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[507] APPELLATE CIVIL.

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

VITHALBOWA (*Original Plaintiff*), *Appellant v.* NARAYAN DAJI THITE (*Original Defendant*), *Respondent*; AND NARAYAN DAJI THITE (*Original Defendant*), *Appellant v.* VITHALBOWA (*Original Plaintiff*), *Respondent.** [22nd August, 1893]

Math—*Manager—Land appertaining to* math—*Sale of* "miras malki" *(ownership of* Miras *tenure)—Miras tenure—Mirasdar on inam estates, position of—Adverse possession—Limitation Act (XV of* 1877), *s.* 28—*Right to recover rent—Construction.*

In 1860 Krishnaji, the manager of a *math*, sold to Baxarbhai the "*miras malki*" (ownership of *miras* tenure) of certain lands appertaining to the *math*, subject to the payment of assessment. Krishnaji died in the same year and was succeeded by Ramkrishna as manager. In 1864 Ramkrishna sued Baxarbhai to set aside the sale. The suit was dismissed in 1865 and Baxarbhai's *miras* right was confirmed. In 1871 one Gopal obtained a decree declaring him to be the legal manager of the *math* and removing Ramkrishna, who was held to have had no title to the office.

In 1887 the plaintiff, who succeeded Gopal in the management of the *math*, brought the present suit against the defendant who was the vendee of Baxarbhai, to recover possession of the lands or to recover assessment for three years previous to the suit. The defendant pleaded that the suit was barred by limitation.

The plaintiff contended that as there was no lawful manager between 1860 and 1875 that period ought to be omitted in computing the period of limitation, and that as under the deed of sale to Baxarbhai the vendee became a tenant, the possession of the vendee and of the defendant could not be adverse.

Held, that if defendant's possession was adverse to the ownership of the *math* during twelve years after Krishnaji's death, the operation of the law of limitation would not be affected by the fact that there was no legal manager during that time.

Held, further, that in the Bombay Presidency the *mirasdar* on inam estates is only "a tenant at quit-rent or at a reasonable rent not subject to ejectment so long as he pays it;" and as there was nothing in the sale-deed passed by Krishnaji to Baxarbhai which required a different construction to be put on the *miras* tenure created by it, Baxarbhai's possession under it could not be adverse to the *math* until there was an assertion by the grantee of his claim to be a permanent tenant, up to which time he would, in the eye of the law, be regarded as a tenant-at-will. But the suit brought by Ramkrishna in 1864 showed that Baxarbhai was then asserting his *mirasi* right, and as more than twelve years had elapsed between that date and the bringing of the present suit, the plaintiff's right as representing the *math* to recover immediate possession was barred.

Held, further, that the plaintiff's right to recover three years' arrears of rent as reserved by the *mirasi* grant was not affected, as the effect of s. 28 of the [508] Limitation Act (Act XV of 1877) was to extinguish the plaintiff's right as claimed by him to treat the grant as null and void.

[F., 1 Bom. L.R. 373 (374, 380); R., 27 B. 515 (539)=5 Bom. L.R. 274; 5 Bom. L.R. 186 (194); 7 Ind. Cas. 202=8 M. L. T. 258 (263).]

THESE were cross second appeals from the decision of Rao Bahadur G. A. Mankar, additional First Class Subordinate Judge of Sholapur with appellate powers.

The plaintiff Vithalbowa *alias* Govindbowa Guru Gopalbowa Gosavi, manager of a *math* at Pandharpur in the Sholapur District, sued to recover possession of certain lands under the following circumstances:—

The lands were an *inam* property granted to the managers of the *math* of Shri Jairam Swami at Vadgaon in the Satara District. The

* Cross Second Appeals, Nos. 670 and 683 of 1891.

