APPELLATE CIVIL.

Before Nasim Ali J.

KRISHNACHANDRA DAS

v.

POORNACHANDRA DAS.*

1934

Aug. 16, 22.

Co-sharer—Ouster—Tenant-in-common—Co-tenant—Adverse possession.

Where a co-sharer enters into possession of the other co-sharer's share, not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other co-sharers, whom he has excluded from enjoyment of the property.

A person cannot be a tenant-in-common with a person, whom he never recognises as a co-tenant.

Mahendra Nath Biswas v. *Charu Chandra Bose* (1) referred to.

Sole possession by one tenant-in-common continuously for a long period, without any claim or demand by any person claiming under the other tenant-in-common, is evidence, from which an actual ouster of the other tenant-in-common may be presumed.

Chandbai Mahamadbhai Vohra v. *Hasanbhai Rahimtoola Vohra* (2) followed.

SECOND APPEAL by defendant No. 1.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Sateendranath Mukherji, Jnanchandra Ray and *Harakrishna Pramanik* for the appellant.

Gopendranath Das for the respondent.

Cur. adv. vult.

NASIM ALI J. This appeal arises out of a suit for joint possession of certain lands after declaration

*Appeal from Appellate Decree, No. 215 of 1932, against the decree of Satyacharan Mukherji, Subordinate Judge of Murshidabad, dated June 4, 1931, modifying the decree of Nishakar Chaudhuri, Second Munsif of Kandi, dated Dec. 19, 1929.

(1) (1927) 107 Ind. Cas. 741; [1928] A. I. R. (Calc.) 396.

(2) (1921) I. L. R. 46 Bom. 213.

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of title. The plaintiffs' case, as stated in the plaint, is as follows:—

The disputed lands, comprising a *bâstu* and a small tank, formerly belonged to two brothers, Kailashnath Adhikari and Bhairabnath Adhikari, in equal shares. Kailash used to possess exclusively the northern half portion of the *bâstu* land, the southern half portion of the western bank of the tank and five palm trees on the western bank and another one on the south-western corner. Bhairab used to possess the southern half of *bâstu* land, the northern half of the western bank of the tank and six palm trees to the south of the tank. The tank was in joint possession of both the brothers. Kailash made a gift of his moiety in favour of the defendant No. 2 and his brother, Anandagopal Das, by a deed of gift, dated the 9th *Srâban*, 1289 B. S. Ananda left home about 25 years ago, relinquishing his interest in favour of the defendant No. 2. The defendant No. 2 left the village Singedda, in which the disputed lands are situated, for Mandunia after the death of his mother, entrusting the care of his properties to the sons of Bhairab and was in *ijmâli* possession by enjoying the usufruct of his share of the property. On the 3rd *Ashâr*, 1331 B. S., the defendant No. 2 sold away his eight annas interest in the disputed lands to the plaintiffs Nos. 1 and 2 and the husband of plaintiff No. 3 by a registered *kâbâlâ*. The defendant No. 1 claimed to have purchased the entire 16 annas interest of the suit lands and dispossessed the plaintiffs. There was a proceeding under section 145 of the Code of Criminal Procedure, in which the defendant No. 1 succeeded. On these allegations, the plaintiffs brought the present suit for declaration of their title to and for recovery of joint possession of the 8 annas share of the disputed lands with the defendant No. 1.

The defence of the defendant No. 1 is that the disputed lands originally belonged to Kailash and Bhairab in equal shares, that Kailash died without any issue and after his death Bhairab became entitled

to this eight annas share by right of inheritance from Kailash and after his death his sons possessed the entire 16 annas share of the suit lands and that the defendant No. 1 subsequently purchased the entire 16 annas interest of the said lands from the sons of Bhairab by registered *kâbâlâs*, the last of which was executed on the 23rd *Kârtik*, 1322 B. S. The defence further was that the title of the plaintiffs' vendor and of the plaintiffs, if any, was extinguished by adverse possession of Bhairab and his successors-in-interest for more than 12 years. The trial court, on a consideration of the evidence in the case, came to the following findings :—

(1) that the defendant No. 1 was in exclusive possession of the suit lands for about 18 years;

(2) that the defendant No. 1 planted various trees on the eastern bank of the tank and converted it into a garden;

(3) that the defendant No. 1 re-excavated the tank;

(4) that neither the plaintiffs nor their vendor had ever any possession in any part of the suit lands within 12 years from the date of the institution of the suit;

(5) that the title of the plaintiffs' vendor, if any, was extinguished by adverse possession of Bhairab's sons and of defendant No. 1;

(6) that neither the plaintiffs nor their vendor were ever recognised as co-sharers by the defendant No. 1 or Bhairab's sons;

(7) that Bhairab's son or the defendant No. 1 did not know even that the plaintiffs' vendor was a co-sharer.

On these findings the learned Munsif dismissed the plaintiffs' suit, holding that the title of the plaintiffs' vendor and of the plaintiffs was extinguished by adverse possession. On appeal by the plaintiffs the learned Subordinate Judge has not reversed the above findings of fact arrived at by the trial court. He has, however, dismissed the plaintiffs' claim so

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far as the *bâstu* portion of the plaint land is concerned. As regards the remaining portion of the disputed land, the lower appellate court has decreed the plaintiffs' claim. Hence the present appeal by the defendant No. 1.

