

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Kanga.

1922.

February 3.

RAGHUNATH WAMAN MATAPURKAR AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* KONDIBA BABAJI MOKASHI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS².

Symbolical possession—Decree—Execution—No relief granted by the decree against parties in possession—Civil Procedure Code (Act V of 1908), Order XXI, Rule 36—Indian Limitation Act (IX of 1908), Article 142.

One P, a brother of the plaintiffs, filed a suit for partition of plaintiff property, to which the defendants were made parties as persons in possession. A decree for partition was made in 1907, but no relief was granted against the defendants who continued in possession as before. In 1911, the plaintiffs obtained, in execution of the decree, a formal receipt from the Court for possession of the property. In 1919, the plaintiffs filed a suit in ejectment, alleging that they had been dispossessed wrongfully by the defendants, and for the purpose of proving their own prior possession relied upon the Court's receipt above mentioned,

Held, that the possession given under the receipt was not symbolical possession as justified by the Civil Procedure Code, 1908, no order or decree for ejectment having been passed in the partition suit against the defendants, and that the prior possession had, therefore, not been proved.

Radha Krishna v. Ram Bahadur⁽¹⁾, distinguished and *Mahadev Sakharam v. Janu Nanji Hatle*⁽²⁾; followed.

APPEAL under Letters Patent against the decision of Macleod C. J. confirming the decree passed by J. N. Bhatt, Assistant Judge, Poona, confirming the decree passed by V. N. Sathe, Subordinate Judge at Haveli.

Suit to recover possession.

The property in suit originally belonged to one Vinayak. By a deed, dated the 4th January 1893, Vinayak sold the property to Vasudev (plaintiff No. 2). Vasudev (plaintiff No. 2), Raghunath (plaintiff No. 1) and one Purshottam were brothers forming a joint Hindu family.

¹ Letters Patent Appeal No. 9 of 1921.

⁽¹⁾ (1917) 20 Bom. L. R. 502, P. C.

⁽²⁾ (1912) 36 Bom. 373.

In 1903 Vasudev (plaintiff No. 2) filed a suit against defendant No. 2 with others for possession. The allegation then was that the defendants had obstructed the plaintiff in taking possession. The suit was withdrawn.

Thereafter in 1907 Purshottam filed a Suit No. 117 of 1907 for partition against the present plaintiffs, his brothers and defendant No. 2. Defendant No. 2 and others were added as being parties in possession. In that suit the decree was passed against the plaintiffs for partition but no order was made against the defendants in possession.

In execution of the decree in Darkhast No. 135 of 1909, the defendants obstructed the partition of lands. A report was made by the Surveyor to the Mamlatdar complaining about the obstruction caused by the defendants. The matter was reported to the Court and the Court gave instructions to the Collector to the effect that the obstruction of the defendants would be of no avail. The matter was then again referred to the Surveyor and before the Surveyor, on the 30th May 1911, the two plaintiffs signed an acknowledgment that they had received possession of the lands in suit.

The Subordinate Judge held that the plaintiffs' title to the land was proved but he found that they had not proved their possession within twelve years as they did not get actual possession of the land in 1911 in execution of the decree of 1907. The suit was, therefore, dismissed under Article 142 of the Limitation Act.

On appeal the Assistant Judge confirmed the decree observing as follows :—

“I have, therefore, no hesitation in agreeing with the view of the learned Sub-Judge that the appellants did not obtain any actual possession under the partition decree. The decree does not show that they or the plaintiff of the suit were entitled only to symbolical possession. The *tabeyadi* (Exhibit 27) cannot, therefore, be interpreted to mean that the appellants had

1922:

RAGHUNATH
WAMAN
v.
KONDIBA
BABAJI.

1922.

RAGHUNATH
WAMAN
v.
KONDIBA
BABAJI.

obtained even symbolical possession. Assuming that it can be so interpreted still symbolical possession is not real possession nor is it equivalent to real possession under the Civil Procedure Code, except where the Code expressly or by implication provides that it shall have that effect (36 Bom. 373 F. B.).

