APPELLATE CIVIL.

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

1891.

April 14.

FA'KI ABAS VALAD FA'KI AHMED MULNA'JI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* FA'KI NURUDIN VALAD FA'KI MOHIDIN MULNA'JI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Adverse possession—Mortgage—Mahomedan family—Redemption of mortgage by some co-sharers—Possession by such co-sharers after redemption—Subsequent claim to property by other co-sharers—Limitation Act XV of 1877, *article* 127, *Sch. II.*

The possession by a Mahomedan co-sharer of property which he has redeemed from a mortgage does not become adverse to the other co-sharers until some exclusive title is set up.

Rámchandra Yashavant v. *Sadáshiv A'báji* (1) and *Bhaudin* v. *Shekh Ismáil* (2) referred to.

THIS was a second appeal from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge with Appellate powers at Ratnágiri.

Suit for redemption.

The plaintiffs, as members of a Mahomedan family, sued to redeem a one-third share of certain property which had been mortgaged by their grandfather. The defendants were members of the same family and the first and second defendants had redeemed the whole property including the share claimed by the plaintiffs about 20 years before this suit. The first and second defendants resisted the plaintiffs' claim, pleading that they had redeemed the property and had ever since held possession adversely to the plaintiffs. They contended that the claim was barred by limitation and also that the suit should have prayed for partition.

The Subordinate Judge (Ráo Sáheb A. G. Bháve) dismissed the suit on the ground that as it was framed it was not maintainable.

Against the decree of the Subordinate Judge the plaintiffs appealed to the District Court at Ratnágiri, and the Subordinate Judge with Appellate Powers confirmed the decree of the Sub-

* Second Appeal No. 338 of 1889.

(1) I. L. R., 11 Bom., 422. (2) I. L. R., 11 Bom., 425.

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ordinate Judge on the ground that though the suit was maintainable in the form in which it was brought, it was barred by the law of limitation as it was filed after the expiration of more than 60 years from the date of the mortgage and more than 12 years from the date of redemption by the defendants.

The Appellate Court in its judgment observed as follows:—

"According to an old Bombay decision the *onus probandi* of shewing their claim to be within time is on the plaintiffs, and they have failed to sustain the burden. It is not disputed by the appellants' pleader that, as said by the lower Court, Exhibits 193, 194, 33 and 34 are the mortgage-deeds respecting the land Nos. 2, 3 and 5 in this case, and that Exhibit 168 shews that the land No. 1 in the plaint was mortgaged in 1806. It is admitted also, and the parties' depositions * * fully establish it, that the suit in respect of these lands is brought after the lapse of more than 60 years since the date of the mortgages and more than 12 years since the date of their redemption, the redemption taking place more than 20 years before the date of the suit. But contends the appellants' pleader, on the authority of the decisions at I. L. R. 11 Bom. 422, 425, that the claim is within time since the parties are sharers and since there is nothing to show when the defendants' adverse possession began. But with all due deference to the high authority of their Lordships who disposed of the case at I. L. R. 11 Bom. 425, it might be observed that the members of a Mahomedan family are not co-parceners in the sense that the members of a Hindu family are; and it cannot be presumed in the case of the one as in that of the other that the possession of one member is on behalf not only of himself but of all the other members. Moreover, even supposing that the law raises the same presumption in the case of Mahomedans as in the case of Hindus, there is in this case the established fact * * that the parties have long since been divided. There is, therefore, that "something more pronounced than mere holding after redemption," which is required by the above quoted decision. True, that, as pointed out by the appellants' pleader, Exhibit 171 itself speaks of the Bhorke village property being kept so as to raise a presumption that it was kept in common.

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But for all that the possession of the redemptors after the redemption was that of divided and not undivided members; and if, as is admittedly the case, that the plaintiffs were excluded from enjoying the profits of the redeemed property, they must have been so excluded to their knowledge. They have been so excluded for more than 12 years before the bringing of the suit.

* * * * Since then the possession of the redemptors was that of divided members, and so adverse to the plaintiffs."

Against the decree of the District Court the plaintiffs appealed to the High Court, and the defendants filed cross objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

Ganesh Krishna Deshamukha for the appellants (plaintiffs):—The lower Court assumed that the plaintiffs were excluded from the property for more than 12 years, and on that ground it rejected their claim. Non-redemption by the plaintiffs was construed by the lower Court as exclusion. In the present case there is no distinct evidence of our exclusion by the respondents, and in the absence of such evidence the plaintiffs' suit cannot be held to be barred. *Rámchandra* v. *Náráyan*,[1] *Ramchandra* v. *Sadáshiv*[2], *Moidin* v. *Oothumanganni*[3]. Mere non-enjoyment of profits is no evidence of exclusion for the purposes of limitation. Besides this, there is also documentary evidence in the case to show that at the time of the division of other family property, this property being under a mortgage was kept undivided.

Mánekshán Jehángirshán Taleyárkhán for the respondents:—The parties to the suit are Mahomedans, and therefore the presumption of Hindu law that one co-sharer holds the property for and on behalf of his other co-sharers does not arise. The theory of Hindu law is that with respect to undivided property the several co-sharers are joint tenants, while according to Mahomedan law they are tenants-in-common. The parties in this case effected a division in the year 1850 of all the property they had to divide, and though the property in dispute was at that time in the possession of the mortgagee, still the division affected the status of the parties. We afterwards redeemed the property

(1) I. L. R., 11 Bom., 216. (2) I. L. R., 11 Bom., 422.
(3) I. L. R., 11 Mad., 416.

