

K. M. Javeri for the respondent.

1901.

DAHYABHAI
v.
BAPALAL.

JENKINS, C.J.:—This is an application by a plaintiff for execution of a decree restraining the defendant in his user of a piece of land.

The application is made against the defendant and a purchaser of the land. But as against the defendant it must fail, as all his interest in the property has been sold in execution of a decree against him. Nor can execution go against the purchaser, as an injunction does not run with the land: *Attorney-General v. Birmingham Tame & Co. Drainage Board* ⁽¹⁾

Appeal dismissed.

(1) (1881) 17 Ch. D. 685.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

NARANBHAI VAGHJIBHAI (ORIGINAL PLAINTIFF), APPELLANT, v.
RANCHOD PREMCHAND AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1901.

August 19.

Hindu Law—Coparcener—Possession—Suit by coparcener for exclusive possession—Failure to prove right to exclusive possession, but right to joint possession proved—Decree for joint possession.

The plaintiff sued for exclusive possession of certain land alleging it to be his property, and complaining that defendants Nos. 1 and 2 had taken possession of it alleging that they had purchased it from defendants Nos. 3 to 8. On appeal the Judge concurred with the lower Court in holding that the plaintiff had failed to prove his right to exclusive possession, but, without going into the question of the plaintiff's right as coparcener, reversed the decree and dismissed the suit, holding that the plaintiff's remedy was a suit for partition.

Held, that the lower Court ought to have considered the plaintiff's right as coparcener in this suit, and, if it found that right proved, ought to have confirmed the decree for joint possession, notwithstanding that the plaintiff's claim in the plaint was only for exclusive possession.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umashankar, Additional First Class Subordinate Judge of

* Second Appeal No. 168 of 1901.

1901.

NABANBHAI
vs.
BANCHOD.

Ahmedabad, with appellate powers, reversing the decree of Ráo Sáheb Jhaveri L. Thakar, Joint Second Class Subordinate Judge of Borsad.

The plaintiff sued to recover possession of a certain piece of land from defendants Nos. 1 and 2, who alleged that they had purchased it from defendants Nos. 3 to 8.

The Subordinate Judge held that the land in suit did not belong exclusively to the plaintiff, but belonged to him jointly with the defendants Nos. 3 to 8, and he passed a decree giving the plaintiff joint possession with defendants Nos. 1 and 2, who had purchased from defendants Nos. 3 to 8.

On appeal by the defendants the Judge concurred with the lower Court that the plaintiff had no right to exclusive possession, and without considering the question of the plaintiff's rights as coparcener, he held that the plaintiff's proper remedy as such was a suit for partition. He therefore reversed the lower Court's decree and dismissed the suit.

The plaintiff preferred a second appeal.

Markand N. Mehta for the appellant (plaintiff) :—The plaintiff sued to recover exclusive possession, and it has been held that he failed to prove his right to it. It is on this ground that the lower Appellate Court has dismissed the suit. We submit that the suit ought not to have been dismissed, inasmuch as the first Court had held that the plaintiff was entitled to be put in joint possession along with the defendants. Having been found entitled to joint possession, the lower Court had power to award it and ought not to have referred the plaintiff to a suit for partition: *Wahid Alam v. Safat Alam*,⁽¹⁾ *Nana v. Appa*,⁽²⁾ *Ramchandra Kashi v. Damodar Trimbak*,⁽³⁾ *Sri Mahant Gorind Rao v. Sila Ram Kesho*.⁽⁴⁾

The question as to the rights of parties was fully gone into in the first Court. It found that neither the plaintiff nor defendants Nos. 3 to 8 were in exclusive possession.

In a suit for joint possession the question of parties cannot arise: *Dugappa Sheti v. Venkatramnaya*.⁽⁵⁾ It is not necessary to

(1) (1800) 12 All. 556.

(2) (1895) 20 Bom. 627.

(3) (1895) *Ibid.* 467.

(4) (1898) 25 I. A. 195; 21 All. 53.

