APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1877 *April* 24.

SHIRO KUMARI DEBI (DEFENDANT) *v.* GOVIND SHAW TANTI (PLAINTIFF).*

Declaration of Title—Adverse Possession—Case made in Plaint—Issues.

A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues.

Tirumalasami Reddi v. *Ramasami Reddi* (1) dissented from.

Ram Lochun Chuckerbutty v. *Ram Soondur Chuckerbutty* (2) followed.

THIS was a suit for the confirmation of possession of, and the establishment of the plaintiff's jamai right in, 7 bigas of kheraji jamai lands, and for the setting aside an order and subsequent sale made in an execution-proceeding under s. 246 of the Code of Civil Procedure. The plaint stated that the lands in question were portion of an estate which originally belonged to one Ram Dhoba, and that the said Ram Dhoba sold them under a khosh-kobala to one Lochunkali, from whom the plaintiff purchased the said lands under a kobala on the 14th Joist, 1269 (27th May, 1862), since which time the plaintiff had been in possession of the said lands through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. The second issue fixed by the Munsif and the only one now material, was, "whether the disputed land was held by Lochunkali by virtue of purchase, and is held by the plaintiff as alleged by him." The Munsif held the plaintiff entitled to the relief sought for, on the ground that he had proved his own possession, and that of his predecessor Ram Dhoba, for twelve years before the institution of the present suit. The Civil and Sessions Judge, after remanding the case for further evidence, dismissed the appeal by the defendant, on the ground that the

* Special Appeal, No. 1678 of 1875, from the decision of J. Tweedie, Offg. Judge of Burdwan, dated the 9th June, 1875, confirming a decree of Baboo Gobind Chunder Ghose, Munsif of Bishtopore, dated 30th May, 1874.

(1) 6 Mad. H. C. Rep., 420. (2) 20 W. R., 104.

plaintiff and his vendor Lochunkali had together enjoyed twelve years' actual possession of the disputed property before filing his present suit for the establishment of his right and title, and was, therefore, entitled to a decree.

The defendant preferred a special appeal to the High Court.

Baboo *Rash Behary Ghose* for the appellant.—Mere proof of possession for twelve years will not justify the declaration the plaintiff asks for in this suit—*Tirumalasami Reddi* v. *Ramasami Reddi* (1), *Umbica Churn Banerjee* v. *Digumburee Dabee* (2), *Man Gobind Sircar* v. *Umbika Monee Dossee* (3), and *Moulvi Abdoollah* v. *Shaha Mujeesooddeen* (4). If the plaintiff wished to rely upon adverse possession for the statutory period, such a case ought to have been set up in the plaint and raised by the issues—*Huro Soonduree Debia* v. *Unnopoorna Debia* (5), *Bijoya Debia* v. *Bydonath Deb* (6), and *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (7). The Munsif having raised all the material issues in the case, the Court of appeal had no right to remit the proceedings to the Munsif under s. 354 of the Code of Civil Procedure.

Baboo *Nil Madhab Sen* for the respondent.—Proof of adverse possession for twelve years is sufficient to entitle a plaintiff to a declaratory decree—*Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (8). The question was sufficiently raised by the issues. Besides, the defendant never complained in the Court below that he had been in any way taken by surprise, and the objection must be allowed in special appeal.

Baboo *Rash Behary Ghose* in reply.—There was no allegation in the plaint that the possession of the plaintiff and his vendor had lasted for twelve years, and the second issue does not, therefore, raise the question of title by adverse possession. The case of *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (8) is distinguishable, there being nothing to show in the

(1) 6 Mad. H. C. Rep., 420.
(2) 12 W. R., 429.
(3) 16 W. R., 218.
(4) *Id.*, 27.
(5) 11 W. R., 550.
(6) 24 W. R., 444.
(7) 25 W. R., 315.
(8) 20 W. R., 104.

