

(1933) 01 BOM CK 0028
In the Bombay High Court
Case No : Second Appeal No. 132 of 1930

Yellappa Yellappa Kammar

APPELLANT

Vs

Fakira Variyappa Barki

RESPONDENT

Date of Decision : 18-01-1933

Acts Referred:

Citation : AIR 1933 Bom 303 : (1933) 35 BOMLR 578

Hon'ble Judges : John Beaumont, J

Bench : Single Bench

Judgement

Beaumont, C.J.—This is a second appeal from a decision of the District Judge of Dharwar, and the case is in a rather unsatisfactory position. The plaintiffs sue for an injunction to restrain the defendants from interfering with their possession of a certain piece of land, and in the alternative, if the plaintiffs are not in possession, then they ask that they may be given possession. The only issues framed in the trial were :-

- (1) Does plaintiff prove the title of his vendor to the suit site ? [This was answered in the affirmative.]
- (2) Does plaintiff prove his possession of the suit site ? [This was also answered in the affirmative.]
- (3) Is he entitled to the injunction sought ? [This was also answered in the affirmative.]

The defendants then appealed, and in the first instance the appeal was heard by the District Judge ex parte. The learned Judge, as I understand his judgment, disagreed with the findings of fact of the trial Judge. The trial Judge had held that the plot of land in question had belonged to a man named Fakirsab, having been purchased by him in 1875, and that it had been leased to a man named Irabasappa in 1901, and that the plaintiffs had been in possession of it from about 1904, and they had taken a conveyance of the property from Fakirsab in

1928. The appellate Court seems to accept the evidence as to the paper title, that is to say, the learned Judge agrees that the documents refer to this particular piece of land, but he disbelieves the plaintiff's evidence as to his having been in possession. Whether he accepted the defendants' evidence of adverse possession I do not know. Then an application seems to have been made to the District Judge by the plaintiff alleging that there had been some mistake in not serving him, and in the result the learned Judge set aside the ex parte decree, and re-heard the appeal, and gave a second judgment dated November 29, 1929, the first judgment having been given in the preceding July. In his second judgment he comes to the same conclusion as in the first judgment, but he alludes to the fact that the plaintiff had been ready to give in the trial Court further evidence as to possession, and had refrained from doing so at the instance of the Judge, and a purshis Exhibit 32 was put in, which is signed, as I understand it, by the trial Judge, which says :-

The remaining three four witnesses for plaintiff (are to be examined) on this very point, that is whether the plaint property is in the possession and vahiwat of plaintiff: they are present to-day. But as the Court says (observes) that it is not necessary (to examine them) if they are (to be examined) on this very point, the witnesses are not examined.

So apparently the plaintiff was prepared to give further evidence as to possession, and he refrained from doing BO owing to an expression of opinion by the Judge that such evidence was not necessary. Now I am bound to say I have myself always understood the rule to be that at a trial it is the duty of counsel to see that he calls sufficient evidence to prove his case, and if, in deference to some observation from the Bench he refrains from calling evidence, he runs the risk of the Court of Appeal taking a different view from that of the trial Judge and holding that there is not sufficient evidence, and according to my understanding of the practice, at any rate in England, a re-trial would not be ordered in order to enable the plaintiff to call further evidence which he might have called at the trial but did not call owing to some expression of opinion from the Bench. In this country, however, a different rule has prevailed in the case of appeals from a mofussil Court, and I have been referred to the case of Arjun v. Shankar ILR (1896) Bom. 253 in which an appellate Bench of this Court held in circumstances similar to the present that the lower appellate Court ought not to have reversed the decree of the first Court without allowing the defendant to give the evidence which the first Court had thought unnecessary. I think, sitting here in second appeal, that I must follow that decision. There is another decision to the same effect in Pabitra Kunwar v. The Maharaja of Benares ILR (1908) All 307 I would, however, observe that the practice may at some future time be the subject of review, and that Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary. I must, therefore, remand the case to the trial Court for the plaintiff's further evidence to be heard, but I think also that the issues should be extended. If the plaintiff proves possession, then of course that disposes of the matter, but if he fails to

prove possession, I think there ought to be an issue as to whether he has been dispossessed, and if so, from what date, and a further issue whether if the plaintiff has not been dispossessed, the defendant proves adverse possession for more than twelve years, because at present it seems to me there is some uncertainty whether the case falls under Article 142 or Article 144 of the Indian Limitation Act. I, therefore, propose to reverse the decree of the lower appellate Court and remand the case to the trial Court with directions to hear further evidence as to the plaintiff's possession, and to amend the issues as suggested, and both parties will be at liberty to call such further evidence as they think right. Costs hitherto incurred will be costs in the suit.