

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KA'SHINATH SITÁRÁM OZE, (ORIGINAL DEFENDANT), APPELLANT, v.
SHRIDHAR MAHADEV PÁTANKAR, (ORIGINAL PLAINTIFF), RESPON-
DENT.*

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July 20.

Vendor out of possession—Adverse possession—Vendor's possession within twelve years of the date of sale—Burden of proof—Article 142, Schedule II of the Limitation Act (XV of 1877).

In a suit brought by a vendee to recover possession of immoveable property which was not in the possession of his vendor at the time of the sale, the defence having raised the point of adverse possession for more than twelve years,

Held that the *onus* lay upon the plaintiff to show that his claim was not barred by the defendant's adverse possession by proving that his vendor had been in possession within twelve years before the date of sale under article 142, Schedule II of the Limitation Act (XV of 1877).

THIS was a second appeal from the decision of A. Steward District Judge of Thána.

Suit to recover possession of lands.

The plaintiff claimed as purchaser from one Bhiwá Rakhmáji under a sale-deed dated 30th April, 1887.

The defendant alleged that fourteen years before the plaintiff's alleged purchase, *viz.* on the 4th September, 1873, Bhiwá Rakhmáji had sold the land to one Govindráv Balvant, whose son Dhondu had sold it to the defendant on the 10th January, 1887. The defendant was in possession. He alleged that the plaintiff had never been in possession, and that the plaintiff's vendor (Bhiwá) had been out of possession for more than twelve years.

The Subordinate Judge rejected the plaintiff's claim, on the ground that, at the date of the sale to him, his vendor (Bhiwá) was not in possession, and that his purchase conferred no title upon him as against a third party (the defendant), who was in possession.

The plaintiff appealed to the District Court and the defendant presented objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

* Second Appeal, No. 137 of 1890.

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The District Judge framed the following issue :—“ Whether plaintiff must fail in this suit, because Bhiwá was not in possession of the land at the time he sold it to plaintiff? ” He found this issue in plaintiff's favour.

In his judgment he made the following observations :—

“ The Subordinate Judge decided all the points in the case in favour of the plaintiff, but held that the plaintiff could not obtain possession in this suit, because his vendor was not in possession of the land at the time that it was sold to him, on the ground that Hindu law requires all sales to be accompanied by possession to be operative against third parties. He supports his conclusion by referring to certain decisions of the Bombay High Court, but it is clear that they have been overruled in *Ugarchand Mánakchand v. Maddya Somana* (I. L. R., 9 Bom., p. 324) in which it was held that the fact that the vendor was not in possession at the time that the *karárnáma* was executed did not prevent the vendee from recovering possession. That decision enables me to decide the present appeal in favour of plaintiff. The pleader for respondent dwells at some length on the fact that the Subordinate Judge held that Bhiwá had been out of possession of the land for some time, but had not decided how long he had been out of possession, on the ground that this was a question which he was not called on to decide. He now asks me to raise an issue on this point and send it back for decision to the lower Court, but I do not see the necessity for doing this, as there is ample evidence before the Court by which this point may be decided. Indeed, I may say that the Subordinate Judge has bestowed great pains on the collection of evidence in this case. To prove that the vendor of the plaintiff, Bhiwá, was not in possession for twelve years prior to the sale to the plaintiff, and that for that time others held adverse, exclusive and uninterrupted possession, the pleader for the respondent relies on exhibits Nos. 28, 29, 33 and 43 for plaintiff, and exhibits Nos. 45, 65, 66 and 73 for defendant. He has gone through the greater part of the evidence of these witnesses, and I do not see that they prove his case.”

Against the decree of the District Court the defendant appealed to the High Court.

Inverarity with *Máneksháh Jehángirsháh Talejárkhán* for the appellant :—The point of limitation which arises in the case must be decided in our favour. The lower Court was wrong in placing on the defendant the burden of proof with respect to his adverse possession for more than twelve years. As the plaintiff's vendor was not in possession when he sold the property to the plaintiff, the burden of proof was upon the plaintiff under article 142, Schedule II of the Limitation Act (XV of 1877)—*Mohima Chunder Mozoomdár v. Mohesh Chunder Neogi*⁽¹⁾; *Faki Abdulla v. Bábáji Gungáji*⁽²⁾; *Zuzia Francis v. Manoel Gustin Fernan*⁽³⁾.

