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SIB SANAYA SUKUL v. SIR CHANDRA JUBARAJ GOSWAMI

BAYLEY, J.—On this special appeal coming on for hearing, the special respondent took an objection under section 348, Act VIII. of 1859, that the suit being one for damages of an amount below 500 rupees, and, therefore, cognizable by the Small Cause Court, no special appeal would, under section 27, Act XXIII. of 1861, lie to this Court.

I am of opinion that this objection is sound and valid. It is quite clear from the judgment of both the lower Courts that the whole contention was, whether or not the plaintiff was entitled to recover, from the Maharaja defendant, the sum which he alleged he had paid over and above what was due from him to the Maharaja on account of rent. In fact, whether, plaintiff having paid it in excess, and it not having been refunded by defendant, there arose a damage to him (plaintiff) or not. This is not a case of contribution for shares of rent as against co-parceners, which has been held by the Full Bench as not coming within the jurisdiction of the Small Cause Court with reference to section 6 of Act XI. of 1865. Although the transaction originally may have been connectd with payment of rent for co-parceners, still the present claim of the plaintiff is for a refund of the money over-paid by him to the defendant, landlord, by the non-refund of which he, the plaintiff, has been endamaged.

The special appeal is dismissed with costs.

HOBHOUSE, J.—I agree. I think that the provisions of section 27, Act XXIII. of 1861, bars this special appeal.

Before Mr. Justice Loch and Mr. Justice Glover.

MATI SING AND OTHERS (PLAINTIFFS), *v.* RAJA LILANAND SING AND OTHERS (DEFENDANTS.)*

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Jan. 20.

Limitation—Act XIV of 1859, *s.* 1, *c.* 12—*Possession.*

In a suit to recover possession of immoveable property, the defence was adverse possession for more than 12 years, except for two short periods, during which plaintiffs had been put in possession by a Civil Court; *first* under a decree of the High Court between the same parties but that they had been dispossessed upon that decree

* Regular Appeal, No. 54 of 1868, from a decree of the Principal Sudder Ameen of Bhagulpore, dated 30th December 1867.

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being reserved on review; and, *second*, under a misconception by the Principal Sudder Ameen of another order of the High Court, in another suit between the same parties, but that they had again been dispossessed after appeal by defendant to the High Court.

Held, per LOCH, J., (GLOVER, J., *dissenting*), that plaintiffs' possession during those two periods was not *bona fide*, and that the suit was barred.

Baboos *Chandra Madhab Ghose* and *Lakhi Charan Böse* for appellants.

Baboos *Annada Prasad Banerjee*, *Ramesh Chandra Mitter*, and Mr. *R. E. Twidale* for respondents.

The facts are fully set forth in the judgment of

LOCH, J.—The facts of this case are shortly as follows:—Tufani Sing, the father of the present plaintiffs and of three other sons, Trilochan Sing, Ranjit Sing, and Mannu Sing, was dismissed from his office of ghatwal of Dhumsaine. The defendant, Raja Lilanand Sing, brought a suit to recover possession of the ghatwali tenure, comprising 35 villages, asli and dakhili, and obtained a decree on 28th November 1853, and was put in possession. The plaintiffs in the present suit, Mati Sing, Khagpat Sing, and Rashdhari Sing, objected to the decree-holder getting possession, as they claimed ten villages as their hereditary property; and urged that they were entitled to a moiety of the said villages, and that they were not parties to the suit brought by the Raja, and could not consequently be affected by the decree passed against their brothers. At the same time, two other parties, Jagi Sing and Nirmal Sing, laid claim respectively to ten and nine villages within the tenure; and the correctness of their claim was admitted by the plaintiffs, whose claim was, as stated above, limited to a moiety of ten villages. After a remand by orders of the late Sudder Court in 1857, the Principal Sudder Ameen, on 6th June 1862, dismissed all three claims. An appeal was preferred by the present plaintiffs, the result of which was that the High Court, on 1st April 1863, held that the appellants were entitled to a moiety of the whole property of Tufani Sing. This order was, however, modified in review, on 15th July 1863, but, in the meantime, the Principal Sudder Ameen, acting upon the first orders of the Court, put the plaintiffs in possession of all the

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villages. On review of his order, on 31st December 1863, he limited possession to a moiety of the ten villages claimed by the plaintiffs, as directed in the High Court's subsequent order of 15th July.

