

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894.
August 7.

HARJIVAN (ORIGINAL PLAINTIFF), APPELLANT, v. SHIVRA'M AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (XV of 1877), Art. 144—Adverse possession—Symbolical possession—Effect of symbolical possession against third parties—Auction-purchaser—His right to tack on his own possession to that of judgment-debtor.

The property in dispute belonged to one Dhondi. He sold it to Arjun on 25th April, 1873, but did not put the vendee into possession. On 18th April, 1883, Arjun sold the property to the plaintiff.

On 4th June, 1883, in execution of a money-decree against Dhondi the property was put up to sale as his, and was purchased by the defendants, who were put into possession by the Court on 26th March, 1885.

On 28th March, 1885, the plaintiff sued Arjun and Dhondi's wife (Dhondi being then in prison) to recover possession of the property. A decree was passed, in execution of which he obtained symbolical possession through the Court on 8th February, 1886. When he sought to take actual possession, he was resisted by the defendants.

Thereupon the plaintiff filed the present suit on 19th December, 1889, to obtain actual possession of the property from the defendants.

Held, that the suit was barred under article 144 of the Limitation Act (XV of 1877). The defendants had a right to tack on the period of their own adverse possession as against the plaintiff to that of Dhondi's adverse possession as against Arjun. The symbolical possession obtained by the plaintiff did not break up the continuity of the adverse possession of the defendants and the person through whom they derived their title.

SECOND appeal from the decision of R. S. Tipnis, Acting Judge of Thána, in Appeal No. 458 of 1890:

The property in dispute originally belonged to one Dhondi.

On 25th April, 1873, Dhondi conveyed it to one Arjun by a deed of sale of that date. The lower Courts held that this was a colourable transaction intended to defeat Dhondi's creditors. Dhondi remained in possession.

On the 18th April, 1883, Arjun sold the property to the plaintiff.

On the 4th June, 1883, the property was put up to sale in execution of a money decree against Dhondi and purchased by the defendants Nos. 1 and 2.

On the 26th March, 1885, defendants Nos. 1 and 2 obtained possession of the property through the Court.

* Second Appeal, No. 950 of 1892.

On the 28th March, 1885, the plaintiff sued his vendor Arjun and Dhondi's wife Girji (Dhondi being then in prison) for possession. He obtained a decree, in execution of which he obtained symbolical possession on 8th February, 1886. When he sought to take actual possession, he was resisted by the defendants.

On the 19th December, 1889, the plaintiff filed the present suit to recover the property from the defendants.

Both the lower Courts rejected the plaintiff's claim as barred by limitation. They held that defendants, who got possession in 1885 under a decree against Dhondi, were entitled to add the period of his possession to their own, and that this possession was adverse to the plaintiff for more than twelve years, and that the plaintiff's suit was, therefore, barred.

Against this decision the plaintiff preferred a second appeal to the High Court.

Shivrám V. Bhandárkar for appellant (plaintiff):—The defendants came into possession on 26th March, 1885, as purchasers at the sale held in execution of the decree against Dhondi. Their adverse possession commenced only from the time when they actually took possession. They have no right to tack on their own possession to Dhondi's. His possession was never adverse to Arjun. Assuming that it was adverse, it did not cover a period of twelve years so as to bar Arjun's title. Moreover, when plaintiff in 1886 obtained symbolical possession in execution of his decree against Arjun and Dhondi's wife, such symbolical possession was effectual against Dhondi and all persons claiming through him as if it was actual possession—*Juggobundhu v. Rám Chunder*⁽¹⁾; *Lokessur Koer v. Purgun Roy*⁽²⁾; *Joggobundhu Mitter v. Purnánund Gossámi*⁽³⁾. Such symbolical possession gives a fresh starting point. We could sue for possession within twelve years from the date we obtained formal possession—*Umbicka Churn Goopta v. Madhub Ghosal*⁽⁴⁾. The case of *Ali Sáheb v. Káji Ahmad*⁽⁵⁾ does not apply.

Mahádev C. Apte for respondents (defendants):—The receipt given by the plaintiff to the officer of the Court who gave him

(1) I. L. R., 5 Cal., 584.

(3) I. L. R., 16 Cal., 530.

