

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Pinhey.

1879
January 21.

DADOPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. KRISHNA
AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Limitation—Act IX of 1871—Tenants-in-common—Landlord and tenant—
—Non-payment of rent—Adverse possession.*

The plaintiffs sued for possession of a third share in certain immoveable property, alleging that they were entitled to it under an agreement dated the 1st December, 1848, and executed by one Balaji, deceased. By that document Balaji appointed as successors to his estate, after his death, three persons, B., R. (plaintiffs' father) and S., on condition that they should maintain him during the remainder of his life, pay off his debts and perform his obsequies. Accordingly one of the three donees, B., lived with Balaji, and managed the property. Balaji died in 1852. B. continued to manage the property till his own death in 1865, when B.'s eldest son took up the management, and he and the other heirs of B. subsequently sold a portion of the property. The suit was principally against the sons and heirs of B. and the purchaser. The plaint was filed on the 8th September, 1873, and alleged (*inter alia*) that B. managed the property as trustee. The defence substantially was that B. held it exclusively as owner and not as trustee, and that the suit was barred by limitation. Both the lower Courts dismissed the suit as barred by limitation, holding that B.'s possession was adverse and that R. had no possession or enjoyment within twelve years previously to the institution of the suit. On appeal to the High Court

Held that B.'s possession, whether it commenced before the death or only on the death of Balaji, was held, after that event, consistently with and in fulfilment of the agreement. B. having entered into possession and been left in possession in the first instance in accordance with the contract, could not change the character of the possession by his mere will. He did not intimate to R. or S. that he repudiated the contract and intended to go into possession in opposition to any rights which they might assert. As he entered and continued to hold in a character consistent with the subsistence of their rights, they were never called on to eject him or by any other process to establish rights which were not denied. While there subsisted any contract, express or implied, between the parties in and out of possession to which the possession might be referred as legal and proper, it could not be pronounced adverse.

Non-payment of rent by a tenant for more than twelve years does not constitute adverse possession.

When possession may be referred to the contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent does not, under ordinary circumstances, affect the relation of the parties.

* Second Appeal, No. 228 of 1878.

THIS was a second appeal from the decision of H. Batty, Acting Assistant Judge at Thana, affirming the decree of the Second Class Subordinate Judge of Bassein.

1879

DADORA
v.
KRISHNA.

The plaintiffs instituted this suit for possession of a third share in certain immoveable property situated in the taluka of Bassein. The plaint was filed on the 8th September, 1873, and alleged that the property belonged to one Balaji (deceased), who, by a deed (exhibit No. 11) dated the 1st December, 1848, agreed to leave the whole of his estate to three persons as his successors after his death, *viz.*, Bhai, Ragunath (the father of the plaintiffs) and Shamji, on condition that they (the donees) should maintain him during the remainder of his life, pay off his debts, and perform his funeral ceremonies; that on the same day the three donees executed to Balaji, as a counterpart to exhibit No. 11, an agreement (exhibit No. 75) which provided, among other things, that Bhai should live with Balaji and manage the property, and that Ragunath and Shamji should pay him Rs 30 annually; that Bhai, accordingly, entered on the management of the estate; that Balaji died in 1852 and Bhai continued in the management of the property till his own death in 1865; that Bhai's sons and heirs then took up the management, and subsequently, on the 24th February, 1873, sold a portion of the property to one Mayaram Govind. The plaint further alleged that Bhai managed the estate as trustee. The suit was principally against the sons and heirs of Bhai and the purchaser Mayaram and nominally against the sons of Shamji. The plaintiffs stated the cause of the action to have accrued at Bhai's death in 1865.

The principal defendants answered (*inter alia*) that Bhai held and managed the property exclusively as owner and not as a trustee, and that the suit was barred by the law of limitation.

The Subordinate Judge held that the plaintiffs' cause of action accrued at Balaji's death in 1852, and that Bhai managed the property exclusively as owner and not as trustee for Ragunath. He, accordingly, dismissed the suit as barred under the Limitation Act IX of 1871, sch. II, art. 145.

In appeal the Assistant Judge affirmed the decree of the first Court, holding that the possession of Bhai was adverse and

1879
 DADOBA
 v.
 KRISHNA.

that the plaintiffs' father, Ragnath, had had no possession or enjoyment of the property at any time within twelve years previous to the institution of the suit.

The plaintiffs appealed to the High Court.

Shantaram Narayan for the appellants.—The nature of the interest created by exhibits 11 and 75 was a tenancy-in-common and not a joint-tenancy. The possession of one tenant in common is the possession of all the tenants, until it is shown that there is an appropriation by such tenant in some overt act, operating to exclude the possession and enjoyment of the others. The date of Balaji's death was the date when the interest vested and not the date at which an adverse possession commenced. All the three tenants-in-common need not have been in the management of the property. The management of one must be presumed to have been on behalf of all the three: (Woodfall's Landlord and Tenant, p. 9, sec. 7, 11th ed.). The distinction between joint-tenants or co-parceners and tenants-in-common is clearly pointed out in *Appovier v. Ram Subhu Anjan and others* (1), where the tenancy was not in its inception a tenancy-in-common, but a joint-tenancy afterwards converted into a tenancy-in-common. Exhibit No. 11 may be regarded as constituting a joint-tenancy, in which case, according to English law, the estate would have devolved on the survivors, and the heirs of Bhat would have been excluded. But the appellants are content to treat that document as creating a tenancy-in-common, and urge that the possession of Bhai can only be regarded as the possession of a tenant-in-common for the rest. The *onus* lies upon the defendants to show that the character of the tenancy has changed from a certain date and that the adverse possession commenced from a certain event. So long as Bhai lived, he did not assume to act exclusively and adversely to the other sharers. He died in 1865, and the acts of his sons and heirs, after that event, were the first that were inconsistent with the continuance of a tenancy-in-common as appears from their alienations of the property. Bhai's death may be regarded as the starting point from which limitation commenced to run. But it cannot be reckoned from the death of

(1) 11 Moo. I. A., 75; S.C. 8 Calc., W. R. P. C., 1.