⁽¹⁾ L. R., 16 I. A., 23.

⁽²⁾ I. L. R., 14 Bom., 458.

⁽³⁾ P. J., 1890, p. 175.

Mahádeo Chinnáji Apte for the respondent:—No issue as to limitation was raised in either of the lower Courts. The only question which the District Court was asked to decide was whether the plaintiff should fail in the suit, his vendor not having been in possession at the time of the sale. We contend that the present suit being brought by a purchaser at a private sale from a vendor out of possession, it is governed by article 136, Schedule II of the Limitation Act (XV of 1877)—*Lakshman Vináyak v. Bisansing*⁽¹⁾. The lower Court was, therefore, right in laying upon the appellant the burden of proof as to twelve years' adverse possession.

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Inverarity, in reply:—Article 136 applies to cases in which the vendor is not entitled to the possession of the property sold. It does not apply to cases where the vendor, as in the present case, is out of possession merely. Though no specific issue on the point of limitation was raised in both the lower Courts, still the question as to title was raised by one of the issues in the Court of first instance, and the point of limitation would arise with that question. If the respondent's right to recover possession be barred by our twelve years' adverse possession, his title would become extinguished under section 28 of the Limitation Act.

SARGENT, C. J.:—In this case the Subordinate Judge found the plaintiff's sale-deed dated 30th August, 1887, proved, and that his vendor, Bhiwá, was the owner of the property at the time of the sale, but decided against the plaintiff's claim to recover possession, because his vendor was out of possession at the time of the sale.

The District Judge, on appeal, raised only one issue, *viz.*, whether plaintiff must fail, because Bhiwá was not in possession, and decided it in the negative. It appears from his judgment that the defendant's pleader at the hearing took an objection that the Subordinate Judge had not found how long Bhiwá was out of possession before the sale-deed, alleging as a fact that Bhiwá had not been in possession for twelve years prior to the sale to plaintiff, and that during that time others held adverse, exclusive and uninterrupted possession. The District Judge refused to send down an issue on the point, as he was asked to do by the

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defendant's pleader, and found that the respondent's allegation was not proved upon the evidence on the record.

It was urged before us that the District Judge misapprehended the defendant's case; that the real question was whether the plaintiff's suit was not barred by article 142 of the Statute of Limitations, and that the *onus* lay on plaintiff of proving that Bhiwá had been in possession during the twelve years preceding the suit. It is to be remarked that the question whether the suit was barred was not raised at the trial; but it was contended, with reference to the second issue, which raises the question of title, that Bhiwá had lost the ownership at the date of the sale-deed, presumably under section 28 of the Act of Limitation (XV of 1877) by reason of his having been out of possession for more than twelve years. In the view the Subordinate Judge took of the law it was not necessary to determine that question. The District Judge, however, holding that the plaintiff's title was not invalidated by Bhiwá not having been in possession at the date of the sale, was obliged to decide it, and has found for the plaintiff.

The only question, therefore, we have to decide on second appeal is whether the *onus* was wrongly placed by the Court on the appellant. The plaintiff relies on his title as derived from Bhiwá, and he must, therefore, prove that the legal ownership was in Bhiwá when he sold to him. But as Bhiwá was out of possession, in order to do this it becomes necessary to show that a suit by Bhiwá to recover the property would not have been barred at the date of the sale; otherwise, Bhiwá's title would have been extinguished. The *onus*, therefore, lay on plaintiff of establishing this, which could only be done by proving that Bhiwá had been in possession within twelve years before the sale, as it is not disputed that Bhiwá had been dispossessed, in which case article 142 of the Statute of Limitations would apply.

As the District Judge placed the *onus* on the defendant, we must reverse the decree and send back the case for a fresh decision on this point, and in the event of its being found that the suit is not barred, then on the merits. Costs to abide the result.

Decree reversed and case sent back.