

him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee.

The decision of the lower appellate Court was also attacked on the ground that the onus of proof had been wrongly thrown upon the defendant and that the finding that the mortgage was a sham transaction could not therefore stand. I, however, think it is clear that the whole of the evidence was fully discussed and considered by the lower Court. The learned Judge came to the conclusion that the surprising nature of the transaction itself and the suspicious circumstances attending it outweighed the inferences which might be suggested by the evidence of some payments having been made by the defendant to creditors of Vishnu Bapat.

It is a judgment upon a pure question of fact which is binding upon us in second appeal.

I see no reason to interfere with the decree passed by the lower Court. I would therefore confirm it and dismiss the appeal with costs.

CHANDAVARKAR, J.:—I concur.

Decree confirmed.

G. P. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

AMRITA RAVJI RAO (ORIGINAL DEFENDANT), APPELLANT, v. SHRIDHAR NARAYAN OKE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1908.

December 9.

Adverse possession—Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession—Ouster.

The property in dispute belonged jointly to two brothers G. and D. The plaintiffs obtained a decree on a mortgage-bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G, and he had to

* Second Appeal No. 729 of 1907.

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file a suit against G, to remove the obstruction. In that suit it was held on the 29th November 1886 that V. was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1895 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1898. Meanwhile, on the 4th October 1894, G. sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1906, to recover possession of the property from defendant: the latter contended that the claim was barred by adverse possession:—

Held, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor G.'s possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against G. during the period of his exclusive possession, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other.

The question of adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

SECOND appeal from the decision of F. X. De Souza, District Judge of Thana, reversing the decree passed by S. A. Gupte, Subordinate Judge at Murbad.

Suit to recover possession of land.

The land in dispute was originally the joint property of two brothers Gangadhar and Damodar. Of these, Damodar was sued on a mortgage-bond, as manager of the joint Hindu family, by one Narayan, the father of the plaintiffs, in 1873. The suit was decreed; in execution of the decree the property was put up for sale and purchased by one Vishnu Ganesh. When Vishnu attempted to recover possession of the property, he was obstructed by Gangadhar; and he had eventually to file a suit against the latter to remove the obstruction. The Court decided in that suit on the 29th November 1886 that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. In execution of this decree Vishnu gave a *darkhast* to recover possession of a moiety. It was sent to the Collector for execution, who effected a partition and handed over possession of lands to Vishnu on the 11th December 1895.

On the 22nd January 1897, Vishnu sold the property to one Vinayak, who in turn sold it to the plaintiff on the 18th March 1898.

Meanwhile, on the 4th October 1894, Gangadhar sold the land to Ravji Rao (father of defendant).

The plaintiff filed this suit on the 4th October 1906 to recover possession of the property from the defendant.

The Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred by time. He was of opinion that the defendant and his predecessor-in-title had been in adverse possession from the 29th of November 1886, the date of the partition-decree.

On appeal the District Judge arrived at a contrary conclusion. He held that the suit was not barred. The following were his reasons:—

The Subordinate Judge holds in the alternative that time must be held to run against the plaintiff from the date of the decree (exhibit 22), *viz.*, 29th November 1886. I am unable to follow this argument. The effect of the decree was to make plaintiff's predecessor-in-title Vishnu Ganesh, virtually a co-parcener with Gangadhar in place of Damodar, entitled to joint possession or rather a tenancy-in-common in the family property, and till the joint tenancy was severed by partition, Gangadhar's possession was joint with, and not adverse to, the decree-holder or the auction-purchaser. The adverse possession of the defendant began, if at all, from 11th December 1895, the date of partition; and computed from that date, the period falls considerably short of the statutory period.

This view is based on the assumption that Article 144 of Schedule II to the Limitation Act XV of 1877 applies to the present case, and that I think is the article applicable; but even if Article 127 or Article 137 applied, the suit would be in time; for, on the former hypothesis, the exclusion of the plaintiff would not begin till 4th October 1894, and, on the latter, the judgment-debtor would not be entitled to exclusive possession till the date of the partition.

It is thus clear that plaintiff has proved his title and that his suit is in time. But at first it seemed to me that it would be inequitable to award possession as against the defendant, who is a *bond fide* purchaser for value from one of the co-parceners and has been in possession by virtue of his purchase for nearly twelve years. But on more careful consideration I am of opinion that the defendant cannot be maintained in possession for the following reasons:—

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The only ground on which the defendant can resist this suit is that he has the equity of a *bond fide* purchaser for value without notice in his favour. But no evidence was adduced to prove that he can claim this equity in the present case. If he purchased the land with the knowledge that it formed part of an undivided co-parcenary estate, he must have known that he was purchasing what his alienor had no right to sell, and he would thus have actual notice of the defect in his title. If he purchased in ignorance, then due enquiry would have apprised him of the true character of the property he was buying, and the law would impute to him constructive notice of the flaw in his title. In either case, the equity now claimed on his behalf would be non-existent.

