

1895.

RAJARAM

v.

GANESH

HARI

KARKHANIS.

who no doubt took them into consideration in coming to the decision he has arrived at.

This ground of appeal also fails. We must confirm the decree of the District Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

PANDHARINA'TH AND ANOTHER, SONS OF PRALHA'D, DECEASED (ORIGINAL PLAINTIFFS), APPELLANTS, v. MAHA'BUBKHAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1895.
September.

Ejectment—Possession—Mahomedan family—Sons living with father—Decree and execution against father—Subsequent possession by sons—Adverse possession—Civil Procedure Code (Act X of 1877), Sec. 263—Limitation.

One A'jamkhan formerly owned the house and land in dispute. He sold it to Gopal, who sold it to the plaintiff. A'jamkhan, however, continued in occupation of the property. In 1879 the plaintiff sued A'jamkhan and Gopal for possession and obtained a decree. On 6th April, 1880, in execution of the decree he was put in formal possession by the Court under section 263 of the Civil Procedure Code (Act X of 1877) in the presence of A'jamkhan, who made no objection. At the time of these proceedings, A'jamkhan's sons (the present defendants) were living with him in the house and they continued to do so subsequently. A'jamkhan died in 1885 and his sons continued in possession of the property and cultivated it. On the 4th April, 1892, the plaintiff brought this suit to eject them. They pleaded that the suit was barred by limitation, contending that the execution proceedings in 1880 did not bind them, as they were not parties to that suit.

Held, that as the present suit would not have been barred against A'jamkhan had he survived, it was not barred against the defendants, whose rights were derived from him. The defendants living with their father had no independent juridical possession of the premises. The father A'jamkhan was the only person in possession. The possession which the plaintiff Pralhad obtained through the Court from A'jamkhan in 1880 operated as well against the defendants (his sons) as against himself.

SECOND appeal from the decision of T. Hamilton, District Judge of Sholapur, reversing the decree of Khan Saheb Ruttonji Muncherji, Subordinate Judge of Barsi.

Suit in ejectment. The original plaintiff Pralhad bought the house and land in question from one Gopal on the 16th October,

* Second Appeal, No. 318 of 1894.

1875. It originally belonged to one A'jamkhán, who sold it to Gopál, the plaintiff's vendor.

The plaintiff was unable to obtain possession and accordingly sued A'jamkhán and Gopál for the property in 1879, and on 15th October of that year obtained a decree for possession. On 6th April, 1880, he was put in formal possession by the Court under section 263 of the then Civil Procedure Code (Act X of 1877) in the presence of A'jamkhán, who made no objection. At the time of these execution proceedings, A'jamkhán's three sons (the present defendants) were living with him in the house, two of them being minors and one of them about twenty-three years of age, and they and the rest of his family continued subsequently to reside in the house with him as they had done previously and to cultivate the land.

A'jamkhán died in 1885. His sons the defendants continued in possession of the property in question and cultivated it.

On the 4th April, 1892, the plaintiff brought this suit to eject them. They pleaded that the suit was barred by limitation, contending that the execution proceedings in 1880 did not bind them, as they were not parties to them.

The Subordinate Judge allowed the claim, holding that it was not barred by defendants' adverse possession.

On appeal by the defendants the Judge reversed the decree on the strength of the decision in *Lakshman v. Moru*⁽¹⁾.

The plaintiff preferred a second appeal.

Máneshkhá J. Taleyárkhán, for the appellant (plaintiff):—We took actual possession through the Court and allowed A'jamkhán to remain in possession as our tenant. In any case the suit is not time-barred by defendants' adverse possession, because the period of twelve years had not elapsed from the time we got possession through Court till we filed the present suit. A'jamkhán's sons cannot say that they were in possession of the house in their own right. They were in possession through their father. If A'jamkhán had been alive he would have been bound to give us possession. His sons are also bound to do so. The ruling in *Lakshman v. Moru*⁽¹⁾ is not applicable, because the parties to that suit

(1) I. L. R., 16 B. m., 72?

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were Hindus, while the law to be considered in the present case is the Mahomedan law.

Gangúrám B. Rele, for the respondents (defendants):—Under the Mahomedan law the sons get an interest in the property from the time of their birth. Their right to recover a share in the property does not accrue to them by survivorship. The law allows them a specific share in the property as soon as they are born. Therefore we submit that we were in possession of the property, or at least some portions of it, in our own independent right. If our contention is correct, then the plaintiff's claim either wholly or partially is barred by our adverse possession. We were not parties to the decree passed against our father; therefore the delivery of possession to the plaintiff in execution of that decree cannot affect us.

FARRAN, C. J.:—It is not disputed that A'jamkhán was the absolute owner of the house and land in dispute. He sold the property to one Gopál, who, in turn, sold it to the plaintiff Pralhád. The conveyance to Pralhád is dated 16th October, 1875.

