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Basavantappa and ors. Vs. Dasappa and ors.

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SooperKanoon Citation : sooperkanoon.com/370994

Court : Karnataka

Decided On : Jun-13-1952

Reported in : AIR1953Kant35; AIR1953Mys35; ILR1953KAR51; (1954)32MysLJ57

Judge : Mallappa, J.

Acts : Limitation Act, 1908 - Schedule - Articles 138, 142 and 144; Code of Civil Procedure (CPC), 1908 - Order 21, Rule 95

Appeal No. : Second Appeal No. 534 of 1948-49

Appellant : Basavantappa and ors.

Respondent : Dasappa and ors.

Advocate for Def. : K.N. Srinivasan, Adv.

Advocate for Pet/Ap. : Nittoor Srinivasa Rao, Adv.

Judgement :

1. The suit filed by the plaintiffs is lor partition of the plaint schedule properties and for being put in possession of such share as they are entitled to. The plaintiffs purchased the properties in execution of a decree obtained by them against a joint family, of which the defendants are members, on the foot of a hypothecation deed. The decree-holders-purchasers were put in possession of the properties on 2-1-

1934. To what extent this decree was binding on the other members oi' the family was considered in 2 suits filed by some of them and it is sufficient to state that it is not disputed in this case that the share of the appellants is not affected by the sale in favour of the plaintiffs.

What is however contended is that the suit filed on 2-1-1946 which is filed just within 12 years after delivery of possession, but beyond 12 years after the sale was made absolute, is barred by time as under Art. 138, Limitation Act, time for a suit for possession of properties purchased in execution of a decree when the judgment-debtor was in possession at the date of the sale is 12 years from the date when the sale becomes absolute.

2. The point for consideration is whether Article 138 is applicable to a case where the decree-holder-purchaser has filed a suit to obtain possession within 12 years after obtaining symbolical possession on filing an application under Order 21, Rule 95. It is to be observed that symbolical possession obtained under execution of a decree to which the person in possession is a party is as effectual as actual possession. As observed in -- '12 Mys LJ 191:

'It stops the previous adverse possession from running and serves to give a fresh starting period for purposes of limitation.'

Article 138 applies only to a case where such delivery has not been obtained, as otherwise it is open to a judgment-debtor to dispossess the decree-holder-purchaser who has obtained delivery 12 years from the date the sale is made absolute and no remedy can be obtained against him as a suit filed by the decree-holder-purchaser subsequently, after 12 years after the date on which the sale was made absolute has to fail.

There was some deliverance of opinion between the Courts of Allahabad and Bombay and other Courts on this question of limitation, but the controversy was set at rest by the Privy Council decision in -- 'Sri Radha Krishna Chanderji v. Earn Bahadur', 22 Cal WN 330 (PC), in which it was held that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given. The point is made clear by the

commentary under Article 138, Rustomji Law of Limitation:

'It would seem that in view of the Privy Council judgment in -- 'Sri Radha Krishna Chanderji v. Ram Bahadur', 22 Cal WN 330 (PC), considerable doubt is thrown on the correctness of the Bombay Full Bench decision -- 'Mahadev v. Janu Namji', 33 Bom 373 (FB), and the Allahabad Full Bench in -- Jang Bahadur Singh v. Hanumant Sitigh', 43 All 520 (FB), which followed the Bombay Full Bench ruling. The Bombay Full Bench decision in 36 Bom 373 was cited in argument before the Privy Council in -- 'Radha Krishna's case', 22 Cal WN 330 (PC), but their Lordships followed -- 'Juggobimdhu v. Ram Chunder', 5 Ca! 584 (FB), in preference to the Bombay ruling, and repelled the argument that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. On the contrary, the Privy Council definitely held that symbolical possession was sufficient in law to save the bar of adverse possession, i.e. 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.

However that may be, it is quite clear that the rule laid down by the Full Bench in Bombay and Allahabad, (viz. that when the judgment-debtor himself is in actual possession, mere symbolical delivery of possession to the execution-purchaser would not suffice to interrupt the judgment-debtor's possession) has obviously no application to cases where the property in question is not of a nature of which actual possession could possibly be obtained by the purchaser, as in the case of a house. Thus, where it is 'zernindari' property and is let out to tenants for cultivation, or is an undivided share in joint property, formal or symbolical possession would give the auction-purchaser a fresh start to limitation.'

I agree with respect with these observations. In this case the decree-holder purchased the appellants undivided share in the joint family property; and the delivery of possession obtained by him is sufficient to give a fresh start of limitation, and the suit filed within 12 years from the date of delivery of possession is in time. There :s no substance in the contention urged on behalf of the appellants that the suit is barred under Article 138, Limitation Act.The appeal fails

and is dismissed with costs.

3. Appeal dismissed.

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