LETTERS PATENT APPEAL.

Before Rankin C. J. and Mukerji J.

BISWANATH CHAKRAVARTI

v.

RABIJA KHATUN.*

1928.

Aug. 3.

Limitation—Adverse possession—Share of co-tenant purchased by a third person—Possession of remaining co-tenants, when adverse to purchasers—Tenancy-in-common, essentials of.

By purchasing a share in a land, the purchaser becomes a tenant-in-common with the other co-tenants and the possession of such co-tenants does not by itself become adverse to that of the purchaser unless and until such possession is clearly hostile.

To constitute a tenancy-in-common, there must be an equal right to the possession of every part and parcel of the subject matter of the tenancy; joint possession is not necessary, unity of right of possession being all that is required.

As a general proposition, the entry of one co-tenant, in the absence of clear proof to the contrary, enures for the benefit of all. The law makes a presumption that the relation between co-tenants is amicable rather than hostile; and regards the acts of one co-tenant as being in subordination of the title of all the co-tenants. This rule prevails not merely on behalf of those who are co-tenants when the entry was made, but extends to all who afterwards acquire undivided interest in the property.

Bejoy Chunder Banerjee v. *Kally Prosonno Mookerjee* (1) explained. *Lakshman* v. *Moru* (2) and *Bhavrao* v. *Rakhmin* (3) distinguished.

LETTERS PATENT APPEAL by the plaintiff.

This appeal arose out of a suit for declaration of title to and recovery of joint possession in the property in suit. The plaintiff purchased, on the 8th December, 1909, in execution of a money-decree, the suit land. In respect of plot No. 1, Niyamat Ali, and in respect of the rest of the suit property, Khadim Ali were the judgment-debtors. The sale was made absolute on the 14th January, 1910. Then symbolical possession was made on the 2nd March, 1913. This suit was instituted on the 27th February, 1923.

The defendants respondents were co-sharers with Khadim Ali.

*Letters Patent Appeal, No. 21 of 1928, in Appeal from Appellate Decree No. 25 of 1926.

(1) (1878) I. L. R. 4 Calc. 327. (2) (1892) I. L. R. 16 Bom. 722. (3) (1898) I. L. R. 23 Bom. 137.

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The suit was dismissed by the Munsif, he having held that the plaintiff had failed to establish his title in plot No. 1 and had established his title to only a share in some of the other plots, but that the suit was barred by limitation, under Art. 138 of the Limitation Act.

The appeal by the plaintiff was unsuccessful, the District Judge agreeing with the Munsif on the question of limitation, as, in his opinion, the suit was barred, whether Art. 138 or Art. 144 applied.

The plaintiff, thereupon, preferred a Second Appeal in the High Court. This appeal was dismissed by Mitter J. sitting singly, Art. 144 being the Article of the Limitation Act applicable in the case in his opinion.

Hence this Letters Patent Appeal by the plaintiff making the defendants respondents.

Mr. Chandra Sekhar Sen, for the appellant. The suit was not barred by limitation. The principle relating to co-sharers is not limited to the case of a joint family. Even if one of the co-sharers is a stranger to the family and he becomes a co-sharer by purchase, the principle would be applicable. See *Corea* v. *Appuhamy* (1) and *Jogendra Nath Mukherjee* v. *Rajendra Nath Bhattacharjee* (2). In the present case, as soon as the plaintiff purchased the property he became a co-sharer and even if he did not take possession within 12 years, his title would not be extinguished unless and until it be proved that there was ouster by the co-sharer. See Freeman on "Co-tenancy and Partition," pp. 166-7.

The cases relied on by the District Judge, viz., *Lakshman* v. *Moru* (3) and *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (4), do not touch the present question.

Mr. Narendra Kumar Das, for the respondents. Art. 144 of the Limitation Act applied to the case: *Bhavrao* v. *Rakhmin* (5), *Lakshman* v. *Moru* (3). The

(1) [1912] A. C. 230.
(2) (1922) 26 C. W. N. 890.
(3) (1892) I. L. R. 16 Bom. 722.
(4) (1878) I. L. R. 4 Calc. 327.
(5) (1898) I. L. R. 23 Bom. 137.

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possession of the defendants became adverse to the plaintiff's vendor as soon as the sale took place. The case of *Jogendra Nath Mukherjee* v. *Rajendra Nath Bhattacharjee* (1), relied on by my learned friend, is distinguishable. There was no court sale in that case.

Cur. adv. vult.

MUKERJI J. The suit out of which this appeal has arisen relates to 7 plots of land. The plaintiff's allegation was that, out of the 7 plots, plot No. 1 belonged to one Niyamat Ali and the defendant No. 1 in equal shares and plots Nos. 2 to 7 belonged to one Khadim Ali and the defendant No. 1 also in equal shares. His case further was that he had purchased the shares of Niyamat Ali and Khadim Ali in execution of a decree for money against them on the 8th December, 1909, and took delivery of possession against those persons through court on the 2nd March, 1913, and when he went to take actual possession Niyamat Ali and Khadim Ali went away, but the defendant No. 1, in collusion with some other persons, including the defendants Nos. 2 to 4, opposed him. He alleged further that the defendants had made certain excavations in and were about to do further damage to the lands. The suit was instituted on the 27th February, 1923, with prayers for declaration of title, joint possession with the defendant No. 1 and injunction.