The Raja brought a suit against the present plaintiffs, to recover possession of the moiety of the ten villages decreed to them under the miscellaneous order of the High Court, and obtained a decree on 10th September 1864; and from this decision an appeal was preferred to the High Court, which was given in favor of the present plaintiffs, the Raja's claim to the moiety of these villages being dismissed with costs in June 1865.

From the miscellaneous order passed by the Principal Sudder Ameen, on 31st December 1863, limiting the plaintiffs' possession to a moiety of the ten villages claimed by them, the plaintiffs appealed; but their appeal was dismissed on 5th April 1864, without prejudice to any rights which might accrue to them from the result of the decision in the regular appeal then pending, and referred to above. An application for review was rejected on 28th April 1864.

On the dismissal of the Raja's suit by the High Court, on appeal in June 1865, the plaintiffs asked for execution, and the Principal Sudder Ameen, under a mistaken view of the High Court's order of 28th April 1864, directed them to be put in possession of a moiety of the 35 villages. An appeal was preferred to the High Court, and it was held that the plaintiffs were entitled to possession of a moiety of only ten villages, as these formed the subject of the suit which had been decreed in their favor, and that this Court could not, by a summary proceeding, eject the Raja from the possession of other villages which had been decreed in his favor, and of which he had been put in possession under that decree, whatever might be the rights of the appellants to them. The order of the Principal Sudder Ameen was, accordingly, cancelled on 12th September 1866, and the possession of the plaintiffs limited to a moiety of the ten villages originally claimed by them, and which formed the subject of the Raja's suit against them. In consequence of this order, the plaintiffs have brought the present suit to recover possession, from the Raja, of a moiety of the villages other than the ten

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mentioned above comprised in his decree of 1853, and also seven villages not included in the decree. The Principal Sudder Ameen has dismissed the suit on two grounds: *first*, that it is barred by limitation; *secondly*, because the plaintiffs are estopped by their petition of 16th November 1854, in which they limited their claim to ten villages.

An appeal has been preferred from the judgment of the lower Court, on the ground that the suit is not barred by limitation, possession having been held by the plaintiffs in 1863 and 1865, under orders of a Civil Court, from which possession they were removed by orders of the superior Court, on appeal.

2. The effect of the litigation going on from 1853 to 1866 was to prevent limitation coming into operation, as held by the Privy Council in the case of *Raja Enayet Hossein* v. *Sayud Ahmed Reza* (1).

3. That the plaintiffs are not estopped by the statements entered in the petition of 16th November 1854, and there is no proof that the petition was put in with the knowledge or consent of the plaintiffs.

4. That seven out of the villages now claimed were not included in the 35 villages for which the Raja got a decree in 1853; and, therefore, the Principal Sudder Ameen's judgment is defective in not disposing of this part of the claim separately and distinctly.

We think the second ground taken before us cannot be sustained. The present case is not of the same character as that of the case quoted, and though there has been litigation between the parties since 1854, it did not relate to the villages now in dispute, but to the ten villages of which the plaintiffs have got possession.

The third ground of appeal, we must give in appellants' favour. The petition presented by them in November 1854 does not amount to an estoppel, though it is a strong piece of evidence which may be used against them.

Having disposed of these two points, it is necessary to determine the point of limitation, before we can enter into the merits of the case in respect to the villages which formed the subject of the decree obtained by the Raja in 1853. The question of the seven villages which formed no part of this suit, is entirely a

(1) 7 Moore, I. A., 238.

separate one, and for its determination it will be necessary to go into the merits, in order that the plea of limitation, as regards these villages, may be determined at the same time.