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grant was made by Bahirji Raje bin Tukoji Raje Pandhare under a *sanad* dated the 2nd August, 1836, to Muneshvarbowa, who was then the chief manager of the *math*. The *sanad*, which was confirmed by the Inam Commission in 1854, mentioned that the lands in suit were granted as inam to the then manager of the *math* Muneshwarbowa, and that he was to apply the income thereof towards the expenses of the *math* at Pandharpur, which was a branch of the principal *math* of the Shri Jairam Swami at Vadgaon.

In the year 1860 Krishnaji, who was then the manager of the *math*, sold the "*miras malki*" (ownership of *miras* tenure) of the lands to one Baxarbhai. The following is an extract from the deed of sale:—

"To Rajashri Baxar valad Masudbhai Musalman Sepoy Gosavi. Deed of sale passed in writing by Krishnaji Gosavi (of) sansthan Vadgaon is as follows:—There is at mauze Shirdhan, taluka Pandharpur, (some) *inam* land belonging to the sansthan. You having agreed to take (*i.e.* purchase) the *mirasi* ownership thereof, Rs. 250 (two hundred and fifty) of the Company's currency are received from you and the abovementioned *jirayit* land, survey No. 42, measuring bighas 155-1 and of the assessed value of Rs. 120 of the Chandvad currency, of which Rs. 40 (being deducted) as *tota* (loss, discount) there remain Rs. 80, is sold to you as *miras* for this (*i.e.* Rs. 80), and for the above amount together with the trees in the land and the broken well (therein). The four boundaries of the same land are as follows:— * * * The land as comprised within the four boundaries is given (sold to you as) *miras*. The above *chavdi* amount is payable to the sansthan. But you being employed for the purpose of collecting the sansthan income on the aforesaid taluka, you are to give credit for (the above amount of the *chavdi*) as your remuneration and *potgi* (subsistence money). If there be any obstruction to (your) service, you should then deduct and take Rs. 40 **[509]** out of the assessment and pay the remaining Rs. 40 to the sansthan. This deed of sale is duly given in writing. Lunar date the 1st of Bhadrapad Shudh, Shak 1782 (17th August, 1860). (Here follows an explanation of an erasure.) The date aforesaid. You should carry on the management of the above-mentioned land from generation to generation."

Krishnaji died in 1860 subsequently to the sale, and Ramkrishna succeeded him as manager of the *math*, having obtained a certificate of heirship. In 1864 Ramkrishna brought a suit against Baxarbhai to set aside the sale of the "*miras malki*," but the suit was dismissed and Baxarbhai's rights were confirmed on the 18th January, 1865.

One Gopal subsequently claimed to be the manager of the *math* in preference to Ramkrishna. He sued to have him removed from the management, and obtained a decree in the year 1871 in the Court of the Principal Sadar Amin at Satara and this decree was confirmed, in appeal, by the High Court in 1875.

In 1887 the plaintiff, who succeeded Gopal as manager, sued the defendant Narayan Daji Thite, the vendee of Baxarbhai, to set aside the sale by Krishnaji and to recover possession of the lands, or, in the alternative, to recover Rs. 223-11 9, being the amount of assessment due by the defendant for three years previous to the suit, deducting the amount of the quit-rent, namely Rs. 134-3-3, paid by the defendant direct to Government.

The defendant pleaded that he had purchased the land from Baxarbhai, who had purchased it from the owner Krishnaji, and that the plaintiff's claim was barred by limitation.

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The Subordinate Judge held that the claim for possession was barred, as the sale to Baxarbhai had not been set aside within twelve years either from its date or from the date of Krishnaji's death, but that the claim to recover assessment of three years before suit was within time. He awarded Rs. 223-11-9 to the plaintiff as the amount of the assessment.

Both parties appealed, but the decree was confirmed.

Both parties then filed second appeals to the High Court—the defendant appealing (appeal No. 683 of 1891) against the decree in respect of the assessment awarded, and the plaintiff [510] (appeal No. 670 of 1891) against the decree so far as it refused possession.

