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GANESHIDAS
In re.

Clearly, then, the application must be made before the case is disposed of, and it cannot be left to the assessee, once the assessment is made and the case is disposed of, to fix his own time for making an application to the Chief Revenue-authority to refer a question under section 51.

The petition, therefore, must be rejected on this point.

Rule discharged with costs.

Solicitors for the petitioner: Messrs. *Tyabji, Dayabhai & Co.*

Solicitor for the respondent: Mr. *J. C. G. Bowen.*

Rule discharged.

G. G. N.

APPELLATE CIVIL.

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

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November 28.

MAHADEVAPPA DUNDAPPA HAMPIHOLI (ORIGINAL PLAINTIFF), APPELLANT *v.* BHIMA DODDAPA MALED KUTARNAHATTI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS^o.

Symbolical possession—Such possession sufficient to interrupt adverse possession between parties to suit—Civil Procedure Code (Act V of 1908), Order XXI, Rule 35.

In 1906, the plaintiff purchased the land in suit from one N. The possession of the land being at that time with the defendants, the plaintiff sued to recover possession in 1911. The defendants contended that they had been adversely in possession since 1898. The decree for possession was, however, passed in plaintiff's favour in 1914, in execution whereof he secured symbolical possession in 1915. In 1918, the plaintiff was obliged to sue again for possession but was again met by the defendants' plea of adverse possession for more than 12 years, it being contended that the symbolical possession obtained in 1915 was ineffective :

^o Second Appeal No. 138 of 1921.

Held, that the plaintiff was entitled to succeed as the decree of 1914 put a stop to defendants' adverse possession prior to that date.

Held, further, that in any case, inasmuch as the defendants were parties to the execution proceedings in 1915, their contention as to symbolic possession could not be supported in view of the Privy Council decision in *Radha Krishna v. Ram Bahadur*⁽¹⁾.

Mahadev Sakharan v. Janu Nanji Hatle⁽²⁾, doubted.

SECOND appeal against the decision of D. A. Idgunji, Assistant Judge of Belgaum, confirming the decree passed by S. A. Aranha, Subordinate Judge at Bail-Hongal.

Suit to recover possession.

The land in suit originally belonged to one Dodappa father of Bhimappa (defendant No. 1).

On the 17th June 1898, Dodappa sold the land to one Ningappa for Rs. 200, but remained in possession.

In 1904, Ningappa brought a suit (No. 792 of 1904) to recover possession of the land from Dodappa and obtained a decree. In execution of the decree Ningappa obtained possession of the land through the Court on the 3rd June 1906.

On the 4th November 1906, Ningappa sold the land to the plaintiff.

In 1911, the plaintiff sued to recover possession of the land from the defendants and obtained a decree. In execution of the decree the plaintiff was put in possession through the Court on the 5th February 1915.

On the 11th October 1918, the plaintiff brought the present suit to recover possession of the land from the defendants.

The defendants contended that the possession obtained by the plaintiff through the Court was only symbolical possession and that neither plaintiff nor his

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⁽¹⁾ (1917) 20 Bom. L. R. 502.

⁽²⁾ (1912) 36 Bom. 373.

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predecessor-in-title was in possession within 12 years before suit and that the suit was barred by adverse possession.

The Subordinate Judge held that, though the plaintiff produced a receipt for possession, actual possession was never given to the plaintiff. He held that the suit was barred under Article 144 of the Indian Limitation Act.

On appeal, the Assistant Judge confirmed the decree.

The plaintiff appealed to the High Court.

D. R. Manerikar, for the appellant :—I submit, first, that even accepting the finding of the lower Court that the plaintiff was never in possession, the lower Court erred in law in holding that the suit was time-barred under Article 142. On that finding the said Article can have no application and the only Article that would apply to the case is the general residuary Article 144: see *Vasudeo Atmaram Joshi v. Eknath Ballakrishna Thite*⁽¹⁾ and *Kumar Basanta Roy v. Secretary of State for India*⁽²⁾.

As Article 144 governs the case the onus lies upon the defendants to prove adverse possession and the lower Court ought to have held that the defendants have failed to discharge the same. In the face of the decree for possession and mesne profits obtained by the plaintiff against the defendants on the 28th February 1914 in original Suit No. 248 of 1911 it is impossible for the defendants to prove adverse possession. Even accepting the lower Court's finding that the plaintiff did not obtain actual possession in 1915 under the Kabja Pavati (Exhibit 43) in execution of the said decree, I submit that the said decree for possession interrupted adverse possession and defendants could not tack their

⁽¹⁾ (1910) 35 Bom. 79.

⁽²⁾ (1917) L. R. 44 I. A. 104 at p. 115.

possession prior to the decree to that after the decree : see *Amrita Rajji v. Shridhar Narayan*⁽¹⁾; *Mir Akbarali v. Abdul Aji*⁽²⁾; *Rakhmabai v. Ramchandra*⁽³⁾. The lower Court erred in law in not giving effect to the said decree for possession.

Secondly, assuming that Article 142 governs the case, the suit is in time. As Ningappa, plaintiff's vendor, was put in possession through the Court on 3rd June 1906, as found by the lower Court, the lower Court ought to have raised a presumption in plaintiff's favour that Ningappa was in possession on 11th October 1906, i. e., within 12 years before suit.

