CALCUTTA HIGH COURT

Kanchiram Bagani

Vs

Nisa Chand Gaita

(Banerjee and Rampini ,JJ.)

23.03.1899

JUDGMENT

Banerjee and Rampini, JJ.

1. This appeal arises out of a suit brought by the plaintiff respondent to recover possession of a plot of land, on his jamai right, that is, his right as tenant thereof, as well as on a title acquired by twelve years' adverse possession.

2. The question for decision is, whether the plaintiff is entitled to a decree merely upon proof of previous possession for a period less than twelve years, on the ground that the defendant has established no title, the suit having been brought more than six months after the date of dispossession. That question was raised in the Courts below. The first Court answered it in the negative, and dismissed the suit. The Lower Appellate Court, on appeal by the plaintiff has answered the question in the affirmative and given the plaintiff a decree.

3. In second appeal it is contended that this view is wrong in law; and in support of the contention urged on behalf of the defendants appellants the cases of *Ertaza Hossein v. Bany Mistry*[1] *Debi Churn Boido v. Issur Chunder Manjee*[2] *Purmeshur Chowdhry v. Brijo Lall Chowdhry*[3] *Shama Churn Boy v. Abdul Kabeer*[4]*, and Wise v. Ameerunnissa khatoon*[5] have been relied upon; while, on the other side, the cases of *Enaetoollah Chowdhry v. Kishen Soondur Surma*[6] *Mohabeer Pershad Singh v. Mohabeer Singh*[7] *and Ismail Ariff v. Mahomed Ghous*[8] have been cited as supporting the judgment of the Lower Appellate Court.

4. The cases of Enaetoollah Chowdhry v. Kishen Soondur Surma (1867) 8 W.R., 386(supra), and Mohabeer Pershad Singh v. Mohabeer Singh (1881) I.L.R., 7 Cal., 591(supra), no doubt support the respondent's contention; but the case of Ismail Ariff v. Mahomed Ghous (1893) I.L.R., 20 Cal., 834: L.R., 20 I.A., 99(Supra), is quite distinguishable from the present case. If that were not so, then notwithstanding that a different view is taken in the more recent decisions of this Court, we should have been bound to follow the decision in that case, it being a decision of the Privy

Council. Now the distinction between the case of Ismail Ariff v. Mahomed Ghous (1893) I.L.R., 20 Cal., 834: L.R., 20 I.A., 99, and the present case is this. There the plaintiff was in possession when he brought his suit, whereas in the present case the plaintiff is out of possession. What the plaintiff asked for in the case of Ismail Ariff v. Mahomed Ghous was a decree declaring his right, and an injunction restraining the defendant from disturbing his possession; what the plaintiff asks for in this case is only recovery of possession; and what was said by their Lordships of the Judicial Committee with reference to the plaintiff's right to obtain this relief is to be found in the following passage of their judgment: "It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By Section 9 of the Specific Relief Act (I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession." This shows, as we understand the judgment, that the reason for their Lordships' decision was this: that as the plaintiff, had his position been rendered somewhat worse by his being dispossessed, could, by instituting a suit within six months for recovery of possession under Section 9 of the Specific Relief Act, have recovered possession even as against a person who might establish a better title, it was only right and just that if he brought his suit before he was dispossessed he should be declared entitled to retain possession as against a mere wrong-doer, and should obtain an injunction restraining the wrong-doer from interfering with his possession. But, though that was so in the case of a plaintiff who was in possession, and had, therefore, a possibility open to him of being restored to possession upon mere proof of possession, by instituting a suit under Section 9 of the Specific Relief Act upon being dispossessed, it does not follow that it should be so in the case of a plaintiff who had been in possession, and allowed more than six months to elapse after his dispossession, and therefore lost the possibility of recovering possession, by a suit under Section 9 of the Specific Relief Act, upon mere proof of previous possession. The case of Ismail Ariff v. Mahomed Ghous (1893) I.L.R., 20 Cal., 834: L.R., 20 I.A., 99(Supra), does not, therefore, in our opinion, help the plaintiff in this case.

