

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Russell,
Mr. Justice Chandavarkar, Mr. Justice Batchelor, and Mr. Justice Heaton.

MAHADEV SAKHARAM PARKAR (ORIGINAL PLAINTIFF), APPELLANT, v. JANU
NAMJI HATLE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1912.

January 5.

Civil Procedure Code (Act XIV of 1882), sections 263, 264, 318 and 319—Civil Procedure Code (Act V of 1908), Order XXI, rule 5 (2)—Court-sale—Symbolical possession by purchaser—Judgment-debtor remaining in actual possession—Limitation.

Merely formal possession of immovable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

Gopal v. Krishnarao(1) and *Mahadeo v. Parashram Bhawanchand*(2), overruled.

SECOND appeal against the decision of M. P. Khareghat, District Judge of Ratnagiri, confirming the decree of S. S. Wagh, Subordinate Judge of Malvan.

The plaintiff sued to obtain by partition one-tenth share in the khoti village of Gotne, alleging that he purchased at a Court-sale one-twentieth share of Bhoju Suryaji Hatle and one-twentieth share of Gunaji Mahadaji Hatle on the 15th September 1887, that the sale was confirmed on the 21st October 1887, that he was given possession on the 14th November 1890, that he obtained possession of some land which was in the possession of the judgment-debtors and that he used to receive *faida* (profit) according to his share. The suit was filed on the 14th November 1902.

The defendants, who were seventy-two in number consisting of co-sharers, mortgagees and purchasers, all resisted the claim as time-barred.

* Second Appeal No. 553 of 1906.

(1) (1900) 25 Bom. 275.

(2) (1900) 25 Bom. 358.

1912.

MAHADEV
SAKHARAM
v.
JANU NAMJI
HATLE.

The Subordinate Judge found that the claim was time-barred under Article 138, Schedule II, of the Limitation Act, and he dismissed the suit.

On appeal by the plaintiff the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

K. N. Koyaji for the appellant (plaintiff).

A. G. Desai for respondents 2, 5, 10, 11, 23, 25 and 34 (defendants 2, 5, 10, 11, 23, 25 and 35).

P. M. Vinekar for respondent 38 (defendant 39).

The second appeal was argued before Scott, C. J., and Heaton, J., on the 8th October 1909 and the case was remanded for findings upon the following issues :—

(1) Was the land in suit or any and what part of it joint family property at the date of the sale to the plaintiff?

(2) If any of the property is joint family property, has the judgment-debtor or the plaintiff been excluded to his knowledge from enjoyment of the same; and if so, from what date?

(3) If the land in suit was not joint family property, how was it held—whether in undivided or divided shares, and when did any partition take place?

(4) At the date of the sale to the plaintiff, were the judgment-debtors whose rights he acquired, entitled to any and what share in the property in suit?

(5) What was the arrangement between the khoti sharers regarding the distribution of khoti profits at the date of the sale to the plaintiff, and had the judgment-debtors whose rights were acquired by the plaintiff, any and what interest in those khoti profits?

(6) What kind of possession could the judgment-debtors at the date of the sale to the plaintiff, have obtained against the defendants?

On the said issues the District Judge (Mr. P. J. Taleyarkhan) found as follows :—

(1) The entire village in suit was joint family property in the sense that though there was separation of interest among the members of the family and different members were for convenience of enjoyment in possession of different portions of the property, the property was liable to be formally and finally partitioned at the suit of any of the sharers in accordance with their strict legal rights.

(2) The judgment-debtors were never excluded. The plaintiff was kept out of enjoyment ever since his purchase, presumably to his knowledge. He was however kept out by the judgment-debtors' successive heirs and as against such of them as

1912.

MAHADEV
SAKHARAM
v.
JANU NAMJI
HATLE.

are now in possession of the shares of the judgment-debtors limitation is saved by reason of plaintiff obtaining symbolical possession within twelve years before suit. The other defendants were not in possession of those shares, and are parties to this suit merely because the plaintiff seeks a general partition.

