

*Special Appeal No. 117 of 1869.*1869  
June 29.

Pandurang Govind. ... Appellant.

Balkrishna Hari. ... Respondent.

*Ejectment—Cause of action—Limitation.*

In an action of ejectment, the plaintiff, though he cannot prove that he has been in possession of the land claimed within twelve years, must not on that account of necessity fail. He must, however, show that his cause of action has accrued within that period; and a plaintiff's cause of action arises when another person takes possession of his land, and not before.

If any question of limitation arises, the burden of showing that the cause of action has arisen within the legal period of limitation lies upon the plaintiff.

This was a Special Appeal from the decision of Baron DeH Larpent, Joint Judge at Ratnagiri, in Appeal Suit No. 261 of 1868, confirming the decree of Ragho Narayan, Munsif of Vengurla.

The plaintiff sued to obtain possession of a piece of land which he alleged he had purchased on the 31st of May 1854 under a deed, and held exclusive possession of until October 1866, when, on his planting some cocoanut and plantain trees on the land, the defendant obtained a decree of the Revenue Court, and interfered with his possession.

The defendant contended that the land claimed by the plaintiff was the defendant's land, and that he had been in possession of it for more than twelve years.

The Munsif rejected the claim as barred by the Law of Limitation.

The Joint Judge, in appeal, found that the plaintiff had not held possession of the land in dispute at any time since the date of purchase, viz., the 31st of May 1854; that, as the suit was filed in April 1867, an interval of more than twelve years had elapsed; and that, consequently, the suit was barred; that the plaintiff was a wrongdoer when, in 1866, he planted cocoanut and plantain trees on the land, and was restrained by the Revenue Court.

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The special appeal was heard on the 23rd of June 1869 before GIBBS and MELVILL, JJ.

*Amiruddin* for the Appellant: The suit is not barred by the law of limitation. The law governing the case is to be found in cl. 12 Sec. I of Act XIV. of 1859, and the only point to be determined is the date on which the cause of action arose. The Judge below considered that, as the plaintiff had not had possession within twelve year before the date of suit, the suit was barred. Because a plaintiff does not show possession within twelve years it does not follow that the defendant should have a judgment in his favor: *Gopeenath Mookerjee v. Issur Chunder* (a) He also cited *Devaji Gayaji v. Godubhai* (b).

*Shahntaram Naraynn* for the Respondent: Unless the plaintiff can prove that he has been in possession within twelve years he must fail. Whatever may be the date of dis-possession which the plaintiff alleges, he should be called upon to show that he has had possession within twelve years. In deciding a plea of limitation it is not for the defendant to show adverse possession: *Kedarnath Mokerjee v. Mohesh Chunder* (c), *Nawab Nazir Sidhee v. Woomesh Chunder* (d), *Mirza Mahomed v. Sarahutoonissa* (e), *Gooroodoss Roy v. Hurvath Roy* (f), *Nobekishore Dey v. Rankishen Mohurir* (g), *Dinobhundhoo Suhaye v. James Furlong* (h), *Maharajah Kooceurr Singh v. Baboo Nund Lolt Singh* (i).

*Amiruddin* in reply: These cases do not apply here, where the defendant's possession is disputed, and even denied. Even the decree obtained by the defendant from the Revenue Court does not find possession in him.

*Cur. adv. vult.*

(a) 9 Calc. W. Rep. Civ. R. 365.

(b) 11 Calc. W. Rep. P. C. 35.

(c) 1 Calc. W. Rep. Civ. R. 67.

(d) 2 Cal. W. Rep. Civ. R. 75

(e) Ibid. 89.

(f) Ibid 246.

(g) 9 Calc. W. Rep. Civ. R. 131.

(h) Ibid 155.

(i) 8 Moo. Ind. App. 199.

29th June—MELVILL, J.:—The plaintiff's case is that he purchased the land in dispute (which is a piece of unenclosed ground near the defendant's storehouse) in 1854, and that in 1866 he planted some trees on it, whereupon the defendant presented a petition to the Mamlatdar, who ordered the plaintiff to vacate the ground until he should establish his title in a Civil Court. For this purpose he has brought the present action; and the Joint Judge has confirmed the Munsif's decree, dismissing the suit on the ground that the plaintiff has not proved possession with twelve years. As regards the planting of the trees, the Joint Judge held that the plaintiff was a wrongdoer, and that this was no possession of the land, but an attempt by a wrong act to further the present claim.

