(1863) 04 CAL CK 0001

Calcutta High Court

Case No: Regular Appeal No. 397 of 1860

Rani Swarnamayi and Others		APPELLANT
	Vs	
Annada Gobind Chowdhry and Others		RESPONDENT

Date of Decision: April 11, 1863

Judgement

Sir Barnes Peacock, Kt., C.J., Norman and Seton-Karr, JJ.

This was a suit instituted on the 21st of July 1858, for the mesne profits of 6025 bighas of land, of which the plaintiff recovered possession by a decree dated 13th July 1855. The lower Court awarded to the plaintiff mesne profits from the 18th July 1841, till the 10th April 1856, the date when the plaintiff recovered possession, being 14 years, 8 months, and 26 days. The suit for possession was instituted on the 19th November 1852. The question in appeal is whether the plaintiff''s claim is barred to any and to what extent by the Regulation of Limitation, III of 1793, section 14[(1)]. The answer would be comparatively free from difficulty, were it not necessary to consider first what is the effect of certain decisions in the Sudder Court, which are supposed to have put a construction upon the Regulation in question.

2. The first of these is Gooroo Pershad Fotedar v. Komlakant Bose 6 Sel. Rep., 52. The plaintiff obtained a decree for possession on the 10th September 1816, and commenced his suit for mesne profits on the 8th December 1828 (more than twelve years after the decree for possession), in which he obtained judgment for mesne profits from 1808. The ground on which the effects of the Regulation were said to be avoided was that the suit for mesne profits was brought within twelve years from the time when the plaintiff obtained possession under the decree. The same point was assigned as a reason for the decision in Rajah Anundnauth Roy v. Dwarkanatk Thakoor S.D.A. Rep., 1847, 157, in which the plaintiff was allowed to recover mesne profits for a period of twenty-seven years before suit. The ground taken by the Court in these cases may be dealt with at once by the observation that actual re-entry is no part of the cause of action in a suit for wasilat; and a plaintiff cannot create rights by his own laches against a defendant. Azrawil Singh v. Balgovind Singh S.D.A. Rep.,

1853, 830 was a suit instituted on the 28th of May 1850, for wasilat from 1819 to 1855. The plaintiff appears to have obtained a decree for possession on the 9th August 1831, under which he got possession in 1837. The decree was affirmed by the Sudder Court, on the 8th April 1859. The suit was dismissed by the Principal Sudder Ameen, but the Court held that the cause of action must be considered to have arisen when all litigation regarding the right to the lands finally ceased. The suit was, in fact, instituted fourteen years after the latest date to which wasilat was claimed, and more than twelve years after the plaintiff got actual possession of the land. In the marginal note it is said that the Court held "that the period during which litigation was protracted in appeal by the defendant should be deducted." Mahomed Hossein v. Mussamut Woozeerun S.D.A. Rep., 1853, 849 is to the same effect. In Dudalee Khan v. Mussamut Woozeerun Ib., 851, the suit was brought on the 14th February 1851, for wasilat from 1826 to 1841. The Principal Sudder Ameen awarded wasilat for the two years, 1840 and 1841, as being within the twelve years before suit: but this decision was reversed, and the full amount awarded by the Sudder Court. In Bachoo Chowdree v. Ramnarain Singh S.D.A. Rep., 1854, 31, it was held that though the defendants did not appeal, the suit for wasilat was within time, if brought within twelve years of the final decision of an appeal by other defendants. In Ranee Surnomoye v. Pertab Chunder Burrooa S.D.A. Rep., 1858, 513, it is said, "the origin of the suit for mesne profits dates from the final "decision in the previous suit." The Court held a suit instituted in March 1851, for mesne profits for 1813, not barred by limitation. In Khetter Monee Dossee v. Gopee Mohun Roy 1 Hay''s Rep., 178, a suit instituted in February 1861, for wasilat from 1817--the date of judgment in the suit for possession was 1832--the Court said that had the suit been instituted at any time prior to 1844, the plaintiff would have been entitled to wasilat from 1820 to 1832.

3. In considering these cases, we observe that in all, except the last cited, the Court seems to consider the right to wasilat after recovery of judgment in an action for possession as an entire indivisible right; so that, if the suit is brought within twelve years from the date of the final judgment, or the latest period of the defendant''s possession of the land, the plaintiff is entitled to recover wasilat from the date of his dispossession, though such dispossession may have taken place twenty or thirty years before suit. We think, however, that it is clear that a separate cause of action in respect of the wrongful receipt by the defendant of rent or profits of the land belonging to the plaintiff arises immediately upon the receipt by the defendant of each several sum. The question in this respect would appear to be the same under Act XIV of 1859, section 1, clause 16[(2)], as it is under Regulation III of 1793, section 14.

4. If the original suit had been for possession and wasilat, the defendant would have been at liberty to plead limitation as to wasilat received beyond twelve years, and it does not follow that an acknowledgment or other answer to the plea of limitation to the suit for possession would been answer to such plea. We think that the plaintiff

cannot enlarge his rights against the defendant, or deprive him of his plea, by suing for wasilat in a separate action.

