APPELLATE CIVIL.

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

1922.
January 31.

MAHAMADSAHEB WALAD IBRAHIMSAHEB (ORIGINAL DEFENDANT), APPELLANT *v.* TILOKCHAND ABEERCHAND MARWADI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Indian Limitation Act (IX of 1908), Article 142—Suit to recover possession of open sites adjacent to a shop—Title held proved—No satisfactory evidence of possession on either side—Presumption that possession goes with title.

In 1893, the plaintiff purchased at a Court sale, a shop and two open sites adjacent to it, and was placed in possession on the 18th July 1896. In 1916, the plaintiff sued to recover possession of the open sites alleging that he had been dispossessed unlawfully by the defendants in 1913. The lower Courts found that the plaintiff's title to the property was proved, but as to possession it was found that the evidence of the witnesses on both sides was unworthy of credence.

Held, allowing the plaintiff's suit, that the initial fact that the plaintiff's title was proved came to his aid, and, in view of the facts found and the position of the open sites with reference to the shop, raised the presumption, that had not been rebutted, that possession went with the title.

SECOND appeal against the decision of D. D. Cooper, Assistant Judge of Sholapur, reversing the decree passed by V. G. Sane, Subordinate Judge at Sholapur.

Suit to recover possession.

In 1893 the plaintiff purchased at a Court sale a shop and two open sites adjacent to the shop. He alleged that he went into the possession of the shop and open sites in 1896 and continued in possession till 1913 when he was dispossessed of the open sites by the defendant.

The defendant pleaded that the plaintiff was not the owner of the sites and had never been in possession thereof and that the defendant had been in possession as owner for a number of years.

* Second Appeal No. 26 of 1921.

The Subordinate Judge held that the sites in dispute were purchased by the plaintiff at the auction sale in 1893 but that his possession within twelve years was not proved. He, therefore, dismissed the suit.

On appeal, the Assistant Judge held that the plaintiff's title by purchase was proved and he was of opinion that the evidence on both sides as to possession being unsatisfactory, the presumption that possession goes with title arose in favour of the plaintiff. He, therefore, decreed the suit observing as follows :—

The lower Court treats the evidence of the witnesses on behalf of the plaintiff as unreliable. I concur with this opinion but must add that that on behalf of the defendants is equally weak and unworthy of credit. In order to bolster up the case both the parties have produced evidence of the most unsatisfactory and unreliable character. For reasons which remain unexplained none of them has produced his rent-notes. I look upon the whole of the oral evidence with the greatest doubt and suspicion and am not prepared to believe a single statement of these witnesses, whether it goes in favour of the party citing him or against him.

The plaintiff having established his title over the plaint property he can rely upon the presumption that possession goes with the title. There being no satisfactory evidence in rebuttal the presumption must be given effect to (vide the Privy Council Ruling in 20 Weekly Reporter, page 25, and the ruling in I. L. R. 33 Bom., page 712).

In determining the question of possession due regard must be had to the nature of the property in dispute. The plaint property is not capable of the same sort of user or enjoyment as a house or a piece of agricultural land is.

Defendant appealed to the High Court.

Gokhale with *V. V. Bhadkamkar*, for the appellant :—This is a suit in ejectment. It is for the plaintiff to prove title and possession within twelve years prior to suit : *Rani Hemanta Kumari* v. *Maharaja Jagadindra Nath Roy*[1]. The lower appellate Court finds that the oral evidence on behalf of the plaintiff is not reliable. If so, the defendant who was in possession at the date of the suit, should be presumed to have

(1) (1903) 8 Bom. L. R. 400.

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been in possession adversely. The result will be that the title of the plaintiff will cease to be useful, having been lost by our adverse possession and it will be wrong to presume that the plaintiff was in possession prior to the alleged dispossession.

P. B. Shingne, for respondent No. 1:—Plaintiff bases his title on an auction purchase which has been amply proved. He was obstructed when he went to take possession and the obstruction was removed by the Court and the plaintiff got possession. Defendant had notice of this. It is unlikely that the plaintiff would allow he possession to be lost. The open site in dispute was necessary for the enjoyment of the house, which admittedly belongs to the plaintiff and the defendant is owner of the remaining open site. Under these circumstances possession must be presumed to have been with the plaintiff; vide *Ganpati* v. *Raghunath*[a].

MACLEOD, C. J.:—The plaintiff filed this suit to recover possession of the two open sites described in the plaint. He alleged dispossession by the defendant unlawfully about three years prior to the suit. The defendant alleged that the plaintiff was not the owner of the plaint property; that he had never been in possession or enjoyment of it; that the defendant had been in possession for many years as owner; that the suit was time-barred; and that the cause of action did not accrue in 1913. The main issues were: (1) Does the plaintiff prove that the plots in suit were purchased by him at the auction sale in 1893; and (2) is it proved that the plaintiff was in possession within twelve years before the suit. The first issue was found by the trial Court in the affirmative, the second in the negative. The result was that the suit was dismissed.

