BOMBAY HIGH COURT

Bhogilal Kripashankar

Vs

Ratilal Balkrishna

(Macklin, C.J. Wassoodew, J.)

30.08.1938

JUDGMENT

Wassoodew, J.

1. This is an appeal from the decree of the Joint First Class Subordinate Judge of Surat in a suit to recover possession with mesne profits of certain house property at Surat and agricultural lands situated at Kosad in the Olpad Taluka of the Surat District. That property is a portion of the estate which was once the coparcenery property of one Bhai-shankar and his two sons Mulshankar and Balkrishna. Bhaishankar died in 1890 leaving behind the said two sons. Mulshankar died childless on August 9, 1893, as a member of the undivided family. His widow Bai Suraj survived him. During Mulshankar's lifetime all the joint family property was entered in his name in the Government records, and after his death the Collector substituted the name of his widow Bai Suraj in his place. In the normal course of things the joint family property including the disputed property upon the death of Mulshankar would vest in his surviving brother Balkrishna. But it appears that Bai Suraj successfully set up before the, Collector her right to possession of the property on the ground that it was the exclusive and self acquired property of her husband Mulshankar on that account Balkrishna hled, a suit in 1895 for a declaration that he was entitled to certain agricultural lands affected by the mutation and that in consequence his name should be entered in the Government records in the place of Bai Suraj Balkrishna succeeded in that suit and the lands were transferred to his name although the possession of Bai Suraj with regard to five items of property, which are now in dispute, continued with her. In 1900 while Bai Suraj was in possession of the property she invited her brothers, including the present defendant No. 1 Bhogilal, to share a portion of the family house with her. Balkrishna therefore instituted an action (Suit No. 187 of 1900) to evict Bai Suraj and her brothers on the basis that their possession was wrongful and that he had a better title being the sole survivor of the joint family. In her defence to that suit Bai Suraj, perhaps in view of the decision in the prior suit of 1895, did not dispute the allegations as to the devolution of the estate by survivorship and the nature of the property,

conceding that it was the joint family property of her deceased husband and his brother Balkrishna. But she urged that she was not given proper maintenance since her husband's death, and requested the Court to do her equity. That request is reproduced in paragraph 15 of the judgment in that suit as follows (vide exhibit 26) :That so long as plaintiff does not make suitable provision for her maintenance and residence and so long as he does not pay her the expenses incurred by her for her husband's obsequies and arrears of maintenance from her husband's death down to date of recovery of possession of the properties in suit a suitable amount for the expenses of pilgrimages which she is bound to go for the salvation of her husband's soul and out standings belonging to her husband which he has collected he cannot claim possession of the properties in suit from her.

2. The materiality of that defense will be apparent if regard is had to the defense in this suit that notwithstanding the decree and her admission in the former suit the possession of Bai Suraj continued to be adverse to Balkrishna and his sons the plaintiffs in this action. The Court in that suit following the invariable practice in this Court passed the following decree on March 21, 1902 :The plaintiff do invest a sufficient sum in Government securities for payment of maintenance to defendant No. 1 at the rate of Rs. 24 per month during her lifetime or secure otherwise according to the mode most convenient and suitable to both parties to be determined in execution, proceedings, the amount of maintenance fixed to be payable to defendant No. 1 as above and ha do repair and put in a habitable condition the eastern moiety of the house, viz., lot No. 1 in the list annexed to the plaint and in her occupation at present for her to reside in it during her lifetime and after doing the above, he do recover from defendant No. 1 and as against defendants Nos. 2, 3, 4, 5 and 7 possession of the properties described in the plaint, the eastern moiety of the house lot No. 1 mentioned above excepted on conditions laid down as regards her maintenance and residence being fulfilled by plaintiff. Defendant No. 1 do deliver up to him possession of the above-mentioned properties together with all title deeds, rent-notes and other documents relating to them that may be in her possession.

