, therefore, that the Court might be pleased to declare that the house site was of the ownership of the plaintiff and that the orders passed by the Government officers might be cancelled. The defendant contended that the plaintiff had recently encroached upon the plaint *gabhan* by constructing a house thereon, that no title had been acquired by him by adverse possession, that the inquiry made by the Revenue Officers was proper and legal and therefore the suit ought to be dismissed.

The learned trial Judge held that for the plaintiff to succeed he had to prove adverse possession which in the case of Crown lands was for a period of sixty years. The plaintiff had only proved twenty years. He, therefore, dismissed the suit.

In appeal reliance has been placed on the decision of this Court in *Hanmantrav* v. *The Secretary of State for India*[1]. In that case Mr. Justice Whitworth dissented from Sir Lawrence Jenkins, and on a reference to Mr. Justice Ranade that learned Judge agreed with the conclusion of the Chief Justice although not on the same grounds. Mr. Justice Ranade considered that the plaintiff had not only possession, but possession accompanied with proof of title sufficiently strong to shift the burden of proof : that the plaintiff's possession was not wrongful and was founded on a *prima facie* title which was to be protected under section 110 till defendant showed a better title. Sir Lawrence Jenkins referred to the case of *Gangaram* v. *Secretary of State for India*[2] as distinctly showing that even in the

[1] (1900) 25 Bom. 287. [2] (1895) 20 Bom. 798.

case of a village site Government cannot rely on any general presumption and that as against the party in possession it must show title. The judgment of Mr. Justice Jardine in that case is a very short one and hardly gives one reason for thinking that the question whether Government could rely on any general presumption had been fully argued. In any event that question is not dealt with in the judgment which merely states as follows : "The plaint prayed that the Court would declare that the defendant had no title, and that the plaintiff had title to the property in dispute. The learned judge found,...that the plaintiff had not proved his title ; and this finding has not been contested here. We are of opinion that the Judge was right in refusing the declaration of title....The plaint, however, contained a prayer that the plaintiff might be awarded any other relief to which he might be entitled. If he had made reference to section 42, illustration (*g*), of the Specific Relief Act, or if the Court had noticed that illustration which refers to suits brought for confirmation of possession, it is probable that an issue would have been raised as to whether the plaintiff was entitled as against the defendant to be retained in possession. There is no evidence, on the record, of the defendant's title ; and it is found by the Judge that the plaintiff has held possession for at least ten years and has built a shed on the land. These facts appear to us to bring the case within the ruling of their Lordships of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*[1]. We, therefore, modify the decree of the District Judge and further declare that the plaintiff is lawfully entitled to possession of the land in suit and the shed thereon". Therefore it cannot possibly be said that that is a very satisfactory judgment on the question whether in the

[1] (1893) L. R. 20 I. A. 99.

1920.

VASTA v. SECRETARY OF STATE FOR INDIA.

case of an unoccupied village site the general presumption of title is with Government. Nor was any reference made to section 37 of the Land Revenue Code which clearly shows that all unoccupied sites are the property of Government unless an individual can establish in his own right a title to such unoccupied property. A very similar question was dealt with by the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao*[1]. The question there was whether the Secretary of State was entitled to incorporate the lands in dispute into a reserved forest under the Madras Forest Act, such lands being islands formed in the bed of the Sea near the mouth or delta of the river Godavari. The High Court of Madras held that "though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification was found, it rested upon the Crown to prove that it had a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, i. e., within sixty years before the notification." Their Lordships of the Privy Council were of opinion that "the view thus taken of the law was erroneous." Their Lordships said: "Nothing was better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions'". Therefore it seems to me that there is no

[1] (1916) 39 Mad. 617 at p. 631, P. C.

force in the argument that section 110 of the Indian Evidence Act must be applied and that because the plaintiff showed he had been in possession for a period of twenty years, the onus was then thrown on the Secretary of State of proving that the plaintiff was not the owner. That would be, as far as I can see, going directly against the *dictum* of the Privy Council I have just referred to. The Secretary of State is able to show by the general law that he is the owner of the land in question and in order to oust him the plaintiff in this case has to prove either that he has got a title better than the title of the Secretary of State or that he has obtained a title by adverse possession, that is to say, by possession for sixty years.

