APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

KRISHNADIXIT BIN BALDIXIT TORO (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* BALDIXIT VAMANDIXIT AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

1913. *August* 6.

Adverse possession—Lease of land by an agent of landlord—Collection of rent by the agent—Agent paying over the rent to the landlord—Agent setting up his own title and keeping the rent to himself during continuance of lease—Landlord's right to land at determination of tenancy.

In 1887 certain land belonging to defendant No. 2's family was leased to a tenant for 18 years by a registered lease by the plaintiffs' family, who acted as agents of the defendant No. 2's family, and collected the rent and paid it over to them. The rent was so paid till 1893, when the plaintiff's family set up their own title to the land and ceased paying over the rent to the defendant No. 2. The tenant remained in possession of the land till the determination of the tenancy in 1905; and then attorned to defendant No. 2. In 1908, the plaintiffs sued to recover possession of the land, alleging that the title of defendant No. 2 to the land was lost by the adverse possession of the plaintiff. The lower Courts decreed their claim. On appeal by defendant No. 2:—

Held, reversing the decree, that so long as the tenant held the land under the tenancy he held it as the tenant of defendant No. 2's family and their rights were just as good at the end of the tenancy as they were at the beginning, and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiffs of an adverse title or by the fact that the rents were retained by the plaintiff.

SECOND appeal from the decision of F. K. Boyd, District Judge of Bijapur, confirming the decree passed by V. R Kulkarni, Subordinate Judge at Muddebihal.

Suit to recover possession of land.

One Yadneshwar, the predecessor of defendant No. 2, owned the land. In 1887, the plaintiffs, acting as agents of the defendant No. 2's family, leased the land to one Ishvardixit for a term of 18 years by a registered lease. At first, the plaintiff used to collect the rent and to pay it over to defendant No. 2's family. In 1893, however,

* Second Appeal No. 292 of 1912.

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they set up their own title to the land and kept the rent to themselves. Yadneshwar died about that time. His widow Jivubai applied to the Revenue Authorities to have the *khâta* of the land transferred to her name. This application was opposed by the plaintiffs who claiming to be heirs of Yadneshwar desired the *khâta* to be transferred to their names. Jivubai succeeded.

At the expiry of the lease in 1905, the defendant No. 2 leased the land to defendant No. 1.

The plaintiffs filed the present suit on the 17th September 1908 to recover possession of land, which, they alleged, had become theirs by adverse possession.

The lower Court decreed the plaintiffs' claim.

The defendant No. 2 appealed to the High Court.

Coyajee, with *S. S. Patkar*, for the appellant :—Ishvardixit having taken possession of the land as the tenant of defendant No. 2, he was bound at the end of the tenancy to deliver possession of the land to defendant No. 2, his landlord. The acts and beliefs of the agent cannot affect either. See *Secretary of State for India* v. *Krishnamoni Gupta*[1].

Jayakar, with *P. B. Shingne*, for the respondents :—The plaintiffs having openly asserted their title to the land and withheld payment of rent, their adverse possession commenced in 1893, and their title was complete. See *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdry*[2].

HEATON, J. :—This is an appeal which was determined by the District Judge of Bijapur on an assumed condition of facts. The assumed facts were these : That the land in suit belonged to defendant No. 2's family and that the members or a member of the plaintiffs' family was an agent leasing the land out and taking rents and

[1] (1902) 29 Cal. 518. [2] (1884) 10 Cal. 1076.

accounting for them to defendant No. 2's family. It was further assumed that in the year 1887 this agent on behalf of defendant No. 2's family leased the land by a registered lease for eighteen years to one Ishwara; that Ishwara took possession under this lease and remained in possession until the term of the lease expired, or at least up to some time well within twelve years of the institution of this suit. Somewhere in 1893 or 1894, however, the agent and his family asserted that they, and not defendant No. 2's family, were the owners of the land and thenceforth they kept the rents received from the tenant Ishwara and never accounted for them to defendant No. 2.

On these facts it was contended that however unimpeachable the title of defendant No. 2's family, that title had been lost by adverse possession beginning in 1893-94 with the assertion that I have mentioned.

Both the lower Courts found in the plaintiffs' favour, that is, that the title by adverse possession had been made out. We think differently, and I will give as briefly as I can the reasons which have led me to this conclusion.

First of all, it appears to me plain both on principle and on authority that so long as Ishwara held this land under the tenancy, he held it as the tenant of defendant No. 2's family and their rights were just as good at the end of the tenancy as they were at the beginning, and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiffs of an adverse title or by the fact that the rents were retained by the plaintiffs or members of their family, except of course that lapse of time would prevent recovery of the rents. It was suggested in argument that because the lease was executed to a member of the plaintiffs' family by name and because it was not stated that he was an agent for any one else, that he was really the landlord and

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Ishwara was his tenant. I cannot think of any principle of law on which this position can properly be based and I think none was indicated. The land belonged to the family of defendant No. 2, and they were the landlords just as they were the owners, and Ishwara was their tenant although his actual dealings were with their agent. So long as the tenant held possession under the tenancy, he was the tenant of defendant No. 2's family. He was their tenant up to the last moment he held the land under the lease, and when he relinquished the land defendant No. 2 was at liberty to enter into possession; or if any difficulty or opposition was offered he could bring a suit to remove that opposition or difficulty and his right to bring the suit would date from the moment when the tenancy terminated. That was far within 12 years from the date on which this suit was brought.

