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I think, therefore, that the decision of the Court below must be set aside and the plaintiff's suit dismissed with costs of the Court below; but it has been suggested that the ground on which our decision is based, has not been taken in the Court below, while if it had been taken there, special appeal might not have been called for: and the appellant has not pressed for the costs of the special appeal, we therefore make no order for the costs of the special appeal.

Markby, J.—I am entirely of the same opinion. I only wish to add one word, with reference to something which I have said in other cases, that whenever an objection is made to the want of jurisdiction for the first time in this Court, on special appeal, I should make every presumption in favor of the jurisdiction of the Courts below; and if it were possible that under any state of circumstances those Courts could have jurisdiction, I should think that this Court, in special appeal, is bound to presume that those circumstances exist. In this case however an order has been made by the Civil Court, declaring that a road, which is claimed to be a public road, shall be stopped. That appears to me to be an order which, under any state of circumstances, the Civil Court has no power to make. I think it has no more power to make such an order, than it would have to try a man for culpable homicide.

Before Mr. Justice Kemp and Mr. Justice Glover.

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May 5.

LAKHI KUMAR (Defendant.) *v.* RAM DUTT CHOWDHRY (Plaintiff)*

Ouster—Twelve Years' Possession—Title.

In a suit for possession of property the plaintiff relied on his previous twelve years' possession, and gave no further evidence of his title. *Held*, that a previous possession for twelve years of the property sought to be recovered, did not dispense with the necessity which lay on the plaintiff to prove his title to that property. He is not on that fact alone entitled to be replaced in possession of the property without regard to any right which may be alleged by the defendant.

Baboo *Kali krishna Sen* for appellant.

Mr. *C. Gregory*, for respondent.

The facts sufficiently appear in the judgment of

Glover, J.—The plaintiff in this case sued to recover possession of a small portion of land, on which had been built a house, and which his (plaintiff's) father was said to have bought in 1829 at a sale in execution of decree of the rights and interests of one Ram Sing. Plaintiff alleges that the defendant, on the strength of a deed of sale given to her on the 22nd Kartik 1267 by

* Special Appeal, No. 373 of 1869, from a decsion of the Subordinate Judge of Shahabad, dated the 25th November 1868, reversing a decree of the Moonsiff of that district, dated the 15th April 1868.

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the wife of Jabu Sing, the brother of the aforesaid Ram Sing, dispossessed him, and built her own house upon the land.

The defendant's allegation was, that all that the plaintiff's father bought at the auction sale was a share in the house itself ; that that house had fallen down a long time ago, and that the plaintiff had carried off the materials.

There was a further allegation that the plaintiff's father was not the auction-purchaser, and that neither he nor the present plaintiff had ever been in possession of the disputed property.

The first Court dismissed the plaintiff's suit, finding apparently that he had neither proved possession nor title ; but the Subordinate Judge reversed that decision, on the ground that the plaintiff had satisfactorily established his possession for more than twelve years.

The point which has been argued before us, on special appeal, is, that as the plaintiff came into Court to recover the disputed land from the defendant admittedly in possession thereof, it was incumbent upon him to prove a good and valid title and that the mere anterior possession for twelve years before ouster was not sufficient to prove such title.

It appears to us, on reading the decision of the Subordinate Judge, that he was under the impression that from the mere fact of a party having been for more than twelve years at some time anterior to a suit in possession of property he is entitled, *ipso facto*, to succeed in a suit brought by him to oust a defendant in possession without disclosing any special title. He seemed to think that a twelve years' possession was sufficient to prevent him from looking into any of the allegations of the defendant, and to entitle the plaintiff to immediate recovery of possession. This appears to us to be an error ; there is nothing in the law that makes anterior possession for twelve years, on the part of a person suing to recover possession, a sufficient ground for putting that party into possession without looking into the allegations of the defendant. A twelve years' limitation, undoubtedly, would be a very sufficient answer to a party suing to recover possession, but the converse of the proposition is not true, for it cannot be said that a plaintiff is in the same position *quoad* a plea of limitation as a defendant. And I see no reason why the plaintiff in this case, who has been, if the point be conceded, in possession for twelve years or even more before the date of suit, should simply, from that fact of anterior possession, be entitled to dispense with all proof of his right. I think that before he can oust the party in possession, he must show that he has some title to recover. There appears to be all the more reason for this, inasmuch as any body ousted from possession, as the plaintiff alleges himself to have been ousted, would have a very good remedy under Act XIV of 1859 ; under that law he could have applied to the Court, and on proof of his possession within six months would have been immediately restored to his land, and have forced the defendant, if he wished to recover from him to take that position which he now fills himself, and in that case he would have been able to plead his twelve

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years' possession as a perfect bar to the suit of the party wishing to oust him. No authority has been shown us in support of the contention that a twelve years' possession on the part of the plaintiff is sufficient to do away with any necessity of proving his title. The utmost the rulings of this Court, and I may add of the Privy Council, go to, is that along anterior possession is *prima facie* evidence of title, and no doubt it is so. The plaintiff in this case was entitled to every advantage he could get from the fact, if he proved it that he and his father before him had been in possession ever since the auction-purchase in 1829; but the case could not have been decided on that allegation alone. The defendant was fully entitled to put forward his case and to prove it if he could, and to show what he alleged to be the fact, that the plaintiff had no title at all, inasmuch as his father was not the auction-purchaser of the property in dispute; that if he had any title at all, it was only to the house which was not now in existence; that he, the defendant, was in possession of the property under a valid deed of sale executed to him by one of the owners. The Principal Sudder Ameen appears to have looked to none of these circumstances and to have decided the case at once on the mere fact of the plaintiff's anterior possession for more than twelve years. I think, therefore, that the interests of justice require that this case should be more fully investigated, and that the defendant should have an opportunity of adducing any evidence he may have to rebut the presumption arising out of the proof of long anterior possession put forward by the plaintiff. The case should, therefore, be remanded in order that the whole of the circumstances of the case should be considered, and the whole of the questions involved decided on their respective merits.

KEMP, J.—I am of the same opinion. There may be cases in which the mere accident of possession will not necessarily determine the case; there may be cases in which the prior possession of the plaintiff may have been a long and a peaceable possession, whereas that of the defendant may have been recent and unexplained. In such a case, the mere fact of the possession on the part of the defendant would not be a sufficient answer to the prior and continuous possession of the plaintiff, and the onus of proving a title on the part of the plaintiff might be shifted on the defendant; but in this case it appears to me that the plaintiff does not rely upon his title, indeed the pleader for the plaintiff, Mr. Gregory, was unable to tell us even the date of his client's purchase; he appears to rely simply upon a long possession prior to suit, and it is therefore necessary, such possession being merely *prima facie* evidence of his title, that the question of title as between the contending parties should be thoroughly gone into, and this has not been done by the Principal Sudder Ameen.

I entirely concur in the order of remand.