APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905. *February 2.*

GANGADHAR *alias* BABURAV BALVANT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* PARASHRAM BHALCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Tenants-in-common—Adverse possession—Exclusive receipt of profits by one tenant continuously for a long time—Presumption as to actual ouster of other tenants-in-common.

To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster.

Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed.

SECOND APPEAL from the decision of Karpurram Manmathram Mehta, Acting First Class Subordinate Judge of Ratnágiri with appellate powers, confirming the decree of V. K. Mavlankar, Second Class Subordinate Judge of Rájápur.

One Vithal Anant, who owned certain *thikáns* (fields) and buildings in the village of Adivre in the Ratnágiri District, had four sons—(1) Krishnaji, (2) Balaji, (3) Lakshman and (4) Vaman. Krishnaji had a son Ganesh who died leaving him surviving a widow Lakshmibai and a daughter Annapurna. Balaji left a son Gangadhar, plaintiff 1. Lakshman left two sons, Ramchandra and Shankar, plaintiffs 2 and 3. Vaman died childless. In or about the year 1857 Balaji and Lakshman left the family house at Adivre and went abroad for employment. After they went abroad, Vithal managed the property till his death in or about the year 1881 and after that Ganesh alone remained in management till his death which took place in 1893. Subsequently Ganesh's widow Lakshmibai mortgaged the property with possession to defendant 1 on the 31st May, 1899. Lakshmibai having died in 1900 the plaintiffs brought the present suit in the year 1901 to recover possession of the *thikáns* and the buildings or in the alternative to recover a two-third share therein by metes and bounds, alleging that Ganesh who had a one-third share in

* Second Appeal No. 151 of 1904.

the property used to manage it on behalf of himself and the plaintiffs, that while the plaintiffs lived abroad on the ghâts in pursuit of their occupations they used to get the income of the property from Ganesh, that after the death of Ganesh's widow Lakshmi they became the full owners of the property, that she had no authority to mortgage the same to defendant 1, and that when the plaintiffs began to manage the property after her death defendant 2 alleging himself to be the agent of the mortgagee, defendant 1, forcibly deprived them of possession in August, 1900.

Defendant 1 answered *inter alia* that Ganesh was the exclusive owner of the property in suit, that his widow mortgaged the property to the defendant for a necessary and proper purpose, that the defendant had no knowledge of the plaintiffs' relationship to Ganesh, that the plaintiffs were not at any time in enjoyment or possession of the property, that the allegation in the plaint about the plaintiffs' participation in the profits was untrue, and that the suit was time-barred.

Defendant 2 did not put in a written statement.

The Subordinate Judge found that the plaintiffs were not entitled to a two-third share in the property, that they were not the direct and lawful heirs of Ganesh, that his daughter Annapurnabai, who was not proved to have died before the death of his widow Lakshmibai, was his heir, that the mortgage by Lakshmibai had a binding effect, it being executed by her for a proper purpose, that the suit was not time-barred, and that the plaintiffs were not entitled to recover possession of either the whole of the property or of a two-third share therein. He, therefore, dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree, holding that though the plaintiffs had a two-third share in the property their claim to it was time-barred on the following ground:—

> From the plaint it appears that the plaintiffs proceed on the assumption that the property had once been divided before their father left Konkan, 40—50 years ago. For they do not claim the whole property by survivorship. There is not the least documentary evidence to show that the plaintiffs or their fathers ever received their share of the property. The oral evidence produced to show that they received some share is all false and got up and no reliance can be placed on it. The plaintiffs are respectable and well off. They were quite

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indifferent and did not care for their property. Ganesh in his deposition in 1892 says that he did not send anything to Balaji, Lakshman or their sons since his father's death which took place 10—12 years ago (1880—1882). If the plaintiffs ever cared for the property and if they ever received their share while Ganesh's father Krishnaji was alive they would not have remained quiet so long and allowed Ganesh to take the whole of the profits. They would have at least written to Ganesh on the subject or asked their nephew, their present agent, to take some steps against (him) and after his death against his widow. But nothing appears to have been done. * * * * * * *

They did not take any steps to have their names entered as co-defendants in the redemption suit filed in 1892 by Vishnubhat Godbole against Ganesh and Naro Gopal (Exhibits 17 and 18). Ganesh also did not raise any objection in that suit that the plaintiffs should be joined as co-defendants (Exhibit 18). On the whole the plaintiffs allowed Ganesh and after him his widow to manage and deal with the property as owners and gave the public to believe that they had no concern with the property. There are thus sufficient circumstances to hold that their right is barred by time as they allowed themselves to be excluded for a period of more than 12 years before Ganesh's death. The plaintiffs' Vakil lays much stress on the statement of Ganesh in his deposition in 1892 (Exhibit 13) in proof that the enjoyment of Ganesh was not adverse or that the plaintiffs were not excluded. But no importance can be attached to it when it is taken into consideration that the object was simply to reduce the amount of maintenance. Ganesh had a concubine with him and did not keep his wife in the house. She had to live with her father. She at first applied to the First Class Magistrate for maintenance and got an order finally; though she did not succeed at first she then filed a suit against him to recover the arrears of maintenance (Exhibit 154). It is therefore possible that Ganesh would make reckless statements in order to defeat her claim or at least substantially to reduce the amount.

The plaintiffs preferred a second appeal.

