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Before Mr. Justice West.

LILLU BIN RAGHUSHET (*Plaintiff*), *Appellant v.* ANNAJI PARASHRAM (*Defendant*), *Respondent.*[*] [21st March, 1881.]

Mamlatdar's finding as to possession—Magistrate's finding as to possession—Code of Criminal Procedure, Act X of 1872, *s.* 530—*Actual possession—Dispossession—Cause of action*—Res judicata.

A Mamlatdar's finding as to the point of actual possession is not conclusive.

A Magistrate's finding is so under s. 530 of Act X of 1872.

Possession actually taken by a person having a right to it is not the less effective, as perfecting his title, by reason of an irregularity in taking it. Subsequent ouster will give rise to a new cause of action.

[R., 15 B. 238 (241); 20 B. 270 (276); 36 B. 185 (188)=13 Bom. L.R. 1200 (1203)=12 Ind. Cas. 913 (914); 9 C W.N. 1061; **Expl. & D.**, 26 B. 353=3 Bom. L.R. 919 (920).]

THIS was an appeal from an order of R. F. Mactier, District Judge of Satara, reversing a decree of Achyut Jagannath Ghate, Second Class Subordinate Judge of Karad, and remanding the case for re-trial.

The plaintiff, Lillu, sued for possession of certain land, alleging that he held a mortgage of the land; that he filed a suit against the defendant, Annaji, and others for possession of the land as mortgagee, and obtained a decree awarding such possession in 1871; that he obtained possession under the decree; that in 1874 a first class Magistrate confirmed his possession; that subsequently, the defendant, Annaji, filed a possessory suit before a Mamlatdar, who decided against Lillu and ousted him from possession in 1877; and hence the present suit.

The defendant, Annaji, answered that he had purchased the land in 1864, and had been in uninterrupted possession since then; [388] that he had no notice of the former suit; and that the plaintiff had never obtained possession under it.

The Subordinate Judge held that the plaintiff, Lillu, had obtained a decree and possession thereunder against the defendant; that the sale to the defendant, being prior to the decree, must be considered to have been adjudicated upon in the former suit, and that the defendant could not be allowed to set up that title again in the present suit. He, therefore, decreed in favour of the plaintiff.

From this decree, the defendant, Annaji, appealed to the District Judge of Satara, who held that it was right that the defendant, Annaji, should have a chance of proving his purchase of 1864 in this case, as he was stated to have been in jail during the pendency of the last suit. He, therefore, reversed the Subordinate Judge's decree and remanded the case for re-trial, to allow Annaji to prove his purchase of 1864 and his possession.

From this order of remand the plaintiff, Lillu, appealed to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant, Lillu.

Shantaram Narayan, for the respondent.

[*] Review in Appeal No. 27 of 1878 from order.

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JUDGMENT.

The case was heard by WEST and PINHEY, JJ., on the 3rd March, 1878, and the following judgment was delivered by

WEST, J.—The former decision in the suit between Lillu and Annaji was *res judicata* as between them; albeit Annaji was a prisoner in the criminal jail at the time of the suit. If he was subjected to any wrong through proceedings fraudulently taken during his incarceration, his proper course was to get those proceedings set aside. While the decree stands unreversed, it is conclusive of the right of Lillu as mortgagee. The Subordinate Judge has pronounced Lillu entitled to possession in this character, and his decree to this effect must be restored; that of the District Court being reversed with costs throughout on Annaji.

The defendant, Annaji, applied for a review of this judgment on the ground that the plaintiff, Lillu, had admitted before the Mamlatdar that he had never obtained possession, and that being [389] so, there was no new cause of action on which to found the present suit, his only proper course being to proceed by execution of the former decree.

A *rule nisi* having been granted on these grounds by a Bench composed of the same Judges as above, it came on for argument before West, J., alone, the other member of the Bench having been absent on leave for more than six months.

