

1869

Dhondiba  
LakhumanKusa, a minor  
by his Mother  
and Guardian,  
Bayaji

"By law the care of the person of a minor and the charge of his property vest in the District Judge (vide Sec. 1, Act XX. of 1864). That officer is therefore the legal guardian of the minor, and I think may be joined as a defendant in that character in cases in which no kinsman of the minor has obtained a certificate of administration."

Per Curiam (Warden and Lloyd, JJ).:—The suit cannot be proceeded with unless the minor be represented by a person holding a certificate of administration under Act XX of 1864. The Small Cause Court Judge should inform the plaintiff that he should apply to the District Judge to appoint an administrator under that Act.

Oct. 13.

*Special Appeal No. 354 of 1869.*

Shridhar Vinayak, Minor, by his Guardian,

Sakharam Sadashiv ... .. *Appellant.*

Babaji bin Jivaji... .. *Respondent.*

*Limitation—Purchase at sale by Court—Suit heard and determined—Res judicata.*

As a purchaser at an auction sale held by a Court only acquires the right title and interest of the judgment-debtor in the property sold, a plea of limitation that would be good against the judgment-debtor is good also against the purchaser.

When a person fails to establish a prescriptive title in a suit in which he is plaintiff, it does not follow that the defendant is entitled to recover the subject of such suit in an action brought by him.

This was a Special appeal from the decision of Baron De-H. Larpent, Joint Judge Puna District, in Appeal Suit No. 238 of 1869, confirming the decree of the Munsif of Puna.

The plaintiff, Babaji bin Jivaji, purchased a house, the subject of the present suit, at an auction sale held, in 1861, in execution of a decree obtained by Vithal Janardan, against his judgment-debtor, Dattu Kasar. The plaintiff, on attempting to take possession of the house, was obstructed by Vinayak Shivram, the father of the minor defendant,

Shridhar Vinayak, who claimed to have possession of the house, under the mortgage bond passed in 1830, by one Hari Kasar, which mortgage had been converted into an absolute sale in 1832, on the expiry of the term of the mortgage bond viz., two years. Vinayak Shivram presented a petition, under Sec. 246 of the Civil Procedure Code, upon which an order was made against the petitioner, who thereupon brought a regular suit to have his right to the house established. The Munsif made a decree in favour of Vinayak Shivram, but in appeal the Assistant Judge refused to take cognizance of the mortgage, as the mortgage bond was on unstamped paper, and found that Vinayak Shivram's possession of the house was not sufficient to give him a prescriptive title to it, and this decree was confirmed in special appeal by the High Court. When the plaintiff proceeded to take possession he was again obstructed by Vinayak Shivram. On the renewal of this obstruction the plaintiff presented a petition to the Munsif's Court, under Sec. 269 of the Code, and these proceedings resulted in the present suit, in which the plaintiff, as auction purchaser, sought to remove the obstruction caused by the defendant.

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The guardian of the Minor defendant said in his written statement that Dattu, the judgment-debtor, whose rights and interests were purchased by the plaintiff in execution of the decree against him, had no right to the house; that the house belonged to Hari Kasar, and had been mortgaged to the father of the minor defendant, which mortgage had been turned into an unconditional sale in 1832. He further pleaded that plaintiff's claim to the house was barred by limitation.

The Munsif of Puna awarded the claim of the plaintiff finding that he had proved his right to the house.

The defendant appealed from this decision, and the Joint Judge confirmed the Munsif's decree, chiefly on the ground that the decree passed in 1864 by the Assistant Judge, and confirmed on appeal to the High Court, was a conclusive determination that the plaintiff in that case, who was defendant in the present suit, had no title to the house, and no

1869 further evidence could be received upon a point finally adjudicated upon. The Joint Judge further held that the plaintiff had a right of action within twelve years from the purchase, and found accordingly that his claim was not barred by limitation.

Shridhar Vissayak, Minor by his Guardian, Sakharan Sadashiva v. Babaji bin Jivaji The defendant appealed from this decision of the Joint Judge, and the appeal was heard before Couch C. J. and Melvill, J.

*Bhairavnath Mangesh* for the appellant:—The previous decision referred to by the Judge, as a conclusive determination of the rights of the parties, was given in appeal suit No. 10 of 1863 on the 26th of February 1864. In that case the Assistant Judge refused to take cognizance of the mortgage bond by reason of its being not stamped; and on the only other issue laid down by him he found that, “though from the oral evidence it clearly appeared that plaintiff has occupied the house for many years, and there is no proof of his having paid any rent for it, the evidence did not establish the facts of thirty years’ possession, which alone could give a prescriptive title.” If this decree is to be held conclusive against the present defendant’s title by adverse possession to the house, it is evidence also that this adverse possession has been for many years with the defendant in fact ever since 1830. This decision was passed in 1864, since which time the defendant has continued in possession undisturbed till now. There is nothing in that decision to prevent the defendant from availing himself of the ordinary defence of limitation as a bar to the plaintiff’s claim. Prescription is not the same thing as limitation; one confers a title, the other is good as a plea in bar. The former decision might be conclusive, so far as the defendant’s prescriptive title is concerned, but it did not determine the question of limitation as a bar to the present suit. The adverse possession of the defendant certainly extends over more than twelve years; and if the defendant could have pleaded this possession against the original owner of the house, it was good against the plaintiff, who was an auction purchaser only.

*Ganpatrav Bhasker* for the respondent.

*Cur. ad. vult.*

Couch, C. J.:—The Joint Judge was in error in holding that the plaintiff's right of action accrued at the date of his purchase in 1861. He only purchased the right and interest of Dattu in the property, and could not be in a better position than Dattu.

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The Joint Judge was also in error in holding that because Vinayak had failed to establish his title in a suit in which he was plaintiff, he was necessarily debarred from defending his right of possession against the present plaintiff. He failed to establish his title, because he could not prove possession for thirty years; but after Act XIV. of 1859 had come into force he was not liable to be ejected, if it could be shown that he had had adverse possession for twelve years. The only proceedings of the plaintiff which appear on the record, and of which we can take cognizance, were commenced in 1864, and the defendant was then legally entitled to defend his possession if he had held it adversely for more than twelve years. The decision of the Assistant Judge of Puna in appeal suit No. 10 of 1863, which was confirmed in special appeal by this Court, leaves no room for doubt that in 1864 Vinayak had been in possession adversely to the plaintiff and the person through whom he claimed for considerably more than twelve years. Under these circumstances the plaintiff could not oust him. The Joint Judge's decree must be reversed with costs.

Babaji bin Jivaji

*Decree reversed with costs.*