

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.

July 23.

GANPATI AMBADAS GAYDHANI (ORIGINAL PLAINTIFF), APPELLANT, v.
RAGHUNATH ANANT GAYDHANI (ORIGINAL DEFENDANT), RESPONDENT.*

Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.

Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land.

Held, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title. *Runjeet Ram Panday v. Goburāhun Ram Panday*⁽¹⁾ and *Agency Company v. Short*⁽²⁾ followed.

Framji Cursetji v. Goculdas Madhowji⁽³⁾ referred to.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree of C. D. Kavishvar, First Class Subordinate Judge.

Plaintiff sued in the year 1906 to have it declared that the land in suit belonged to him, to obtain possession of it, to recover Rs. 45 as damages for the defendant's wrongful possession and to obtain an injunction ordering the defendant to remove the superstructure raised by him on the land and restraining him from obstructing the plaintiff in the enjoyment of a door and well jointly with him. The plaint alleged that the land was plaintiff's ancestral property, that plaintiff's building had been erected on it for more than 22 years, that the land had been in plaintiff's possession and that the defendant took wrongful possession of it two months before the institution of the suit and began to build on it in spite of the plaintiff's protests.

* Second Appeal No. 141 of 1908.

(1) (1873) 20 W. R. 25 (Civ. Ruh).

(2) (1888) 13 App. Cas. 793.

(3) (1892) 16 Bom. 338.

Defendant contended that the allegations in the plaint were false, that the land belonged to the defendant and had been in his possession since a long time, that it did not belong to the plaintiff and was never in his possession, that the door and the well did not belong to the plaintiff and were never in his enjoyment, that the plaintiff never raised any protest against the defendant's structure and that the claim was time-barred.

The Subordinate Judge found that the plaintiff was proved to be the owner of the land in dispute, that the claim was not time-barred, that the plaintiff was entitled to obtain possession of the land and passed a prohibitory order against the defendant and a further order directing the defendant to remove his superstructure, and further held that the plaintiff was entitled to recover from the defendant Rs. 5 as nominal damages. He passed a decree accordingly.

On appeal by the defendant the District Judge found that the house-site belonged to the ancestors of the plaintiff and that the plaintiff had not been in occupation since 1880 when the ancestors of the plaintiff were expelled from the house and the building was pulled down by the ancestors of the defendant. He therefore held that the claim was time-barred by defendant's adverse possession and reversed the decree and dismissed the suit. His reasons were :—

It appears that the ancestors of the defendant expelled the ancestors of the plaintiff from the house about the year 1880 and that the plaintiffs have never been in occupation since. I cannot conceive of a better starting point of a claim adversely to the rightful owner than pulling down his house and expelling him. If then the defendant has since been in occupation and the land has not since remained empty space of no certain proprietorship the rightful owner must be barred. But it is clear from the sight of the place, that the site so invaded is enclosed so as to form part and parcel of the defendant's premises, and that it is actually part of the plinth of his house. It is, therefore, not a mere empty site adjacent to defendant's house such as those over which it is difficult to establish effective ownership but the enjoyment of it is inextricably and of necessity attached to the enjoyment of the defendant's premises as a verandah is part of a bungalow or a garden of a villa. In my opinion the plaintiff has been out of possession and the defendant in possession since 1880. I, therefore, reverse the finding and decree of the lower Court and dismiss the suit with costs in both Courts.

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The plaintiff having preferred a second appeal, the High Court (Scott, C. J., and Batchelor, J.) sent down the following issue for trial:—

“Whether the defendant has been in possession, if so, how long and whether adversely?”

In sending down the said issue the High Court made the following observations:—

In deciding the question of adverse possession the District Judge appears to have based his conclusion upon two circumstances. First, he says, that in 1880 there was a starting point of adverse possession, because the defendant's father pulled down the plaintiff's house and expelled him; and secondly, he says, that at the time of his view of the site, towards the end of 1907, the land in dispute was enclosed so as to form part and parcel of the defendant's premises and is actually part of the plinth of his house.