Ganesh Ramchandra Kirloskar, for the plaintiff, Lillu, showed cause. —There is no evidence before the Court as to the alleged admission of Lillu. The Mamlatdar's judgment is not even admissible for such a purpose. On the other hand, there is the conclusive finding by the Magistrate of the actual possession of Lillu in 1874. The Magistrate's finding under s. 530 of Act X of 1872 is conclusive so far as the determination of the question of actual possession is concerned. The plaintiff, moreover, had executed the former decree as far as he could, and had actually taken possession under it. His old cause of action was thus at an end; any fresh disturbance would give him a fresh cause of action: *Bindobashinee Dossee* v. *J.R. Rainey* (1), *Gobind Mundal* v. *Bhoopal Chunder Biswas* (2), *Umbika Churn* v. *Madhab Ghosal* (3). Even if the objection taken be in itself a good one, it is not rightly taken in review of the appeal in the High Court.

Shantaram Narayan, for the defendant, Annaji, in support of the rule. —Plaintiff, having himself put in the Mamlatdar's judgment, cannot object to its admissibility. Even if it be not conclusive evidence, it was sufficient to show that he had a *prima facie* case. The dispute before the Magistrate shows that Lillu had not peaceful possession. Then the Mamlatdar declared that we were in possession. My contention is that plaintiff never executed his decree, and never obtained real possession; *Sayad Nasrudin* v. *Venkatesh* (4) The cases quoted for the plaintiff do not apply, as they relate to execution against land which tenants had a right to hold in spite of the decree.

The Court took time to consider its judgment, which was delivered on the 21st March, 1881, by—

(1) 15 W.R. 307.
(2) 19 W.R. 101.
(3) 4 C. 870.
(4) Printed Judgments for 1879, p. 89.

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[390] WEST, J.—The rule for review in this case was granted upon an apparent admission of the plaintiff, Lillu, in the inquiry before the Mamlatdar, that, although he had obtained a decree for possession, in 1871 of the property in dispute, yet he had never actually obtained possession under it. And his statement, as given by the Mamlatdar in his judgment in the possessory suit, does say that, at the time when he was taken to receive possession, the person who should have delivered it did not actually do so. There was a crop on the land, and he told the plaintiff merely that when that crop was removed he was to enter on possession and enjoyment. Still, however, in other parts of his deposition as set forth, Lillu, as I find, does assert that he is in possession of the land awarded to him. The assumption, therefore, on which the rule was granted, is not supported by Lillu's deposition as a whole. The original deposition has not been produced; but the defendant, Annaji, who moved the Court on the Mamlatdar's summary of it, cannot object to that summary being taken as correct. It was by way only of indulgence to him that notice was taken of the apparent admission in his favour indicated by the Mamlatdar's judgment, and, on the failure of the admission, the reason for the rule is gone. Lillu stands now in this position, that he has a decree for possession as mortgagee, and an order of a Magistrate in 1874 pronouncing him in possession; while, by a Mamlatdar's order of 1876, Annaji was declared to be in possession, and Lillu was thus driven to his present suit in the Civil Court. By an express provision of the Mamlatdar's Act, the decision of the Mamlatdar is not conclusive as to the point of actual possession in any subsequent suit. The decision of a Magistrate under the Code of Criminal Procedure, is conclusive as to the possession; but it is contended that a possession available to Lillu for perfecting his title under the decree must have been a peaceable possession, and that the dispute before the Magistrate in 1874 implies that his possession was not a peaceable one. As to this, the general principle is that a man who acquires possession is remitted, as it is said,—that is, he may rely for the support of his possession on any still subsisting title vested in him, and for which a legal remedy is still open to him (1): *Brassington* v. *Llewellyn* (2). Of two persons entering [391] simultaneously, the English law assigns possession to him that has the right, by a rule identical in substance with that of the Hindu law on the same subject] (3). Consistently with this, a person having a right to possession may enter peaceably, and may then maintain the possession thus acquired: *Taylor* v. *Cole* (4). This, as Lord Kenyon said, " will not break in upon any rule of law respecting the mode of obtaining the possession of lands" (5). If there is a breach of the peace in attempting to take possession, that affords a ground for a criminal prosecution; and, if the attempt is successful, for a summary suit also for a restoration to possession under s. 9 of the Specific Relief Act I of 1877—*Dadabhai Narsidas* v. *The Sub-Collector of Broach* (6); but an unlawful act in entering does not make the owner a trespasser *ab initio* (7); the law will still annex the right to the possession. In *Doe dem. Stephens* v. *Lord* (8) a mortgagee,

