

1921.

SITABAI
v.
KESHAYRAO.

particular dates ; but we see no reason why a Darkhast, which asks for the assistance of the Court for the recovery of one of several instalments due at the date of the Darkhast, should not be considered as a step-in-aid so as to start a new period of limitation with regard to all the instalments then due. In our opinion the appeal should be allowed and the Darkhast should proceed with costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

December 2.

VENKATESH DAMODAR MOKASHI (ORIGINAL PLAINTIFF), APPELLANT
v. MALLAPPA BHIMAPPA CHIKKALKI AND ANOTHER (ORIGINAL
DEFENDANTS), RESPONDENTS^o.

Agreement to sell immoveable property—Payment of purchase money—Vendee in possession—No sale deed executed—Right of vendee to seek specific performance barred by limitation—Suit by vendor to recover possession of property—Vendee can resist the claim.

The plaintiff agreed to sell certain property to the defendants which was already in their possession. The defendants paid up the full purchase money to the plaintiff, but omitted to take from him a registered sale deed. After their right to obtain specific performance of the agreement to sell had become time-barred the plaintiff sued to recover possession of the property :—

Held, dismissing the suit, that the defendants were entitled to remain in possession against the plaintiff.

SECOND appeal from the decision of D. A. Idgunji, Assistant Judge of Belgaum, reversing the decree passed by R. N. Nadgir, Subordinate Judge at Athni.

Suit to recover possession of lands.

The defendants were the original owners of the lands. In execution of a decree obtained against them by the plaintiff's father, the lands were sold at a Court sale and purchased by one Jayappa, who was apparently a *benamidar* of the plaintiff's father. The sale was duly confirmed by the Court. Jayappa next sold the property to Jayaram, a nephew of the plaintiff's father.

In January 1906, the plaintiff's father agreed to sell the property to the defendants, who had throughout been in possession. They paid up the purchase money, but omitted to take a registered deed of sale, and in fact allowed the right to obtain it to be barred by limitation.

The plaintiff filed a suit in 1917 to recover possession of the property from the defendants.

The Court of first instance held that the defendants could not resist the plaintiff's claim, since they allowed their right to seek specific performance of the agreement to become time-barred. The suit was accordingly decreed.

On appeal, the Assistant Judge was of a contrary opinion, and dismissed the suit.

The plaintiff appealed to the High Court.

Coyajee, with *A. G. Desai*, for the appellant.

Nilkanth Atmaram, for the respondents.

MACLEOD, C. J. :—The plaintiff's father, Damodar, got a decree against the defendants. In execution of that decree the suit property was put up for sale and was purchased by one Jayappa in 1905. In 1906 Jayappa purported to sell the property to Jayaram. But in 1909 it appears that Jayappa disregarding that sale got symbolical possession, one must presume under his

1921.

VENKATESH
DAMODAR
v.
MALLAPPA
BHIMAPPA

1921.

VENKATESH
DAMODAR
v.
MALLAPPA
BHIMAPPA.

purchase at the Court sale in 1905. In the same year (1909) Jayaram sold back the property to Damodar; and there seems good foundation for the suggestion that throughout Damodar, the execution-creditor, was the real purchaser, for in 1906 Damodar agreed to re-sell the property to the first defendant at a certain price, and the evidence shows that that price has been wholly paid, although Damodar at one time raised objections to receiving the balance of the purchase money owing to there being delay in paying it. The result is that Damodar has agreed to sell the property to the first defendant who was then in possession, and had all along been in possession since the time of the decree, and the defendant paid the purchase price. It is quite true that the defendant has not got a sale-deed, and the time has passed within which he could have sued Damodar to get a sale-deed. But the equitable principles which should be applied to these facts are, in my opinion, perfectly clear.

In *Gangaram v. Laxman Ganoba*⁽¹⁾ the plaintiff sued for a declaration of title to and for possession of immovable property from the defendant. He based his title upon a registered sale-deed, dated the 5th December 1911, from one Narayan. Prior to that date the plaintiff had notice of the execution of a contract of sale of the same property by Narayan to the defendant. It was held that the plaintiff having purchased with notice of the defendant's contract, his suit for possession must fail. The Court said: "The question is whether the defendant has a good defence to a suit by a purchaser from Narayan who can rely upon a registered sale-deed and whether he can, notwithstanding the sale-deed, retain possession of the property on the ground that the plaintiff purchased with notice of the defendant's contract...It is not

(1) (1916) 40 Bom. 498 at p. 502.

contended that in the defendant's contract any date is fixed for performance nor is there any evidence that before he learnt of the plaintiff's purchase, the defendant had any notice that the vendor would refuse performance. Therefore, at the date of the plaintiff's suit, namely, the 16th of April 1912, a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation. It must not be taken from the above remarks that the defendant would be in a worse position in relation to the plaintiff if at the date of suit his right to sue his vendor for specific performance had been barred, since he is a defendant now relying up on his possession."

In *Lalchand v. Lakshman*⁽¹⁾ the facts were different. The defendant who was in possession had filed a suit for specific performance against his vendor which had been dismissed, and accordingly it was held that the plaintiff who had executed a conveyance of the property without its being registered was entitled to recover against his purchaser.

Then there is a Full Bench decision in *Bapu Apaji v. Kashinath Sadoba*⁽²⁾ where it was decided that "where the plaintiff being the owner of certain immoveable property seeks to recover possession of that property and there are no facts operating to his prejudice it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant, who has taken possession under the

1921

VENKATESH
DAMODAR
v.
MALLAPPA
BHIMAPPA.

(1) (1904) 28 Bom. 466.

(2) (1916) 41 Bom. 438.

1921.

VENKATESH
DANODAR
v.
MALLAPPA
BHIMAPPA.

agreement for sale and is willing to perform his part of it with the plaintiff." That decision was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. That argument must also apply where the vendee in possession has allowed the time for filing a suit for specific performance to expire.

In this case, therefore, the defendant is entitled to remain in possession against the plaintiff. He will not be able to sue the plaintiff for a sale-deed, and so will have to remain in possession for twelve years before he can acquire a good title, but in the light of our decision the plaintiff might now be well advised if he passed the sale-deed. The appeal will be dismissed with costs.

SHAH, J.:—I agree.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

December 6.

GANESH RAMCHANDRA KULKARNI (ORIGINAL PLAINTIFF), APPELLANT
v. LAKSHMIBAI BHRATAR VENKATESH NARAYAN KULKARNI
AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Hereditary Offices Act (Bom. Act III of 1874), section 5—Money decree against Vatandar—Execution after death of judgment-debtor—Vatan property purchased at Court sale by a Vatandar of same Vatan—Suit by reversioners to set aside sale—Validity of sale—Res judicata.

In execution of a money decree, obtained in his life-time against a deceased Vatandar, his Vatan property was put up for sale and purchased by a Vatandar of the same Vatan in 1896. In the execution proceedings the judgment-debtor

* Second Appeal No. 912 of 1918.