(1910) 08 BOM CK 0022

Bombay High Court

Case No: Appeal No. 8 of 1910

Vasudeo Atmaram Joshi		APPELLANT
	Vs	
Eknath Balkrishna Thite		RESPONDENT

Date of Decision: Aug. 23, 1910

Acts Referred:

- Limitation Act, 1963 - Article 142, 144

Citation: (1910) 12 BOMLR 956

Hon'ble Judges: N.G. Chandararkar, J; Heaton, J

Bench: Division Bench

Final Decision: Allowed

Judgement

N.G. Chandararkar, Kt. J.

1. The question of law for determination in this appeal is, whether the suit brought by the father of the appellants, since deceased, to establish his right to attach and sell the property In dispute in execution of a money decree is, for the purposes of limitation, governed by Article 142 or Article 144 of Schedule I to the Limitation Act.

2. That question turns upon the following facts, which are not in dispute.

3. The father of the appellants, having obtained a decree for money against the third respondent, Ramchandra Namdeo, and his brother Dnaneshwar Namdeo, deceased, represented by his son Kondi, in Suit No. 234 of 1900, attached the lands in dispute in execution as belonging to his judgment-debtors.

4. The first respondent, Eknath Balkrishna, thereupon intervened and applied to have the attachment raised on the ground that the land had belonged originally to one Vithal, who had sold it to the second respondent, and that the latter had mortgaged it to the intervenor (the first respondent). The application having been allowed, the appellants'' father brought the suit, which has given rise to the present appeal, for a declaration that the lands in dispute were liable to be attached as those

of his judgment-debtors, the first respondent and Dnaneshwar.

5. The defence was that the second respondent''s predecessor-in-title, one Vithal, had acquired a title to them by purchase, from the father of the appellants'' judgment-debtors in 1878, and that the title of the latter was barred by limitation.

6. The Courts below have found the purchase not proved. So the other defence, that of limitation, alone remains.

7. On that question it is found as a fact by those Courts that the got into possession, without any title, only in 1898, so that the respondents, who claim under him and resist the appellants'' right to attach and sell the property as belonging to their judgment-debtors, are mere trespassers. But it is contended for those respondents that, though they have acquired no title to the property by adverse possession for the statutory period of twelve years, the appellants are not entitled to succeed and recover possession, unless they prove possession within twelve years next preceding this suit brought in 1905.

8. And they maintain that, on the facts found by the lower Courts, the appellants were not in possession either by themselves or through their predecessors-in-title within the twelve years contemplated by Article 142 of Schedule I to the Limitation Act.

9. The facts are these. The property belonged to Namdeo, who died in 1879, leaving two sons, the third respondent and his brother Dnaneshwar (represented now by the 4th respondent), who were then minors. On Namdeo''s death, his mistress Ambu, who had lived with him, took charge of his minor sons, administered to their wants, and entered into possession of the property, including that now in dispute, which they had inherited from their father. When they arrived at the age of majority, they found that Ambu claimed the property in her own right.

10. In 1891, the third respondent and his brother Dnaneshwar sued Ambu for possession of the lands and obtained a decree on the 30th of August 1892. That decree was confirmed in appeal on the 15th of June 1894. On the 26th of June 1897, the appellants'' father applied for its execution, but the application was dismissed as barred by limitation, and execution was refused.

11. Relying on these facts, the 1st and 2nd respondents urge that, from at least 1891 to 1897, Arabu was in possession; that from 1898 Vithal, and after him they, have been in possession; and that, therefore, the appellants'' judgment-debtors have been out of possession for more than twelve years next preceding the suit.

12. That would be so, if Article 142 of Schedule I to the Limitation Act applied. That article contemplates a suit'''' for possession of Immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession." The present suit has been brought by the appellants, u/s 283 of the old CPC (Act XIV of 1882), to establish their right to attach and sell the

property in dispute as that of their judgment-debtors, the Ist respondent and Dnaneshwar (father of the 4th respondent), in execution of their money decree. In such a suit the appellants must prove that on the date of the attachment, which was subsequently raised by order of the Court on the application of the first respondent, their judgment-debtors had a subsisting right to the property : Harishankar Jebhai v. Naran Karsan ILR (1893) 18 Bom. 260. The suit must then be tried as if it were a suit for possession by the judgment-debtors.

13. So regarded, it is not the case here of the judgment-debtors having been dispossessed or having discontinued possession, while in possession of the property. The allegation, which has been found proved, is that, when Namdeo, father of the judgment-debtors, died, leaving them minors, his mistress Ambu looked after them by administering to their wants, and entered into possession of their property.

14. The Subordinate Judge, who tried the suit, held that Ambu''s possession had been from the beginning wrongful, and he negatived the plea of the appellants'' father that she had commenced her vahivat on behalf of his judgment-debtors, who had then been minors. The Subordinate Judge with appellate powers has recorded no finding on that plea. But the law is, as pointed out by Lord Hardwicke in Morgan v. Morgan (1737) 1 Atk. 489 where any person, whether a father or a stranger, enters upon the estate of an infant, and continues in possession, this Court will consider such person entering as a guardian to the infant" (See other decisions to the same effect collated in the notes to the case of Taylor v. Horded). Ambu''s possession must, therefore, be deemed to have begun as that of bailiff or agent for the minors and to have continued as such until, after the minors had arrived at the age of majority, she did something to convert it into a wrongful possession on her own account.

15. It was only in 1891 that she denied, their title, and in consequence she had to be sued. But there had never been any dispossession by Ambu of the appellants'' judgment-debtors while they had been in possession, because it was she who had been in possession. "Dispossession is where a person comes in and drives out the others from possession:" per Fry J. in Rains v. Buxton (1880) Ch. D. 537.