With regard, then, to the 35 villages which formed the subject of the decree of 1853, it is admitted that the Raja was put in possession on 15th July 1854. His possession was disturbed in September 1863, for the Principal Sudder Ameen, acting under the order passed by the High Court on 1st April 1863, and apparently not having the subsequent order of the High Court of the 15th July 1863 before him, directed possession to be given to the plaintiff of a moiety of all the villages, and they remained in possession till deprived of it under a subsequent order of December 1863, passed by the Principal Sudder Ameen in review. The plaintiffs a second time got possession in February 1866, in execution of the decree passed by the High Court in June 1865, by which the Raja's claim to the moiety of ten villages was dismissed. This possession was, however, set aside by the High Court, on appeal, on 12th September 1866, and the plaintiffs urge that, from either of the above dates on which possession was given to them by order of the Civil Court, they are within time. They also urge that their possession was a legal possession, having been given by a Civil Court of competent jurisdiction, and that their cause of action arose on the date in which they were dispossesed by a subsequent order of the same Court. Again it is urged that any kind of possession is sufficient to bar the operation of the law of limitation. There is a case of *Rani Lakhi* v. *Muktakeshi Debi* (1), which has a bearing on the present case. There it was held that, "wrongful possession, "under an erroneous order of a Magistrate, under Act IV. of "1840, does not constitute such *bona fide* possession as will prevent "the law of limitation running against the person so holding." (Thomson's Law of Limitation, page 47.) It is urged, however, that possession need not be *bona fide*. If a party has held adverse possession, no matter how that possession was originally obtained, limitation can, except in cases of fraud, be successfully pleaded against a plaintiff, if he fail to sue within 12 years from the date of the cause of action. So when a party, as the plain-

(1) 1 Hay, 306.

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tiffs in this case, is put into possession by order of the Civil Court, he is entitled to plead that possession against the plea of limitation. Had plaintiff retained possession for six or eight years, instead of three months, and at the close of that period had been dispossessed under an order passed in review, would not their possession for so long a period, under the order of the Court, be a *bona fide* possession? If a wrong-doer, who, without any authority of law takes forcible possession of his neighbour's property, can effectually plead limitation against a claim to recover if not brought within 12 years, why should a party who has been put into possession by order of a Civil Court, and subsequently deprived of that possession by the same Court, not be able to point to that possession as an answer to the plea of limitation? So far as he was concerned, his possession was legal, and in good faith. He believed himself entitled to possession, and asked the Court, to give it him. The Court taking the same view of the claim and of the order passed by the superior Court as the petitioner put him in possession. On the other hand, it may be said, is a person to lose the benefit of long and continuous possession of his estate, because some stranger is thrust into possession by an erroneous order of a Court, which order is subsequently set aside? Will such a possession, which the party dispossessed could not avoid, except by appealing to Higher Court or by application for review, entitle a stranger to bring a suit for possession, and be a sufficient answer to a plea of limitation. The plaintiff claims possession under an hereditary title, and sets forth that, under an order of Court, he was put into possession of the property; but admits that this order was, subsequently, declared to be erroneous, and was set aside, and he was dispossessed by the Court which had given him possession. Defendant pleads that he has held possession for more than 12 years, having been put into possession under a decree of Court. Is the possession of plaintiff, given under an erroneous order of a Civil Court, sufficient to give plaintiff a status which he otherwise would not have, and deprive the defendant of the benefit of his long possession?

Looking at the question, as put before us by the pleaders on either side, it appears to me that a clear distinction must be drawn in cases where the cause of action is shown to have occurred at

date more than 12 years previous to the suit, and cases such as the present where a possession not illegal has been obtained by an accident or by an error of Court. In cases of the former kind, the Court will not look into the *bona fides* of the possession except when fraud is pleaded, because the party seeking to recover has slept over his rights for more than 12 years, and the law declares that if a party be so neglectful, he must lose his remedy, however good his title may be. But where, in answer to a plea of limitation, it be shown that there has been a possession of some kind within the period of limitation, it must be also shown that such possession was a *bona fide* possession. Were a man to take forcible possession of his neighbour's estate, and then for some reason relinquish that possession, and were subsequently to bring an action alleging a title, it would be no sufficient answer to the plea of limitation that he had taken possession at a period within five or six years before the suit was brought. So if a party be put in possession by a Court under an erroneous order or under some misconception, which error is subsequently rectified, and the party be again deprived of possession, it would not be sufficient to point to that possession as a legal or *bona fide* possession, though given by order of a Court, as a complete answer to the plea of limitation put in by the defendant, particularly where he had all along objected to the erroneous order, and had done his best to have it set aside, and was successful in his efforts. Possession of this kind cannot, I think, in a legal sense, be termed *bona fide*, and, therefore, it cannot give the plaintiff in this case a status which he had not before, and enable him effectually to defeat the defendant's plea of limitation. I would confirm the judgment of the lower Court on this point.