But even assuming that the equity can be successfully claimed, the plaintiff has an equal equity on his side, and the legal title being in him, his title must prevail. The law is settled that a purchaser from an undivided co-parcener acquires no title to specific property; he merely acquires a right to claim a partition in which he has an equity to have the family property so marshalled as to allot the specific property to the share of the co-parcener from whom he derives his title, provided this can be done without injustice to the other co-parceners (*vide Udaram v. Ranu*, 11 B. H. C. 76; and *Ayyagari v. Ayyagari*, I. L. R. 25 Mad. 690). In the present case, the property purchased by the defendant was not allotted to the share of his alienor Gangadhar, and it is suggested that this was due to the fraud of Gangadhar himself. Be this as it may, it has been decided that in the analogous case of a mortgage the mortgagee's sole remedy in similar circumstances is to proceed against the share which has been allotted to his mortgagor in lieu of the property mortgaged (*Byjnath v. Ramooden*, 1 I. A. 106; *Hem Chunder Thako Moni*, 20 Cal. 533; *Amolak v. Chaudan*, 24 All. 483). By parity of reasoning, I would hold in the present case that defendant's sole remedy is to proceed against the share of Gangadhar for compensation.

The defendant appealed to the High Court.

B. V. Vidwans for the appellants:—We are entitled to tack Gangadhar's possession to our own adverse possession. Gangadhar did not hold the property on Vishnu's behalf, and the passing of the partition decree did not change the character of that possession. He was in the position of a vendor who remains in possession after the sale: such a possession has been held to be adverse to the purchaser: *Anand Coomari v. Ali Jamin*⁽¹⁾.

In the present case the *darbhast* under which Vishnu obtained the symbolical possession was presented subsequently to our purchase, and so the *darbhast* and the granting of symbolical

(1) (1885) 11 Cal. 229.

possession do not affect us, who are third parties: see *Juggabundhu Mukerjee v. Ram Chunder Bysack*⁽¹⁾ and *Harjivan v. Shivram*⁽²⁾.

The view of the lower appellate Court that Vishnu by his decree became virtually a co-parcener with Gangadhar and that Gangadhar's possession would not be adverse till Vishnu came to know of his ouster or exclusion is obviously not correct, because a stranger cannot become a co-parcener and cannot claim his privileges: *Ram Lakhi v. Durga Charan*⁽³⁾.

J. R. Gharpure for the respondents:—We submit that the decree of the lower appellate Court is right. The appellant is a purchaser from Gangadhar. He will either be subject to the equities and legal defences that existed against Gangadhar or will take free from all such equities. In the former case, as Gangadhar's physical possession itself was not enough to complete his title against us, defendants claiming through him cannot be in a better position. In the latter case, if he claims independently of Gangadhar and in his own right, his possession not being for twelve years is not adverse.

None of the cases cited for the appellant apply here as they are cases before execution.

CHANDAYARKAR, J.—The facts upon which the question of adverse possession, arising on the second appeal, turns, are found and stated as follows in the judgment of the lower appellate Court:—

“The plaint-land (S. No. 17, Pot No. 1) along with other lands was originally the joint property of two brothers, Gangadhar and Damodar.

One Narayan, the father of the plaintiffs, obtained a decree in Regular Suit No. 735 of 1873 against Damodar on a mortgage-bond; and in execution of that decree, in Darkhast No. 699 of 1875, he brought the property to sale. The property was purchased by Vishnu Ganesh. The suit had been instituted by Narayan against Damodar as manager of the joint Hindu family. Gangadhar, however, obstructed the purchaser, Vishnu Ganesh, in taking possession, whereupon the latter instituted Regular Suit No. 178 of 1877 against Gangadhar to remove the obstruction. The District Court decided in appeal in that

(1) (1880) 5 Cal. 584.

(2) (1894) 19 Bom. 620.

(3) (1895) 11 Cal. 680.

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suit that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. The date of this decision was 29th November 1886 (*vide* exhibit 22).

In execution of this decree, Vishnu gave a Darkhast No. 344 of 1894 to recover possession of a moiety. The Darkhast was sent to the Collector for execution and the Huzur Surveyor, in effecting a partition, handed over to Vishnu possession of the plaint-land (Survey No. 17, Pot No. 1) and other survey numbers on 11th December 1895. Exhibit 23 is the possessory receipt passed by Vishnu in token of having obtained possession.

On 22nd January 1897 Vishnu sold the property to one Vinayak Mahadev, and he in turn sold it to plaintiff 1 on 18th March 1898 under a sale-deed (exhibit 16). That is the title-deed under which the plaintiff claims.

Meanwhile, on 4th October 1894, Gangadhar has sold the plaint-land to the defendant's father under a sale-deed (exhibit 26)."