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report that title by adverse possession had not been alleged in the plaint or raised by the issues. That case moreover is contrary to the case of *Court of Wards* v. *Radhapershad Sing* (1), where the Court refused to make a decree on the basis of adverse possession, that case not having been made either by the plaint or the issues.

The judgment of the Court was delivered by

MARKBY, J.—This is a suit brought under the provisions of s. 246 of the Code of Civil Procedure for setting aside an order made in an execution-proceeding taken in respect of certain land, of which the plaintiff claims to be the owner. He put in a claim under s. 246, and failed; and thereupon he brought this suit, to use the words of that section, "to establish his right." He sets out his title saying that the land of which he claims to be the owner appertained to 23 bigas 11 cottas 7 chittaks of land which belonged to one Ram Dhoba; that out of the said land, Ram Dhoba sold 7 bigas, which are in dispute, to Lochunkali; that while Lochunkali was in possession of the said land, he sold it to the plaintiff under a kobala of the 14th Joist, 1269. "Since then I have been in possession of the same through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. To this there was no objection offered by any body."

Various issues were raised; and one of those issues, or rather part of one of those issues, is this,—Is the disputed land held by the plaintiff as alleged by him? Ultimately, after a remand, the Lower Appellate Court was not satisfied that the plaintiff had established the precise title which he had set up, but it was satisfied that he had been in possession for twelve years; and upon that ground gave him the declaration which he asked.

Now, in the first instance, it was broadly contended before us, that, in a suit of this kind, no declaration of the plaintiff's title can be made merely upon twelve years' possession; and in support of that, a decision of the Madras High Court, *Tiruma-*

(1) 22 W. R., 238.

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lasami Reddi v. *Ramasami Reddi* (1) was relied on. With the general proposition there laid down, I must say I am unable to agree: it is in direct conflict with a decision of this Court in *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (2)—the decision of Sir Richard Couch and Mr. Justice Glover, wherein it is laid down in the most distinct terms that a declaration of title may be made upon proof of twelve years' possession. Sir Richard Couch says:—"What the plaintiffs sought was a declaration of title to this share in the land, and the first Court had given them that. They having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee in the case of *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (3), extinguished in their favour. The effect of their possession was to extinguish other titles, if any existed; and we think, in a suit of this kind, although they failed to satisfy the Court that their title to the land had been acquired in the way they stated, if in fact they are entitled to it, they ought to have a declaration to that effect, and not be driven to bring another suit in which they would omit any statement of the manner in which they became entitled, and simply say that they were entitled to it, and that they had been in possession of it for a greater number of years, more than sufficient to bar all other claimants by the law of limitation, and ask for a decree on that ground."

It appears to me that if we look to the reason of the thing, we could come to no other conclusion. The plaintiff comes into Court, as for this purpose we must assume that he has a right to come, to prove his title. There is no reason whatever why he should not prove his title by any mode which will show that he has a good title, and when once the law has declared that twelve years' possession is a good title by itself, I do not see how it is possible that the Court can refuse to recognize that, any more than it can refuse to recognize a conveyance from a previous owner.

Then it is said that there are decisions of this Court in which

(1) 6 Mad. H. C. Rep., 420. (2) 20 W. R., 104.
(3) 11 Moore's I. A., 345.

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a contrary view has been taken. The decisions relied on are: *Moulvi Abdoollah* v. *Shaha Mujeesooddeen* (1), *Court of Wards* v. *Radhapershad Sing* (2), *Bijoya Debia* v. *Bydonath Deb* (3), *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (4). Now it is possible that there may be some conflict between the two last of those decisions and the decision of Sir Richard Couch, to which I have already referred, upon one point. Sir Richard Couch clearly thought that if the question of twelve years' possession was properly raised in the issues, the suit ought not to have been dismissed although the title had not been based upon that ground in the plaint. Possibly, I do not say that it is so, possibly there may be a conflict between the two last decisions and the decision of Sir Richard Couch upon that point; but we need not consider that, because I do not think that, upon the two important points which arise in this case, there is any conflict between the decision of Sir Richard Couch in *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (5) and the other decisions. I think, on the one hand, there is nothing which contradicts the decision of Sir Richard Couch, that a possession for twelve years is a good title upon which a declaration may be based; and on the other hand, I think, Sir Richard Couch clearly admits, what the other decisions expressly lay down, that the question of twelve years' possession must be raised in the issues. I think that appears from what Sir Richard Couch says, when dealing with the judgment of Sir Barnes Peacock, in the case of *Ram Coomar Shome* v. *Gunga Pershad Sein* (6). He says there: "The nature of the case, as appears from the papers," (that is, speaking of the papers of the case before Sir Barnes Peacock) "did not admit of the plaintiff's asking for what has been given to the plaintiff in this case by the first Court, namely, a declaration that he is the person entitled to the land."