(The suit is in my opinion governed by Article 144 and not by Article 127 of the Limitation Act; and as there was a break in the continuity of adverse possession by reason of plaintiff's symbolical possession of 14th November 1890, the claim is not time-barred.)

(3) Does not arise.

(4) The judgment-debtors Bhoju Suryaji was entitled to a $\frac{1}{10}$ th share, and Gunaji Mahadji to a $\frac{2}{10}$ th share.

(5) Representatives of the two main branches used to manage the village and collect the khoti profits every alternate year and distribute them among their sub-sharers. The judgment-debtors' shares in the profits were as stated in (4).

(6) This issue does not arise as the judgment-debtors' heirs were in possession of their shares at the date of the sale. If they had not been in possession they could either have recovered possession of the property which they were previously enjoying separately (under the provisional family arrangement) from those who dispossessed them, or they could have brought a suit for general partition against all the sharers.

Against the said findings the appellant as well as the respondents put in cross-objections and the case was argued before Scott, C. J., and Batchelor, J., who being of opinion that the question involved in the case should be considered by a Full Bench, the following referring judgment was delivered on the 2nd January 1912 by

SCOTT, C. J. :—The learned Judge in his judgment on remand has found that the plaintiff was kept out of enjoyment of the interests purchased by him by the judgment-debtors' successive heirs and that as against such of them as are now in possession of the shares of the judgment-debtors limitation is saved by reason of the plaintiff obtaining symbolical possession within twelve years before suit. He finds that the *vahivat* was actually with the judgment-debtors and their representatives and not that the shares were in the possession of tenants.

The material dates are as follows :—The plaintiff purchased at a Court-sale the rights of the judgment-debtors on the 15th September 1837. He purported to take formal possession through the Court on the 14th November 1890. The suit was

1912.

MAHADEV
SAKHARAM
v.
JANU NAMJI
HATLE.

filed on the 14th November 1902. As the judgment-debtors were in possession at the date of sale the possession has been adverse to the plaintiff unless the so-called formal possession gives a fresh starting point for limitation.

The learned Judge observes that the plaintiff's claim is clearly in time "for as between the auction-purchaser and the judgment-debtor or his heirs symbolical possession is as good as actual possession (L. L. R. 25 Bom. 275 and 358)". In the first of these cases, *Gopal v. Krishnarao*⁽¹⁾, it was held that limitation commenced to run against a purchaser at a Court-sale only from the date of formal possession and not from the date of purchase. Mr. Justice Ranade in the judgment purported to base the decision upon *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽²⁾, *Juggobundhu Mitter v. Purnanund Gossami*⁽³⁾ and *Lakshman v. Moru*⁽⁴⁾. It appears to us that none of these cases support the conclusion in *Gopal v. Krishnarao*⁽¹⁾ unless the latter can be treated as a case where the property purchased was in the possession of tenants so as to render formal possession under section 319 of the Code of 1882 the only possible method of taking possession. The facts reported however do not support any such case. In *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽²⁾ formal possession of land in the possession of tenants given under section 224 of the Act of 1859 (corresponding with section 264 of the Act of 1882) was given effect to as against the judgment-debtor-defendant and similarly in *Juggobundhu Mitter v. Purnanund Gossami*⁽³⁾ formal possession obtained under section 319 was given effect to against the judgment-debtor-defendant, as it was the only mode in which the Court could give the purchaser possession.

In *Lakshman v. Moru*⁽⁴⁾ the plaintiff had a decree for possession which he should have enforced by obtaining actual possession under section 263. Instead of doing so he only took formal possession although it was not a case in which the procedure under section 264 was applicable. Telang, J., said "the rule,

(1) (1900) 25 Bom. 275.

(3) (1889) 16 Cal. 530.

(2) (1860) 5 Cal. 584.