The result is to show that the appellants had no possession. The lease, Exhibit 12, is a sham. The person who passed it had no possession. The appellants having no possession ever since the date of their purchase in 1893, their suit is time-barred under Article 142 of the Limitation Act."

The plaintiffs appealed to the High Court.

The appeal was heard by Macleod C. J., who dismissed it under Order XLI, Rule 11.

The plaintiffs preferred an appeal under the Letters Patent.

A. G. Desai, for the appellant.

S. C. Joshi for *P. V. Nijsure*, for respondent No. 2.

PRATT, J. :—This is a suit by the plaintiffs to recover possession of property of which they claim title, from the defendants, alleging prior dispossession. Both the lower Courts have found that the plaintiffs' title to the property in suit is proved but their suit has been dismissed on the ground that they have not shown, as they should show under Article 142 of the Limitation Act, that they were in possession within twelve years of the suit.

Now the various proofs which the plaintiffs gave of possession are all issues of fact disposed of by the judgments of the lower Courts with the exception of one that survives in this appeal. That is the plaintiffs' claim to have obtained possession under execution proceedings which followed on a partition suit filed by their brother in 1907. In that suit the two plaintiffs were the 1st and 2nd defendants and a decree for partition was made on the 11th October 1907. The plaintiffs claim that they got possession of the property in execution proceedings under that decree and

that the defendants were bound because they were made parties in that suit.

Now the suit was a partition suit filed against the two plaintiffs by their brother and the defendants in this suit were impleaded on the ground that they were in possession and colluding to defeat the plaintiff. The suit was, therefore, in effect a suit for partition as against the present plaintiffs and a suit for ejectment as against the present defendants. The decree, however, that was made gave the relief of partition only as between the two present plaintiffs and their elder brother but no relief was given as against the present defendants. The execution proceedings were referred to the Collector on the 17th December 1910 and the Surveyor, who was the ministerial officer of the Collector to make the partition, reported that he was unable to make the partition because the present defendants claimed that they were in possession and that the land was theirs. On this report, the Subordinate Judge gave instructions to the Collector to the effect that the obstruction of the defendants would be of no avail. The matter was then again referred to the Surveyor and before the Surveyor, on the 30th May 1911, the two plaintiffs signed an acknowledgment that they had received possession of the land in suit.

Now the acknowledgment of the 30th May 1911 does not show that the defendants were dispossessed of the land in suit or that physical possession was given. Mr. Desai, however, contends that the transaction of that date amounted to delivery of symbolical possession and that in the recent case of *Radha Krishna v. Ram Bahadur*⁽¹⁾, the Privy Council have held that symbolical possession is sufficient to interrupt adverse possession of a person who was a party to the proceeding in

1922.

RAGHUNATH
WAMAN
v.
KONDIBA
BABAJI.

(1) (1917) 20 Bom. L. R. 502, p. c.

1922.

RAGHUNATH
WAMAN
v.
KONDIBA
BABAJI.

which possession was ordered and given. But this judgment was given in a case where the land was in the possession of cultivating tenants and proceeds on the basis that the case was one in which symbolical possession could be given. It in no way affects the Full Bench ruling of this Court in *Mahadev Sakharam v. Janu Namji Hatle*⁽¹⁾, that symbolical possession is effective only in the cases in which the Code recognises symbolical possession. Here if symbolical possession was given, it could only be on the assumption that defendants who were in possession were not bound by the decree : Order XXI, Rule 36. If they were bound by the decree then the so-called symbolical possession was ineffective. Further it is not a case which can be brought within the Privy Council ruling because though they were parties to the partition suit yet in substance the suit against them was only for ejection and no order was passed nor any decree given against them for ejection.

On these two grounds, therefore, (1) possession given was not symbolical possession as justified by the Code, and (2) they were not in substance parties to the suit, the case is outside the scope of the Privy Council ruling.

We, accordingly, confirm the decree of the lower Court and dismiss this appeal with costs.

Decree confirmed.

J. G. R.

⁽¹⁾ (1912) 36 Bom. 373.