APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

PEMRAJ BHAVANIRAM (ORIGINAL DEFENDANT), APPELLANT, *v.* NARAYAN SHIVARAM KHISTI (ORIGINAL PLAINTIFF), RESPONDENT.*

1882 *February* 7.

Title by possession—Decree—Attachment and sale under a decree of property claimed by a third person—Suit by a third person to establish his title—Evidence—Burden of proof—Civil Procedure Code (Act VIII of 1859), Secs. 230—246 *—Ejectment.*

S obtained a money decree against the sons and heirs of A, and under that decree attached a shop as part of A's estate. N (father of A) applied to have the attachment removed under section 246 of the Civil Procedure Code (Act VIII of 1859), alleging that the shop was his. The application was rejected, and the shop was sold in execution, and bought by P, the defendant. N then brought this suit against P (the purchaser) to establish his title. The Subordinate Judge dismissed the suit. In appeal, the District Judge reversed that decree, holding that the plaintiff had been in possession of the shop, and had proved his title. The defendant appealed to the High Court.

Held that the plaintiff having proved his possession at the date of the execution sale, it lay upon the defendant (P), who claimed the property, to prove a title in himself or in the judgment-debtor A, and that, he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant.

Possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him.

The above rule held to be applicable where the plaintiff alleged title by conveyance, and also relied upon possession, but failed to prove his title while his possession was held proved.

Where a dispossessed party proceeds, under section 230 of Act VIII of 1859, to vindicate the possession of which he has been deprived, although he may give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proving his title,—*i. e.*, his right to dispossess the applicant.

Per WEST, J.—A person in possession of property which is sold in execution as that of another, is not called upon, when suing to establish his title, to prove his proprietorship as by an action *in rem* against all the world. It is enough if he establishes a good title as against the judgment-debtor whose right has been sold; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purpose of the suit except so far as the right vested in

* Special Appeal, No. 213 of 1874.

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the judgment-debtor can be shown affirmatively to contradict or qualify it. Possession constitutes an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and, therefore, where a person in possession of property which has been sold in execution as being the property of another sues to establish his title to such property, the burden of proof lies, not upon him, but upon the person who claims as purchaser at the execution sale.

THIS was a special appeal from the decision of A. Bosanquet, Judge of the District Court of Ahmednagar, reversing the decree of P. S Binivale, First Class Subordinate Judge at the same place.

One Anant Narayan died indebted to Sahebram Bhagvant. After Anant's death, Sahebram obtained a money decree against the sons and heirs of Anant, and under that decree attached a certain shop as being the property of Anant Narayan. On September 16th, 1871, the plaintiff, who was Anant Narayan's father, alleging that he was in possession of the shop and that it was his property and not the property of his son Anant, applied to the Subordinate Judge, under section 246 of the Civil Procedure Code (Act VIII) of 1859, for removal of the attachment. That application was rejected, and the shop was sold in execution and bought by Pemraj, the defendant. The plaintiff then brought this suit to establish his title. The Subordinate Judge held that the shop was not the property of the plaintiff, but belonged to his son, Anant Narayan, and he made a decree for the defendant. In appeal the District Judge reversed that decree, holding that the plaintiff had possession of the shop as proprietor, and had in virtue of such possession proved his title. The defendant thereupon appealed to the High Court.

The special appeal came in the first instance before West and Nanabhai, JJ., who referred it to a Full Bench with the following remarks :—

"The District Judge in this case has found that the plaintiff Narayan was in possession of the property in dispute as proprietor at a time when it was attached in execution of a decree against Narayan's son, Anant. Narayan applied to raise the attachment, but his application was dismissed as not having been presented within a reasonable time. The sale of the property was proceeded with, and it was purchased by Pemraj, the present defendant.

"Upon this, Narayan filed the present suit to have his proprietorship established, and the sale declared void. The Subordinate Judge found that Anant was owner of the property. The District Judge found that the plaintiff Narayan "had possession of this shop as proprietor", and decreed for the claim set up by him.

"It is now contended, in appeal, that Narayan, coming into Court for a declaration of his proprietary title, was bound to prove that title affirmatively, and, in support of this argument, the decision of Sargent, C.J., and Melvill, J., in *Rajkrishna* v. *Bai Itcha* (1) has been relied on. The circumstances of that case seem to have agreed in essentials with those of the present one ; and the learned Judges, holding that the plaintiffs were bound to prove their title affirmatively, reversed the decree of the Assistant Judge in the plaintiff's favour and remanded the cause for retrial.