The District Judge has considered that the possession was adverse, because there was notice of adverse holding accompanied by an overt act. No doubt there was a notice that the plaintiffs' family claimed the ownership and there was an overt act in that the rent was withheld. But the difficulty in the way of this argument is this: the possession, or occupation rather, was with the tenant, and the tenant was the tenant of defendant No. 2's family, so that the possession actually was on behalf of the defendant No. 2's family and the possession legally was with them. A very large number of authorities have been referred to, but out of them all I will only mention two. The first is the *Secretary of State for India* v. *Krishnamoni Gupta*[1], where the nature of adverse possession is discussed in relation to facts in some respects similar to those in this case. The law pertinent to the point before us is summarised in a passage at page

(1) (1902) 29 Cal. 518.

535: "In order to sustain a claim to land by limitation under the Indian Act, there must in their Lordships' opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him." To apply that principle here we find that the plaintiffs' family had not actual possession by themselves or by persons who derived title from them. The person in actual occupation derived title from the defendant's family. Therefore the plaintiffs could not acquire the title by adverse possession. The other case is *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdry*[1], and this is a case which is very strongly relied on by the counsel for the respondent. It was a case in which the Zamindar, whose land was held by tenants, had his title jeopardized by the defendants in that case who had turned out the tenants and were claiming the land as against them. The Court held that though the tenancy still continued, there was a cause of action not only to the tenants but to the landlords, because their title was jeopardized. But how was it jeopardized? It was jeopardized because the defendants had turned out the tenants and taken possession of the land. We are invited to apply that principle to a case where there was no turning out of the tenant whatever, where the tenant remained in possession as the tenant, and the only way in which the landlord's rights were affected was by a statement of adverse title and a refusal by an agent to account for rents received. It is perfectly true that the defendant No. 2 or his family could have brought certain suits. They could no doubt have established their right to receive the rents. They could have obtained an order that the tenant was not to pay rent to any member of the plaintiffs' family and so forth. But they could not have brought a suit for possession, because there was no cause of action which entitled or enabled them

(1) (1884) 10 Cal. 1076.

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to do that. They could not in short have brought any suit which would have fallen within the words of section 28 of the Limitation Act. That is merely another way of reaching the conclusion at which I have already arrived.

The proper order in the case is to reverse the decree of the appellate Court which is based on a decision of a preliminary point, *viz.*, limitation, and to remand the case to be disposed of in the light of our finding on the issue of limitation.

Costs throughout to be costs in the cause.

SHAH, J. :—I concur in the conclusion arrived at and the order proposed by my learned brother. On the assumed state of facts, upon which the lower appellate Court has decided the question of limitation, it is clear that there could be no adverse possession of the plaintiff against defendant No. 2. The tenant was in possession from 1887 and had a right to remain in possession upto 1905. During this interval defendant No. 2 had no right to recover possession. It is also clear on the assumed facts, that the property was not in the actual possession of the plaintiff claiming as of right by himself or by persons deriving title from him. He could not, therefore, sustain a claim to land by limitation.

Further in the present case the repudiation of title, based on the allegation that Anna was the heir of Yadneshwar in 1893, is not of such an unequivocal character as to amount to a notice to defendant No. 2 that he was going to claim the property adversely to him even if it were found that he was not Yadneshwar's heir. We have the fact that after that assertion of title, the Revenue Authorities decided in favour of the widow Jivubai and did not accept Anna's claim. Subsequently in 1895 when Jivubai died, there was an occasion for Anna to assert his title ; but no such assertion was made. It is not suggested that he ever put himself

forward as the heir of Yadneshwar on any subsequent occasion. I do not think it right to assume that Anna wanted to maintain the improper position which he took up in 1893, *viz.*, that he was the heir of Yadneshwar and therefore the owner of the property in suit.

Secondly, the overt act, which has been relied upon by the lower appellate Court, amounts only to this that Anna received the rents from the tenant and withheld them from defendant No. 2. It is not established in this case that prior to 1894 the rents were regularly paid by Anna to defendant No. 2 from year to year. Accounts were made apparently at irregular intervals and it is difficult to say that the mere withholding of the rents by Anna, at least for some reasonable time after the first assertion of his title in 1893, was such an overt act as would suffice to make his enjoyment adverse. The present suit was brought on the 17th September 1908, and the overt act which the plaintiff must prove must be prior to twelve years before the date of the suit. It is quite possible that honestly acting the plaintiff may have made up as before his accounts in 1896 or in 1897, and withholding the payment of rents for two or three years would not in the circumstances be necessarily an overt act of such a character as would justify the finding on the question of limitation. The subsequent withholding of rents in the present case is not a matter of much moment, because the repudiation of title and the overt act must necessarily be more than twelve years prior to suit.

On these grounds I think that the finding on the question of limitation cannot be accepted.

Decree reversed.

R. R.