Balaji. The lower Courts have confounded the date of the vesting of the estate with the date on which the cause of action accrued. Bhai's assumption of an adverse possession cannot be presumed, and though the right vested on Balaji's death, no adverse possession commenced for many years afterwards. Nothing is to be presumed from the mere possession of Bhai, as held by the Privy Council in a similar case: *Kadir Baksh Khan v. Musst. Fussehoonnissa* (1). Mere possession confers no right or title in such a case. Non-receipt of rent or profits alone does not constitute the possession of a tenant-in-common adverse to those who are out of possession. It must be shown that the tenant in possession has done some act indicating adverse possession in himself. The Assistant Judge was wrong in applying the provisions of sections 12 and 13 of 3 and 4 William IV, c. 27, to this case.

1879

DADOBA
v.
KRISHNA.

Nanabhai Haridas (Government Pleader) and *M. C. Apte* for the respondents.—Under ordinary circumstances the onus lies upon a plaintiff out of possession to prove that his claim to recover it is not barred by the law of limitation: *Pandurang Govind v. Balkrishna Hari* (2); *Kalee Narain Bose v. Anund Moye Goopta and others* (3); *Ahmed Ali and others v. Haree Chan* (4). The property has been in the exclusive possession of Bhai and his heirs for more than twelve years. The possession is adverse and bars the plaintiffs' claim, as rightly held by the Courts below. Exhibit No. 75 is inadmissible in evidence, as it has not been executed on a stamp of proper value.

WEST, J.—The possession of Bhai, whether as a physical act it commenced before the death or only on the death of Balaji, was, on Balaji's death, held consistently with and in fulfilment of the agreement (No. 11). By that document Balaji, in consideration of three persons, Bhai, Ragunath and Shamji, undertaking or having undertaken to provide for him and to perform his obsequies, conveys to them the whole of his property to vest immediately on his own death with a conditional right to assume possession forthwith if they will pay off his debts. Reference is

(1) 5 Moore's I. A., 413.

(3) 21 Calc. W. R., 79.

(2) 6 Bom. H. C. Rep., 125, A. C. J.

(4) 21 Calc. W. R., 282.

1879

DADOBA
v.
KRISHNA.

made in the document to another whereby the three donees had entered into the engagement to provide for Balaji, and thus that other document, exhibit No. 75, is embodied by reference in exhibit No. 11 for the purpose of showing what the precise consideration for No. 11 was. It might have been set forth at length in the document No. 11 itself, and no sum is sought to be recovered on it as an agreement or constitution of any title apart from exhibit No. 11. It is a mere explication of the terms of that document and was admissible as an explication on the stamp of 8 annas which it bears. The two documents are to be read together as parts of one and the same contract.

The care of Balaji was assumed by Bhai, and Bhai appears also to have taken the management of the property either as manager for Balaji, or by way of possession in virtue of a right arising from the payment of Balaji's debts which were gradually liquidated. On Balaji's death, Bhai continued the management, and was now, at any rate, in full possession. It is said that his possession was *prima facie* adverse. The possession of his son at a later period was admittedly adverse; and for the defendants it is contended that the plaintiffs must go back to some point of time within twelve years at which this now adverse possession was not adverse, some point at which they were co-possessors of the property or joint enjoyers of it in order to bar the operation of the Limitation Act which ordinarily attaches ownership to an exclusive possession for twelve years. But Bhai's possession in the first instance was quite consistent with the agreement between the three donees and Balaji, and those who take a common benefit in consideration of a joint undertaking are to be regarded as each contributing his own promise and liability as a consideration for those of the other parties. Bhai having then entered on possession and been left in possession in the first instance in accordance with the contract, could not change the character of that possession by his own mere will. It is not pretended that he intimated to Rangunath or Shamji that he repudiated the contract and intended to go into possession in opposition to any rights they might assert. As he entered and continued to hold in a character consistent with the subsistence of their rights, they were never called on to eject him or by any other process to

establish rights which were not denied. While there subsists any contract, express or implied, between the parties in and out of possession to which the possession may be referred as legal and proper, it cannot be pronounced adverse (1). The common case of a tenant paying no rent for more than twelve years, which has frequently arisen in this and other Courts, is an illustration of this principle (2). As the possession may be referred to contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent does not, under ordinary circumstances, affect the relation of the parties. So also in cases between mortgagee and mortgagor (3). The Assistant Judge has referred to the provisions of the Statute 3 and 4 William IV, c. 27, to support his decision that failure of the plaintiffs to prove enjoyment within twelve years raised the bar of limitation; but that statute changed the common law for the sake of convenience in a way in which the Legislature in this country has not followed it, though it has done so to a certain extent in the case of joint Hindu families. Bhai's possession not being adverse, was not rendered so by any act of his. The adverse act of his son admittedly falls within twelve years of the institution of the suit, and down to that point the state of things previously existing must be presumed to have continued possession and enjoyment by one as representative of all the donees. We, therefore, reverse the decrees of the Courts below, and remand the cause for retrial on the merits. Costs to follow the final decision.

Decree reversed.

(1) *Doe dem. Colclough v. Hulse*, 3 B. & Cr., 757.

(2) *Nathabhai Samaldas v. Itchhabhai Kishordas* (S. A. No. 384 of 1871) decided by Lloyd and Kembal, JJ., on the 14th December, 1871 (unreported).

(3) 2 W. & T., 770.
