APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916. *January* 24.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPELLANT *v.* GULAM RASUL GYASUDIN KUWARI (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 80—Notice of suit—Suit against Government—Government threatening to demolish property, the subject of suit—Suit within two months of the notice.

On the 2nd May 1912 the plaintiff gave notice to Government under section 80 of the Civil Procedure Code (Act V of 1908) of a suit which he intended to file for a declaration of ownership of certain property. Shortly afterwards, the Mamlatdar threatened to demolish the property which was the subject matter of the notice. The plaintiff thereupon filed the present suit against Government on the 19th June 1912. The defendant contended that the suit was bad under section 80 as having been instituted within two months of the date of the notice.

Held, that the suit was not bad under section 80, inasmuch as the defendant's agent had during the currency of the notice threatened to demolish the property in dispute.

APPEAL against the decision of J. D. Dikshit, District Judge of Thana.

The plaintiff owned a house at Badlapur. In front of the house was an open piece of land, on which he erected a *padvi* (a roofed verandah).

On the 13th January 1911, the Assistant Collector gave a notice to the plaintiff under section 202 of the Bombay Land Revenue Code, calling upon him to remove the *padvi* as the land belonged to Government.

On the 2nd May 1912, the plaintiff gave notice of suit to Government under section 80 of the Civil Procedure Code.

* First Appeal No. 187 of 1913.

Shortly afterwards, the Mamlatdar threatened the plaintiff that he was going to demolish the *padvi*.

The plaintiff thereupon instituted the present suit on the 19th June 1912 praying for a declaration that the land in dispute belonged to the plaintiff and for an injunction restraining the defendant from interfering with the plaintiff in the enjoyment of his property.

The defendant contended *inter alia* that the suit was bad for want of notice under section 80 for more than two months before the filing of the suit.

The District Judge held that the land in dispute belonged to the plaintiff and decreed the suit in plaintiff's favour. He held that the suit was not bad for want of proper notice under section 80 of the Civil Procedure Code on the following grounds :—

In the present case, the proper legal notice was given, and while the notice was running demolition of the building was threatened. In the notice given the relief intended to be sought is mentioned as the declaration of the plaintiff's ownership and an order of the Court allowing him to retain his building. In the plaint the additional relief sought is by way of an injunction restraining the defendant from demolishing the building. New circumstances came into existence since the giving of the notice and an imminent and immediate injury to the property was apprehended. Just as a party is bound not to bring a suit before the expiration of the period prescribed, in the same way when a notice is already given by a party, it seems to me to be the duty of Government to wait till the expiry of that period otherwise anomalous results would follow. Here a man is precluded by law from instituting the suit while the notice is running and consequently obtaining an injunction and there the officers would effect the mischief before he can run for relief to a Court of Justice. Such a result in my opinion was never contemplated by the Legislature. The learned Government Pleader relied upon the following cases : *The Secretary of State* v. *Gajanan* (13 Bom. L. R. 273, 35 Bom. 365) ; *Sakharam* v. *Secretary of State* (14 Bom. L. R. 353), and the observations at p. 1151 of *Naginlal* v. *The Official Assignee* (14 Bom. L. R. 1148), while on the other hand the plaintiff's pleader relied on the *ratio decidendi* in the last mentioned case. I myself went through many other cases including I. L. R. 7 Cal., 499 ; 15 Cal., 259; 29 All., 567; 14 Bom. L. R., 577 and 12 Bom. L. R., 825. In none of these cases notice as required by law had been given. In the present case the notice

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was given but the suit was brought before the expiration of the two months' period. The rulings in these cases, therefore, have hardly any application to the present case.

The defendant appealed to the High Court.

S. S. Patkar, Government Pleader, for the appellant.

M. R. Bodas, for the respondent.

BATCHELOR, J.:—This is an appeal by the Secretary of State who was the defendant in the original suit. That suit was brought by the plaintiff for a declaration that a piece of land forming an open space in front of his house belonged to him and for a perpetual injunction restraining the defendant from interfering with his enjoyment of it.

Of the three points urged in appeal by the learned Government Pleader, the first is the question of fact whether the plaintiff had proved his title. Now the evidence in favour of the plaintiff upon this point is, it is not disputed, sufficient and convincing, unless the effect of it can be removed by the consideration which formed the basis of Sir Charles Sargent's decision in *Framji Cursetji* v. *Goculdas Madhowji*,[1] where the learned Chief Justice pointed out that in this country slight acts of user were insufficient to give a title to land by adverse possession. That, however, was a very different case from the one which we are now considering. For, it was a case where a private plaintiff complained that his land had been encroached upon and the private defendant justified the encroachment by pleading that adverse possession had given him title to the property. Here we are dealing with the claim to a piece of land situated in a village which has not been surveyed or measured. The only evidence open to the plaintiff to establish his title would be such

(1) (1892) 16 Bom. 338.

evidence of user as he has given, and the acts of user are, in my opinion, of a far more significant and important character than those which were before Sir Charles Sargent. I agree with the learned District Judge in thinking that the evidence adduced by the plaintiff on the question of title proves the plaintiff's case on that point.

