1869
April 21.

Special Appeal No. 589 of 1868.

Narayan bin Raghoji. ... ...*Appellant.*

Bholagir Guru Mangir... ... ...*Respondent.*

Special Appeal No. 597 of 1868.

Hormasji Sorabji and Ramji bin Keroji...*Appellants.*

Bholagir Guru Mangir. ... ...*Respondent.*

Special Appeal No. 602 of 1868.

Bholagir Guru Mangir. ... ...*Appellant.*

Hormasji Sorabji. ... ...*Respondent.*

Building erected upon another's land—Right of builder to remove—Equity.

Where H., knowing that B. claimed certain land as his own, nevertheless purchased the land from a third person and erected a bungalow upon it, which B. did not interfere to prevent.

It was held that the English rule of Equity, which under such circumstances would allow B. to recover the land with the bungalow upon it, ought not to be applied in India, but that H. should be allowed to remove the bungalow he had erected.

These were cross Special Appeals from the decision of N. Daniel, Assistant Judge at Puna, in Appeals No. 638 of 1865 and No. 13 of 1866, amending the decree of the Sadr Amin of Puna.

In 1863, prior to the 1st of May Bholagir Guru Mangir purchased from Ramji bin Keroji certain lands in the Puna District (Survey Nos. 92, 93, 94, and 96). The lands were at the time held in mortgage by one Narayan bin Raghoji, and it was part of the terms of the purchase that Bholagir should pay off Narayan's mortgage; no special time was, however, fixed within which he was to do so. He did not then pay off the mortgage and enter into possession, but he duly registered his deed of purchase on the 8th of June 1863.

On the 1st May 1863, Hormasji Sorabji agreed to purchase from Ramji bin Keroji, 30 gunthas of Survey No. 92, and 34

gunthas of Survey No. 93. He then, on the 26th May, published a notice of his contract in the "*Vruta Prakash*" requiring any person having claims against ths property to come forward. On the 20th of August following, he completed the purchase, and registered his purchase deed on the 23rd February 1865.

At the time of his purchase Hormasji knew that Bholagir had a claim upon the land, as Hormasji purchase deed mentioned the fact of the sale to Bholagir, but stated that Bholagir had failed to fulfil his part of the contract in not redeeming the mortgage of Narayan, such redemption forming part of the consideration.

After the completion of his purchase, Hormasji entered into possession and commenced to build an expensive bungalow upon the land.

These circumstances were known to Bholagir. Two suits were now filed by Bholagir, one, about sixteen months after the purchase of Hormasji, against Narayan bin Raghoji, the mortgagee, to redeem the mortgage, in which suit Hormasji was made a defendant. The other against Ramji bin Keroji to recover part of the land in his possession.

The Sadr Amin, Krishnarav Sadashiv, awarded that the plaintiff, Bholagir, should pay Rs. 175 to the defendant, Narayan, and recover possession of the Survey Nos. 94 and 96, and threw out the plaintiff's claim in respect to Nos. 92 and 93, on the ground that he had slept over his rights.

The issues raised in appeal were—

1. Is the deed of sale to Bholagir valid ?

2. If so, can it be enforced against the right of proprietorship pleaded by the respondent, Hormasji, and on what terms ?

The judge found that the deed was valid.

The following is an extract from his judgment on the second issue :—

"With Hormasji there are two points especially to notice; first, he was aware of Bholagir's claim on the property, and

1869

NarayanRaghoji v. Bholagir Guru Mangir

HormasjiSorabji *et al.* v. Bholagir Guru Mangir

Bholagir Guru Mangir v. HormasjiSorabji

the means he took to secure his own right were not the best means within his power. A general notification in an obscure vernacular print is of no value when he had it in his power to communicate directly with Bholagir, and so to force on Bholagir the responsibility of any delay in establishing his right. The other point is that there is a strong presumption of Hormasji having made a great portion of his outlay on the land subsequent to the filing of the suit.