Thirdly, as that Kabja Pavati (Exhibit 43) which is an official document purports to show that plaintiff was put in actual possession on 5th February 1905 by the Court-bailiff in execution of the decree for possession, the lower Court ought to have presumed that everything required by law had been properly done and that plaintiff was put in actual physical possession, unless and until the defendants had proved by unimpeachable evidence that Exhibit 43 was a false document.

Further, even accepting the lower Court's finding that the plaintiff got no actual possession but obtained merely symbolical possession as per the said Kabja Pavti, that is quite sufficient to interrupt adverse possession and to save the limitation bar under the recent Privy Council ruling of *Radha Krishna v. Ram Bahadur*.⁽⁴⁾ Though the Full Bench case of *Mahadev Sakharam v. Janu Namji Hatle*⁽⁵⁾ had been cited to their Lordships of the Privy Council by the appellants' counsel as is clear from the summary of the arguments, yet their Lordships deliberately follow the Full Bench

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⁽¹⁾ (1908) 33 Bom. 317.⁽³⁾ (1920) 45 Bom. 943.⁽²⁾ (1920) 44 Bom. 934.⁽⁴⁾ (1917) 20 Bom. L. R. 502.⁽⁵⁾ (1912) 36 Bom. 373.

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case of the Calcutta High Court *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽¹⁾ in preference to the Bombay Full Bench case. I, therefore, submit that our Full Bench ruling is no longer good law.

No doubt, in a later ruling of *Shridhar Madhavrao v. Ganpati Punja*⁽²⁾ an attempt is made to distinguish the said Privy Council ruling and to hold that our Full Bench ruling is still good law, but in that case too much importance is attached to the procedural rules of the Code of Civil Procedure, 1908.

G. R. Madhibhavi, for the respondent:—The Full Bench ruling in *Mahadev Sakharam v. Janni Nanji Hatle*⁽³⁾ is applicable here. Mere symbolical possession is not sufficient to interrupt adverse possession.

The *Kabja Pavati* (Exhibit 43) gave only paper possession. The lower Court has rightly disbelieved it.

The Privy Council ruling in *Radha Krishna v. Ram Bahadur*⁽⁴⁾ cannot be applied here. It was a case where symbolical possession only could be given. But this is a case where actual possession *ought* to have been given under Order XXI, Rule 35, Civil Procedure Code. And the fact that there was a decree is not sufficient to interrupt adverse possession.

The suit is, therefore, barred under Article 142 of the Indian Limitation Act.

Plaintiff's remedy was by way of execution and not by a separate suit.

MACLEOD, C. J.:—The plaintiff filed this suit for possession and mesne profits. The trial Court dismissed the suit and an appeal from that decree was dismissed with costs. The question is whether the defendants could succeed against the plaintiff who had obtained a

⁽¹⁾ (1880) 5 Cal. 584.

⁽³⁾ (1912) 36 Bom. 373.

⁽²⁾ (1918) 43 Bom. 559.

⁽⁴⁾ (1917) 20 Bom. L. R. 502.

decree for possession on the 28th February 1914. It was alleged that in execution of that decree the plaintiff was put in possession on the 5th February 1915. The learned Judge says "the main question, as was frankly stated by the learned pleader, is whether the possession delivered on the 5th February 1915 was symbolical possession or real possession," and the learned Judge came to the conclusion that the possession was only symbolical.

In *Mahadev Sakharam v. Janu Namji Hatle*⁽¹⁾ it was decided by a Full Bench that merely formal possession of immoveable 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 persons entitled to occupy the same. 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.

But in *Radha Krishna v. Ram Bahadur*⁽²⁾ it was decided by the Privy Council that symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. Their Lordships approved of the decision in *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽³⁾. This decision of the Privy Council appears to throw considerable doubt on the decision of this Court in *Mahadev Sakharam v. Janu Namji Hatle*⁽¹⁾ which may, when the occasion arises, have to be reconsidered.

In my opinion in this case it cannot be said that the question of adverse possession arises in face of the

⁽¹⁾ (1912) 36 Bom. 373.

⁽²⁾ (1917) 20 Bom. L. R. 502.

⁽³⁾ (1880) 5 Cal. 584.

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plaintiff's decree of February 1914. That would put a stop to any adverse possession prior to the date of the decree, and even if that were not so, considering that the defendants were parties to the execution proceedings, the decision in *Radha Krishna v. Ram Bahadur*⁽¹⁾ would be applicable. The plaintiff, therefore, would be entitled to succeed, and the appeal must be allowed and a decree passed for possession with costs throughout. There will have to be an inquiry with regard to mesne profits for the past three years before suit and also with regard to future mesne profits.

SHAH, J.:—I agree.

Decree reversed.

J. G. R.

⁽¹⁾ (1917)120 Bom. L. R. 502.

APPELLATE CIVIL.

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

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November
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EKOBA PARASHRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS
v. KASHIRAM TOTARAM AND OTHERS (ORIGINAL PLAINTIFF), RES-
PONDENTS^o.

Hindu law—Mitakshara—Succession—Sons of the same father by different mothers—Sons of different fathers by the same mother—Priority given to the former.

On the death of a Hindu, his property was claimed by the plaintiff, his half-brother, (*i.e.*, son of the same father by a different mother) in preference to the defendants who were sons of the same mother born to a different father :—

Held, that the plaintiff was entitled to succeed.

^o Second Appeal No. 153 of 1921.