

APPELLATE CIVIL.

Before Duval and Mitter JJ.

SABJAN BIBI

v.

ASHANULLA BEPARI.*

Partition—Suit for partition, maintainability of—Possession of co-owner, effect of—Partition, significance of—Limitation—Adverse possession of co-owner—Civil Procedure Code (Act V of 1908), s. 47.

It is essential for the maintainability of a suit for partition that the plaintiff should be in actual or constructive possession of the properties.

Bidhata Rai v. Ram Chariter Rai (1) relied on.

Whether a plaintiff in a suit for partition has such possession or not is to be determined in view of the principle that the possession of one co-owner is *prima facie* the possession of all the co-owners and his possession must be presumed to be in conformity with his right and title as co-owner. If it is established that he is not in possession at all of any portion of the joint property and that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* court-fees upon a plaint appropriately framed for that purpose. This follows from the principle that partition signifies the transformation of joint possession into separate possession. If, however, the possession of the plaintiff is admitted or established over what forms part of the joint estate, the suit does not cease to be one for partition, merely because the defendant denies the title of the plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile title and adverse possession therein.

Corea v. Appuhamy (2), explained.

If the right of the plaintiff to execute the decree for *khas* possession is barred by the statute of limitation, he cannot again sue for recovery of *khas* possession.

*Appeal from Order, No 473 of 1925, against the order of Kunja Behary Ghose, Subordinate Judge of Rangpur, dated Aug. 28, 1925, reversing the order of Manmatha Kumar Roy, Munsif of Gaibanda, dated Nov. 28, 1923.

(1) (1907) 12 C. W. N. 37.

(2) [1912] A. C. 230.

Where the defendant did not raise the plea, in the Court of first instance, in bar of the suit under section 47 of the Code of Civil Procedure, the plaintiff should be given an opportunity of showing that his right to execute the decree for joint possession is still subsisting and is not barred by limitation.

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APPEAL FROM APPELLATE ORDER by Sabjan Bibi and another, the plaintiffs.

This appeal arose out of a suit for partition. In a previous suit brought by the plaintiffs against the defendants, the plaintiffs' right was declared to 7 annas $10\frac{2}{8}$ pies share of the lands in suit and they were given a decree for joint possession of the lands to the extent of their share with the defendants. The plaintiffs, without executing the decree in the said suit, brought the present suit for partition and asked for delivery of possession of their share as declared by the previous decree by metes and bounds. The Court of first instance decreed the suit, but, on appeal, the lower appellate Court held that the plaintiffs were not entitled to get a decree for partition before they obtained joint possession in execution of their previous decree and that the present suit was not maintainable in view of the provisions of section 47 of the Code of Civil Procedure. The said Court, however, remanded the suit to the lower Court for being treated as a proceeding in execution subject to any objection as to limitation. Against the said order of remand, the present appeal was preferred.

Mr. Atul Chandra Gupta (with him *Babu Jitendra Kumar Sen Gupta*), for the appellants. Section 47 has no application. The relief claimed in this suit, viz., partition, could not be claimed in execution of the decree for joint possession.

A co-owner has an indefeasible right to obtain partition of the lands of which he is owner. The plaintiffs'

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right to a share in the lands was declared in the previous suit. Their right to partition cannot, therefore, be questioned in the present suit.

The plaintiffs' title as co-owner was declared in presence of the defendants on the 31st May, 1919, and the present suit was brought in 1923. Unless there is an ouster of the plaintiffs for the statutory period since 31st May, 1919, their right to partition cannot be questioned. See *Corea v. Appuhamy* (1) and *Jogendra Nath Rai v. Baladeo Das* (2).

Moulvi Nasim Ali (with him *Babu Diptendra Mohan Ghosh*), for the respondents. The plaintiffs brought the previous suit on the allegation that they were out of possession. Twelve years have passed since the date of dispossession as alleged in the previous suit. The plaintiffs, therefore, could not claim partition unless they recovered possession since the date of dispossession alleged in the previous suit. The lower Appellate Court is, therefore, right when it says that unless the plaintiffs had the right to recover possession by execution of the previous decree, the right to partition was extinguished.

Partition means conversion of joint possession into separate possession. Unless the plaintiffs have got joint possession of the disputed lands with the other co-owners, they cannot sue for partition: *Bidhata Rai v. Ram Chariter Rai* (3).

Mr. Gupta, in reply. It is not correct to say that partition means conversion of joint possession into separate possession, but it is really conversion of joint ownership into separate ownership. Besides, the plaintiffs' title as co-owners being admitted, the plaintiffs should be considered to be in constructive

(1) [1912] A.C

(2) (1907) I. L. R. 35 Calc. 961, 968.

(3) (1907) 12 C. W. N. 37.

possession of the lands, the actual possession being with their co-owners.

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MITTER J. This appeal has been preferred by the plaintiffs and is directed against an order of remand. Plaintiffs' case is that the defendants kept the plaintiffs out of possession of the lands in suit and the plaintiffs, consequently, had to bring a title suit for recovery of possession of the lands. In that suit, plaintiffs got a declaration of title in respect of 10 annas $7\frac{1}{4}$ pies share. On appeal by the defendants, the extent of the plaintiffs' share was reduced to 9 annas $10\frac{2}{8}$ pies and plaintiffs' decree for *khas* possession in respect of that share was confirmed in appeal by the decree, dated the 31st of May, 1919. The plaintiffs asked the defendants to have the lands partitioned amicably and to give up possession of plaintiffs' share of the lands, but the defendants refused to give up possession and have been exclusively possessing all the lands. It may be mentioned here that it does not appear that the plaintiffs made any attempt to execute the decree for recovery of joint possession through Court. They did not even obtain symbolical possession. The plaintiffs commenced the present suit, to which this appeal relates, for partition of the lands in suit by metes and bounds and pray that they may be put in possession of the lands which may fall to their share on partition. There was also a prayer for recovery of mesne profits. One of the issues raised in the trial Court was:—Is the suit for *khas* possession barred by the law of limitation? The Munsif held that the suit was not so barred, as the previous title suit between the parties was decided in 1917 and the appeal was decided in 1919 and the present suit was