Inverarity (with *H. C. Coyaji*) for the appellants (plaintiffs):—The finding of the Judge on the question of limitation cannot be accepted because there is no evidence to support it, but on the contrary there are admissions which bring our claim in time. Lakshmi the wife of Ganesh, who would not allow her to live in the family house, had brought a suit against him in the year 1891 to recover maintenance. In that suit Ganesh admitted that there were other sharers along with him (Exhibit 13). The Judge has got rid of this admission by merely conjecturing that Ganesh made the admission for the purpose of minimizing the amount of maintenance. We submit that the view taken by the Judge is wrong. Further, there is the admission of Lakshmibai herself

(Exhibit 14). She has admitted that there were other sharers in the property. The Judge has totally ignored her admission. Limitation cannot begin to run until there is necessity to assert title, *Tarubai* v. *Venkatrao*.[1] The mere fact that we did not ask for our share is not sufficient to hold that our claim is time-barred. There might have been an arrangement that some members of the family should enjoy the whole of the profits by turns or perhaps, as the Judge puts it, we did not care for the profits. These circumstances would not deprive us of our share. The plaint has been wrongly construed.

Mahadev B. Chaubal for respondent (defendant 2):—The plaint is properly construed. It proceeds on the assumption that the plaintiffs and Ganesh were tenants-in-common with regard to the property in suit. The Judge has considered the deposition of Ganesh (Exhibit 13) and has dealt with it. With regard to the deposition of Lakshmi (Exhibit 14) we contend that she had, owing to her short stay in her husband's house, little or no opportunity of speaking with any knowledge on the subject. Further, the Judgment in the suit which she had brought for her maintenance does not disclose the existence of other sharers in the property. Another circumstance which is significant is that the present plaintiffs were not joined as parties to the suit for maintenance which one Sarasvatibai had filed against Lakshmi in 1896. The Judge has found that the plaintiffs did not receive their share for the last forty or fifty years. Further, there were certain alienations made by Ganesh, and plaintiffs took no action with respect to them. These circumstances clearly show that the claim is time-barred. We rely on *Bandacharya* v. *Shriniwasacharya*[2] which lays down that as between tenants-in-common non-participation of profits by one tenant-in-common continuously for a long period may amount to an ouster of the other tenants-in-common. Further, under the old Limitation Act, XIV of 1859, non-participation of profits for twelve years extinguished the right to property, *Shidhojirav* v. *Naikojirav*,[3] *Sitaram* v. *Khanderav*,[4] *Appasami* v. *Subramanya*.[5]

(1) (1902) 27 Bom. 43.
(2) (1903) 5 Bom. L. R. 743.
(3) (1873) 10 Bom. H. C. R. 228.
(4) (1876) 1 Bom. 286.
(5) (1888) 12 Mad. 26.

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S. S. Patkar for respondent 1 (defendant 1).

Coyaji in reply:—The statement was made by Lakshmi in 1896 and the present suit was filed in 1901. Therefore the suit is in time. It is not open to the defendants who claim through Lakshmi to say that her possession and that of her husband Ganesh was adverse to us. The Judge has nowhere considered Lakshmi's deposition and no explanation is offered as to why she gave it. The Judge has misconstrued the plaint.

JENKINS, C. J.:—(After discussing the arguments based on certain admissions, His Lordship continued):—The next objection is that the Judge had not sufficient material on which to hold that as between tenants-in-common there was a bar to the plaintiffs' suit.

It has been recently pointed out in the case of *Bandacharya* v. *Shriniwasacharya*[1] that to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster, and after citing from the judgment of Lord Denman in *Culley* v. *Doe dem Taylerson*,[2] it was said "No doubt exclusive receipt of profits continuously for a long period may point to an ouster, but the Court must be satisfied that such taking of profits is an indication of a denial of rights in the other co-tenant to receive them."

Now here the Judge of the lower Court has found that there has been an exclusion, and the only question is whether or not there was justification for that finding.

The conclusion to which the Judge has come is that ever since the predecessors of the present plaintiffs left the family home in or about 1857 there has been no participation by them in the profits of the property now in suit, and as far as the record discloses there has never been any account rendered or any demand made.

In this the case is very similar in its circumstances to that of *Fishar* and *Taylor* v. *Prosser*,[3] which was an action of ejectment tried in the first instance before Lord Mansfield.

(1) (1903) 5 Bom. L. R. 743. (2) (1840) 11 Ad. and E. 1008 at p. 1014.
(3) (1774) 1 Cowper 217 at pp. 219, 220.

There for about 40 years one tenant-in-common had been in the sole possession of lands without any claim or demand by any person claiming under the other tenant-in-common. No actual ouster was proved; but upon the circumstances Lord Mansfield left it to the Jury to say whether there was not sufficient evidence before them to presume an actual ouster.

The Jury found that there was an actual ouster. Subsequently there was a rule to show cause why a new trial should not be granted, and the four Judges before whom the case came were unanimously of opinion that there was sufficient ground for the Jury to presume an actual ouster.

Mr. Justice Ashhurst said:—"Here is a possession of nearly 40 years without any claim by the lessors of the plaintiff to a share of the rents and profits, and without any acknowledgment of his right, by the other tenant-in-common. After so long an acquiescence I think the jury were well warranted to presume anything in support of the defendant's title, and they might presume either an *actual ouster* or a *conveyance*."

It seems to us therefore that it is impossible for us to say that there was no evidence, as an English lawyer would express it, to go to a Jury.

Therefore, notwithstanding the very able argument that has been addressed to us by Mr. Coyaji we hold we cannot interfere in second appeal.

For these reasons we confirm the decree with costs.

Decree confirmed.

G. B. R.