The plaintiff Pralhád being unable to obtain possession under his purchase sued both A'jamkhán and Gopál for the property (Suit No. 457 of 1879), and on the 15th October, 1879, obtained a decree ordering him to be put in possession of it. On the 6th April, 1880, he was accordingly placed in formal possession by the Court's officer under section 263 of the Code of Civil Procedure (Act X of 1877) in the presence of A'jamkhán, who made no objection. A'jamkhán was, however, after this allowed to live in the house with his family as he had been previously doing.

At the time of these execution proceedings A'jamkhán had living with him in the house his three sons, the present defendants, two of whom were then minors. The third, the defendant Mahábubkhán, was a major, being about twenty-three years of age. In July of the same year the plaintiff Pralhád sent his men to plough the land. They were prevented from doing so by the defendant Mahábubkhán. The plaintiff Pralhád then took proceedings against Mahábubkhán before the Magistrate, but ultimately withdrew his complaint. The District Judge has not found as a fact why it was withdrawn.

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A'jamkhán continued to occupy the premises until his death in 1885. His sons, the defendants, are his heirs. They continued to live in the house and cultivate the land after their father's death. The present suit to eject them was begun on the 4th April, 1892. The only question is, whether it is barred by limitation.

There can be no doubt that as against A'jamkhán the plaintiff Pralhád obtained possession on the 6th April, 1880, though A'jamkhán and his family may not have been actually turned out of the house.—*Runjit Singh v. Bunwari*⁽¹⁾; *Jogobundhu v. Purnanund*⁽²⁾ (a Full Bench ruling); *Venkatrámanna v. Viramma*⁽³⁾. These were cases of symbolical possession. The present is a stronger case, as the plaintiff was put in actual possession—*Rámchandra v. Rájji*⁽⁴⁾. The District Judge has, however, held that these proceedings did not affect the defendants, the sons of A'jamkhán, who were then living in the house as they were not parties to the suit, which resulted in the execution proceedings of the 6th April, 1880. We are unable to agree with that ruling. The defendants living with their father had no independent juridical possession of the premises. The father was in the eye of the law the only person in possession. His wife, his sons and his servants would, as to possession, stand in the same category. None of them though occupying the premises can be said to have been in juridical possession of them or indeed in possession of them in any sense of the term. If dispossessed otherwise than by due course of law they could not have been replaced in their occupation by proceedings before the Mámlatdár or under the Specific Relief Act, section 9—*Nritto Láll v. Rájendro*⁽⁵⁾. The possession which the plaintiff Pralhád obtained through the Court from A'jamkhán operated as well against his dependents as against himself. The case would be different if the sons had been in independent possession of any part of the premises. They in that case would have been in the position of third parties who would not have been affected by the decree and the formal possession given under it—*Runjit Singh v. Bunwari*⁽¹⁾. That is the distinction between the present case and the case of *Laksh-*

(1) I. L. R., 10 Cal., p. 993.

(2) I. L. R., 16 Cal., p. 530.

(3) I. L. R., 10 Mad., p. 17.

(4) P. J. for 1895, p. 140; I. L. R., 20 Bom., 351.

(5) I. L. R., 22 Cal., 562.

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man v. Moru⁽¹⁾ relied on by the District Judge. The son in that case, who was a Hindu, was in actual and apparently in juridical possession of the land of which he took the crop. The judgment-debtor, the father, was not in possession. It was, therefore, held, that the symbolical possession taken by the plaintiff did not affect the son, who was not a party to the proceedings. The facts, though they have an apparent resemblance to, are really different from those in the present case.

As the suit would not have been barred against A'jamkhan had he survived, it is not barred against his sons and heirs whose rights are derived from him. We reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs on the defendant No. 1 in this and the lower Appellate Court.

Decree reversed.

(1) I. L. R., 16 Bom., 722.

APPELLATE CIVIL.

Before Chief Justice Barran and Mr. Justice Parsons.

1895.
October 2.

MA'LA'PA SIDA'PA DESA'I (ORIGINAL DEFENDANT No. 1), APPELLANT,
v. DEVI NA'IK (ORIGINAL PLAINTIFF), RESPONDENT.*

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Secs. 365 and 366—Regulation VIII of 1827, Secs. 7, 9 and 10—Act XLIX of 1841, Sec. 9—Act VII of 1874, Sec. 18—Death of appellant—Administrator of the property of the deceased placed on the record—Abatement of appeal.

An administrator appointed under section 10 of Regulation VIII of 1827 does not by such appointment become the legal representative of the deceased, or entitled to continue an appeal filed by him.

APPEAL from the decision of Ráo Bahádur G. V. Bhánap, First Class Subordinate Judge of Belgaum.

In this case the plaintiff obtained a decree in the lower Court. The first defendant (appellant) who was a minor and was represented by his guardian *ad litem* A. P. Vardráj, the Názir of the District Court of Belgaum, appealed against the decree. On the 7th March, 1894, while the appeal was pending the appellant (defendant No. 1) died.

* Appeal, No. 64 of 1893.