"On the other hand, beyond the filing of the suit, Bholagir does not appear to have hindered Hormasji by injunction or otherwise. This suit was filed sixteen months after the execution of Hormasji's deed, and Hormasji may have been led to believe that Bholagir had no real lien on the property. I think it clear that Bholagir slept for some period over his rights, and that he only put forward his claim when circumstances had turned much in his favour.

"A decree in Equity, while giving him all that he is entitled to at law, would debar him from any benefit which he might hope to have acquired by his procrastination in asserting his own rights.

"I rule that Bholagir can recover possession of the land, and I award a decree to that effect, in amendment of the decree of the lower Court. The recovery of possession is subject to the following reservation : that Hormasji at his option may remove his buildings and restore the property to the condition in which he found it when he assumed possession, or that he may recover from Bholagir the value of the permanent bulidings and improvements on the land according to the valuation proved either at the present date or at the date of the enforcement of recovery (whether by suit or otherwise), whichever valuation may be the lower.

" In the case of Narayan, I consider the award of the lower Court sound as to the payment of the mortgage, and I confirm the decree against him. "

White (with him *Dhirajlal Mathuradas* and *Pandurang Balibhandr*) for the appellant, and *Shantaram Narayan* for the Respondent, in S. A. No. 597 of 1868.

1869

Narayan Raghoji v. Bholagir Guru Mangir

Hormasji Sorabji *et al.* v. Bholagir Guru Mangir

Bholagir Guru Mangir v. Hormasji Sorabji

Dhirajlal and *Pandurang* for the Appellant and *Shantaram* for the Respondent, in S. A. No. 589 of 1868.

Shantaram for the Appellant, and *White* (with him *Dhirajlal*) for the Respondent, in S. A. No, 602 of 1868.

The case come on for argument on the 17th of March 1869, when it was adjourned that Bholagir might be consulted as to whether he wished to take the bungalow at a valuation.

March 31st—*Shantaram Narayan* stated that Bholagir did not wish to purchase the bungalow, but was willing to sell the land ; but that Hormasji would not agree to the amount claimed by Bholagir for it.

COUCH, C. J.—We cannot force the owner of the land to take the building on it at a valuation.

White.—Story, in his work upon Equity Jurisprudence, section 388, says, "if a man supposing he has an absolute title to an estate, should build upon the land, with the knowledge of the real owner, who should stand by, and suffer the erections to proceed, without giving notice of his claim, he would not be permitted to avail himself of such improvements, without paying a full compensation therefore ; for in conscience, he was bound to disclose the defect of title to the builder—Nay a Court of Equity might, under circumntances, go further, and oblige the real owner to permit the person making such improvements on the ground to enjoy it quietly and without disturbance." (COUCH, C. J.—That does not go to the extent of holding that the owner should be obliged to pay for the buildings. What is laid down is that the owner would not be permitted to *avail himself* of such buildings, that is, they should be allowed to be removed.)

Shantaram Narayan.—It is not shown here that the owner, Bholagir, led Hormasji to believe that he was safe in building upon the land. If he was led to believe so, the doctrine to be followed would have been the one illustrated in *Anandrav* v. *Ravji* (*a*). The doctrine quoted from Story does not

(a) 2. Bom. H. C. Rep 214, 2nd Ed.

1869

NarayanRaghoji v. Bholagir Guru Mangir.

HormasjiSorabji *et al* Bholagir Guru Mangir

Bholagir Guru Mangir v. HormasjiSorabji

April 12

apply, because there the person building was induced to believe that he was safe in doing so.

Cur. adv. vult.