The only point, urged in support of the appeal, is that, on the findings of fact, arrived at by the trial court, which have not been reversed by the lower appellate court, the lower appellate court should have dismissed the plaintiffs' claim *in toto*. As has been already stated, the learned Subordinate Judge, who heard the appeal, has dismissed the plaintiffs' claim, so far as the *bâstu* portion of the disputed land is concerned, on the ground that the plaintiffs' title to that portion of the disputed land was extinguished by adverse possession. As regards the remaining portion of the disputed land, the learned judge was of opinion that the plaintiffs' vendor, being a co-sharer, was in constructive possession, through the other co-sharers, *viz.*, the defendant No. 1 and his vendors. Now, as regards the plaintiffs' claim with regard to the western and southern banks and all the trees on those banks, it is very difficult to understand how the learned judge could distinguish this part of the plaintiffs' claim from the claim as regards the *bâstu* portion of the disputed land. The plaintiffs' specific case in the plaint was that, so far as these banks and the palm trees are concerned, the plaintiffs' vendor was in exclusive possession and not in joint possession with the defendant No. 1 or his vendors. The learned judge no doubt has observed that this exclusive possession, as stated in paragraph 2 of the plaint, with regard to these banks and all the palm trees on those banks has not been proved. But the plaintiffs having failed to prove the specific case they made in the plaint, they cannot fall back upon the theory of constructive possession. So far as the tank is concerned, the plaintiffs' case was that their vendor was in joint possession with the defendant No. 1 and his vendors. But, in my opinion, the facts, which have been found in the present case, go to show that there

had been ouster of the plaintiffs and his vendor more than 12 years ago and that the plaintiffs' title was extinguished by adverse possession for more than 12 years long before the institution of the suit.

It appears that, after the death of Kailash, Bhairab entered into possession of the eight annas share of Kailash in his own right as an heir of Kailash. Bhairab never recognised the plaintiff's vendor or the plaintiff as his co-sharers. In fact he asserted his own right to the remaining eight annas share of the property by inheritance to the exclusion of the persons claiming under gift from Kailash. Bhairab's sons, after the death of Bhairab, never recognised the title of the plaintiff's vendor as their co-sharer. In fact, as the learned judge has pointed out, for the last 30 years, the plaintiffs' vendor was never in possession of any portion of the suit land or of any share thereof. The learned Subordinate Judge appears to have relied on a decision of this court in the case of *Biswanath Chakravarti* v. *Rabija Khatun* (1), for the view, which he has taken in this matter. In that case Mukerji J. observed as follows :—

> 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 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.

The learned Judge referring to the case of *Bhavrao* v. *Rakhmin* (2) also observed as follows :—

> The case of *Bhavrao* v. *Rakhmin* (1) 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 land, ' 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 co-parceners of the vendors or mortgagors.

From these observations it is clear that, where a co-sharer enters into possession of the share of the

(1) (1928) I. L. R. 56 Calc. 616, 620. (2) (1898) I. L. R. 23 Bom. 137.

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other co-sharer, not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other co-sharers, whom he has excluded from the enjoyment of the property. It is true that the principle of possession between the co-owners is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person, whom he never recognises as a co-tenant. So far as Bhairab is concerned it is clear that, when he entered into possession of Kailash's share, he repudiated the title of the donees from Kailash, as he entered into possession of that share by right of inheritance by setting up his own right of inheritance from Kailash. It does not appear also whether Kailash was even aware of this deed of gift in favour of these donees. It was not disputed before me that, in the absence of such a gift, Bhairab would be the heir of Kailash. It does not appear also that these donees ever possessed any portion of the disputed land at any time on the basis of the deed of gift or that they asserted their right on the basis of the gift. In these circumstances, it cannot be said that Bhairab or his heirs were in possession of Kailash's share as co-sharers, because they never recognised the plaintiffs' vendor as a co-sharer. The sons of Bhairab had no knowledge even of the existence of these donees. See the case of *Mahendra Nath Biswas* v. *Charu Chandra Bose* (1) . In this case, another peculiar fact is that the defendant No. 1 purchased the 16 annas share of the property from the heirs of Bhairab more than 12 years ago. He is in possession of the entire property on the basis of his purchase for more than the statutory period. He is not the transferees of an undivided share. Bhairab's sons transferred the 16 annas share in the property setting up their exclusive possession to the property more than twelve years ago. The defendant No. 1 cannot, therefore, be said to have entered into possession of the 16 annas share of

(1) (1927) 107 Ind. Cas. 741 ; [1928)] A. I. R. (Calc.) 396.

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the property as a co-sharer, but in his own right as 16 annas owner of the property by purchase from the heirs of Bhairab, who had already set up an exclusive title to this property.

Again "sole possession by one tenant-in-common "continuously for a long period without any claim or "demand by any person claiming under the other "tenant-in-common is evidence, from which an actual "ouster of the other tenant-in-common may be "presumed." [See the case of *Chandbhai Mahamadbhai Vohra* v. *Hasanbhai Rahimtoola Vohra* (1).] Under these circumstances, I am of opinion that the learned Munsif was justified, from the facts found by him and which have not been reversed by the lower appellate court, in coming to the conclusion that the title of the plaintiffs or of his vendor was extinguished by adverse possession.

The result, therefore, is that this appeal is allowed: the judgment and decree of the lower appellate court are set aside and those of the trial court restored with costs throughout.

(1) (1921) I. L. R. 46 Bom. 213.

Appeal decreed.

G. S.