3. Subsequent to that decree both parties filed execution proceedings which proved abortive. In 1902 Bai Suraj applied to the Court to obtain the maintenance fixed in that decree from Balkrishna, but it was held that the decree being merely declaratory she had no right to execute it against Balkrishna or the family property. The dismissal of that application was confirmed in appeal in 1903 by the High Court (vide exhibit 126). Balkrishna in his turn filed unsuccessfully three darkhasts for possession in the lifetime of Bai Suraj. The last darkhast was filed in 1930 by Balkrishna's representatives after the death of Bai Suraj, which took place on October 1, 1930, against her brother and the persons in possession through her. The years in which the first three darkhasts were instituted are 1905, 1908 and 1913. It may be noted that the last darkhast filed after the death of Bai Suraj against some of the defendants was dismissed on the ground that it

was barred under Article 182 of the Indian Limitation Act and Section 48 of the Civil Procedure Code. The third ground of dismissal was that the plaintiff not having fulfilled the conditions laid down in the decree which was declaratory, he could not re-cover possession.

4. It seems that Bai Suraj had on March 31, 1921, executed a sale-deed with regard to lots Nos. 2 to 5 in dispute in favour of her brother, defendant No. 1, for the consideration of Rs. 8,999. Balkrishna therefore instituted suit No. 386 of 1921 against Bai Suraj and the alienee from her for a declaration that that sale was hollow and did not affect his rights. No possession was claimed, but there was a prayer for injunction preventing Bai Suraj from making further alienations of this property. That suit was decided by the Joint Second Class Subordinate Judge of Surat in the plaintiffs' favor on March 21, 1922.

5. As already observed, Balkrishna's representatives, namely, his son and grandson, having failed to recover possession in execution proceedings against Bai Suraj's brother, who was in possession of the properties in the darkhast of 1930, have brought this suit to recover possession of the properties in the plaint with mesne profits. There were several defenses to this action, the chief being that the suit was barred by limitation and also under Sections 11 and 47 and Order II, Rule 2, of the Civil Procedure Code. The learned trial Judge disallowed those contentions and passed a decree in the plaintiffs' favor affecting all the properties in suit and directed an enquiry as to future mesne profits. Against that decree defendant No. 1, the brother of Bai Suraj and purchaser from her of lots Nos, 2 to 5 in the plaint, has filed this appeal.

6. Counsel for the appellant has formulated his contentions in the same way as in the trial Court. His principal point is that Bai Suraj's possession continued to be adverse to Balkrishna and his successor in estate notwithstanding the decree passed in 1902 and that her possession had ripened into a perfect title at the time of the sale to her brother. It is strenuously argued that after the decree of 1902 the only remedy of Balkrishna was by execution, and having failed therein, this suit based upon the same cause of action is barred. It is also pointed out that Balkrishna having failed to ask for possession in the suit of 1921, his remedy is lost by reason of the provisions of Order II, Rule 2, of the Civil Procedure Code.

7. Now, the claim of the plaintiffs in so far as it relates to the property comprised in lot No. 1, which is the eastern moiety of the house occupied by Bai Suraj, must be distinguished from the rest. It is clear from the decree passed in suit No. 187 of 1900 that the eastern moiety of the house was excepted from the decree for possession on the ground that it was in the occupation of Bai Suraj as her residence to which she was entitled during her life. That, as a widow of a deceased coparcener, she was entitled to residence in a portion of the joint family property is not denied. And the decree having determined the rights of the parties in that respect and having reserved lot No. 1 for her residence, the right of the plaintiffs to recover possession thereof

accrued only on the death of Bai Suraj. Mr. Thakor for the appellant has conceded that the entire moiety of the property excepted by the decree is identical with lot No. 1, and after satisfying himself on that point he has not pressed the defendant's claim to lot No. 1. We, therefore, hold that the title to that lot vests in the plaintiffs.