5. If the suit is for possession and wasilat, the enquiry as to wasilat ordinarily takes place in the execution of the decree. If the claim for wasilat form, the subject of separate suit u/s 10, Act VIII of 1859, or under the Circular Order of the 15th June 1849, as a general rule, such suit cannot he conveniently tried until after the question of title has been determined in the suit for possession. Looking at the language of section 14 of Regulation III of 1793, and at the construction put upon it in John Rose Troup, vs. The East India Company , Rajah Enayet Hossein vs. Sayud Ahmed Reza and Mahammad , Prannath Roy Chowdry vs. Rookea Begum, , and Doorgapersaud Roy Chowdhry v. Tarapersaud Chowdhry 8 Moore''s I.A., 38, in counting the period of limitation, it seems not unreasonable to exclude the period of the pendency of the suit for possession, during which, whether the claim for wasilat is being litigated in the same or another suit, the plaintiff''s hands are stayed, and he is practically "precluded" from taking active steps for obtaining the remedy he seeks in the suit for wasilat. This is in accordance with the suggestion in the marginal note of Azrawil Singh v. Balgovind Singh S.D.A. Rep., 1853, 830. To lay down this doctrine is to treat the question whether the plaintiff proceeds under the Circular Order of June 15th, 1849, as a mere question of form. It puts the plaintiff only in the same position as if he had included the claim for possession and wasilat in one action, but secures the defendant from being deprived of any right the Regulation would give him in respect of any delay subsequent to judgment in the suit for possession.

6. It is impossible to accede to the reasoning in the earlier cases in the Sudder Court, or to treat the present case as one in which the principles "cursus curiae lex curiae" or "communis error facit jus" apply. The late Sudder Court, and this Court in the two later cases, shrunk from the consequences of the doctrine supposed to be established by the previous cases.

7. In the case of Ranee Surnomoye v. Pertab Chunder Burrooa S.D.A. Rep., 1858, 513, the Sudder Court attempted to escape these consequences by holding that "the period from which mesne profits should be granted must be "determined by the nature of the possession of the opposite party, "whether it be a bona, fide possession or not,--i.e., a possession without "knowledge on the part of the possessor of the defect of his own title. "So long as a party has a bona fide possession of land in the sense "above given, he is not liable to the legitimate owner for mesne profits; "immediately, however, he has notice of the defect of his title, &c., he "ceases to be a bona fide possessor." The case of Khetter Monee Dossee v. Gopee Mohun Roy 1 Hay''s Rep., 178 is an attempt to create a sort of double plea of limitation for which there is no warrant under the Regulation of Limitation, or otherwise.

8. We, therefore, in this case, which arises under Regulation III of 1793, think we are at liberty to hold that the plaintiff is entitled to wasilat for twelve years before suit,

excluding from such computation the period of the pendency of the suit for possession from the date of the plaint till the final decree.

9. We may observe that Act XIV of 1859, section 1, clause 16, does not contain the exceptions which we found in Regulation III of 1793, section 14; and, therefore, that it will be prudent for plaintiffs in future to include any claim for wasilat in the suits for possession.

10. According to the above ruling the plaintiff will be entitled to wasilat from the 20th of October 1843 to the 10th of April 1856, The decree of the Court below must be modified accordingly, and each party will recover costs in the Court below, in proportion to the amounts recovered and disallowed respectively, and also costs in this Court in the like proportions.

Steer, J.

11. The decision of the lower Court being allowedly in conformity with the invariable principle of the late Sudder decisions in cases where the same question has arisen, and the present case being likely to be the last one, or among the last, in which the propriety of the principle as established by the Sudder Court can be called in question (for the new Law of Limitation and the new Procedure Code have introduced a new rule and practice, rendering obsolete the old decisions of the Sudder), I could not alter at the twelfth hour the principle of the old Sudder, which principle has become, from long observance, universally known, and according to which parties have been entirely guided in the institution of their suits. I would, under this view, allow the judgment to stand.

Kemp, J.

12. A claim for recovery of the possession of laud and a claim for the mesne profits of such land are distinct causes of action, and may either be joined in the same suit, or sued for separately (Circular Order, 15th June 1849; section 10, Act VIII of 1859).

13. The case before the Court is governed by section 14, Regulation III of 1793. Under this law the plaintiff was bound to bring his suit for mesne profits within twelve years from the date of the cause of action. Now the cause of action in this suit arose not from the date of the decree awarding possession, but from the date on which the profits were appropriated by the defendant. The plaintiff in this case delayed suing for possession for more than eleven years from date of ouster; and after obtaining a decree for possession in 1855, and recovering possession in execution of that decree in 1856, his present suit for mesne profits was not brought until July 1858, or 17 years after date of cause of action. I would, therefore, award mesne profits for a period of twelve years only. I admit that a long current of decisions is opposed to this view of the case; and it may also be that the plaintiff with these decisions before him, has been influenced by them. But I am of opinion that these decisions are contrary to law; and that the great and unexplained delay of

the plaintiff in the case before the Court ought to deprive him of any consideration. Further, I cannot admit that the pendency of the suit for possession was any "good or sufficient cause" such as to have precluded the plaintiff from obtaining redress in a timely action for mesne profits.

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(1) Regulation III of 1793, s. 14. - "The Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th of August 1765; or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he directly preferred his claim within that period, for the matters in dispute, to a Court of competent jurisdiction, to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit; or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress."

(2)Act XIV of 1859, s. 1, cl. 16--"To all suits for which no other limitation is hereby expressly provided, the period of six year from the time the cause of action arose.