It is precisely on that ground that the cases of *Bijoya Debia* v. *Boydonath Deb* (3) and *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (4), are distinguishable from the decision

(1) 16 W. R., 27.
(2) 22 W. R., 238.
(3) 24 W. R., 444.
(4) 25 W. R., 315.
(5) 20 W. R., 104.
(6) 14 W. R., 109.

in the case of *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (1). In the case of *Bijoya Debia* v. *Bydonath Deb* (2), Sir Richard Garth says: "This decision," speaking of the decision of the Court below in that case, "appears to us to be entirely beside the plaintiff's real claim and the issues which have been raised, and properly raised, in the Court below;" and so Mr. Justice Macpherson says in the case of *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (3): "The Lower Appellate Court ought not have given a decree in favour of the plaintiff upon a ground which is not suggested in the plaint, or in the issues tried." It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period. I think, therefore, it is clear how we ought to deal with this case. We ought, on the one hand, to hold that the plaintiff may have a declaration of his title based on twelve years' possession, but that if he wishes to claim a declaration upon a title of that kind, he must at least clearly raise that question in the issues in the case. Now, therefore, we must examine what are the issues raised in this case. Some issues were raised by the District Judge on appeal, and were remanded to be tried by the Munsif. I am not at all clear what new points the District Judge desired to have tried, but this is immaterial, because the new issues contain nothing about twelve years' possession. We need only, therefore, look at the issues as settled in the first Court. As I have already shown, the form of the issue there was whether the disputed land was held by the plaintiff as alleged by him? The issue, therefore, refers us back to the allegations in the plaint, and no question can arise in this case as to what would be the result if the issues disclosed a new title.

Now let us turn to see what the allegation in the plaint is. When we come to look at the allegation in the plaint, I think

(1) 20 W. R., 104. (2) 24 W. R., 444. (3) 25 W. R., 315.

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it is not sufficiently clearly stated that the plaintiff intended to rely upon twelve years' possession. In fact, the plaintiff says that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the possession of his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years. It follows that the question of twelve years' possession has not been properly raised either in the plaint or in the issues in this case, and the defendant had no proper notice that such a point was going to be raised; therefore, it was not open to the Lower Appellate Court, having negatived the title which had been alleged by the plaintiff, to declare in his favour a title which had not been alleged. For those reasons I think that the decision of the Lower Appellate Court is wrong, and it ought to be reversed, and the plaintiff's suit dismissed.

I only wish to add that it is not necessary for us now to consider whether we ought to interfere in this case on the ground that the suit ought not to have been remanded. But I think it right to say that, as far as I can see, there was no ground upon which a remand ought to have been directed in this case. The plaintiff had had an opportunity of proving his title, but he had failed to do so; and having failed to do so, I think the Lower Appellate Court ought to have dismissed the suit, and not to have given the plaintiff an opportunity of producing any further evidence.

The suit will be dismissed, and the appellant will be entitled to her costs in this Court and in the Courts below.

I think it desirable to add that, in this judgment, I do not express any opinion as to whether a declaration can be given upon a title which appears in the issues but is not set forth in the plaint. I only say that a declaration cannot be given on a title not distinctly stated either in the plaint or in the issues.

Decree reversed.