Privy Council Appeal No. 110 of 1921.

Oudh Appeals Nos. 2 and 3 of 1916.

Raja Mohammad Mumtaz Ali Khan - - - - *Appellant*

v.

Mohan Singh - - - - - - - *Respondent*

Same - - - - - - - - *Appellant*

v.

Samrath Singh - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1923.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD CARSON.
SIR JOHN EDGE.
LORD SALVESEN.

[*Delivered by* LORD SALVESEN.]

The appellant in these two appeals which have been consolidated was the defendant in a separate suit brought by each plaintiff (respondent) for a declaration to the effect that he was an under-proprietor of certain land situated in the village of Badhia Farid. This village forms part of the estate called the Bilaspur estate in the Gonda District of Oudh. The Munsif's Court granted to each plaintiff a declaratory decree in terms of the plaintiffs' crave; these decrees were affirmed in appeal and the defendant obtained special leave to appeal to His Majesty in Council. There is no distinction between the two cases so far as the points in controversy are concerned and they may, therefore, be treated as one.

There has, unfortunately, been a considerable amount of litigation between the defendant and the plaintiffs who have the use or occupation of the land described. As far back as the year 1891 the defendant issued notices of ejectment under Sections 54 and 55 of the Oudh Rent Act, 1886 (Act 22 of 1886) against the two plaintiffs or their predecessors in the title. They thereupon instituted proceedings under Section 108 (8) of this Act to contest the said notices on the ground that they were not tenants liable to ejection by notice under the Act but were under-proprietors thereunder. In these proceedings, final judgment was pronounced on 17th March, 1893, by the Board of Revenue in N.W.P. and Oudh. The operative part of the judgment was that the notice of ejectment issued by the defendant be cancelled and the objections of the plaintiffs be allowed. The ground of the decision, to put it shortly, was that when in answer to a notice of ejectment an occupier pleads that he has an under-proprietary right in his holding, it is sufficient for him to satisfy the Board of Revenue that there is reasonable ground for presuming that he is not an ordinary statutory tenant under the Rent Act in order to obtain cancellation of the notice.

It is plain from the considered judgment of the Board of Revenue that they were of opinion that a *prima facie* case had been made out by the plaintiffs. The judgment was based on previous proceedings which had taken place between the defendant and certain persons in occupation of the land in question in whose right the present plaintiffs now are. In 1871 these persons had claimed in the Settlement Courts sub-settlement of the village. Their claim was rejected, but in rejecting it the Settlement Court of first instance gave them a proprietary decree in respect of "sir." This decree was appealed to the Commissioner's Court by which the decree was wholly set aside; not, however, on the merits of the title to settlement or to "sir" but on a technical ground. The case was sent back for trial, but prosecution of it was dropped by the parties and no decision in favour of either was passed, but the fact that the settlement Court of first instance had pronounced a decree in favour of the plaintiffs was held sufficient justification for cancelling the notice of ejectment, leaving the parties to constitute their claims, if they so desired, in the proper Civil Court.

No enquiry seems to have been made in this suit as to the state of the title so far as depending upon written evidence, nor as to the point which was brought before their Lordships in argument in the present case, that under-proprietors who failed to get a decree in their favour in the Settlement Court prior to a given date must be presumed to have abandoned or lost any rights which they might previously have possessed. This is scarcely to be wondered at, in view of the fact that while the Revenue Court was the only one which was competent to deal with a notice of ejectment it had no jurisdiction to determine proprietary rights.

After the decree of cancellation of the notice of ejectment, both parties remained quiescent until 1905, when the defendant instituted a suit against the plaintiffs in the Court of the Munsif of Utraula alleging that they were merely tenants and claimed possession of the lands in their occupation. The plaintiffs resisted the suit, but on 20th September, 1905, the Munsif granted a decree in favour of the present appellant. An appeal was taken to the Court of the Judicial Commissioner of Oudh, which on 8th August, 1906, held that the suit, being for recovery of possession, would not lie in a Civil Court and dismissed the same. This proceeding need not be further referred to beyond showing that the defendant then maintained the same position as he took up when he served notices of ejectment upon the plaintiffs.

In 1910, the tenants fell into arrears of the money payment (to use a neutral term) which they had hitherto been making in respect of the lands in question, and the defendant sued them in the Rent Court for arrears of rent, claiming interest thereon under Section 141 of the Oudh Rent Act. It may be noted that one of the differences between an under-proprietor and an occupancy tenant having a more or less fixed tenure is, that the former is not liable to pay interest on arrears of rent. The plaintiffs in the present case took this point and contested their liability to pay interest. On 31st May, 1910, however, the Rent Court held that the plaintiffs were not under-proprietors, and treating them as tenants allowed the claim for interest and decreed the suit.