8. The question affecting the other property is not free from difficulty. The dispute centres round the true construction of the decree passed in March, 1902, for, that construction must affect the question of limitation and the maintainability of this action in view of the provisions of Sections 11 and 47 of the Code of Civil Procedure. Considerable argument has been advanced before us as to the effect of that decree. It has been urged on behalf of the plaintiffs-respondents that that decree was merely a declaratory decree recognizing the right of the deceased Bai Suraj to continue in possession of the family property in dispute in lieu of the maintenance to which she was unquestionably entitled, and that at least until some suitable provision was made for her maintenance with her consent, the plaintiffs could not execute the decree. It is also pointed out that notwithstanding the offers made to Bai Suraj she was not willing to accept reasonable suggestions in that behalf. Consequently it is urged that her possession was not adverse to the plaintiffs in her lifetime, at least till she effected the sale of lots Nos. 2 to 5 in 1921. It is also urged that upon that basis the decree was not executable so long as Balkrishna or his descendants preferred to continue Bai Suraj during her life to recover her maintenance out of the property. And therefore, proceeds the argument, this suit being based upon a cause of action arising upon the death of Bai Suraj whose claim to maintenance out of the property ceased with her is not incompetent under Section 11 of the Civil Procedure Code.

9. In has been concededand the point is res judicata between the parties having regard to the operation of the decree in the suit of 1920,that Mulshankar was a member of an undivided Hindu family governed by the Mitakshara at the time of his death in August, 1893, and that all the property in dispute as well as the other property in the possession of the plaintiffs was then the joint family property of Mulshankar and his brother Balkrishna. Consequently it follows that Mulshankar's widow Bai Suraj was entitled to nothing more than maintenance out of the joint family estate. She was also entitled to residence in a portion of the family house. If therefore Bai Suraj trespassed upon certain property of the joint family and claimed it in her own right as the widow of her deceased husband, that possession at its inception would be adverse to the survivor in the coparcenery unless, as pointed out by their Lordships of the Privy Council in *Sham Koer v. Dah Koer*[1] it was the result of an arrangement between the widow and the surviving coparcener or coparceners. It is clear from the record that upon her husband's death Bai Suraj claimed the property in his possession in her own right as his heir and succeeded on that plea before the Collector in getting her name entered in the record. There can be no doubt whatsoever that her possession originated in wrong and was reinforced by an unequivocal assertion of an adverse

title. A vague reference has been made to an arrangement in the following pleadings as if to suggest that the continuance of that possession was the result thereof :And in the end in order that she might obtain her maintenance we allowed her to pass the rent-note and ganot and to that effect was the family arrangement and pursuant to the said arrangements the said properties were given in management and in possession to her and under the circumstances properties were allowed to remain with her, and this kind of family arrangements were pursuant to the aforesaid decree and were in accordance with that decree, and she remained in management and in possession pursuant to that decree.

10. It is difficult to spell out a consistent defence from that statement. We are however informed by the learned advocate on behalf of the respondents that besides the arrangement envisaged by the decree of 1902 there was no arrangement of any kind between the parties and that the reference was expressly to the terms of that decree. Therefore if the quality of Bai Suraj's possession must be regarded as adverse at its inception, the question is whether when the decree was obtained in the suit of 1900 there was any alteration in the character of that possession.

11. It may be noted that in the plaint in that suit of 1900 (exhibit 26) express mention is made of the fact that Bai Suraj and her brothers including the defendant Bhogilal were wrongfully in possession. That was the scope of the suit, and the decree merely emphasized the title of Balkrishna, the plaintiff's father, to immediate possession of the property. Incidentally it set out the right of Bai Suraj to claim maintenance out of the family property. The manner in which that maintenance should be provided for was certainly indicated; but no charge was created over any property in her favour. The form of that decree was apparently suggested by *Yellawa v. Bhimangavda*[2] Therein the practice of this Court that an heir or coparcener suing to recover family property from a widow entitled to be maintained out of it should not be allowed to evict the widow without first securing a proper maintenance for her, has been indicated. But it is clear that there was no declaration of the widow's right to remain in possession in lieu of her maintenance as erroneously assumed in the Court below. We are satisfied that the plaintiffs and their predecessors were entitled under that decree to execute it on the terms postulated, the moment it was passed. It is evident that the present suit is instituted for the same relief and upon the same cause of action against a transferee from Bai Suraj who was a party to the former suit of 1900. Prima facie this suit is affected by the prohibition contained in as. 11 and 47 of the Civil Procedure Code and its conversion into an application in execution is barred under Section 48 of the said Code. It was open to the plaintiffs to fulfil the terms imposed by the decree and claim possession in execution. The mere fact that Balkrishna's offer of certain terms was not accepted by Bai Suraj in her application in execution did not prevent the executing Court from deciding the question left to it for decision in a proper application by the plaintiffs or their predecessor. If the right to execute the decree was lost owing to the inaction of the plaintiffs, the second suit will

not lie.

