

(1960) 10 MP CK 0031

In the Madhya Pradesh High Court

Case No : Second Appeal No. 65 of 1958

Laxminarain Mulchand Kothari

APPELLANT

Vs

Vithaldas Kanhaiyalal and Others

RESPONDENT

Date of Decision : 15-10-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 29 Rule 1
Limitation Act, 1908 — Article 142, 144

Citation : AIR 1962 MP 31

Hon'ble Judges : Shiv Dayal, J

Bench : Single Bench

Advocate : Patankar, for the Appellant; Inamdar, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Dayal, J.—This second appeal arises out of a suit for declaration of title and possession in respect of a Bagichi (consisting of some structure and open land). It was alleged in the plaint that this suit property together with other properties was mortgaged with the plaintiff's ancestors on May 16, 1925. The plaintiff's father resided in Bombay. His Munim Vithaldas Kothavi looked after his business at Khilchipur where the suit property is situate. The munim temporarily permitted some persons (not named in the plaint, nor made parties) to use the suit property for recreation. The plaintiffs father died on December 8, 1951, and the munim predeceased him. When the plaintiff came to Khilchipur he found the 18 defendants in possession of the suit premises. The plaintiff nor his ancestors had ever permitted any individual or corporation or institution but had given permission only to particular persons and after they ceased to exist, the permission also determined. The defendants' possession was alleged to be that of trespassers.

2. The suit was dismissed by the trial Judge on two grounds. It was held that the suit was bad for non-joinder of necessary parties. Secondly, the suit was barred by limitation. The first appellate Court upheld the judgment and decree of the

trial Judge on both these grounds.

3. It is contended by Shri Patankar that this suit was based on the specific allegation that the 18 persons (defendants) were in wrongful possession and decree against them was claimed. As such it was unnecessary to add any other person as defendant. In my opinion, this contention must be accepted. The contesting defendants, it is admitted by Shri Inamdar, did not give the names of any other person as being in possession of the suit premises. The objection was vaguely raised in the written statement.

It is a different question whether a decree, if passed in favour of the plaintiff against the defendants, would be effective or not in the absence of any other person or persons who may be in possession. Shri Inamdar's argument is that on the suit premises a recreation club is being run and unless all the members of that club were made parties to the suit, no effective decree could be passed. It is true that a club is not a legal entity, unless it is incorporated or is a registered society. But here it is not known whether in fact there are any members other than the defendants. The suit, therefore, cannot be held to be bad for non-joinder of necessary parties.

4. AS regards the question of limitation, the findings of the courts below are that in 1925 a club was started on the suit premises. The opening ceremony of that club was performed by the Ruler of Khilchipur State. This fact is reported in the annual administrative reports of the State for the years 1925 (Ex. D. 6), 1926 {Ex. D. 1), 1941 (Ex. D. 7) and 1944-45 (Ex. D. 2). Both the Courts below have found that there was overwhelming evidence to prove that fact. It is also found that since 1925 there was continuous possession of the members of the club who use the premises for the purposes of recreation. Both the courts below have applied Art. 142 of the Limitation Act.

5. It is urged by Shri Patankar that the Courts below have erred in not applying Article 144 to this suit inasmuch as the plaintiff alleged that the defendants were trespassers and the contesting defendants also applied to the Court for amendment of the written statement to add the allegation that their possession was adverse. I find from the record that the application for leave to amend was disallowed on March 1, 1954, by the trial Judge. It is true that the defendant's plea that the premises had been given to the club by the Ruler of Khilchipur has been negatived. But it remains a fact that according to the plaintiff himself certain persons had been given premissive possession, and it is not alleged by the plaintiff that at any time after 1925 he or his ancestors entered into possession. To put it differently, the plaintiff and his father discontinued possession in 1925 and never resumed it thereafter.

6. Precisely the question is whether it is Article 142 or Article 144 that is attracted. Although the period of limitation for a suit for possession (A immovable property under both the Articles is 12 years, Article 142 applies to a case where the plaintiff while in possession of the property has been

dispossessed or has discontinued the possession while Article 144 applies when the possession of the defendant becomes adverse to the plaintiff. Since adverse possession is not claimed by the defendants and discontinuance of possession has not only been made out but is admitted, obviously Article 142 applies.

7. "Discontinuance" means that a person in possession goes out and is followed into possession by another person. It implies that all indications of occupation have been withdrawn. It is difficult to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a building but it is possible to conceive a case of discontinuance of possession as to a piece of land where the owner does nothing to it for a space of 12 years. After all it is a question of fact. What may amount in a particular case to discontinuance of possession, depends very much on the nature of the property and the particular circumstances. In *Abdul Latif and Others Vs. Nawab Khajeh Habibulla and Others*, , the learned Judges saw three elements in the terms "discontinued" in Art. 142--two physical and one mental.

