

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900.
November 27.

JAGJIVANDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI AMBA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Adverse possession—Joint family—Adverse possession of a co-sharer as against another co-sharer—Burden of proof—Limitation.

The land in question in this suit had formerly been the joint property of three brothers, Kalian, Dullabh and Vallabh. In 1884 Kalian and Vallabh removed to a village elsewhere, and Dullabh was left in exclusive possession of the land which he cultivated until his death in 1894, when his daughter, the first defendant, entered into possession. In 1888, however, Kalian and Vallabh had sold the land to one Nagar, who in 1895 sold it to the plaintiff. In 1897 the plaintiff brought this suit for possession. The first Court passed a decree in his favour, but on appeal the Judge reversed the decree, holding that the defendant and her father Dullabh had had adverse possession for more than twelve years and that the suit was therefore barred.

On second appeal,

Held, by the High Court, that adverse possession had not been proved. The burden of proving adverse possession should have been placed on the defendant. Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case.

As between brothers, especially when no partition is proved, the adverse possession of one should be proved by more satisfactory evidence than was given in this case.

SECOND appeal from the decision of Khán Bahádur B. E. Modi, Additional First Class Subordinate Judge, A.P., of Surat, reversing the decree of Ráo Sáheb M. B. Hora, Second Class Subordinate Judge at Surat.

Suit for possession. The land in question had been the joint property of three brothers, Kalian, Dullabh and Vallabh. In the year 1884, Kalian and Vallabh removed to a village in the Gáekwár's territory, and from that time Dullabh remained in exclusive possession of the fields until his death, which took place in 1894, when his daughter Bai Amba (defendant No. 1) took possession.

In November, 1888, Kalian sold the land to one Nagar by a registered deed of sale. This deed of sale was attested by his

* Second Appeal, No. 424 of 1900.

brother Vallabh, and in 1895 Nagar, in his turn, sold the land to Jagjivan Parbhudas (the plaintiff). This sale-deed was attested both by Kalian and Vallabh.

In 1897 plaintiff brought this suit to obtain possession.

He alleged that Kalian had become the sole owner of the land on his undertaking to pay the family debts and that Bai Amba's father Dullabh had cultivated it merely as a tenant.

The defendant contended that she and her father Dullabh had held adverse possession for more than twelve years and that the suit was barred.

The Court of first instance decreed plaintiff's claim, holding that on Kalian's undertaking to pay off the ancestral debts, his brothers Vallabh and Dullabh had relinquished their interest in the land, that Dullabh had been merely a tenant of Kalian and that his possession was not adverse.

This decision was reversed in appeal by the Additional First Class Subordinate Judge, A.P., who held that the property had remained joint, that Dullabh was not a tenant and that his possession being adverse to both Kalian and Vallabh, the suit was barred by limitation.

Plaintiff preferred a second appeal to the High Court.

Mannubhai Nanabhai for appellant (plaintiff).

G. H. Desai for respondent 1 (defendant 1).

RANADE, J.:—The dispute in this case relates to two fields in Uchhrel.

The plaintiff's case was that these two fields together with three others, about which there is no dispute now, belonged to three brothers, Kalian, Dullabh and Vallabh. In a partition between the three brothers, Kalian obtained these lands for his share as he undertook to pay the family debts. Kalian sold the lands to one Nagar in 1945 (Samvat) and Nagar sold them to the plaintiff in Samvat 1951 (1895). The lands were cultivated by Dullabh as tenant of Kalian and Nagar till 1894, when Dullabh died, and his daughter, the defendant Bai Amba, came into possession. When plaintiff claimed possession as purchaser of the lands in dispute, Bai Amba refused to give up possession, and hence the suit.

1900.

JAGJIVANDAS

v.

BAI AMBA.

1900.

JAGJIVANDAS
v.
BAI AMBA.

Bai Amba stated that in the partition Dullabh her father, and not Kalian, undertook to pay the family debts and the lands fell to Dullabh's share. He was in possession as owner for twenty years, and after his death she, as his daughter and heir, succeeded, and Dullabh had also made a will in her favour. She denied all knowledge of the sales and leases, and stated that Kalian had relinquished all interest in the lands and could give no title to the plaintiff.

The Court of first instance found that the sale-deeds passed by Kalian and Nagar were proved and that they were not nominal transactions. It also found that Dullabh held the lands as tenant of Kalian and Nagar and not in adverse right as owner, so that plaintiff's claim was not time-barred. A decree was accordingly passed in plaintiff's favour.

