

1893
MARCH 13.

18 B. 216.

APPELLATE CIVIL.

APPELLATE CIVIL. Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

LATE

CIVIL.

18 B. 216.

MUKTA AND ANOTHER (*Original Defendants*), Appellants v. DADA VALAD SUPADU (*Original Plaintiff*), Respondent.* [13th March, 1893.]*Adverse possession—Limitation Act (XV of 1877), sch. II, art. 141—Reversioner.*

Nathu, a Hindu, died in 1863, leaving two widows (Tulsa and Gama) and a daughter Mukta him surviving. In 1874 the widows divided the property left by Nathu between them, and one of them (Tulsa), in 1876, sold her share to one Ganpatrav, who again sold it to the plaintiff. Gama died in 1887, Tulsa having died previously. After the death of the two widows, Mukta, the daughter of Nathu, was heir to the property, but the plaintiff in this suit alleged a title by adverse possession.

Held, that the plaintiff had no title as against the defendant Mukta. Under art. 141 of the Limitation Act (XV of 1877) the possession of Tulsa's vendee and of the plaintiff was not adverse to the defendant Mukta who took as Nathu's heir, until the death of Gama the surviving widow of Nathu. Gama did not die until 1887.

Srinath Kur v. Prosunno Kumar Ghose (1) and *Cursandas Govindji v. Vundravandas Purshotam* (2) followed.

[F., 20 M. 493 (494); 2 Bom. L.R. 106 (107); Cons., 19 A. 357 (372); R., 21 B. 646 (660).]

THIS was a second appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with Appellate Powers.

One Nathu Shet, who was the owner of two adjoining houses, died, leaving two widows Gama Bai and Tulsa Bai, and Mukta, a daughter by Gama Bai. The two widows divided Nathu's property on the 21st November, 1874, and each took a house. Tulsa Bai lived for some time in the house which she thus acquired, and on the 12th February, 1876, sold it to one Ganpatrav Shamrav. The house subsequently fell down, and on 7th January, [217] 1887, Ganpatrav sold the site to the plaintiff Dada valad Supadu. The plaintiff then re-built the house on the southern part of the site.

On the northern part of the site there was a door which was in the house that had fallen to Gama Bai's share. Tulsa Bai died childless, and subsequently in 1887, Gama Bai died leaving her daughter Mukta surviving her. In 1889 the plaintiff brought the present suit against Mukta and her husband for an injunction restraining them from preventing his passing across the northern portion of the site and from preventing him from shutting up the door in the defendant's house.

The defendants Mukta and her husband Ramshet denied the plaintiff's right and contended that they had been using the door and enjoying light and air through it for more than twenty years, and that the suit was, therefore, time-barred.

The Subordinate Judge dismissed the suit on the ground that the plaintiff's claim to close the door was barred by limitation, the defendants having acquired a right by prescription to have it kept open, and that the plaintiff's right to pass across the land was not proved.

On appeal by the plaintiff, the Court reversed the decree, holding that the claim with regard to the door in dispute was within time; that the

* Second Appeal No. 849 of 1891.

(1) 9 C. 934 (937).

(2) 14 B. 492 (498).

door belonged to the houses of both the parties, and that defendants had no right to pass through it; and that the plaintiff was entitled to the relief as prayed for in the plaint. The Court in its judgment observed:—

“Tulsa Bai died within a year or so after the date of the sale-deed passed by her to Ganpatrav. The alienation made by her in favour of Ganpatrav was never set aside, nor was any suit brought after her death by Gama, or the defendant No. 1, to set aside this alienation, and recover the property left by her. It thus appears that the plaintiff's right to his house is now unimpeachable (arts. 125 and 141 of sch. II of Act XV of 1877).