Macpherson (with *Ghanasham N. Nadkarni*) for the appellant (defendant) in appeal No. 683 of 1891 and the respondent in appeal No. 670 of 1891:—The whole claim of the plaintiff was barred and not merely his claim for possession. The sale to Baxarbhai was a valid one and we claim under Baxarbhai. Krishnaji was *de facto* and *de jure* manager of the *math* and could sell. But even if he had no authority to sell, nevertheless we have been in possession for more than twelve years, and the plaintiff's claim is now barred—*Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (1). The possession of the vendee was adverse when he entered. At all events it became adverse from the time Ramkrishna sued Baxarbhai in 1864 to set aside the sale, because Baxarbhai then openly asserted his title to the land. The claim to account is also barred.

Inverarity (with *Mahadev B. Choubal*) for the respondent (plaintiff) in appeal No. 683 of 1891 and the appellant in appeal No. 670 of 1891:—Under the deed of sale the defendant is a tenant from year to year, and his possession cannot, therefore, be adverse to the plaintiff. A tenant cannot say he holds adversely to his landlord, and is not liable to pay rent. In calculating the period of limitation the time during which Ramkrishna was acting as manager (*i.e.* between 1860 and 1875) should be omitted, as he was judicially held not to have been the proper and legal successor of Krishnaji, and was removed.

Macpherson in reply:—If the deed of sale be construed to mean that we are tenants, we submit that the document confers upon us a *mirasi* tenure, and, therefore, we are not liable to be evicted so long as we pay rent. West and Buhler, p. 177; *Prataprav Gujar* v. *Bayaji* (2).

JUDGMENT.

SARGENT, C.J.:—These appeals arise out of a suit by the plaintiff as manager of the *math* at Pandharpur to set aside the sale in 1860 (Ex. 17) of the "*miras malki*" by Krishnaji, a previous manager of the *math*, of certain lands in favour of one Baxarbhai, subject to the payment of assessment as therein provided. [511] The Court below has found that the lands were not the private *inam* of Krishnaji, but the property of the *math*, and that the alienation by Krishnaji as manager was invalid beyond his life. This was not disputed before us on appeal. The lower Court of appeal has, however, held that the plaintiff's claim to recover the lands is barred by the Statute of Limitations, inasmuch as twelve years had elapsed both since the alienation and the death of Krishnaji in 1860, but that the plaintiff had not lost his right to recover full assessment on the land.

(1) 4 C. 327.

(2) 3 B. 141 (145, Note).

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This conclusion is resisted by appeal No. 670 on two grounds: first, that there was no lawful manager of the *math* between 1860 and 1875, Ramkrishnaji, who had succeeded Krishnaji, having been declared by the Civil Court to have had no title to the management; and, second, that Ex. 17 created the relationship of landlord and tenant, and that, therefore, there could be no adverse possession during 1860 and 1875 such as could run against the *màth* according to the ruling in *Radhabai* v. *Anantrav* (1).

If the defendant's possession was adverse to the ownership of the *math* during the twelve years after Krishnaji's death, the operation of the Act cannot be affected by the circumstance that there was no legal manager of the *math* during that period. The important question is, what was the character of defendant's possession after Krishnaji's death?

It was contended by Mr. Macpherson, for the defendant, that the grant of a "*mirasi malki*," does not create the relationship of landlord and tenant between the grantor and grantee; and he relied on the judgment of Mr. Justice Markby in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (2). In that case the Court treated a *mirasi* grant in Bengal as creating an estate in fee-simple and passing the ownership in the property, apparently on the ground that there was no reversion reserved to the grantor. It is not necessary for us to say whether that case was properly decided, as in this Presidency we must regard it as well established that the *mirasdar* on *inam* estates is only "a tenant at a quit-rent or at a reasonable rent not subject to [512] ejectment so long as he pays it"—see West and Buhler, p. 177, and *Prataprav* v. *Bayaji* (3), and the note at p. 145; and there is nothing in the language of Ex. 17 which requires a different construction to be put on the *mirasi* tenure created by it. That being the true position of Baxarbhai by virtue of the grant, his mere possession under it after Krishnaji's death could not be adverse to the *math* until there was an active assertion, by the grantee, of his claim to be a perpetual tenant, up to which time he would, in the eye of the law, be regarded as a tenant, at-will. However, the suit brought by Ramkrishna Bowa in 1864 shows that Baxarbhai was then asserting his *mirasi* right, and as more than twelve years elapsed between that date and the bringing of the present suit, the plaintiff's right as representing the *math* to recover immediate possession is barred, and we must, therefore, dismiss appeal No. 670 of 1891, with costs.