The defendants denied the plaintiffs' title and raised some dispute as to the extent of their own title as amongst themselves.

The Munsif held that the plaintiff had failed to make out that Niyamat Ali had any title to plot No. 1, or that Khadim Ali had any title to plot No. 7. He held that Khadim Ali and the defendant No. 1 were co-sharers in respect of plots Nos. 2 to 6. He was able to find the extent of Khadim Ali's share in only two out of these five plots, that is to say, in plots Nos. 2 and 6, and he found that share as 1/7th. As regards plots Nos. 3, 4 and 5 he was unable to find the extent

(1) (1922) 26 C. W. N. 890.

of Khadim Ali's share. He held that the plaintiff had made out his title to plots Nos. 2 to 6 and to the shares mentioned above. He, however, dismissed the suit, as, in his opinion, Article 138 of Schedule 1 of the Limitation Act applied and the suit had not been instituted with 12 years from the 14th January, 1910, the date of confirmation of the sale at which the plaintiff had made his purchase. He did not arrive at any finding as regards the extent of the shares, if any, of the different defendants. The plaintiff appealed to the District Judge, who affirmed the Munsif's view on the question of limitation, and held further that, even if Article 144 applied, the same result would follow.

The plaintiff then appealed to this Court. My learned brother, Mitter J., held that Article 144 applies to the case. Applying that Article, he held that, as by the sale the title of Khadim Ali was extinguished, the possession of the co-sharers of Khadim Ali became from the point of time adverse to the plaintiff, who had by the said sale become the true owner, and such adverse possession having continued for over twelve years, the suit was barred under Article 144. The suit, it may be said, was instituted beyond twelve years from the 8th December, 1909, which was the date of the sale and also beyond the like period from the 14th January, 1910, which was the date of its confirmation. Mitter J., accordingly, dismissed the appeal and from his decision the plaintiff has preferred this appeal under the Letters Patent.

I have examined the evidence in the case and I may state here that if it is to be determined as a question of fact when the defendants' possession became adverse to the plaintiff, the question has to be decided in only one way, namely, by holding that such adverse possession commenced only after the plaintiff went upon the land after obtaining possession against the judgment-debtor, Khadim Ali, through court on the 2nd March, 1913. It will have to be seen, however, whether upon any principle of law, the

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possession of Khadim Ali's co-sharers became adverse to the plaintiff from and by reason of the sale itself.

Now, to constitute a tenancy-in-common, there must be an equal right to the possession of every part and parcel of the subject matter of the tenancy: joint possession is not necessary, unity of right of possession being all that is required. As a general proposition, the entry of one co-tenant, in the absence of clear proof to the contrary, enures for the benefit of all. The law makes a presumption that the relation between co-tenants is amicable rather than hostile; and regards the acts of one co-tenant as being in subordination of the title of all the co-tenants, for by so regarding they may be made to promote the interest of all. This rule prevails not merely on behalf of those who are co-tenants when the entry was made, but extends to all who afterwards acquire undivided interest in the property. In Freeman on Co-tenancy and Partition, 2nd Edition, Section 167, the following illustration appears: "If A and B together own "(personal) property, of which A is in actual posses- "sion, and B sells his moiety to C, the possession of A "immediately becomes the possession of C also."

My learned brother, Mitter J., has referred to certain cases to which it is necessary to advert in order to see whether they, in any way, militate against the aforementioned view. In one of these cases, *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (1), Markby J. said: "By adverse possession I under- "stand to be meant possession by a person holding "the land, on his behalf or of some person other than "the true owner, the true owner having the right to "immediate possession." But with the extinguishment of the right to possess, the unity of the right to possession ceases, and as soon as the title passed to the purchaser, it is the latter in whom vests the right to possession, and the purchaser becomes a tenant-in-common with the vendor's co-tenants. It would be a fundamental misconception to think that one co-tenant, in the absence of any thing to the contrary, is,

(1) (1878) I. L. R. 4 Calc. 327.

in any sense, in control or possession of the share of his co-tenants. The case of *Lakshman* v. *Moru* (1) explains what is meant by "adverse possession,", but does not profess to touch the present question. The case of *Bhavrao* v. *Rakhmin* (2) has also little bearing upon this question, as it was a case where certain members of a joint Hindu family alienated by sale and mortgage specified plots of lands, "out of their "share," giving boundaries of the plots and covenanting for title; and what was really decided was that the purchaser entered as owner and not as a co-sharer, and, being in such possession for over twelve years, was able to defeat, under Article 144, the title of the coparceners of the vendors or mortgagors.

With all deference, I am of opinion that the view taken by my learned brother, Mitter J., is not correct. I would, accordingly, allow the appeal and, setting aside the decisions of all the courts below direct a decree to be entered in plaintiff's favour declaring his right by purchase and awarding him joint possession with the defendants in plots Nos. 2 to 6 mentioned in the plaint, the share of the plaintiff being 1/7th in plots Nos. 2 and 6, and the extent of his share in plots Nos. 3, 4 and 5 not being determined. The other reliefs asked for by the plaintiffs in respect of these plots should be refused , as there are no materials on which they may be granted. The suit in respect of plots Nos. 1 and 7 should be dismissed *in toto*. The plaintiff will get half his costs in all the courts.

RANKIN C. J. I agree.

Appeal allowed.

S. M.

(1) (1892) I. L. R. 16 Bom. 722. (2) (1898) I. L. R. 23 Bom. 137.