16. In a suit against her, her plea of limitation would be decided by the application, not of Article 142, but of Article 144 : Lallubhai Bapubhai v. Mankuverbai ILR (1876) . 2 Bom. 413; Dadoba v. Krishna ILR (1879) 7 Bom. 34.

17. On the facts alleged and found proved, Ambu herself was wrongfully dispossessed in 1898 by Vithal, under whom the first respondent claims. The appellants'' judgment-debtors do not claim under or through Ambu; rather they claim against and in spite of her; and it is found in the judgment under appeal that the respondents claiming under Vithal cannot tack on the period of their possession to Ambu''s. That is not contested before us. So, it cannot be said that the

dispossession of Ambu by Vithal in 1898, when she was in possession of the property, was dispossession of the appellants'' judgment-debtors. Article 142 is out of place in this respect also.

18. So much for the dispossession required to bring the case under Article 142. But the article also contemplates discontinuance of possession by the person suing. As was said by Fry J. in Rains v. Buxton (1880) 14 Ch. D. 537, "discontinuance is where the person goes out and is followed into possession by other persons." It implies that the person discontinuing has given up the land and left it to be possessed by any one choosing to come in. In the present case there was, either on the allegations in the pleadings or on the facts found, no such abandonment. It is not the case of any party, and it is not the finding of the Courts below, that the appellants'' judgment-debtors, while in possession, relinquished it, as if they did not care for it, and that in consequence the respondents followed them into possession.

19. The decree for possession obtained by the appellants'' judgment-debtors the 3rd respondent and Dnaneshwar) against Ambu has, no doubt, become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation. But nevertheless the right established by it remains; and though that right can not be enforced as against Ambu by execution through the Court, the decree-holders can enter by ousting any trespasser, Ambu included : Bandu v. Naba ILR (1890) 15 Bom. 238.

20. Under these circumstances, there being no allegation of possession in the appellants'' judgment-debtors lost by dispossession or discontinuance of possession, but the case put forward being a title in them established by their decree against Ambu and a wrongful possession obtained from her, after the decree, by Vithal under whom the 1st and 2nd respondents claim, the limitation applicable to the suit is that provided by Article 144, not Article 142 of the statute, according to the ruling of this Court in Fuki Abdulla v. Babaji Gungaji ILR (1890) Bom. 458, where the distinction between the two articles is explained. The first two respondents admitted in their written statement the original title of Namdeo, from whom as heirs the appellants'' judgment-debtors derive their ownership, but they pleaded that the title had become extinct by reason of the alleged purchase by Vithal from Namdeo in 1878 and of Vithal''s adverse possession for twelve years from that year. The purchase being found not proved, the respondents in question can succeed only by proving their right by adverse possession for twelve years. They have failed to prove it.

21. In this respect the case resembles Ganga ayal Nagu Kaval Mhatra v. Nago Daya Mhatra (1887) P.J. 242 There the plaintiff, who sued for possession on the strength of her title and defendants'' tenancy under her, was met by the defence that the defendants had obtained the land from her, first, under a certain agreement, and afterwards under a mortgage, and that they had been in adverse possession for more than twelve years. This Court held that, though the plaintiff had failed to prove

the tenancy of the defendants set up by her, yet, as the defendants had admitted the plaintiff''s title but alleged having come into possession under her, the defendants "cannot claim to retain the land except by proving that they are entitled to do so in virtue of one or other of the alleged transactions with the plaintiff or that their possession has been in fact adverse for twelve years."

22. For these reasons the decree appealed from must be set aside and that of the Subordinate Judge with appellate powers restored, with the costs of the second appeal and this appeal under the Letters Patent on the 1st and the 2nd respondent, who were respectively defendants Nos. 1 and 2 in the suit.

Heaton, J.

23. The facts are recited in the judgment of the learned Chief Justice from-whose decision this is an appeal under the Letters Patent.

24. The plaintiff''s claim is to make good the ownership of defendants Nos. 3 and 4 over the laud in suit. It was opposed by defendants Nos. 1 and 2 who claimed independent ownership. It was objected that the claim to establish the title of defendants Nos. 3 and 4 was barred by Article 142 of the Schedule to the Indian Limitation Act. But it seems to me that neither in form nor in substance is this claim of the kind contemplated by Article 142. It is in effect a claim by an owner for his land against a trespasser; and the cause of action is not based on dispossession or discontinuance of possession, but simply on the allegations that defendants Nos. 3 and 4 are the owners of the land and that defendants Nos. 1 and 2 have no right to be there. It is established that defendants Nos. 3 and 4 are the owners and that defendants Nos. 1 and 2 have no right to be there. It is also established that defendants Nos. 1 and 2 first came into possession within twelve years of the institution of the suit and that there is no title made good by adverse possession against defendants Nos. 3 and 4. These defendants have the title and their title still subsisted when this suit was brought; it had not been extinguished.

25. I do not think that Article 142 has any application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession. It was indeed urged that it is a general principle that any one suing in ejectment must prove possession within twelve years and the authorities seem to bear out that contention : but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title. But it is not the only one; there is another Which in some cases is equally good; and that is an assertion of title made in Court and established by a decree. That is good against those who are party defendants to the suit; and if the same title is reasserted and made good, as here in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title-claimant has or has not been in possession within twelve years; unless the opponent can defeat the title by

adverse possession. There is no such defeat in this case.

26. Therefore I am of opinion that the appeal must succeed?