"There must be (1) actual withdrawal, (2) with an intention to abandon and (3) another should step in and begin to occupy after the withdrawal."

8. The distinction between "discontinuance of possession" and "dispossession" was pointed out in the leading case of *Rains v. Buxton* (1880) 14 Ch D 537, in these words :

"The difference between dispossession and discontinuance of possession might be expressed in this way--the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed into possession by other persons."

This definition has been widely accepted. In *Maharban Lalli v. Yusuf Khan Kallu* AIR. 1939 Nag 7, the law has been succinctly laid down by Vivian Bose, J. thus :

"The term "dispossession" applies when a person ("imps in and drives Out others from the possession. It imports ouster, a driving out from possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of both sides the transfer of possession was voluntary, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" however implies a voluntary Act, an abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by any one choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession. But this cannot be assumed. It must be either admitted or proved." (per head note).

9. It is argued by Shri Patankar that the present defendants have not been shown to be in possession for more than 12 years and the persons (members of the club) who may have been in possession earlier are not resisting the suit as such, it is contended, the trespass of the former members cannot be tacked with

that of the present defendants. In *Willis v. Earl Howe* (1893) 2 Ch. 545, a person trespassed upon the property of another, alleging himself to be his brother, when he was not his brother, continued the trespass. It was argued that they must be treated as separate trespassers as they were not brothers. Kay, L. J., observed :

"It was suggested in reply that, as the alleged brother was not really the brother of George, his taking possession formed a new departure, and that statute would begin to run from that entry, and that the previous possession of George was material. The effect of that would be that if a series of occupiers, not claiming under one another kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does in my opinion, bar the true owner. I desired to consider the case to which I referred during this part of the argument, but which was not then before the court. *Trustees, Executors and Agency Co. Ltd., v. Short* (1888) 13 AC 793. In that case there had been an adverse possession of land for some time short of the statutory period which was then abandoned, and the land left vacant, and after the statutory period had elapsed, but within 20 years before the plaintiff's action, the defendant, or his predecessor in title, took possession. The law is thus stated in the language of Lord Macnaghten. These observations were made in a case in which, as I have already noticed, the defendant or his predecessors had not been in possession for the statutory period. If this defence could prevail, it would be enough for a man who entered the day before the action was brought to say that the true owner had left the possession vacant for more than 12 years. But it was not meant that if the possession had not been vacant, but some one or other had been in adverse possession during the twelve years, such possession would not bar the true owner, unless all such occupants could show a title derived from one another."

This decision was followed by the Madras High Court in *Vennam Ramiah v. Kusru Kotanuna* ILR 45 MP 370: (AIR 1922 Mad 59), and it was observed that in that case it was not shown that anybody gave up possession which was taken up by a fresh trespasser. The same case is here. In that case observations of Lord Macnaghten in (1888) 13 AC 793 were distinguished because there a trespasser without having acquired title under the Statute abandoned possession. In *Gangoobai v. Soui* 1942 Nag LJ 99, it is held that if a plaintiff sues for possession on the allegation that the defendant came into possession under license from the plaintiff and the defendant denies the same, the suit will be governed by Article 142 and not by Article 144 of the Limitation Act, as the plaintiff will be deemed to have discontinued possession within the meaning of the former Article. The plaintiff in such a case must prove that the defendant's permissive possession began within 12 years of the suit. The case of *Chandel Ranjit v. Hiralal Sundersingh* AIR 1952 Nag 188 relied on by Shri Patankar has no application here because discontinuance of possession, is admitted in the plaint.

10. It is urged by Shri Patankar that on the principle that possession follows title, the plaintiff must be held to be in possession of the suit premises because the finding as to title is in his favour. In the present case the suit property is not an open piece of land; there are constructions over it. The presumption which arises in the case of an open land being in possession of its true owner is not so strongly available to the plaintiff. That apart, here actual and continuous possession of the members of the club has been proved as a fact beyond any manner of doubt.

Learned counsel for the appellant then invites my attention to the defendants' evidence and endeavours to succeed on the ground that the defendants failed to prove their possession for the statutory period of 12 years. This argument has no weight. If the plaintiff in a suit for possession has failed to prove his own possession within "the statutory period, he is out of Court, and it is not necessary to consider the defendants' evidence. Once it is found that the suit is barred under Article 142 there is no obligation cast upon the defendants to prove that they had held the land at any stage.

My view finds support in *Shivaji Mahraj and Others Vs. Lala Barati Lal and Others*, and *Gathi Koch v. Mehemddin*, AIR 1956 Ass 111.

11. Here it is admitted that the possession of the bagichi had been voluntarily abandoned by the plaintiff's father and it has been found as a fact that since 1925 the premises have been continuously used by the members of the club for recreation purposes. This is, therefore, a clear case of discontinuance of possession and Article 142 applies to it. And since the suit was instituted on January 30, 1953, it was clearly barred by time.

12. This appeal is dismissed with costs.