(4) (1892) 16 Bom. 722 at p. 727.

therefore, as finally laid down in Calcutta, is that where possession is given under section 264 of the present Civil Procedure Code, corresponding with section 224 of the old Code, that possession, though only 'formal' or 'symbolical', is equivalent to an actual possession as between the purchaser and the judgment-debtor, and limitation . . . runs in favour of the judgment-debtor, not from the date of the sale . . . but from the date of the subsequent dispossession". Telang, J., further takes exception to the dictum of Parker, J., in *Venkatramanna v. Viramma*⁽¹⁾ that there was no difference in the operation of sections 263 and 264 on this point.

The other case relied on by the learned District Judge is *Mahadeo v. Parashram Bhawanchand*⁽²⁾. The decision is professedly based upon that in *Gopal v. Krishnarao*⁽³⁾.

It appears to us that these two cases are inconsistent with the judgment in *Lakshman v. Moru*⁽⁴⁾. The question, therefore, arises for the decision of a Full Bench whether merely formal possession of immovable property by a purchaser at a Court-sale can prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

The question was argued before a Full Bench consisting of Scott, C. J., Russell, Chandavarkar, Batchelor and Heaton, JJ.

K. N. Koyaji for the appellant (plaintiff) :—The Code of Civil Procedure is not exhaustive. Sections 264 and 319 of the Code of 1882 provided for cases where the property was in the possession of tenants or other persons entitled to occupy it, but did not provide for cases where joint possession was to be given to the auction-purchaser along with the judgment-debtor. In such cases formal possession can and should be given. By Order XXI, rule 35, of the Code of 1908, provision is now made for formal possession to be given to judgment-creditors entitled to joint possession, but a similar provision is not made in rule 96 of the same Order which deals with purchasers being put in

(1) (1886) 10 Mad 17.

(3) (1900) 25 Bom. 275.

(2) (1900) 25 Bom. 358.

(4) (1892) 16 Bom. 722.

1912.

MAHADEV
SAKHARAM
v.
JANGU NAMJI
HATLE.

1912.

MAHADEV
SAKHARAM
v.

JANU NAMJI
HATLE.

possession. We submit that the Court has inherent power, apart from the Code, to give formal or actual possession according to the exigencies of a case.

But if formal possession can be given in execution in those cases only which are provided for in the Code, then we cannot support *Gopal v. Krishnarao*⁽¹⁾ and *Mahadeo v. Parashram Bhawanchand*⁽²⁾. The Calcutta Full Bench cases relied upon in *Gopal v. Krishnarao*⁽¹⁾ were cases of property in the possession of ryots and tenants.

A. G. Desai for respondents 2, 5, 10, 11, 23, 25 and 34 (defendants 2, 5, 10, 11, 23, 25 and 35), not called upon.

P. B. Shingne for respondent 38 (defendant 39), not called upon.

The judgment of the Full Bench was delivered by

SCOTT, C. J.:—We answer the question referred in the negative. Symbolical possession is not real possession nor is it equivalent to real possession under the Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

Sections 264 and 319 of the Code of 1882 prescribed and impliedly gave effect to symbolical possession under certain specified conditions but symbolical possession was neither prescribed nor recognised by sections 263 or 318 of that Code or by the corresponding sections of the earlier Codes, nor in our opinion do the Bengal Full Bench decisions, *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽³⁾ and *Jogobundhu Mitter v. Purnanund Gossami*⁽⁴⁾ suggest the contrary.

Under the new Code of 1908, rule 35 (2) of Order XXI provides one additional case in which symbolical possession may be resorted to.

We overrule *Gopal v. Krishnarao*⁽¹⁾ and *Mahadeo v. Parashram Bhawanchand*⁽²⁾, which, we think, were wrongly decided.

Decree confirmed.

G. B. R.

(1) (1900) 25 Bom. 275.

(2) (1900) 25 Bom. 358.

(3) (1880) 5 Cal. 584.

(4) (1889) 16 Cal. 530.