12. It is said that although the right to execute the decree was barred, the title declared under that decree continued. In support of that statement reliance has been placed on several rulings *particularlyMir Akbarali v. Abdul Ajij*[3]The argument again is based upon the assumption that the decree recognized Bai Suraj's right to remain in possession in lieu of her maintenance. That view is not warranted by the terms of the decree. But the argument is also directed to showing that the decree effectively interrupted the course of adverse possession and prevented Bai Suraj or the assignees from her from maintaining that the plaintiffs' title was extinguished. It is clear that the action of 1900 was an action in ejectment. The judgment was in favour of the plaintiff Balkrishna as owner of the property. The question is whether such a judgment if not accompanied by the decree-holder's entry would constitute breach or interruption of the continuity of the judgment-debtor's adverse possession. The answer must be found in the fact that the adjudication that Baikrishna, the father of plaintiff No. 1 was the true owner and had a good title was not incompatible with the wrongful possession of Bai Suraj or the defendant-appellant. That title could have been enforced in execution within the time allowed by law [see *Subbaiya Pandaram v. Muhammad Mustapha Marcayar*[4] *and Chaudhri Satgur Prasad v. Kishore Lal*[5].] That position was not properly appreciated by the learned trial Judge. It is suggested that the widow Bai Suraj had not in her defence to that action set up a title adverse to Balkrishna. I have set out above her defence in that respect. Although she does not in so many words say that she was in possession adversely to the plaintiff in that suit, she has nowhere accepted the position that her possession was with the concurrence of the true owner. All that she has stated is that the Court should, not pass a decree in the plaintiff's favour so long as her claim to maintenance was not fully satisfied. If therefore Bai Suraj's possession was initially adverse to the true owner, the mere declaration of the plaintiff's title neither deprived her of that possession nor altered its character. The declaration in the view we take instead of disturbing Bai Suraj's possession emphasized the fact of its adverse quality. That possession had the necessary continuity and publicity to defeat the title of the true owner.

13. The cases to which we were referred and which held that a decree for possession interrupts the course of adverse possession, namely *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite*[6] and *Rakhmabai v. Ramchandra* [7]are clearly distinguishable on the facts. In *Singaravelu Mudaliar v. Chokkalinga Mudaliar*[8] there was a suit to recover possession of a choultry building belonging to a charity by one alleging that he was the hereditary trustee, and it was held that the judgment of the Court declaring that a party in possession of immoveable property had no title to it had not the effect of interrupting the continuity of the adverse possession as against the real owner, and that if he continued in possession for twelve years before suit, his title was perfected. In the Privy Council case of Subbaiya Pandaram v. Mohammad' Mustapha Marcayar the appellant was

trustee under a registered deed executed by his grandfather in 1890. In 1898 the first respondent purchased part of the property at a sale in execution of a decree against the appellant's father, the then trustee, for debts incurred by him ; the purchaser and the other respondents, who claimed under him, had been in possession since that date. In 1904, in a suit the appellant obtained a decree declaring the validity of the trust. In 1913 the appellant sued the respondents for possession of the purchased property. In considering the defence that the suit was barred either under Article 124 or Article 144 of the Indian Limitation Act their Lordships observed as follows (p. 755) :Now the real argument in favour of the appellant was that in the presence of the purchaser it was declared that the trust had been validly created and that the property was, in fact, trust property, and it is suggested that this effects res judicata as against the respondents and prevents them from now asserting that the property is their own. Their Lordships do not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession ; it merely emphasized the fact that it was adverse.In view of that decision we think with respect that the ruling of this Court in Mir Akbarali v Abdul Ajij is no longer good law. Consequently if Bai Suraj's possession was wrongful, that possession was certainly perfected into a good title in 1914 when the right to recover possession under the decree of 1902 was barred. In other words, the inaction of the plaintiff Balkrishna in not enforcing in time the decree of 1902 defeated his right against the judgment-debtor or the person claiming through him.