(1) Coke Lit. 349 *a*. (2) 27 L.J. Ex. 297.
(3) Perkins Prof. Bk., 213. Narada I; 4; 12, 13.
(4) 1 S. L. C. (6th ed.) 115. So also *Brinsmead* v. *Harrison*, L.R. 7 C.P. 547. *Ex parte Drake*, L. R. W. N. for 1877, p. 119.
(5) See 3 T. R. at p. 295. (6) 7 B.H.C.R. A.C.J. 82.
(7) I Hilliard on Torts, p. 600. See 1 & 2 Vic., c. 74, s. 6. That a landlord entering by force is answerable for an injury to the tenant's property, see *Beddall* v. *Maitland*, L. R. W. N. for 1881, p. 43.
(8) 7 A. & E. 610.

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whose writ of possession was set aside as irregularly obtained, was ordered to restore the possession he had acquired under it. It was declared an abuse of the process of the Court that the mortgagee should have entered with an appearance of authority to which he was not really entitled (1). A similar principle is involved in the case of *Sayad Nazruddin* v. *Venkatesh Prabhu* (2). If, therefore, there was on Lillu's part an abuse of the process of the Court in obtaining the possession which he was found to have in 1874, he would not probably be allowed to benefit by that possession. But what occurred was merely this, that, having what was equivalent to a writ of possession, he was not put into possession by immediately ousting the tenant, but was told by the officer of the Court to enter after the crop was removed. If he did enter afterwards, his entry could not be deemed an unlawful one; he would be doing only what he had a right to do, and what the officer, if present, would have compelled his adversary to submit to. If he used violence, the person injured [392] should have prosecuted him; if he, notwithstanding the decree, took possession otherwise than "in due course of law," the person dispossessed should have sued him on this ground. *Prima facie*, his possession was justified; it fulfilled the decree of 1871, and, completing his right, gave him a new action if he was again dispossessed. Now the Magistrate in 1874 adjudged that Lillu was in possession, and gave, or secured, him possession even if he had it not before. There may have been a dispute down to that time; but then, at any rate, Lillu's possession could no longer be called unlawful. It was a lawful possession until Lillu should be "ousted in due course of law"; and a possession already decreed to him by the Civil Court. Any mere irregularity on the part of the Magistrate would not prevent the legal consequences, for he had authority to determine the question of possession, and his order has never been set aside. It was not like the case of an authority being invoked and exercised which did not legally subsist, and which, therefore, coerced the defendant by an unlawful compulsion; nor was it an order like that of the Mamlatdar, expressly deprived of effect for the purpose of any ulterior proceedings on the question of possession. A proviso to that effect is annexed to s. 534 of the Code of Criminal Procedure, but not to s. 530; and the Magistrate's inquiry is a judicial proceeding binding for its intended purpose, even though the reasons for the order should be weak and insufficient. There was, thus, nothing to prevent the possession acquired by Lillu from adhering to his right under the decree. The fact subsisted; and its results were not vitiated by any misconduct on his part. His supposed admission in 1876, that he had not acquired possession, turns out not to be well founded. He says, or seems to say, that he did not at once get possession under his decree; but he says also that he was told to go in and take possession, and that, in fact, he is in possession. There is thus nothing conclusive to set against the Magistrate's adjudication in his favour.

The rule must be discharged with costs.

(1) See 7 A. & E., pp. 613, 614.

(2) 5 B. 382.