(2) I. L. R., 7 Cal., 418.

(4) I. L. R., 4 Cal., 870.

(5) I. L. R., 16 Bom., 197.

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possession states that he obtained *actual* possession of the property in dispute. If that be so, section 263 of the Code applies, and not section 264. If section 263 applies, then the principle contended for, that symbolical possession is equivalent to actual possession as against the judgment-debtor, has no application to the present case—*Lakshuman v. Moru*⁽¹⁾. Assuming that the plaintiff obtained symbolical possession under section 264 of the Code, even then it is of no avail either as against Dhondi or as against the defendants who were in actual possession of the property in dispute, for they were not parties to the plaintiff's suit against Arjun and Girji. They cannot, therefore, be bound by the decree passed in that suit. The formal possession given to the plaintiff in execution of that decree is, therefore, ineffectual as against the defendants and their predecessor in title, Dhondi. Dhondi's possession was adverse to Arjun, and the defendants, who have succeeded to him, are entitled to tack on their own possession to Dhondi's in bar of the plaintiff's claim. The suit is, therefore, barred under article 144 of the Limitation Act—*Ali Sáheb v. Káji Mahomad*⁽²⁾; *Dinendro Náth v. Rámkumar*⁽³⁾; *Syed Nyámtula v. Nána*⁽⁴⁾.

RÁNADE, J.:—The chief point argued before us in this appeal relates to the question of limitation. The property in dispute admittedly belonged to one Dhondi, who executed a deed of sale in favour of Arjun on 25th April, 1873. Both the lower Courts have held that this deed of sale was a collusive transaction, and that Dhondi, and not Arjun, continued to be in possession of the property.

The appellant traces his title through Arjun, who first mortgaged, and then sold, the property on 18th April, 1883, to the appellant. As appellant did not obtain possession of the property, he brought a suit on his deed of sale against Arjun and Dhondi's wife Girji (Dhondi himself being in prison), and obtained a decree, in the execution of which appellant obtained on 8th February, 1886, what he now states was a symbolical possession of the property. In his plaint, appellant stated that he had passed a receipt on that day to the bailiff, admitting that

(1) I. L. R., 16 Bom., 722.

(2) L. R., 8 I. A., 65, 75.

(3) I. L. R., 16 Bom., 197.

(4) I. L. R., 13 Bom., 424.

he had obtained possession of the property. As a matter of fact, the possession was with Dhondi, and after he went to jail, with his wife Girji.

Respondents Nos. 1—2 claim through Dhondi, having purchased Dhondi's interest at an auction sale in execution of their own decree on 4th June, 1883, and subsequently obtained actual possession through Court on 26th March, 1885. On 28th March, 1885, the appellant brought his suit against Arjun and Dhondi's wife Girji, as stated above, and as he did not obtain actual possession in execution of his decree in that suit, he brought his present suit against the respondents in December, 1889. Both the lower Courts held that appellant's suit was time-barred by reason of Dhondi's adverse possession against Arjun being tacked on to respondents' possession since 1885.

Appellant's contention before us was that the lower Courts were in error in joining Dhondi's possession to that of the respondents Nos. 1—2. He contended (1) that on the day that respondents obtained possession (26th March, 1885), Dhondi's possession, dating from 25th April, 1873, had not become adverse, as it did not cover a period of twelve years; (2) that appellant's symbolical possession of 8th February, 1886, broke up the continuity of the two periods; and (3) that as his claim under the decree and the execution proceedings was good against Arjun and Dhondi, it was equally good as against respondents Nos. 1—2, whose adverse possession only commenced since March, 1885.

