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[222] APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Jardine.

HARGOVANDAS LAKHMIDAS AND OTHERS (*Original Plaintiffs*), *Appellants v. BAJIBHAI JIJIBHAI AND OTHERS (Original Defendants), Respondents.** [29th August, 1889.]

Limitation Act (XV of 1877), s. 28, art. 95, sch. II—Plea of fraud—Sale—Fraudulent sale—Vendor's right to plead fraud after twelve years from the date of sale.

In 1872 the plaintiffs induced the first defendant by fraud and misrepresentation to execute in their favour a deed of sale of the property in dispute. They did not pay the purchase-money, nor obtain possession of the property. The defendant remained in possession, and in 1873 mortgaged the property with possession to defendants Nos. 2 and 3, and in 1880 sold it to defendant No. 2.

In 1884 the plaintiff sued for possession of the property, relying on their title under the sale-deed. The defendant impeached the deed as fraudulent, and disputed the plaintiffs' title. The plaintiffs contended that as the defendant had not sued to set aside the deed, on the ground of fraud, within three years, as provided by art. 91 or 95 of the Limitation Act (XV of 1877), or within twelve years from the date of sale, it was too late for him to set up the plea of fraud.

Held, (SCOTT, J., doubting) that the defendant's right to raise the plea of fraud was not barred by the law of limitation.

Per SCOTT, J. —There was another point of limitation which could be raised. The consideration money was never paid by the plaintiffs, and possession was never given. There was no complete contract of sale passing the property. Therefore the plaintiffs' only right was to sue for specific performance of the contract. Such a suit, however, became barred in three years after the date of the contract. The plaintiffs, therefore, had lost their rights against defendant No. 1; and even if they had not, the present claim for possession as against defendants Nos. 2 and 3 must fail, as defendant No. 2 was mortgagee and defendant No. 3 was *bona fide* purchaser for value, and no satisfactory evidence was given by plaintiffs on whom lay the *onus*, that these defendants had notice of the deed of sale.

Per JARDINE, J. —Section 28 of the Limitation Act XV of 1877 does not apply to the case of defendants who rely on an actual possession which has never been disturbed.

[R., 16 B. 1 (8); 20 B. 270 (277); 17 M. 255.]

APPEAL from the decree of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in suit No. 130 of 1884.

The plaintiffs sued to recover possession of land bearing two survey Nos. 66 and 81, situate in the village of Kassia in the Broach Taluka, alleging that they had purchased the property [223] from one Bajibhai, (defendant No. 1), by a sale-deed dated 12th December, 1872. The present suit was filed in 1884 within twelve years from the date of the alleged sale.

Defendant No. 1 pleaded that the sale-deed set up by the plaintiffs had been obtained from him by fraud and misrepresentation; that he had received no consideration for it; that in 1873 he had mortgaged the property with possession to defendants Nos. 2 and 3 for Rs. 4,499; and that in 1880 he had sold it to defendant No. 2 for Rs. 7,125, including the mortgage-debt.

Defendants Nos. 2 and 3 joined in the defence of the first defendant.

The Subordinate Judge found that the sale-deed relied on by the plaintiffs was void for want of consideration; that it had been obtained

* Appeal No. 123 of 1885.

by misrepresentation; and that the plaintiffs had never been in possession of the property. He, therefore, rejected the plaintiffs' claim.

Against this decision the plaintiffs appealed to the High Court.

Jardine (with him *Gokuldas Kahandas Parekh*), for appellants (plaintiffs):—We claim the land sold to us by the first defendant in 1872. It is too late now for the first defendant to impeach the sale on the ground of fraud. Under arts. 91 or 95 of the Limitation Act (XV of 1877) he ought to have filed a suit to set aside the sale-deed as fraudulent. That article prescribes three years as the period of limitation for a suit of that kind. He cannot now be allowed to raise the plea of fraud. It is now more than twelve years since the sale, and no suit will lie. We contend that under s. 28 of the Limitation Act he has not only lost his remedy, but also his title to the property. Refers to *Jugaldas v. Ambashankar* (1).