5. Then as regards the cases in this Court which have been cited by the plaintiff respondent, they have been regarded in the later decisions of this Court as practically overruled by the decision of the Privy Council in Wise v. Ameerunnissa Khatoon (1879) L.R., 7 I.A., 73(Supra). In this last mentioned case their Lordships observe: "It is quite clear that the plaintiffs have failed to make out a title. The defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the Code of Criminal Procedure to be retained in possession. If the plaintiffs had wished to contend that the defendants had been wrongfully put into possession, and that the plaintiffs were entitled to recover on the strength of

their previous possession, without entering into the question of title at all, they ought to have brought their action within six months, under Section 15 of Act XIV of 1859; but they did not do so"; and then their Lordships add: "The High Court with reference to this point say (and in their Lordships' opinion, correctly say): 'Further, de facto possession having been given to the defendants under Section 318 of the Code of Criminal Procedure, in accordance with the Deputy Collector's award, the plaintiff will not be entitled to a decree until and unless he can show a better title to these lands than the defendants. The fact that the plaintiff's possession as regards B, C and D was confirmed under Act IV of 1840, and that the defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Section 2 of Act IV of 1840 only affects persons concerned in the dispute. If Kalkini had belonged to a private individual he might have reduced into his own possession lands which had accreted to the estate, and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under Section 15 of Act IV of 1859, which must be brought within six months from the time of that dispossession.' "

6. Following these observations of their Lordships of the Privy Council, this Court in the cases of Ertaza Hossein v. Bany Mistry (1882) I.L.R., 9 Cal. 130(supra); Debi Chum Boido v. Issur Chunder Manjee (1882) I.L.R., 9 Cal., 39(supra); and Purmeshur Chowdhry v. Brijo Lall Choudhry, (.1889) I.L.R., 17 Cal., 256(Supra), has held that a plaintiff in a suit for possession brought more than six months after his dispossession, is not entitled to possession, merely upon proof, of previous possession short of possession for the statutory period of twelves (sic) which can give a title by adverse possession; and the last case cited for the appellant, namely *Shama Churn Boy v. Abdul Kabeer*[9], takes the same view, and distinguishes suits for recovery of possession (sic) that class of cases which the Privy Council had to consider in the case of Ismail Ariff v. Mahomed Ghous (1893) I.L.R. 20 Cal., 834: L.R. 20 I.A., 99(supra). The weight of authority is therefore clearly in favour of the view contended for by the learned Vakil for the appellant. That being so, it is not necessary for us to go into the matter any further. If it were necessary to give reasons in support of this view, we should say that in a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve years cannot be sufficient for the purpose, because, if that were so, anomalous results might arise; and it would be difficult to determine what should be the relative durations of possession of the plaintiff and the defendant to entitle the former to a decree. For take a case like this: A plaintiff whilst in possession, which had lasted for eight years, is dispossessed by the defendant, and does not bring his suit until after seven years. Why should eight years' possession of the plaintiff entitle him to a decree against the defendant, whose possession, though originating it may be in force, was allowed to continue for seven years peaceably? Or, again, the periods may be reversed; and a plaintiff who was in possession for seven years may be dispossessed, and may not bring his suit until after eight years. These difficulties and anomalies must arise unless we accept the view contended for by Babu Saroda Charan Mitter on behalf of the appellant. It is true Section 9 of the Specific Relief Act does not expressly prohibit a person from recovering

possession upon mere proof of previous possession in a suit brought more than six months after dispossession; but the inclination of our minds is, that if a person wishes to recover possession merely upon proof of previous possession, without proof of any title, the remedy prescribed for him is to be found in Section 9 of the Specific Belief Act. If he does not avail himself of that remedy by bringing a suit within six months, it becomes barred.

7. The result is, that this appeal must be allowed, and the decree of the Lower Appellate Court be set aside and that of the first Court restored and affirmed, with costs in this Court and the Court below.

Cases Referred.

1(1882) I.L.R., 9 Cal., 130
2(1882) I.L.R., 9 Cal., 39
3(1889) I.L.R., 17 Cal., 256
43 p. W.N., 158
5(1879) L.R., 7 I.A., 73
6(1867) 8 W.R., 386
7(1881) I.L.R., 7 Cal., 591
8(1893) I.L.R., 20 Cal., 834: L.R., 20 I.A., 99
93 C.W.N., 158, (sic)