[a] (1909) 33 Bom. 712.

In appeal the learned Judge was of opinion that the evidence of the witnesses on both sides was unworthy of credit. But the plaintiff having established his title over the plaint property he could rely upon the presumption that possession goes with the title. There being no satisfactory evidence in rebuttal the presumption must be given effect to.

This raises a question which has often been discussed in these Courts, and eventually it may have to come up for decision before a Full Bench. No doubt if the suit comes under Article 142 of the First Schedule of the Indian Limitation Act time begins to run from the date of the dispossession. But if the plaintiff alleges he is dispossessed within twelve years of the suit, then the question must arise, according to the circumstances of each case, how far the plaintiff has correctly fixed the date of dispossession, and how far the onus lies on the defendant to show that that date was wrong. I may refer to *Secretary of State for India* v. *Chelikani Rama Rao*[1] and *Kuthali Moothavar* v. *Peringati Kunharankutty*[2] where their Lordships said on the question of the *onus probandi* in cases where title has been proved :

"Standing a title in 'A', the alleged adverse possession of 'B' must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor."

We take it that the general principle is as laid down by the Privy Council in *Rani Hemanta Kumari* v. *Maharaja Jagadindra Nath Roy*[3] that it is for the plaintiff in a suit for ejectment to prove possession prior to the dispossession which he alleges. At the same time, on this question of evidence the initial fact of the plaintiff's title comes to his aid, with greater or

[1] (1916) L. R. 43 I. A. 192.

[2] (1921) L. R. 48 I. A. 395 at p. 404.

[3] (1906) 8 Bom. L. R. 400.

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less force according to the circumstances established in evidence. If it is proved that the plaintiff has title and obtained possession under that title, then the general presumption of law is that possession goes with the title.

In *Ganpati* v. *Raghunath*[1] the plaintiff sued to have it declared that the land described in the plaint belonged to him and to recover damages from the defendant for wrongfully taking possession of it, and for possession. The learned Chief Justice at p. after referring to the evidence with regard to possession, which had been found to be unsatisfactory, said:

"Upon that finding as to the present state of facts and having regard to the statement of the defendant's father to which we have already referred, we have to consider whom the possession of the vacant land must be presumed to have been with, in the absence of direct evidence. Now it is held in the case that the title to this land was in the plaintiff and it is held that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land. That being so a case is made out for the application of the presumption stated by their Lordships of the Privy Council in *Runjeet Ram Panday* v. *Goburdhun Ram Panday*[2], that possession goes with title. No contrary presumption adverse to the plaintiff can, we think, arise from the wrongful acts of the defendant's father in 1880, which were promptly repudiated by him when he was charged in the Magistrate's Court."

Now a reference to the map in this case would show that the plaint sites lie adjacent to and appurtenant to the shop which was purchased by the plaintiff together with the sites and it certainly would not be necessary for him to preserve evidence that ever since the date of his purchase he was in active possession of these open sites. Possession of those sites would naturally go with the possession of the shop, and when the defendant asserted his right over the open sites he would have to show in the absence of any evidence that these sites ceased to be appurtenant to the shop, and that he had been in possession adversely against the owner of

(1) (1909) 33 Bom. 712. (2) (1873) 20 W. R. 25.

the shop. Therefore this is one of those cases in which the fact of the plaintiffs' title comes to his aid with greater force as far as the evidence goes with regard to the possession of the open sites; and eliminating all the oral evidence on both sides as being unsatisfactory, (and naturally, considering the position of these open sites, and the difficulty of proving active user, it would be unsatisfactory), we think the learned Assistant Judge was perfectly right in holding that possession went with the title. Therefore, unless the defendant could show that he had been in possession adversely to the plaintiff for more than twelve years, the plaintiff would be entitled to a decree. The decree of the lower appellate Court is varied by eliminating the direction as to past mesne profits. In other respects the decree is confirmed and the appeal dismissed with costs.

Decree varied; appeal dismissed.

J. G. R.

APPELLATE CIVIL.

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

1922.

January 5.

ISHRAPPA GANAP HEGDE (ORIGINAL PLAINTIFF), APPELLANT *v.* MANAGER KRISHNA PUTTA SHANKAR HEGDE AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 5), RESPONDENTS*.

Hindu law—Partition—Sale of co-parcener's interest in a particular item of property—Suit for partition of specific property—Suit not maintainable—General suit for partition necessary.

Where a Hindu co-parcener sells his interest in a particular item of property belonging to the joint family, a suit by the vendee for partition of the specific property cannot lie. His remedy will be to sue for general partition.

Pandu Vithoji v. *Goma Ramji*[1], relied on.

*Second Appeal No. 380 of 1920.

[1] (1918) 43 Bom. 472.