“The door is an old one. It has been in existence for the last more than forty years. The Subordinate Judge, therefore, held that the plaintiff's claim, as regards this door, was time-barred (s. 26 of Act XV of 1877). The two houses had belonged to [218] Nathu till his death. They appear from the defendant's written statement to be more than seventy-five years old. These houses descended after Nathu's death to his two widows Gama and Tulsa. The two co-widows effected a partition and became separate in 1874, *i.e.*, fourteen-years before the date of this suit. The owner, therefore, of the two houses till 1874 was the same. While unity of ownership or of possession lasts, no question of easement can arise (1). Unity of possession at any time within the twenty years is fatal to a claim to a right of easement (2). Unity of ownership of the dominant and servient tenements prevents the acquisition of a prescriptive right to the access of light and air (Addison on Torts, 4th Ed., pp.127, 138, 139, 140 and 141, and s. 46 of the Easements Act No. V of 1882). The period prescribed, in the Limitation Act, of twenty years must, therefore, be calculated from 1874, when Tulsa and Gama became separate, and as the defendants have thus had this door for fifteen years only, the plaintiff's claim in respect thereof is within time. In the *farikhat* (Ex. 19) no mention is made at all of this door, nor are there words showing that any such easement was meant to be created or was transferred in favour of the defendant's house.”

The defendants filed a second appeal.

Ghanasham N. Nadkarni, for the appellants (plaintiffs):—The lower Court awarded the plaintiff's claim on the ground that no steps were taken to set aside the sale by Tulsa within twelve years from its date, *viz.*, 1876. But the defendant Mukta claims as her father's reversionary heir on her mother Gama's death. After Tulsa's death, her interest, whatever it was, passed to her co-widow Gama, and after Gama's death Mukta as her father's heir became entitled to the property. There could be no adverse possession as against Mukta so long as Gama was alive—*Cursandas Govindji v. Vundravandas Purshotam* (3).

Tulsa had only a life interest which she sold to Ganpatrav, and Ganpatrav sold to the plaintiff. But that interest terminated at her death. If there was any adverse possession, it only began at her death, and the lower Courts have not ascertained this date.

[219] *Narayan Vishnu Gokhale*, for the respondent.

JUDGMENT.

SARGENT, C.J.—The plaintiff in this case asks for an injunction to restrain the defendants from preventing his passing through the land marked “pa”, “fa”, “ba”, on the map (Ex. 3) and from preventing his

(1) 6 C. L. R. 282 and 284. (2) 15 B. L. R. 361. (3) 14 B. 482 (488).

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shutting up the gate marked "ksha" in the same map. Both the parties in the occupation of the parties belonged to Nathu Shet, who died leaving two widows Tulsa and Gama, who effected a partition of the property in November, 1874. Tulsa sold the house and land allotted to her to Ganpatrav Shamray in February, 1876, who sold the site (the house having fallen down) to the plaintiff in January, 1877. Gama survived Tulsa and died, leaving a daughter the first defendant. The Subordinate Judge, without determining to whom the door belonged, found that in any case defendants had acquired a right by prescription to have the door kept open; and as to the land over which the plaintiff claimed a right of passage, he held that, whatever Tulsa's enjoyment might have been, it was personal to her; that he had no jurisdiction in this suit to determine as to the validity of the sale by Tulsa; that plaintiff could not go beyond the terms of his sale-deed, and as no right of passage over the land was, in his opinion, given him by the deed, dismissed the plaint. The lower appeal Court held that plaintiff had acquired an unimpeachable right by adverse possession to the property which was allowed to Tulsa; that the door was in the common wall of the two properties which fell to the shares of Gama and Tulsa, and that defendants had not acquired a prescriptive right to have light and air pass through it; and, lastly, that plaintiff and those through whose hands the property had passed were entitled, both upon the construction of the deed of partition and actual user, to a right of passage as claimed as a way of necessity to the lane to the north. It accordingly reversed the decree of the Subordinate Judge, and awarded the plaintiff's claim.