Branson (with him *H. K. Pandia*), *Shantaram Narayan* and *Motilal M. Munshi*, for the several respondents (defendants):—Section 28 of the Limitation Act does not apply. The defendants have always had possession. The fact that they did not take steps to disprove a claim which the plaintiffs never made until now, cannot be held to have destroyed their title to their property. The plaintiff has never had possession. He has [224] taken no steps to assert his rights under the sale-deed. He has thus lost not only his remedy, but also his title, if he had any. It does not lie in his mouth to say that the defendant cannot plead fraud or disclose the true character of the transaction, when he himself has abstained from asserting his rights under the sale. Until he took some steps to do so there was no occasion for the defendant, who was in possession, to disclose the fraud. It only became important when the plaintiffs attempted to enforce the alleged sale. The case of *Jugaldas v. Ambashankar* (1) does not apply. Refers to *Merwanji Hormusji v. Rustomji Burjorji* (2); *Knox v. Gye* (3); *Dayal Jairaj v. Khatao Ladha* (4).

JUDGMENT.

SCOTT, J.—I agree in this case with the Judge in holding that the sale-deed of the 12th December, 1872, is void for want of consideration and because it was obtained under misrepresentation. A careful examination of the facts of the case shows (1) that the consideration money was not paid, (2) that the purchaser undertook, as a condition of the sale not inserted in the contract, but agreed upon by both parties, to pay off certain charges, (3) that he did not pay off those charges, and (4) that possession was never given to the purchaser. In 1884 he brought this suit to recover possession on the strength of the sale-deed of 1872. Defendant No. 1 pleads that the deed was obtained by fraud. Defendant No. 2 pleads that he is mortgagee and purchaser, and No. 3 that he is purchaser from defendant No. 1, and both plead that they are *bona-fide* holders without notice.

As regards defendant No. 1, it is doubtful whether he can raise the defence of fraud at this date: see *Jugaldas v. Ambashankar* (1). But there is another point of limitation which can be raised even at this stage. The consideration money was never paid, and possession was never given. There was no complete contract of sale passing the property. Therefore the plaintiffs' only right was to sue for specific performance of the contract.

(1) 12 B. 501.

(3) L.R. 5 Eng. & Ir. Ap. 656.

(2) 6 B. 628.

(4) 12 B.H. C. R. 97.

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Such a suit, however, is barred in three years from the date of the contract—Limitation Act, 2nd schedule, art. [225] 113. The plaintiffs, therefore, have lost their right. Even if they had not lost their right against defendant No. 1, they would fail in this claim for possession as against defendants Nos. 2 and 3, as they were mortgagee and *bona-fide* purchaser for value respectively, and no satisfactory evidence was given by plaintiffs, on whom lay the *onus*, that they had notice of the deed of sale; nor could notice be presumed, as the vendor remained in possession. Moreover, the vendor swore he did not give notice to defendants 2 and 3, as he held the first sale had not been carried out. Decree confirmed with costs.

JARDINE, J.—I am of opinion, on the evidence, that the Court below has come to right conclusions on the facts, and that we must, therefore, accept its findings on the issues. We must take the facts to be that the sale-deed whereon the plaintiffs rely is void for want of consideration, and that it was obtained from the defendant Bajibhai by misrepresentation, and that they have never had possession of the property in dispute. Thus the case bears a resemblance to *Ikbal Begam v. Gobind Prasad* (1) and *Achobandil Kuari v. Mahabir Prasad* (2), which have been cited by Mr. Branson.