That being so, the second objection raised by the appellant seems to me also to fail. The objection is based upon Article 14 of the Limitation Act and section 202 of the Bombay Land Revenue Code. But admittedly the order made by the Assistant Collector under section 202 of the Bombay Land Revenue Code was made without jurisdiction and was in law and in fact a nullity if the land was—as we now hold that it was—the private property of the plaintiff. Since, therefore, the Assistant Collector's order was a nullity, it was not incumbent on the plaintiff, suing for this declaration, to pray also that that order should be set aside: see the case of *Surannanna* v. *Secretary of State for India*[1] and the observations of Mr. Justice Batty in the case of *Balvant Ramchandra* v. *The Secretary of State*.[2]

There remains only the third point taken on behalf of the appellant by the learned Government Pleader, and that point turns upon section 80 of the Civil Procedure Code which requires a plaintiff suing the Secretary of State to give two months' notice before the suit is instituted. The plaintiff gave the notice required on the 2nd May 1912. But, on the 19th June 1912, i.e., before the expiry of the two months, he filed this present suit. At first sight, therefore, the suit would seem to be bad for want of due legal notice. But the plaintiff justifies his suit on the ground that

(1) (1900) 24 Bom. 435. (2) (1905) 29 Bom. 480 at pp. 488, 489.

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during the currency of his notice he was compelled to precipitate the institution of his suit by reason of the fact that the defendant's agent, the Mamlatdar, threatened to demolish the property which was the subject matter of the suit. It is not denied in appeal that, as a matter of fact, the Mamlatdar did threaten this action. In that state of the facts I think that the suit is not bad under section 80. I agree with what was said in *Secretary of State* v. *Kalekhan*[1] to this extent that the words of section 80 countenance no distinction based only on the class or character of the suit filed, when it is filed, as here, against the Secretary of State. But, in my judgment, the section is inapplicable on the present facts not by reason of the particular character of the suit, but by reason of circumstances which would equally apply to any kind of suit. For, following Mr. Justice Cunningham's exposition of section 424 of the Code of 1877 which corresponds with our present section 80, I am of opinion, as I said in *Naginlal Chunilal* v. *The Official Assignee, Bombay*,[2] that the object of section 80 is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice.

If then, that is the object of the section which in terms allows a private litigant to sue the Secretary of State for redress, it appears to me undesirable to extend the meaning and scope of the section so as to produce this result, that although a private person is empowered to sue the Secretary of State after two months' notice, yet the Secretary of State's agent during the currency of the two months is to be permitted to destroy the material object which is the very subject matter of the suit. In my opinion to place this construction upon

(1) (1912) 37 Mad. 113. (2) (1912) 37 Bom. 243.

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section 80 is to attribute to the Legislature an inconsistency which ought to be avoided. In reading the section, as I now read it, it appears to me that full effect is given to its object and intent, while the opposite construction leads directly to inconsistency and injustice. It is small gain to a private person to enact that he may have redress against a defendant after two months' notice if, during the currency of the two months, the defendant is allowed to make redress impossible. The right of suit, which is expressly granted by the Legislature, cannot, in reason, be deferred until its exercise has become illusory. This view has the support of the observations recorded by Mr. Justice Chandavarkar and Mr. Justice Heaton in the case of *Secretary of State* v. *Gajanan Krishnarao*.[1]

No other point has been taken in this appeal by the appellant, and I am, therefore, of opinion that the appeal fails and should be dismissed with costs.

SHAH, J. :—I am of the same opinion.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

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

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February 16.

GAUTAM JAYACHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT *v.* MALHARI BIN BAPU BHONG (ORIGINAL DEFENDANT), RESPONDENT.°

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 3, clause (y) *and 10A—Suit for possession under a sale deed—Contemporaneous lease—Nature of suit—Intention of parties.*

The plaintiff relying on his sale-deed of 1887 sued to recover possession of the land in s alleging that the defendant held it as his tenant under a lease

(1) (1911) 35 Bom. 362 at p. 365.

° Second Appeal No. 7 of 1915.