14. But it is urged on behalf of the plaintiffs-respondents that, even if Bai Suraj had perfected her title in her lifetime and the estate became her stridhan or an accretion to the estate of her deceased husband, the plaintiffs being her nearer heirs or the next reversioners of her husband are entitled to succeed to that estate. Now a plea of title on that basis cannot be reasonably spelt out from the plaint. There is a reference in paragraph 7 of the plaint to the suits Nos. 187 of 1900 and 386 of 1921, and the plaintiffs have stated their effect as follows :In accordance with the arrangements of the family the properties were allowed to remain in the possession of the aforesaid Bai Suraj and to that effect the declaration was made, and in accordance with the tenets of Hindu Law we are the heirs to our ancestor Mulshanker Bhaishanker and his widow the aforesaid Bai Suraj and with regard to the said properties till this date we the plaintiffs are the sole owners and the defendants have no right whatsoever over the said properties.There is no reference to the acquisition by Bai Suraj of this property in her own right; nor is there any averment of the alternative plea that Bai Suraj's possession had converted the coparcenery property into her stridhan. No issue was demanded on that point in the trial Court and in our opinion it is not open to the respondents to urge that claim based on an entirely different title for the first time in this appeal. Moreover it seems unreasonable to assume that Bai Suraj who

inherited no estate from her husband could benefit by her individual act an estate which she did not represent on the principle stated in Lajwanti v. Sofa Chand (1924) 26 Bom. L.R. 1117 , P.C. And as I shall presently show, if the property formed part of her stridhan, the plaintiffs cannot defeat the claim of the purchaser from her. We have therefore refused to consider the claim of the plaintiffs on the alternative title in this appeal.

15. In view of our conclusion that Bai Suraj had perfected her title in 1914, the defendants who claim through her as transferees of lots Nos. 2 to 5 are entitled to be maintained in possession. The defense of Bhogilal has been that he is a transferee from Bai Suraj. It has been urged that in the decree in the suit of 1922 there was a declaration that the sale to defendant No. 1 was void and that no title had passed to him thereunder and that therefore the defendants cannot deny that the plaintiffs had a title in 1922. But that was a decision of a Second Class Subordinate Judge who had no jurisdiction to try the present suit. Consequently that decree would not operate in this suit as res judicata under Section 11 of the Civil Procedure Code. It is important to note that in the pleadings in this suit beyond a recital of that decree of 1922 there is no suggestion that the sale to defendant No. 1 was not operative to convey the rights of Bai Suraj on the ground that it was a sham and colourable sale. From the issue framed, it appears no such claim was made in the trial Court. It is not therefore open to the respondents to urge for the first time in this appeal that we should consider the question of the validity of the sale on the evidence available or give a fresh opportunity to the plaintiffs to lead additional evidence on the point.

16. On the above grounds the appeal must succeed so far as lots Nos. 2 to 5 are concerned. It is therefore unnecessary to consider the plea that the provisions of Order II, Rule 2, of the Civil Procedure Code, constitute a bar to this action against defendant No. 1 inasmuch as the plaintiffs could have in the suit of 1922 claimed to recover possession. In the result we allow this appeal, and reverse the decree of the trial Court except in regard to the property comprised in lot No. 1. With regard to the property in that lot the decree of the lower Court is maintained. In other respects the claim of the plaintiffs to possession is dismissed. In view of the partial success of the defendant-appellant we direct that he alone shall get half the costs throughout from the plaintiffs.

17. The cross-objections are dismissed with costs.

Cases Referred.

1(1902) I.L.R. 29 Cal. 664 : S.C. 4 Bom. L.R. 547, P.C.
2(1893) I.L.R. 18 Bom. 452
3.(1920) I.L.R. 44 Bom. 934 : S.C. 22 Bom. L.R. 916
4(1923) I.L.R. 46 Mad. 751 : S.C. 25 Bom. L.R. 1275
5(1919) L.R. 46 I.A. 197 : S.C. 22 Bom. L.R. 451
6(1910) I.L.R. 35 Bom. 79 : S.C. 12 Bom. L.R. 956
7(1920) 23 Bom. L.R. 301

8(1922) I.L.R. 46 Mad. 525