The learned Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred, because the defendant, and before him his vendor, had been in adverse possession from the 29th of November 1886, the date of the partition decree. On appeal by the plaintiff, the learned District Judge, differing from the Subordinate Judge, has held that the period commencing from the 29th of November 1883 and ending with the 11th of December 1895, when the partition was effected by the Collector in execution of the decree, should not be taken into account, because the effect of that decree was to make the plaintiffs' predecessor in title, Vishnu Ganesh, "virtually a co-parcener with Gangadhar in place of Damodhar, entitled to joint possession or rather a tenancy-in-common in the family property," and that the possession of Gangadhar could not be adverse to the decree-holder until the joint tenancy was severed by partition.

I am unable to agree with the learned District Judge, if by this he means that, where two or more persons hold property jointly as tenants-in-common and one of them is out of possession, the possession of the rest does not in any case become adverse until the property is partitioned. It has been held by a Division Bench of this Court in *Bandacharya v. Shrinivasacharya*⁽¹⁾ on the authority of Lord Denman's remarks in *Culley v. Doe dem Taylerson*⁽²⁾,

(1) (1907) 5 Bom. L. R. 743.

(2) (1840) 11 Ad. & E. 1008 at p. 1014.

followed in *Gangadhar v. Parashram*⁽¹⁾, that "to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster," and "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." The question of adverse possession depends, therefore, not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

In the present case, the decree for partition which was obtained by Vishnu Ganesh (under whom the plaintiff claims) on the 29th of November 1886 against Gangadhar, established his right to a moiety of the property and to get that moiety separated and allotted to him. Under ordinary circumstances the continuance of Gangadhar in possession to the exclusion of Vishnu Ganesh would have been adverse from that date, and the defendant, who claims under a purchase from Gangadhar, would have been entitled to tack on the period of the latter's exclusive occupation to his own, so as to perfect his title to the property by adverse possession for more than twelve years as against Vishnu Ganesh and those claiming under him. But to entitle the defendant to add to the period of his own adverse possession (which is admittedly less than twelve years before the date of the present suit) the period of his vendor Gangadhar's possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against Gangadhar during the period of his exclusive occupation, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other. Suppose during the period that the decree was alive and capable of execution, the judgment-debtor Gangadhar, who was in possession, had repudiated his liability thereunder and claimed the property as his own. That could not have given Vishnu Ganesh

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(1) (1905) 29 Bom. 300; 7 Bom. L. R. 252.

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a fresh cause of action or the right to sue him afresh in ejectment, because, his right having been established by the decree, he could proceed in execution without any fresh suit. It is not contended before us, nor does it appear to have been urged in either of the Courts below, that on the 11th of October 1894, when Gangadhar sold the property to the defendant, the decree had been barred so as to become incapable of execution and to free Gangadhar from his liability under it. As a matter of fact, the decree was subsequently executed by the Collector according to law, with the result that, as against Gangadhar, Vishnu Ganesh was allotted his divided moiety and put in possession on the 11th of December 1895. No doubt that possession was symbolical and would not bind the defendant, who was then in actual possession under his deed of purchase of a prior date. But so far as Gangadhar was concerned, it was otherwise; his possession of the property was subject to his liability under the decree and could in no sense become adverse to the decree-holder during the period when his right to execution of the decree had not become barred. The defendant cannot, therefore, invoke the aid of the possession of his vendor to support his plea of a title acquired by adverse possession. Such possession could begin, if at all, only when Gangadhar, in spite of his liability under the decree, sold the property to the defendant, and the defendant's occupation of the land commenced. Whether, even then, the defendant's possession became adverse from that date, need not be decided, because assuming it was, the suit was brought within twelve years from then. For these reasons the decree must be confirmed with costs.

HEATON, J.—The predecessor of the plaintiff, who sues for possession, obtained a decree for possession, after partition, of the half of a property. This decree was against one Gangadhar who was in possession of the whole property and who after the partition decree, but before its execution, sold the property to the defendant and placed him in possession. So defendant was in actual possession of the whole, when partition was made in execution of the decree and plaintiff's predecessor was formally placed in possession of the half he was under the decree entitled to. Thereafter neither the plaintiff nor his predecessor converted the

formal into actual possession and the defendant remained in actual possession of the property. The latter had not had actual possession for twelve completed years when the suit was filed but seeks to add on to his own actual possession that of Gangadhar and call the whole adverse. The facts being as they are he cannot do this. When plaintiff's predecessor executed the decree by having his share of the property separated and formally given over to him he perfected his claim.

From that moment a new condition of things came into existence; new rights arose and amongst them, that of the decree-holder to take actual possession of his separated share. This was not a right continued or derived from any previous holder of the land but a new right unlike any which previously existed. No possession prior to its inception could be adverse to that right. Therefore, no case of title in the defendant based on adverse possession is established.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

IN RE LAND ACQUISITION ACT (ACT I OF 1894), CAUSE IN THE MATTER OF '1 GOVERNMENT OF BOMBAY, 2 KARIM TAR MAHOMED.*

1908.

June 18.

Land Acquisition Act (I of 1894), section 18—Compensation—Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to Surveyors' reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award.

In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood.

* Reference No. 32 of 1907.