"To us it appears that a person in possession of property which is sold as that of another, ought, in the regular suit which he institutes to establish his title, to be in the same position as to the burden of proof as if he had made an application under section 246, or as if he had waited until an attempt was made to take possession, his resistance to which had led to proceedings under section 269 of the Code. He is not called on by a sale of the property as that of a stranger to come in and prove his proprietorship as by an action *in rem* against all the world. It would be unjust that proceedings between strangers should thus have the effect of depriving him of all the advantages of his possession. It is enough, in our view, if he establishes a good title as against the judgment-debtor, whose right has been sold ; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purposes of the suit, except so far as the right vested in the judgment-debtor can be shown affirmatively to contradict or qualify it. A declaratory suit seems admissible in such a case, because the right of the possessor is directly assailed, and as against an assailant he may, we think, though plaintiff, rely on his possession just as he would if he waited for the attempt at dispossession which his proceedings are taken to avert. The case of *Asher* v. *Whitlock* (2) shows that mere possession constitutes a devisable interest, and it should

(1) See note *infra*, p. 224. (2) L. R. 1 Q. B. 1.

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apparently constitute an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it. If that be so, the burden of proof lies necessarily, in a case like this, on the execution purchaser; but as a different view seems to have been taken by a Division of this Court, we refer the question for the decision of a Full Bench."

Shivashankar Govindram appeared for the appellant.

Rao Saheb *V. N. Mandlik* appeared for the respondent.

The following is the judgment of the Full Bench delivered by

WESTROPP, C.J.—Sahebram Bhagvant having obtained a money decree against the sons and heirs of Anant Narayan, deceased, in respect of a debt due to Sahebram Bhagvant by Anant Narayan, caused the shop to be attached under that decree as the property of Anant Narayan. The present plaintiff, Narayan Shivram Khisti, the father of Anant Narayan, by *darkhast* (No. 754 of 1871), dated September 16th, 1871, applied to the Subordinate Judge, under secton 246 of Act VIII of 1859, for a removal of that attachment, and on the same day the Subordinate Judge directed that notice of that application should be given to the judgment creditor, Sahebram Bhagvant. The *batta* for that notice was reported on the 18th October, 1871, as paid, and the Subordinate Judge was then informed that the 8th of November, 1871, was fixed for the sale. It is extraordinary that no further step seems to have been taken by the Subordinate Judge until the 6th of December, 1871, when he rejected the application on the ground that the sale had taken place on the 8th November, 1871, and there was, therefore, no longer any attachment in the suit to be removed. He, accordingly, declined to consider the application on its merits. The ground, on which the application had been made, was that the shop belonged to Narayan Shivram Khisti, and not to his son, Anant Narayan, the deceased judgment-debtor, and was in the possession of Narayan Shivram Khisti.

Narayan Shivram Khisti then brought the present suit to establish his title.

As observed by the Subordinate Judge in his judgment in this suit, no evidence of the confirmation of the sale of the 8th Nov-

ember, 1871, to Pemraj, nor any such certificate, as is required by section 259 of Act VIII of 1859, of that sale has been produced in this Court, and none appears to have been produced in the Court of the District Judge. A memorandum (exhibit 3, dated 8th November, 1871) by the Court *karkun*, reporting to the Subordinate Judge's Court the fact of the sale, has been given in evidence in that Court, whence it appears that the price, at which the shop was knocked down to Pemraj, was Rs. 13-4.

In the present suit of Narayan Shivram Khisti, the plaintiff, to establish his title, the Subordinate Judge—holding that the shop was not that of the plaintiff but belonged to his son Anant Narayan—made a decree for the defendant Pemraj with costs. The District Judge reversed that decree, and made a decree for the plaintiff with costs of suit and appeal. The defendant has made a special appeal to this Court.