The decision in this case led to the institution of the present suits which were brought in the beginning of 1913 in the Court of the Munsif of Utraula. In his petition of plaint each plaintiff narrated the previous proceedings, and prayed that a declaratory decree be passed in his favour to the effect that he was under-proprietor of the lands which he occupied in the village of Badhia Farid. He maintained his suit upon two grounds—first, that he and his ancestors had been throughout under-proprietors and as such had been in possession of the lands for many years; and second, even if he failed to establish this, that he had continued in possession for more than twelve years after the date of the decree cancelling the notice of ejectment and had thus by prescription acquired under-proprietary rights.

The only issue in the suit was: Is the plaintiff under-proprietor of the plots in suit? The Munsif decided that the plaintiff had no under-proprietary rights but that he had become under-proprietor by prescriptive possession; he therefore decreed the suit with costs. The defendant appealed to the Court of the District Judge of Gonda, who agreed with the Court below and dismissed the appeal. The defendant next appealed to the Court of the Judicial Commissioner of Oudh who affirmed the judgment on the same grounds and dismissed the appeal.

As all these Courts were of opinion that each plaintiff had failed to establish the under-proprietary rights which he claimed, and as no appeal has been taken on behalf of either, and he has

not appeared before the Board in the present appeal, it is not necessary to consider the grounds upon which the learned Judges reached a result on which they were all agreed. That this result was amply warranted appears, however, from the only document of title that has been produced in the case. That document is the wajib-ul-arz of the village of Badhia Farid, the date of which is stated to be approximately 1873. An extract from this document contains the following "Paragraph 12 relating to under-proprietary rights" and states categorically "In this village there is no under-proprietor." In view of this document and in the absence of anything evidencing proprietary rights in favour of the plaintiff the Board think that there cannot be any doubt as to the correctness of the decision arrived at under this heading by the Courts below. This becomes all the clearer when the history and terms of the Oudh Settlement Acts are examined. If this document had been produced in 1893 when the defendant sought and obtained the cancellation of the ejectment notice it may well be that the Revenue Board would not have reached the conclusion which they did that there was *prima facie* evidence on which they were entitled to maintain the state of possession until the rights of the parties had been declared in a competent Court.

There remains, however, the other question on which the Courts below have decided against the defendant. The essential ground of judgment is contained in a single sentence of the judgment of the Judicial Commissioner where he says, "There has been continuous possession of the land in the assertion of an under-proprietary right which is adverse to the landlord's proprietary title and I agree, therefore, with the lower Court that these plaintiffs have a good title by prescription."

The assertion relied on is, of course, that contained in the proceedings for the cancellation of the notice of ejectment in 1893, and as there has been no judicial challenge of this assertion by the landlord within twelve years and the date when it was made, it is immaterial to consider from what date prescription would run, and whether the period of limitation applicable be twelve or six years.

The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the defendant, might, if he had chosen, have at once instituted proceedings for a declaratory decree that the plaintiff was not an under-proprietor, but such a course was equally open to the plaintiff. Each party had had his supposed rights judicially challenged by the other, the plaintiff by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor. The Board, however, do not consider

that it was the duty of either party to institute such a suit if they were content that possession should remain on the same footing as before the notice of ejectment was served. They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. It is notorious that in actions for rent or enhancement of rent or for ejectment the persons in possession are prone to maintain rights which they do not possess, and if for any reason, as in the present case, no judicial determination is arrived at, but the parties continue on the original footing, the mere lapse of so short a period as six or twelve years (which might be amply explained upon other grounds) would deprive the landlord of his proprietary rights unless in the meantime he had brought a declaratory suit to settle once and for all the terms on which possession was held. The case might have been different if, in addition to the judicial assertion by the plaintiff there had been any change in the money payment which he thereafter made to his landlord. There is, however, no suggestion that the same money payment which had been made before the notice of ejectment was not continued thereafter. The possession by the plaintiff therefore remained on precisely the same footing as at the time when he was held by the Court to have merely an occupancy title, the precise nature of which it is not necessary to consider in this case.

Reference was made to the Limitation Act IX of 1908 and especially to Section 28 which is as follows :—

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." This section appears to have no application to this present case, for the appellant through his counsel did not maintain that he could institute a suit for possession of the village in question, or treat the plaintiffs as if they had merely been squatters, and the Board were not referred to and are not aware of any other section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession.

Special leave to appeal was granted only upon the footing *inter alia* that the directions as to the payment of costs in the Courts below should not be varied in any event and that the appellant should pay the respondents costs. Their Lordships will humbly advise His Majesty that the decrees be reversed, except in so far as they deal with the payment of costs, and that the suits be dismissed. As the respondents have not appeared there will be no order as to the costs of the appeals.

In the Privy Council.

RAJA MOHAMMAD MUMTAZ ALI KHAN

v.

MOHAN SINGH.

SAME

v.

SAMRATH SINGH.

(*Consolidated Appeals.*)

DELIVERED BY LORD SALVESEN.

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