(5) (1880) 5 Bom. 493.

make all the coparceners parties to such a suit: *Kallapa v. Venkatesh*.⁽¹⁾ Every member of a joint family is presumed to be in joint possession unless he is excluded from it to his knowledge: *Babaji Lakshman v. Vasudev Vinayak*.

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Hiralal D. Nanavati for the respondents (defendants Nos. 1 and 2).—No specific issue was raised in the first Court with respect to joint possession. We claim to be entitled to exclusive possession. The first Court made out a case for the plaintiff which was never set up by him. In the cases cited there was an alternative prayer for joint possession, and there was a specific issue on that point. Therefore those cases are distinguishable. Exclusive possession cannot be awarded unless exclusive title is proved: *Sambayya v. Gopalakrishnamma*.⁽³⁾ When a plaintiff claims exclusive possession, he cannot be put in joint possession: *Beejoynath v. Luckhee Monee Dabee*,⁽⁴⁾ *Muttusami v. Ramakrishna*.⁽⁵⁾

CHANDAVARKAR, J. :—The question of law, which is raised in this second appeal, is whether the plaintiff is entitled to joint possession of the property in dispute with defendants Nos. 3 to 8, if he is able to prove that it is the joint family property of the parties.

The action was brought by the plaintiff to recover exclusive possession on the allegation that he was its owner and that the defendants were trespassers. Defendants Nos. 1 and 2, who claim under defendants Nos. 3 to 8, set up the defence that the plaintiff was not the owner of the property, but that defendants Nos. 3 to 8 were. The Subordinate Judge of Borsad, who tried the suit, held that the property did not belong exclusively either to the plaintiff or to defendants Nos. 3 to 8, but that it was their joint property. Accordingly, he rejected the plaintiff's claim for exclusive possession, but passed a decree placing him in joint possession with defendants Nos. 1 and 2.

Against that decree the defendants appealed to the District Court of Ahmedabad and the plaintiff filed cross-objections. The

(1) (1878) 2 Bom. 676.

(3) (1892) 15 Mad. 489.

(2) (1876) 1 Bom. 95.

(4) (1860) 12 Cal. W. R. 248.

(5) (1880) 12 Mad. 202.

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Subordinate Judge with appellate powers, who heard the appeal, concurred in the finding of the first Court, that the plaintiff had failed to prove his right to exclusive possession, but without going into the question as to the plaintiff's right to the property as a coparcener, reversed the decree for joint possession, on the ground that his proper remedy was by a suit for partition.

It appears to us that the Subordinate Judge with appellate powers has taken too narrow a view of the remedies which are available, at any rate in this Presidency, to a Hindu coparcener who is excluded from the enjoyment of joint family property either by the other coparceners or by strangers claiming under them. There has been a series of decisions of this Court on that point, and though the decisions as to the right of a mortgagee or a purchaser under a Hindu coparcener to claim joint possession with other coparceners may not be reconcilable with one another, it must be taken now as the settled law of this Court that the right exists in the case of the coparcener himself. That is the principle of the decisions in *Babaji v. Vasudev*⁽¹⁾; *Kallappa v. Venkatesh*⁽²⁾; *Ramchandra v. Danodar*⁽³⁾; *Parashram v. Miraji*⁽⁴⁾; *Nana v. Appa*.⁽⁵⁾

In *Dugappa v. Venkataramaya*⁽⁶⁾ the suit was brought by a coparcener of a joint family against a stranger in exclusive possession claiming as purchaser of the right, title and interest of one of the other coparceners, and the coparcener suing was given by this Court a decree for joint possession. Commenting on that case in *Balaji Anant v. Ganesh Janardhan*,⁽⁷⁾ Westropp, C.J., remarked that the Court had gone in it quite as far as it could go with prudence. In *Vishnu Vithal v. Venkatrav*,⁽⁸⁾ Sargent, C.J., observed as to the case in *Dugappa v. Venkataramaya*⁽⁶⁾ that as it was a suit "by members of the united family against a purchaser from one of the family," the principle of the decisions in *Babaji v. Vasudev*⁽¹⁰⁾ and *Kallappa v. Venkatesh*⁽¹¹⁾ had been followed in it.