It does not appear to us that those two circumstances standing by themselves can in this case afford a safe basis for the conclusion that the defendant has been in adverse possession, for, as stated in the judgment of the first Court, the defendant's father was punished for pulling down the plaintiff's house in 1880. The judgment of the Magistrate filed as exhibit 55, shows that the accused Anant admitted in that case that the house belonged to the minor, that he had pulled it down and he said he would get it built again. In face of this admission which we take as an admission that Anant would not wrongfully claim the land from the plaintiff but would restore it to his possession with a new house upon it.

We are unable to agree with the District Judge that there is a good starting point for a claim of adverse possession, and in the absence of any finding of fact by the District Judge as to positive acts of exclusive possession by the defendant for the statutory period prior to suit, we are unable to accept the opinion expressed by him that the plaintiff has been out of possession and that defendant has been in possession since 1880.

With respect to the first part of the said issue the District Judge found that no one of the parties was in exclusive possession having regard to the position of the site, its surroundings and other circumstances in the case.

As to adverse possession he observed as follows:—

As for adverse possession I should express an opinion that the “admission” as to plaintiff's ownership was doubtless made. But is such an admission made by an accused to a Magistrate to avoid punishment equivalent to an undertaking given to the plaintiff to hold under him or to restore? It is, I submit, only in the latter case that the originally unlawful expulsion by the defendant

of the plaintiff would merge in a subsequent lawful and derivative occupancy and do not give rise to a starting point for limitation. It appears from the judgment of the Magistrate that he adjourned the case to allow of such an undertaking being given but in vain. There were also other violent acts, obstruction of doors and locking of persons up in rooms about the same time which gave rise to a wahiwat case. Exhibit 51. No admission was made in this case.

I should find then that if these acts are legally an assertion of ownership limitation ran from 1880, but if not there have been no acts subsequent to 1880 which would give a starting point for limitation.

The plaintiff-appellant filed cross-objections to the finding of the District Judge.

D. R. Patwardhan appeared for the appellant (plaintiff):—The finding of the lower Court on the issue sent down by the High Court is not precise and does not amount to a finding of adverse possession. The finding as it stands cannot be taken to be a finding of adverse possession in law. The High Court, when it sent down the issue, held in its remand order that the admission of the plaintiff's title by the defendant's ancestor in the criminal case saved the bar of limitation and there was no subsequent act of adverse possession on the part of the defendant. The land being an open space and there being no evidence of defendant's adverse possession since his father's admission in 1880 the principle laid down in *Framji Curseji v. Goculdas Madhowji*⁽¹⁾ applies. In such cases possession goes with title: *Dharm Singh v. Hur Pershad Singh*⁽²⁾.

R. R. Desai appeared for the respondent (defendant):—It is found as a fact that in 1880 the plaintiff's ancestor was forcibly ejected by the defendant's ancestor. Since then the defendant's possession became adverse to the plaintiff. There is no evidence in the case showing that plaintiff's title was admitted. The alleged admission is merely referred to by the Magistrate in his judgment in the criminal case. This circumstance cannot be evidence of the admission. Moreover, the alleged admission was made to evade criminal liability and is inadmissible in evidence as proof of plaintiff's title. Further, the undertaking given in the alleged admission was never carried out, and it is found by

(1) (1892) 16 Bom. 333.

(2) (1857) 12 Cal. 58.

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the lower Court that in the possessory suit brought by the plaintiff there was no such admission. All this happened more than twelve years prior to the present suit.

As to adverse acts subsequent to 1880, the defendant has repaired the compound wall and used the site as his court-yard to the exclusion of the plaintiff. Further the defendant has built a new house. We submit that such acts are evidence of adverse possession, therefore, the ruling in *Framji Cursetji v. Goculdas Madhowji*⁽¹⁾ does not apply.