COUCH, C. J.—The question in this case is whether the decree rightly gives an option to Hormasji to remove his buildings or to recover from Bholagir their value according to the valuation proved either at the date of the decree or "at the date of the enforcement of recovery (whether by suit or otherwise) whichever valuation may be the lower." Mr. White has quoted a passage from Story on Equity Jurisprudence to show that, where an owner stands by, and, seeing a person building upon his land, raises no objection, he must suffer. There is a case of *Cawdor* v. *Lewis* (*b*) on this point which was not quoted at the hearing, and there are others to the same effect; but they do not apply here, because in the conveyance (No. 16) to Hormasji from Ramji it is clearly recited that "the said land and the land now sold to you were bargained to be given (sold) to the worshipful Bholagir, and a deed of purchase was passed, but, though about five or six years have passed, he has not paid the mortgagee (and settled the matter in any way. The papers are lying with him in the same state. I therefore have sold the land to you."

Thus, Hormasji in this case was not building upon the land without the knowledge of Bholagir's claim, but was possessed of all the information which Bholagir himself could have given him. In the case of *Ramsden* v. *Dyson* (*c*) Lord Cranworth observed:—"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain

(*b*) I. Y. & Coll. 427. (*c*) Law Rep. I. E. & I. App. 129.

wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. 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" (p. 140.)

In the case of *Master of Clare Hall v. Harding* (*d*) the Vice-Chancellor said, "if a party in the possession of an estate, knowing that another claims the property, will, with his eyes open, spend money upon it, I know of no case in which it has been held that he can, in the absence of special circumstances, keep the lawful owner out of possession, unless he will reimburse the party in possession the expenditure he has made." (p. 296). Here Hormasji knew that Bholagir claimed the land and, knowing this, expended the money.

The circumstances of this case, therefore, are such that it does not come within the rule relied upon by Mr. White. Hormasji took the risk, and, as he was informed of Bholagir's claim, it was necessary, for the latter to give a notice. We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, *viz.*, that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India, that the party so building on another's land should be allowed to remove the materials. We must, therefore, modify the decree of the Appellate Court by striking out the reservation in favour of Hormasji, and substituting for it that he shall be at liberty forthwith to commence to remove his buildings and to re-

(d) 6 Hare 273.

1869

Narayan Raghoji v. Bholagir Guru Mangir

Hormasji Sorabji et al. v. Bholagir Guru

Bholagir Guru Mangir v. Hormasji Sorabji

store the property to the condition in which it was when he took possession; the same to be completed within one year from the date of this decree. Costs of Special Appeal, No 589 of 1868, on Narayan bin Raghoji, and those of Special Appeals Nos, 597 and 602 of 1868, on Hormasji.

GIBBS, J.—Concurred.

Decree modified.

Special Appeal No. 64 of 1869.

Malhari valad Raghoji. ... *Appellant.*

Tukaram valad Darkoji. ... *Respondent.*

Limitation—Gatkuli *land*—*Non-payment of assessment.*

Where a *gatkuli* tenant omitted to pay the assessment on his *gatkuli* land, and the defendant obtained possession of it. The lower Court decided that the *gatkuli* tanant, having omitted to pay his assessment, had lost all title to his land.

On Special Appeal the High Court remanded the case for the lower Court to inquire whether the Government had taken act on in the matter by putting the defendant in possession; as, if not, he would be merely a trespasser, and the *gatkuli* tenant would be entitled to recover.

This was a Special Appeal from the decision of F. Lloyd, Judge of the District of Puna, in Appeal Suit No. 496 of 1866, reversing the decree of the Munsif of Khed.

Malhari valad Raghoji sued to recover from Tukaram valad Darkoji possession of a filed, alleging that it had been registered in his (Malhari's) name for thirty-two years, and that he had during that time paid assessment on it; that about eight years ago he had let it under a verbal agreement for five years to the defendant who now refused to give it up.

Tukaram's defence was that the land was *gatkuli* and that the plaintiff had no right to it; that the plaintiff was unable to cultivate it and had relinquished it fifteen years ago; that, with the consent of the Patil and Kulkarni, one Sabatu cultivated it for two or three years; that he had also resigned it, and that then the Government placed him (Tukaram) in possession, and that he had since paid the assessment.