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from the mortgagee, and the nature of our subsequent enjoyment was such as to preclude the idea that we held it for ourselves and the other co-sharers. If a suit be barred against the original mortgagee, it will be barred against the person who has stepped into his place—*Ashfaq Ahmad* v. *Vazir Ali*[1]. The limitation of 60 years applies only to a mortgagee. It does not apply to a person who has redeemed. A co-sharer who does not redeem within 60 years has no right to redeem at all, and his claim is governed by article 127, schedule II of the Limitation Act (XV of 1877). The exclusion of the appellants began when we redeemed the property about 20 years before the institution of the present suit. After redemption we enjoyed all the profits and dealt with the property as if it was our exclusive property. We actually mortgaged it in the year 1880 (Exhibit 119). This mortgage also refers to a previous mortgage of 1876 which was renewed. *Bálu bin Bápurav* v. *Náráyan bin Bhivrav*[2] shows that our possession was adverse under the Limitation Act VIII of 1859, section 3, which was merely the same as article 127, schedule II of the present Limitation Act. After redemption we became full owners of the property and not mere lienors. The cases cited in the foot-note to *Ránchandra* v. *Náráyan*[3] show what is meant by adverse possession. The parties to this suit lived in the same village, and the plaintiffs knew that we were in possession since redemption. The lower Court has also found that after the partition all our connection with the other members of the family was severed.

In the cases relied on by the appellants the parties were joint at the time of the redemption and, therefore, those cases are not applicable to the circumstances of the present case. At the time of the redemption we were divided from the other members and we redeemed the property with our own money. In any case the appellants cannot succeed in the present suit. They have not joined their sisters, who are sharers in the family property according to the Mahomedan law, as parties to the suit. The suit must, therefore, fail for non-joinder of parties. Further, the appellants' proper remedy was to bring a suit for partition.

(1) I. L. R., 11 All., 423 (Full Bench). (2) P. J. for 1874, p. 132.
(3) I. L. R., 11 Bom., 216.

By trying to redeem their share from us, the appellants virtually seek for joint possession.

Ganesh Krishna Deshamukha, in reply:—When a party is in possession of property he may enjoy the profits; but that fact alone does not show that he does so to the exclusion of the other co-sharers. The decided cases have held that the exclusion must have come to the knowledge of the other co-sharers. We had no knowledge of the exclusion, and the lower Court merely presumed that we must have been excluded. The burden of proof was upon the respondents to show when their adverse possession began. *Ramchandra* v. *Narayan*(1), *Moidin* v. *Oothumanganni*(2). One of the appellants in his deposition (Exhibit 139) says that he came to know of the redemption only 7 or 8 years ago. Up to a very recent date the appellants were minors. Both the appellants were minors at the time of the redemption. Appellant No. 1 came of age about 6 years before the institution of the suit, and appellant No. 2 who was joined subsequently attained majority a little earlier.

[*Mánikshá*:—This point was not taken in either of the lower Courts.]

[SARGENT, C. J.:—But the point must be dealt with in order to proceed with the case fairly. The appellants being minors could not be excluded to their knowledge. They can get a declaration of their right to share in the profits of the property and would, therefore, be entitled to joint possession. If this is to be considered a partition suit, all the parties interested ought to have been joined.]

There is only one sister of ours who has been left out. We made an application to the Court of first instance to bring her in, but our application was rejected by that Court. Even now we are ready and willing to join her.

SARGENT, C. J.:—This is a suit by members of a Mahomedan family to enforce their right to share in certain family property which was mortgaged by the grandfather and father of the parties and was subsequently redeemed by defendants 1 and 2.

In a suit of a similar nature between members of a Hindu family who had joined in a mortgage which came under the considera-

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tion of a Division Bench of this Court in *Rámchandra Yashwant* v. *Sadáshiv A'bájí*[1], it was held that the possession taken by the sharer who redeemed the mortgage was not in itself inconsistent with the proprietary rights of his co-sharers, and, therefore, that such possession would not become adverse until some exclusive title was set up. We think this is the correct view of the legal relationship between the parties.

In *Bháudin* v. *Shekh Ismail*[2], where the suit was of a similar character between the members of a Mahomedan family, the Court applied the same principle and expressed the opinion that the possession would not become adverse "without something more pronounced than mere holding after redemption." It may be, as pointed out by the Subordinate Judge, that the presumption that the possession of one member is on behalf of himself and all the others must necessarily be weaker in the case of Mahomedan than of Hindu family property, and that circumstances of a less decided character might well be deemed in the former case to make the possession adverse as regards the co-sharers, but the governing principle is the same. In the present case the Subordinate Judge has relied, as establishing adverse possession, on the fact that there had already been a partition of all the family property except the mortgaged land in question; and that for more than 20 years the plaintiffs have not participated in the enjoyment of the lands. But although the other family property may have been divided, still it is clear from Exhibit 71 that it was intended on the occasion of the partition that the land in question being then mortgaged should retain its family character, and there was no evidence in the case before the Courts to show or from which it could be inferred that the defendants had been holding otherwise than as lienors and asserting a title adversely to the plaintiffs' proprietary right for 12 years before the institution of the present suit.

We think, therefore, that the lower Appellate Court was wrong in holding that the suit was barred, and must reverse the decree of the Court below and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed.

(1) I. L. R., 11 Bom., 422. (2) I. L. R., 11 Bom., 425.