

Before Mr. Justice Banerji.

DEBA (DEFENDANT) v. ROHTAGI MAL (PLAINTIFF) AND RAM CHANDRA (DEFENDANT).\*

1906  
March 21.

Act No. XV of 1877 (*Indian Limitation Act*), schedule II, article 142—  
Suit by vendee for possession of immovable property—Vendor out of  
possession—Burden of proof.

Where a vendee of immovable property sues for possession, his vendor not having been in possession at the time of the sale, it lies upon the plaintiff to show that his vendor was in possession at some period within twelve years prior to the date of the suit. *Kashinath Sitaram Oze v. Shridhar Mahadev Patankar* (1) followed.

And when in such a case the property sold was a share in a house belonging to two separated brothers, it was held that the possession of one of the brothers could not be taken to be on behalf of the absent vendor.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Karamat Husain*, for the appellants.

Mr. *D. N. Ohdedar*, for the plaintiff-respondent.

BANERJI, J.—This appeal arises out of a suit brought by the plaintiff, Rohtagi Mal, for partition of a half share of a house and for possession of that share. The house originally belonged to two brothers, Badri and Shibba. It has been found that Badri was separate from Shibba and his son, the appellant, Deba. The plaintiff purchased the half share claimed by him from Ram Chandar, the son of Badri, on the 14th of January, 1897. He brought the present suit on the 17th of January, 1902. The Court of first instance decreed the claim, and this decree has been affirmed by the lower appellate Court. It is not easy to follow the reasoning of the learned Judge of the lower appellate Court. But upon his finding the suit must fail, as the plaintiff, was unable to prove that he or his vendor was in possession within 12 years preceding the date of the suit. The learned Subordinate Judge finds that Badri absconded from the village 22 or 23 years before the institution of the suit. He further finds that Ram Chandar was not in possession of the house, but left it shortly after the disappearance of his father, Badri. The plaintiff admittedly never got possession. Now the plaintiff could not succeed in his

\* Second Appeal No. 560 of 1904, from a decree of Mr. H. David, Subordinate Judge, Meerut, dated the 19th March, 1904, confirming a decree of Babu Ram Chander Chaudhri, Munsif, Meerut, dated the 26th November 1902.

(1) (1891) J. L. R., 10 Bom., 323.

1906

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DEBA  
v.  
KONTAGI  
M.L.

suit unless he could show that, if the suit had been brought by his vendor, the latter could have been entitled to a decree. The learned Subordinate Judge seems to think that because the property was not divided by metes and bounds the possession of Deba, who on the learned Judge's own finding, was in exclusive possession, was possession on behalf of Ram Chander also. I am unable to agree with this view. It is clear from the learned Judge's own finding that Ram Chander discontinued possession. Therefore it was for the plaintiff to prove that he had a subsisting title not barred by limitation on the date of the suit and article 142 of schedule II would apply. This view is supported by the ruling of the Bombay High Court in *Kashi Nath Sitaram Oze v. Shridhar Mahadev Patankar* (1). Following that ruling I hold that the onus was on the plaintiff to show that the claim was not barred by limitation and that his vendor had been in possession within 12 years before the date of the sale to him. As has been stated above, the plaintiff's vendor, Ram Chandar, was out of possession. Even if he was a minor during the period that he was out of possession, he was certainly of age when he made the sale in favour of the plaintiff, and he had attained majority more than three years before the date of the present suit. Therefore if Ram Chandar had brought the suit he could not have succeeded in it, and no more can the plaintiff, the vendee, from him. In my judgment the claim was clearly barred by limitation and ought to have been dismissed. I accordingly allow the appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit with costs in all Courts.

*Appeal decreed.*

(1) (1891) I. L. R., 16 Bom., 343.