The facts apear to be these. The plaintiff and defendant concur in claiming title to the shop from Varanshabai, the widow of Gopal Pandya, sister of the plaintiff Narayan and paternal aunt of Anant, his son, the judgment debtor. If the allegation in the defendant's written statement be true, the shop had belonged to her hushand Gopal Pandya. A document (exhibit 27), dated 22nd March, 1857, was produced on behalf of the plaintiff Narayan. It recited that Varanshabai's husband was dead, and that she and her co-widow had spent all of their moveable property, and had no one to support them except Babaji Shivram, and that, for the purpose of such support by him and of the performance of their funeral ceremonies, Varanshabai gave over to him part of a house and part of a shop. The District Judge appears to have doubted the genuineness of exhibit 27. It being unstamped, and he, not being satisfied that the omission to have it stamped did not arise from an intention to evade payment of the stamp duty, declined to accept that duty and the penalty under Act XVIII of 1869, sec. 20, and accordingly, excluded it from evidence. The plaintiff also produced a deed of sale (exhibit 25, dated 13th August, 1870, and registered 14th September, 1870) of the shop and other property by Babaji Shivram to his brother the plaintiff, Narayan Shivram, for Rs. 1,499. As to the *bona fides* of this deed, also, the District Judge appears to have entertained mis-

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givings; inasmuch as in a deed of release (exhibit 19), dated 24th September, 1867, (unregistered) executed by Anant Narayan to his father, the plaintiff, reciting that the plaintiff had no property, Anant Narayan, in consideration of Rs. 50, released Narayan, the plaintiff, from any claim of Anant on Narayan's estate. The District Judge found it difficult to reconcile the allegations in exhibit 25—that Narayan gave Rs. 1,499 in September 1870, for the shop—with the recital in exhibit 19 that he had not in September, 1867, any property. It did, however, appear that in November, 1870, Narayan, by mortgage of the shop in dispute, borrowed Rs. 700 from Murlidar Vithaldas (exhibit 54). That mortgage was registered. The District Judge has not arrived at any positive finding as to the validity of exhibit 25.

The defendant Pemraj alleged that Varanshabai executed a deed of gift to Anant Narayan, but the defendant did not produce or prove any such deed, or account for its non-production.

The District Judge, after so stating, added: "It is a remarkable fact that Anant Narayan's right in the shop fetched only Rs. 13-4 at the auction sale. It is difficult to imagine that, if the shop had been occupied by him as proprietor, it would not have fetched more."

The defendant Pemraj endeavoured, but failed, to prove that Anant Narayan had occupied the shop until his death. And, on the other hand, the District Judge held that Babaji Shivram and, after him, his brother, the plaintiff Narayan Shivram, have held the shop. To this conclusion the District Judge was led by two rent notes given by a tenant to Babaji Shivram, exhibits 29 and 30 respectively, dated 9th November, 1861, and 17th March, 1863, and by a rent note, exhibit 26, dated 15th September, 1870, executed by another tenant to the plaintiff Narayan, and by oral evidence, more especially an admission made by one of the defendant's witnesses, Lakshmandas Hindumul (No. 47), that he had seen Rupchand, the tenant who had executed the rent notes (exhibits 29 and 30) to Babaji Shivram, in occupation of the shop many years before he (Lakshmandas) gave his evidence. His deposition bears date the 19th July, 1873. Under these circumstances, the District Judge, while excluding exhibit 27

from evidence, found that the plaintiff had possession of the shop as proprietor, and had proved his title; and, as already stated, the District Judge reversed the decree of the Subordinate Judge, and made a decree for the plaintiff with costs.

In the Division Court (West and Nanabhai Haridas, JJ.) which heard this special appeal it was contended on behalf of the appellant (the purchaser Pemraj) that the plaintiff Narayan, seeking, as he was, by this suit, a declaration of his title as proprietor, ought to have proved it "affirmatively", and that mere proof of possession of the shop previously to and at the time of the judicial sale to the appellant was not sufficient to entitle him to a decree establishing his title. In support of that contention the decision in *Rajkrishna* v. *Bai Itcha*(1) was referred to: West and Nanabhai, J. J., seem to have regarded that case as in point, but, not being disposed to concur in it, referred the question to a Full Bench.

The decision in *Rajkrishna* v. *Bai Itcha* (1) seems to be in accordance with *Rassonada* v. *Sitharama*(2), and, to some extent, with *Tirumalasami* v. *Ramasami* (3). There does not appear to have been any authority cited in either of those cases. The first of them was cited and followed in *Rajkrishna* v. *Bai Itcha*(4). We should have been disposed to attribute more weight to the Madras cases, if the true value and legal import of possession had been considered in them, than we now find ourselves able to assign to them.