On a careful consideration of the authorities cited on behalf of the appellant, we feel satisfied that his contention is not valid, and that it must be disallowed. Mr. Shivrám Vithal, the appellant's pleader, chiefly relied on the fact that the purchase from Arjun, which the lower Appellate Court has found to be a valid purchase, was dated 18th April, 1883, and preceded the auction-purchase dated 4th June, 1883, of Dhondi's rights on which respondents based their claim. The lower Appellate Court adjudicated the question of title in appellant's favour. It, however, rejected appellant's claim on the ground of respondents' adverse possession for more than twelve years, and this period was made up by tacking on respondents' own possession against appellant

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to that of Dhondi's against Arjun. It is true Dhondi's possession by itself had not covered the full period of twelve years necessary to constitute adverse possession, but respondents had full right to fall back upon Dhondi's possession, and plead this joint possession in bar of plaintiff's claim. It has no doubt been ruled in *Juggobundhu v. Rám Chunder*⁽¹⁾ and *Joggobundhu v. Purnanund*⁽²⁾ that a formal possession, such as the appellant obtained on 8th February, 1886, was, as against the judgment-debtor, equivalent to actual possession, but there is nothing in these rulings to warrant the extension of their scope so as to embrace third parties, who, though they derived their title from the judgment-debtor, had an adverse interest to that of the judgment-debtor's. In *Juggobundhu v. Rám Chunder*, it was expressly ruled that such symbolical possession was of no avail as against third parties. In the present case, Dhondi's possession was admittedly adverse to that of Arjun. Appellant no doubt obtained a decree both against Arjun and Girji, who, in the absence of her husband Dhondi, was made a party to that suit. But neither Arjun or Girji nor Dhondi were in possession of the property at the time when the appellant brought his suit of 1885. Two days before that suit was commenced, respondents had obtained actual possession of the property, and appellant ought to have joined respondents' names as co-defendants in that suit. Appellant failed to take this precaution, and by the time that he obtained symbolical possession on 8th February, 1886, Dhondi's and respondents' adverse possession covered a period of more than twelve years, and the appellant's claim was very properly held to be time-barred under article 144 of the Limitation Act. We are led to this conclusion even if we accept appellant's line of argument as correct.

We do not wish, however, to be understood in any way as affirming the correctness of that line of argument. In *Lakshman v. Moru*⁽³⁾ the matter was discussed, and it was held that the doctrine of symbolical possession only held good in cases where execution under section 264 was alone possible, and that it had no application when the creditor could only execute his decree

(1) I. L. R., 5 Calc., 584.

(2) I. L. R., 16 Calc., 530.

(3) I. L. R., 16 Bom., 722.

under section 263 by obtaining actual possession. The execution proceedings, in which the appellant passed the receipt dated 8th February, 1886, do not show that the execution was carried out under section 264; and it is clear that even if Dhondi had himself continued to be in possession till 8th February, 1886, yet, as he was not a party to appellant's suit, appellant would not have succeeded, under the authority of *Lakshman v. Moru*, in ousting him in execution of his decree against Arjun and Girji. The case of *Lakshman Vinayak v. Bisansing* ⁽¹⁾ was distinguished by Mr. Justice Telang from *Lakshman v. Moru* solely on the ground that, in the one case, the period of actual possession of the defendant exceeded, while in the other it fell short of, twelve years. Mr. Justice Telang expressed an opinion in the case decided by him that the defendant in the suit would be entitled to tack on his own possession to that of his father, the judgment-debtor. In the present case, the respondents Nos. 1—2 are auction-purchasers of Dhondi's rights, and they have obviously a better right to fall back upon Dhondi's possession to supplement their own. If a vendor remains in possession of property sold by him, his possession is adverse to that of the purchaser—*Anand Coomari v. Ali Jamin* ⁽²⁾. Dhondi's possession was, therefore, adverse to Arjun, and respondents' possession through Dhondi is adverse to that of the appellant through Arjun. In *Gossain Dalmar Puri v. Bepin Behary Mitter* ⁽³⁾ it was held that symbolical possession, as against the judgment-debtors, grantors of a lease in that case, would not avail as against a permanent lessee from those grantors, if such lessee was more than twelve years in possession.

On the strength of these authorities, we hold in this case that the appellant's symbolical possession of 8th February, 1886, did not break up the continuity of the adverse possession of the respondents, and the person through whom they derived their title, and that appellant's claim was very properly held to be time-barred by reason of the adverse enjoyment of Dhondi and respondents as against appellant and his vendor Arjun.

We accordingly confirm the decree and reject the appeal with costs.

Decree confirmed.

(1) I. L. R., 15 Bom., 261.

(2) I. L. R., 11 Calc., 229.

(3) I. L. R., 18 Calc., 520.

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