

Baldeo - - - - - *Appellant*

v.

Kanhaiyalal and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 12TH MARCH, 1920.

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DUNEDIN.

LORD ATKINSON.

[*Delivered by* LORD DUNEDIN.]

The plaintiff and appellant in this suit, Baldeo, is in right of an 8-anna share of certain property which belonged to Gulabsingh, as attested by a certificate of sale, the property having been sold by virtue of a mortgage. Having obtained his certificate on the 31st October, 1911, he applied for and got a warrant for possession on the 8th November, 1911. This warrant was in the form suitable for obtaining actual physical possession, being Form No. 11, pursuant to Rule 35 (1) of Order 21 of the Civil Procedure Code. Being obstructed in obtaining possession, he, on the 21st November, 1911, presented an application to be put into possession. This being resisted by one Gokullal, who was not the judgment debtor and not instigated by the judgment debtor, the application was dismissed, under Rule 99 of Order 21, on the 12th January, 1912. On the 23rd January, 1912, Baldeo presented another application to be given constructive possession, as under Rule 35 (2), by having the certificate affixed to the *garhi* and proclaimed by beat of drum. This, after some obstruction, was done on the 12th April, 1912. Following on this, Baldeo attempted to take physical possession of some of the lands. This was resisted and resulted in a riot. The

matter was taken up by the Magistrate, under Section 145 of the Criminal Code, who, on the 9th December, 1912, passed an order declaring that the resisters were in physical possession of the lands and forbidding all disturbance of them until they should be evicted in due course of law.

On the 10th February, 1913, the appellant raised the present proceedings. In his plaint he asked to be put in possession of the 8-anna share of the mouza Nankathi. The defendants and respondents denied his right, asserted that the whole mouza belonged to them, and *inter alia*, pleaded that the suit was time-barred under Article XI (a) of the Schedule of the Limitation Act of 1908. This article is as follows :—

“ DESCRIPTION OF SUIT.

“ By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.”

(Period of limitation—one year from the date of the order.)

The Trial Judge found that the appellant was in right of the 8-anna share, and that the 8-anna share belonging to Gulabsingh was an 8-anna share of the mouza. He also found that the suit was not time-barred, as he considered that the suit was not for the same possession as had been claimed by the warrant of the 8th November, 1911, and disposed of adversely to the applicant on the 12th January, 1912, but was really based on dispossession after the symbolical possession of the 12th April, 1912, and consequently not time-barred under Article XI (a), which he considered inapplicable.

On appeal the Court of Appeal reversed on the latter point. The reasons for their judgment are shortly and clearly stated as follows :—

“ The present suit is not one asking for possession of the kind which was granted by the Deputy Commissioner's second order on the second application. That possession was the possession of a co-sharer who did not claim any physical possession, but possession through the co-sharer in actual physical possession. What is asked for in this suit is that, ‘ defendants 1 to 4 be directed to put the plaintiff in possession and control of the 8-anna share in Mouza Nankathi with its hamlet, with *khudkash* land and cultivating rights in *sir*.’ This appears to us to be exactly the same relief as was asked for in the first application for possession which was refused. It is not the relief asked for in the second application which was granted. The plaintiff asked to be put in actual possession, and that prayer was refused, under Rule 99. If an order under Rule 99 entails the necessity of bringing a suit within a year, then the present suit *as brought* is barred.”

Their Lordships agree with the view of the Court of Appeal. It was argued by the appellant that, inasmuch as Gulabsingh was only proprietor of an 8-anna share, and as the appellant's right was as a purchaser of the property of Gulabsingh as brought to sale

under a mortgage, he could not be entitled to actual possession. The question, however, is not what the appellant might or ought to have asked, but what he *did* ask. Now that he asked for actual possession, and was refused under Rule 99, is certain. It only remains to see what he asked in the present suit. Here he has made it too clear for argument. In his plaint he asks for possession and says that he took actual possession. He ignores the symbolical possession of the second order altogether. Nay, more. The respondents in their answer first of all deny that the appellant took possession, and then go on in Statement 6 of their defence to narrate the application for symbolical possession. In rejoinder to this the appellant actually denies the averments in Statement 6 of the respondents' defence. It follows that the present suit, as brought, is time-barred under Article XI (a).

Their Lordships will humbly advise His Majesty to dismiss the appeal. As the respondents have not appeared there will be no order as to costs.

In the Privy Council.

BALDEO

v.

KANHAIVALAL AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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