Serjeant Adams in his well-known Treatise on Ejectment writes thus:

"Let us now consider the proofs to be adduced by a claimant in ejectment when his title to the lands can be controverted.

"And, first, when he claims by descent, he must prove that the ancestor, from whom he derives his title, was the person last seized of the lands in fee simple, and that he, the claimant, is his heir.

"This seisin of the ancestor may be proved by showing that he was either in the actual possession of the premises at the time

(1) See note *infra*, p. 224.
(2) 2 Mad. H. C. Rep., 171.
(3) 7 Mad. H. C. Rep., 420.
(4) See note *infra*, p. 224.

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of his death, or in the receipt of rent from the terre-tenant; *for possession is presumptive evidence of a seisin in fee until the contrary be shown* (1). But if it is probable that the defendant will rebut this presumption, the lessor (plaintiff) should be prepared with other proofs of his ancestors' title" (2).

Vice-Chancellor Wigram in *Jones* v. *Smith*(3), in considering a question of notice, says: "Possession is *prima facie* evidence of a seisin in fee."

Doe d. Hughes v. *Dyeball* (4) was an ejectment brought to recover possession of a room in a house. The defendant had forcibly taken possession of the room. The plaintiff proved a lease to him of the house and a year's possession. Chitty, for the defendant, objected that no title was proved in the demising parties to the lease; but Lord Tenterden, C. J., said: "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out; you must show your title." There was a verdict for the plaintiff.

In *Asher* v. *Whitlock*(5), mentioned by the referring Judges it was held that a person in possession of land, without other title, has a devisable interest; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator. Cockburn, C.J., said: "I take it as clearly established that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine." And again he said: "It is too clear to admit of doubt, that if the devisor had been turned out of possession, he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that estate which the law gives him against all of the world, but the true owner": and again: "We know to what extent encroachments on waste lands have taken place; and

(1) Buller's Nisi Prius, 103.

(2) Adams on Ejectment, 281.

(3) 1 Hare, 60.

(4) My. & Mal., 346; and see the notes to *Armory* v. *Delamirie*, 1 Sm. L. C., (8th ed.), 375 *et seq.*

(5) L. R. I. Q. B. 1. See *Smith* v. *Oxenden*, Chan. Ca., 25, where it is said by Clarendon, C.: "He that hath possession hath right against all but him that hath the very right." S. P. 16 Vin. Abr. 457; *sed vide Borr* v. *Vandall*, Chan. Ca., 30.

if the lord has acquiesced, and does not interfere, can it be at the mere will of any stranger to disturb the person in possession." Finally he said: "On the simple ground that possession is good title against all but the true owner, I think the plaintiff is entitled to succeed." Mr. Justice Mellor, after saying that "the fact of possession is *prima facie* evidence of seisin in fee," added: "In the common case of proving a claim to landed estate under a will, proof of the will and of possession or receipt of rents by the testator is always *prima facie* sufficient, without going on to show possession for more than twenty years. I agree with the Lord Chief Justice in the importance of maintaining that possession is good against all but the rightful owner." In that case it is manifest that the devisor was neither more nor less than a squatter. Yet it was laid down as to him, and no doubt correctly so, that if he had been turned out of possession by any person other than the true owner, he (the devisor) could have maintained ejectment, and the heir of his devisee was held entitled to maintain that action.

It is true that the plaintiff in the present case did allege title by conveyance, and that the District Court has not found that title to be proved; but the plaintiff by his plaint also relied upon his possession, and the District Court has found that possession to be proved. We have seen that possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. The plaintiff does not ask the Court to declare that he has a good title against the world. He merely asks for a declaration that he has a good title against the defendant Pemraj who has purchased the premises (whereof the plaintiff is in possession) as the property of Anant Narayan, but is unable to show that Anant Narayan had either title to or possession of those premises. Nay more, we understand the District Judge as substantially finding that the plaintiffs have shown that Anant Narayan had not any such possession. There cannot be any doubt that, under those circumstances, if Pemraj had caused the plaintiff to be evicted, the plaintiff would, within the time limited by law, have been entitled to maintain ejectment against Pemraj, because the plaintiff's possession was a good title

