

Dadoba and ors. Vs. Krishna and ors.

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Court : Mumbai

Decided On : Jan-21-1879

Reported in : (1883)ILR7Bom34

Judge : West and ;Pinhey, JJ.

Appellant : Dadoba and ors.

Respondent : Krishna and ors.

Judgement :

West, J.

1. The possession of Bhai, whether as a physical act it commenced before the death or only on the death of Balaji, was, on Balaji's death, held consistently with and in fulfillment of the agreement (No. 11). By that document Balaji, in consideration of three persons, Bhai, Ragunath and Shamji, undertaking or having undertaken to provide for him and to perform his obsequies, conveys to them the whole of his property to vest immediately on his own death with a conditional right to assume possession forthwith if they will pay off his debts. Reference is made in the document to another where by the three donees had entered into the engagement to provide for Balaji, and thus that other document, exhibit No. 75, is embodied by reference in exhibit No. 11 for the purpose of showing what the precise consideration for No. 11 was. It might have been set forth at length in the document No. 11 itself, and no sum is sought to be recovered on it as an

agreement or constitution of any title apart from exhibit No. 11. It is a mere explication of the terms of that document and was admissible as an explication on the stamp of 8 annas which it bears. The two documents are to be read together as parts of one and the same contract.

2. The care of Balaji was assumed by Bhai, and Bhai appears also to have taken the management of the property either as manager for Balaji, or by way of possession in virtue of a right arising from the payment of Balaji's debts which were gradually liquidated. On Balaji's death, Bhai continued the management, and was now, at any rate, in full possession. It is said that his possession was prima facie adverse. The possession of his son at a later period was admittedly adverse; and for the defendants it is contended that the plaintiffs must go back to some point of time within twelve years at which this now adverse possession was not adverse, some point at which they were co-possessors of the property or joint enjoyers of it in order to bar the operation of the Limitation Act which ordinarily attaches ownership to an, exclusive possession for twelve years. But Bhai's possession in the first instance was quite consistent with the agreement between the three donees and Balaji, and those who take a common benefit in consideration of a joint undertaking are to be regarded as each contributing his own promise and liability as a consideration for those of the other parties. Bhai having then entered on possession and been left in possession in the first instance in accordance with the contract, could not change the character of that possession by his own mere will. It is not pretended that he intimated to Ragunath or Shamji that he repudiated the contract and intended to go into possession in opposition to any rights they might assert. As he entered and continued to hold in a character consistent with the subsistence of their rights, they were never called on to eject him or by any other process to establish rights which were not denied. While there subsists any contract, express or implied, between the parties in and out of possession to which the possession may be referred as legal and proper, it cannot be pronounced adverse *Doe dem. Colclough v. Hulse* 3 B. & Cr. 757. The common case of a tenant paying no rent for more than twelve years, which has frequently arisen in this and other Courts, is an illustration of this principle *Nathabhai Samaldas v. Itchhabhai Kishordas S.A.* No. 384 of 1871 decided by Lloyd and Kemball, JJ., on the 14th December, 1871 (unreported). As the

possession may be referred to contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent does not, under ordinary circumstances, affect the relation of the parties. So also in cases between mortgagee and mortgagor 2 W. & T., 770. The Assistant Judge has referred to the provisions of the Statute 3 and 4 William IV, c. 27, to support his decision that failure of the plaintiffs to prove enjoyment within twelve years raised the bar of limitation; but that statute changed the common law for the sake of convenience in a way in which the Legislature in this country has not followed it, though it has done so to a certain extent in the case of joint Hindu families. Bhai's possession not being adverse, was not rendered so by any act of his. The adverse act of his son admittedly falls within twelve years of the institution of the suit, and down to that point the state of things previously existing must be presumed to have continued possession and enjoyment by one as representative of all the donees. We, therefore, reverse the decrees of the Courts below, and remand the cause for retrial on the merits. Costs to follow the final decision.

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