Then as regards the seven villages which were not included in the Raja's claim for 35 villages, the defendant pleads that they never formed any part of the ghatwali tenures, but are included in his Nizamut mehals, situated within his zemindari, in Pergunna Goddas; and that they have never been in the plaintiff's possession, and the claim is barred by limitation. The Principal Sudder Ameen has disposed of this part of the plaintiff's claim by saying, that as the decree given in favor of the Raja in 1853 was for the ghatwali mehal, these Mauzas, if comprised within it, must

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also have been decreed. This, however, is not a proper method of dealing with the plaintiff's case. It is clear that the defendant sued for possession of 35 villages by name, and obtained a decree for them in 1853, and got possession under that decree. He could not, under that decree, have taken possession of any villages not mentioned in his plaint, and he does not now claim these seven villages as having been included in the ghatwali tenure. It is no doubt for the plaintiffs to show that these villages did form part of the ghatwali tenure. If they did, then plaintiffs are entitled to have a clear finding on their claim, provided they be able to avoid the plea of limitation set up by the defendants. It appears, however, that neither party have given evidence on this point, so that this Court is unable to dispose of the case. It must, therefore, be remanded to the lower Court, and the Judge, after calling upon the parties to give evidence as to their respective claims, will dispose of the case in the usual manner.

GLOVER, J.—On the question of limitation I am compelled to differ from the opinion expressed by Mr. Justice Loch.

It appears to me that any possession not obtained by force or fraud would be *bona fide* possession sufficient to take the case out of the Statute.

In the present instance, the test, as it seems to me, would be the accruing of the defendant's cause of action, if he had brought the suit, instead of the plaintiffs. Could he in the years 1863 and 1865, whilst he was in possession under the order of the Civil Court, have brought a suit for recovery of possession? I think not; he would have been told that, so long as he retained the possession given to him by the Civil Court, he had no cause of action, and if he brought an action after subsequent dispossession, his time for suing would run from the date of that dispossession; and if so, his possession, though under a mistake of the Civil Court, would still be legally an adverse possession against the opposite party.

It is not, in this instance, the case of a wrong-doer getting possession of property not belonging to him, and then seeking to take advantage of his own wrong doing, but of an honest litigant, fighting for what he considered his rights, and being put in

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possession, however erroneously, by the order of a competent Court.

For the rest, I concur in the judgment proposed by my learned colleague.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

AJONNISSA BIBI (PETITIONER) *v.* SURJAIKANT ACHARJI (OPPOSITE PARTY.)*

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Jany. 22.

Superintendent—24 and 25 Vict., c. 104, *s.* 15—*High Court—Review—Act VIII. of* 1859, *ss.* 377 *and* 378.

The High Court refused to interfere with the order of a Court, granting a review of its judgment, although the application for review was not made until three years after the date of the decree; the party who preferred the application for the review having satisfied such lower Court of the existence of just and reasonable cause for his not having preferred his application for review wthin ninety days.

Baboo *Anukul Chandra Mookerjee* (with him Baboo *Amarendra Nath Chatterjee*) moved to make absolute a *Rule Nisi* issued upon the following petition :—

"That your petitioner was plaintiff in a suit instituted by her against one Lakhi Debi and others in the Court of the Moonsiff of Mymensingh; that her suit having been dismissed by that Officer, an appeal was preferred by her to the Principal Sudder Ameen of that district, who decreed her appeal, with costs, on the 12th September 1864.

"That this Lakhi Debi having died, the estate went to the Court of Wards, and your petitioner, in execution of her decree, having obtained possession of the land, sued for and realized from the said Court the amount of the costs adjudged in her favor on the 14th August 1867.

"That since then one Surja Kant Acharji, calling himself the adopted son of the said Lakhi Debi, filed a petition of review in the Principal Sudder Ameen's Court at Mymensingh, on the 12th February 1868, seeking a re-consideration of the judgment passed by the predecessor of the said Principal Sudder Ameen.

* *Rule Nisi, No.* 57 of 1869.