APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

MA MA LAY (*a*) MEDIYAN BI (APPELLANT)

v.

NAZIR KHAN AND ANOTHER (RESPONDENTS).*

H.C. 1948

Aug. 27.

Maxim quic quid plantatur solo solo cedit ***how far applicable to Burma—Ss. 106 and 110 of Evidence Act—Second appeal to the High Court under s. 100 of the Code of Civil Procedure.***

Held : Narayan Das Khettry v. *Jatindra Nath Roy Chowdhury and others*, I.L.R. 54 Cal. 669 ; *Vallabhdas Naranji* v. *Development Officer, Bandra*, I.L.R. 53 Bom. 589 ; *Thakoor Chunder Poramanick and others* v. *Ramdhone Bhuttacharjee*, (1866) 6 W.R. 228 do not state anywhere that the maxim *quic quid plantatur solo solo cedit* can have no application for any purpose whatsoever in India.

Where a person in possession of a house standing on the land of another claims the house to be his then the burden of proving of the ownership of the house is on the person alleging his ownership when the land admittedly belongs to a third party.

In second appeal where there is a concurrent finding of facts and when the burden of proof has not been misplaced, the High Court has no power to disturb the findings of fact of the District Court.

Ram Coomar Roy v. *Beejoy Gobind Bural and others*, (1867) 7 W.R. 535, followed.

Maung Ba U v. *Bailiff of the District Court, Hanthawaddy*, A.I.R. (1936) Ran. 68, referred to.

Mussummat Durga Choudhrain v. *Jawahir Singh Choudhri*, 17 I.A. 122, followed.

Tun Aung for the appellant.

P. K. Basu for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, J.—The plaintiff-appellant Ma Ma Lay *alias* Mediyan Bi, owns, a piece of land known as Holding No. 2, Block Nos. 322-24, Sein Ban Quarter Mandalay, and she claims to be the owner

* Special Civil Appeal No. 5 of 1948 against the decree of the High Court, Appellate Side, in Civil 2nd Appeal No. 108 of 1947, dated 18th March 1948.

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of the building which was erected on that piece of land. She sues the defendant-respondents for possession of the said building and land and claims Rs. 180 as compensation for use and occupation. The defendant-respondents Nazir Khan and Josami *alias* Josephine, are in occupation and possession of the building and land in question, and their case is that they are the owners of the building and that they had paid ground rent at the rate of Rs. 60 per month to the plaintiff-appellant.

There is thus no dispute about the ownership of the land on which the building stands, and the real question which is to be decided in this case is, who is the owner of the building in dispute. It has been contended on behalf of the defendant-respondents that the burden of proving that the building belongs to the plaintiff-appellant rests upon the plaintiff-appellant, and that this burden had not been discharged in the present case. In this case, it is however admitted that the land on which the building was erected belongs to the plaintiff-appellant, and the question becomes whether the principle underlying the maxim *quic quid plantatur solo solo cedit* ought to be applied for the purpose of considering on whom the burden of proving the ownership of the building lies in a case where there is no dispute as to the ownership of the land on which the building had been constructed.

Certain cases have been cited on behalf of the defendant-respondents to show that the maxim *quic quid plantatur solo solo cedit* has no application in India. The decision in the case of *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others* (1) turns on facts which are entirely different from the facts in the case now under appeal, and the

(1) I.L.R. 54 Cal. 669.

first paragraph of the headnote in that case is as follows:

"In India there is no absolute rule of law that whatever is affixed or built on the soil becomes part of it, and is subject to the same rights of the property as the soil itself."

The use of the word "absolute" before the words "rule of law" appears to be important, as it tends to suggest that it is not intended to lay down in that case that the maxim *quic quid plantatur solo solo cedit* has no application in India at all, whatever the circumstances of a case might be.

In the case of *Vallabhdas Naranji* v. *Development Officer, Bandra* (1), the main question to be decided was whether the appellant in that case was entitled to compensation under the Land Acquisition Act in respect of buildings which had been erected by the Government upon the land of the appellant before the declaration under section 6 of the Land Acquisition Act was notified, and there it was held that the appellant who owned the land was not entitled to the value of the buildings because, according to the law in India, the buildings did not form part of the land on which they were erected. In the case of *Thakoor Chunder Poramanick and others* v. *Ramdhone Bhuttacharjee* (2) it was observed at page 299 as follows:

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil;"

This case also, as well as the case of *Vallabhdas Naranji* v. *Development Officer, Bandra* (1), does not state anywhere that the maxim *quic quid plantatur solo solo cedit* can have no application for any purpose

(1) I.L.R. 53 Bom. 589. (2) (1866) 6 W.R. 228.

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whatsoever in India. It might also be mentioned that in all the three cases referred to above there was no dispute as to the person or persons who had erected the buildings in those cases.

In the case now under appeal the question to be decided is not whether the plaintiff-appellant should be considered to be the owner of the building in question by reason of the fact that she is the owner of the land on which the building stands, even if the defendant-respondents were to prove that they constructed or owned the building in dispute ; and if that had been the question that falls to be decided in the present appeal, the decision in the three cases which have been already referred to would have been most relevant. We are unable to see any good reason why the principle of law which underlies the maxim *quic quid plantatur solo solo cedit* ought not to be applied in a case like the present case for the purpose of ascertaining on which party the burden of proof lies. A person does not ordinarily erect a house on another man's land without a right in some form or another to do so, and if he did construct a house on another man's land, one would have expected him to be able to produce evidence to show that it was in fact constructed by him, or at least to show that he had obtained the consent of the owner of the land to build on the latter's land. It is only proper that a person, who asserts that a building which stands on a land which admittedly belongs to another man, ought to prove that the building had been erected by him or that the building really belongs to him. This appears to us to be a sensible rule, which is consistent with the principle underlying the provisions of section 106 of the Evidence Act.