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against every body except the true owner. This being so, we fail to perceive any good reason for requiring the plaintiff to wait until he is evicted, or for preventing him from obtaining a declaration, of that which is, beyond all doubt, his right, viz., that his title as possessor is good against a person who is seeking to disturb that possession, and who has not a colour of title to the land in dispute and has never had possession of it. The law(1) indeed gives to the possessor a still earlier opportunity of defending his possession by permitting him to apply to have the attachment of the judgment-creditor raised, and of that advantage the plaintiff has been deprived by the unexplained supineness of the Subordinate Judge above described. It seems to be the better opinion that where a dispossessed party proceeds, under section 230 of Act VIII of 1859, to vindicate the possession of which he has been deprived, although he may, if he please, give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proof of title,—*i.e.*, his right to dispossess the applicant. This appears to have been so held in the Full Bench Calcutta Case—*Radha Pyari* v. *Nabin Chandra* (2), and is quite in accord with the value and import of possession as laid down in the English authorities to which we have referred, as well as in the Indian Evidence Act I of 1872, sec. 110 (3).

We think that the plaintiff having proved his possession, and the defendant having failed to prove any title in himself or in the judgment-debtor, Anant Narayan, or any possession by either of them, a decree should be made declaratory of the title of the plaintiff as against the defendant.

Decree reversed.

(1) Act VIII of 1859, sec. 246. (2) 5 Beng. L. R., 708, 712.
(3) See also Sp. Ap. 94 of 1875, Printed Judgments of 1875, p. 368.

NOTE.—In *Rajkrishna Harikrishna* v. *Bai Itcha and another* (Sp. Ap. No. 119 of 1872) above referred to, the plaintiffs (Bai Itcha and Bai Janak) sued for a declaration of their title to certain land, of which, it was admitted by the defendants, the plaintiffs and their ancestors had been in possession for nearly 30 years. The plaintiffs alleged that it had been wrongfully sold under a decree obtained by the defendant, Rajkrishna, against a third party and purchased by defendant No. 2. The defendants answered (*inter alia*) that the plaintiffs, although in possession, were not the owners of the land, but only the mortgagees

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of it. The Subordinate Judge dismissed the suit, holding that the Plaintiffs had no right of ownership in the land, but that they were only mortgagees. In appeal, the Assistant Judge reversed that decree, and allowed the plaintiff's claim, principally on the ground that the defendants failed to prove the plaintiffs to be mortgagees of the land, as alleged by them. In special appeal (which was preferred by the defendants), it was contended on their behalf that the Assistant Judge had wrongly placed the burden of proof on them.

The following is the judgment of the High Court (Sargent, C.J., and Melvill, J.):

Per Curiam.—We think that there is ground for the appellants' objection that the Assistant Judge has placed the *onus probandi* on the wrong party. The plaintiff in such cases is bound to prove his title affirmatively (see 2 Mad. H. C. Rep. 171). But the Assistant Judge seems to have made the declaratory decree asked for, not on the ground that the plaintiffs have proved that they are owners, but because the defendants have failed to prove that the plaintiffs are mortgagees. We, therefore, reverse the Assistant Judge's decree, and remand the case, in order that the Court below may find whether the plaintiffs have proved their title, and may pass a new decree, awarding costs (16th July, 1872).

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

LAKSHMAN MAYARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAMNABAI, WIDOW OF DAYARAM MAYARAM (ORIGINAL DEFENDANT), RESPONDENT.* *February 7.*

Hindu law—Gains of science—Self-acquired property—Partition.

The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint funds is his self-acquired property, and is not subject to partition; but the improvement or augmentation of the family property by the exertions of one of the members is subject to division.

Hindu law texts regarding gains of science establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family.

When the Hindu texts speak of the gains of science, they intend the special training for a particular profession which is the immediate source of the gains, and not the general elementary education which is the stepping stone to the acquisition of all science. Consequently, the property acquired by a Subordinate Judge who had received elementary education at the family expense, but a knowledge of law and judicial practice without such aid, is impartible.

The ruling of the Privy Council in *Luximon Rao Sudasew* v. *Mullar Rao Bajee*(1) interpreted to mean no more than the law as now settled, viz., that when there is

* Regular Appeal, No. 9 of 1881.

(1) 2 Knapp. 60.