[SCOTT, C. J., referred to *Runjeet Ram Panday v. Goburdhun Ram Panday*⁽²⁾.]

That case is distinguishable. There the defendant was not in possession. In the present case it is found that the defendant has continued in possession to the exclusion of the plaintiff and the *status quo ante* was never restored.

It is undisputed that in spite of the Mamlatdar's decree in the possessory suit the defendant has continued in possession and it is not proved that the plaintiff was ever in possession within twelve years of the suit.

SCOTT, C. J. :—In this case the plaintiff sues to have it declared that the land described in the plaint belongs to him and to recover damages from the defendant for wrongfully taking possession of it. He alleges that the defendant took possession of it wrongfully two months before suit.

The plaintiff obtained a decree in the first Court but in the lower appellate Court on an issue, which raised substantially the question, whether the plaintiff or the defendant had been in possession of the land prior to the alleged date of dispossession by the defendant, the learned Judge found that the defendant had been in possession.

We were not satisfied with that finding and therefore remanded the case again to the lower appellate Court for a fresh finding as to possession. On the facts found now as to the nature of the property and after perusal of the judgment of the Magistrate in

(1) (1832) 16 Bom. 338.

(2) (1873) 20 W. R. 25 (Civ. Rul.).

a criminal case instituted in 1880, which contained certain statements made by the defendant's father, we are of opinion that the issue as to possession ought to be decided in favour of the plaintiff. The criminal proceedings to which we have referred were instituted by the plaintiff's mother in consequence of the defendant having committed certain wrongful acts upon the plaintiff's property, and pulled down part of the plaintiff's house. On the charge of mischief, the defendant pleaded that he had merely entered upon the house of the plaintiff because it had tumbled down and he had to repair it. But he admitted that he had no interest in the house which belonged to the plaintiff who was separate from him.

Now the house in question stood in a walled compound which contained also the house of the defendant. It appears that the plaintiff's house was not re-built after it had been pulled down in 1880 and the District Judge finds as follows :—

The house originally belonging to plaintiff and defendant's house originally formed one self-contained property isolated on all sides from other property by boundary-walls. These boundary-walls are not new, though one has been repaired within the last ten years. The position of things is such that any person owning the only residence in the enclosure must make use of the whole enclosure including the property claimed by the plaintiff. To this extent defendant is in possession. He has made no permanent use of it inconsistent with its being the plaintiff's or any one else's land, and therefore had it not been for its isolation and inclusion in defendant's property, I should have been inclined to hold as is so often the case in the country with townlets, that no one was in exclusive possession.

Upon that finding as to the present state of facts and having regard to the statement of the defendant's father to which we have already referred, we have to consider whom the possession of the vacant land must be presumed to have been with, in the absence of direct evidence. Now it is held in the case that the title to this land was in the plaintiff and it is held that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land. That being so a case is made out for the application of the presumption stated by their Lordships of the Privy Council in *Runjeet Ram Panday v. Goburdhun Ram Panday*⁽¹⁾, that posses-

(1) (1873) 20 W. R. 25 (Civ. Rul.).

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sion goes with title. No contrary presumption adverse to the plaintiff can, we think, arise from the wrongful acts of the defendant's father in 1880, which were promptly repudiated by him when he was charged in the Magistrate's Court. For, as observed by their Lordships of the Privy Council in *Agency Company v. Short*⁽¹⁾:—"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner."

Such use as the defendant is held to have made of the vacant ground of the plaintiff since the year 1880 is no evidence of adverse possession: see *Framji Cursetji v. Goculdas Madhooji*⁽²⁾.

We, therefore, reverse the decision of the District Judge and restore that of the Subordinate Judge.

Plaintiff to have costs throughout.

Decree reversed.

G. B. R.

(1) 1888) 13 App. Cas. 793 at p. 798.

(2) 1892) 16 Bom. 338.