It has been contended on behalf of the defendant-respondents that, as they are in possession of the

building in question, the burden lies, in view of the provisions of section 110 of the Evidence Act, on the plaintiff-appellant to prove that the building belongs to her, but we do not think this contention can be accepted in view of the fact that the land on which the building was constructed admittedly belongs to the plaintiff-appellant, and in this case there is also evidence to show that the building had already been erected on the land before the defendant-respondents came into it. In the case of *Ram Coomar Roy* v. *Beejoy Gobind Bural and others* (1) it was observed that " when a ryot is holding lands of considerable extent under a zamindar, it is a matter peculiarly within his own knowledge of what that holding consists; and if he alleges that one or two plots occupied by him are held under a different title, it is for him to shew it." The observation made in the case of *Ram Coomar Roy* v. *Beejoy Gobind Bural and others* (1) appears to us, with respect, to be good sense, and can be appropriately applied to the present case. We are, accordingly, of opinion that where a person erects a building on a piece of land which admittedly belongs to another man, the burden of proving that he erected or owns the building will be upon the person who asserts that the building was erected by or belongs to him. We might observe here that we are unable to see anything in any of the cases which have been cited on behalf of the defendant-respondents, which will either indicate that the principle of the maxim *quic quid plantatur solo solo cedit* could not be applied in this country even for any limited purpose whatsoever, or that it would be fundamentally wrong and unjust to apply the principle of that maxim even for a limited purpose in the sense which we propose to do in the

(1) (1867) 7 W.R. 535.

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case now under appeal. The case of *Maung Ba U* v. *Bailiff of the District Court, Hanthawaddy* (1) does not lay down any new principle different from the Bombay case or the Calcutta case which have already been referred to, and, as we have observed before, the plaintiff-appellant in this case does not contend that the building would still by virtue of the maxim *quic quid plantatur solo solo cedit* belong to her even if the defendant-respondents could prove that they or their predecessor in title erected the building in question, or that they own it. We might add that in the case of *Maung Ba U* v. *Bailiff of the District Court, Hanthawaddy* (1) as in the Calcutta and Bombay cases which have been mentioned earlier in this judgment, there was no dispute as to who had, in fact, erected the buildings in those cases.

Section 110 of the Evidence Act expresses a well-known principle of law that possession raises a *prima facie* presumption of ownership, but we do not think that the principle contained in section 110 of the Evidence Act can be applied to a case like the present case where the ownership of the land is admittedly in the name of the plaintiff-appellant Ma Ma Lay, and when it is also clear from the evidence that the building in question was already on the land at the time when the defendant-respondents first came to occupy it. It seems to us only good sense to hold that in the absence of proof by the defendant-respondents in this case to show that they own the building or had erected or must have erected it, and in the absence of any proof that anybody else had owned this building before the defendant-respondents came to occupy it, it ought to be presumed at the outset unless there is evidence to the contrary that the building belongs to the plaintiff-appellant who is the owner of the land. The finding

(1) A.I.R. (1936) Ran. 68.

of the District Court and the Court of the Subordinate Judge that the burden of proving in this case that the house belongs to the defendant-respondents was upon them is accordingly correct; and as both the District Court and the Court of the Subordinate Judge have held that the defendant-respondents failed to prove that they are the owners of the building in question, the appeal which was filed against the judgment and decree of the District Court ought to have been dismissed. The headnote of the case of *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1) is as follows:

"No second appeal lies except on the grounds specified in section 584 of the Civil Procedure Code.

There is, therefore, no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

Where there is no error or defect in the procedure the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

In view of the fact that we have held that the District Court and the Court of the Subordinate Judge were correct in holding that the burden of proving that the building belongs to the defendant-respondents lay on them, we do not see anything in this case on which the second appeal could have been allowed in the light of the decision of Their Lordships of the Privy Council in the case of *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1).

We do not think it will be necessary to further discuss any other points in this case, but it might in short be mentioned that we do not believe that the plaintiff-appellant had signed the Exhibit 2 in that her alleged signature in Exhibit 2 is entirely different from

(1) 17 I.A. 122.

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her admitted signature. This is apparent even to the naked eyes; and as regards Exhibit 4 there is no evidence to support the first defendant-respondent's statement that it was signed by the plaintiff-appellant. We also do not think we can allow any question as to whether a proper notice had been served upon the defendant-respondents or as to whether the suit can be instituted without a certificate from the Controller of Rents to be agitated for the first time in this special appeal. No issues had been raised in respect of these points, and apparently no discussion had been advanced in connection with these points either in the trial Court or the District Court, or in the second appeal from which this special appeal arises. In the circumstances, it must be considered that the defendant-respondents have waived their objection in so far as those points are concerned. In any case it seems to us that the provisions of section 11 (*a*) of the Urban Rent Control Act, 1946, are provisions which the defendant-respondents can in law waive. It appears to us that the provisions of section 16, which relate to a claim for rent, ought to be read very strictly, and reading it in that light we do not think it should be extended to apply to a case where the defendant asserts an adverse title to the premises in his possession.

The appeal is accordingly allowed with costs. The judgment and decree passed in Civil Second Appeal No. 108 of 1947 of the High Court are set aside, and the judgments and decrees of the District Court and the Court of the Subordinate Judge will be restored.