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In special appeal it has been urged on behalf of the plaintiff that, even if it be admitted that he had not possession of the land previously to the planting of the trees, yet that no one else had possession, and that, therefore, no cause of action accrued until he was obstructed by the defendant in 1866. On the other side it has been contended that, in an action of ejectment, the plaintiff must necessarily fail, unless he prove that he has been actually in possession within 12 years; and numerous cases have been cited, in which such a rule appears to have been more or less clearly laid down.

In a question of limitation there can be no doubt that the burden of proof is upon the plaintiff. Sec. 26 of Act VIII. of 1859 requires that the plaintiff should set forth "the cause of action, and when it accrued; and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the law is claimed."

Sec. 32 provides that "if upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint." Thus, even before the plaint can be admitted, the plaintiff is under the necessity of satisfying the Court that his claim is not barred by lapse

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of time. Nor does this obligation cease when the plaint has been admitted. If the defendant plead limitation, or if, although he do not plead it, it appear to the Court upon the facts that the suit was commenced after the period of limitation had expired, the Court is bound to call upon the plaintiff to prove that he has not forfeited his right of action. Act. XIV. of 1859, sec. 1, says plainly that "*no suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature any Law or Regulation to the contrary notwithstanding.*" The words are distinctly prohibitive; and, therefore, if any question or doubt on the subject arise, the plaintiff is bound to satisfy the Court that it has not been induced to entertain a suit which the law has forbidden it to entertain.

The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it, or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land, and not before. If he has omitted to take possession of the land himself, he may not be able to treat the intruder as a trespasser; but he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land.

This proposition seems so clear that it is hardly necessary to quote precedents in support of it. We will only refer to two decisions under the English Statute of Limitation, 3 & 4, W. 4, c. 27, Sec. 2 of that Act enacts that "no person shall make an entry, or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued;" and Sec. 3 goes on to say that the right of action shall ordinarily be deemed to have accrued at the time of the plaintiff's dis-possession or discontinuance of possession.

In *M'Donnell v. M'Kinty* (j), Blackburne, C. J., said: "The word discontinuance means an abandonment of possession by one person followed by the actual possession of another person. This, I think, must be its meaning; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected," p. 526. In *Smith v. Lloyd* (k), which was an action of trespass, the plaintiff's replication was that the entry made by the defendants on the the surface of certain land and minerals was not within twenty years after the right to make the same accrued to the defendants, or any one under whom they claimed, and that, therefore, the right of entry was extinguished. But Parke B. said: "We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under the 3 & 4 W. 4, c. 27, sec. 3; for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment

(j) 10 Irish Law Reports, 514.

(k) 9 Exch. 562; S. C. 23 Law Journal Exch. 194.

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of Chief Justice Blackburne in *M'Donnell v. M'Kinty*, and the principle upon which that decision is founded."

In the present case the Joint Judge has not found that the defendant was ever in possession, and the Mamlatdar seems to have found no more than that in 1866 the defendant and others were in the habit of passing to and fro across the disputed ground. This would at the most be evidence only of a right of way, and would not entitle the defendant to oppose the plaintiff's entry on the land. Assuming the plaintiff to have acquired a title by purchase in 1854, and not to have taken possession till 1866 then, if the land had remained in the meantime unoccupied, and was not in the exclusive possession of any other person in 1866, the plaintiff was in no sense a trespasser or wrongdoer. We think that the case must be remanded, in order that the Court below may find whether, at the time of the plaintiff's entry in 1866, the defendant was in possession of the ground, and if so, whether the plaintiff has proved that the defendant's possession, which constitutes his cause of action, commenced within 12 years preceding the date of action. If either of these issues be determined in favour of the plaintiff, the Court will consider the evidence of the plaintiff's title, and of any easement which may be claimed by the defendant, and pass a new decree on the merits.

Costs to follow the final decision.

*Decree reversed and suit remanded.*