APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920.
January 5.

MIR AKBARALI WALAD MIR INAYATALLI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* ABDUL AJIJ WALAD MIRASAHEB JAHAGIRDAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation—Adverse possession—Decree—End of adverse possession by the passing of the decree—Possession prior to decree cannot be tacked to possession after decree—Party wishing to acquire good title by adverse possession must start afresh after the decree—Execution—Execution time-barred—Right to recover possession not barred.

The defendants had brought Suit No. 96 of 1893 againt the plaintiff for a declaration that they were entitled to a half share in the right to manage a Devasthan property. The plaintiffs then pleaded that they were solely entitled to the management as they were in adverse possession for over twelve years prior to the suit. It was however held that the plaintiffs' adverse possession commenced only from 1885, and a decree declaring the joint management of the plaintiffs and the defendants was passed on the 7th July 1896. After the decree, the plaintiffs remained in possession and the defendants took no active step to execute the decree in their favour until they were let into possession by the Collector's order dated the 1st August 1908. The plaintiffs, thereupon, brought a suit in 1912 to establish their sole right to manage the Devasthan property, alleging hereditary right and ancient and immemorial custom, and contended that by non-execution of the decree in Suit No. 96 of 1893, they became entitled to tack on the period of adverse possession before the date of that decree to the period after the decree thereby acquiring an absolute title by adverse possession.

Held, (1) that the decree in Suit No. 96 of 1893 put an end to adverse possession on 7th July 1896; (2) that although the execution of that decree was barred, the right remained and therefore the plaintiff could not get absolute title by adverse possession.

Bala v. *Abai*[1], relied on.

The period of adverse possession is calculated for the benefit of the party setting up adverse possession; and if he loses, then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after a decree.

*Second Appeal No. 24 of 1919.

(1) (1909) 11 Bom. L. R. 1093.

SECOND appeal against the decision of C. V. Vernon, reversing the decree passed by K. H. Kirkire, First Class Subordinate Judge at Ahmednagar.

Suit for a declaration of right to manage property.

In 1773, the village of Usthal in Nevasa Taluka, Ahmednagar District was granted in Inam to the Pirjade family of Ahmednagar for the maintenance of the expenses of the Devasthan of Hajrat *Pir Bara Imam.*

In 1853, the Inam Commissioner by his decision recognised Mir Meherali (plaintiff's ancestor), and three others Mir Kasam, Mir Abutale and Mir Haidar as Pir-Jada co-sharers. Disputes arose between these co-sharers regarding the management of the village of Usthal and in 1893 Mir Haidar filed a Suit No. 96 of 1893 against Mir Meheralli and others claiming a declaration that he was entitled to a half share in the right of management of the Devasthan property in suit. Mir Meheralli defended the suit mainly on the ground that Mir Haider's right was barred by the adverse and exclusive enjoyment of the right by Mir Meharalli for over twelve years. It was held that Mir Meheralli's adverse enjoyment of right of management commenced in 1885 but the suit being filed wihin twelve years from that date, the adverse right was not complete. A decree was, therefore, passed in favour of Mir Haidar declaring that he was entitled to a share in the management along with other sharers. This decree was confirmed in appeal by the High Court on the 7th July 1896.

After this decree was passed, the plaintiff Haidar presented a Darkhast No. 872 of 1897 which was dismissed on the 12th July 1898 for default in paying process fee. Mir Haidar died in 1902 and thereafter his heirs did nothing to execute the decree.

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Mir Meheralli continued uninterruptedly in management of the village as before till his death in 1905. On his death, the plaintiffs entered into the management in their own right and under the will of Mir Meheralli and while their vahiwat was going on, plaintiff, No. 1's cousin Mir Hayat Alli made an application to the Collector praying that he may be appointed manager of the village. The Collector caused an inquiry to be made and by his order, dated the 1st August 1908 appointed a board for the management of the Jahagir village and of Devasthan. Defendants Nos. 1 and 2 were the members of this board.

The plaintiffs, therefore, filed a suit in 1912 for a declaration that the plaintiffs have a right to collect the revenues of the Jahagir village of Usthal and to have the vahiwat of and manage the said village according to immemorial custom; that the board of management appointed by the Collector for the vahiwat of the Jahagir village being derogatory to the plaintiff's ancestral rights of vahiwat of the said village was illegal and for a declaration that the appointment of the defendants Nos. 1 and 2 on the said board of management by the Collector was illegal.