It has, however, been contended for the plaintiffs by Mr. Jardine that neither Bajibhai nor the other defendants who derive their title from him can be allowed to profit by these findings, as no suit was brought for relief on the ground of fraud within the period of three years defined in art. 95, of sch. II of the Limitation Act XV of 1877, nor within twelve years from the date of the sale. Mr. Jardine relied on *Jugaldas v. Ambashankar* (3) as an interpretation of s. 28 of the Limitation Act. That case decided that certain tenants, defendants, wishing to impeach the sale by their former landlords to the plaintiffs could not, even with the vendors' consent, set up the defence that the vendors had been cheated, their right to file a suit to set aside the sale being then barred by limitation. In endeavouring to distinguish that case, Mr. Branson pointed out the absence of any allusion to s. 28 of the Act, or to any case upon the subject [226] of prescription. I do not think the case can be treated as an interpretation of that section to govern the present case, which depends on the construction of that section. The learned Judges were dealing with a constructive possession of tenants, and so the case may be distinguished from the present case where defendants rely on an actual possession which plaintiffs have never disturbed. There may also have been equitable circumstances important to the determination of the former case. Mr. Gokaldas on the same side has referred by way of analogy to *Rani Janki Kunwar v. Raja Aji Singh* (4) and *Nilo Pandurang v. Rama Patloji* (5). But the first of these interprets art. 91 of sch. II of the Limitation Act, and the other deals with s. 246 of Act VIII of 1859 and ss. 278 to 283 of the latter Codes: and neither do, in my opinion, assist in determining the present point.

I must now give my opinion on the question of limitation under s. 28 of the Act of 1877 which I do with some doubt, lest anything I should say should conflict with the principles applied in *Jugaldas v. Ambashankar* (3). Section 28 of the present Act is an extension of s. 29 of the Limitation Act IX of 1871 which has been held to be of like effect to s. 34 of 3 and

(1) 3 A. 77.
(4) 14 I. A. 148.

(2) 8 A. 641.
(5) 9 B. 35.

(3) 12 B. 501.

4 Will. IV, c. 27, in *Bambhat Agnihotri v. The Collector of Puna* (1), where the Regulations and Acts about limitation and prescription in this Presidency are fully discussed. There it was held that the effect is not merely to bar the remedy, but to extinguish the title of the original proprietor after twelve years of a possession adverse to him. In *Radhabai v. Anantrav* (2), the Full Bench treated acquisitive prescription as depending upon an adverse possession, and most distinctly this appears from the judgment of West, J., at pp. 227 to 230. In *Jagrani v. Ganeshi* (3), the same view is taken. The intention of the Acts is, as pointed out in *Radhabai v. Anantrav* (2), shown by the judgment of the Privy Council in *Ganga Govind Mundul v. The Collector of the twenty-four Pergunnahs* (4), where their Lordships say: "It is of the utmost consequence in India that the security which long possession [227] affords should not be weakened." In *Scott v. Nizon* (5), Lord St. Leonards being called on to explain his meaning in *The Incorporated Society v. Richards* (6), said: "I have heard nothing to displace the observation which has been made, that that Statute (3 and 4 Will. IV, c. 27) does not operate by a mere bar of the remedy, that it does not work so imperfectly, it bars the estate itself; and if so where can the right be but in the person, whose possession the Statute prevents from being interrupted? I am clearly of opinion, that by the effect of the Statute, after the proper period of limitation has passed, the legal fee-simple is in the party, who has been in possession during that period, and that he is competent to convey it to another." In *Brassington v. Llewellyn* (7), the Statute was interpreted to mean plainly that "after twenty years' possession against a former title, that title shall be deemed to be extinguished and a new title created;" see also *Mayor of Brighton v. Guardians of Brighton* (8), and Angell on Limitation, c. I, p. 3. None of these authorities extend to cases like the present where the party who has never had possession seeks to get a wider meaning put on s. 28 of Act XV of 1877 so as to extend its effect beyond prescription and get it treated as a Law of Limitation applicable to defendants. Such an extension, it seems to me, would defeat the policy of the law and disturb titles based on long possession. For these reasons I would confirm the decree with costs.

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Decree confirmed.

(1) B. 592 (599).

(3) 3 A. 435.

(5) 3 Dru. & W. 388 (396, 405).

(7) 27 L. J. Exch. 297 (299).

(2) 9 B. 198.

(4) 11 M. L. A. 345 (362).

(6) 1 Dru. W. 285 (289).

(8) L.R. 5 C. P. D. 368.