APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

1885

March 4.

UGARCHAND MANACKCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MADAPA SOMA'NA' AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Possession—Transfer of property by a person not in possession—Validity of such transfer—Hindu Law.

The plaintiffs sought to recover possession from the defendants of certain land, claiming under a *karárnáma* executed to them by one Mutyawa. The defendants contended that Mutyawa had never been in possession of the land. The lower appellate Court held that as Mutyawa was not in possession at the time when the karárnáma was executed, the plaintiff's claim was not maintainable. On appeal to the High Court,

Held, reversing the decree of the lower appellate court, that the circumstance of Mutyawa's not having been in possession at the time the karárnáma was executed, did not prevent the plaintiffs from recovering possession from the defendants.

Kálidás v. *Kanhaya Lál*(1) referred to and followed.

THIS was a second appeal from the decision of E. Hosking, Acting Assistant Judge, Full-power, of Poona at Sholápur.

The plaintiffs claimed to recover possession of certain land (Survey No. 352) from the defendants under a *karárnáma* executed to them on the 2nd August 1880 by Mutyawa, the daughter of one Ugápá.

The defendants stated that the land had come to them through their father Sománá, who had held it jointly with Ugápá, and they alleged that Mutyawa had never been in possession.

The Subordinate Judge of Sholápur passed a decree for the plaintiffs.

The defendants appealed and the Assistant Judge of Sholápur reversed the decree of the Subordinate Judge and rejected plaintiff's claim with the following remarks:—

"As Mutyawa was not in possession when she executed the "*karárnáma* under which plaintiffs claim, that document gave

* Second Appeal, No. 509 of 1883.

(1) L. R. 11 Ind. Ap. 219. (S. C.) I. L. R. 11 Calc. 121.

"them no title against defendants. To give validity to a sale "or gift, a mortgage or a lease, the person transferring the land "to another must have possession unless he merely transfers "the equity of redemption or the right of entry. *Lalubhái* "v. *Bái Amrit and others.*(1)

From this decision the plaintiffs preferred a second appeal to the High Court.

Ghanashám Nilkanth Nádkarni for the appellants:—Admitting that Mutyawa had not possession at the date of the *karárnáma* that fact will not in any way affect the plaintiffs' claim. See *Kálidás* v. *Kanhaya Lal.*(2)

Mánekshá Jehángirshah for the respondent.

SARGENT, C. J.:—The plaintiffs claim to recover possession of land (Survey No. 352), alleging that they hold under a *karárnáma* passed to them, on 2nd August 1880, by Mutyawa, the daughter of one Ugápá. The first and second defendants are the sons of one Sománá, who, they say, was jointly interested in the land with Ugápá. The Assistant Judge, without deciding whether Sománá and Ugápá were joint, came to the conclusion that Mutyawa was at any rate not in possession when she passed the *karárnáma*; and that, consequently, she could confer no title on the plaintiffs to sue for possession.

This is doubtless supported by the reasoning of the Court in *Lalubhái Surchand* v. *Bái Amrit,*(3) and more particularly by the Full Bench decision in *Bái Suraj* v. *Dalpatrám Dayáshankar,*(4) where it was held, on the authority of the Privy Council decisions in *Rája Sáheb Pralhád Sen* v. *Bábu Budhusing,*(5) and *Rani Bhobosundri Dossah* v. *Issurchunder Dutt,*(6) followed by this Court in *Mathews* v. *Girdharlál Fatechand*(7) and *Káchu Bayáji* v. *Káchobá Vithobá,*(8) that "the sale of an estate by a person who is not in possession cannot operate as a present conveyance nor enable the purchaser to sue in ejectment." This

(1) I. L. R. 2 Bom. p. 299 (as to leases, *vide* pp. 334-341).
(2) L. R. 11 Ind. Ap. 219 (S.C) I. L. R. 11 Calc. 121.
(3) I. L. R. 2 Bom. 299.
(4) I. L. R. 6 Bom. 380.
(5) 12 Moo. I. A. 275, 307.
(6) 11 Beng. L. R. 36.
(7) 7 Bom. H. C. Rep. O. C. J. 1.
(8) 10 Bom. H. C. Rep. 491.

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decision was subsequently qualified by the ruling in *Vásudev Hari* v. *Tatia Náráyan*[1] to the extent of allowing the vendee to sue a trespasser where the conveyance mentioned that the vendor was not in possession and admitted of being construed as a transfer of the right to entry, although in terms it professed to convey the property itself. However, in the judgment of the Privy Council in the recent case of *Kali Das Mullick* v. *Kanhyá Lál Pandit*[2] —their Lordships express an opinion that the decision in *Rájá Sáheb Pralhád Sen* v. *Bábu Budhusing*[3] has been misunderstood ; further, that *Káchu Bayáji* v. *Káchobá Vithobá*[4] was decided upon a misapprehension as to what was actually decided in *Harjivan Anandrám* v. *Náran Haribhai*[5] and *Girdhar Parjárám* v. *Dáji* [6].