(1) (1875) 1 Bom. 95.

(2) (1878) 2 Bom. 676.

(3) (1895) 20 Bom. 467.

(4) (1895) 20 Bom. 569.

(5) (1895) 20 Bom. 627.

(6) (1880) 5 Bom. 493.

(7) (1880) 5 Bom. 499.

(8) (1880) P. J. p. 248.

(9) (1880) 5 Bom. 493.

(10) (1876) 1 Bom. 95.

(11) (1878) 2 Bom. 676.

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Apart from authority, there is no reason, founded on sound principle, why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other coparceners or strangers claiming under them and against his will to break up the joint family and forced to a suit for partition. To force him to such a suit is practically to hold that coparceners or strangers who exclude him have a right to exclusive possession till the property is divided, whereas, as pointed out by West, J., in the case of *Hariharappa v. Shidlingappa*,⁽¹⁾ according to Hindu law, amongst the members of a united family, none of them "is entitled as against the other members to an exclusive occupation of any portion of the common property," and "each is entitled to joint possession."

It has, however, been contended for the defendants in this case that, as the plaintiff sued for exclusive possession, he ought not to be allowed to shift his case by claiming joint possession. In several of the cases above cited the same point was taken, but overruled, and, as we think, rightly.

The next question is as to the form of the decree to which the plaintiff would be entitled, if his right as a coparcener of defendants Nos. 3 to 8 were proved. The decisions of this Court are not in accord on that point, as in some of them a mere declaration of the plaintiff's right to joint possession was made, whereas in others the decree directed that the plaintiff be put in joint possession. We think that a mere declaration of the plaintiff's right to joint possession in such a case will not be consistent with the principle on which that right is founded, that principle being that his coparceners have no right to exclude him from joint enjoyment. A declaratory decree can serve no purpose beyond merely establishing his right. It cannot save him the necessity of suing for partition against his will. If the plaintiff establishes a subsisting right as a coparcener to the joint property, the proper decree to pass is one placing him in joint possession with defendants Nos. 1 and 2.

As the Subordinate Judge with appellate powers has not considered the right of the plaintiff to joint possession on the merits, we reverse his decree and remand the case for disposal

(1) (1873) P. J. p. 73.

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by him with reference to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Chandavarkar.

1901.
 August 26.

BHIMAPPA (ORIGINAL DEFENDANT No. 8), APPELLANT, v.
 IRAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (XV of 1877), sch. II, art. 11—Civil Procedure Code (Act XIV of 1882), section 335—Order under section 335—Subsequent suit—Partition—Present possession—Limitation.

The plaintiff purchased certain land at a Court sale in execution of a money decree against defendant No. 1. In attempting to obtain possession he was obstructed by defendant No. 8, who claimed the land under a mortgage with possession from the coparceners of defendant No. 1. He then applied to the Court for the removal of the obstruction under section 335 of the Civil Procedure Code (XIV of 1882), but his application was rejected on the 12th March, 1898. The present suit was brought on the 13th March, 1899, in which the plaintiff, while seeking a partition of the family property of the defendants, prayed that the order of the 12th March, 1898, might be set aside and a partition directed, and that at such partition he might be allotted and put in possession of the land in dispute.

Held, that the suit was barred under article 11 of the Limitation Act, 1877, as it was not brought within a year after the date of the order of the 12th March, 1898, passed under section 335 of the Civil Procedure Code, and as it was in form and substance one for establishing the plaintiff's right to and for the present possession of the particular land in question.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree passed by Ráo Sáheb Sheshgiri Ramchandra Koppikar, Joint Second Class Subordinate Judge at Dhárwár.

Suit by the plaintiff for possession of certain land (Survey No. 78) which he had purchased at an execution sale.

The land in question was the joint property of defendants Nos. 1 to 4, of whom defendants Nos. 3 and 4 were minors represented by their mother (defendant No. 5).

* Second Appeal No. 85 of 1901.