

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

1882
November 28.

MAIDIN SAIBA (ORIGINAL PLAINTIFF), APPELLANT, v. NGAPA
AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Trespasser—Adverse possession—Limitation Act XV of 1877, Art. 144, Sch. II.

A defendant has a right to set up the plea of tenancy and at the same time to rely on the statute of limitations.

The plaintiff sued to recover possession of certain land. The defendant pleaded that it was included in a permanent lease granted to him in 1849 by the plaintiff's predecessor in title, and that the suit was barred by the law of limitation. It was found at the hearing that the land was not included in the lease. It appeared that there were disputes between the parties about the land since 1856, each asserting his own right to it. It was contended for the plaintiff that inasmuch as the defendant had claimed the land as a tenant, his possession was not adverse under article 144 of the Limitation Act XV of 1877.

Held that under the circumstances the defendant's possession was adverse. The defendant was a trespasser, setting up pretended tenancy which the plaintiff denied throughout. The case, therefore, was to be regarded as one against a trespasser and not as one between landlord and tenant.

Dinomoney Dabea v. Doorgapersad Mozoomdar(1) followed.

Tekaetni Govra Kumari v. The Bengal Coal Company and others (2) distinguished.

THIS was a second appeal from the decision of S. Tagore, Judge of the District Court of Kanara, reversing the decree of the Subordinate Judge of Honavar.

This suit was brought by the plaintiff to recover possession of a field No. 61. The defendants contended that it was included in a *mulgeny* (permanent) lease, granted to them in 1849 by the plaintiff's predecessor in title in respect of another field No. 44, and that the suit was barred by the law of limitation. The Subordinate Judge held that No. 44 was leased to the defendants, but not No. 61. He, accordingly, awarded the plaintiff's claim.

In appeal the District Judge (Mr. J. W. Walker) remanded the case for further evidence, with the following remarks :—

* Second Appeal, No. 523 of 1881.

(1) 12 Beng. L. R., 274.

(2) 12 Beng. L. R., 282 (foot-note).

1882

 MAIDIN
 SAIBA
 v.
 NAGAPA.

“On considering the judgment of the lower Court I find that no issue has been raised on the question of possession for twelve years next preceding the institution of the suit.* * * But the question whether No. 61 was or was not included in the lease, has been for a long time the subject of dispute, and there are facts mentioned in the judgment of the lower Court which tend to show that the defendants have for more than twelve years successfully asserted that they do hold No. 61 under the lease. It is urged for the plaintiff that, as the defendants admit they hold as tenants, they cannot set up adverse possession. But I am inclined to hold that if the defendants can show that they have only paid the amount due on the lease (which is admitted) and have for more than twelve years been in possession of No. 61, then the plaintiff has lost all rights as against the defendants, except those under the lease; in other words, that No. 61 must now be held to be a part of the land leased. A. leases to B. his field No. 1; and B. then in some way or other, it does not appear how, also obtains possession of A.'s field No. 2, and for more than twelve years holds both fields, but only pays the rent due for field No. 1, alleging all through that he holds both fields under the one lease on which he pays rent. A. is aware of B.'s allegation, and disputes arise, but B. continues in possession. Then I think A.'s right to recover possession of field No. 2 at the end of twelve years would be restricted to his right, if any, to recover possession under the lease. B.'s admission alone gives him such a right, and without the admission A. could not recover at all. The question does not very clearly appear from the long judgment of the lower Court, and hence I have stated it fully, but it is not necessary at present to decide the point. I remand the suit to the lower Court for it to take evidence and record its opinion on the following point:—Have the defendants been in possession of No. 61 for more than twelve years next preceding the institution of the suit?”

On the return of the case with the evidence, the Judge (Mr. S. Tagore) held that the land in dispute was included in the *mulgeny* lease granted to the defendants in 1849 and that they had been in possession of the land (No. 61) for more than twelve years next preceding the institution of the suit. He, accordingly,

1882

MAIDIN
SAIBA
v.
NAGAPA.

reversed the decision of the Subordinate Judge and threw out the plaintiff's claim.

The plaintiff appealed to the High Court.

Shamrav Vithal (with him *Shantaram Narayan*) for the appellant.—The defendants are admittedly in possession of the land as tenants. The Judge, therefore, ought to have held that their possession was not adverse to the plaintiff as provided by article 144 of the Limitation Act XV of 1877. Indeed, the question of adverse possession does not arise in this case. It is found that the land is not included in the lease under which the defendants claim to have been in possession as tenants. The plaintiff, therefore, is entitled to recover it.

N. G. Chandavarkar for the respondents.—The plaintiff treated the defendants as trespassers throughout, and even in the Courts below his case was that the defendants were in wrongful possession of the land. He cannot now set up a new case and seek to bind them by an admission which he all along repudiated. According to the plaintiff's own showing, his cause of action arose in 1849 when the defendants set up a permanent lease and he distinctly repudiated it, alleging that they had no right whatever to the land. If the lease set up by the defendants was false, the plaintiff had a right to immediate possession and to eject them as trespassers. Adverse possession means possession to the exclusion of the true owner, and the effect of the false title set up by the defendants was to exclude the plaintiff totally from the possession of the land as well as the right to recover rent in respect of it. The defendant's acknowledgment of his ownership in that qualified way cannot avail him, because it was no acknowledgment of his right to recover possession from them. Such right of action as the plaintiff had when he became aware of the false title set up by the defendants could not be kept hanging over their heads for an indefinite period: *Dinomoney Dabea v. Doorgapersad Mozoomdar* (1).

SARGENT, C. J.—The suit is to recover possession of certain lands to which the defendant pleads that they were included in a *mulgeny* lease granted to him in 1849 and also that the plaintiff's claim is barred by the Statute of Limitations. The District

Court has found, first, that the lands were not included in the lease; secondly, that the defendant has been in actual possession of the lands ever since 1849, claiming throughout to hold them as such *mulgeny* tenant. The Full Bench ruling in *Dinomoney Dabea v. Doorgapersad Mozoomdar* (1) is conclusive as to the right of the defendant to set up the defence of tenancy and at the same time to rely on the Statute of Limitations. But it was said that inasmuch as the defendant has always claimed the land as a permanent tenant, there has been no adverse possession as contemplated by article 144 of the Limitation Act XV of 1877. In the case reported at the foot of 12 Bengal Law Reports, 282, the Court held that such possession was not adverse, because notice of defendant's claim to hold it under *mokurrari* tenure had not been given to the plaintiff; but here, if not from 1849, at any rate ever since 1856, the plaintiff was acquainted with the fact that the defendant insisted that the lands were included in the *mulgeny* lease. Again, as far back as 1856, the plaintiff was actually engaged in asserting his right by endeavouring to let the lands to other tenants. Under these circumstances it is impossible, we think, to hold that the defendant's possession was not adverse to the plaintiff. The defendant was, in fact, a trespasser setting up a pretended tenancy which the plaintiff throughout denied, and we entirely agree with Mr. Justice Mitter in his remark at page 280, 12 Bengal Law Reports, that the case must, under such circumstances, be regarded as throughout a case against a trespasser, and not as one between landlord and tenant. The decree must, therefore, be confirmed with costs.

1882

MAIDIN
SAIBA
v.
NAGAPA.

Decree confirmed.

(1) 12 Beng. L. R., 285.