In *Kálidás Mullick* v. *Kanhayá Láll*,[7] the plaintiff claimed as a donee from one Ráma Sundari, who was made a defendant to the suit and admitted the plaintiff's claim to recover possession of certain lands from the defendant Kanhayá Láll, who claimed adversely to Ráma Sundari. Kanhayá pleaded that Ráma Sundari was never in possession of the disputed property, and that the deed of gift executed by her was of no use and invalid ; but the Privy Council held that as the donor affirmed the validity of the gift, and there was no question of compelling the donor to do more, the circumstance of the plaintiff not having been put into possession was immaterial, and concluded by expressing themselves in the following terms :—"Their Lordships see no reason why a gift or contract of sale of property, whether moveable or immoveable, if it is not of a nature which makes giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession," and they accordingly held that the plaintiff was entitled to the possession as against Kanhayá with mesne profits. This conclusion was arrived at after a discussion of the Hindu texts and the decisions of this Court, as well as those of the Privy Council upon which the former decisions were based.

(1) I. L. R. 6 Bom. 387.
(2) L. R. 11 Ind. Ap. 219.
(3) 12 Moo. I. A. 306.
(4) 10 Bom. H. C. Rep. 491.
(5) 4 Bom. H. C. Rep. 31 A. C. J.
(6) 7 Bom. H. C. Rep. 4 A. C. J.
(7) L. R. 11 Ind. Ap. 219.

As to the Hindu law, their Lordships express an opinion that it does not require that the vendor should be in possession to give validity to the contract of sale, and that the texts, which relate to the transfer of possession (except in the case of gifts where it is necessary to give a complete title as against the donor) "have reference only to the comparative strength of a title with possession and a title without it." After commenting on the judgment in *Káchu Bayáji* v. *Káchobá Vithobá*[1], as proceeding on a misapprehension of what was decided in the cases of *Harjivan Anandrám* v. *Náran Haribhai*[2] and *Girdhar Parjárám* v. *Dáji*[3], they proceed to explain the decisions in *Rája Sáheb Pralhád Sen* v. *Bábu Budhusing*[4] and *Rani Bhobosundri Dosseah* v. *Issurchunder Dutt*[5] as proceeding on the ground that the contracts from their very nature did not operate as a present transfer of property, being contracts to be performed in future, in the first case on the happening of a contingency which never occurred, and in the second with respect to such property as might be recovered in a certain suit which was never brought, and conclude with the observation that "the ground of them is that the plaintiff was not entitled under the terms of sale to possession." This decision is irreconcileable with the Full Bench decision of this Court in *Bái Suraj* v. *Dalpatrám Dáyáshankar*[6] and being a decision of the highest authority must be deemed to overrule it.

We must, therefore, hold that the circumstance of Mutyawa not being in possession at the time the *karárnáma* was executed, does not prevent plaintiffs from seeking to obtain possession from the defendants.

It was contended, however, for the respondents that as the Assistant Judge has found that Mutyawa was not in possession when the *karárnáma* was executed, the plaintiffs could not have been dispossessed on the day of execution which he alleges in his plaint as constituting his cause of action. But we do not think we ought to allow this objection to prevail, the substantial

(1) 10 Bom. H. C. Rep. 491.
(2) 4 Bom. H. C. Rep. 31 A. C. J.
(3) 7 Bom. H. C. Rep. 4 A. C. J.
(4) 12 Moo. I. A. 306.
(5) 11 Beng. L. R. 36.
(6) I. L. R. 6 Bom. 380.

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question between the parties being, who has the better title to the land. It will, however, be open to the defendants to raise an issue as to the plaintiffs' claim being barred by the Statute of Limitation.

We must therefore reverse the decree of the Assistant Judge and remand the case for trial with reference to the above remarks. Costs to abide the result.

Decree reversed and case remanded.

APPELLATE CIVIL

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1884.

December 16.

GOPA'L HANMANT DESHKA (ORIGINAL PLAINTIFF), APPELLANT, *v.* KONDO KA'SHINA'TH (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution of decree—Construction—Res judicata—Civil Procedure Code Act (XIV. of 1882), Section 230—Limitation—Vatandárs (Bom.) Act III of 1874, Section 10—Collector's certificate.

A decree of a District Court dated 5th October 1863 declared the plaintiff to be a hereditary deputy vatandár of a certain Deshpande vatan vested in the ancestors of the defendant as hereditary vatandárs, and that the plaintiff, as such deputy, was entitled to receive a certain sum annually out of the income of the vatan. The decree did not explicitly deal with the claim to future payments then set up by the plaintiff as hereditary deputy vatandár. The plaintiff received moneys from time to time under the decree until 1875, but he neglected to have himself registered as a representative vatandár under Bombay Act III of 1874, section 56. In 1875 he made a claim for certain arrears of the allowance which he alleged to be due under the decree and he attached certain moneys out of the income of the defendant's vatan. The Collector issued a certificate under section 10 of the Vatandárs' Act (III. of 1874) for the removal of the attachment, and the attachment was accordingly removed by the Subordinate Judge. The plaintiff appealed from the order of removal, but the appellate Court confirmed that order. On second appeal to the High Court, it was held on 23rd June 1879 that the lower courts were right in raising the attachment; that the civil courts had no jurisdiction to register the plaintiff as a representative vatandár and that the Collector was the proper authority to be referred to. Thereupon the plaintiff applied to the Collector to cancel the certificate which had removed the attachment and to register him as a representative vatandár. The Collector rejected the plaintiff's application on 31st March 1881.

* Second Appeal No. 367 of 1883.