

# **BOMBAY HIGH COURT**

Dagadabai Fakirmahomed

Vs

Sakharam Gavaji

(Macklin, J. Gajendragadkar, CJ.)

12.12.1946

## **JUDGMENT**

### **Macklin, J.**

1. The plaintiff claiming to be the heir of her husband, who died in 1923 sued to eject the defendants from the property in suit. Defendants Nos. 2 and 3 claimed to be the true heirs of the plaintiff's husband, and they denied the plaintiff's rights altogether. They also set up title by adverse possession.

2. On the merits the plaintiff's claim to heirship of her husband has been recognised in all the Courts; but the lower appellate Court has ordered that her suit should be dismissed on the grounds of the adverse possession of the defendants, and that contention was upheld on second appeal. The plaintiff now comes in appeal under the Letters Patent.

3. It is to be noted that the plaintiff had mortgaged the land, and the mortgagee brought a suit in 1929 against the plaintiff and also against defendants Nos. 2 and 3, who were in possession of the property. He obtained a decree on his mortgage; and it was therein provided that he should have possession for two years and that possession thereafter should go to the plaintiff. He attempted to execute this decree, but the bailiff was assaulted on attempting to hand over possession. It is common ground that possession was never in fact obtained by anybody. It was nevertheless argued in the Courts below that the adverse possession set up by the defendants was interrupted by the decree of 1931; and that point of view has been argued before us also. It has also been suggested that the plaintiff's right to sue arose only two years after the decree of 1931 was passed; but that would not, so far as we can see, affect the question of the adverse possession of the defendants. It is also argued that the possession was not really adverse, since the defendants went into possession in the belief that they were heirs of the man who afterwards was found to be the plaintiff's husband, and until the plaintiff was found to be the heir, it would not be right to infer any intention on their part to keep out the rightful heir. It seems to us that the subsequent

conduct of the defendants in resisting the execution of the decree is a sufficient indication of what their probable intentions were. Their possession must on the facts be deemed to have been adverse throughout, unless it can be said to have been interrupted by the decree of 1931.

4. We have been referred to only one decision which seems to us to have a direct bearing on this point and at the same time is in favour of the plaintiff, and that is *Mahadevappa Dundappa v. Bhima Doddapa*<sup>1</sup> That was a case where a decree was followed by symbolical possession; and it was held that the adverse possession of the defendants was thereby interrupted. In the course of the judgment Macleod C.J. said (p. 715):In my opinion in this case it cannot be said that the question of adverse possession arises in face of the plaintiff's decree of February 1914. That would put a stop to any adverse possession prior to the date of the decree.No reason is given for that statement, and we have not been able to discover what reason there could be for making it, unless it was some reference to the fact that the decree was followed by symbolical possession. It may be that cases involving symbolical possession are on a somewhat different footing from cases where no possession at all is given, but whether a decree for possession does or does not interrupt adverse possession must surely be a pure question of fact. If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, we do not see how it can be said that it has interrupted possession; nor can it in law affect the nature of the possession, so far as we can see, unless it does so in fact; and whether it does so in fact would probably depend upon the attitude with which it was received by the defendant. However that may be, the remark of Macleod C.J. is clearly obiter, unless it is intended to apply only to cases involving symbolical possession, and in either case is no authority to be applied to the facts of the present case.

5. This Court had to deal with a similar question in *Bhogilal v. Ratilal*<sup>2</sup> The question there was whether a certain suit interrupted possession which was otherwise adverse, and the suit was one for a declaration of title with a prayer for ejectment. In fact the possession did not change in any way; and in the course of the judgment Mr. Justice Wassoodew said (p. 504):-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.

It is true that their Lordships were there dealing with the declaratory aspect of the decree. But in fact it was a decree in ejectment, and for ourselves we cannot see why the fact of ejectment being ordered should make any difference. Surely what counts is not the order for ejectment but the actual ejectment or cessation of possession. I may remark that in the course of the judgment Mr. Justice Wassoodew refers to two cases of this Court [*Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite*<sup>3</sup> and *Rakhmabai v. Ramchandra*<sup>4</sup>] as if they were cases in which the question

involved was purely a question of the effect of a decree as interrupting adverse possession. But in both those cases it appears that the decree was in fact followed by an interruption of possession, though it was not the execution of the decree that interrupted it. We have not been referred to any reasoned decision that a decree for possession even when followed by an unsuccessful execution must be deemed as a matter of law to have the effect of either interrupting possession or altering its character, and we do not think that there is ever likely to be any such decision. In our opinion it is purely a question of fact to be decided in the circumstances of each case.

6. On that ground we dismiss this appeal with costs.

#### Cases Referred.

1(1921) I.L.R. 46 Bom. 710, s.c. 24 Bom. L.R. 283.

2(1938) 41 Bom. L.R. 497

3(1910) I.L.R. 35 Bom. 79, s.c. 12 Bom. L.R. 956

4(1920) 23 Bom. L.R. 301