The principal ground on which the case has been argued before us on special appeal is that time would not run against the first defendant Mukta, who was the heir of Nathu, until after Gama's death; but that even if time ran from Tulsa's death, as the lower appeal Court held, that Court has never distinctly determined when Tulsa did die so as to justify the conclusion that plaintiff had [220] acquired an unimpeachable title, by adverse possession, and that it would be necessary to send back the case for a finding. As to this, it is to be remarked that the sale by Tulsa to Ganpatrav would not be binding on the surviving widow unless made under emergent circumstances. Assuming for the moment that it was not made under such circumstances, the possession by Ganpatrav and plaintiff would become adverse to Gama on Tulsa's death, but according to the ruling in *Srinath Kur v. Prosunno Kumar Ghose* (1), which we think is the correct view of art. 141 of the Limitation Act (XV of 1877) and was followed in *Cursandas Govindji v. Vundravandas Purshotam* (2), the Act would not begin to run against the first defendant Mukta, who takes as heir of Nathu, until after Gama's death: in other words, the possession during Gama's life-time was not adverse to the defendant. The result of the above considerations is that the plaintiff has not established an ownership in the premises occupied by him by adverse possession as found by the lower appeal Court, and cannot ask the Court for an injunction to restrain the defendants from interfering with him in closing up the door, because the defendant may have failed to prove that she had acquired a prescriptive right to the free passage of light and air through these doors.

Hitherto, we have considered the rights of the parties on the assumption that the alienation to Ganpatrav was not binding on the

(1) 9 C. 934 (937).

(2) 14 B. 482 (488).

family, but that question has not been distinctly raised owing to the manner in which the case has been tried, and we must, therefore, send down the following issue for that purpose:—

Has the plaintiff acquired the property allotted to Tulsa on the partition between her and Gama under such circumstances as to be binding on the first defendant?

Both parties to have power to give fresh evidence. Finding to be transmitted to this Court within a month.

Issue sent down.

18 B. 221.

[221] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

LAKSHMAN (*Original Plaintiff*), Appellant v. VITHU AND OTHERS
(*Original Defendants, Nos. 3 to 8, Respondents.**) [15h March, 1893.]

Landlord and tenant—Commencement and origin of tenancy—Tenancy forty years old—Section 83 of the Land Revenue Code (Bombay Act V of 1879) applicability of.

Section 83 † of the Land Revenue Code (Bombay Act V of 1879) does not apply to a tenancy which commenced about forty years ago, but it applies to a tenancy with respect to which there is no satisfactory evidence to show the commencement as well as the terms of a tenancy.

[F., 11 Ind. Cas. 693=7 N.L.R. 100; Cons., 18 B. 433.]

SECOND appeal from the decision of T. W. Walker, Assistant Judge of Satara.

The plaintiff sued to recover possession of a piece of land with mesne profits from the date of the institution of the suit. He alleged that the land originally belonged to one Pandurang Narayan Pendharkar, who was the inamdar and mirasdar, and [222] that at a Court-sale held on the 17th April, 1874, he (the plaintiff) purchased the right,

* Second Appeal No. 664 of 1891.

† Section 83 of the Land Revenue Code (Bombay Act V of 1879):—A person placed, as tenant, in possession of land by another, or, in that capacity, holding, taking or retaining possession of land permissively from or by sufferance of another, shall be regarded as holding the same at the rent, or for the services, agreed upon between them, or in the absence of satisfactory evidence of such agreement, at the rent payable or services renderable by the usage of the locality, or if there be no such agreement or usage, shall be presumed to hold at such rent as, having regard to all the circumstances of the case, shall be just and reasonable.

And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

And where there is no satisfactory evidence of the capacity in which a person in possession of land in respect of which he renders service or pays rent to the landlord, receives, holds or retains possession of the same, it shall be presumed that he is in possession as tenant.

Nothing contained in this section shall affect the right of the landlord (if he have the same either by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable, by the tenant, or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid.