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was to be at liberty to recover possession in any year on payment of the sum of Rs. 700. There was no promise by the mortgagor to pay the money. It was simply provided that until he did pay the amount, the mortgagee was to retain the property. Under these circumstances, we think it was not the intention of the parties that the land should be sold, and that the deed contained a special agreement which took the case out of the provisions of clause (3) of section 15 of Regulation V of 1827, which was the law in force at the time the mortgage was effected.

We must, therefore, reverse the decrees of the Courts below and reject the claim, with costs on the plaintiff throughout.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

1895. *February* 13.

PREMJI JIVAN BHATE, DECEASED, BY HIS HEIR AND EXECUTRIX OF HIS WILL HIS WIDOW MA'NEKBA'I (ORIGINAL PLAINTIFF), APPELLANT, *v.* HA'JI CA'SSUM JUMA AHMED (ORIGINAL DEFENDANT), RESPONDENT.*

Encroachment—Stranger building on land of another—Acquiescence of owner—Standing by—Delay of owner in suing for possession—Form of decree where owner succeeds in suit.

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building.

Delay by the owner in bringing a suit is not in itself sufficient to create an equity in favour of the person spending money on the land so as to deprive the owner of his strict rights.

The decree made by the High Court was that the plaintiff should recover the land with liberty to the defendant forthwith to commence to remove his building and to restore the property to the condition in which it was when he took possession, the same to be completed within one year from date of decree. In default, the plaintiff to be at liberty to remove the building at the expense of the defendant.

* Second Appeal, No. 397 of 1893.

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PREMJI JIVAN BHATE v. HA'JI CA'SSUM JUMA AHMED.

THIS was a second appeal from the decision of W. H. Crowe, District Judge of Poona, amending the decree of Ráo Sáheb Váman M. Bodas, Subordinate Judge of Haveli.

Suit for the recovery of certain land and for the removal of a building which the defendant had erected upon it. The plaintiff complained that, by the building, 116 yards of his land had been appropriated by the defendant in October, 1888, and February, 1889. The suit was brought in 1890. Notice of encroachment was given to the defendant in March, 1889.

The defendant answered that the ground in dispute belonged to him and had been in his *vahivát* (management); that the suit was time-barred; and that the plaintiff had not objected to the building during the progress of the work.

The Subordinate Judge passed a decree for plaintiff directing the defendant to remove that part of his building which stood on the land in dispute and to deliver the land to the plaintiff. He also issued an injunction restraining the defendant from in any way interfering in future with the plaintiff's enjoyment of the land.

On appeal by the defendant the District Judge, relying on *Benode Coomaree Dossee* v. *Soudamineey Dossee*[1] and *Navalchand* v. *Amichand*[2], held that as the plaintiff failed to explain the delay of a year between the notice of encroachment to the defendant and the institution of the suit, she was entitled only to recover damages and not to have the building removed. He, therefore, remanded the case to the Subordinate Judge for the determination of the amount of damages, and the Subordinate Judge having fixed the amount at one hundred rupees, the Judge amended the decree by ordering the defendant to pay that amount to the plaintiff.

The plaintiff preferred a second appeal.

Macpherson (with *Gangárám B. Rele*) for the appellant (plaintiff):—There was no unreasonable delay on the plaintiff's part, and the defendant had notice of our objection to the encroachment. This is not a case for damages. The defendant intentionally

(1) I. L. R., 16 Calc., 252. (2) P. J., 1889, p. 259.

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encroached on our land; therefore, he is not entitled to any consideration from the Court. His building should be removed and our land should be restored to us—*Dattátraya* v. *Shridhar*(1); *Náráyan* v. *Bholágir*(2); *Jamnádás* v. *Atmárám*(3); *Ráma* v. *Rája*(4); *Ramsden* v. *Dyson*(5).

Shivrám V. Bhandárkar, for the respondent (defendant):—The plaintiff ought to have brought the suit within a reasonable time after our encroachment began. It was not necessary for her to wait for one year after the second encroachment in 1889. Our building was completed before the suit was filed, and the plaintiff stood by during all that time. She having delayed to file the suit, there is now no equity in her favour. The decree for damages is the proper decree under the circumstances of the case—*Benode Coomáree Dossee* v. *Soudaminey Dossee*(6); *Navalchand* v. *Amichand*(7).

SARGENT, C. J.:—It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land—*Ramsden* v. *Dyson*(5); *Plimmer* v. *Mayor, &c., of Wellington*(8); and see *Dattátraya* v. *Shridhar*(1). This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building—*Náráyan* v. *Bholágir*(2).

As to delay in bringing a suit, we agree with the Madras High Court that it is not in itself sufficient to create an equity in favour of the person spending money on the land and to deprive the owner of his strict rights—*Ráma* v. *Rája*(4). In the present case there are no circumstances creating such an equity, but on the contrary the plaintiff's notice to the defendant in March, 1889, informed him that he (the defendant) was laying the

(1) P. J., 1892, p. 348.
(2) 6 Bom. H. C. Rep., A. C. J., 80.
(3) I. L. R., 2 Bom., 133.
(4) 2 Mad. H. C. Rep., 114.
(5) L. R., 1 H. L., 129 at p. 170.
(6) I. L. R., 16 Calc., 252.
(7) P. J., 1889, p. 259.
(8) L. R., 9 App. Ca., 699 at p. 710.

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foundations of his new chawl on his (the plaintiff's) land and required him to remove them. The cases relied on by the District Court are all light and air cases and have no bearing on the present question. As the removal of the building is optional with the defendant, and is for his benefit, a mandatory injunction to the defendant is not the right order to make.

The decree of the Court below must be, therefore, reversed, and an order made that the plaintiff do recover the land in question with liberty to the defendant forthwith to commence to remove his building on the said land and to restore 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. In default, the plaintiff to be at liberty to remove the same at the expense of the defendant. Plaintiff to have his costs throughout.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

THE ADVOCATE GENERAL OF BOMBAY, PLAINTIFF, *v.* MOULVI ABDUL KADUR JITAKER AND OTHERS, DEFENDANTS.*

1895. *July* 27.

Taxation—Charity suit—Defendants' costs as between attorney and client ordered out of the charity estate—Charges allowed and disallowed as against estate—Discretion of Taxing Master.

In a suit brought by the Advocate General at the instance of relators for the purpose of removing the defendants from the position of directors of a Mahomedan mosque, and for administration of the property of the mosque, &c., the decree ordered that the defendants should have their costs taxed as between attorney and client out of the charity funds. The attorneys of the defendants accordingly brought in their bill of costs, and in taxation it was contended that they should be allowed out of the charity funds all the sums which the Taxing Master certified they should pay their attorneys.

Held, that where the Taxing Master decided that certain items allowed against the defendants should not come out of the charity funds, his decision could not be disturbed.

It does not follow that because a charge is proper to be allowed between an attorney and a client, that the client, if a trustee, should be allowed that charge out of the trust funds.

* Suit No. 656 of 1891.