In my opinion, therefore, the appeal fails and the suit must be dismissed with costs.

FAWCETT, J.:—I agree. I do not think that *Hanmantrav* v. *The Secretary of State for India*[1] can be considered as a conclusive decision on the question whether mere possession of land that appears to have been formerly unoccupied throws the onus of showing a title upon the Secretary of State. There was a disagreement on this point between the two learned Judges who first heard the appeal, and the referring Judge, Mr. Justice Ranade, though he concurred with the Chief Justice in disposing of the appeal in favour of the plaintiff in that case, yet differed from him on the important point whether the possession entitling the plaintiff to defeat Government's claim need be possession according to title or might be possession quite independent of any such question of title. Mr. Justice Ranade held that, though the plaintiff may rely upon his previous possession, it must be of such a character as leads to a presumption of title; that mere previous

[1](1900) 25 Bom. 287.

1920.

VASTA v. SECRETARY OF STATE FOR INDIA.

possession less than the law of limitation requires is insufficient except in a possessory suit; and that mere wrongful possession is insufficient to shift the burden of proof. Sir Lawrence Jenkins on the other hand held that section 110 of the Indian Evidence Act obviously does not require possession according to title. This difference of opinion is referred to in Ameer Ali's Law of Evidence in British India, 6th Edition, page 698, and deprives the decision of any effect as a binding judgment on the main point under discussion.

In the present case we have the fact that the land dispute is a *gabhan* or village site and it has long been asserted by Government that according to the custom of the country the proprietary right in any village site vests in Government unless it has been unmistakeably purchased: see the Circulars referred to in Mr. Joglekar's Land Revenue Code, page 57. This assertion is supported in this case by the existence of the *gabhan* Register of 1866, Exhibit 78. For, unless Government were interested in such village sites, there would be no reason for them to keep a register tabulating such of these sites as belonged to particular persons in the village. Then we have section 37 of the Land Revenue Code, which, in my opinion, undoubtedly does put Government on a superior footing to a private individual in regard to a claim to lands which originally were waste or unoccupied. The evidence in this case shows that this particular site was waste or vacant until at any rate 1898. The learned District Judge has disbelieved the evidence that plaintiff adduced to show that previously to his building a house there were the ruins of a wall upon it. He has also believed the defendant's evidence that the site was formerly an open space and was not used by the plaintiff before it was built upon by the latter. No attempt has been

made before us to dispute these findings. In these circumstances I think a legitimate presumption arises that the title to this particular site vests in Government under the old customary law and section 37 of the Bombay Land Revenue Code, and the presumption displaces the original presumption arising in favour of the plaintiff under section 110 of the Indian Evidence Act. Accordingly I think the District Judge came to a right conclusion and I agree in dismissing the appeal with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

THE MUNICIPALITY OF SHOLAPUR (ORIGINAL DEFENDANT), APPELLANT *v.* ABDUL WAHAB VALAD SHAIKH CHAND (ORIGINAL PLAINTIFF), RESPONDENT*.

1920. *September 7.*

Bombay District Municipal Act (Bombay Act III of 1901), sections 96 and and 40 (6)—Permission to build—Permission once granted cannot subsequently be cancelled—Sale of land by Municipality—Absence of written contract of sale—Effect on the validity of the sale.

It is not competent to a District Municipality to revoke a permission to build which has already been granted under the provisions of section 96 of the Bombay District Municipal Act, 1901.

Emperor v. *Kareem Ranjan Khoji*[1] and *Vithal Dhonddev* v. *The Alibag Municipality*[2], followed.

Quaere—Where a District Municipality sells land without a contract in writing as required by section 40 (6) of the Act, is the sale valid?

Abaji Sitaram v. *Trimbak Municipality*[3] and *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa*[4], considered.

* Second Appeal No. 850 of 1919.

(1) (1916) 19 Bom. L. R. 65.
(2) (1918) 42 Bom. 629.
(3) (1903) 28 Bom. 66.
(4) (1883) 8 App. Cas. 517.