

NOTES.

[" POSSESSION " UNDER Sec. 331, C. P. C. (1882)

The possession that is contemplated under that word in this and corresponding sections is not merely physical but includes also symbolical possession :—

- (1901) 25 Bom. 478 ;
- (1890) 14 Bom. 627 F. B. ;
- (1906) 33 Cal., 487=3 C. L. J., 293.]

[87] APPELLATE CIVIL.

The 4th November, 1880.

PRESENT :

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Virasami Mudali.....(Plaintiff) Appellant.

versus

Ramasami Mudali.....(Defendant) Respondent.*

Agreement—Condition precedent—Limitation—Specific Performance.

Two brothers, V and R, in 1861 agreed together that part of their house should be divided and part enjoyed in common. Each brother was to occupy an assigned division and have the use in common of the rest. If either wished to leave the house, he was bound to offer his share to the other at a fixed price ; or if he wished to purchase the share of the other, and the other refused to sell, then the party refusing to sell at a fixed price was bound to buy the share of the other brother who wished to purchase.

V called upon R in 1877 either to pay Rs. 418 or give up the house.

Held that this was an agreement enforceable by law ; that until demand no cause of action arose, and limitation only began to run from the demand ; that specific performance should be granted in the alternative.

Venkappa Chetti v. Akku (7 M.H.C.R., 219) distinguished.

THE plaintiff and defendant were brothers. In 1861 they entered into a written agreement that part of the house, in which till then they had lived jointly, should be divided and the remainder enjoyed in common, and that when either desired to leave the house, he should offer his share, except his share in certain trees in the backyard which should be paid for separately, to the other at a fixed price, *viz.*, 418 rupees ; or if he wished to purchase the share of the other, and the other refused to sell, then the one refusing to sell at the fixed price should buy the share of the other one (if he wished to sell).

On 16th October 1877, plaintiff being unwilling to reside any longer with defendant called upon him to fulfil the terms of the agreement, and either pay 418 rupees and 10 rupees for the trees in the backyard or deliver up possession of the premises.

The case was tried by Mr. Justice INNES on the 28th March 1878.

[88] *Nullathambi Mudali* for the Plaintiff.

Ratnavelu Mudali for the Defendant contended that the object of the agreement was to secure the property from alienation to strangers, and that specific performance could not be enforced after such a lapse of time.

* Appeal No. 25 of 1878 from the Original Side against a decree of Mr. Justice Innes dated 28th March 1878.

His Lordship's **Judgment** was as follows :—

“The translation appended to the document appears wrong. There is no allegation of an agreement in the sense of an agreement with consideration.

“The word used means ‘consent,’ ‘as I have consented.’ But if there was an agreement, the right to enforce it is barred. The right was a personal right, and in accordance with the ruling in *Venkappa Chetti v. Akku* (7 M.H.C.R., 219) could be exercised at once, and time therefore runs from date of the document.

“This was executed in 1861.

“Further, even if not barred, there has been too great delay to justify the Court in granting specific performance.

“Suit dismissed with costs.”

The plaintiff appealed.

R. Balaji Rau for Appellant.

Ratnavelu Mudali for Respondent.

The Court (KERNAN and MUTTUSAMI AYYAR, JJ.) delivered the following **Judgment** :—

Kernan, J.—The view I take of the contract between the parties, the two brothers, on the partition, as evidenced by the two agreements of the 13th November 1861, is this: Each brother was to occupy an assigned division, and have the use in common of certain portions not divided. If either wished to leave the house, he was bound to offer his share to the other at a fixed price, or if he wished to purchase the share of the other, and the other refused to sell, then the party refusing to sell at the fixed price is bound to buy the share of the other brother who wishes to sell, as he cannot buy. An option is given to each, but when the offer is made by one, the other is bound either to buy or to sell. I do not see anything in principle against such an agreement as this. Plaintiff is entitled, I should think, to relief in the alternative. Of course, if the party required to sell at the fixed [89] price has, with the knowledge of the other, made improvements, and if they cannot agree on the value of those improvements, then it may be held that (as this is a circumstance not provided by the agreement, and as the party insisting on performance of the contract knew of these improvements and did not then exercise his option before the improvements were made) it would be impossible to carry out the contract in its entirety, and therefore that performance should be refused, especially referring to the long lapse of time. It might, under such circumstances, be held that the party insisting on performance had waived his right. After improvements had been made performance could not be declared, except by consent, without payment of the full amount of improvements. Defendant, however, has not alleged improvements except at the Bar.

It seems to me that the *Statute of Limitation* does not apply, as the performance does not appear to have been refused until after service of notice of the 16th October 1877 (*see* Article 113*, Act of 1871; Article 113 of Act XV

* [Art. 113 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For specific performance of a contract.	Three years ..	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.]

of 1877). The case in 7 High Court, page 219, was on the *Limitation Act* XIV of 1859, Section 12.* The agreement was executed in two parts and both were produced and admitted.