This, however, does not affect the plaintiff's right to recover the three years' arrears of rent as reserved by the *mirasi* grant, as the effect of s. 28 of the Statute of Limitations would only be to extinguish the plaintiff's right as claimed by him to treat the grant as null and void.

With respect to the amount of the annual rent payable by defendant, it was stated by plaintiff that the service of collecting the assessment on the *inam* estate has not been performed by Baxarbhai or his alienee, the defendant, during the last three years as contemplated by the grant. It was contended by Mr. Ghanasham that even if not so collected, and whatever may have been the reason for it, and indeed even if it were due to the defendant's own default, the defendant has to pay Rs. 40 rent, and no more. We entertain no doubt that, upon the proper construction of the grant, Baxarbhai or his alienee, the defendant, must pay the full rent of Rs. 80 if the rent was not so collected unless they were prevented from collecting it by reason of some obstruction caused by the manager

(1) 9 B. 198. (2) 4 C. 327. (3) 3 B. 141 (143).

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of the *math*, and we must, therefore, send down the following issues for determination :—

1. Was the assessment on the *inam* estate collected by Baxarbhai or the defendant during the three years preceding the suit ?

[513] 2. If not so collected, was it due to the default of Baxarbhai or his alienee, the defendant, or on the contrary to "obstruction" caused by the manager of the *math* that the assessment on the *inam* estate was not collected by Baxarbhai or the defendant during the three years preceding the suit ?

The findings to be sent to this Court within two months, and the parties to be allowed to give fresh evidence.

Issues sent down.

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APPELLATE CIVIL.

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

HANMANTA KOLAJI (*Original Plaintiff*), *Appellant v.* MAHADEV KONDAJI (*Original Defendant*), *Respondent.** [29th August, 1893.]

Limitation—Limitation Act (XV of 1877), sch. II, arts. 127, 144—Suit for possession of land alleging a previous partition—Partition—Co-sharers—Adverse possession—Burden of proof—Evidence.

The defendant had purchased the land in question at a sale in execution of a decree obtained by him against cousins of the plaintiff. The plaintiff claimed to recover the land, alleging that it was his share of ancestral property which had been allotted to him on partition four or five years before suit, and of which he had actually been in separate possession. The lower Court upon these allegations rejected the plaintiff's claim, holding that the suit was not one for partition and did not fall within art. 127 of the Limitation Act (XV of 1877), but that art. 144 applied, and that the plaintiff had failed to show that the defendant's adverse possession had begun within twelve years preceding the suit. On appeal to the High Court,

Held (reversing the decree and sending back the case) that under art. 144 it was for the defendant to prove adverse possession for twelve years before suit.

[R., L.B.R (1893—1900) 360 (361).]

THIS was a second appeal from the decision of S. Hammick, District Judge of Ahmednagar.

Suit to recover certain land.

The defendant was in possession of the land in question as purchaser at a sale held in execution of a decree obtained by him against one Rama and his brothers. The plaintiff was Rama's cousin and he alleged that the land was ancestral, and that it had been partitioned equally between himself and Rama's branch of [514] the family four or five years before suit. He claimed to recover his half share.

The defendant (*inter alia*) pleaded limitation.

The lower Court rejected the plaintiff's claim as barred, being of opinion that as the plaintiff alleged that he had been in separate possession of his share after the division, the suit was not one for partition under art. 127 of the Limitation Act, but that the burden of proof was on the plaintiff to show that the defendant's adverse possession had begun

* Second Appeal, No. 186 of 1892.