

1878
 HARIGHAT
 v.
 DAMODHAR-
 BHAT.

WESTROPP, C.J.—The execution of the will of Subava not being disputed, and Subava as daughter of Damodarbhat having succeeded to an absolute and several estate in his immoveable property, (1) she, not having any issue, might have made a gift of that property in her lifetime, or might devise it by will.(2) The defendant, who is her devise, is, therefore, entitled to hold it against the heirs of Subava or against the heirs of her father. On these grounds we affirm the decree of the First Class Subordinate Judge, which costs.

Decree affirmed.

(1) *Pranjiandas Tulsidas v. Devkuverbai*, 1 Bom. H. C. Rep. 130, and *per Sausse, C. J.*, in *Vidayak Anandray v. Lukshmbai*, *ibid.* 124; *Navalram Atmaram v. Nankiskor Shivnarayan*, *ibid.* 209; 2 Stra H. L. 402; *Gangaram v. Ballia*, Sp. Ap. 519 of 1873, see printed Judgments of 1876, p. 31; West and Buhler, 471 (2 ed.)

(2) *Narotam Jagjivan v. Narsandas*, 3 Bom. H. C. Rep. 6 A. C. J.; see also the note 5 Bom. H. C. Rep. 136 O. C. J.—*Bhikka v. Bhana*, 9 Harr. S. D. A. 449, and *Rikhowdas v. Baee Dewakor* (2 Morris, S. D. A., 127). This last case, in which the property devised is described as “personal,” goes far beyond the cases cited above the testator here having left son, daughter and widow. Possibly, however, that property was self-acquired; whether that was so or not, does not appear in the report.

APPELLATE CIVIL.

(39)

Before Mr. Justice Melvill and Mr. Justice Kimball.

November 25. TRIMALRAY RAGHAVENDRA (ORIGINAL DEFENDANT), APPELLANT, v. THE MUNICIPAL COMMISSIONERS OF HUBLI (ORIGINAL PLAINTIFFS) RESPONDENT.*

Sale of immoveable property—Non-payment of purchase-money—Vendor's remedy.

A vendor of immoveable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid. His remedy is to use for the sum due and, he has a lien on the property for the amount.

THIS was a second appeal from the decision of Ray Bahadur Gopal Govind Phatak, First Class Subordinate Judge of Dharwar, confirming the decree of the Subordinate Judge, Second Class; of Hubli.

* Second Appeal, No. 248 of 1878.

The plaintiffs, the Municipal Commissioners of the town of Hubli, sold to the defendant a house belonging to them for Rs. 2,000. The defendant paid Rs. 500 down, and agreed, by a writing dated the 19th of November 1875, to pay the balance in three equal instalments at certain specified dates. Before the sale the defendant was in possession of the house as a monthly tenant ; since the date of the sale he was allowed to continue in possession as purchaser. The defendant having failed to pay two of the instalments, the Municipal Commissioner filed suits and obtained decrees against him, which decrees, however, remained unexecuted. They thereupon brought the present suit for a rescission of the contract of sale, offering to return the sum of Rs. 500 received by them and giving up the two decrees already obtained. The defendant contended that by the terms of the contract the plaintiffs possession no other right than that of suing him for the balance of the consideration agreed upon. The contract had been completed on his paying part of the consideration and receiving possession in his new capacity. His non-payment of the balance did not entitle the plaintiffs to repudiate the completed contract. Both the lower Courts disallowed this objection, and gave a decree in favour of the plaintiffs.

Manekshah Jehangirshah for the appellant.—The contract having been completed could not be set aside except on the allegation of fraud or illegality : Contract Act (IX of 1872), ss. 73 to 78 ; Story's Eq. Juris., ss. 694, 695 and 706.

Ghanusham Nilkanth for the respondents.—The rule as to the vendor's lien for unpaid purchase-money applies to this case, and the plaintiffs are entitled to have the contract set aside and put back into possession of their property : *v. Mackreth Symmons*.(1)

The judgment of the Court was delivered by

MELVILL, J.—On the face of the plaint it appears to us that, subsequently to the 19th of November 1875, the date of the contract of sale, the defendant was in possession, not as tenant but as purchaser ; and the plaintiffs themselves, in suing for unpaid purchase-money, have admitted by their conduct that the defendant is in possession under the contract of sale. By the terms

(1) 1 White and Tudor's L. C. Eq. 219 (4th ed.)

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of the contract the right of suing for the balance of purchase-money, and that right is expressly reserved to the vendors ; and, independently of the terms of the contract, we think that that is the only right which the plaintiffs would retain. They have a lien on the house for the unpaid purchase-money ; but they cannot be allowed to rescind the contract, and recover possession of the house. The decrees of the Courts below are, accordingly, reversed and the claim disallowed ; but, under the circumstances, we order that the parties bear their own costs throughout.

Decree reversed.

APPELLATE CIVIL

(40)

Before Mr. Justice West and Mr. Justice Pinhey.

November 25.

MOHANLAL JECHAND (ORIGINAL PLAINTIFF), APPELLANT, v.
AMRATLAL BECHARDAS (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Prescription—Easement—Custom.

The plaintiff and the defendant were owner, respectively, of two adjoining houses, having a space between them belonging to the plaintiff. The roof of the defendant's house built more than thirty years previously, projected over a part of this space. The plaintiff built a new story to his house, with a roof overhanging the roof of the defendant's house, and under an alleged custom of the country (Ahmedabad) claimed a right to remove the part of the defendant's roof which projected over his (plaintiff's) land. He also sued to establish his right to an easement as against the defendant of compelling the defendant to receive upon the roof of his house the rain water which flowed from the newly-erected roof of the plaintiff.

Held, with regard to the former claim, that if the enjoyment by the defendant were considered as possession by him, of the space occupied by his projecting roof, the Limitation Act extinguished the plaintiff's right to sue ; and if such enjoyment were to be regarded as a mere easement then the uninterrupted user of more than thirty years vested in the defendant a proprietary right to the same.

Held further, with regard to the plaintiff's claim to an easement, that the plaintiff could only have acquired such easement either by contract or prescription, on neither of which did he rely.

No custom can be admitted to override the provisions of the Limitation Act.

THIS was a second appeal from the decision of Satyendranath Tagore, Judge of Ahmedabad, reversing the decree of the Second

* Second Appeal, No. 292 of 1874.