In appeal the issues were the same as in the first Court. The lower Appellate Court found that there was no partition between the three brothers and the lands did not belong to Kalian solely. It also found that the leases said to have been passed by Dullabh to Kalian and Nagar were forged and did not represent any real transactions. It held, further, that as the property was joint, Kalian had only a one-third share, and that plaintiff, as purchaser from Kalian, could not claim the two fields in dispute because he had obtained possession of the other three fields which exceeded Kalian's one-third share. It accordingly held that plaintiff's suit must fail on this ground, and it held further that it must also fail because Dullabh's possession was in adverse right and for more than twelve years. For this reason also the suit must fail. The decree of the first Court was accordingly reversed and plaintiff's claim disallowed.

In second appeal the chief point urged was that the lower Appellate Court was in error in holding that Dullabh's possession was adverse for over twelve years which barred plaintiff's claim. It was further urged that as the Court had held that there was no partition, Kalian and his other brother Vallabh were owners of the lands in dispute by right of survivorship, and plaintiff succeeded to their rights.

After hearing the arguments on both sides, we feel satisfied that both the grounds on which the lower Appellate Court has

disallowed plaintiff's claim cannot be supported. Accepting the findings of facts of the lower Appellate Court, it is clear that if there were no partition between the brothers, the fields were joint property, and Dullabh cannot claim any exclusive right to the same except on the ground of adverse possession for over twelve years. On Dullabh's death Kalian and Vallabh, his two brothers, would succeed by right of survivorship. As Kalian passed the deed of sale to plaintiff's vendor Nagar, and Vallabh joined in the same, it is plain that all the rights of Kalian and Vallabh would pass to the plaintiff, and the lower Court's view that Kalian only obtained a third share (which was less than the three fields of which plaintiff had obtained possession) and that therefore plaintiff had no right to sue for the two fields cannot be regarded as consistent with the facts found, except of course on the ground of adverse possession.

The question thus really turns upon the point whether Dullabh's possession can be regarded as adverse for over twelve years. If the property was joint, the burden of proving exclusive adverse possession must rest on the defendant, who claims to be Dullabh's heir and devisee. The lower Appellate Court placed this burden on the plaintiff. In the case of a joint family, where no partition was proved, the mere fact that two of the brothers, Kalian and Vallabh, went to live in a neighbouring Gaikwadi village would not make the possession of Dullabh, who continued to live in the village of Uchhrel, necessarily adverse. The respondent's pleader contended that Kalian's deed of sale, as also Nagar's sale-deed, mention the fact of Dullabh's possession. The deeds (Exhibits 29 and 31) show that Dullabh's possession commenced eight years before the deed of sale of 1888, and it was urged that he was thus proved to be in adverse possession for over twelve years at the time of the suit. These recitals in Exhibits 29 and 31 might prove possession over twelve years, but by themselves they cannot prove adverse possession as against Kalian or Nagar, because both the sale-deeds mention the fact that Dullabh held the lands in his possession as tenant. Though the leases were held to be forgeries, these recitals cannot prove that Dullabh's possession was adverse. The only other evidence of adverse possession was that furnished

1900.

JAGJIVANDAS

BAI AMBA.

1900.

JAGJIVANDAS

BAI AMBA.

by the statement that Dullabh instigated Kalian's creditor Morar to execute his decree against Kalian. Accepting this evidence for what it is worth, this instigation took place in 1889 (Exhibit 40). This evidence would not secure to Dullabh adverse possession for over twelve years, as the present suit was brought in 1897.

These are the only grounds on which the lower Appellate Court has relied to prove Dullabh's adverse possession for over twelve years. They prove nothing of the kind. At the most they prove adverse possession for eight years counting from 1889. Even counting from the time when Kalian left the village towards the end of S. 1941, it is doubtful if Dullabh's possession extended over twelve years. Possession to be adverse must be shown to be continuous, public, and adequate to the circumstances of the case. As between brothers, especially when no partition is proved, the adverse possession of one must be proved by more satisfactory evidence than it has been done in this case—*Radha Proshab Singh v. Ram Coomar Singh* ⁽¹⁾; *Lachmeswar Singh v. Manowar Hossein*.⁽²⁾

We should under these circumstances have felt ourselves justified in reversing the finding of the lower Appellate Court on this point. It appeared to us, however, that in the lower Appellate Court some confusion arose from the way in which the fourth issue was worded. The wording was proper enough in the view taken by the first Court which held the partition proved and the leases genuine. When these findings were reversed by the lower Appellate Court, the old fourth issue was out of place. The burden of proving adverse possession should have been placed on the defendant, and not on the plaintiff. The respondent-defendant may have been prejudiced by this circumstance. We accordingly send down the following issue, viz. :—

“Whether the respondent-defendant has proved that Dullabh was in exclusive adverse possession of the lands for over twelve years so as to confer full title on Dullabh?”

Finding to be returned within two months.

Issue sent down.

(1) (1877) 1 Cal. L. R. 259 at p. 264. (2) (1891) 19 Cal. 253.