

(1945) 11 BOM CK 0015
In the Bombay High Court

Ningappa Awwappa

APPELLANT

Vs

Danappa Sharnappa and Others

RESPONDENT

Date of Decision : 13-11-1945

Acts Referred:

Transfer of Property Act, 1882 — Section 59

Citation : AIR 1947 Bom 206

Hon'ble Judges : Lokur, J

Bench : Division Bench

Judgement

Lokur, J.—The suit out of which this appeal arises was filed by the plaintiff for partition and possession of a moiety of survey Nos. 138 and 139 of Bagalur in Bijapur District. The two lands belonged to two brothers Nagappa and Rayappa and at the public auction held in execution of a money decree obtained against Nagappa by one Mallappa in Suit No. 383 of 1919, Nagappa's half share in the lands was purchased by the plaintiff on 23rd September 1935. When Mallappa's suit was pending, Nagappa and Rayappa sold both the lands to their brother-in-law, defendant 3, on 16th October 1920. At that time one Saibanna was in actual possession of the two lands. It appears from the Record of Rights that on 17th July 1919, Nagappa and Rayappa borrowed Rs. 350 on the mortgage of Survey NO. 138 and Rs. 250 on the mortgage of survey No. 139 and gave possession of both the lands to Saibanna on condition that he should enjoy the income of survey No. 138 for seven years and that of survey No. 139 for nine years in full satisfaction of the two loans and then restore their possession to them. Saibanna remained in possession till 7th November 1934, and then handed them over to defendant 3 admitting that his dues had been satisfied. The plaintiff filed this suit on 5th August 1938, and during the pendency of the suit, defendant 4 purchased the lands from defendant 3 and got himself impleaded as a co-defendant. The plaintiff's claim was resisted on various grounds, but the one that was pressed till the end was that the suit was time-barred under Article 137, Sch. 1 to Limitation Act. The trial Court held that the claim was in time and passed the usual preliminary decree for partition as prayed for. The appeal to the District

Court by defendants 3 and 4 was dismissed summarily. The only contention urged in this Court is that the suit is time-barred under Article 137.

2. That Article prescribes a period of twelve years for a suit by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, and that period begins to run from the date when the judgment-debtor is first entitled to possession. It is argued that though Nagappa and Rayappa had placed Saibanna in possession of both the lands as a usufructuary mortgagee, the mortgage was void as no registered mortgage deed had been executed as required by Section 59, T.P. Act and hence, Saibanna being a trespasser, Nagappa and Rayappa were entitled to recover their possession on the very day on which they gave it to Saibanna. If so, the period of twelve years under Article 137 commenced to run from 17-7-1919, and this suit brought by the plaintiff as auction-purchaser more than twelve years thereafter is out of time. This argument is fallacious and cannot be accepted for three reasons.

3. In the first place, the words, "when the judgment-debtor is first entitled to possession" in column 3 of Article 137 relate to the beginning of dispossession referred to in column 1 of that Article, and the meaning of the Article is that if, supposing no sale had taken place, the judgment-debtor's title would have been alive at the time the auction-purchaser's suit is brought, then such suit would not be barred. But, if on the other hand, at the date of the auction-purchaser's suit the judgment debtor was out of possession for twelve years and had thereby lost his right to recover possession, then the auction-purchaser's suit would be time-barred. Although the judgment-debtor may be out of possession at the date of auction-purchaser's suit, yet if it is shown that the judgment-debtor's suit for possession would be in time, then the suit of the auction purchaser also would not be barred under Article 137. The test is not merely when the judgment-debtor becomes entitled to possession but when he is excluded from possession wrongfully so as to start the period of limitation to run against him. Article 136, which relates to a private sale, is similarly worded, and in explaining it Knox and Aikman JJ. observed in 23 ALL. 4421 (p. 445):

Suppose that a vendor succeeds to property on his father's death, remains in possession thereof for twenty years, is then ousted by a trespasser, and two years after this sells his rights; we think that it could not be contended in a suit brought by the vendee against the trespasser that, inasmuch as the plaintiff's vendor was first entitled to possession on his father's death, twenty-two years before, the suit was out of time.