The defendants contended *inter alia* that the suit was barred by *res judicata* by reason of the decision in Suit No. 96 of 1893; that the defendants' right was recognised by the decree in the said suit and that they were entitled to maintain the possession which they obtained under the Collector's order.

The Subordinate Judge held that plaintiffs' hereditary right was not proved, but that they had acquired a right to manage the village by adverse possession owing to the non-execution of the decree in Suit No. 96 of 1893. He, therefore, allowed the plaintiff's claim.

On appeal, the District Judge reversed the decree and dismissed the suit on the ground that the barring of the right to execute the decree, did not extinguish the right to possession; *Bala v. Abai*[1].

The plaintiffs appealed to the High Court.

Weldon with *J. G. Rele*, for the appellants:—We submit that the title of the plaintiffs to manage the village had become complete by long and continuous adverse enjoyment of the right. Our adverse possession had commenced from 1885 and the same had continued and remained unaffected in spite of the decree in Suit No. 96 of 1893 as the same was never executed at any time within twelve years. The barring of the right to execution of the decree obtained by the defendants also extinguished their right to possession; section 28, Limitation Act.

The authority of *Amrita Ravji* v. *Shridhar Narayan*[2], relied on by the lower Court, only says that so long as there is a decree alive and capable of execution, the possession cannot become adverse. In our case however, the High Court decree, dated 7th July 1896, became incapable of execution, three years later, i.e., on 7th July 1899, so that the adverse possession which had continued to run from 1885 became perfected in 1899 by non-execution of the decree, and therefore in 1908 the defendants had lost all right to the property.

The case of *Bala* v. *Abai*[1] is also distinguishable from the facts of the present case, though it is no doubt held in the case that the barring of the right of execution does not extinguish the right. In this case the effect of holding the property adversely before the passing of the decree and its consequential effect by non-execution of the decree is not considered. Our

(1) (1909) 11 Bom. L. R. 1093. (2) (1903) 33 Bom. 317

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submission is that by non-execution of the decree it must be considered as if it was never passed and the adverse possession which had commenced in 1885 was complete.

S. R. Bakhale, for the respondents, not called upon.

MACLEOD, C. J. :—The plaintiffs brought this suit to establish their sole right to manage the Devasthan of Usthal, alleging hereditary right and ancient and immemorial custom, against defendants Nos. 1 and 4 as representing a board of management elected by various co-sharers under the Collector's order of 23rd March 1908. This question appears to have been decided against the plaintiffs by a decree of the High Court in Suit No. 96 of 1893 which was passed on the 7th July 1896. Apparently after the decree was passed the plaintiffs remained in possession, and nothing was actually done by the other side to get into possession until the Collector's order of the 1st August 1908.

It is suggested in the first place that the plaintiffs can tack on the period of adverse possession before the decree in Suit No. 96 of 1893 to the period after the decree, so that they acquired an absolute title after twelve years from the date of the original possession. That is an argument which we cannot accede to. The period of adverse possession is calculated for the benefit of the party setting up adverse possession, and if he loses, then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree. But we cannot presume since the decree was passed by the High Court on the 7th July 1896 that the plaintiffs in this suit determined at once to hold adversely to the successful party, and in effect in contempt of the decree of the High Court. It is quite possible after the decree had been passed, and

after the successful party was so remiss in seeking to execute it, the plaintiffs might have gathered fresh courage, and might have after a certain period had elapsed from the date of the decree determined to set up again a title in themselves against the successful party in that suit. But we have no evidence of that, and certainly there is no evidence that they took that attitude before the 1st August 1908. But we think that it would require very strong evidence indeed on the part of a losing party to acquire a fresh title by adverse possession against the decree of the High Court or of any Court, and he would certainly have to act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running. But in this case although the execution of the decree in Suit No. 96 of 1893 was barred by time, yet as laid down by the late Chief Justice in *Bala* v. *Abai*[1], although the remedy may be barred the right remains. We therefore think that the decision of the learned District Judge was correct. The appeal fails and must be dismissed with costs.

Decree confirmed.

J. G. R.

[1] (1909) 11 Bom. L. R. 1093.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920. *January 7.*

RAMCHANDRA KOLAJI PATIL AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* HANMANTA AND ANOTHER SONS AND HEIRS OF THE DECEASED LAXMAN WALAD DAGDU KADASKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Withdrawal of suit—Suit for redemption—Permission to withdraw on condition that a fresh suit to be brought within two years—New suit after eight years—Limitation.

* Second Appeal No. 195 of 1918.