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instituted in the year 1925, *i.e.*, within 12 years from the date of decision of the first suit. The Munsif granted a preliminary decree for partition and appointed a Commissioner to effect the partition of the *jote* into two allotments, one for plaintiffs' share and the other for defendant No. 1's share, and directed that the plaintiffs would get *khas* possession of their lands. *Wasilat* was also decreed. On appeal by the defendants, the lower appellate Court held that plaintiffs' claim for *khas* possession was barred by section 47 of the Civil Procedure Code, but allowed the plaintiffs to convert the present suit into a proceeding in execution under section 47, clause 2 of the Code of Civil Procedure, subject to any objection as to limitation. But, as there was no sufficient material on the record to decide the question of limitation, he framed an issue on the point and remitted the case to the Court below for the trial of that issue. The issue which was framed by the lower appellate Court runs as follows :—“ If there is any bar of limitation to this suit being treated as a proceeding in execution ”. The lower Appellate Court further observed that “ as the finding of the lower Court on other points was not assailed and is not being disturbed in appeal, the suit will be decreed with costs if the issue is decided in plaintiffs' favour and will stand dismissed with costs if it is decided against them ”. Against this order of remand an appeal has been preferred to this Court and it has been contended before us by the learned advocate for the appellant that the lower Appellate Court is wrong in holding that section 47 of the Civil Procedure Code bars the present suit and that it should have held that the decree in the previous suit between the parties having declared plaintiffs' title they must be deemed to be in constructive possession of the suit lands and as they

were in possession within 12 years of the suit they are entitled to a decree for partition by metes and bounds and to a decree for recovery of possession after partition. We are unable to accept this contention, for we think that the plaintiffs cannot now be heard to say that they are in constructive possession of the disputed lands after having alleged in the previous suit that they were dispossessed in 1320 B. S. and having succeeded in the previous suit in obtaining a decree for *khas* possession on the basis of such allegation. Plaintiffs' present suit for partition must, therefore, be regarded as having been brought by persons who are out of possession of joint lands. Such a suit is not maintainable, for as has been pointed out in the case of *Bidhata Rai v. Ram Chariter Rai* (1), the plaintiff is entitled to maintain a suit for partition if his possession to some part of the joint property is admitted or established. It is essential that he should be in actual or constructive possession of the properties, and whether he has such possession or not is to be determined in view of the principle that the possession of one co-owner is *prima facie* the possession of all the co-owners, and his possession must be presumed to be in conformity with his right and title as co-owner. If it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* court-fees upon a plaint appropriately framed for the purpose. This follows from the principle that partition signifies the transformation of joint possession into separate possession. If, however, the possession of the plaintiffs is admitted or established over what forms part of the joint estate, the suit does not cease

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to be one for partition, merely because the defendant denies the title of plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile title and adverse possession therein.

It follows, therefore, that if the right of the plaintiffs to execute the decree for *khas* possession is barred by the statute of limitation he cannot again sue for recovery of *khas* possession. And, consequently, being out of possession, the plaintiffs are not entitled to sue for partition. In such a case the Court can only pass an ineffective decree for partition, for it cannot grant to the plaintiffs the relief of possession on partition. It has been ingeniously argued by the learned advocate for the appellants that his inability to execute the decree for joint possession, assuming such inability to exist, does not preclude him from suing for possession after partition, which is not the same as joint possession. This argument is unsound, for a suit for partition presupposes a joint possession either actual or constructive. Reliance has also been placed by the learned advocate for appellants on the case of *Corea v. Appuhamy* (1) for the proposition that the right to partition is not lost unless there is an ouster for the statutory period which would bar the title of the co-owner claiming partition. All that that case lays down is that a co-owner's possession of joint lands is not *prima facie* adverse against another co-owner and that a co-owner's possession is possession on behalf of all the other co-owners. But it is no authority for the proposition that where a co-owner admits that he is not in possession of joint lands and that the possession of the other co-owners is not possession on his behalf, but exclusive and hostile possession, still such hostile possession is to be regarded as possession on behalf of all including the

(1) [1912] A. C. 230.

excluded co-owner. In this view we think that the decision of lower Appellate Court is right and as the defendants did not raise the plea under section 47 in bar of suit in the Court of first instance plaintiffs should be given an opportunity of showing that their right to execute the decree for joint possession in the previous suit is still subsisting and is not barred by limitation. If the plaintiffs had obtained symbolical possession in execution of the decree in the previous suit, then that symbolical possession would have amounted to actual possession as between the plaintiffs and defendants and plaintiffs' right to sue for partition would have been subsisting within 12 years of the previous suit: see *Jug jobundhu Mukherjee v. Ram Chunder Bysack* (1), as also the decision of the Judicial Committee in *Midnapore Zamindari Company, Ltd. v. Naresh Narayan Roy* (2). But as we have stated at the outset that no symbolical possession was obtained in this case and the principle of the decision of the Judicial Committee does not apply.

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The result is that the order of the lower Appellate Court must be affirmed and the appeal dismissed with costs with 2 gold mohurs.

DUVAL J. I agree.

S. M.

Appeal dismissed.

(1) (1880) I. L. R. 5 Calc. 584.

(2) (1924) I. L. R. 51 Calc. 631; L. R. 51 I. A. 293.