Muttusami Ayyar, J.—This was a suit for specific performance. The plaintiff and the defendant are the sons of one *Arumachala Mudali*, since deceased, and on the 13th March 1861 they divided their family property. It is provided in the partition-deed executed by the defendant to the plaintiff that the defendant should enjoy the eastern portion of their family house at *Pudupakum*—the northern rooms, the big eastern room, and the room in the eastern verandah; that the plaintiff should enjoy the room in the western hall, the big room, and the room in the verandah; that both should enjoy in common the well, the privy, the bathing place, the backyard, the passage, the street pial, the portions of open ground, and the trees thereon according to a list prepared by them; and that defendant should pay taxes and cost of repair according to his share. The instrument then contains the following clause: “As I (defendant) have consented to give up to you at once the said house, if, while acting as aforesaid, you pay me Rs. 418, the price of my share of the said house and the estimated price of my trees, I have no right to make the said [90] house liable to others by mortgage, sale, or letting.” It was alleged by the plaintiff that he executed a similar partition-deed in favour of the defendant; that each was bound by the agreement either to give up his share in the house on receipt of Rs. 418 and a moiety of the value of the trees in the backyard, or to take the other share by making a like payment; that the defendant failed to act in accordance with the agreement, though the plaintiff called upon him to do so on the 16th October 1877; and that he was entitled to a decree directing the defendant either to pay him Rs. 418 and take the entire house, or to receive Rs. 418 and give up the house to him. The learned Judge who tried the case held that there was no agreement in the sense of an agreement with consideration; that the word used meant ‘consent’; that if there was an agreement, the right to enforce it was barred; that the right was a personal right; and that in accordance with the ruling in the case reported in 7 *Madras High Court Reports*, 219, it could be exercised at once; and that, even if not barred, there had been too great delay to the Court granting specific performance. It is argued in appeal that the suit is not barred by the *Act of Limitation*; that the deed of division has been misconstrued; and that the agreement is valid. Assuming that the partition-deed is authentic, and that there is a similar clause in the document executed by the plaintiff to the defendant, it seems to me that there was an actionable agreement, as was alleged in the plaint. It is true that the words are “I have consented”; but reading the whole of the document, I see no sufficient reason to doubt that the parties intended an agreement. Defendant’s promise to take the stipulated sum and give up the house is recited in the partition-deed as a reason for the defendant’s promise not to sell, or mortgage, or to let it to others. It is alleged in the plaint that the partition-deed executed by the plaintiff in defendant’s favour contains a similar promise for the plaintiff. If so, I do not see why these mutual promises should not be regarded the one as consideration for the other. The intention of the parties was to prevent a stranger from getting a share in the family house, which was not suscep-

What persons to be deemed to be under legal disability under preceding section.

*[Sec. 12 :—The following persons shall be deemed to be under legal disability within the meaning of the last preceding section—married women in cases to be decided by English law, minors, idiots, and lunatics.]

tible of separate enjoyment except in part, and to secure the whole house to one of the family by giving the plaintiff a right to take the house by paying the other the ascertained value of his share, or to receive a like sum [91] and give up his right to a share in it. In substance it is an arrangement which is usually made where a house does not admit of being divided into distinct and convenient moieties, with this difference, *viz.*, that so long as the parties to the suit chose to retain their shares and to enjoy in common portions of the house which did not admit of being divided without their usefulness being impaired, the agreement was not to come into force. I see nothing in this condition or agreement to render it unlawful.

Another question for decision is whether the agreement is barred by the *Act of Limitation*. This suit was brought in 1878, the agreement was made in 1861, and the plaintiff made a demand in October 1877. If a demand from the plaintiff is a condition, the suit is not barred; but if it refers to a personal right, enforceable at once, it would be barred. According to the intention of the parties it is, in my judgment, a condition. The house was joint property; until 1861 it was enjoyed in common; in 1861 it was found that the whole house could not be divided, and it was agreed that a portion should be divided and the remainder enjoyed in common; and that this state of things the parties agreed to terminate if either paid the other the value of his share. From the very nature of the case, the imperfect division made in 1861 was provisional, and the offer to pay the defendant the value of his share was a condition precedent to enforcing the agreement. In the case reported in 7 *Madras High Court Reports*, 219, the power of re-purchase was created by contract without any limitation of time within which it was to be exercised, and it was held that it could not be enforced after 12 years, as it could be exercised at once; but in this case the right was to be exercised only when either party did not wish that the imperfect division should continue and desired either to sell his share or buy the other's share.

Nor do I think that, if the right to sue accrued only in 1877, there was any unreasonable delay to bar specific performance.

We reverse the decree of the Court below, and the defendant agreeing in open Court to buy the share, right, and interest of the plaintiff in the house, yard and trees, and premises occupied in common, on payment of Rs. 418, it is ordered that the defendant do pay to the plaintiff the sum of Rs. 418 within one month from the 4th of November 1880, and that thereupon the plaintiff [92] do convey such share to the said defendant, and do deliver to the said defendant the possession of such share; and in default of the said defendant so paying the said sum of Rs. 418 to the plaintiff within the time aforesaid, it is ordered that the plaintiff be at liberty within one month from the 4th of December 1880 to pay the said sum of Rs. 418 into this Court, to be paid to the said defendant, and that thereupon the said defendant do convey his share, right, and interest in the said house, yard and premises occupied in common, to the said plaintiff, and do deliver possession of such share to the plaintiff; and in case of either party (bound to deliver possession) failing to deliver such possession, it is ordered that such possession be delivered to the proper party by the Sheriff of *Madras*.

We allow each party to bear his own costs of this suit throughout.