4. It is true that in the absence of a valid mortgage Nagappa and Rayappa could have repudiated it and sued to recover possession of the lands from Saibanna immediately. As held in AIR 1935 Bang. 2302 and AIR 1940 Rang. 112 Nagappa and Rayappa could not file a suit for redemption, but were entitled to treat Saibanna as a trespasser and evict him even without repaying the loans advanced by him. But Nagappa and Rayappa did not take that step. Saibanna had advanced Rs. 550 to them and instead of repaying the loans in cash, they

allowed Saibanna to take possession of their two lands and enjoy the usufruct for a specific number of years towards the satisfaction of the loans, although no valid mortgage had been created. The fact that they chose not to rescind the arrangement and recover possession of the lands as they could have done, but allowed Saibanna to go on enjoying the usufruct of the lands towards the loans, would not, after twelve years, confer ownership on Saibanna. Saibanna never claimed that his possession was adverse to Nagappa and Rayappa. As held in 44 Mad. 946,4 he would acquire only the rights of a usufructuary mortgagee and even after twelve years Nagappa and Rayappa could sue to recover possession from him and he could not resist, their claim on the ground that it was time-barred, as Saibanna never claimed or asserted any rights higher than those of a mortgagee. He would be even accountable to the mortgagor for the rents and profits for the period subsequent to the period agreed upon. As in the Madras case just cited, there is no evidence in this case that Saibanna ever claimed or thought that he was prescribing the whole interest of ownership of the lands. As held in 29 C.L.J. 241 the expression "out of possession" in column 1 of Article 187 implies that some person is in possession adversely to the judgment-debtor, -some person holding in a character incompatible with the idea that the ownership remains vested in the judgment-debtor, -and Saibanna's possession was never of that character. In fact Saibanna himself gave up the lands voluntarily to defendant 3 who was claiming title through Nagappa and Rayappa, admitting that his loans had been satisfied out of the usufruct of the lands.

5. Secondly, we have to see who was in possession at the date of the auction-sale in 1935. At that time Saibanna had nothing to do with the lands. Defendant 3 who was in possession did not claim it through Saibanna. He had purchased the lands from the judgment-debtor and recovered possession of them from Saibanna on the strength of the purchase. Hence Saibanna's prior possession cannot come in the way of the auction-purchaser's suit. If defendant 3's purchase be genuine and valid, then being earlier in date it will take priority over the auction purchase, and the auction-purchaser would acquire no interest in the land as none had been left in the judgment-debtor at the date of the auction-sale. But both the Courts have held that the sale to defendant 3 is bogus and that it was never intended to confer any title on him. He is the brother-in-law of the vendors and a hollow sale-deed was executed to screen the lands when Mallappa's suit against Nagappa was pending. That finding of fact has to be accepted in second appeal. Thus defendant 3 was only a benamidar for Nagappa and Rayappa and his possession was really on their behalf. It must, therefore, be held that the judgment-debtor was not out of possession at the date of the auction-sale, and hence Article 138 and not Article 137 would govern the suit. Under Article 138, time begins to run from the date when the sale becomes absolute. This suit brought within twelve years thereafter is, there-fore, in time.

6. Thirdly, even if defendant 3 be not in possession on behalf of the judgment-debtor, his possession commenced only in 1934 and it cannot be tacked on to that of Saibanna. Nagappa and Rayappa could sue to recover possession from

him on the ground that the sale-deed passed by them to him was bogus and never intended to confer title on him. The cause of action in such a suit accrued only when he took actual possession of the lands from Saibanna in 1934. Assuming that Saibanna's possession also was adverse to Nagappa and Rayappa, then as held in 61 I.A. 78 a person cannot add to his own adverse possession that of another independent previous trespasser from whom he does not derive his liability to be sued and whom he does not represent by birth, transfer or devise. In such a case, it was held in 33 ALL. 2247 that the suit for possession by an auction-purchaser against the second trespasser would be in time if instituted within twelve years of the date on which such second trespasser took possession of the property independently of, and not through, the first trespasser. In that case, Article 144 was held to apply as the defendant's trespass commenced after the plaintiff's auction-purchase, but in this case the auction-sale having taken place after defendant 1 took possession of the lands, Article 137 would apply, but the period of limitation would begin to run from 1934 when his possession commenced.

7. Looked at from any point of view, the plaintiff's suit is in time and as no other point is urged, I dismiss the appeal with costs.